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A "NEW AMERICAN LAND ETHIC": UTILIZING THE ENDANGERED SPECIES ACT TO SETTLE LAND USE DISPUTES

KELLY O'KEEFE

"In nature there are neither rewards nor punishments—there are only consequences."1

"Nature is a language, and every new fact that we learn is a new word; but rightly seen, taken all together, it is not merely a language, but the language put together into the most significant and universal book."2

I. INTRODUCTION

THE Endangered Species Act (ESA)3 currently is being considered for reauthorization by Congress, and a final vote on the proposed amendments is expected in the 1994 session.4 The reauthorization stems from efforts of the Act's critics who claim it is inflexible and

1. THE NATURE COMPANY, NATURE—AN ILLUSTRATED BOOK OF QUOTATIONS (Gregory C. Aaron, ed., 1992). This quote, by American attorney R.G. Ingersoll (1833-1899), sums up in a few words why strong legislation is needed to ensure efficient use of our natural resources. If we misuse our resources and permit habitat destruction to continue at its present rate, we are sure to experience the detrimental consequences of our actions. Presently, both environmentalists and developers are suffering the consequences of actions taken in the past. The crisis situations that exist today indicate that a new approach to land use, one that balances environmental protection with economic interests, is necessary.

2. Id. This quote, by American essayist and poet Ralph Waldo Emerson (1803-1882), reflects the type of holistic approach that must be embodied in federal land use legislation in order to effectively preserve ecosystems and efficiently use natural resources. Effective conservation efforts require an examination of the big picture, as opposed to the narrow view that predominated in the past.


4. See Brad Knickerbocker, Babitt Tackles Resource Reform, CHRISTIAN SCIENCE MONITOR, May 11, 1993, at 3 (although several bills have been introduced to amend the ESA no one expected a vote before the end of 1993); Timothy R. Van Valen, Keynote Address Highlights Interior's Agenda, SONREEL NEWS (Section of Natural Resources, Energy, and Environmental Law, American Bar Assoc., Chicago, Ill.); Ashville Fall Meeting 1993, at 3 (statement of Thomas C. Collier, Chief of Staff to Secretary Babbit)(reauthorization of ESA "not likely to occur before 1994").

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has been too stringently applied in the past. However, many, including Secretary of the Interior Bruce Babbitt, believe the ESA has the potential to change the way Americans view and make use of their natural resources. Accordingly, only minimal changes to the Act, such as those suggested by Representative Billy Tauzin, may be necessary. Representative Tauzin describes the changes he has proposed as procedural ones that improve the operation of the Act by making it less "litigation-friendly" and more "user-friendly." In addition, these and other proposed amendments are in line with Secretary Babbitt's belief that the ESA should advocate an ecosystem approach to species management which protects species and allows for economic growth. In fact, the majority of proposed amendments follow along these same lines.

Secretary Babbitt and others believe that the ESA, if implemented properly, can be used to prevent crisis situations like the one that

5. See Oliver A. Houck, The Endangered Species Act and Its Implementation by the U.S. Department of the Interior, 64 U. COLO. L. REV. 277, 280 (1993). "The Endangered Species Act was intended as a shield for species against the effects of major construction projects like highways and dams, not a sword aimed at the jobs, families and communities of entire regions like the Northwest . . . Its time to put people ahead of owls." Id. (footnote omitted) (quoting President George Bush); Senator Don Young, Republican, Arkansas, stated that "if we do not change [the ESA] to consider the human factor we will have a revolution in this country." Id. (citation omitted).

6. See Knickerbocker, supra note 4, at 3.


9. Id.


[*] Encourage earlier, more comprehensive species conservation by giving priority to multi-species listings, recovery actions, and federal agency consultations; [encourage] federal agencies to conserve candidate species to avoid the high cost of bringing species back from [the] brink of extinction or, in some cases, to avoid the necessity to list the species; and [facilitate] development of habitat conservation plans for candidate species on private and non-federal lands . . . .

[*] Create incentives for private landowners to conserve species by authorizing federal assistance for private property owners to conserve species on their land; and [authorize] private landowners to obtain a conservation planning permit for a candidate species before the species is listed.


11. This Comment emphasizes that the ESA should stress ecosystem management as opposed to single species preservation. Accordingly, the word "properly" in this context implies implementing the ESA to conserve, not only the species themselves, but also the ecosystems upon which endangered and threatened species depend. For a discussion of the advantages associated with implementing the Act in this way, see William M. Flevares, Ecosystems, Economics,
erupted over the Northern Spotted Owl. Although critics claim the Act has caused these crises, Secretary Babbitt and other supporters of the Act contend that the manner in which past administrations have implemented the ESA is at the root of the problem. Proof that ineffective implementation is at least partially to blame for the Act’s inability to remedy certain situations is the new desire of environmentalists and developers to break the counter-productive deadlocks of the past and work together to find solutions to present and future environmental problems.

The Clinton Administration, particularly Secretary Babbitt, has inspired this desire to work together by offering a plan that caters to all sides in the controversy. The current administration is dedicated to preventing crisis management of species, but it also wants to provide both private and public developers some certainty concerning what the Act will and will not permit. These goals can be achieved within the bounds of the Act, provided those who implement it and those whose actions are covered by it realize that all individuals have an obligation to the earth. Species will continue to decline and disputes will continue to arise unless lawmakers take the advice of Secretary Babbitt and maintain enough space for nature, not just behind fences in national parks, but everywhere.

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12. "Had spotted owl habitats been identified ten years ago, a coordinated plan likely could have been developed to preserve old-growth forest while permitting logging to continue in less critical areas." Cole, supra note 11, at 353. For a general overview of the controversy surrounding the spotted owl, see George Cameron Coggins, An Ivory Tower Perspective on Endangered Species Law, NAT. RESOURCES & ENV'T, Summer 1993, at 3, 4-5.

13. In a statement to the Environmental Grantmakers Association, an organization consisting of private foundations that fund environmental groups and projects, Secretary Babbitt stated that

by either deliberate intent or incompetence—preceding administrations have used the Endangered Species Act to create a train wreck, to refuse to use the full power of the law, to let it drift till the last minute, and then to present the specter of three agencies—the Bureau of Land Management, the Fish and Wildlife Service, and the United States Forest Service—fighting each other in front of a federal judge . . . [who has] no response left except injunctive action to shut down huge segments of an industry . . .

Address by Bruce Babbitt, Secretary of the Interior, at the Environmental Grantmakers Association Embassy Row Hotel, Washington, D.C., Fed. News Serv., Feb. 25, 1993 [hereinafter Grantmakers Address]; see also Cole, supra note 11, at 345 ("It is not the ESA that thrusts the owls and loggers into an existential contest for trees. Rather, the diminishing size of our national forests creates the conflict.").


15. Francis Wilkinson, Bruce Babbitt, Is He Tough Enough to Save the Environment?, ROLLING STONE, July 8-22, 1993, at 46, 48. Secretary Babbitt calls his philosophy the “new
This Comment focuses primarily on Secretary Babbitt’s approach to land use and development issues which clearly has found its way into the proposed amendments to the ESA, as well as several other bills currently before Congress. Secretary Babbitt sees the ESA as the key to resolving land disputes. In order to effectuate the purposes of the Act, particularly ecosystem management that preserves biological diversity, Secretary Babbitt believes that a National Biological Survey should be created. Such a survey, overseen by a commission within the Department of the Interior, would provide the scientific knowledge necessary to fine-tune the ESA. In particular, this information would allow the development and successful implementation of the Act’s regional land use plans prior to the listing of an endangered species. Such proactive plans encourage environmentalists and developers “to make compromises in which development is permitted if enough land can be set aside to sustain a threatened species’ ecosystem.”

American land ethic.” Achieving this new land ethic requires discarding the concept of land as property and trying to find a different understanding of the natural landscape. Although America is considered the land of private ownership, Secretary Babbitt suggests that his ideas are not socialistic. If people realize that they cannot throw chemicals into a stream because such action affects others who use the water, they can also understand that using land in a way that detrimentally affects certain species can harm nature’s balance and consequently all who depend on that balance. See id.

16. Secretary Babbitt “talks of using the controversial Endangered Species Act as the gateway to a ‘new American land ethic.’” Id. at 46; see also Knickerbocker, supra note 4, at 3 (describing Secretary Babbitt’s intent to protect ecosystems while working to assist communities dependent upon natural resources).

17. Congress enacted the ESA in part so that “ecosystems upon which endangered species and threatened species depend may be conserved . . . .” 16 U.S.C. § 1531(b) (1988). “Ecosystem preservation is the most effective way to conserve biological diversity. Indeed, the two concepts are so interconnected that one could say that conserving biological diversity is the best method of maintaining . . . ecosystems.” Flevares, supra note 11, at 2050.

18. See Knickerbocker, supra note 4, at 3.

19. See id.

20. See 16 U.S.C. § 1539(a) (1988), which permits the incidental taking of a listed species by private parties if such taking is consistent with a habitat conservation plan developed by the private party; see also infra notes 171-74 and accompanying text.

21. The ESA requires the Secretary of the Interior to maintain a list of threatened and endangered species. 16 U.S.C. §1533(c) (1988). Listing serves as a warning signal that development could affect the survival of a species. Houck, supra note 5, at 280. Once the species is listed, various provisions of the ESA are triggered that require consideration of critical habitat, 16 U.S.C. § 1533(a)(3)(A) (1988), creation of recovery plans, id. § 1533(f), review by the Secretary and cooperation with other government agencies, id. §1536(a)(1), limitations on takings of the listed species, id. §1538(a)(1), and creation of habitat conservation plans, id. §1539(a)(2)(A). The issues associated with listing are numerous and they are beyond the scope of this Comment. Rather, this Comment focuses on problems that occur after a species has been listed and the means to avoid such problems through actions that prevent the need for the listing. For a thorough discussion of the controversies associated with the listing process see Houck, supra note 5, at 280-96.
In addition, the collection of scientific information would encourage cooperation among various levels of government. Secretary Babbitt notes that everyone, including city councils, state legislators, county governments, administrative agencies and Congress, must get involved in gathering scientific information upon which people can base land use decisions. Multilevel government involvement, as well as private input, is necessary to attain the goals set by Secretary Babbitt.

Part II of this Comment will briefly examine each of the interrelated factors Secretary Babbitt regards as critical to achieving the goals of preserving ecosystems and making efficient use of natural resources. Parts III and IV will examine the origin of the primary elements of Secretary Babbitt's plan. Secretary Babbitt's ideas are not entirely new, but have evolved from various evaluations of federal land use legislation, particularly the ESA. Reviewing the events that have led Secretary Babbitt to conclude that space for nature must be maintained everywhere will provide a better understanding of the goals he has set and the means by which he intends to achieve them. Finally, Part V will analyze how Secretary Babbitt's ideas have been incorporated into the proposed amendments to the ESA and other environmental bills currently before Congress. If these bills become law, Secretary Babbitt's "new land ethic" may become a reality.

II. THE NEW LAND ETHIC ACCORDING TO SECRETARY BABBITT

The phrase "land ethic," which Secretary Babbitt often uses to succinctly sum up his views, was coined by the author Aldo Leopold in his book *A Sand County Almanac*. Secretary Babbitt recounted an episode in Leopold's book during an interview in which he was asked to explain his use of the term. He said:

Leopold begins with a striking image, of Odysseus returning home from his long adventure and promptly hanging a couple of dozen unfaithful slaves—his property. Leopold goes on to note that we've gradually come to the point of understanding that human beings are not property. But we've always thought of the land as property, meaning that we have no obligations toward it. What a land ethic is

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about is discarding that concept of property and trying to find a different understanding of the natural landscape.  

Quotes from Leopold’s book are sprinkled throughout literature critiquing the manner in which the ESA has been implemented. Leopold used the phrase “land ethic” as a label for the idea that humans must achieve an ecological conscience that encourages them to include the interests of all living and nonliving things in their decision-making processes. Although achieving this mentality would require treating land as a resource rather than an economic commodity, it would not prohibit development, as many fear it would. However, instilling this mentality in those who make land use decisions may not be as easy as Secretary Babbitt predicts. Some suggest that “we would need ‘an entire reorientation of the mind and heart’ to adopt Leopold’s land ethic.” The law, which generally changes slowly, may not accommodate such dramatic moral adjustments. But Secretary Babbitt, with his ambitious agenda for reforming federal land management, is confident that a balance can be achieved “in which conservation accommodates economic expansion by preference and expansion cedes to conservation by law.”

A. The First Step—A National Biological Survey

“[E]ven if people do not adopt the land ethic as a personal philosophy, they might be less adverse to land-use regulations if they under-

27. Id.
28. See Flevares, supra note 11, at 2077-78 (citations omitted).
29. Id. at 2078.
30. There is a large constituency that believes the ESA puts property rights under siege. See John A. Baden, Property Protection and Property Rights in Harmony, Seattle Times, Mar. 30, 1993, at A7. One commentator stated that
31. Flevares, supra note 11, at 2078 (citation omitted).
32. Id.
33. Wilkinson, supra note 15, at 46. Steps are already being taken in this direction. A prominent example is the innovative agreement between the Fish and Wildlife Service and Georgia Pacific in which Georgia Pacific initiated efforts to follow land management practices that would allow it to preserve the red-cockaded woodpecker and utilize forest lands at the same time. See News Conference With: Bruce Babbitt, Secretary, Department of the Interior and Georgia Pacific Officials, Fed. News Serv., Apr. 15, 1993 [hereinafter News Conference].
stood ecology."34 Secretary Babbitt's plan to initiate a national biological survey to gauge the health of ecosystems nationwide should instill the ecological understanding necessary to help environmentalists and developers find common ground. Such a survey should foster a greater understanding of biological systems and the benefits they provide.35 Without adequate scientific knowledge, Secretary Babbitt believes there is no chance of regulating as current law requires.36 In fact, inadequate knowledge is one of the primary reasons that governments have not applied ecological criteria to land use decisions in the past.37 However, with adequate scientific knowledge at their disposal, decision makers should be able to intervene in natural resource conflicts while there is still enough time, space and technology to prevent future crisis situations.

The National Biological Survey, which is currently being considered by Congress,38 would serve numerous purposes. In particular the Survey would ensure:

(1) the comprehensive assessment of the biological resources of the United States;
(2) the provision of information to be used in protecting and managing ecosystems, including their plant, fish, and wildlife components; and
(3) that the Secretary may anticipate and avoid or resolve conflicts arising in the implementation of the Endangered Species Act of 1973 and other fisheries and wildlife conservation laws.39

The Secretary also would be required to use the "information developed through the Survey to direct resources and respond to the most critical biological resource concerns. . . ."40

While a new commission within the Department of the Interior would serve these purposes,41 various organizations would assist in a

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34. Flevares, supra note 11, at 2078.
36. See Interior Secretary Bruce Babbitt Address to the Wildlife Management Institute, REUTER TRANSCRIPT REPORT, BC Cycle, Mar. 22, 1993 [hereinafter Wildlife Address]; see also Grantmakers Address, supra note 13 (noting that successful proactive policy making is not possible without a common base of geographical information).
37. Flevares, supra note 11, at 2060.
38. See infra notes 54, 215-16, and accompanying text.
continuing effort to collect data regarding the "distribution, abundance, health, status, and trends of the living resources of the United States." In fact, Secretary Babbitt strongly emphasizes the need for various groups, including universities, cooperative research units, private researchers, city and county governments, state agencies, and federal agencies, to take part in gathering data so that a systematic, unbiased assessment of ecosystems can be achieved. A decentralized program such as this would ensure that the accumulated information cuts across jurisdictional boundaries and, consequently, across ecosystems as well. The result will be computerized "ecosystem-wide databases from which [land] managers at all levels can routinely do the type of gap analysis that is the indispensable tool in making habitat, species and land management decisions."

In attempting to gain acceptance for the National Biological Survey concept, particularly in Congress, Secretary Babbitt has compared it to the United States Geological Survey, which was very successful when implemented in 1878. During a public address, he recounted the development of the Geological Survey and noted that the situation which initiated the survey was similar to the one currently faced in endangered species and land use management. Secretary Babbitt stated that in 1878, "the government science effort had splintered across the West." Those conducting surveys in different areas, however, frequently ran into each other, and these collisions often turned into hostile confrontations. Finally, Congress stepped in and the result was the United States Geological Survey, a coordinated effort to create common geographical standards based on sound scientific data. Secretary Babbitt believes Congress must take the same type of action today if it seeks to successfully reform federal land use management.

Secretary Babbitt contends that even those who believe the ESA may detrimentally impact this country's economic structure, and those concerned with maintaining biodiversity, are likely to support the idea of a National Biological Survey. As a result, this may be "one of

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43. See Wildlife Address, supra note 36; see also Grantmakers Address, supra note 13.
44. See Grantmakers Address, supra note 13.
45. Wildlife Address, supra note 36.
47. See Grantmakers Address, supra note 13.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id.
those unique times where a national commission concept really fits." Legislators have taken steps to clarify the details of the survey that Secretary Babbitt initially proposed. In particular, several bills currently before Congress lay out the framework of the Survey and the commission responsible for overseeing it. The success of the survey is crucial since the other changes Secretary Babbitt and his supporters recommend are substantially dependent upon the information the survey will provide.

B. Saving Ecosystems Through the Endangered Species Act

Practices that destroy ecosystems destroy jobs, as well as species. Therefore, maintaining healthy ecosystems is essential to any plan that serves the purposes of both environmentalists and developers. Although the ESA has failed to successfully maintain ecosystems in the past, Secretary Babbitt believes that the Act has the potential to function as an ecosystem protection act. However, to change the focus of the Act, Secretary Babbitt states that it is important to avoid the crisis management tactics that have been used in the past in an attempt to save single species. This type of "train wreck endangered

53. Id.
54. The basic framework proposed by the National Biological Survey Act of 1993 places responsibility for the survey on the shoulders of the Secretary of the Interior. S. 1110, 103d Cong., 1st Sess. § 101(a)(1) (1993). However, the Secretary, with the approval of Congress, is to appoint a Director "from among individuals with academic training and expertise in the biological sciences" to head the survey. Id. § 101(a)(3). In addition, the Secretary must appoint 17 members to the National Biological Survey Science Council, which acts as an advisory board to the Director. Id. § 103(b). Finally, the Act requires the Secretary to appoint one senior representative from each bureau within the Department of the Interior to the National Biological Survey Policy Board. Id. § 104(b). The Secretary may also appoint members from other federal agencies to serve on this board. Id. The Board will identify priorities for the survey and offer guidance "concerning the potential effects of biological science on policies carried out by the Survey." Id. § 104(c).
55. The ESA was created to preserve the ecosystems on which endangered and threatened species depend, 16 U.S.C. § 1531(c)(1) (1988). However, "[L]egislative language and judicial construction . . . have limited the geographical areas preserved in order to minimize the potential for conflict with human activities." Edwin M. Smith, The Endangered Species Act And Biological Conservation, 57 S. CAL. L. REV. 361, 386 (1984). As a result, those implementing the Act have taken a narrow approach to habitat conservation issues. Rather than working to maintain biological diversity in the form of healthy ecosystems, federal agencies maintain only those areas essential to avoid losing a species completely. Id. at 387.
56. Knickerbocker, supra note 4, at 3.
57. See Wildlife Address, supra note 36. Secretary Babbit stated that it is environmentally unacceptable to wait to apply the ESA until the "eleventh hour, when the species is spiralling towards extinction, on a habitat base which has been degraded and destroyed to the point that there's no flexibility left for management and there is an inevitable collision because there's no space left on either side." Id.
species administration” has proven unsuccessful. Instead, Babbit encourages earlier and more comprehensive protection of interacting groups of species. Secretary Babbitt has described the ESA as “transcendent, overwhelming... encompassing all types of land use and development issues.” He views the Act as his primary tool for “protecting ecosystems while working with families and communities dependent on natural resources...” The key portion of the Act which he relies on to achieve this goal is section 10(a)(2), which pertains to habitat conservation plans (HCP’s) that are “essentially large scale ecosystem blueprints conceived to preserve the correct configuration of habitat for an endangered species and all of its cohorts.” However, Secretary Babbitt’s use of this section to prevent conflicts over ecosystems and economic progress goes beyond the actual language of the statute.

The ESA, as currently implemented, only protects the habitats of endangered species; however, the need to protect lands that do not harbor endangered species is becoming apparent. In order to avoid the problems of the past, Babbitt wants to initiate a modified form of

58. Grantmakers Address, supra note 13. One of the most publicized cases where poor administration of the ESA resulted in a “train wreck” was the timber/spotted-owl crisis that erupted in the Pacific Northwest. When the spotted-owl crisis began, the Bush Administration refused to take any action until environmental organizations filed suit. Wilkinson, supra note 15, at 48. Eventually, a federal judge was forced to decide the issue because of the unwillingness of the Department of the Interior to meet its legal responsibility. Id. See also Coggins, supra note 12, at 5 (citing Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988) and Northern Spotted Owl v. Lujan, 758 F. Supp. 621 (W.D. Wash. 1991)).


60. Knickerbocker, supra note 4 (ellipses in original).


62. Section 1539(a) states that the Secretary may permit “any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a) (1988). Section 1538(a)(1)(B) prohibits the taking of endangered species within the United States and its territorial seas. 16 U.S.C. § 1538(a) (1988). Consequently, the language of the Act indicates that the HCP concept was created to allow persons whose actions might affect an endangered or threatened species to obtain permits for the incidental taking of the species. See H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 29, 1982, reprinted in 1982 U.S.C.C.A.N. 2860, 2870; see also Robert Reinhold, Tiny Songbird Poses Big Test Of U.S. Environmental Policy, N.Y. Times, Mar. 16, 1993, at A1.

63. See Cole, supra note 11, at 346.
the HCP prior to the listing of a species. Secretary Babbitt stated that these problems cannot be addressed in the traditional way. Rather than wait until an environmental organization files suit to force the listing of a single species, a more productive approach can be taken. Such an approach would require looking at a species’ entire ecosystem and expeditiously deploying information gathered through the National Biological Survey to determine the species’ status. The information could then be used by various groups to devise an HCP that meets the requirements of section 10(a) prior to listing. An effective HCP could prevent a species in danger of being listed from ever reaching endangered levels and also could protect other plants and animals upon which that particular species depends. As a result, the HCP may also avert expensive legal battles and the costs associated with obtaining permits under the ESA once a species is designated as endangered.

In an effort to generate approval for this idea, Secretary Babbitt has emphasized that a program exists in California that serves as “a good example of the kind of collaborative problem solving we need across the country to balance the need for sound ecosystem planning and economic progress.” The California program, referred to as the Natural Communities Conservation Planning program (NCCP), is an attempt to voluntarily preserve the entire ecosystem of the troubled California gnatcatcher. The plan permits developers to destroy part of the gnatcatchers’ habitat provided they agree to set aside enough crucial land to sustain the bird and the ecosystem on which it depends. The program is based primarily on section 10(a) of the ESA

66. See Grantmakers Address, supra note 13.
67. Id.
68. Id.
69. For the Secretary to accept an HCP, the plan must specify (i) the impact which will likely result from such taking; (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.
71. See Grantmakers Address, supra note 13.
72. Id.
73. Id.
75. Reinhold, supra note 64, at A1.
and the various HCPs that have been implemented under this provision. However, the program also includes many innovative ideas that are not emphasized in the ESA. In particular, California legislators have stated that the plan promotes coordination and cooperation among public agencies, landowners, and other private interests, provides a mechanism by which landowners and development proponents can effectively participate in the resource conservation planning process, provides a regional planning focus which can effectively address cumulative impact concerns, minimizes wildlife habitat fragmentation, promotes multi species management and conservation, . . . and promotes the conservation of broad based natural communities and species diversity.

The plan is also broader and geographically wider than other HCP plans that have been used in the past. In addition, it allows developers to proceed with projects under interim guidelines while the habitat is being studied and details of the plan are being established.

While Secretary Babbitt sees the NCCP as a model for the nation, the plan has not yet been successfully implemented. Rather, the plan, first introduced in 1991, by Secretary of the California Resources Agency Douglas Wheeler and California Governor Pete Wilson, is still in the developmental stages. A panel of university scientists must first identify and rank the undeveloped lands containing coastal sage

76. There are currently about 60 HCP's in various stages throughout the county. Robert Reinhold, California Environmentalists Cut a Deal, Hope for the Best, N.Y. TIMES, Mar. 28, 1993, § 4, at 4; see also infra notes 181-84 and accompanying text (describing the basic elements of an HCP). In Florida, an HCP to preserve panther habitat is in the planning stages. See Ron Word, Report Calls for Cooperation to Save Panthers of Florida, TALLAHASSEE DEMOCRAT, Jan. 1, 1994, at 4B.

77. CAL. FISH & GAME CODE § 2810 (West 1993).

78. Id., supra note 76.

79. Id. Although the gnatcatcher was listed as a threatened species in March 1993, flexibility has been introduced into the program by these interim guidelines, which allow some destruction of the gnatcatcher or its habitat while the program is being developed. Robert D. Thornton, The Search for a Conservation Planning Paradigm: Section 10 of the ESA, NAT. RESOURCES & ENVT, Summer 1993, at 21, 22. If developers fail to live up to their promises and proceed with the program until it is fully implemented, the Fish and Wildlife Service can still institute enforcement actions against the developers pursuant to the Endangered Species Act. Tom Kenworthy, Babbitt Clears Compromise to Protect California Bird, WASH. POST, Mar. 26, 1993, at A2.


81. Reinhold, supra note 64 (in practice, the NCCP program has had a minimal effect).

82. Zausner, supra note 22.

83. Lesher, supra note 80.
scrub, in which approximately fifty rare animals, including the gnatcatcher, live. Local officials will then use those guidelines to establish wildlife preserves.\textsuperscript{84} Some 210,000 of the 400,000 acres of California sage scrub are available for the preserves, as they were either public lands already protected from development or voluntarily enrolled in the program by developers.\textsuperscript{85} However, some of the lands identified by scientists as crucial to the gnatcatcher are sure to be privately owned lands that do not fall within the 210,000 acres already set aside. Establishing the preserves, therefore, will involve long and difficult negotiations concerning which lands to protect and how to acquire those lands.\textsuperscript{86} Still, the federal government's use of public lands for the preserves should eliminate some of the costs placed on developers and spread them among federal taxpayers.\textsuperscript{87}

Many have reservations about the California Plan. In particular, many environmentalists complain that developers never intended to develop the lands they dedicated for habitat preservation. They are also concerned about enforcement of the scientist's guidelines.\textsuperscript{88} While these guidelines are not mandatory, they will place pressure on local governments to insure developers avoid areas designated as prime spots for the ecosystem.\textsuperscript{89} Additionally, the recent listing of the gnatcatcher as a threatened species will place pressure on developers to make the program work.\textsuperscript{90}

There is also some concern over how developers will be compensated for land that is determined through scientific research to be crucial to an ecosystem.\textsuperscript{91} Legislators, especially those at the federal level, are keenly aware of this obstacle and are working to obtain the funding necessary to compensate landowners for the regulatory takings that are certain to occur.\textsuperscript{92} Secretary Babbitt also has pointed out that there are several other ways to solve funding dilemmas. First, if programs like the NCCP are implemented early, while there is still room for flexibility, public land (when available) can be used as opposed to

\textsuperscript{84} Cone, infra note 74.
\textsuperscript{85} Lesher, supra note 80, at A13.
\textsuperscript{86} Id.
\textsuperscript{87} See Thornton, supra note 79, at 65. The government's use of public lands reflects increased acknowledgement that developers should not bear the cost of endangered species conservation alone. See id. at 23.
\textsuperscript{88} Cone, supra note 74.
\textsuperscript{89} Id.
\textsuperscript{90} Lesher, supra note 80 ("For developers, Babbitt's designation of the gnatcatcher as a 'threatened species' also adds the specter of federal intervention if progress is not made to preserve gnatcatcher habitat.").
\textsuperscript{91} Reinhold, infra note 64, at A1.
\textsuperscript{92} See Species Act, supra note 8.
private land. In addition, early involvement will permit plans that enhance the value of the land the owner retains, thereby preventing substantial economic loss. Allowing developers to obtain denser development rights on relatively large blocks of land may increase their returns and, consequently, persuade them to dedicate land crucial to the success of the program. If such ideas fail, however, Secretary Babbitt concedes that compensation will be necessary. If plans cannot be implemented to avoid the destruction of land values, funds to compensate owners may be obtained from the Land and Water Conservation fund within the Department.

Despite these uncertainties, all involved parties (including the federal government, the State of California, three counties, and a large number of communities) believe the NCCP, if it works as envisioned, is the best alternative to resolving land use disputes. The plan has brought environmentalists, developers, and federal and state officials together to preserve an entire ecosystem. As a result, there should be no need for eleventh-hour intervention to save a single species from extinction. Rather, the plan should permit the gnatcatcher, as well as other rare species within the coastal sage ecosystem, to flourish while still allowing for substantial economic development. Consequently, the NCCP program should be a viable model for resolving future environmental disputes.

C. Increased Federal Involvement—A Hands-On Approach

Another component in Secretary Babbitt’s plan to reform federal land management is to take a hands-on approach in dealing with the resource-dependent communities affected by decisions resulting from programs like the NCCP. Secretary Babbitt recognizes that federal assistance will be necessary as some jobs will be displaced in efforts to restore and maintain ecosystems. However, he also insists that just

94. *Id.*
95. *Id.* This has actually occurred in Orange County, California, where the Irvine Company, the largest developer in the county, agreed to dedicate a large portion of coastal sage covered upland in exchange for an agreement giving the company denser development rights on the tract it retained. *Id.*
96. *Id.*
97. *Id.*
98. Lesher, *supra* note 80.
as many jobs were destroyed by the ineffective management practices that created the crisis situations we now face.\textsuperscript{101}

Programs to assist resource-dependent individuals and communities already have been introduced to address current controversies that pit jobs against the environment. While assistance programs like those suggested at the April 1993 Forest Conference\textsuperscript{102} are essentially responses to the problems left by previous administrations, they serve as models for future methods of insuring federal involvement during all stages of the resolution process.\textsuperscript{102} The programs insure that the human, as well as the environmental and economic dimensions of these problems, will be considered.\textsuperscript{104} The success of such programs is dependent, however, on several factors. In particular, increased coordination among state and federal agencies will be necessary.\textsuperscript{105} “Policies should be coordinated among federal and state agencies to maximize benefits to affected communities and workers.”\textsuperscript{106} Of course, early involvement, which is often the key to avoiding expensive solutions to environmental disputes, may alleviate the need for the type of extensive assistance that was required by the ailing timber community in the Northwest. If programs like the NCCP succeed, the “human factor”
can be considered long before a community's livelihood is placed at odds with an endangered species.\textsuperscript{107}

III. BIOLOGICAL DIVERSITY—THE PHILOSOPHY AT THE HEART OF SECRETARY BABBITT'S PLAN TO REFORM FEDERAL LAND USE MANAGEMENT

The notion of using a broader rather than a narrow approach to conserve natural resources in land disputes is not a new one. The key to this broader approach is maintaining biological diversity. Many of the ideas presented here are aimed at conserving biological diversity, which has been continuously eroded as a result of the modification and destruction of natural ecosystems.\textsuperscript{108} An analysis of the concept of biological diversity, including an evaluation of the reasons why it should be protected, will provide added insight into the proposals of Secretary Babbitt and his followers.

A. What is Biological Diversity?

Biological diversity has been defined as "the full range of variety and variability within and among living organisms and the ecological complexes in which they occur."\textsuperscript{109} The concept actually encompasses three types of diversity. The first, genetic diversity, is "the genetic variability among individuals within a single species' breeding population."\textsuperscript{110} The second, ecological diversity, is "the number of species within a single community of organisms."\textsuperscript{111} The third, ecosystem diversity, is "the number of ecosystems within a larger geographical unit, such as a country."\textsuperscript{112} This extensive definition implies that preserving biological diversity will involve many more considerations than the preservation of a single species. Since the process to preserve biological diversity is a complicated one,\textsuperscript{113} there must be exceptional reasons for the tremendous support this concept is receiving.

\textsuperscript{107} See Cole, supra note 11, at 353.
\textsuperscript{108} See Flevares, supra note 11, at 2039 ("the loss of habitat resulting from the destruction of old-growth forests and other ecosystems is significantly diminishing biological diversity").
\textsuperscript{110} Smith, supra note 55, at 369. Genetic diversity is caused by environment variability. Id.
\textsuperscript{111} No environment is stable; therefore, as an environment changes, the genetic structure of a species must also change to survive in the new environment. Id. Genetic diversity increases the likelihood that a species will adapt to the new environment. Id.
\textsuperscript{112} Flevares, supra note 11, at 369. If ecological diversity is disturbed by the removal of a particular species, the numbers of species that depend on the particular species also may decrease. Id. at 370.
\textsuperscript{113} See Cole, supra note 11, at 351-52 (diversity protection will be difficult to implement).
There are numerous reasons for preserving biological diversity. These reasons can be divided into three general categories. The first category involves economic or utilitarian concerns. "The human species has thrived largely because of its ability to use a multitude of other species to its benefit." In fact, other living species provide almost all of our foods and medicines. Consequently, by destroying species we may be destroying untapped resources. For example, while a species may seem unimportant, it may actually be the source of a useful medicine. The Court in Tennessee Valley Authority v. Hill recognized this fact when it noted that a previously unstudied plant had provided the chemicals necessary for developing oral contraceptives. In addition, species are a source of valuable scientific information from which we can learn more about ourselves and our surroundings. "From a cost-benefit perspective it is in the best interest of this country to foster biological diversity worldwide."

Concerns regarding self-preservation constitute a second category of reasons for preserving biological diversity. "[T]he web of species around us helps generate soil, regulate freshwater supplies, dispose of waste, and maintain the quality of the atmosphere. Pillaging nature to the point where it cannot perform these functions is dangerously foolish." Maintaining biological diversity for this purpose insures that the needs of future generations will be met.

A final category—one that generally is not embraced by legislators—stems from the belief that animals, plants and other natural objects have legal rights. This theory generally provides that

114. Flevares, supra note 11, at 2042-48; Smith, supra note 55, at 370-82; Mann & Plummer, supra note 63, at 47; see also Wm. Robert Irvin, The Endangered Species Act: Keeping Every Cog and Wheel, NAT. RESOURCES & ENV'T, Summer 1993, at 36, 38.
115. Flevares, supra note 11, at 2042.
116. Mann & Plummer, supra note 63, at 47.
118. Id. at 178 (citing H.R. REP. NO. 412, 93d Cong., 1st Sess. 45 (1973)).
119. See Smith, supra note 55, at 370-74 ("[D]estruction of the natural habitats of many different species threatens the advance of biological knowledge."); see also Mann & Plummer, supra note 63, at 47 ("[G]enetic information encoded in the DNA from the common mouse . . . would almost fill the fifteen editions of the Encyclopedia Britannica printed in 1768. Who . . . would like to see that information vanish, along with its potential benefit to humanity?").
120. Flevares, supra note 11, at 2042.
121. Mann & Plummer, supra note 63, at 47.
122. Id.; see also Flevares, supra note 11, at 2049-50 (ecosystems perform a variety of services that help the planet function).
123. See 34 CONG. REC. H1388 (1968).
124. As a corollary to this reason legislators often maintain that biodiversity must be maintained because it provides "many aesthetic benefits that enhance the quality of our lives." 139 CONG. REC. S5637 (daily ed. May 6, 1993) (statement of Sen. Baucus).
125. Flevares, supra note 11, at 2046. See also LEOPOLD, supra note 25, at 262.
every living thing, regardless of the benefit it provides humanity, has a right to exist.\textsuperscript{126} Those who promote preserving biological diversity for this reason, often referred to as the Noah principle,\textsuperscript{127} are generally limited to ecologists, conservationists, scientists, and the like.

B. Recognizing the Importance of Biological Diversity

For primarily economic and self-preservation reasons, some federal legislators concluded that preserving biological diversity is a necessity.\textsuperscript{128} They also discovered that species could be saved more efficiently and cost effectively by changing the focus of federal legislation, in particular the ESA, from conserving single species to maintaining biological diversity.\textsuperscript{129} Even before Secretary Babbitt announced his plans to reform federal land use management, legislators attempted to codify their conclusions in the National Biological Diversity Conservation and Environmental Research Act.\textsuperscript{130} The ideas embodied within this Act demonstrated that legislators finally learned what scientists had known for some time: "the way to save the trees is to save the forest and that the way to save endangered species is to prevent them from becoming endangered."\textsuperscript{131}

It is widely accepted that "[h]abitat destruction is the most important contemporary source of human-caused extinction."\textsuperscript{132} Biological diversity, which is best achieved through ecosystem preservation, can

\textsuperscript{126} Flevares, \textit{supra} note 11, at 2047 (citation omitted).
\textsuperscript{127} Mann & Plummer, \textit{supra} note 63, at 47 (the theory was given this name by biologist David Ehrenfeld).
\textsuperscript{128} 134 \textit{Cong. Rec.} H1388 (1988) ("a comprehensive Federal strategy is needed to arrest the loss of biological diversity and to restore it, where possible; increased ecological and biological research is needed to provide the knowledge to maintain biological diversity"); \textit{see also} H.R. 585, 102d Cong., 1st Sess. § 5 (1991) (setting forth a national biological diversity policy).
\textsuperscript{129} 134 \textit{Cong. Rec.} H1388 (1988).
\textsuperscript{130} Several versions of the proposed Act were introduced. \textit{See} S. 58, 102d Cong., 1st Sess. (1991); \textit{see also} H.R. 585, 102d Cong., 1st Sess. (1991). However, all the versions were similar in nature. Some of the primary goals of the proposed legislation included providing incentives to promote local and regional land-use planning based on ecosystem conservation; forming a "national database or comprehensive survey" that would provide information about the status of species and their ecosystems; establishing a "national commission on biodiversity to develop recommendations for a national strategy to be implemented at the local, state and federal level to preserve the nation's species, habitats and ecosystems;" and strengthening the ESA in part by placing more emphasis on the use of HCPs. \textit{Environment, Biodiversity Policy Seen Needed to Prevent Conflicts With Endangered Species Act}, \textit{Daily Report for Executives}, Feb. 26, 1992, at A-10. Secretary Babbitt is now advocating essentially the same goals, with hopes that his focus on insuring economic growth, in addition to saving species, will be enough to convince legislators of the importance of maintaining biological diversity. Similar goals are also contained in the proposed amendments to the ESA. \textit{See} S. 921, 103d Cong., 1st Sess. (1993).
\textsuperscript{131} 134 \textit{Cong. Rec.} H1388 (1988).
\textsuperscript{132} Smith, \textit{supra} note 55, at 367.
prevent extinction caused by degradation and destruction of habitat. In fact, maintaining biological diversity can prevent species from becoming endangered because it requires preservation of entire ecosystems, including the species within ecosystems and the habitat on which they depend. The focus, as both past and present proposed legislation indicate, should be on preserving ecosystems rather than individual species. If laws are structured to focus on ecosystems, many species' populations will not drop to the critical levels at which an endangered designation is needed.

Implementing a system of ecosystem management will not be easy. Preserving ecosystems, and consequently biodiversity, requires consideration of "the short-term and long-term needs of wildlife, the health of the habitat upon which a specific species or variety of species depend for survival, and the needs and goals of those humans who interact with the wildlife in the ecosystem." The National Biological Survey, as proposed by Secretary Babbitt, should provide this information. In addition, the survey should provide knowledge that will help solve some of the problems that have prevented the use of an ecosystem approach in the past. The information provided by the survey should establish where boundaries for a given ecosystem should be drawn. In addition, the survey should establish how much human activity—including mining, grazing, and timber harvesting—can be conducted in a particular area without adversely affecting a species. Although the overall process will be difficult to implement and initially expensive, in the long run it will be the most efficient and effective means of saving species while permitting development and economic growth to proceed.

IV. WHETHER THE ENDANGERED SPECIES ACT MAY BE USED TO MAINTAIN BIODIVERSITY

The ESA would better serve its purpose if it functioned as an ecosystem protection act, aimed at maintaining biological diversity, as opposed to a single species protection act. While the ESA has come

133. "Ecosystems are geographical areas in which populations of various species evolve and adapt to their environment and to each other." Flevares, supra note 11, at 2049. Therefore, protecting ecosystems requires protecting both the species and the non-living elements within an area. Id.
134. Id. at 2051.
135. Id. at 2050 (quoting Gary D. Myers, Variation on a Theme: Expanding the Public Trust Doctrine to Include the Protection of Wildlife, 19 ENVTL. L. 723, 725 (1989)).
136. See supra notes 84-86 and accompanying text. "Boundaries should be designed so that conservation managers will be able to treat the ecosystem as a discrete ecological area." Flevares, supra note 11, at 2052.
137. Winckler, supra note 63, at 14A.
closer than any other federal law to addressing biological diversity, it has only been used to protect diversity in areas designated as critical habitat\textsuperscript{138} for listed species.\textsuperscript{139} Unfortunately, once a species is listed there is no longer room for compromise among the players involved. Rather, at this point, all decisions must be made to benefit the species.\textsuperscript{140} Consequently, a broader approach, one that protects ecosystems in an attempt to prevent listing, is needed if we intend to use the ESA to avert disputes between environmentalists and developers.

A. Past Implementation of the Endangered Species Act

Understanding how the ESA has been implemented will provide a better understanding of why specific changes to the Act have been proposed. Only a few provisions of the Act are relevant to this analysis. Those provisions and, more importantly, the interpretation courts have applied to them, are addressed below.

1. Statutory Framework

Once a species is listed under the ESA, a number of general prohibitions and guidelines become applicable.\textsuperscript{141} These prohibitions make subsequent development virtually impossible. The most notorious prohibition, included in section 9, makes it unlawful for any person to "take" an endangered species.\textsuperscript{142} As defined by the Department of the Interior, "taking" includes harassing, pursuing, hunting, shooting, killing, wounding, trapping, capturing or collecting an endangered species, or attempting any of these activities.\textsuperscript{143} Courts also have interpreted the term to include the failure to prevent adverse modification

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\textsuperscript{138} Critical habitat is defined by the ESA as:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination . . . that such areas are essential for the conservation of the species.

\textsuperscript{139} See 16 U.S.C. § 1532(5)(A) (1988). Although designation of critical habitat is to accompany the listing of a species, the process has generally not worked that way. For a discussion of the problems associated with designating critical habitat, a subject beyond the scope of this Comment, see Houck, supra note 5, at 296-315.

\textsuperscript{140} See 16 U.S.C. § 1531(c)(1) (1988) ("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") (emphasis added).

\textsuperscript{141} Smith, supra note 55, at 383.

\textsuperscript{142} 16 U.S.C. § 1538(a) (1988).

\textsuperscript{143} 50 C.F.R. § 17.3 (1988).
of critical habitat where such failure harms the species.\textsuperscript{144} In contrast, "harm" to a species is narrowly defined as an act that actually injures or kills a member of that species or significantly alters its behavioral patterns.\textsuperscript{145}

To prevent the possibility of a taking of a species, federal agencies must follow the guidelines in section 7\textsuperscript{146} of the Act. Essentially, section 7 requires each agency to ensure that its actions do not "jeopardize" the continued existence of any endangered or threatened species or result in the destruction or adverse modification of its critical habitat, unless the agency has received an exemption.\textsuperscript{147} To insure that its actions concur with the ESA, an agency, even if only minimally involved with a project,\textsuperscript{148} must consult with the Fish and Wildlife Service (FWS) to determine whether any listed species are within the project area.\textsuperscript{149} If a listed species is found, and it appears that agency action could jeopardize the species, the agency must consult with and obtain the Secretary of the Interior's opinion as to the effect the agency's action will have on the species and/or its critical habitat.\textsuperscript{150} This opinion will advise whether available alternative actions should be taken, whether the agency action is permissible because no jeopardy exists, or whether the proposed action jeopardizes the species.\textsuperscript{151} If it is determined that the action will jeopardize the species, the agency may obtain an exemption from the Act known as an "incidental take" permit, provided it meets several criteria.\textsuperscript{152}

2. Judicial Interpretation

Again, it is important to remember that the provisions discussed above only apply to listed species. The scope of the ESA is further narrowed by case law emphasizing that only critical habitat, as op-

\begin{footnotes}
\item[144.] \textit{E.g.}, Palila v. Hawaii Dep't of Land and Natural Resources, 639 F.2d 495, 497-98 (9th Cir. 1981).
\item[145.] 50 C.F.R. § 17.3 (1988).
\item[147.] \textit{Id.} For an example of agency action that was found to have jeopardized a listed species, see Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1055 (1st Cir. 1982).
\item[148.] Section 7 applies even if federal involvement in a project is limited to providing a permit or funding. \textit{See, e.g.}, National Wildlife Fed'n v. Coleman, 529 F.2d 359, 373 (5th Cir.) (holding that the provisions of Section 7 are applicable to a state that is using federal funds for a highway project), \textit{cert. denied}, 429 U.S. 970 (1976).
\item[150.] \textit{Id.} § 1536(a)(2), (b).
\item[152.] \textit{See} 16 U.S.C. §§ 1536(g)-(h) (1988). Private parties may receive an incidental take permit only if they comply with the provisions of section 10(a) of the ESA. \textit{Id.} § 1539(a)(2); \textit{see infra} note 172.
\end{footnotes}
posed to the ecosystem in which a species lives, must be conserved to protect a species.\textsuperscript{153} In fact, in the majority of cases where a violation of the Act has been found, the violation was due to destruction of critical habitat. In \textit{Tennessee Valley Authority v. Hill},\textsuperscript{154} the United States Supreme Court held that a dam project, although structurally complete, could not be filled because doing so would destroy the endangered snail darter, in violation of section 7 of the ESA.\textsuperscript{155} The Court stated that its decision merely enforced statutory intent because the Act’s prohibition against jeopardizing any species required halting the project.\textsuperscript{156} The Court’s decision was made easier, however, since critical habitat already had been designated for the snail darter.\textsuperscript{157} Critical habitat also was designated in \textit{National Wildlife Federation v. Coleman},\textsuperscript{158} where the court held that the Department of Transportation violated section 7 of the ESA by allowing a highway construction project to proceed, despite the fact that foreseeable private development accompanying the highway would detrimentally affect the habitat of the endangered sandhill crane.\textsuperscript{159} In \textit{North Slope Borough v. Andrus},\textsuperscript{160} however, the court refused to enjoin the sale of oil and gas leases off the Alaska shoreline in order to protect the endangered bowhead whale, because no critical habitat had been specifically designated for the whale.\textsuperscript{161} The court concluded that although significant alteration to the whales’ environment could result from the installation of drilling rigs, the alteration would not jeopardize the whales or the whales’ designated critical habitat.\textsuperscript{162}

One district court case, however, has interpreted the ESA to forbid actions that destroy habitat, and thus illustrates a potential relation between the ESA and biological diversity. In \textit{Palila v. Hawaii Department of Land and Natural Resources},\textsuperscript{163} several environmental groups filed suit alleging that the State’s failure to remove feral goats and sheep from critical habitat of the endangered palila amounted to a taking as defined by the ESA and related regulations.\textsuperscript{164} The court

\textsuperscript{153} See Smith, supra note 55, at 388-95 (discussing a number of cases in which critical habitat designation was central to the outcome).

\textsuperscript{154} 437 U.S. 153 (1978).

\textsuperscript{155} Id. at 172-73.

\textsuperscript{156} Id. at 173.

\textsuperscript{157} See Smith, supra note 55, at 389-90.

\textsuperscript{158} 529 F.2d 359 (5th Cir. 1976).

\textsuperscript{159} Id. at 373-74.

\textsuperscript{160} 642 F.2d 589 (D.C. Cir. 1980).

\textsuperscript{161} See id. at 607.

\textsuperscript{162} Id. at 593.

\textsuperscript{163} 471 F. Supp. 985 (D. Haw. 1979), aff’d, 639 F.2d 495 (9th Cir. 1981).

\textsuperscript{164} Id. at 995.
agreed that the State's actions amounted to a "significant environmental modification or degradation" of habitat and, therefore, harmed the species. Because harming a species constitutes a taking, the court found that the State had violated section 9 of the Act. The Department of the Interior concluded, however, that the court's interpretation of "harm" was too broad, and consequently altered the definition of "taking" to require that actual death or injury occur as a result of habitat modification. The Department's response indicated that habitat protection per se was still not authorized unless it was necessary to the survival of a listed species.

The majority of these courts did not interpret the ESA to require habitat protection as the Act's primary goal. On the contrary, case law suggests that habitat protection is needed only to avoid risks to listed species. Consequently, the cases do not support the concept of protecting biological diversity as a means of protecting species. "Although the most efficient way to protect species from extinction is to maintain biologically diverse ecological reserves capable of responding to natural environmental change, such strategies appear to have a limited role in current implementation of the ESA." Secretary Babbitt, however, is working to change the way the Act has been implemented. The subsequent sections briefly describe the primary tools he intends to utilize in making this comprehensive change.

B. Habitat Conservation Plans

Prior to the 1982 amendment of the Act, there was no way to ensure that a private party's actions on privately-owned land did not violate the ESA. The 1982 amendments provided an exemption process, similar to that in section 7, allowing for incidental takings on private property. The most important 1982 amendment, for the pur-
poses of this Comment, is section 10(a),\(^\text{172}\) which allowed for the development of habitat conservation plans.\(^\text{173}\) Although HCPs originally were devised to establish the mitigation measures a private party had to meet before an incidental taking would be permitted,\(^\text{174}\) these plans have provided a means to change the emphasis of the Act from eleventh-hour, single species preservation to the ecosystem approach advocated by Babbitt and others.

Section 10(a) grew out of a conflict between a development project and two endangered butterflies.\(^\text{175}\) Shortly after a California developer agreed to dedicate two-thirds of San Bruno Mountain as a park, a proposal was made to list the remaining portion of the mountain as critical habitat of the callippee silverspot butterfly.\(^\text{176}\) In order to avoid listing under the ESA, a long-term program called the San Bruno Mountain HCP was initiated, which protected the butterfly while also permitting development.\(^\text{177}\) The plan was a result of efforts of the environmental community, landowners and developers, and local, state, and federal agencies,\(^\text{178}\) and was based on the results of an extensive biological study conducted over a two-year period.\(^\text{179}\) The plan allowed for development to destroy fourteen percent of the butterflies' habitat and in exchange, a substantial portion of privately owned habitat was turned over to the county to benefit the butterfly.\(^\text{180}\) Additionally, funding provided by developers was used to prevent invasion into the butterflies' habitat by exotic vegetation and off-road vehicles.\(^\text{181}\)

\(^{172}\) 16 U.S.C. § 1539(a)(2)(B) (1988). Under section 10(a), a taking may be permitted if:
(i) the taking will be incidental;
(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
(iii) the applicant will ensure that adequate funding for the plan will be provided;
(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
(v) [any other measures required by the secretary are met]

\(^{173}\) See id.

\(^{174}\) See id.


\(^{176}\) See Thornton, *supra* note 175, at 621-22.

\(^{177}\) Id. at 622. "Although the plan focused on the conflict between development and the preservation of the butterflies, the plan also sought to preserve the diversity of species and their habitat on the mountain." Id.

\(^{178}\) Id.


\(^{181}\) Id.
Congress adopted the San Bruno plan as a model for section 10(a) and stated that future HCPs should be measured against it. The primary elements of the plan which Congress endorsed were as follows:

1. The conservation plan addresses the habitat throughout the area and preserves sufficient habitat to allow for enhancement of the survival of the species...
2. The establishment of a funding program which will provide permanent on-going funding for important habitat management and enhancement activities. Funding is to be provided through direct interim payments from landowners and developers and through permanent assessments on development units within the area;
3. The establishment of a permanent institutional structure to insure uniform protection and conservation of the habitat...by the overlapping jurisdiction of various governmental agencies and the complex pattern of private and public ownership of the habitat; and
4. A formal agreement between the parties to the plan which ensures that all elements of the plan will be implemented.

The San Bruno plan and the 1982 section 10(a) amendment spawned a multitude of similar planning efforts; however, few habitat conservation plans have been successful. As of January 1991, only five section 10(a) permits had been issued. This planning concept failed for a variety of reasons. One reason was the extensive length of the planning process. "Unless there is a written understanding at the beginning of the process setting forth what the parties intend to achieve, there is a considerable risk that the effort will fail." The lack of assurances to developers that dedicating property for reserves will reduce the need for additional endangered species mitigation has caused additional problems. Developers have not been assured that their contributions are not increasing the ability of competing developers to develop their property. Lack of coordination between state and federal agencies also has hindered the success

182. H.R. Rep. No. 835, supra note 179, at 32, reprinted in 1982 U.S.C.C.A.N. 2872. Shortly after section 10(a) was amended to allow for HCPs, the biological methodology underlying the HCP was challenged, though unsuccessfully. See Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976 (9th Cir. 1985).
184. Thornton, supra note 175, at 626.
185. Id. For an analysis of several plans that have succeeded see id. at 626-39.
186. Id. at 631.
187. Id.
188. Id. at 630. Developers still faced legal risk associated with subsequent listing of new species. Thornton, supra note 79, at 23.
189. Thornton, supra note 175, at 633.
of HCPs. The primary problem, though, is that the ESA has not yet recognized the legitimacy of conservation plans that protect biodiversity rather than a single species. Although the House Conference Report on the 1982 amendments to the ESA contains a great deal of language illustrating support for the concept of biological diversity, no clear steps actually were taken to alter the focus of the ESA from conservation of habitat of individual species to conservation of biological communities that include both listed and unlisted species. Plans like the National Communities Conservation Planning program, referred to as regional habitat conservation plans, however, have built on the concept of the section 10(a) HCP in an attempt to alter the focus of the ESA.

C. Regional Habitat Conservation Plans

Although HCPs have provided the basic framework needed to change the emphasis of the ESA, it has taken the efforts of developers, environmentalists, and federal officials to introduce into these programs the flexibility that is necessary to ensure that the programs foster earlier and more comprehensive protection of species. The combined efforts of these groups have produced a mechanism "for allowing current and future development in a large geographic area to obtain ESA approval at an early stage." This mechanism is known as the regional habitat conservation plan (RHCP).

"Combined" and "future" are the key words that describe the RHCP. While section 10 seems to focus on the facilitation and enforcement of a developer's conservation plan for its individual project, RHCPs clearly require input from various groups and extend beyond the life of an individual project. In addition, the RHCP is focused on achieving biological diversity rather than the salvation of a single species. Accordingly, the broader approach offered by the RHCP allows developers, who normally must seek ESA review on a

190. Id. at 630.
191. Id. at 642.
192. In particular, Congress noted that "[a]lthough the regulatory mechanisms of the Act focus on species that are formally listed as endangered or threatened, the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species." H.R. Rep. No. 835, supra note 179, at 30, reprinted in 1982 U.S.C.C.A.N. 2871. In addition, Congress stated that habitat conservation plans would implement the broader purposes of federal environmental legislation, including the ESA, "and allow unlisted species to be addressed in the plan." Id.
194. Id. at 1394-95 (emphasis added)
195. Id. at 1408.
project-by-project basis, to obtain "one-stop shopping" while insuring the survival of numerous species in a given area.196

The first attempt at anything like a RHCP was made to protect the Cochella Valley fringe-toed lizard.197 The listing of the lizard as a threatened species prompted local developers, environmentalists, city and county governments, and the Nature Conservancy, to embark on a six-year effort to develop an acceptable RHCP.198 This resulted in a section 10 incidental taking permit and a plan that set aside about fifteen percent of the remaining dune habitat in preserves purchased for approximately $25 million.199 Intergovernmental districts within the RHCP area oversaw preserve management and RHCP implementation.200 Funding came from federal and state sources, the Nature Conservancy, and development mitigation fees.201 To the extent that the local land use decisions made within the eight districts involved were consistent with overall RHCP objectives, the section 10 permit allowed "local government to continue the exercise of traditional land use controls, permitting development in certain areas occupied by the [lizard] and still remain in compliance with the ESA."202

Although this RHCP was successful, other attempts to implement RHCPs have met with some difficulty. As with the HCP, the planning process is "difficult, controversial, and time consuming."203 Adequate funding for the biological research needed to create the plans has been difficult to generate.204 Finally, "creating and sustaining the necessary broad-based public and private support becomes more tenuous as the territorial scope and biological diversity of the RHCP increases."205 Despite these difficulties and the fact that the RHCP has no real legal basis,206 this method of resolving land use disputes currently is gaining

196. Id. at 1395.
197. Id. at 1404 (citation omitted).
198. Id. at 1405.
199. Id.
200. Id.
201. Id.
202. Id. (citation omitted).
203. Id. at 1407. The controversy and time required to develop a plan, however, could be decreased if the Fish and Wildlife service—the agency that judges the adequacy of an HCP—provided explicit and continual direction during the planning process. Michelle Desiderio, The ESA: Facing Hard Truths and Advocating Responsible Reform, NAT. RESOURCES & ENV'T, Summer 1993, at 37, 79.
204. Id. at 1407-8. The best resolution to the funding dilemma appears to be a fund from which resources could be drawn to assist in planning efforts. See Thornton, supra note 79, at 65; Desidero, supra note 203, at 80.
205. Ruhl, supra note 193, at 1408.
206. While RHCPs are based on the concept of HCPs as contained in section 10 of the ESA, there is no specific statute that actually sets forth the elements of an RHCP.
tremendous acceptance. Secretary Babbitt's designation of the NCCP, the California regional habitat conservation plan for the gnatcatcher, as a national model has given the RHCP staying power. In addition, a recent agreement between Georgia Pacific and the Fish and Wildlife Service, aimed at protecting the red-cockaded woodpecker, illustrates developers' willingness to make these voluntary programs work.\footnote{207}

V. CONCLUSION—SECRETARY BABBITT'S IDEAS HAVE GAINED ACCEPTANCE

Despite obstacles that have prevented legislators from changing the primary focus of the ESA from single species to ecosystems, it now appears that the change will occur. A bill to reauthorize the Act currently is before Congress and clearly acknowledges that the Act was devised to preserve "biodiversity," or biological diversity.\footnote{208} In order to change the focus of the Act, the bill recommends amending it to achieve four major goals.\footnote{209} Many of these goals are consistent with the ideas and programs presented by Secretary Babbitt.

In addition to providing for funding increases,\footnote{210} the bill attempts to abolish crisis management of species by requiring consideration of groups of species dependent on the same ecosystem.\footnote{211} The bill also attempts to provide private landowners with the assistance they need to protect species.\footnote{212} Additionally, the bill attempts to build a stronger partnership between state and federal governments in their efforts to carry out the ESA.\footnote{213} Finally, the bill seeks to encourage decisions that reduce the social and economic costs of the Act.\footnote{214}

If the bill passes, it will open the door to programs such as regional habitat conservation plans and the National Biological Survey. A bill to implement the survey also is before Congress.\footnote{215} While several ver-

\footnote{207. Georgia Pacific stated that it would like to reach agreement on management practices on four million acres of privately owned pine forest in the southeast so that [it] can strike a balance that will enable [it] to protect and preserve the [red-cockaded] woodpeckers on that forest land at the same time that [it utilizes] the forest ... [for its] business of producing forest products.}

\footnote{208. S. 921, 103d Cong., 1st Sess. (1993).}

\footnote{209. 139 CONG. REC. S5658 (daily ed. May 6, 1993) (statement by Sen. Baucus).}

\footnote{210. Congress currently appropriates less than $50 million annually to implement the ESA program. Thornton, supra note 79, at 23.}

\footnote{211. 139 CONG. REC. S5658 (daily ed. May 6, 1993) (statement by Sen. Baucus).}

\footnote{212. Id.}

\footnote{213. Id.}

\footnote{214. Id.}

\footnote{215. S. 1110, 103d Cong., 1st Sess. (1993).}
sions of the bill have been introduced, all versions focus on the need for comprehensive, high-quality research that can be used to make informed and timely decisions regarding natural resources.\textsuperscript{216} If these bills pass and successfully broaden the focus of land management, the United States will be well on the way to achieving a "New American Land Ethic". 

\textsuperscript{216} See id. § 2(a).
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