



# UNITED STATES CODE SERVICE



*Lawyers Edition*

Issued in

April 2006

**CUMULATIVE SUPPLEMENT**

By The Publisher's Editorial Staff

**16 USCS  
Conservation  
§§ 1531-2700**

(Supplementing the 1999 Main Volume)



LexisNexis®

1475 PAQFS-1-10 LEXISNEXIS

IT-73

on environment as required by 10 C.F.R. § 1021.410(b)(3) as easement and mine were connected actions that were inextricably linked. DOE failed to consider both easement and future mine expansion as required by 40 C.F.R. §§ 1508.7 and 1508.8 as mine expansion was reasonably foreseeable, and DOE violated its continuing duty under 16 USCS § 1536(a)(2) to consult with Fish and Wildlife Service on environmental impacts of easement, including proposed mining project, on habitat of Preble's jumping mouse, which was listed as threatened species under ESA. *Sierra Club v United States DOE* (2002, DC Colo) 255 F Supp 2d 1177, 56 Env't Rep Cas 1119.

Plaintiffs were granted summary judgment in their challenge to validity of regulations adopted under Endangered Species Act, 16 USCS §§ 1531-1544, as procedures utilized in promulgating "permit revoca-

tion rule" (PRR), codified at 50 C.F.R. §§ 17.22(b), 17.32(b), were deficient as matter of law because regulation was adopted without notice and comment as required under Administrative Procedure Act, 5 USCS § 553, and relationship between PRR and No Surprises Rule (NSR), codified at 50 C.F.R. §§ 17.22, 17.32, 222.2, which it amended, was such that remand of PRR required remand of NSR. *Spirit of the Sage Council v Norton* (2003, DC Dist Col) 294 F Supp 2d 67, 57 Env't Rep Cas 2103, 34 ELR 20008.

Secretary of Interior's argument that requiring it to abide by court's order would violate Anti-Deficiency Act, 31 USCS § 1341, failed because it ignored fact that, in order to comply with Anti-Deficiency Act, Secretary had to be permitted to continue its ongoing 10-year violation of Endangered Species Act, 16 USCS §§ 1531 et seq. *Ctr. for Biological Diversity v Norton* (2003, DC Ariz) 304 F Supp 2d 1174.

## § 1532. Definitions

### CODE OF FEDERAL REGULATIONS

Animal and Plant Health Inspection Service, Department of Agriculture—Endangered species regulations concerning terrestrial plants, 7 CFR Part 355.

### RESEARCH GUIDE

#### Am Jur:

35A Am Jur 2d, Fish, Game, and Wildlife Conservation §§ 62, 63, 66, 67.

#### Forms:

13 Fed Procedural Forms L Ed, Natural and Mineral Resources (2005) § 50:214.

#### Law Review Articles:

Estes. The effect of the Federal Endangered Species Act on state water rights. 22 *Env'tl L* 1027, 1992.

Morris; Stroup. Quartering species: the "living Constitution," the Third Amendment, and the Endangered Species Act. 30 *Env'tl L* 769, Fall 2000.

### INTERPRETIVE NOTES AND DECISIONS

#### 2. "Critical habitat"

It is clear that Congress intended that conservation and survival be two different (though complementary) goals of Endangered Species Act, 16 USCS §§ 1531 et seq.; clearly, then, purpose of establishing "critical habitat" is for government to carve out territory that is not only necessary for species' survival but also essential for species' recovery. *Giford Pinchot Task Force v United States Fish & Wildlife Serv.* (2004, CA9 Wash) 378 F3d 1059, 59 Env't Rep Cas 1110, 34 ELR 20068, amd (2004, CA9 Wash) 387 F3d 968.

Fish and Wildlife Service's designation of critical habitat for Alameda whipsnake was in violation of Endangered Species Act, 16 USCS § 1531 et seq., where Service failed to identify within Final Rule physical or biological features essential to conservation of species, required element of occupied land designated as critical habitat under 16 USCS § 1532(5)(A)(i). *Home Builders Ass'n of N. Cal. v United States Fish & Wildlife Serv.* (2003, ED Cal) 268 F Supp 2d 1197.

Fish and Wildlife Service's designation of critical habitat for Alameda whipsnake was in violation of Endangered Species Act, 16 USCS § 1531 et seq., where Service failed to comply with statutory requirement that under 16 USCS § 1532(5)(A)(i); Service was required to make finding, prior to designating particular area as critical habitat, that area in question might require special management considerations and protections at some time in future; nothing in Service's arguments pointed court to indication in Final Rule or Administrative Record that Service made that finding prior to designation of critical habitat or that it was factor in designation. *Home Builders Ass'n of*

*N. Cal. v United States Fish & Wildlife Serv.* (2003, ED Cal) 268 F Supp 2d 1197.

Fish and Wildlife Service was entitled to deference in revising endangered seaside sparrow's critical habitat designation, but once it determined revision was necessary it was under obligation to take timely action in determining specific schedule and process. *Biodiversity Legal Found. v Norton* (2003, DC Dist Col) 285 F Supp 2d 1, 57 Env't Rep Cas 1916, motion gr, dismd (2004, App DC) 2004 US App LEXIS 9238.

#### 4. "Take"

Eliminating habitat of species can constitute "taking" that species for purposes of 16 USCS § 1538. *Env'tl. Prot. Info. Ctr. v Simpson Timber Co.* (2001, CA9 Cal) 255 F3d 1073, 2001 CDOS 5730, 2001 Daily Journal DAR 7051, 53 Env't Rep Cas 2129, 31 ELR 20778.

Property owners identified no duty requiring federal authorities to act in manner under 16 USCS § 1532(19), Endangered Species Act, 16 USCS § 1531 et seq., that would likely redress their alleged injuries concerning beach erosion on Fire Island. *N.Y. Coastal P'ship, Inc. v United States DOI* (2003, CA2 NY) 341 F3d 112.

Trial court properly granted summary judgment to federal forest service where environmental organization did not show that state livestock agency was violating any environmental laws despite restrictions imposed on permit issued to it by federal forest service so that state livestock agency could operate its bison capture facility in Montana; in particular, environmental organization did not show that Endangered

Species Act, 16 USCS because no causal connection between alleged harm and actions, and, thus, no proof and organization did not mental Policy Act, 42 because federal forest "look" at environmental and its decision not to p was not arbitrary, capricious otherwise not in accordance with Garber (2004, CA9 Moir Cas 1833, 34 ELR 20008).

District court's issuance of Endangered Species Act was affirmed where Nat altered its own interpretation in its biological opinion head in Federal Columbia River Fishery Commission's interpretation deference. *Nat'l Wildlife Federation v U.S. Fish & Wildlife Serv.* (2005, CA9

Plan for mitigation of endangered species was upheld where Service could rationally improve habitat and endangered species were alleged to be at risk. *Nat'l Wildlife Federation v U.S. Fish & Wildlife Serv.* (2004, ED Cal) 306 F Supp 2d 1618.

Leaseholders' citizen suit for take of endangered plover under 16 USCS § 1532(19) was improper because it failed to provide requisite proof that they intended to take plover in process of mobile homes; leaseholders' mention of plover and their opportunity to rectify violation under 16 USCS § 1531 et seq. was insufficient. *Pulaski v Clatsop County* (2004, ED Cal) 306 F Supp 2d 1105.

#### 5. —"Harm"

Federal agencies were not liable for harm to species because no endangered species was harmed in "taking" under 16 USCS § 1538(a)(1) and definition of "harm" requires that actually kills or injures species. *Tribe v United States* (2004, ED Cal) 306 F Supp 2d 1105.

#### 6. Other terms

Species can be extirpated from its range if the area in which it is no longer found; areas need not coincide with political boundaries, although they may. *Sierra Club v Norton* (2001, DC Dist Col) 2001 CDOS 6429, 2001 Daily Journal DAR 7051, 31 ELR 20778.

State proposition that federal agencies are not required to capture or control extent that federal agencies are not required to trapping is necessary because federal agencies are not required to use methods and procedures for capturing endangered species under 16 USCS § 1532(19). *Soc'y v Davis* (2000, DC Dist Col) 2000 CDOS 5730, 31 ELR 20778.

Fish and Wildlife Service's determination that a subpopulation of species was "endangered" to "endanger"

Secretary of Interior, Bureau of Reclamation (BOR), Fish and Wildlife Service (FWS), and National Marine Fisheries Service (NMFS), alleging violation of consultation requirements of Endangered Species Act with regard to protected species in Colorado River Delta in Mexico, summary judgment was granted for Secretary of Interior, BOR, NWS, and NMFS under Fed. R. Civ. P. 56(c) where, although environmental organizations had standing to bring their action because they demonstrated that impacts on species in question had direct effect on their aesthetic, scientific, recreational, and economic interests, and their declarations were sufficiently detailed to show that their members suffered injury in fact to particularized interest, and that BOR's ongoing operations on lower Colorado River had and would continue to have significant impact on delta region and species in question, record contained no suggestion of way, with or without consultation, for BOR to ensure that more water reached species listed as endangered or threatened under 16 USCS § 1532 in Colorado River Delta, Law of River strictly limited BOR's authority to release additional waters to Mexico, 16 USCS § 1536(a)(2) did not loosen those limitations or expand BOR's authority, and BOR did not have discretion to manipulate water delivery in United States in order to create excess releases for Colorado River Delta. *Defenders of Wildlife v Norton* (2003, DC Dist Col) 257 F Supp 2d 53, 33 ELR 20162, app dismd (2003, App DC) 74 Fed Appx 63.

### § 1533. Determination of endangered species and threatened species

#### (a) Generally. (1), (2) [Unchanged]

(3) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—

(A)(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

(ii) Nothing in this paragraph affects the requirement to consult under section 7(a)(2) [16 USCS § 1536(a)(2)] with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 9 [16 USCS § 1538], including the prohibition preventing extinction and taking of endangered species and threatened species.

#### (b) Basis for determinations. (1) [Unchanged]

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)–(8) [Unchanged]

#### (c)–(i) [Unchanged]

(As amended Nov. 24, 2003, P. L. 108-136, Div A, Title III, Subtitle B, § 318, 117 Stat. 1433.)

### HISTORY; ANCILLARY LAWS AND DIRECTIVES

#### Amendments:

2003. Act Nov. 24, 2003, in subsec. (a)(3), redesignated subparas. (A) and (B) as cls. (i) and

It was not contrary to clear congressional intent for National Marine Fisheries Service and Fish and Wildlife Service (Services) to consider significance of distinct population segment (DPS) when determining whether that population was entitled to Endangered Species Act listing; term “distinct population segment” was ambiguous and, as Services concluded when promulgating DPS policy, DPS must be both discrete and significant because interests of conserving genetic diversity would not be well served by efforts directed at either well-defined but insignificant units or entities believed to be significant but around which boundaries cannot be recognized; therefore, DPS policy was not contrary to congressional intent regarding ESA and it was reasonable interpretation of ambiguous term. *Ctr. for Biological Diversity v Lohn* (2003, WD Wash) 296 F Supp 2d 1223, 58 Env't Rep Cas 1340.

Secretary of Interior's interpretation of “significant portion of its range,” as used in 16 USCS § 1532(6), was not reasonable because Secretary's conclusion that viability of two core populations in Eastern and Western distinct population segments made all other portions of gray wolf's historical or current range insignificant and unworthy of stringent protection was contrary to Endangered Species Act, 16 USCS §§ 1531–1543, and appellate court precedent. *Defenders of Wildlife v Sec'y, United States DOI* (2005, DC Or) 354 F Supp 2d 1156, 35 ELR 20033.

(ii), respe  
inserted

United State  
wildlife and  
National Ma  
Commerce—

#### Federal

24A Fed  
2159, 23

#### Am Jur:

35A Am

#### Forms:

13 Fed F

12 Am J

13A Am

#### Annotat

Designat

#### Law Re

Morris;

Endange

### 2. Constitution

Secretary of  
duty by failing  
gered minnow  
preceded any  
spending and  
years prior to  
injunctive relie  
CA10) 174 F  
(criticized in  
(2002, DC Dist  
Cas 2082).

### 3. Prerequisite

Notice prov  
garding propos  
snake was in  
dures Act, 5 U  
Species Act, 1  
Service compl  
posal for crit  
extent of timin  
notice provide  
deprived publ  
ment and to o  
Home Builder  
& Wildlife Ser

It was not c  
National Mari  
life Service  
distinct popul  
whether that  
Species Act  
ment” was a  
was a promul  
discrete and s  
ing genetic di  
units or entiti  
which bound  
DPS policy v  
regarding ES  
ambiguous te

trarily and capriciously terminated consideration of critical habitats for green sea turtles, hawksbill sea turtles, and leatherback sea turtles prematurely; however, as defendants had remedied this violation, issue was moot, so plaintiff environmentalists' motion for summary judgment on this issue was denied as moot. *NRDC v Evans* (2003, ND Cal) 279 F Supp 2d 1129, motion to strike den, in part, motion to strike gr, in part (2003, ND Cal) 2003 US Dist LEXIS 20394.

Where 2003 Atlantic Sea Scallop fishery management plan (FMP) was adopted, but new biological opinion and amendment to Atlantic Sea Scallop FMP was completed in 2004 based upon new information about condition of scallop fishery and its impact on sea turtles, organization's challenge to 2003 framework and its accompanying biological opinion was moot because they were superseded by 2004 biological opinion and amendment. *Oceana, Inc. v Evans* (2004, DC Mass) 59 Env't Rep Cas 1281.

Army Corps of Engineers failed to comply with its obligation under § 7(a)(2) of Endangered Species Act, 16 USCS § 1536(a)(2), to consult with Fish and Wildlife Service (FWS), and consultation with FWS may or may not have resulted in Corps modifying its general nationwide permits; however, because Corps' finding of no significant impact and minimal impact finding under Clean Water Act (CWA), 33 USCS §§ 1251 et seq., were closely intertwined with Corps' compliance with § 7(a)(2), both sides' motions for summary judgment were denied on claims under CWA and National Environmental Policy Act, 42 USCS § 4331 et seq. *Nat'l Wildlife Fed'n v Brownlee* (2005, DC Dist Col) 60 Env't Rep Cas 1111.

Although plaintiffs argued that forest service violated § 7 of Endangered Species Act (ESA) by failing to properly consult with Fish and Wildlife Service (FWS) to insure that project would not adversely affect Canada lynx (listed species under ESA), that FWS failed to list critical habitat for lynx even though such listing was required concurrently with listing determination, and that action was arbitrary and capricious because administrative record was devoid of specific data on lynx populations within last 24 years, forest service demonstrated that it properly considered lynx habitat and properly consulted with FWS, and that consultation, coupled with previously developed lynx conservation strategies and court's general deference to expertise of agencies, demonstrated that defendants' analysis regarding Canada lynx was not arbitrary and capricious. *Sierra Club v Bosworth* (2005, DC Minn) 352 F Supp 2d 909.

Challenging federal officials' issuance of permits allowing field tests of genetically engineered crops, several organizations sued officials for alleged viola-

tions of National Environmental Policy Act, 42 USCS §§ 4321 et seq.; § 7(a)(2) of Endangered Species Act, found at 16 USCS § 1536(a)(2); Plant Protection Act, 7 USCS §§ 7711 et seq.; where challenged permits expired after one year, and officials stated that they were likely to issue such permits in future for field tests at same locations as challenged permits, and in addition to seeking declaratory and injunctive relief regarding permits, organizations sought any other relief court deemed appropriate, organizations' claims fell within "capable of repetition yet evading review" exception to mootness doctrine; thus, court declined to dismiss lawsuit under Fed. R. Civ. P. 12(b)(1). *Ctr. for Food Safety v Veneman* (2005, DC Hawaii) 364 F Supp 2d 1202, 60 Env't Rep Cas 1313.

Fish and Wildlife Service's determination that proposed copper and silver mine would not jeopardize Cabinet-Yaak grizzly bear population was arbitrary and capricious (given clear possibility that bears were at least not increasing, contemplating loss of additional bears related to mine was not rational), in violation of 16 USCS § 1536(a)(2) and 5 USCS §§ 701-706; therefore, court granted summary judgment to plaintiff environmental groups. *Rock Creek Alliance v United States Fish & Wildlife Serv.* (2005, DC Mont) 390 F Supp 2d 993.

Fish and Wildlife Service (FWS) fulfilled its responsibility under 16 USCS § 1536 by developing reasonable and prudent measure that would work, if properly implemented; whether mitigation would be effective was part of another claim, but on claim that that FWS' reliance on mitigation plan that allowed acquisition of replacement habitat after mine was to be built was "irreversible commitment of resources" in violation of 16 USCS 1536(d), FWS was entitled to summary judgment. *Rock Creek Alliance v United States Fish & Wildlife Serv.* (2005, DC Mont) 390 F Supp 2d 993.

Interior Board of Land Appeals does not have authority to review merits of biological opinions issued by Fish and Wildlife Service (FWS) under 16 USCS § 1536; although Board has no jurisdiction to set aside or "second-guess" biological opinion determinations made by FWS, Board may review party's objections as they relate to compliance or consistency with policy determinations. *Southern Utah Wilderness Alliance* (2000) 152 IBLA 216.

Since initial suspension of contractual timber sale operations was required by Endangered Species Act and by listing of marbled murrelet as threatened species, suspension following listing was act of government as contemplated by contract, and therefore, was not in breach of contract. *Croman Corp. v United States* (2001) 49 Fed Cl 776, vacated, remanded (2004, CA FC) 89 Fed Appx 237.

### § 1537. International cooperation

(a) **Financial assistance.** As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1415 of the Supplemental Appropriation Act, 1953 (31 U.S.C. 724) [31 USCS § 1306], use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 4 of this Act [16 USCS § 1533]. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 15 of this Act [16 USCS § 1542].

(b)-(d) [Unchanged]

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

## Explanatory notes:

In subsec. (a), "31 USCS § 1306" has been inserted in brackets pursuant to § 4(b) of Act Sept. 13, 1982, P. L. 97-258, which appears as a note preceding 31 USCS § 101. Section 1 of such Act enacted Title 31 as positive law, and § 4(b) of such Act provided that a reference to a law replaced by § 1 of such Act is deemed to refer to the corresponding provision enacted by such Act.

## RESEARCH GUIDE

## Law Review Articles:

Morriss; Stroup. Quartering species: the "living Constitution," the Third Amendment, and the Endangered Species Act. 30 *Envtl L* 769, Fall 2000.

## INTERPRETIVE NOTES AND DECISIONS

## 2. Import

Certification procedure specified in § 609(b) of Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1990 (Act Nov. 21, 1989, P.L. 101-162, Title VI, 103 Stat. 1037, codified as 16 USCS § 1537 note), which prohibits import of shrimp that have been harvested with fishing technology that may harm sea turtles, is not only way foreign nation may comply with statute; thus, federal government may permit import of individual shipments from uncertified countries if exporters represent that those particular shipments were caught without use of commercial fishing technology that may adversely affect those species of sea turtles protected by domestic law. *Turtle Island Restoration Network v Evans* (2002, CA FC) 284 F3d 1282, 55 *Envtl Rep Cas* 1201, 23 *BNA Intl Trade Rep* 2217, 32 *ELR* 20571, reh den, en banc, den (2002, CA FC) 299 F3d 1373, 24 *BNA Intl Trade Rep* 1540 and cert den (2003) 538 US 960, 155 L Ed 2d 511, 123 S Ct 1748, 57 *Envtl Rep Cas* 1832, 25 *BNA Intl Trade Rep* 1128.

## 3. Practice and procedure

U.S. Department of State guideline permitting importation of shrimp caught by vessel equipped with turtle excluder device, even if vessel was from country not certified as requiring such device on all shrimpers, violated 16 USCS § 1537 note. *Earth Island Inst. v Daley* (1999) 23 *CIT* 215, 48 *F Supp* 2d

1064, 21 *BNA Intl Trade Rep* 1269, costs/fees proceeding, judgment entered sub nom *Turtle Island Restoration Network v Mallett* (2000) 24 *CIT* 627, 110 *F Supp* 2d 1005, affd in part and revd in part (2002, CA FC) 284 F3d 1282, 55 *Envtl Rep Cas* 1201, 23 *BNA Intl Trade Rep* 2217, 32 *ELR* 20571, reh den, reh, en banc, den (2002, CA FC) 299 F3d 1373, 24 *BNA Intl Trade Rep* 1540 and cert den (2003) 538 US 960, 155 L Ed 2d 511, 123 S Ct 1748, 57 *Envtl Rep Cas* 1832, 25 *BNA Intl Trade Rep* 1128.

Turtle protection organizations are denied attorney's fees and injunctive relief, even though they prevailed on threshold issue by showing that federal officials violated sea turtle protection statute by allowing import of some shrimp snagged by trawls equipped with turtle excluder devices (TEDs) through waters of nations not formally certified to Congress by State Department as utilizing only acceptable methods of shrimp harvesting, because, given myriad difficulties of imposing TED requirements on fishermen worldwide, court cannot conclude that government's position is not substantially justified. *Turtle Island Restoration Network v Mallett* (2000) 24 *CIT* 627, 110 *F Supp* 2d 1005, affd in part and revd in part (2002, CA FC) 284 F3d 1282, 55 *Envtl Rep Cas* 1201, 23 *BNA Intl Trade Rep* 2217, 32 *ELR* 20571, reh den, reh, en banc, den (2002, CA FC) 299 F3d 1373, 24 *BNA Intl Trade Rep* 1540 and cert den (2003) 538 US 960, 155 L Ed 2d 511, 123 S Ct 1748, 57 *Envtl Rep Cas* 1832, 25 *BNA Intl Trade Rep* 1128.

## § 1538. Prohibited acts

## CODE OF FEDERAL REGULATIONS

Animal and Plant Health Inspection Service, Department of Agriculture—Endangered species regulations concerning terrestrial plants, 7 *CFR* Part 355.

United States Fish and Wildlife Service, Department of the Interior—General permit procedures, 50 *CFR* Part 13.

United States Fish and Wildlife Service, Department of the Interior—Importation, exportation, and transportation of wildlife, 50 *CFR* Part 14.

United States Fish and Wildlife Service, Department of the Interior—Endangered and threatened wildlife and plants, 50 *CFR* Part 17.

United States Fish and Wildlife Service, Department of the Interior—Importation and exportation of plants, 50 *CFR* Part 24.

## RESEARCH GUIDE

## Federal Procedure:

9A *Fed Proc L Ed*, Criminal Procedure § 22:1492.

12 *Fed Proc L Ed*, Evidence § 33:95.

## Am Jur:

35A *Am Jur* 2d, Fish, Game, and Wildlife Conservation §§ 62, 66, 67.

## Law Review Articles:

Estes. The effect of the Federal Endangered Species Act on state water rights. 22 *Envtl L* 1027, 1992.

Morriss; Stroup. Quartering species: the "living Constitution," the Third Amendment, and the Endangered Species Act. 30 *Envtl L* 769, Fall 2000.

substantiate its decision, and, although it was therefore inappropriate for court to remand biological opinion and regulations without vacatur, court exercised its equitable authority to stay prior mandate to leave in place interim regime until NMFS could

complete new biological order. *Haw. Longline Ass'n v Nat'l Marine Fisheries Serv.* (2003, DC Dist Col) 288 F Supp 2d 7, magistrate's recommendation, costs/fees proceeding (2004, DC Dist Col) 2004 US Dist LEXIS 19511.

### § 1539. Exceptions

#### CODE OF FEDERAL REGULATIONS

United States Fish and Wildlife Service, Department of the Interior—General permit procedures, 50 CFR Part 13.

#### RESEARCH GUIDE

##### Federal Procedure:

24A Fed Proc L Ed, Natural and Marine Resources §§ 56:2074, 2105, 2132, 2139, 2152, 2154, 2155, 2336.

##### Am Jur:

35A Am Jur 2d, Fish, Game, and Wildlife Conservation §§ 62, 66, 67.

##### Law Review Articles:

Morris; Stroup. Quartering species: the "living Constitution," the Third Amendment, and the Endangered Species Act. 30 *Envtl L* 769, Fall 2000.

#### INTERPRETIVE NOTES AND DECISIONS

### 2. Issuance of permits

Fish and Wildlife Service violated 16 USCS § 1539(a)(2)(B) and (c) by not making map available to individual and environmental organization that had been submitted by residential developer in connection with incidental take permit for endangered fox squirrel. *Gerber v Norton* (2002, App DC) 352 US App DC 375, 294 F3d 173, 54 *Envtl Rep Cas* 1737, 32 *ELR* 20767, reh den (2002, App DC) 2002 US App LEXIS 20118.

Fish and Wildlife Service violated Endangered Species Act in issuing incidental take permit to residential developer without making finding that developer's plan would have minimized negative impacts on endangered fox squirrel to maximum extent practicable as required by 16 USCS § 1539(a)(2)(B)(ii). *Gerber v Norton* (2002, App DC) 352 US App DC 375, 294 F3d 173, 54 *Envtl Rep Cas* 1737, 32 *ELR* 20767, reh den (2002, App DC) 2002 US App LEXIS 20118.

Property owners' claim for alleged administrative taking of value of trees they sought to harvest was held to be unripe where owners had never applied for incidental take permit and government had never taken final action. *Morris v United States* (2004, CA FC) 392 F3d 1372.

Incidental take permit issued by Interior Secretary and Fish and Wildlife Service will not be disturbed, even though it is shown that "urban glow" of artificial beachfront lighting and vehicular traffic on beach somewhat disturb nesting sea turtles, because voluminous administrative record contains requisite support for decision to approve county's habitat conservation plan and permit, and refusal to revoke permit or reinstate consultation. *Loggerhead Turtle v County Council* (2000, MD Fla) 120 F Supp 2d 1005, magistrate's recommendation, costs/fees proceeding (2001, MD Fla) 2001 US Dist LEXIS 2611, subsequent app (2002, CA11 Fla) 307 F3d 1318, 55 *Envtl Rep Cas* 1161, 33 *ELR* 20057, 15 *FLW Fed C* 1104.

Environmental groups' challenge to Fish and Wildlife Service's approval of habitat conservation plan must fail, to extent they argue plan does not adequately disclose impacts on covered species and their habitat, where plan does discuss impact that will likely result from development activities, rice farming, and operation of water conveyance systems in

basin, and make general assessments of affect of development on various species, especially endangered giant garter snake and Swainson's hawk, because precise quantitative measures of take are not required for compliance with 16 USCS § 1539(a)(2)(A). *National Wildlife Fed'n v Babbitt* (2000, ED Cal) 128 F Supp 2d 1274.

Plan for mitigation of incidental taking of endangered species was upheld where Fish and Wildlife Service could rationally conclude that plan would improve habitat and enhance survival of species alleged to be at risk. *Nat'l Wildlife Fed'n v Norton* (2004, ED Cal) 306 F Supp 2d 920, 58 *Envtl Rep Cas* 1618.

### 7. Rulemaking procedure

Fish and Wildlife Service's protocols for determining presence of quino checkerspot butterfly were not "rules" under Administrative Procedure Act because protocols could not form basis for liability; liability for butterfly "taking" could only be based on proof that "taking" prohibition under Endangered Species Act was violated. *Nat'l Ass'n of Home Builders v Norton* (2003, DC Dist Col) 298 F Supp 2d 68, 58 *Envtl Rep Cas* 1455.

Fish and Wildlife Service's protocols for determining presence of quino checkerspot butterfly were not "rules" under Administrative Procedure Act where home builders that brought suit challenging protocols failed to show that any reliance on protocols by state or local authorities in local land use permitting process was product of federal requirement. *Nat'l Ass'n of Home Builders v Norton* (2003, DC Dist Col) 298 F Supp 2d 68, 58 *Envtl Rep Cas* 1455.

### 8. Judicial review

U.S. Forest Service's Texas Red-Cockaded Woodpecker Plan was approved because it provided for particular approach to forest and habitat management for woodpecker that was not arbitrarily based on administrative record and best available science; while there might be legitimate disagreements among scientists on particular methods of accomplishing objective in plan, that disagreement did not mean Forest Service acted arbitrarily when it chose among competing alternatives. *Sierra Club v Veneman* (2003, ED Tex) 273 F Supp 2d 764.

Where home builders failed to show that they had

been subj  
Wildlife §  
terminated  
cedure Ac  
erspot bu  
because n  
and home  
any injur  
(2003, DC  
Cas 1455

Where  
imposed  
vice (NM  
(ESA), I  
vate prop  
tion in vic  
incidenta

### § 1540.

(a)-(g) |

(h) Coo

for appr

quaranti

Act of

Nothing

limiting

to prohi

ing or c

of any

Agricul

function

ing, wi

wildlife

tions of

(As am

Offi

Ani

tion

Ani

Part

pro

Uni

50

Uni

CFI

Uni

trar

Un

wil

Un

pla

Fis

of

Se

## ENDANGERED SPECIES

been subjected to adverse action as result of Fish and Wildlife Service's protocols (which district court determined were not "rules" under Administrative Procedure Act) for determining presence of quino checkerspot butterfly, matter was not ripe for litigation because no facts had been developed to resolve issue and home builders lacked standing for failure to show any injury. Nat'l Ass'n of Home Builders v Norton (2003, DC Dist Col) 298 F Supp 2d 68, 58 Env't Rep Cas 1455.

Where landowners, who claimed that restriction imposed on them by National Marine Fisheries Service (NMFS), pursuant to Endangered Species Act (ESA), 16 USCS §§ 1531-1544, was taking of private property for public use without just compensation in violation of U.S. Const. amend V, had not filed incidental take permit in order to receive permission

to cut down trees on their property, their takings claim was not yet ripe, and government's motion for judgment on pleadings was granted. *Morris v United States* (2003) 58 Fed Cl 95, 57 Env't Rep Cas 1518, aff'd (2004, CA FC) 392 F3d 1372, 59 Env't Rep Cas 1641, 34 ELR 20156.

## 9. Miscellaneous

During voluntary remand to U.S. Fish and Wildlife Service (USFWS) of its critical habitat designations of two endangered species, 16 USCS §§ 1538 and 1539, California Natural Communities Conservation Programs, and special rule under 16 USCS § 1533(d) did not replace consultation for adverse modification under 16 USCS § 1536 by USFWS. *NRDC v United States DOI* (2002, CD Cal) 275 F Supp 2d 1136.

## § 1540. Penalties and enforcement

(a)-(g) [Unchanged]

(h) **Coordination with other laws.** The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the administration of this Act with the administration of the animal quarantine laws (as defined in section 2509(f) of the Food, Agriculture, Conservation, and Trade Act of 1990 (21 U.S.C. 136a(f)) and section 306 of the Tariff Act of 1930 (19 U.S.C. 1306). Nothing in this Act or any amendment made by this Act shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations or possession of animals and other articles and no proceeding or determination under this Act shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture. Nothing in this Act shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930, including, without limitation, section 527 of that Act (19 U.S.C. 1527), relating to the importation of wildlife taken, killed, possessed, or exported to the United States in violation of the laws or regulations of a foreign country.

(As amended May 13, 2002, P. L. 107-171, Title X, Subtitle E, § 10418(b)(3), 116 Stat. 508.)

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

## Amendments:

2002. Act May 13, 2002, in subsec. (h), substituted "animal quarantine laws (as defined in section 2509(f) of the Food, Agriculture, Conservation, and Trade Act of 1990 (21 U.S.C. 136a(f))" for "animal quarantine laws (21 U.S.C. 101-105, 111-135b, and 612-614)".

## CODE OF FEDERAL REGULATIONS

Office of the Secretary of Agriculture—Administrative regulations, 7 CFR Part 1.  
 Animal and Plant Health Inspection Service, Department of Agriculture—Endangered species regulations concerning terrestrial plants, 7 CFR Part 355.  
 Animal and Plant Health Inspection Service, Department of Agriculture—Forfeiture procedures, 7 CFR Part 356.  
 Animal and Plant Health Inspection Service, Department of Agriculture—Rules of practice governing proceedings under certain acts, 7 CFR Part 380.  
 United States Fish and Wildlife Service, Department of the Interior—Civil procedures, 50 CFR Part 11.  
 United States Fish and Wildlife Service, Department of the Interior—Seizure and forfeiture procedures, 50 CFR Part 12.  
 United States Fish and Wildlife Service, Department of the Interior—General permit procedures, 50 CFR Part 13.  
 United States Fish and Wildlife Service, Department of the Interior—Importation, exportation, and transportation of wildlife, 50 CFR Part 14.  
 United States Fish and Wildlife Service, Department of the Interior—Endangered and threatened wildlife and plants, 50 CFR Part 17.  
 United States Fish and Wildlife Service, Department of the Interior—Importation and exportation of plants, 50 CFR Part 24.  
 Fishery Conservation and Management, National Oceanic and Atmospheric Administration, Department of Commerce—Fisheries of the Exclusive Economic Zone off Alaska, 50 CFR Part 679.

## CROSS REFERENCES

Sentencing Guidelines for the United States Courts, 18 USCS Appx § 2Q2.1.

## RESEARCH GUIDE

## Federal Procedure:

10 Moore's Federal Practice (Matthew Bender 3d ed.), ch 54, Judgments; Costs § 54.171.

## § 1541. Endangered plants

## RESEARCH GUIDE

## Law Review Articles:

Morriss; Stroup. Quartering species: the "living Constitution," the Third Amendment, and the Endangered Species Act. 30 *Envtl L* 769, Fall 2000.

## § 1542. Authorization of appropriations

## RESEARCH GUIDE

## Law Review Articles:

Morriss; Stroup. Quartering species: the "living Constitution," the Third Amendment, and the Endangered Species Act. 30 *Envtl L* 769, Fall 2000.

## § 1543. Construction with Marine Mammal Protection Act of 1972

## RESEARCH GUIDE

## Law Review Articles:

Morriss; Stroup. Quartering species: the "living Constitution," the Third Amendment, and the Endangered Species Act. 30 *Envtl L* 769, Fall 2000.

## § 1544. Annual cost analysis by the Fish and Wildlife Service

Notwithstanding section 3003 of Public Law 104-66 (31 U.S.C. 1113 note; 109 Stat. 734), on or before January 15, 1990, and each January 15 thereafter, the Secretary of the Interior, acting through the Fish and Wildlife Service, shall submit to the Congress an annual report covering the preceding fiscal year which shall contain—

(1), (2) [Unchanged]

(As amended May 18, 2000, P. L. 106-201, § 1(a), 114 Stat. 307.)

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

## Amendments:

**2000.** Act May 18, 2000 (effective 12/19/99 pursuant to § 1(b) of such Act, which appears as a note to this section), in the introductory matter, substituted "Notwithstanding section 3003 of Public Law 104-66 (31 U.S.C. 1113 note; 109 Stat. 734), on" for "On".

## Other provisions:

**Effective date of May 18, 2000 amendment.** Act May 18, 2000, P. L. 106-201, § 1(b), 114 Stat. 307, provides:

"The amendment made by this section [amending this section] takes effect on the earlier of—

"(1) the date of enactment of this Act; or

"(2) December 19, 1999."

## RESEARCH GUIDE

## Law Review Articles:

Morriss; Stroup. Quartering species: the "living Constitution," the Third Amendment, and the Endangered Species Act. 30 *Envtl L* 769, Fall 2000.

## CHAPTER 36. FOREST AND RANGELAND RENEWABLE RESOURCES PLANNING

## Section

1650. Hardwood technology transfer and applied research

1674b. Sustainable forestry outreach initiative

## PLANNING

## § 1600. Congressional findings

## RESEARCH GUIDE

## Am Jur:

53A Am Jur 2d, Mines and Minerals § 256.

## Am Jur Proof of Facts:

86 Am Jur Proof of Facts 3d, Citizen Suit for Injunctive Relief Pending Federal Agency's Compliance with National Environmental Policy Act, p. 99.