

Challenge to Administrative Policies Under the Endangered Species Act: Can Secretary Babbitt's Program Pass Muster?

John Ivanac

Stephanie K. Cervoni

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

CHALLENGE TO ADMINISTRATIVE POLICIES UNDER THE ENDANGERED SPECIES ACT: CAN SECRETARY BABBITT'S PROGRAM PASS MUSTER?

The Endangered Species Act ("ESA")¹ has taken a circuitous route to becoming the foundation for endangered species protection,² and today occupies the arena of animal and plant conservation in the United States.³ Challenges to federal policies⁴ which may be considered deleterious to certain endangered animal or plant species, are frequently raised by environmental groups seek-

¹ 16 U.S.C. §§ 1531-1544 (1985 & Supp. 1994). The Endangered Species Act ("ESA") provides:

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

Id. § 1531(b); *see also id.* § 1531(a)(4). "[T]he United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction" *Id.*

² *See* Christopher A. Cole, Note, *Species Conservation in the United States: The Ultimate Failure of the Endangered Species Act and Other Land Use Laws*, 72 B.U. L. Rev. 343, 355 (1992). The ESA was enacted to avoid species elimination. *Id.* It seems that certain administrations have used it, counter to its purported purpose, to shield the interests of industry. *Id.* The current shift of policy is reflected in revisions to the National Environmental Policy Act. *Id.* at 359.

³ *See, e.g.,* Tennessee Valley Authority v. Hill, 437 U.S. 153, 158-59 (1978) (applying ESA to TVA's dam and reservoir project and its threat to existence of snail darter); Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the Navy, 898 F.2d 1410, 1414 (9th Cir. 1990) (reviewing Navy's leasing acreage and contiguous water rights to local farmers in light of ESA's requirement that federal agency action will not jeopardize existence of endangered species or their critical habitats); Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106, 1107 (9th Cir. 1988) (applying ESA to challenge of Hawaii Department of Land & Natural Resources' maintaining sheep in habitat of endangered species of bird); Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 935-40 (D. Mont. 1992) (applying ESA to challenge of Fish & Wildlife Service's failure to prepare adequate opinion of impact of forest plan on endangered species and alleged taking of grizzly bear and gray wolf).

⁴ *See* 5 U.S.C. §§ 551-706 (1982). Agency action is generally subject to judicial review under the Administrative Procedure Act. *Id.*; *see also Hill*, 437 U.S. at 158-59. The Tennessee Valley Authority ("TVA") sought to complete the Tellico Dam and Reservoir Project, which began in 1967 and toward which the TVA had expended \$78 million. *Id.* The TVA challenged the injunction ordered by the Secretary of the Interior to halt construction of the dam. *Id.* The construction threatened extinction of the snail darter whose continued existence depends upon the Little Tennessee River, which would be inundated by the dam project. *Id.*; Sierra Club v. Morton, 405 U.S. 727, 730 (1972). The Sierra Club challenged a grant to build the Disney Ski Resort next to the Sequoia National Park in the interests of preserving Mineral King in its present state. *Id.*

ing to advance their interests in preserving various species.⁵ The Secretary of the Interior,⁶ Bruce Babbitt,⁷ has recommended a broader interpretation of the ESA, proposing that entire ecosystems⁸ be examined and preserved as a whole.⁹ The new policy presents a radical departure from the approaches taken by the two previous Secretaries in upholding the same congressional mandate.¹⁰ Babbitt's policy, however, has run into the firm barrier of Justice Antonin Scalia's ruling in *Lujan v. Defenders of Wild-*

⁵ See 16 U.S.C. § 1540(g) (1993) (granting standing to "any person" to bring suit on their own behalf to challenge agency action in violation of ESA); *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2146 (1992) ("[I]t is clear that in suits against the government, at least, the concrete injury requirement must remain."); *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 929 (D. Mont. 1992) ("environmental organizations . . . may bring suits in their own name").

⁶ See 43 U.S.C. § 1451 (1986). The statute provides in relevant part: "There shall be at the seat of government an executive department to be known as the Department of the Interior, and a Secretary of the Interior, who shall be the head thereof." *Id.*; see also 43 U.S.C. § 1457 (1993). The statute provides in relevant part:

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

1. Alaska Railroad.
2. Alaska Railroad Commission.
3. Bounty-lands.
4. Bureau of Land Management.
5. United States Bureau of Mines.
6. Bureau of Reclamation.
7. Division of Territories and Island Possessions.
8. Fish and Wildlife Service.
9. United States Geological Survey.
10. Indians.
11. National Park Service.
12. Petroleum conservation.
13. Public lands, including mines.

Id.

⁷ See *Interior Department, Senate Confirms Babbitt to Interior Post After Unanimous Committee Vote*, 13 Daily Rep. (BNA) 41 (Jan. 22, 1993). The former Governor of Arizona and Chairman of the League of Conservation Voters was formally appointed by unanimous vote. *Id.*

⁸ See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 720 (1981). An "ecosystem" is defined as an ecological community considered together with the nonliving factors of its environment as a unit. *Id.*

⁹ See Ted Gup, *The Land Lord*, TIME, Mar. 8, 1993, at 38. "[Babbitt] proposes to focus less on rescuing individual species already on the brink of extinction, taking instead a multispecies approach in which ecosystems will be examined as a whole." *Id.*; see also Maura Dolan, *Babbitt Seeks to Balance Land Use, Conservation*, L.A. TIMES, Apr. 27, 1993, at A1. The ESA would be most effective if it was implemented through better planning methods. *Id.* This entails transforming the ESA from a remedial nature to a more preventative tool, so as to avoid "eleventh hour" emergency accommodations which generally leave all parties involved dissatisfied. *Id.*

¹⁰ See Rudy Abramson, *Wildlife Act: Shield or Sword?*, L.A. TIMES, Dec. 14, 1990, at A1 (analyzing former Secretary Lujan's policies); John Lancaster, *President Curtails Offshore Drilling, Decision on Endangered—Owl Issue Angers Environmentalists*, WASH. POST, June 27, 1990, at A1 (discussing dissatisfaction of environmentalists with temporary bans on offshore drilling under former Secretary Watt during early years of Reagan Administration and with former Secretary Lujan's plan to seek exemption from ESA for timber sales).

*life*¹¹ that an environmental group lacks standing¹² to challenge a federal agency program.¹³ The decision reflects the classic controversy between governmental agencies and the judiciary in the struggle for proper separation of powers application.¹⁴

The shift in philosophy discussed in Secretary Babbitt's proposals, favoring the promotion of environmental concerns, will undoubtedly face challenges by groups whose interests could be adversely affected by administrative action under the ESA.¹⁵ The development of legal standards for administrative challenges will necessarily ensue.¹⁶ Under the guidance offered by *Lujan*,¹⁷ it

¹¹ 112 S. Ct. 2130 (1992).

¹² See U.S. CONST. art. III, § 2, cl. 1. This section of the Constitution provides: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a party

Id.; see also *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (identifying disputes which are appropriately resolved through judicial process); *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (finding standing requirement that complaining party has suffered "injury in fact").

¹³ See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2135 (1992). In 1978, the Fish and Wildlife Service and the National Marine Fisheries Service, as authorized by the Secretary of the Interior and the Secretary of Commerce, promulgated a joint regulation extending the agencies' obligations to list endangered species under section 7 of the ESA to foreign nations. *Id.* This was revised in 1979, to apply only to the United States and the high seas. *Id.* Actions were brought in *Lujan* by various environmental organizations against the Secretary of the Interior for a declaratory judgment that the new regulation was erroneous and an injunction requiring the reinstatement of the 1978 rule. *Id.* The Court affirmed the District Court's dismissal for lack of standing. *Id.* at 2145.

¹⁴ See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 426-27 (1987). Through timetables and deadlines, not only Congress, but the judiciary and the executive, have made various efforts to maintain a check on the regulatory process. *Id.* The tension arises due to the ideological differences between the branches. *Id.*; see also Karin P. Sheldon, *Lujan v. Defenders of Wildlife: The Supreme Court's Slash and Burn Approach to Environmental Standing*, 23 ENVTL. L. REP. (ENVTL. L. INST.) 10,031, 10,038 (Jan. 1993). The courts can compel the Secretary of the Interior to reinstate certain regulations, but he, in turn, could not force the agency to comply with those regulations. *Id.*

¹⁵ See DIXY LEE RAY & LOU GUZZO, ENVIRONMENTAL OVERKILL 81 (1992). There is severe criticism that there has been overbroad interpretation and implementation of the ESA. *Id.* There have also been suggestions for narrowing modifications to the ESA. *Id.* at 82-83; *The Emotional Species Act*, WALL ST. J., Nov. 2, 1993, at A22 [hereinafter *The Emotional Species Act*]. Some advocates of economic development and opponents of the ESA ridicule the efforts to save species as seemingly "meaningless" as snails. *Id.*; Randy Fitzgerald, *When a Law Goes Haywire*, READER'S DIGEST, Sept. 1993, at 49. Environmental policy changes will have drastic economic effects on homeowners and small business owners occupying land designated as the critical habitat of an endangered species. *Id.* at 51. "[T]he Endangered Species Act lacks the flexibility to balance human costs and ecological benefits. We owe it to ourselves to seek an accommodation that preserves mankind's unique place in nature's plan." *Id.* at 53.

¹⁶ See Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 660 (1985) (discussing standards elaborated by Supreme Court in *Heckler v. Chaney*, 470 U.S. 821 (1985) and *Overton Park v. Volpe*, 401 U.S. 402 (1971)).

¹⁷ *Lujan*, 112 S. Ct. at 2130. The Court delineated standards for determining when there has in fact been agency action and when such action can be deemed "final." *Id.* "Except where Congress explicitly provides for our correction of the administrative process at a

seems Secretary Babbitt's prerogatives step across Justice Scalia's strict interpretation of the separation of powers doctrine, or his "bright line theory," implicating constitutional questions.¹⁸ Many issues remain unresolved, such as the identity of groups who will challenge the Secretary's policies¹⁹ and what, if any, "standing" the Court will find inheres in such parties.²⁰ Nevertheless, the Secretary's action in stretching the boundaries of the ESA confronts various obstacles that have arisen over the past twenty years,²¹ particularly the constraining

higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Id.* (quoting *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164-66 (1967)).

¹⁸ See Sheldon, *supra* note 14, at 10,039. Justice Scalia's analysis of the separation of powers doctrine is that of constitutional "bright lines" drawn around each of the three branches of government, making their respective powers exclusive, instead of intertwined. *Id.* He feels that Congress's function is to promulgate clear, specific laws for executive agencies to carry out. *Id.* at 10,040. Justice Scalia objects to a "liberalized" view of standing, similar to that supported by Secretary Babbitt, because it allows for the judicial branch to cross over into the executive branch's territory. *Id.* at 10,039. Ultimately, Scalia argues, this circumvents the political process by allowing courts to make political decisions. *Id.*

¹⁹ See Robert D. Thornton, *The Search for a Conservation Planning Paradigm: Section 10 of the ESA*, NAT. RESOURCES & ENV'T, Summer 1993, at 21. "Despite Secretary Babbitt's good intentions and unless the Secretary addresses the institutional problems of the HCP process, he is likely to fail in his attempt to avoid more 'economic train wrecks' like the spotted owl controversy." *Id.* at 23; see also Linda Kanamine, *Spotted Owl is "Acid Test" for Clinton Policy: Effects of One Proposal*, USA TODAY, Feb. 10, 1993, at 3A. Mark LaRochelle of Putting People First stated: "The act is a terrible failure. We would like to see it take into account the economic impact of its regulations, the cost to human life and the cost to quality of life." *Id.*

²⁰ See Sheldon, *supra* note 14, at 10,031. Ms. Sheldon states:

[J]ustice Scalia constricted the citizen suit provision of the ESA, and by implication similar provisions in a host of other environmental statutes. His opinion held that Congress cannot create a procedural injury that gives rise to standing by conferring on all persons "an abstract, self-contained" right to have agencies comply with the law. . . . [I]t is unclear what [environmental groups] must do in the future to ensure that they can overcome the standing hurdle and continue their efforts to protect environmental resources.

Id.

²¹ See *Seattle Audubon Soc'y v. Evans*, No. 689-160WD, slip op. at 17 (W.D. Wash. May 23, 1992). There have been express violations, by the Forest Service and the Fish and Wildlife Service under the Bush administration, of laws protecting wildlife. *Id.*; Robert J. Taylor, *Biological Uncertainty in the Endangered Species Act*, NAT. RESOURCES & ENV'T, Summer 1993, at 6, 7. "The sad fact is that, twenty years into endangered species protection, we still do not have a clear definition of what it is we are trying to protect." *Id.*; see also Michelle Desiderio, *The ESA: Facing Hard Truths and Advocating Responsible Reform*, NAT. RESOURCES & ENV'T, Summer 1993, at 37, 41. Ms. Desiderio explained:

Of the hundreds of species listed by FWS as endangered or threatened since 1973, most remain poised today on the brink of extinction. Less than a handful of species have recovered in numbers sufficient to warrant a change in their condition. Importantly, more species have become extinct than those that have been recovered. . . . The Act's vital mission, to serve as a tool for recovery, is being squandered in light of the misplaced emphasis on species-listing.

Id.

view of the ESA that has been adopted by the Supreme Court.²²

This Note will critique Secretary Babbitt's policy suggestions and propose a more balanced, effective plan, favorable to all interested parties. Part One explores the potential success or failure of the ESA under Babbitt's administration of the Act. Part Two analyzes several foreseeable objections to Babbitt's proposed plan. Part Three considers the underlying balance of practical arguments by environmentalists against those of economic development advocates.

I. THE CHANGING OF THE GUARD

When Bruce Babbitt was appointed Secretary of the Interior in President Bill Clinton's Administration, he came in with a flourish and brought with him a legacy of pro-environmental activism and love of the outdoors.²³ Many of the programs he proposed in the area of land management, particularly the sale of public land to private enterprise, suggested an unprecedented, broader interpretation of the ESA.²⁴ Long-neglected environmental groups heralded the new appointee and anticipated great strides toward a more comprehensive and effective plan for species conservation in the context of industrial land development.²⁵

²² See *Defenders of Wildlife v. Lujan*, 112 S. Ct. 2130, 2133 (1992) (severely limiting range of potential plaintiffs that may challenge agency decisions under ESA); Sheldon, *supra* note 14, at 10,038. Ms. Sheldon has suggested that the recent adoption of such a limited view of recognizing viable standing is in direct contravention of the Constitution and clearly inconsistent with prior Supreme Court decisions. *Id.*

²³ See *Babbitt Plans Big Change in Wildlife Policy*, CHI. TRIB., Feb. 17, 1993, at 3 [hereinafter *Change in Wildlife Policy*]. Secretary Babbitt stated on numerous occasions that his proposal intends to devise ecosystem conservation and rehabilitative plans to avoid the stranglehold of litigation upon a species' listing. *Id.*; Dolan, *supra* note 9, at A1. Babbitt has long been associated with a deep regard for nature and the environment. *Id.* "Babbitt's current agenda closely parallels that of environmental groups." *Id.*

²⁴ See *Gup*, *supra* note 9, at 38. Babbitt's proposal takes the focus of the ESA off of individual species in serious danger of extinction. *Id.* Babbitt suggests a "multispecies approach" which considers the maintenance of entire ecosystems. *Id.*

²⁵ See Dolan, *supra* note 9, at A1. "Babbitt's current agenda closely parallels that of environmental groups." *Id.* Secretary Babbitt wishes to move the Department of the Interior from an agency that "helps people exploit the land . . . to one that also protects the land." *Id.* The administration gladdened environmental groups by promising to charge higher fees on hard-rock minerals mined on public lands and pledging to raise cattle grazing fees. *Id.*; William K. Stevens, *Interior Secretary is Pushing a New Way to Save Species*, N.Y. TIMES, Feb. 17, 1993, at A1. Babbitt had adopted the view that the Department of the Interior could devise plans that would halt the demise of species before the listing process would be triggered by the ESA. *Id.* This is the long-held view of many conservation groups who also back the accommodation of both business and pro-environmental concerns. *Id.*

Babbitt, however, was aware of the legal complications arising from his philosophy on the ESA,²⁶ he understood that eventually his programs would face close scrutiny by public interest groups, politicians, and the courts.²⁷ His greatest challenge, perhaps, lies among the philosophical underpinnings that can be discerned from Justice Scalia's strict interpretation of standing requirements.²⁸ The short shrift given to the ESA in *Lujan* leaves questionable how, if at all, challenges to environmental agency policies may be effectuated.²⁹

A. Secretary Babbitt's Policies

With respect to disposition of publicly owned lands, it is likely that Secretary Babbitt will push for a more stringent following of the National Environmental Policy Act³⁰ requirements for environmental impact statements³¹ and the Federal Land Policy and Management Act³² resource management plan requirements.³³ Previous Secretaries have made attempts, often successful, to cir-

²⁶ See Dolan, *supra* note 9, at A1. Babbitt is a strong proponent of the ESA and believes that the Department of the Interior has not utilized its authority and flexibility to the fullest extent possible. *Id.*; see also Stevens, *supra* note 25, at A1. "Opponents of the Act charge that too often economic interests and property rights are threatened when protection measures are taken on behalf of an endangered species on a crash basis." *Id.*

²⁷ See Stevens, *supra* note 25, at A1. There has been widespread dissatisfaction with the ESA in its present form, and with future proposals. *Id.*; Ike C. Sugg, *If a Grizzly Attacks, Drop Your Gun*, WALL ST. J., June 23, 1993, at A15. "If the Endangered Species Act is to remain a valid public policy, the public as a whole should bear the cost of the burdens it imposes on the rural minority." *Id.* The suggestion is that there is widespread discontent over the application of the ESA. *Id.*

²⁸ See Antonin Scalia, *The Doctrine of Standing*, 17 SUFFOLK U. L. REV. 881, 886 (1983). Justice Scalia has perennially advocated following a literalist approach in applying constitutional mandates. *Id.* As such, he has been extensively cited as a main proponent for limiting the doctrine of standing, particularly in environmental proponents' actions. *Id.*; see also Sheldon, *supra* note 14, at 10,039 (analyzing Scalia's "bright line theory" on the separation of powers doctrine).

²⁹ See *Lujan v. Defenders of the Wildlife*, 112 S. Ct. 2130, 2136 (1992). The Court ruled that the mere fact that members of the Defenders of Wildlife would not be able to enjoy observing species that would be eliminated by agency-funded projects did not meet the Article III "injury" requirements. *Id.*

³⁰ See 42 U.S.C. §§ 4321-4347 (1986 & Supp. 1993) (mandating all federal agencies give extensive deliberation to environmental consequences of their actions and establishing Environmental Protection Agency).

³¹ See 42 U.S.C. §§ 4321-4347 (1986 & Supp. 1993). The statute provides:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Id. § 4321.

³² See 43 U.S.C. § 1731 (1986 & Supp. 1993) (creating Bureau of Land Management).

cumvent statutory mandates in the interest of facilitating land-sale transactions to private industry.³⁴ The new administration's philosophy represents an about-face in executive action toward species protection.³⁵ Clinton and Babbitt present a strong sensitivity to environmental concerns, particularly those of species protection.³⁶ They have frequently noted their departure from previous administrations' lack of due regard for environmental interests.³⁷

Congress expressly recognizes in the text of the ESA that species satisfy various valuable interests including "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."³⁸ The ESA contemplates the prevention of extinction of species that are already endangered,³⁹ as the ESA's name plainly suggests. Babbitt seeks to effectively accelerate the time schedule of species protection, such that the decline in the number of species could be stopped before listing them as threatened or endangered becomes necessary.⁴⁰ This approach

³³ See 43 U.S.C. § 1701 (1986 & Supp. 1993) (setting forth federal policy for natural resources on public land).

³⁴ See *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 481 (W.D. Wash. 1988). The Fish and Wildlife Service initiated a status review of the northern spotted owl under the Department of the Interior regulations. *Id.* Despite scientific findings and peer review suggesting that further development in the spotted owl's habitat would lead to extinction, the Fish and Wildlife Service declined to list the owl for protection. *Id.* The court ruled such failure to list violated the ESA. *Id.* at 482; see also *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 980-81 (9th Cir. 1985). The court rejected the appellant's argument that field studies were methodologically flawed. *Id.* at 980. The Wildlife Service did not act "arbitrarily and capriciously" by not issuing an EIS for development on land which would result in the taking of endangered species. *Id.* at 982; Kanamine, *supra* note 19, at 3A. Previous administrations used means to avoid congressional dictates. *Id.*

³⁵ See Kanamine, *supra* note 19, at 3A. In a more authoritative approach, Interior Secretary Bruce Babbitt stated: "[enforcing the Endangered Species Act] is the biggest issue before this department." *Id.*

³⁶ See *id.* President Clinton and Secretary Babbitt brought about a "get-tough switch from past administrations" in the field of environmental protection. *Id.* Both men, however, are committed to the co-existent goals of wildlife preservation and economic growth. *Id.*

³⁷ See *Change in Wildlife Policy*, *supra* note 23, at 3. Babbitt and Clinton intend to avoid major controversies between constituents of the environment and those of the economy by focusing on "preventive measures based on long-term protection of whole ecosystems and their inhabitants." *Id.* The key is intervention before crisis. *Id.*

³⁸ See 16 U.S.C. § 1531 (1985 & Supp. 1994); see also 16 U.S.C. § 1531(4) (1985 & Supp. 1994) (pledging to recognize need to protect species on worldwide scale); *Hill v. Tennessee Valley Authority*, 549 F.2d 1064, 1073 (6th Cir. 1977) (refusing to ignore congressional intent to preserve the esthetic and ecological value of species), *aff'd*, 437 U.S. 153 (1978); Cole, *supra* note 2, at 348-49 (noting justifications for conservation effort include esthetic or popular values, scientific research, moral values, ecological stability, economic value, and personal survival).

³⁹ See *supra* note 1 and accompanying text (discussing purposes of ESA).

⁴⁰ See *Change in Wildlife Policy*, *supra* note 23, at 3 (discussing Babbitt's switch to preventative measures).

renders the ESA more of a safety net, rather than an interactive method for ecosystem management.⁴¹

Babbitt's ultimate goal seems to be steering away from allowing the ESA to take a proverbial stranglehold upon more civil and reasoned negotiations among proponents of competing interests.⁴² Instead, the new objective is to properly plan the future of an entire ecosystem and thereby avoid the actual endangerment of any species.⁴³ According to this new philosophy, a survey of the territorial United States is to be conducted by eight governmental bureaus, cataloging the status of all species.⁴⁴ The survey is designed to effectuate more structurally-sound land management policies in light of delicate environmental concerns.⁴⁵ The practical effect is to avoid the toilsome process of deciding the "listing" of a species and then dealing with the ensuing possibility of litigation to compel and/or prevent certain administrative action by preempting the strangling grip of the ESA.⁴⁶

B. Problematic Proposals

Given the context in which the new policies must either sink or swim, Babbitt's prospective course, heavily laden with hurdles,

⁴¹ See 5 U.S.C. § 533 (1977) (defining procedures Secretary of the Interior must follow in maintaining lists of threatened species); 16 U.S.C. § 1533(a)(1)A-E (1987) (setting forth criteria for determination of listing of species); see also Stevens, *supra* note 25, at A1 (discussing reevaluation of ESA and implementation of multispecies approach).

⁴² See Dolan, *supra* note 9, at A1 (discussing Babbitt's desire to enable government to act preemptively before species become endangered); see also LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 12-13 (1984) (discussing shortcoming of litigation process in resolving environmental disputes and arguing in favor of negotiation as alternative); GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES—A DECADE OF EXPERIENCE 30 (1986) (discussing examples of mediation for disputes over land use).

⁴³ See *Change in Wildlife Policy*, *supra* note 23, at 3. The underlying premise is that parties will be able to present their relative positions and ultimately agree to a situation that will adequately represent all sides who disagree. *Id.*; Dolan, *supra* note 9, at 1. The Secretary has shown a propensity to hear all sides of a controversy before making administrative decisions. *Id.*; Gup, *supra* note 9, at 38. Secretary Babbitt advocates a "change by consensus." *Id.*

⁴⁴ See *Change in Wildlife Policy*, *supra* note 23, at 3 (advocating need to examine entire ecosystem).

⁴⁵ *House Passes Bill Creating Biological Survey*, REUTERS, Oct. 26, 1993, available in LEXIS, Nexis Library, REUTERS File. The survey is designed to give the entire federal government a dependable source in assessing the United States' biological resources. *Id.* Such a database, Babbitt insisted, would be an effective measure of warning officials that there may be a species crisis. *Id.* Additionally, the survey is an independent, credible source "essential to improve [the country's] capacity to protect and manage [its] natural resources." *Id.*

⁴⁶ See *Change in Wildlife Policy*, *supra* note 23, at 3. Babbitt believes his plan will avoid "[t]he downward spiral of listing, and then the long-contentious legal process that is triggered when the ESA takes hold." *Id.*

will not likely survive judicial scrutiny absent decisive congressional action.⁴⁷ Babbitt's policies are defective in numerous ways under the present law.⁴⁸ First, his policies contravene the ESA's original charter as an emergency provision to protect endangered species, by transforming the ESA into a preventive ecosystem protection plan.⁴⁹ Second, the policies, apparently swaying toward environmental concerns, face imminent practical quagmires relating to enforceability problems from staunch advocates for economic development.⁵⁰ Third, the philosophy could founder into the area of abuse of administrative discretion under the Executive Enabling Clause of the Constitution.⁵¹ Fourth, there are concerns regarding the efficiency of the ESA, in light of federal court decisions limiting the practical operation of the ESA.⁵² Finally, in conjunction with the judicial oversight problem, courts are reluctant to intervene on behalf of citizens challenging agency action, because of the separation of powers doctrine, which essentially encompasses and pervades the other four defects mentioned.⁵³ The opti-

⁴⁷ See Sunstein, *supra* note 14, at 426. Congress's attempts to curtail administrative action clash with the President's efforts to gain greater control over agencies. *Id.* The move toward regulation on a national scale has resulted in alienation of the common citizen by emasculating local concerns. *Id.* The suggestion is that these long-ignored local issues can be better represented through the political process and congressional action. *Id.*

⁴⁸ See *infra* notes 67-88 and accompanying text (discussing legal problems arising under Babbitt's new policies).

⁴⁹ See Cole, *supra* note 2, at 354. "[T]he ESA was designed to reverse observed trends of species extinctions and to allow for the recovery of species approaching extinction." *Id.* The National Environmental Policy Act ("NEPA") contains procedural requirements that must be satisfied by all federal agencies, in light of the devastating effects of human activity on the interdependent components of the environment. *Id.* at 359. NEPA is "the principal vehicle through which the [Endangered Species] Act applies to the federal agencies." *Id.*

⁵⁰ See *infra* note 102 and accompanying text (discussing practical problems encountered in public land management and species protection efforts).

⁵¹ U.S. CONST. art. II, § 3. This section provides in relevant part: "[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; . . . he shall take Care that the Laws be faithfully executed. . . ." *Id.*

⁵² Compare *Palila v. Hawaii Dep't of Land & Nat. Resources*, 649 F. Supp. 1070, 1081 (D. Haw. 1986) ("Endangered Species Act does not allow a 'balancing' approach for multiple use considerations . . . [and] the Act leaves no room for mixed use or other management strategies or policies."), *aff'd*, 852 F.2d 1106 (9th Cir. 1988) with *Palila v. Hawaii Dep't of Land & Nat. Resources*, 471 F. Supp. 985, 995 (D. Haw. 1979) ("the Tenth Amendment does not restrict enforcement of the Endangered Species Act, both because of the power of Congress to enact legislation implementing valid treaties and because of the power of Congress to regulate commerce"), *aff'd*, 639 F.2d 495 (9th Cir. 1981). Cf. *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 929 (D. Mont. 1992) (ruling under standing provision of ESA, environmental organizations need meet only constitutional requirements for standing).

⁵³ See U.S. CONST. art. I, § 1 (vesting all lawmaking power in Congress); U.S. CONST. art. II, § 1 (vesting all power to implement law with President); U.S. CONST. art. III, § 1 (entrusting interpretation of law with courts); see also *Buckley v. Valeo*, 424 U.S. 1, 119-25 (1976) (Congress may not appoint "officers of the United States" who impinge upon execu-

mal solution to such problems is a complete overhaul of the ESA, which would address all the concerns that have beleaguered it for the past twenty years.⁵⁴ Due to years of operation with deficient legislative direction, such a solution, however, is not feasible.⁵⁵

C. *Locking Horns*

It appears that at some point the Supreme Court and Babbitt will lock horns in light of the Court's jurisprudential differences⁵⁶ with the new philosophy and the Court's "toothless" interpretation of the ESA. Proposed amendments have already surfaced in immediate response to the Court's evaluation under *Lujan*.⁵⁷

Perhaps the Court will continue to trump the executive branch's discretionary power in this area as did the district court in *Northern Spotted Owl v. Hodel*.⁵⁸ In *Northern Spotted Owl*, the court considered an environmental organization's challenge to the

tive's powers); *Gilligan v. Morgan*, 413 U.S. 1, 8 (1973) (ruling question of use of militia in Kent State riots was political in nature); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952) (ruling executive must rely on Constitution or congressional act as authority for actions).

⁵⁴ See Don Young, *The Survival of the Fittest*, ENVTL. FORUM, July-Aug. 1990, at 34. The ESA has been inundated by many difficulties which the drafters did not anticipate. *Id.* Many of the problems can be traced to the exponential growth of industry and the steadily deteriorating status of endangered species. *Id.*

⁵⁵ See Desiderio, *supra* note 21, at 41. The author suggests that the years of species protection in practice under the ESA has inundated the original intentions of its drafters. *Id.* The present focus is upon the "listing" process. *Id.*

⁵⁶ See *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759-60 (D.D.C. 1971). "Congress should fill its paramount duty, the executive should have the law's guidance, and the courts should have reasonable clear legal benchmarks against which to assess executive behavior." *Id.*; Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 455 (1987). "[E]xecutive behavior is to be pursuant to law." *Id.* See generally David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance*, 83 MICH. L. REV. 1223, 1275 (1985). The delegation doctrine clarifies the line between the rule of law and separation of powers. *Id.* "Unchecked delegation would undercut the legislative's accountability to the electorate and subject people to rule through ad hoc commands, rather than democratically considered general laws." *Id.*

⁵⁷ See H.R. REP. NO. 193, 103d Cong., 1st Sess., pt.1, at 7 (1993). Congressman Tauzin proposed that a national analysis of human impact on biological resources be taken into consideration by all federal agencies. *Id.* Tauzin also proposed a system under which the federal government would have to compensate landowners if a regulatory action reduced the value of their property by fifty percent, by giving highest priority to such land before acquiring any other, at the landowner's option. *Id.*; see also H.R. 4899, 102d Cong., 2d Sess. (1992). The House Agriculture Committee passed a broad-based bill to establish a longterm strategy of habitat and wildlife protection. *Id.* The ecosystem-based approach would use scientific research to weigh the short-term and longterm effects of decisions under environmental legislation. *Id.*; Sheldon, *supra* note 14, at 10,038. Amendments have been proposed, regarding standing requirements and application of ESA to governmental activities abroad, beyond the territorial United States. *Id.*

⁵⁸ 716 F. Supp. 479 (W.D. Wash. 1988).

United States Fish and Wildlife Service's decision not to list the northern spotted owl as threatened or endangered under the ESA.⁵⁹ The court ruled that the federal agency's decision was "arbitrary and capricious," since the agency did not make an express finding on whether the owl was indeed threatened.⁶⁰ The court took a brave stance against an agency policy of "rubber-stamping" land development proposals.⁶¹

In light of the ultimate compromise achieved under *Northern Spotted Owl*, there may even be a realistic concession by staunch environmentalists that economic factors must be considered in determining the best possible alternatives for land use.⁶² Whatever the outcome may be, the policies of applying the ESA to effectuate the drafters' goals of halting the elimination of preciously scarce species must reflect consistent, careful, and realistic aggregate planning. Such intentions can best be reflected in a comprehensive amendment to the ESA itself.

D. Citizen Environmental Suits: The Standing Dilemma

Many scholars have found the Article III concept of standing⁶³ to be an imprecise tool of the Supreme Court.⁶⁴ Professor David L. Gregory has likened the concept of granting standing to an "accordion" that the Court can expand or contract as it collegially or

⁵⁹ *Northern Spotted Owl*, 716 F. Supp. at 480. The environmental organizations included the Seattle Audubon Society, the Washington Environmental Council, the Natural Resources Defense Council, the Wilderness Society, the Sierra Club, and the Portland Audubon Society. *Id.* at 479.

⁶⁰ *Id.* at 482-83. Although several experts contributed to the analysis of the northern spotted owl's status, none of them made a final determination that the owl was not at risk of extinction. *Id.* The Fish and Wildlife Service ignored the indication that the species could be threatened, and asserted the conclusion that the owl was not facing extinction. *Id.* Without a "rational connection" between the evidence and the final decision, such decision was "arbitrary and capricious and contrary to law." *Id.*

⁶¹ See Jon Jefferson, *Timmberr!*, *How Two Lawyers and a Spotted Owl Took a Cut Out of the Logging Industry*, A.B.A. J., Oct. 1993, at 81. The court's decision in favor of spotted owl protection was a major shift from the usual practice of approving agency decisions. *Id.*; see also Kanamine, *supra* note 19, at 3A. "[P]ast administrations 'deliberately flouted the law,' leading to court orders that set deadlines for [Babbitt] to list hundreds of endangered species for protection." *Id.* (quoting Secretary Babbitt).

⁶² See Thornton, *supra* note 19, at 22. Congress should apply a "market" approach in efficiently allocating land use among various groups, including both environmental and developmental concerns. *Id.*

⁶³ See U.S. CONST. art. III, § 2, cl. 1. The judicial branch is limited to hearing actual bona fide disputes arising among parties. *Id.*

⁶⁴ See Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 425 n.1 (1974). The Court's shifting understanding of the specific standing requirements has, predominantly, reflected the change in personnel on the bench. *Id.*

majoritatively desires, reflecting whether or not it wishes to hear a particular case.⁶⁵ In the aftermath of *Lujan*, the apparent change in administrative policy under Secretary Babbitt could, as a practical matter, render the Court's limited view of standing irrelevant in public land-sale decisions.⁶⁶

Babbitt effectively preempts judicial review by providing an independent settlement procedure for foreseeable environmental and developmental controversies, presumably insulating the agency's decisions from private challenge.⁶⁷ Babbitt favors considering the entire spectrum of interests in making a land management decision, presumably accommodating concerns of both business and of the environment.⁶⁸ The sustainable development of the ecosystem is to be a pivotal player and the ultimate goal is to achieve a mutually agreeable solution to all disputes.⁶⁹ Nevertheless, there is still the potential for unresolvable controversy during this negotiations phase and beyond it, such that judicial re-

⁶⁵ Interview with David L. Gregory, Professor of Law at St. John's University School of Law, in Jamaica, N.Y. (Dec. 10, 1993). This answer was offered in response to a question on the likely stance the Supreme Court will take on the standing issue given the recent change in administration and Court personnel. *Id.*; see also *Allen v. Wright*, 468 U.S. 737, 752 (1984). The Court found that the parents of black public school students lacked standing to challenge the Internal Revenue Service's grant of tax-exempt status to private schools which discriminated against blacks. *Id.* The Court found the plaintiff's claim that the grant induced white parents to withdraw their children from public schools, denying black children the right to attend integrated schools, to be lacking in proof of causation. *Id.*; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982). The Court found that plaintiffs claiming that a gift of government land to a religious college was a violation of the Establishment Clause, did not have standing to sue since the gift was not a congressional action under the Taxing and Spending Clause of article IV of the Constitution. *Id.*; Sheldon, *supra* note 14, at 10,038-39. The concept was construed broadly under the Warren Court in the late 1960s, began to be constrained by the Burger Court in the mid-1970s, and sealed tight by the time of Scalia's opinion in *Lujan*. *Id.* The suggestion is that the sway of conservatism on the Court's bench has essentially fused the two concepts of separation of powers and standing. *Id.*

⁶⁶ See *supra* note 9 and accompanying text (discussing Babbitt's desire to settle controversies before they have opportunity to reach courts).

⁶⁷ See *supra* note 9 and accompanying text (discussing Babbitt's independent settlement procedure). Although there may, theoretically, be further challenges to the ultimate outcome of such negotiated settlements, given the aforementioned fusion by the courts of standing and separation of powers doctrines, it is unlikely a court could properly entertain such an action. *Id.*; cf. *supra* note 65. The converse of standing being an "accordion-like" principle is that a shift in philosophical underpinnings or personnel could effectively result in an irreversible expansion of the doctrine. *Id.*

⁶⁸ See John Adams, *An Urgent Agenda*, U.S. ENV'TL PROTECTION J., Sept.-Oct. 1992, at 14-15. Sustainable development is a highly valued ideal among all interest groups. *Id.* The premise is that land can be devoted to various uses for all parties through an aggregate planning approach. *Id.*

⁶⁹ See *supra* note 9 and accompanying text (discussing Babbitt's pro-environmental proposals with view of addressing all interested parties' concerns).

view would be critical.⁷⁰ In this context, environmental as well as developmental interests will suffer, and the need for proper amendment of the ESA becomes evident.⁷¹

With a proper statutory mandate for agency action regarding the choice of disposition or conservation of publicly owned land, the potential for costly and wasteful judicial conflicts will be greatly diminished, and the propriety of a national survey of species becomes manifest.⁷² The Secretary's pursuit of a comprehensive amendment⁷³ is the proper and imperative path to follow. Further, many environmental and business groups seem to be hesitant or ambivalent⁷⁴ pending Senate consideration of the House of Representatives' proposed bill.⁷⁵

The ESA's express grant of citizen suit standing,⁷⁶ however, should be expanded,⁷⁷ repudiating the Supreme Court's truncated

⁷⁰ See *supra* note 42 and accompanying text (discussing potential for unresolvable controversies over resource use and advocating need for negotiation).

⁷¹ See *supra* note 19 and accompanying text (discussing deficiencies of ESA in current posture); see also ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 190 (2d ed. 1966). "The last word in ignorance is the man who says of an animal or plant: 'What good is it?'" *Id.*

⁷² See George Cameron Coggins, *An Ivory Tower Perspective on Endangered Species Law*, NAT. RESOURCES & ENV'T, Summer 1993, at 3 (noting, with approval, flexibility of ESA, but expressing concern that ESA does not come into play until species are in danger of extinction). *Id.*

⁷³ See Ken Miller, *Western Governors, Enviro Groups Back Endangered-Species Reform*, GANNETT, May 6, 1993, available in LEXIS, Nexis Library, CURRENT NEWS File. Babbitt has pursued revisions to the ESA before the House of Representatives and the Senate, allowing states and property owners to have greater input when deciding which species to protect. *Id.* The suggestions for the ESA have been supported by members of Congress and lobbying groups who are not involved with drafting the legislation. *Id.* The proposed legislation has reflected a balance between greater government responsibility for protecting species and their habitats, and incentives for state, local and private governments to promote species conservation. *Id.*

⁷⁴ See Frank Clifford, *Babbitt Tries to Rustle Up Support for Policies*, L.A. TIMES, Dec. 26, 1993, at A28 (illustrating initial pleasure with Babbitt's proposed environmental policies followed by opposition due to harsh economic burdens).

⁷⁵ See *House Passes Bill Creating Biological Survey*, REUTERS, Oct. 26, 1993, available in LEXIS, Nexis Library, REUTERS File (stating Senate expected to take up bill in 1994 session).

⁷⁶ See 16 U.S.C. § 1540(g) (1987). This section provides in relevant part:

[A]ny person may commence a civil suit on his own behalf—(A) to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or (B) to compel the Secretary to apply . . . the prohibitions set forth . . . with respect to the taking of any resident endangered species or threatened species within any State; or (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

Id.

⁷⁷ See *supra* note 64. In light of the administration's change in philosophy, Congress must be wary of challenges from environmentalists and industrialists. *Id.*

view of such provisions.⁷⁸ Since the express language of the ESA recognizes that species protection is a national interest,⁷⁹ the citizen suit provision⁸⁰ should be broadened to reflect that "injury," within the meaning of constitutional standing requirements, includes a violation by a governmental agency of statutory mandates.⁸¹ Agency decisions made through procedurally deficient methods should continue to give rise to the requisite injury for citizens contesting those actions.⁸² Further, the exact defects found by the Court in *Lujan* should be legislatively eradicated so as to permit standing to be recognized even at the point of Babbitt's so-called "negotiations" phase.⁸³ The result of such a provision seems to directly conflict with Babbitt's policy of circumventing nightmarish listing conflicts, such as that in *Northern Spotted Owl*.⁸⁴ Nevertheless, much of the underlying conflict would be weeded out by the "negotiation" provisions themselves where parties could most effectively present their respective positions for agency resolution.⁸⁵

⁷⁸ See Sheldon, *supra* note 14, at 10,036. There has long been a cognizable trend toward limiting challenges of agency decisions. *Id.* The real surprise was the "machete work" on the citizen suit standing provision of the ESA. *Id.*; see also Charles N. Nauen, *Citizen Environmental Law Suits After Gwaltney: The Thrill of Victory or the Agony of Defeat?*, 15 Wm. MITCHELL L. REV. 327, 349 (1989). The author analyzes the Supreme Court's decision not to grant standing to a citizen for solely past violations in *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield*, 108 S. Ct. 376 (1986). *Id.* The author suggests that the decision is indicative of a future court trend limiting environmental groups' ability to prove standing. *Id.*

⁷⁹ See 16 U.S.C. § 1531 (1993). "[T]hese species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." *Id.*

⁸⁰ See 16 U.S.C. § 1540(g) (1987) (providing standing requirements for persons to commence suits).

⁸¹ See Sheldon, *supra* note 14, at 10,038 (citing cases which discuss injury in citizen standing statutes flowing from fact that violation of some other provision of statute occurred); see also Albert, *supra* note 64, at 451 (stating that intent to protect particular persons does not automatically confer right to judicial review).

⁸² See *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 120 (8th Cir. 1990) (deciding that procedural injury was sufficient for Article III standing), *rev'd*, 112 S. Ct. 2130 (1992).

⁸³ See *supra* note 62 and accompanying text (discussing desirability of attaining mutually agreeable compromises for land use).

⁸⁴ See *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988). The court essentially forced the Fish and Wildlife Service to list the northern spotted owl as a protected species and halted all harvesting of the trees in which the owls lived. *Id.*; see also Lancaster, *supra* note 10, at A1. Upon formal decision by the Interior Department to list the northern spotted owl as an endangered species, the Bush Administration maneuvered to avoid the loss of twenty thousand jobs. *Id.* In fact, had studies shown that the Forest Service could not sell the timber without jeopardizing the owl, the administration planned to seek an exemption from the ESA or even an amendment by Congress to immunize the administration's decision to allow the harvesting of the trees from judicial review. *Id.*

⁸⁵ See *supra* note 67 and accompanying text (discussing potential for irresolvable controversies).

The experience of both developmental and environmental groups under the Bush-Reagan era⁸⁶ counsels a vehicle by which expeditious challenges to administrative action should be allowed.⁸⁷ Such a strategy will create a very strong impetus for parties to reconcile their differences and agree to realistic pareto-efficient compromises.⁸⁸

II. CHALLENGES TO ADMINISTRATIVE AGENCY'S ACTIONS

In light of the uncertainty of the precise form any future amendments to the ESA may take, it is unclear whether Department of Interior action regarding public land use will face increased challenges and, if so, exactly who will have standing to bring such actions.⁸⁹ Given the present posture of the new administration's views on the environment, most speculators believe the evidence is indicative of increased sensitivity to pro-environmental concerns among executive agencies.⁹⁰ Heretofore, most of the concerns with respect to Bureau of Land Management⁹¹ actions have

⁸⁶ See Lancaster, *supra* note 10, at A1. Environmentalists express continued discontent with the environmental policies of the recent administrations. *Id.*; *U.S. Effort Under Endangered Species Act Faulted in Defenders of Wildlife Report*, 15 Env't Rep. (BNA) No. 7, at 258 (June 15, 1984). A report by the Defenders of Wildlife criticized the Reagan administration's efforts to implement protections under the ESA. *Id.* The report stated that only ten percent of the Interior Department's listing capacity was being used. *Id.*

⁸⁷ See Ted Gup, *It's Nature, Stupid*, TIME, July 12, 1993, at 39. The White House might not oppose Congress preempting the sale of timber land for logging in the northern United States. *Id.*; see also Heckler v. Chaney, 470 U.S. 821, 854 (1985) (Brennan, J., concurring). "[A]gency action, including the failure to act, is reviewable to assure that it is not 'arbitrary, capricious, or an abuse of discretion . . .'" *Id.*; Sunstein, *supra* note 14, at 509. "Because they lack internal checks and balances, administrative agencies pose special risks from the standpoint of the traditional distribution of national powers." *Id.*

⁸⁸ See Gup, *supra* note 87, at 39 (discussing legislation passed by Texas legislature as compromise of conflict between Sierra Club and United States Fish and Wildlife Service).

⁸⁹ See Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2152 (1992) (Blackmun, J., dissenting). Environmentalists alleged that injuries should not be considered less cognizable under Article III standing requirements. *Id.* To prove injury in fact, "a property owner claiming a decline in the value of his property from government action might have to specify the exact dates he intends to sell his property and show there is a market for the property. . . ." *Id.* at 2153; see also Sheldon, *supra* note 14, at 10,043. The practitioner bringing actions under citizen suit provisions must ensure their clients fall within the class of persons Congress intended to have standing. *Id.*

⁹⁰ See Dolan, *supra* note 9, at A1. The author explained: Babbitt is trying to turn around 12 years of Interior Department policies that tended to favor rural industries over conservation. He wants to raise fees on miners and ranchers who use public lands, charge farmers more for water from federal water projects and manage public lands so that wildlife is protected before becoming endangered.

Id.

⁹¹ See Reorganization Plan No. 3 of 1946, § 403, 11 F.R. 7876 (1946), reprinted in 43 U.S.C. § 1 (1986), and in 60 Stat. 1100 (1946) (reorganized General Land Office and Grazing Service into Bureau of Land Management).

concerned environmental groups seeking to protest activity that would threaten or endanger species.⁹² Presently, the pendulum has swung in the opposite direction.⁹³ It seems foreseeable that developmental interest groups will seek to challenge agency actions which restrict sale of public land for industrial uses in the interest of environmental protection.⁹⁴

The shift in executive policy has markedly increased the previously remote possibility of challenges by developmental interests to agency land management action.⁹⁵ Secretary Babbitt has apparently been open to suggestions that economic factors might have to be considered in application of the ESA.⁹⁶ Perhaps new amendments will reflect these views.⁹⁷ Should the new amendments choose to incorporate more developmental concerns, a disregard of those interests by subsequent agency action, such as an extended complete preservationist approach, would potentially violate congressional mandates.⁹⁸ This could lead to a citizen suit⁹⁹

⁹² See *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 303 (9th Cir. 1989) (challenging Bureau of Land Management's selling old-growth timber habitat of northern spotted owl for harvesting).

⁹³ See *supra* notes 35-37 and accompanying text (discussing Clinton Administration's favorable treatment of environmental concerns).

⁹⁴ See Kanamine, *supra* note 19, at 3A. Citizen groups fighting animal rights and extremists want regulations to take into account the economic impact of an administration's policies. *Id.* But see Gup, *supra* note 87, at 40. Clinton's proposal allows logging industries to use certain land and this has created a built-in compromise. *Id.*

⁹⁵ See Sunstein, *supra* note 14, at 474. Courts in the 1970's began to allow regulatory beneficiaries to compel statutorily mandated regulation of entities. *Id.* Prior to that, regulatory beneficiaries were relegated to the political process while regulated entities used the courts to fend off unauthorized intrusions. *Id.*

⁹⁶ Cf. Thornton, *supra* note 19, at 21. Historically, courts have been willing to apply the ESA very broadly and to strictly enforce the statute based solely on scientific data without regard for the economic impact of the listing. *Id.*; see also Eugene Linden, *Sustainable Follies*, TIME, May 24, 1993, at 56. Environmentalists in favor of the theory of sustainable development are bound to encounter developmental groups who will invariably "cheat" by using more than their allocable share. *Id.*

⁹⁷ See Francis S. Blake, *The Economic Impacts of Environmental Regulation*, NAT. RESOURCES & ENV'T, Summer 1990, at 24. Environmental controls must be developed in contemplation of national economic health. *Id.*; see also Robert W. Kasten, Jr., *Hand in Hand: Economic Development and Environmental Protection*, 18 *Env't. L. Rep.* (Env't. L. Inst.) 10,047, 10,047 (Feb. 1988). "[E]conomic development is dependent on environmental protection. For long-term sustainable economic development to occur, basic environmental resources must be protected. Development gains that lack environmental safeguards all too often cannot be sustained, and result in systematic economic collapse." *Id.*

⁹⁸ See Cole, *supra* note 2, at 354-55 (discussing option of complete preservation).

⁹⁹ See Sunstein, *supra* note 14, at 509. The author explained:

Because they lack internal checks and balances, administrative agencies pose special risks from the standpoint of the traditional distribution of national powers. Dangers of factionalism and self-interested representation have been the foremost concern of modern administrative law.

on behalf of those developmental interests.¹⁰⁰ Again, it is unclear whether Congress will find Babbitt's proposed "negotiations" phase representative of a proper resolution of relevant concerns under the ESA, effectively immunizing such actions from judicial review.¹⁰¹ As indicated from past experience, the better choice is to subject most administrative action to public challenge.¹⁰²

The overarching impetus is for a clear, unambiguous citizen-suit provision, such that even a near-agency preemption of the ESA through "negotiated" settlements could still be scrutinized by an arbiter of the law.¹⁰³ Absent such a provision, considering the almost euphoric tide of environmentalism,¹⁰⁴ there is strong potential for business concerns to be swept underfoot without adequate recourse.¹⁰⁵ The classic example is the situation in which a private landowner occupies, or merely owns land next to publicly owned land that is protected or preserved for species protection.¹⁰⁶ An aggressive administrative agenda that borders upon being hypersensitive to environmental concerns could effectively trample upon bordering landowners' rights to merely having title to his or her own property, presenting a potential "takings" problem.¹⁰⁷ The real threat is the landowners' burden of subsequently desiring to improve land in a way that could affect a protected species'

Id. There should be no threshold question of whether an agency action is actually reviewable, instead, Congress can expressly immunize certain decisions from review, subject to constitutional restraints. *Id.* at 478.

¹⁰⁰ See *The Emotional Species Act*, *supra* note 15, at A22 (indicating business community's discontent with pro-endangered species policies).

¹⁰¹ See Sunstein, *supra* note 14, at 477. Congress sometimes takes administrative action outside the scope of judicial review. *Id.* The current trend seems to be to the contrary, subjecting administrative action to the "modern hard-look doctrine." *Id.* at 509.

¹⁰² See Rosemary Salomone, *Judicial Oversight of Agency Enforcement: The Adams and WEAL Litigation*, in *JUSTICE & SCHOOL SYSTEMS—THE ROLE OF THE COURTS IN EDUCATION LITIGATION* 153 (Barbara Flicker ed., 1990) (discussing statutory citizen suit provisions as being consistent with spirit of democracy and encouraging more responsible and effective government action).

¹⁰³ See Sunstein, *supra* note 14, at 477-78 (discussing desirability of subjecting agency action to review).

¹⁰⁴ See Dolan, *supra* note 9, at A1 and accompanying text (discussing strong nationwide pro-environmental movements).

¹⁰⁵ See Sunstein, *supra* note 14, at 477 (arguing regulated entities should be allowed to continue challenging agency regulation).

¹⁰⁶ See Fitzgerald, *supra* note 15, at 49-52 (discussing effect of costly governmental studies on private landowners); Thornton, *supra* note 19, at 65 (discussing dilemma of private landowners); see also Kevin A. Gaynor, *A System Spinning Out of Control*, ENVTL. FORUM, May-June 1990, at 28-29 (examining criminal sanctions on private landowners).

¹⁰⁷ See Steven P. Quarles et al., *The Unsettled Law of ESA Takings*, NAT. RESOURCES & ENV'T, Summer 1993, at 10 (discussing dilemma of landowners whose land use activities may be enjoined or subject to penalties because they effect ESA takings).

"critical habitat."¹⁰⁸ In order to avoid substantive conflicts in the context of post-negotiation settlements, all interests must be represented before and during the settlement negotiations.¹⁰⁹

III. THE PRACTICAL CONTROVERSY

Historically, the road to adequate species protection measures has been very unpredictable and fraught with unnerving quibbles between industrial and environmental interests.¹¹⁰ The weakest application of the ESA will pave the way for the destruction of species and their habitats.¹¹¹ The strongest implementation of the ESA will weigh down businesses with so many restrictions, and even criminal sanctions,¹¹² that the United States' economy would come to a near halt.¹¹³

To make any progress, it is essential that environmental policy-makers strongly consider the economic effects of their plans.¹¹⁴ If

¹⁰⁸ See Endangered Species Act, 16 U.S.C. § 1533(b)(2) (1985 & Supp. 1994). The Secretary is to balance scientific data and economic factors to determine and designate areas of critical habitat. *Id.* If failure to designate the area as critical habitat would lead to extinction of the species, then the Secretary must designate it so. *Id.*; see also Thornton, *supra* note 19, at 65. The author posited:

The Secretary shall designate critical habitat, and make revisions thereto . . . on the basis of the best scientific data available and after taking into consideration the economic impact, 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 outweighs the benefits of specifying such area as critical habitat will result in the extinction of the species concerned.

Id.

¹⁰⁹ See Stevens, *supra* note 25, at A1, A13 (discussing Babbitt's desire to avoid last-minute settlements).

¹¹⁰ See BACOW & WHEELER, *supra* note 42, at 5 (discussing typical conflict between developmental and conservationist interests). See generally Karin P. Sheldon, *Wildlife, in SUSTAINABLE ENVIRONMENTAL LAW 279, 285-92* (Celia Campbell Mohn et al. eds., 1993) (discussing history of wildlife preservation).

¹¹¹ See Cole, *supra* note 2, at 345-47 (stating ESA only protects "critical habitats," therefore, other lands without presently endangered species are not protected in long run).

¹¹² See Gaynor, *supra* note 106, at 28. More definite lines need to be drawn around conduct which warrants prosecution for environmental crimes in order to place individuals on notice. *Id.* at 29. In addition, government officials seem to be insensitive to the difficulties of running a business, and that such criminal sanctions for environmental violations is completely overreaching. *Id.*; see also Paul D. Kamenar, *Environmental Protection or Enforcement Overkill?* ENVTL. FORUM, May-June 1990, at 29. Some advocates of economic development believe that environmental violations, though, in fact, violations, are not "heinous crime[s]" that call for felony sanctions. *Id.* at 30.

¹¹³ See Jefferson, *supra* note 61, at 80. Timber industry leaders are concerned that Clinton's environmental policies will be an "economic disaster." *Id.* at 81; see also RAY & GUZZO, *supra* note 15, at 88. The Fish and Wildlife Service proposed to preserve 11.6 million acres for the spotted owl. *Id.* This particular land contained an airport, mobile home parks, business offices, a logging supply store, and a museum. *Id.* This "protectionism gone wild" would cost the federal government 23,000 to 103,000 jobs. *Id.* at 87.

¹¹⁴ See Blake, *supra* note 97, at 27. Environmental regulation is not an area that can be isolated from economic considerations. *Id.* at 56.

the interests of industrial and economic development are allowed excessive significance, the scales will be tipped and the environmental purpose totally undermined.¹¹⁵ It is important for advocates of development to understand that this controversy is not an ordinary political issue that can afford for resolutions to ebb and flow with the tides of congressional sessions.¹¹⁶ It is, instead, a problem of global proportion which, if not prioritized, will diminish the importance of fiscal or economic health¹¹⁷ and will turn the spotlight on the very question of environmental perpetuity.¹¹⁸

The underlying premise in any attempt to reconcile the parties' differences is the theory of "sustainable development."¹¹⁹ In other words, land can be devoted to various uses, namely, economic development and species preservation.¹²⁰ One of the unique aspects in Babbitt's "negotiations" phase is the desirability of agency competition and cooperation.¹²¹ The competition among various interests seems consistent with the democratic political process and most effectively calibrated to decide crucial policy matters.¹²² This forum of competing agency interests is a novel concept and would

¹¹⁵ See Linden, *supra* note 96, at 56-57. There is one theory that the entire concept of sustainable development, which seriously considers economic factors in the formulation of environmental regulation, is a feigned tactic by environmentalists to appear as advocates of economic progress. *Id.* at 57. This theory proposes pure preservation for some "vital areas" in conjunction with changing values as a society, in light of recent environmental catastrophes. *Id.*

¹¹⁶ See Kasten, *supra* note 97, at 10,047 (discussing foreign economic development's dependence on environmental protection); see also *In Search of Balance*, POPULAR SCIENCE, Mar. 1993, at 10 [hereinafter *In Search of Balance*]. Twelve magazines have joined forces to educate Americans as to the importance of the environment, and the indispensable role it plays in the support of a stable economy. *Id.* The Times Mirror Magazines Conservation Council attempts to involve the public in the conservation of natural resources. *Id.* They have created the Partnership for Environmental Education to fund environmental education endeavors. *Id.*

¹¹⁷ See Leopold, *supra* note 71, at 190 (encouraging all mankind to appreciate environment).

¹¹⁸ See *In Search of Balance*, *supra* note 116, at 10. President Clinton has commented, regarding the ESA, that "[l]isting decisions for species under the Endangered Species Act should be based on science, not politics." *Id.*

¹¹⁹ See Linden, *supra* note 96, at 56-57. "Economic development, if carried out in a careful manner, can proceed without exhausting the natural resources needed by future generations." *Id.*

¹²⁰ See Linden, *supra* note 96, at 57 (discussing theory of sustainable development by which resources can be devoted to multiple uses).

¹²¹ See Gup, *supra* note 9, at 38. Various experts will have to join forces to protect entire ecosystems, instead of individual species. *Id.* Such interagency deliberation and negotiation will prevent fights among federal agencies after decisions are made. *Id.*

¹²² See Sunstein, *supra* note 16, at 666-68 (discussing administrative agency competition and its beneficial effects). But see Paul H. Brietzke, *Administrative Law and Development: The American "Model" Evaluated*, 26 How. L.J. 645, 674 (1983) (arguing agency competition shades into bureaucratic conflicts which stifle proper resolutions of disputes).

likely eradicate many controversies in the nature of the *Northern Spotted Owl* dilemma.¹²³

Thus, the interagency debate should prove to create healthy market-like competition¹²⁴ which could help fully represent and, ultimately, reconcile conflicting interests during the "negotiations" phase of agency action and prevent needless litigation.¹²⁵ Various groups from either side of the debate could submit their respective views to the agency best tailored to fit their needs and likely provide satisfactory representation.¹²⁶ Nevertheless, for such negotiation to be fruitful and most representative of a proper solution, there is an abundantly clear need for proper amendment of the ESA as Secretary Babbitt has suggested.¹²⁷

Additionally, assertions, arguments, and decisions propounded by the agencies should be held to a fully accountable standard.¹²⁸ Agencies must substantiate their positions with well-documented evidence that these positions are truly valid and not simply conclusory remarks.¹²⁹ Such a measure of agency accountability is not a foreign concept, and should not be so, particularly in the context of environmental enactments.¹³⁰

CONCLUSION

Considering the odds against Babbitt's policies, the administration should revamp its approach to forwarding endangered species policies. A better strategy would involve congressional amend-

¹²³ See Jefferson, *supra* note 61, at 84 (discussing seemingly endless conflict between environmentalists and development advocates in fight over northern spotted owl and timber industry).

¹²⁴ See Gup, *supra* note 9, at 38 (proposing comprehensive consideration of environmental issues by groups of experts); Thornton, *supra* note 19, at 65 (suggesting market-based approach that would support credit system through which landowners could earn merits for developmental planning in return for contributing to habitat maintenance).

¹²⁵ See *supra* notes 83-85 and accompanying text (discussing desirability of avoiding wasteful litigation in making land use decisions).

¹²⁶ See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1569 (1992). The author analyzes the benefits of cooperation and negotiation among interest groups to the efficiency of administrative decisions. *Id.* "Courts should require an agency to grant meaningful access to all affected groups, honestly justify its decisions by appeal to the public welfare, and act deliberately in reaching its conclusion about which policy best serves that welfare." *Id.* at 1570.

¹²⁷ See Stevens, *supra* note 25, at A1 (asserting need for amendments to ESA to reflect "accelerated listing" measures).

¹²⁸ See *Northern Spotted Owl*, 716 F. Supp. at 481 (discussing need for courts to closely examine agency action).

¹²⁹ *Id.* (discussing arbitrary and capricious standard).

¹³⁰ See Nauen, *supra* note 78, at 328-32 (discussing many environmental acts providing citizen suit standing provisions).

ment to the ESA in order to avoid the potential disputes addressed above.¹³¹ Babbitt's policies are well intentioned, but absent proper congressional adoption they are threatened with extinction.

As indicated, protection of natural ecosystems, as proposed by Secretary Babbitt, is directed toward the long term goal of a "multi use" environment. An initial period of total preservation of resources and animal habitats is crucial to ultimately reach any stage of unfailing environmental maintenance. Nevertheless, Babbitt's overaggressive and problematic plan is destined for serious attack and inevitable failure if it is not significantly modified and tailored to address the opposing concerns regarding economic development.

Successful environmental policy cannot possibly be attained through regular political administration. The worldwide issue of environmental stability,¹³² which undoubtedly transcends politics, must be dealt with in an apolitical arena. Since this is not possible in a predominantly factional, bipartisan government, the next best alternative is to limit the discretion of environmental federal agencies by way of specific congressional mandates.¹³³

Regarding species preservation and the implementation of the ESA, the Department of the Interior must be strictly limited to exact guidelines promulgated by Congress. For example, section 1533 of the ESA, which directs the Secretary as to when a species should be listed as threatened or endangered,¹³⁴ must be nar-

¹³¹ See Sheldon, *supra* note 14, at 10,042. Senator Metzenbaum's proposal for amendment to the ESA provides for any person with "a demonstrated aesthetic, ecological, educational, historical, professional, recreational, or scientific interest" to satisfy the injury requirement for standing to challenge agency actions. *Id.*

¹³² See Johannah Bernstein et al., *Earth Summit Bulletin*, GREENWIRE, June 4, 1992, available in LEXIS, Environment Library, CURRENT NEWS File. This report analyzes various global strategies for environmental conservation, and the dire need for international cooperation. *Id.*; see also *OECD Environment Committee Ministerial Level Communique*, INT'L ENVTL. REP., Feb. 13, 1991, available in LEXIS, Environment Library, BNA-ENV File. The European Committee stresses the importance of longterm planning, international planning, and full integration of environmental and fiscal policies in all business sectors. *Id.*

¹³³ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518 (1989). Justice Scalia criticized the broad delegation of power to executive agencies. *Id.* Justice Scalia commented:

If Congress is to delegate broadly, as modern times are thought to demand, it seems to be desirable that the delegatee be able to suit its actions to the times, and that continuing political accountability be assured through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight.

Id.

¹³⁴ See 16 U.S.C. § 1533(a)(1) (1985). The statute lists factors which the Secretary must take into account when listing endangered species:

rowed and expressed definitively. If this is not accomplished, policy regarding environmental preservation through biological diversity will fluctuate with each new administration.¹³⁵ Such inconsistency is completely intolerable and counterproductive to the ESA's success. The whole concept of sustainable development is a neverending accommodation of interests which, if distorted by the whims of each administration, will be rendered useless.

The global nature of environmental concern places it, by importance, far above many of the subjects addressed by most administrative agencies. Considering the alarming ramifications and ecological quandaries stemming from environmental neglect, Secretary Babbitt and Congress must set aside political appeasement in the interest of achieving sustainable development.

John Ivanac & Stephanie K. Cervoni

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

Id. The section continues to provide for the basis for determination of status, listing, protective regulations, recovery plans, and agency guidelines. *Id.* § 1533(b)-(h).

¹³⁵ See *supra* notes 110-13 and accompanying text (discussing need to control damaging effects upon environment and business by radical policy changes).