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# A THREATENING TURN FOR A THREATENED SPECIES: THE IMPACT OF *NATIONAL WILDLIFE FEDERATION* V. *NATIONAL PARK SERVICE*

David P. Sheldon

## I. INTRODUCTION

This is an animal that cannot compromise or adjust its way of life to ours. Could not by its very nature, could not even if we allowed it the opportunity, which we did not. For the grizzly bear there is no freedom but that of the unbounded space, no life except its own. Without meekness, without a sign of humility, it has refused to accept our idea of what the world should be like. If we succeed in preserving the wild remnant that still survives, the glory will rest primarily on this bear whose stubborn vigor has kept it alive in the face of increasing and seemingly hopeless odds.<sup>1</sup>

The grizzly bear captures our imaginations, thoughts and respect. The bear represents one of the last vestiges of the myth and reality of the American West.<sup>2</sup> Men like John Colter of the Lewis and Clark Expedition of 1804 testified of the bear's awesome physical strength and magnetic force.<sup>3</sup> Today, the grizzly endures as the most physically powerful animal on the North American continent. Yet, even with this power the grizzly faces the threat of extinction. In the nation's oldest national park, Yellowstone, the grizzly clings to its survival. This comment addresses National Park Service policy regarding the preservation of the grizzly bear in light of a recent federal district court opinion, *National Wildlife Federation v. National Park Service*.<sup>4</sup>

In an attempt to preserve endangered or threatened species like the grizzly bear, Congress enacted the Endangered Species Act (ESA).<sup>5</sup> Today, the act protects nearly six-hundred different animals.<sup>6</sup> In addition, Congress has imposed upon the National Park Service (Park Service)

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1. NATIONAL PARK SERVICE, DEP'T OF THE INTERIOR, GUIDELINES FOR MANAGEMENT INVOLVING GRIZZLY BEARS IN THE GREATER YELLOWSTONE AREA i (1979). The report adapted this quote from Robert Porter Allen.

2. C. CLARKE, THE MEN OF THE LEWIS AND CLARK EXPEDITION 153-55 (1970).

3. *Id.* at 155.

4. 669 F. Supp. 384 (D. Wyo. 1987).

5. Pub. L. No. 93-205, § 2, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-43 (1982)). Congress defined "endangered" as "any species which is in danger of extinction throughout all or a significant portion of its range. . . ." *Id.* at § 1532(6). Congress defined the term "threatened" as "any species which is likely to become endangered within the foreseeable future throughout all or a significant part of its range. . . ." *Id.* at § 1532(20).

6. Endangered and Threatened Wildlife, 50 C.F.R. § 17.11 (1988).

statutory obligations under the National Park Service Organic Act.<sup>7</sup> This act obligates the Park Service to provide for the benefit and enjoyment of the nation's parks, while safeguarding the parks' natural integrity.<sup>8</sup>

The dual nature of the Park Service's obligations of provider and protector gives rise to an inherent conflict.<sup>9</sup> The Park Service, dedicated to its mission, attempts to manage the bear, park and people so that no one suffers at the expense of the others. Unfortunately, this goal appears elusive in the face of the stark reality of the politics of management.

The district court in *National Wildlife Federation v. National Park Service* misapplied the ESA by failing to support the intent of Congress and to observe previous judicial interpretations of the ESA. The statute clearly mandates that the Park Service should act progressively and affirmatively to insure the security of endangered or threatened species and their habitat. In addition, the court failed to consider substantively the Park Service's obligations under the National Park Service Organic Act of 1916.<sup>10</sup>

Unfortunately, this decision not only affects the bears in Yellowstone, but affects every endangered or threatened species, and, in another sense, it affects the health and vitality of our national parks. The problems of managing the grizzly bear in Yellowstone illuminate the greater obstacle of managing parks and people. Without a commitment by the Park Service to intervene and preserve the grizzly bear, the nation will not only lose the bear to extinction, but also the splendor which Yellowstone Park offers because of the presence of such species.<sup>11</sup>

## II. BACKGROUND

Today, the grizzly bear remains in only four states in the continental United States: Idaho, Montana, Washington and Wyoming.<sup>12</sup> A significant grizzly bear habitat lies between the Pelican Creek valley and the Yellowstone River valley in Yellowstone National Park.<sup>13</sup> This area,

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7. Ch. 408, § 1, 39 Stat. 535 (1916) (codified as amended at 16 U.S.C. §§ 1-460 (1982)).

8. *Id.* at § 1.

9. A. CHASE, *PLAYING GOD IN YELLOWSTONE: THE DESTRUCTION OF AMERICA'S FIRST NATIONAL PARK* 142 (1986).

10. 16 U.S.C. § 1 (1982).

11. A. CHASE, *supra* note 9, at 372.

12. U.S. FISH AND WILDLIFE SERVICE, U.S. DEP'T OF INTERIOR, *GRIZZLY BEAR RECOVERY PLAN* (1982). This study targets six ecosystems where the bear can sustain a viable grizzly bear population: (1) the Greater Yellowstone (Yellowstone Park and the lands in the surrounding states of Montana, Idaho, and Wyoming); Northern Continental Divide (northern Montana); Selway-Bitterroot (Montana and Idaho); Cabinet Yaak (northwestern Montana); North Cascades (northern Washington); and the Selkirk (Idaho). Recent reports indicate that Congress could remove the grizzly from the threatened species list in the Northern Continental Divide region.

13. NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, *FISHING BRIDGE AND THE*

known for the famous bridge which crosses the Yellowstone river, Fishing Bridge, provides a critical and recognized habitat for virtually every grizzly bear in the park.<sup>14</sup>

Fishing Bridge has always attracted travelers. Considerable evidence suggests that prehistoric man hunted and fished in the area.<sup>15</sup> Because of its abundance of both wildlife and established fisheries, Fishing Bridge drew Indians and, with the beaver trade of the 1800s, white men as well.<sup>16</sup> When Congress established Yellowstone as the nation's first national park,<sup>17</sup> no permanent facilities existed at Fishing Bridge.<sup>18</sup> But with the completion of the east entrance road through Cody, Wyoming, and the first bridge over the Yellowstone, activity at Fishing Bridge increased.<sup>19</sup> By the mid 1930s Fishing Bridge boasted a campsite with a store, cafeteria, gas station, museum, and tourist cabins.<sup>20</sup>

Throughout the first half of this century, Yellowstone sustained a viable grizzly bear population.<sup>21</sup> The Park functioned in a compatible manner for visitor and bear alike. However, several problems emerged in the 1960s which called attention to the decline of the Yellowstone grizzly. First, the environmental awareness of the 1960s brought about a substantial shift in Park Service policy.<sup>22</sup> The Park Service established a set of bear management guidelines to alleviate bear problems and to respond to the growing outcry in the 1960s to eliminate all unnatural food sources for the bears. What followed was a virtual elimination of a primary feeding source

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YELLOWSTONE ECOSYSTEM: A REPORT TO THE DIRECTOR I (1984).

14. *Id.* at 34.

15. G. WRIGHT, ARCHEOLOGICAL RESEARCH IN YELLOWSTONE NATIONAL PARK (1982). *See also* NATIONAL PARK SERVICE, U.S. DEPT. OF THE INTERIOR, PRELIMINARY ARCHEOLOGICAL INVESTIGATIONS IN YELLOWSTONE NATIONAL PARK (1964) (researched by D. Taylor, Montana State University). Wright and Taylor document that humans occupied the Yellowstone region for several thousand years.

16. Hedges, *Yellowstone Lake*, Helena Daily Herald, Nov. 9, 1870.

17. Yellowstone National Park Act of 1872, ch. 24, 17 Stat. 32-33 (1872).

18. B. Obrien, *The Yellowstone National Park Road System: Past, Present And Future* 35-55 (1965) (unpublished Ph.D. Thesis, Univ. of Wash.).

19. *See generally id.* at 81-124.

20. *See generally id.* at 125-140.

21. NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, *supra* note 13, at 45. The study suggests that the Yellowstone region can sustain a viable population of 301 bears, and that the Fishing Bridge region affects nearly all grizzly bears in the Yellowstone region. The study takes into account the number of female bears of breeding age. Knight and Eberhardt, both preeminent research biologists who have studied the Yellowstone grizzly, maintain that the number of female grizzlies determines whether the species thrives or depletes itself. *See* R. Knight and L. Eberhardt, 48 JOURNAL OF WILDLIFE MANAGEMENT 1434-38 (1984).

22. Leopold, Cain, Cottam, Gabrielson & Kimball, *Wildlife Management in the National Parks*, in 28 TRANSACTIONS OF THE N. AM. WILDLIFE & NAT. RESOURCES CONF. 29, 29-44 (1963). The report, presented to the Park Service by the Advisory Board of Wildlife Management, Aldo Leopold, chairman, encouraged the Park Service to implement long range management programs that would provide a balance between use and preservation.

for the bears, garbage dumps. Bears, unlike humans, make no distinction between natural and unnatural food. By 1970, the Park Service had closed every park dump, some of which had operated for nearly one-hundred years.<sup>23</sup> The Park Service decided that the bears of Yellowstone would no longer scavenge in the park's garbage dumps, but rather, would live within and from the pristine environment of Yellowstone. Ironically, later studies showed that the removal of the garbage dumps resulted in a dramatic reduction in the average weight of the bears. With the nutritional level and average weight of the bear decreasing, the bear's reproductive rate correspondingly decreased.<sup>24</sup> The closure of the dumps clearly removed a critical source of bear nutrition. Thus, the bear's need for and reliance upon the natural habitat in the Fishing Bridge area became critical.

In addition, after World War II, visitor use of the park increased notably.<sup>25</sup> In response, the Park Service implemented the Mission 66 program to upgrade park facilities.<sup>26</sup> More people meant a greater impact upon the park in general and the bear in particular. In 1959, the Park Service completed the present facilities at Fishing Bridge, a campground with 310 sites, 14 comfort stations and a ranger station. Then, in 1964, the Park Service added a 360 site recreational vehicle campground with supporting facilities.

The Park Service instituted several studies to consider the impact of both the dump closures and the increase in visitor use upon Yellowstone. What emerged was not only a realization that these factors had reduced bear numbers, but also that the Fishing Bridge region was a vital link to the survival of a viable population of grizzlies in the Yellowstone region.<sup>27</sup>

In 1969, after considerable research, one of the Park Service's own biologists recommended removal of the facilities at Fishing Bridge.<sup>28</sup> The consideration to close the Fishing Bridge campgrounds was not unprecedented as Park officials had closed the nearby Pelican Creek Campground in 1972 because of persistent and heavy use of the area by grizzlies.<sup>29</sup>

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23. The Park Service chose a similar route in its decision to allow wild fires to burn naturally if the fires were started by natural causes. This decision made at the same time received much criticism in the wake of the catastrophic fires of the summer of 1988.

24. KNIGHT, FINAL REPORT, AD HOC COMMITTEE TO INVESTIGATE THE NEED AND FEASIBILITY OF THE YELLOWSTONE GRIZZLY BEAR table I (1983). Knight and Eberhardt found that the size of the Yellowstone bear population has declined as a direct result of the dump closure. Knight and Eberhardt, *supra* note 21, at 1434-36.

25. A. HAINES, THE YELLOWSTONE STORY 366-88 (1977).

26. *Id.*

27. F. DARLING AND N. EICHHORN, MAN AND NATURE IN THE NATIONAL PARKS (1967). The authors spoke harshly of "that national park slum called Fishing Bridge." *Id.* at 38.

28. Memorandum from W. Barmore to the Superintendent (Nov. 25, 1968) (proposed Fishing Bridge bypass road).

29. NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, *supra* note 13, at 15. The Park

Between 1968 and 1972, Yellowstone researchers accumulated more data establishing Fishing Bridge was an area of "special value" to grizzly bears.<sup>30</sup> This culminated in the Park Service's decision to remove the campgrounds and support facilities at Fishing Bridge.<sup>31</sup> Further, as the problems of visitor impact and declining bear nutritional levels became more prevalent, both park researchers and managers realized that the campsite at Fishing Bridge not only diminished the bears' habitat but that the campsite's location near critical bear habitat posed a danger to humans.<sup>32</sup> By 1977, the Park Service limited the Fishing Bridge complex to only hard-sided vehicles.

The Park Service planned to replace the facilities at Fishing Bridge with another development at Grant Village, a facility which the Park Service had tried to incorporate into its network of facilities since the mid-1960s.<sup>33</sup> With this decision, the Park Service, in compliance with its ESA duties, asked the United States Fish and Wildlife Service (FWS) to review plans for the expansion of Grant Village. The FWS found that the increased development at Grant Village would not constitute "jeopardy" within the meaning of Section 7 of the ESA,<sup>34</sup> *but only if* the Park Service eliminated the facilities at Fishing Bridge.<sup>35</sup> Park Service Superintendent John Townsley reconfirmed the Park Service's commitment to phase out Fishing Bridge in 1981, qualifying this, however when he stated that "it must be recognized that our intent to remove all facilities from Fishing Bridge must be politically and socially acceptable."<sup>36</sup>

In December 1983, the Park Service, led by Superintendent Robert Barbee, formed a committee to consider the manner in which the Park Service would remove the complex. The committee asked that the FWS review the ecological data upon which the removal of Fishing Bridge was

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Service also closed the Squaw Lake group campground in 1983 because of concern for both visitor safety in an area of heavy grizzly bear concentration. *Id.* at 17.

30. Memorandum from G. Cole to the Superintendent (Aug. 23, 1971) (bear management).

31. NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, YELLOWSTONE MASTER PLAN OF 1974 (1974).

32. Note to file from D. Despain (July 24, 1972)(bear activity In The Fishing Bridge area). *See also* NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, *supra* note 13, at 15. The studies show that in comparison to other park facilities in Yellowstone, Fishing Bridge presented a far greater danger to humans. The report suggested that "Fishing Bridge has the highest natural ability to generate harmful events". *Id.* at 61-62.

33. The Park Service completed over 300 sites at the Grant Village complex in 1983. Grant Village, like Fishing Bridge, lies on the shores of Yellowstone Lake. A. CHASE, *supra* note 9, at 197-231.

34. The non-jeopardy clause is outlined in section 7 of the ESA. The clause requires that all federal actions constitute no jeopardy to the endangered species. 16 U.S.C. § 1536(a)(2) (1982).

35. Memorandum from the acting area manager, U.S. Fish and Wildlife Service, Billings, Mt., to the Regional Director, National Park Service, Denver, Co. (Dec. 12, 1980).

36. Letter from Superintendent Townsley, National Park Service (Yellowstone Park), to Area Manager Steucke, U.S. Fish and Wildlife Service (Jan. 26, 1981).

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The Park Service released *Fishing Bridge and the Yellowstone Ecosystem: A Report To The Director* in November, 1984. The report considering the Fishing Bridge area found that:

[i]n this particular setting Yellowstone presents to us a level of ecological diversity uncommon for this region and unparalleled for this national park . . . an ecological crown jewel . . . of extreme importance to grizzly bears.<sup>37</sup>

With the array of perspectives that the FWS compiled, the report permitted an unusually comprehensive examination of Fishing Bridge.<sup>38</sup> The FWS determined that Fishing Bridge reduced the grizzly bear population and interfered with grizzly bear use of the habitat.<sup>39</sup> With extraordinarily high numbers of bear/human conflicts, Fishing Bridge accounted for more than half of all grizzly bear-caused injuries in Yellowstone Park during the period of 1968-83.<sup>40</sup> During that time, Fishing Bridge accounted for the greatest number of bear losses from the Yellowstone ecosystem.<sup>41</sup>

The Park Service recognized that not only was the removal of Fishing Bridge appropriate, it was a matter of urgency.<sup>42</sup> The report concluded that:

Fishing Bridge is an outstanding instance of a developed area having an intolerably high impact on the grizzly bear . . . [that] if Fishing Bridge alone were able to seriously affect the grizzly bear in Yellowstone, Fishing Bridge operating in concert with Grant Village has a potential cumulative effect that is disastrous.<sup>43</sup>

It seemed that in late 1984 the Park Service had amassed conclusive, irrefutable evidence which not only supported the removal of the campgrounds but, in compliance with its statutory duties, mandated it as well.

However, a force devoid of the purpose of protecting the bear arose. The Cody, Wyoming Chamber of Commerce vigorously objected to the planned removal of the Fishing Bridge complex.<sup>44</sup> The Park Service elected

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37. NATIONAL PARK SERVICE, U.S. DEP'T OF INTERIOR, *supra* note 13, at 34.

38. *Id.* at 35.

39. *Id.* at 56.

40. *Id.* at 57-8.

41. *Id.* at Figure 32.

42. *Id.* at 1.

43. *Id.* at 109-10.

44. The removal would result in a loss of tax revenue for Cody, Wyoming. In addition, the Chamber of Commerce expressed considerable fears that the closure would result in tourists possibly choosing other Park entrances, thereby denying the citizenry their vested right to the fruits of

to reevaluate the ecological data and impact, given the relevant socioeconomic concerns.<sup>45</sup> Finding itself "committed"<sup>46</sup> to Senators Alan Simpson and Malcolm Wallop, the Park Service once again decided to delay the removal of Fishing Bridge.<sup>47</sup> In 1985, Park Service biologists reported that extinction of the grizzly bear in the Yellowstone ecosystem was a very real possibility:

There are . . . various grounds to believe that the population may be declining, and good evidence that the number of adult breeding females is small. The prospect of extirpation thus has to be considered.<sup>48</sup>

In response to the Fishing Bridge controversy, the Park Service elected to prepare an Environmental Impact Statement (EIS) to determine the ramifications of keeping the Fishing Bridge campgrounds open. From 1985-87, while awaiting the completion of a new EIS, the Park Service operated under an Interim Management Plan which kept the Fishing Bridge campgrounds open.<sup>49</sup>

In 1986, the National Wildlife Federation brought suit against the National Park Service and the United States Fish and Wildlife Service, asserting that the two agencies had violated their statutory requirements under the ESA and the National Park Service Organic Act.<sup>50</sup> The Wyoming federal District court found that the agencies had complied with their statutory requirements and obligations.<sup>51</sup>

The Park Service completed its EIS recommending that the Park Service remove the 310-site NPS operated-campground and implement several different management actions, while retaining some support facilities and the 360-site RV park.<sup>52</sup>

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Yellowstone National Park. The University of Wyoming conducted a study of economic success of gateway communities and the location of park facilities and found no correlation between the two. UNIVERSITY OF WYO., *THE ECONOMIC BASE OF THE GREATER YELLOWSTONE STUDY AREA* (1978) (Water Resource Research Institute, Laramie, Wyo.). *See also* UNIVERSITY OF WYOMING, *SOCIO-ECONOMIC IMPACT ANALYSIS OF THE PROPOSED RELOCATION OF FISHING BRIDGE FACILITIES IN YELLOWSTONE NATIONAL PARK* (1986) (Institute for Policy Research and the Dep't of Economics, Laramie, Wyo.).

45. National Park Service, U.S. DEP'T OF THE INTERIOR, *ENVIRONMENTAL IMPACT STATEMENT FOR THE DEVELOPMENT CONCEPT PLAN 1-2* (Feb. 8, 1985).

46. Letter from Superintendent Barbee, National Park Service, U.S. Dep't of the Interior, to Tom France, National Wildlife Federation, Missoula, MT (February 21, 1986).

47. *Id.*

48. KNIGHT and EBERHARDT, *Population Dynamics of the Yellowstone Grizzly Bear*, 66 *ECOLOGY*, 323 (1985). *See generally* CHASE, *supra* note 9, at 142-94.

49. NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, *INTERIM MANAGEMENT PLAN FOR OPERATIONS AT FISHING BRIDGE AND GRANT VILLAGE, YELLOWSTONE NATIONAL PARK* (1986).

50. *National Wildlife Federation v. National Park Service*, 669 F. Supp. 384 (D. Wyo. 1987).

51. *Id.* at 392.

52. NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, *FINAL ENVIRONMENTAL IMPACT*



Throughout the summer of 1988, fires burned an estimated 25-35% of the park. The fires dramatically impacted the environment and ecosystem in the park.<sup>53</sup> Park biologists recently asserted that the fires have allowed the grizzly to rebound and possibly even reach numbers which would allow for the de-listing of the bear as a threatened species.<sup>54</sup> Other notable biologists vehemently dispute these assertions.<sup>55</sup> Meanwhile, the Park Service has requested more Congressional funds to study the impact of the fires on the bear.<sup>56</sup>

Sadly, the grizzly bears' habitat and welfare as a species remain in jeopardy. With a large portion of its habitat greatly impacted by the catastrophic fires of 1988, the Fishing Bridge region would now provide critical habitat for maintaining a viable population of grizzlies in Yellowstone.

Before considering the court's decision in *National Wildlife Federation v. National Park Service*, a thorough analysis of both the statutory requirements and judicial interpretation of ESA and National Park Service Organic Act of 1916 is needed.

### III. STATUTORY REQUIREMENTS UNDER THE ENDANGERED SPECIES ACT

During the summer of 1916, Congress established the National Park Service and outlined its purposes as follows:

The Service . . . shall promote and regulate . . . national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks . . . to *conserve* the scenery and the natural land historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them *unimpaired* for the enjoyment of future generations.<sup>57</sup>

Thus Congress required the Park Service to perform two distinct duties:

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STATEMENT AND DEVELOPMENT CONCEPT PLAN, FISHING BRIDGE AREA iii-iv (1988).

53. Telephone interview with Dr. John Craighead (Dec. 7, 1988). Craighead has dedicated his life to studying the grizzly bear. He is considered a foremost expert on the species.

54. *Grizzlies Thrive Despite Big Fires*, The Billings Gazette, October 23, 1988, at 1c.

55. Telephone interview with Dr. John Craighead (December 7, 1988). Craighead points out that where the fires burned, they destroyed berry bushes for at least 3-5 years, rodents, and pine bark nuts. As well, ungulate populations such as the elk and deer suffered extraordinarily high winter kills. *Winterkill Takes Toll in Yellowstone*, The Missoulian, Feb. 12, 1989. Each of these factors will have a significant impact upon the bear. Acting in concert, their impacts could be catastrophic. Telephone interview with Dr. John Craighead (Dec. 7, 1988).

56. *Grizzlies Thrive Despite Big Fires*, *supra* note 54, at 1c.

57. National Park Service Organic Act, Ch. 408 § 1, 39 Stat. 535 (1916) (codified as amended at 16 U.S.C. § 1 (1982) (emphasis added)).

First, to conserve the splendor of Yellowstone; second, to provide for the enjoyment of the same. With the broad language provided by Congress within the act, courts generally deferred to the judgment of the agency.<sup>58</sup>

In response to the fear and concern over threats to the world biosphere, Congress also enacted the National Environmental Protection Act of 1969 (NEPA).<sup>59</sup> Congress provided that the purpose of the Act:

is 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 national resources important to the Nation. . . .<sup>60</sup>

These two acts, the National Park Service Organic Act and NEPA, provide no specific limitation upon activities affecting either species or their habitats. In particular, NEPA only requires the agency to evaluate the impact of its actions upon habitat, and, as noted before, courts have generally deferred to the discretion of the agency when evaluating the broad language of the National Park Service Organic Act.

In the mid 1960s, Congress again acted, this time to shelter species from the threat of extinction. This sentiment culminated in the passage of the Endangered Species Act of 1973 (ESA).<sup>61</sup> Congress' overriding concern was to devote whatever efforts were deemed necessary to avoid further diminution of national as well as world-wide species.<sup>62</sup> Congressional hearings reported that all land-management agencies must act to avoid damaging critical habitat and take positive steps towards protecting it.<sup>63</sup> Courts recognized three critical provisions within the ESA. In the non-jeopardy provision, Congress provided that:

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species . . . .<sup>64</sup>

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58. *Robbins v. United States*, 284 F. 39, 45 (8th Cir. 1922); *Organized Fisherman of Florida v. Hodel*, 755 F.2d 1544, 1550 (11th Cir. 1985).

59. Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-70 (1982)).

60. 42 U.S.C. § 4321.

61. 16 U.S.C. §§ 1531-1543 (1982).

62. Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D.L. REV. 315, 321 (1975).

63. For a more in-depth discussion of the history and implications of the ESA, see *id.* at 315.

64. 16 U.S.C. § 1536(a)(2).

After the landmark case, *T.V.A. v. Hill*,<sup>65</sup> Congress passed legislation which allowed an exemption under the Act for projects already undertaken.<sup>66</sup> Congress further provided the affirmative duty in the conservation provision that:

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal Agencies shall, in consultation with and with the assistance of the secretary, utilize their authorities in furtherance of the purposes of this act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to this act.<sup>67</sup>

Congress defined "conserve" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the provisions pursuant to this chapter are no longer necessary."<sup>68</sup> Congress clearly mandated that the ESA provide whatever means necessary to remove the species from the endangered and threatened species list, thereby making the application of the act unnecessary.<sup>69</sup> Congress further rejected amendments which would have weakened the act's affirmative duty under the conservation provision.<sup>70</sup> House Representatives, aware of the plight of the Yellowstone grizzly, added:

Under the authority of section 7, the Director of the Park Service would be required to conform the practices of his agency to the need for protecting the rapidly dwindling . . . grizzly bear(s) in Yellowstone.<sup>71</sup>

Undoubtedly, Congress mandated that federal agencies do everything within their power to affirmatively act to preserve and shelter species which fall within the custody of the act in general, including the Yellowstone grizzly.

Finally, Congress provided that under the "takings" clause, no person shall "take" an endangered species.<sup>72</sup> The term "take" ". . . means to

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65. 437 U.S. 153 (1978).

66. 16 U.S.C. § 1536(g).

67. 16 U.S.C. 1536(a)(1).

68. Congress defined "conserve" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the provisions provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

69. 16 U.S.C. § 1532(2).

70. *Amending the Endangered Species Act of 1973: Hearings on S. 2899 Before the Subcomm. on Resource Protection of the Senate Comm. on Environmental and Public Works*, 95th Cong., 2d Sess. 361-62 (1978).

71. H.R. REP. NO. 93-412, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & ADMIN. NEWS 979.

72. 16 U.S.C. § 1538.

harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”<sup>73</sup> Though at first glance the takings provision appears to apply to only endangered species, under a separate section, the Secretary must also develop a plan to conserve and prohibit the taking of a threatened species as well.<sup>74</sup>

With each of these provisions, the non-jeopardy clause, the conservation clause and the takings clause, Congress created a measurable and significant underpinning of support to the dominant theme in the National Park Service Organic Act and NEPA. Under the ESA, endangered or threatened species and their habitat demand protection if the Nation expects to have within its parks the beauty and splendor which these parks offer.

#### IV. JUDICIAL INTERPRETATION OF THE ENDANGERED SPECIES ACT

The United States Supreme Court addressed the protection of endangered species in the landmark case *T.V.A. v. Hill*.<sup>75</sup> In that case, the Court ruled that where a federal agency's operation of a completed dam would destroy a snail darter's critical habitat, statutory law, under the ESA, forbade the agency from operating the dam.<sup>76</sup> The Court, interpreting the non-jeopardy clause, found that the agency had an affirmative duty to protect the species.<sup>77</sup> The Court found in the legislative history and the statutory language of the ESA that “Congress intended endangered species to be afforded the highest of priorities.”<sup>78</sup>

With such a conclusive mandate, courts examined other sections of the ESA.<sup>79</sup> Though earlier courts focused on the concept of an affirmative duty within the non-jeopardy clause, successive courts found an affirmative duty within the management conservation clause.<sup>80</sup>

In *Defenders of Wildlife*, the federal district court considered an

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73. 16 U.S.C. § 1532(19).

74. 16 U.S.C. § 1533(d). See also France and Tuholske, *Stay The Hand: New Directions For The Endangered Species Act*, 7 PUB. LAND L. REV. 1, 17 (1986).

75. 437 U.S. 153 (1978).

76. *Id.* at 195.

77. *Id.* at 173.

78. *Id.* at 174.

79. *Defenders of Wildlife v. Andrus*, 428 F.Supp. 167 (D.D.C. 1977); *Palila v. Hawaii Dep't. of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981); *Carson Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257 (9th Cir. 1984); *National Wildlife Federation v. Hodel*, No. s-85-0837, slip op. E.J.G., (E.D. Cal. Aug 26, 1985) (the reader can find this opinion at 15 ENVTL. L. RPT. 20891); *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985); *Palila v. Hawaii Dep't of Land and Natural Resources*, 649 F. Supp. 1070 (D. Haw. 1986); *National Wildlife Federation v. National Park Service*, 669 F. Supp. 384 (D. Wyo. 1987).

80. *Defenders of Wildlife*, 428 F. Supp. at 170; *Carson Truckee*, 741 F.2d at 262; *Sierra Club* 755 F.2d at 622. See also France and Tuholske, *supra* note 74, at 1.

agency's actions to conserve an endangered species.<sup>81</sup> In that case, agency regulations allowed the hunting of migratory game birds, which consequently resulted in the killing of endangered birds because of hunter misidentification.<sup>82</sup> The court found that the Department of the Interior violated the ESA because the agency could provide no reasonable justification or rational relationship for allowing hunting during twilight hours.<sup>83</sup> In so holding, the court explained:

It is clear from the face of the statute that the Fish and Wildlife Service, as part of the Interior, must do far more than merely avoid the elimination of protected species. It must bring the species back from the brink so that they may be removed from the protected class, and it *must* use all methods to do so. The Service cannot limit itself to what it considers the most important management tool available to it, i. e., habitat control, to accomplish this end.<sup>84</sup>

The court substantively reviewed the decisions of the agency by considering the specific facts asserted by the plaintiffs: that hunters would misidentify endangered species when hunting during twilight hours and that the agency provided no substantive evidence which would allow for the agency to implement such a policy.<sup>85</sup>

In *National Wildlife Federation v. Hodel*, the court held that the FWS violated the ESA when the agency permitted the hunting of migratory game birds with lead shot.<sup>86</sup> This method poisoned an endangered species, the bald eagle, which fed on the waterfowl. The agency failed to identify the relevant factors or articulate a rational connection between the permissible hunting of the game with lead shot and those factors which the agency's decision rested upon.<sup>87</sup> The court's ruling clearly scrutinized the agency's acts and found a violation of the department's statutory duties under the ESA by considering the specific factual background presented by the plaintiffs in the case. The plaintiffs provided studies which showed that the hunting method resulted in the death of bald eagles.<sup>88</sup>

In *Carson Truckee v. Clark*, the Department of the Interior, mindful of its conservation duties, gave priority to endangered fish over the releasing of water for hydroelectric use and the catching of salmon by

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81. *Defenders of Wildlife*, 428 F. Supp. at 169.

82. *Id.* at 168-9.

83. *Id.* at 170.

84. *Id.* (emphasis added).

85. *Id.* at 169, 170.

86. *National Wildlife Federation*, 15 ENVTL. L. RPTR. at 20893.

87. *Id.*

88. *Id.*

Indians.<sup>89</sup> Appellant, Carson Truckee Water District, unsuccessfully argued that the act would not violate the non-jeopardy provision and thus, did not violate the ESA.<sup>90</sup> The court found no merit in this argument, holding that the conservation provision mandated the department's action.<sup>91</sup> The court stated:

ESA Section 7(a)(1), moreover, specifically directs that the secretary "shall" use programs administered by him to further the conservation purposes of ESA.<sup>92</sup>

The court then examined the agency's specific acts and determined that the agency fulfilled its duties by not only protecting the salmon by not taking an action which might jeopardize the species but by affirmatively acting to conserve the fish by holding the salmon's needs above that of the Water District and the Indians.<sup>93</sup> With such analysis, the court again substantively evaluated the agency's acts.<sup>94</sup>

Courts also began to examine the "takings" clause.<sup>95</sup> Courts particularly concerned themselves with the destruction of an endangered or threatened species critical habitat.<sup>96</sup>

In *National Wildlife Federation v. Hodel*, the court held that the agency's permission to hunt migratory birds with lead shot harmed bald eagles and resulted in their death, thus constituting a taking.<sup>97</sup> The court further judged that the defendants had failed to adopt any reasonable and prudent mitigation procedures to remedy the unlawful taking.<sup>98</sup> The court concluded that the defendant had violated the takings provision of the ESA.<sup>99</sup>

In *Sierra Club v. Clark*, the Department of the Interior issued hunting permits for the trapping of the Eastern Timber Wolf in Minnesota.<sup>100</sup> The Eastern Timber Wolf was listed as a threatened species. The court ruled

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89. *Carson Truckee Conservancy District*, 741 F.2d 256 (1984).

90. *Id.* at 261.

91. *Id.* at 262.

92. *Id.* at 261.

93. *Id.*

94. *Id.*

95. *Palila v. Hawaii Department of Lands and Resources*, 471 F. Supp. 985, *aff'd*, 639 F.2d 495 (9th Cir. 1985); *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985); *Friends of Endangered Species v. Jantzen*, 760 F.2d 976 (9th Cir. 1985); *National Wildlife Federation v. National Park Service*, 669 F. Supp. 384 (D. Wyo. 1987).

96. *National Wildlife Federation v. Hodel*, 15 ENVTL. L. RPTR. 20891; *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981), *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985).

97. 15 ENVTL. L. RPTR. at 20893.

98. *Id.*

99. *Id.*

100. *Clark*, 755 F.2d at 611.

that the defendant's act violated the takings provision.<sup>101</sup> Under the takings clause for threatened species, the Secretary shall make a conservation plan and only allow for a prohibited taking when the species population can not otherwise be controlled or influenced.<sup>102</sup> The Secretary on appeal attempted to argue that the court should defer to his judgment in allowing for a taking of a threatened species.<sup>103</sup> The court, citing Congressional intent, held that the agency could only allow for a taking when a given species' reliance upon the range exceeds the carrying capacity of the range.<sup>104</sup> Citing Congressional reports on the term conservation as defined under the ESA, the court found that conservation "include[s] the full spectrum of 'activities' that might be engaged in to improve the status of endangered or threatened species."<sup>105</sup> The court substantively examined the agency's programs and determined that the programs constituted an unlawful taking because the threatened species did not exceed the range's carrying capacity.<sup>106</sup>

The court, in *Palila v. Hawaii Dep't of Land and Natural Resources*, reviewed a state's decision to continue to allow sheep and goats, which were hunted by sportsmen, to graze on an endangered species habitat.<sup>107</sup> The FWS found that when the goats and sheep were removed from the Palila bird's habitat, the habitat recovered and the bird consequently rebounded.<sup>108</sup> By reviewing the record presented by both parties and the FWS, the court found that the state's action violated the ESA by causing a taking of the bird's habitat.<sup>109</sup> In a later related case, the district court found that once the evidence showed that the agency's acts resulted in a taking of the endangered bird or its habitat, "the ESA left no room for balancing policy considerations and consequently required the removal of the harm."<sup>110</sup>

Thus, within the conservation and takings section of the ESA, courts have upheld three major premises. First, agencies must affirmatively act to conserve within the meaning of the conservation clause and its legal history, and further, the court will consider the agency's acts in light of the relevant facts to determine a rational relationship between the agency's decision and the agency's statutory duties. Second, the agency has no

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101. *Id.*

102. *Id.* at 612.

103. *Id.* at 615.

104. *Id.* at 617.

105. *Id.*

106. *Id.*

107. *Palila*, 639 F.2d at 496-97.

108. *Id.*

109. *Id.*

110. *Palila*, 649 F.Supp. at 1082. The district court considered a separate issue in this case from the appellate decision.

discretion when considering the "takings" provision of Section 9 unless it determines that such measures are required because of a species depleting or exceeding the carrying capacity of the range. Finally, these courts have honored the commitment of Congress to not only avoid further diminution of endangered or threatened species and their habitat, but to act affirmatively to increase the numbers of the species in question in order to remove the aegis of the act.

#### V. NATIONAL WILDLIFE FEDERATION V. NATIONAL PARK SERVICE

The National Wildlife Federation filed suit against the National Park Service, the United States Fish and Wildlife Service, and the Department of the Interior. The National Wildlife Federation asserted that the departments had violated their statutory duties under the Endangered Species Act and the National Park Service Organic Act when the Service kept the campground and support facilities at Fishing Bridge open with the knowledge that the human activity destroyed bear habitat, disturbed bear use of the habitat and presented a significant and real threat to tourists using the campground.<sup>111</sup>

The Wyoming federal district court granted defendants' motion for summary judgment holding that the agencies had complied with their obligations under the Endangered Species Act, National Park Service Organic Act, and The Administrative Procedure Act.<sup>112</sup>

The court focused its attention on the non-jeopardy clause<sup>113</sup> and the conservation provision.<sup>114</sup> The court applied the requirement that the Park Service utilize the best scientific evidence available.<sup>115</sup> The court found that the measures provided for in the conservation clause were unreviewable given the Park Service's attempt to utilize a cumulative effects model — the best scientific evidence.<sup>116</sup> The court chose not to review the Park's reversal in policy. Instead, the court deferred to the Park Service's judgment until the Park Service could release the results of its EIS.

The court also considered whether the agencies' actions constituted a prohibited taking of the threatened species.<sup>117</sup> The court reasoned that

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111. *National Wildlife Federation v. National Park Service*, 669 F. Supp. 384 (D. Wyo. 1987).

112. *Id.* at 392. The court having so found chose not to address whether the defendant's acts violated the Concessions Policy Act. *Id.*

113. 16 U.S.C. § 1536(a)(2). Briefly, this section provides that no federal action shall jeopardize an endangered or threatened species.

114. 16 U.S.C. § 1536(a)(1). Briefly, this section provides that federal agencies act affirmatively to preserve endangered or threatened species.

115. *National Wildlife Federation*, 669 F. Supp. at 387.

116. *Id.* at 387.

117. 16 U.S.C. § 1532 defines take as "to harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect, or to attempt to engage in any such conduct." For a thorough analysis of the "takings" provision, see Coggins and Russell, *Beyond Shooting Snail Darters into Pork Barrels*:



because the Park Service designed the Interim Management Plan to reduce bear mortalities at Fishing Bridge and that no bear mortalities had occurred at Fishing Bridge, the Park Service's decision to keep the campgrounds open did not constitute an unlawful taking.<sup>118</sup>

The court finally considered whether the Park Service's actions constituted an incidental taking.<sup>119</sup> Relying upon the defendants' assertion that no incidental takings were expected from the operation of the campgrounds under the Interim Management Plan, the court found that a "careful reading of this provision supports defendants' contention."<sup>120</sup>

The court also considered whether the agencies violated their duties under the National Park Service Organic Act. The court found that the Park Service has broad discretion to implement the policies outlined in the act.<sup>121</sup> The court, resting upon authorities which gave the Park Service this discretion, concluded that the agency had the authority to implement the Interim Management Plan.

The National Wildlife Federation filed an appeal with the Tenth Circuit Court of Appeals, asserting that the district court committed reversible error when the court applied the statutory and judicial duties under the Endangered Species Act. The parties negotiated the case and finally stipulated to a settlement. Accordingly, the Appellate Court vacated the finding of the federal district court on the grounds that the question under appeal was moot. The federal district court opinion in *National Wildlife Federation v. National Park Service* remains a persuasive authority.

## VI. ANALYSIS OF THE CASE

The court's analysis in *National Wildlife Federation v. National Park Service* fails to support the intent of Congress and to uphold the previous judicial interpretation of statutory law. The court in its own words "will not substitute its opinion for that of the agency."<sup>122</sup>

The court, unlike previous courts that considered the provisions of the ESA, failed to consider the actual decision-making process of the agency. The court should have considered whether the Park Service arbitrarily decided to maintain the facilities at Fishing Bridge. In light of the voluminous evidence which the Park Service had collected over nearly two

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*Endangered Species and Land Use in America*, 70 GEO. L. J. 1433 (1982).

118. *National Wildlife Federation*, 669 F. Supp. at 389.

119. Joint Regulations on Endangered Species, 50 C.F.R. § 402.02 defines incidental takings as "takings that result from but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant."

120. *National Wildlife Federation*, 669 F. Supp. at 390.

121. *Id.* at 391.

122. *Id.* at 390.

decades, the court never considered the merits of a sudden reversal in policy.<sup>123</sup> Such review of an agency decision is critical to upholding the Congressional intent of the ESA.

The Park Service has a duty to develop a "conservation" plan under both Section 7 and 9 of the ESA. The conservation and takings sections provide that while the plan is not mandatory in its implementation by the Park Service, it must reflect a well-reasoned decision. The Park Service gathered evidence over twenty years which established that Fishing Bridge interfered with a threatened species' ability to recover to such an extent as to not warrant the force of the act. Fishing Bridge accounts for half of all bear/human conflicts in the Yellowstone region. It accounts for the greatest number of all bear removals in the Park. In 1984, the Park Service's own comprehensive report found that the Fishing Bridge area was of "special value" to grizzlies and that the campground catastrophically affects the grizzlies. However, the Park Service, influenced by Senators Alan Simpson and Malcolm Wallop, chose to reevaluate its decision given the relevant socio-economic pressures. The ESA exists not to protect the coffers of the Cody, Wyoming Chamber of Commerce nor its tax base.<sup>124</sup> The ESA exists to protect species from extinction. To accept the court's reasoning that because no bear/human conflicts or bear removals have occurred under the Park Service's intermediary plan, and therefore that no takings have occurred under section 9 of the act, denies the extensive and exhaustive research compiled over the last two decades. Given this factual record, the court's decision to defer to the Park Service's judgment presents an incredible if not threatening turn for the grizzly in particular and all threatened and endangered species in general.

What the court failed to come to terms with is how this federal agency, obligated to its mission of preservation, can implement a plan which interferes with and harms a threatened species. Congress acted with clear intent and fortitude in implementing the ESA. Previous courts have established a willingness to review an agency's decisions in light of the factual record presented and the requirements of the ESA and NEPA. This court failed to make any attempt to consider the irrefutable and exhaustive record presented by the Park Service's own studies.

The district court's opinion rejects and misconstrues the abundant legislative history and plentiful case law. Both Congress and the courts have upheld the theme of protection which the National Park Service

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123. Note, *Regulated Taking of Threatened Species Under the ESA*, 39 HASTINGS. L.J. 399 (Jan. 1988) (written by Keith Saxe). Saxe advocates a "hard look" at agency policy when reviewing "takings" measures. *Id.* at 438.

124. Professor Tribe criticized a similar cost-benefit analysis. Tribe, *Ways Not to Think About Plastic Trees: New Foundations For Environmental Law*, 83 YALE L.J. 1315, 1319-20 (1974).

Organic Act, NEPA and ESA provide. The statutory and judicial duties under both the takings provision and the conservation management provision demand substantive review. That the Park Service could propose that the facilities at Fishing Bridge did not constitute a taking under section 9 of the ESA seems ludicrous in light of the Park Service's finding that Fishing Bridge hindered the bears use of the area. Without such analysis, and correspondingly, with deference to the scientific capability of the acting agency, the value of the ESA is lost. In this case, the grizzly could find no protection unless the court considered the factual background and the merits of the agency's clear reversal in policy.

The ESA acts as a protective cloak against the threat of species extirpation. But it also acts as so much more. Why is the theme of conservation and preservation so important to this nation and its people in the latter part of the twentieth century?<sup>125</sup> The grizzly, like so many other species, represents a symbol. Not unlike the three whales trapped in an iced-over passage way, a dead harbor seal on Prince William Sound on the Alaska coastline, or even an oil-coated sea-gull on a beach twenty years ago on a Santa Barbara coastline, the grizzly represents both a symbol and a barometer of humanity's impact and effect upon the world biosphere.<sup>126</sup> In a greater sense, it also represents humanity's own recognition of and commitment to valuing and maintaining the planet's natural environment.<sup>127</sup> If the NEPA and National Park Service Organic Act represent a promise to the American people, then the ESA represents an attempt by Congress to fulfill that promise.

The Park Service is the steward of the grizzly. It owes the people of this country a duty to always act in accordance with the ESA. Ultimately it must act to protect the grizzly so as to allow the species to rebound and throw off the force of the act. The Service's decision to keep the campgrounds open, given the substantial research that the Park Service's own biologists have presented over a course of twenty years, violates the purpose of the ESA.

## VII. CONCLUSION

Congress, acting with courage and determination, reserved to the people of this country both splendor and magic in the form of this nation's parks. The people have asked the Park Service to watch as an overlord of these most precious lands and animals; yet, in the controversy over the campgrounds at Fishing Bridge, the Park Service instead seems to pose a

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125. *Id.* at 1315.

126. Plater, *Reflected in a River: Agency Accountability and the TVA Tellico Dam Case*, 49 TENN. L. REV. 747, 772 (1982).

127. *Id.* at 722.

very real threat to the land and species rather than act as its protector.

The impact of the loss might not be as prevalent today. But some day, visitors to Yellowstone will undoubtedly ask: "Why was this place so special?" and "Who is to answer for its demise?"<sup>128</sup> Perhaps though, if we heed today's warnings and resolve this conflict, the threat posed by Fishing Bridge will slip into our memory and we will need not recall these words of Brower:

Remember these things lost;  
and under the vaulting roof of the cathedral  
burn a candle to the memory.<sup>129</sup>

Until that time though, with this threatening turn for a threatened species, the grizzly can find no comfort in either this court's application of the ESA or, ironically enough, the work of the Park Service.

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128. A. CHASE, *supra* note 9, at 372.

129. BROWER, *TIME AND THE RIVER FLOWING* 159 (1968) (writing of a great cavern, submerged during Lake Powell's creation in June, 1965, that had once been called the Cathedral in the desert); Tribe, *SUPRA* note 124, at 1311, began his article with this quotation.

