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## The Development and Application of the "Extraordinary Case" Exception within the ESA: Private and National Interests in Conflict

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# THE DEVELOPMENT AND APPLICATION OF THE “EXTRAORDINARY CASE” EXCEPTION WITHIN THE ESA: PRIVATE AND NATIONAL INTERESTS IN CONFLICT

Kevin R. Peterson\*

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I. INTRODUCTION

Congress drafted and passed the Endangered Species Act of 1973<sup>1</sup> (ESA) to “conserve to the extent practicable the various species of fish or wildlife and plants facing extinction . . . .”<sup>2</sup> Congress articulated a purpose statement that embodied the overall mission of the ESA:

The purposes of this Act 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 steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in . . . this section.<sup>3</sup>

The primary goal of Congress in passing the ESA was “safeguarding . . . the Nation’s heritage in fish, wildlife, and plants”<sup>4</sup> through conservation.<sup>5</sup> In addition to the protective benefits of the ESA to endangered or threatened plants and animals, Congress passed the ESA “for the benefit of all citizens” of the United States.<sup>6</sup>

Although the intent of Congress in passing the ESA was to benefit all citizens, extensive litigation surrounding ESA enforcement regulations indicates that not all citizens feel “benefitted.”<sup>7</sup> Conflicts exist over

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1. 16 U.S.C. §§ 1531-1544 (1988).

2. *Id.* § 1531(a)(4).

3. *Id.* § 1531(b). *See also* Fouke Co. v. Brown, 463 F. Supp. 1142 (E.D. Cal. 1979).

4. 16 U.S.C. § 1531(a)(5) (1988).

5. “The terms ‘conserve’, ‘conserving’, and ‘conservation’ mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this act are no longer necessary.” *Id.* § 1532(3).

6. *Id.* § 1531(a)(5).

7. Three citizens of Wyoming, two of whom are ranchers, were recently fined by a U.S. Magistrate \$22,000, \$30,000, and \$5,000 for inadvertently poisoning bald and golden eagles. *Wyoming Ranchers Fined for Eagle Deaths*, NATIONAL WOOL GROWER, Mar. 1993, at 35. The deaths resulted from non-target eagles feeding on tainted carcasses designed to kill target predators such as coyotes.

[T]he wolf promoters set about placing a \$20,000 fine . . . for anyone convicted of killing a wolf in Minnesota. With no trapping, and no one willing to risk arrest by shooting a wolf, wolves in Minnesota have increased rapidly and are now running amok among Minnesota’s deer herds, and also forcing many a farmer to go out of business.

Lester J. McCann, *Let’s Not Allow Yellowstone Park to Become Another Killing Field*, Guest Editorial, MONTANA WOOLGROWER, Dec. 1992, at 8 (statewide sheep trade magazine).

My farming background, and having raised livestock all my life, brought vivid memories of coyote attacks on my sheep in Illinois. Through my years of experience in the magazine business I have seen many articles come to our office with pictures of wolf attacks and coyote attacks on sheep as well as cattle.

It doesn’t take a complete rocket scientist to figure out that there is no fence around . . . Yellowstone National Park. Plenty of large sheep flocks graze near the park and it is only a

regulations protecting species and the critical habitat necessary to sustain endangered or threatened species in the plant and animal kingdoms.<sup>8</sup> This Comment will first focus on the conflict between state-granted rights of property owners to defend property from harm by wildlife and the preemptive "taking"<sup>9</sup> provision within the ESA. The common law defense to taking game that cause property damage was set out in *State v. Rathbone*,<sup>10</sup> which the Montana Supreme Court decided long before Congress passed the ESA. *Christy v. Hodel*<sup>11</sup> exemplifies the constitutional tensions between federal interests and private property interests and is relatively recent. The facts of *Christy* are set out followed by a discussion of the conflicts between state constitutional rights and federal prohibitions against exercising state constitutional rights to defend property from wildlife.

Private hunting interests and agricultural interests have traditionally backed legislation to enable state and federal agencies to allow hunting of predators such as the timber wolf and the grizzly bear. This Comment will next trace the history and analyze the reasoning of the court in *Sierra Club v. Clark*<sup>12</sup> in halting all hunting and trapping activities of the eastern timber wolf in Minnesota absent proof of an "extraordinary case"<sup>13</sup> where the wolves have populated beyond the carrying capacity of the habitat. This Comment will further trace the "extraordinary case" standard through *Christy v. Hodel* where the Ninth Circuit Court of Appeals briefly

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matter of time until the critters that are turned loose become what their name implies . . . wolves.

Greg A. Deakin, Editorial, THE SUFFOLK BANNER, Aug.-Sept. 1992, at 5 (nationwide sheep trade magazine).

The above excerpts targeted farmers and ranchers through trade magazines. The ESA has enormous potential to directly affect water use and land use on private land nationwide. See Melissa K. Estes, *The Effect of the Endangered Species Act on State Water Rights*, 22 ENVTL. L. 1027 (1992); Rufus C. Young, Jr., *The Endangered Species Act: Impacts and Land Use*, A.L.I.-A.B.A. 631 July 31, 1991; Craig A. Arnold, *Conserving Habitats: the Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1 (1991).

8. See *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988); *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991); *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988); *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (1979); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

9. "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1988).

10. 100 P.2d 86 (Mont. 1940).

11. 857 F.2d 1324 (9th Cir. 1988), *cert. denied sub nom. Christy v. Lujan*, 490 U.S. 1114 (1989) (White, J., dissenting).

12. 755 F.2d 608 (8th Cir. 1985).

13. The "extraordinary case" standard provides a narrow exception for regulated takings of individuals within a species "in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved . . ." 16 U.S.C. § 1532(3) (1988). This standard applies where it is necessary to take individual members of a species as a drastic measure to conserve the species as a whole. *Sierra Club v. Clark*, 755 F.2d at 613-15.

discussed the standard and accepted the adequacy of the U.S. Fish and Wildlife Service's (FWS) bear population data at face value.

Finally, in *Fund for Animals v. Turner*,<sup>14</sup> a federal district court issued a preliminary injunction stopping grizzly bear hunting in Montana until the issue concerning grizzly bear population data was resolved. Contrary to the court in *Christy*, the court in *Turner* examined the sufficiency of the data on which the FWS and the state of Montana based the necessity of a grizzly bear hunt. The court determined that the data was insufficient to support the contentions of the FWS and the state. As a result, the court issued a preliminary injunction stopping any further grizzly bear hunting in Montana. The federal government ultimately withdrew the case from federal district court. The FWS then invoked rulemaking procedures and removed 50 C.F.R. section 17.40(b)(i)(E), which authorized the special hunt of grizzly bears in northwestern Montana.<sup>15</sup> The opportunity afforded hunters to hunt grizzly bears under the ESA no longer exists.

## II. BALANCING THE NATION'S INTEREST IN PROTECTING LISTED PREDATORS WITH PRIVATE INTERESTS UNDER THE ESA REGULATIONS

### A. *The Facts and Circumstances Which Precipitated the ESA Challenge in Christy v. Hodel*<sup>16</sup>

Richard Christy, a sheepman in northwestern Montana, leased grazing land from the Blackfeet Indian Tribe (Tribe) to run 1,700 head of sheep beginning on June 1, 1982. The leased grazing land was located adjacent to Glacier National Park, near prime grizzly habitat.<sup>17</sup> Approximately one month after turning the sheep into the leased grazing allotment, grizzly bears began killing sheep on a nightly basis. Christy's shepherd attempted to ward off the attacks by building fires or firing a rifle into the air. These prophylactic measures resulted in limited success, and the sheep slaughter continued.

Shortly after the grizzly bear attacks began, Christy asked for help from the FWS to stave off the grizzlies. A federal trapper set snares to catch the offending grizzly bears, but had no success. After ten days, Christy had lost approximately twenty sheep. On July 9, 1982, while

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14. No. 91-2201 1991 WL 206232 (D.D.C. Sept. 27, 1991) (granting preliminary injunctive relief to halt grizzly bear hunting in Montana).

15. 57 Fed. Reg. 37,478 (1992).

16. 857 F.2d 1324 (9th Cir. 1988), *cert. denied sub nom.* Christy v. Lujan, 490 U.S. 1114 (1989) (White, J., dissenting).

17. *Id.* at 1326. The grizzly bear is classified as threatened in the lower 48 states. 50 C.F.R. § 17.11(h) (1987).

Christy and the federal trapper were on the leased property, two grizzlies emerged from the forest. The first grizzly retreated back to the forest; the other continued toward the flock. Christy fired a single shot at the grizzly when it came within 60-100 yards from the sheep. The bullet struck the grizzly, which tried to beat a hasty retreat to the forest, but fell wounded a short distance from where it was shot. Christy fired a second shot to ensure that the bear was dead.<sup>18</sup>

The grizzly bear raids continued, and finally on July 22, 1982, the Tribe agreed to cancel the lease. Christy removed the remaining sheep two days later. Christy had lost a total of 84 sheep to grizzly bear attacks. Throughout the time the FWS was involved in predator control measures, the federal trapper apprehended no grizzly bears.<sup>19</sup>

In addition to the financial loss of his sheep, the U.S. Department of the Interior levied a \$3,000 civil fine<sup>20</sup> for killing a grizzly bear<sup>21</sup> in violation of the ESA, which prohibits the taking of a listed species.<sup>22</sup> After a hearing, the Administrative Law Judge reduced the fine to \$2,500.<sup>23</sup> Christy filed an administrative appeal of the fine. He argued that the fine was invalid because it violated his "fundamental constitutional right to defend his sheep."<sup>24</sup> The Department denied the appeal for lack of jurisdiction to determine the constitutionality of the ESA regulations.<sup>25</sup> Following the appeal, Christy and two other sheepmen who had also lost sheep to grizzlies filed this suit in federal district court.

The plaintiffs' claims rested upon the Fifth Amendment and the ESA. The U.S. Supreme Court denied certiorari.<sup>26</sup> Thus, to date, the Court has not recognized a fundamental right arising from the U.S. Constitution to protect private property from federally protected animals.<sup>27</sup>

### B. *Federal and State Constitutions are at Odds in Many States*

In *Christy*, the Ninth Circuit Court of Appeals towed the line set out by the U.S. Supreme Court by refusing to acknowledge the existence of a

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18. *Id.*

19. *Id.*

20. *Id.* at 1327. (The ESA provides for civil penalties for taking listed species under 16 U.S.C. § 1540(a) (1988)).

21. *Id.* (The ESA enumerates prohibited acts under 16 U.S.C. § 1538(a)(1)(B) (1988)).

22. *Id.* (The ESA requires the Secretary of the Interior to promulgate and issue protective regulations to provide for the conservation of threatened or endangered species. 16 U.S.C. § 1533(d) (1988). The ESA also expressly prohibits the taking of listed species under § 1538(a)(1)).

23. *Christy*, 857 F.2d at 1326.

24. *Id.*

25. *Id.*

26. *Christy v. Lujan*, 490 U.S. 1114 (1989) (White, J., dissenting).

27. *Christy*, 857 F.2d at 1329 (citing *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1428 n.8 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987)).

fundamental right to protect property under the Constitution.<sup>28</sup> The Ninth Circuit Court held: "[T]he right to kill federally protected wildlife in defense of property is not 'implicit in the concept of ordered liberty'<sup>29</sup> nor so 'deeply rooted in this Nation's history and tradition'<sup>30</sup> that it can be recognized by us as a fundamental right guaranteed by the Fifth Amendment."<sup>31</sup> The Supreme Court declined to review the issues presented in *Christy*.<sup>32</sup> Thus, no fundamental right to protect property from federally protected wildlife exists in the federal courts.

Although the federal courts do not recognize a fundamental right to protect property from harm by wildlife, many state constitutions address protection of private property as such a fundamental, inviolable or inalienable right.<sup>33</sup> Several state courts have upheld citizens' rights to protect their private property, by use of lethal force, from damage by state regulated wildlife.<sup>34</sup>

The common law doctrine of "defense of property" has roots predating the Constitution, and several commentaries trace the doctrinal development.<sup>35</sup> In Montana, the court in *State v. Rathbone*<sup>36</sup> examined whether defense of property was a state-granted constitutional right.<sup>37</sup> The prosecution argued that defense of property was unavailable to the defendant as an affirmative defense for the offense of killing regulated game animals.<sup>38</sup> The court, upon examining the Montana Constitution and

28. The Supreme Court's teaching is clear and unmistakable-federal courts should refrain from divining new fundamental rights from the due process clauses of the [F]ifth and [F]ourteenth Amendments . . . " "In light of the Supreme Court's admonition that we exercise restraint in creating new definitions of substantive due process, we decline plaintiffs' invitation to construe the [F]ifth [A]mendment as guaranteeing the right to kill federally protected wildlife in defense of property.

*Id.* at 1330.

29. *Id.* at 1330 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

30. *Id.* at 1330 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

31. *Id.*

32. *Christy v. Lujan*, 490 U.S. 1114 (1989).

33. Lauri Alsup, *The Right to Protect Property*, 21 ENVTL. L. 209, 213 n.26 (1991) (setting out many state constitutions which enumerate the right to protect property as an inviolable or fundamental right).

34. See generally *Cotton v. State*, 17 So.2d 590 (Ala. 1944); *State v. Ward*, 152 N.W. 501 (Iowa 1915); *State v. Rathbone*, 100 P.2d 86, (Mont. 1940); *Cook v. State*, 74 P.2d 199 (Wash. 1937); *State v. Cross*, 370 P.2d 371 (Wyo. 1962).

35. See generally Alsup, *supra* note 33; Sam A. Elbadawi, *Grin and Bear it: The Unbearable Consequences of the Endangered Species Act's Taking Restrictions and the Hunt for a Solution*, 41 SYRACUSE L. REV. 1021 (1990); David S. Klain, *Does the Endangered Species Act Deprive an Owner of Fundamental Constitutional Rights: Christy v. Hodel*, 12 GEO. MASON U. L. REV. 421 (1990).

36. 100 P.2d 86 (Mont. 1940).

37. "All persons are born free and have certain inalienable rights. They include . . . acquiring, possessing and protecting property . . . in all lawful ways." MONT. CONST. art. II, § 3.

38. *Rathbone*, 100 P.2d at 88. (C.R. Rathbone killed an elk out of season and at trial claimed defense of property as justification for the killing).

relevant statutes, stated: "If one may kill a human being or attack him in defense of his property, it would be an unreasonable doctrine to hold that the right of defense of property as justification for the killing of wild beasts of the field and the forest does not exist."<sup>39</sup> Therefore, the court held that a citizen could always interpose defense of property as a justification to kill a wild animal.<sup>40</sup> However, the act must be "reasonably necessary."<sup>41</sup> *Rathbone* narrowed the "reasonably necessary" rule announced in *State v. Ward*<sup>42</sup> by setting out a three pronged test which the trier of fact must consider before acquitting a defendant:

[B]efore the defendant can resort to force in protecting his property from wild animals, (1) he must have exhausted all other remedies provided by law; (2) the use of such force must be reasonably necessary and suitable to protect his property; and (3) he must use only such force and means as a reasonably prudent man would use under like circumstances.<sup>43</sup>

Many state courts have applied this test since its adoption in 1940.<sup>44</sup> The rule is still valid for defending property from all game animals that are under exclusive state regulatory authority. However, states may place requirements such as obtaining a permit before game may be legally taken to prevent property destruction.<sup>45</sup>

Although state law controls when a citizen may kill a regulated wild animal in defense of property, federal law preempts less restrictive state laws in all cases where threatened or endangered animals are listed under the ESA.<sup>46</sup> When Congress passed the ESA, certain plants and animals were selected to be specially protected under federal law. The central selection criteria for listing species were generally declining numbers of

39. *Id.* at 91.

40. The court stated that "[l]egal justification may always be interposed as a defense by a person charged with killing a wild animal contrary to law." *Id.*

41. The *Rathbone* court, in recognizing the right to defend property from damage by wildlife as a function of the Iowa statute under the Iowa Constitution, stated: "If in this case it was reasonably necessary for the defendant to kill the deer in question in order to prevent substantial injury to his property, such fact, we have no doubt, would afford justification for the killing." *Id.* at 92 (citing *State v. Ward*, 152 N.W. 510, 502 (Iowa 1915)).

42. 152 N.W. 501 (Iowa 1915).

43. *Rathbone*, 100 P.2d at 93. See also Ron A. Bender, *The Right to Kill Wild Animals in Defense of Person or Property*, 31 MONT. L. REV. 235 (1970) (more extensive analysis of *Rathbone*).

44. See, e.g., *State v. Webber*, 736 P.2d 220, 222 (Or. 1987); *Cross v. State*, 370 P.2d 371 (Wyo. 1962).

45. See *Webber*, 736 P.2d at 221-22 (defendant failed to obtain a permit under Oregon law before killing six deer that were eating hay from defendant's haystack because he did not want to comply with the non-wasting measures that the permit required).

46. "Any [s]tate law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this Act but not less restrictive than the prohibitions so defined." 16 U.S.C. § 1535(f)(2) (1988).



rare plants and animals or shrinking critical habitat<sup>47</sup> which caused a species to be either endangered<sup>48</sup> or threatened.<sup>49</sup> When Congress stepped into the area of wildlife management through the ESA, federal law preempted<sup>50</sup> state laws that were contrary to Congress' goals of protecting selected species. *Rathbone* is still valid law when a person raises defense of property as justification for killing state regulated wildlife.<sup>51</sup> But the defense is inapplicable when a person "takes"<sup>52</sup> threatened or endangered species in violation of the ESA. In *Christy*, the Ninth Circuit Court made it clear that the provisions of the ESA preempt less restrictive state law when ESA listed predators are taken.<sup>53</sup>

47. The ESA defines critical habitat for an endangered or threatened species as the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection; and (ii) specific areas outside the geographical area . . . ."

*Id.* § 1532(5)(A).

48. The Act defines endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range. . . ." *Id.* § 1532(6).

49. The Act defines threatened species as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

50. Preemption may occur when Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). If Congress has not entirely displaced state regulation, state law is preempted to the extent it actually conflicts with federal law. *Id.* State cooperation in furthering the intent of Congress is encouraged under the ESA as long as goals or objectives are not jeopardized. *See* 16 U.S.C. § 1535 (1988).

51. A recent controversial example of state regulation in Montana is the practice of shooting bison that wander from the Yellowstone National Park boundaries onto Montana state lands. The purpose of the regulation is to protect people and the domestic livestock industry from contracting disease from the bison. Until recently, hunting permits were issued to accomplish this goal. Now, permittees rather than park rangers shoot the bison. Since park rangers closely monitor the wandering bison, the likelihood of a rancher shooting a bison is low. *See* MONT. CODE ANN. § 87-1-215 (1991) (the legislature found hunting inappropriate as a management tool, but clearly maintained that the bison are a threat to people and property in Montana). *See also* *State v. Yarns*, 826 P.2d 543 (Mont. 1992) which provides insight into the controversy over killing bison wandering from Yellowstone National Park.

52. "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532 (1988). "Harm" includes acts that result in "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns . . . ." 50 C.F.R. § 17.3(c) (1992).

53. The Ninth Circuit Court held: "[T]he right to kill federally protected wildlife in defense of property is not 'implicit in the concept of ordered liberty' nor so 'deeply rooted in this nation's history and tradition' that it can be recognized by us as a fundamental right guaranteed by the Fifth Amendment." *Christy v. Hodel*, 857 F.2d 1324, 1331 (9th Cir. 1988) *cert. denied sub nom. Christy v. Lujan*, 490 U.S. 1114 (1989) (White, J., dissenting) (citations omitted).

This statement seems at odds with article II, § 3, of the Montana Constitution which grants citizens the inalienable right to protect property. However, the right is qualified in the Montana Constitution by the phrase "in all lawful ways." MONT. CONST. art. II, § 3. The ESA prohibits the taking of threatened

### III. LIMITED TAKINGS OF THREATENED PREDATORS UNDER ESA SANCTION: THE MINNESOTA AND MONTANA EXPERIENCE

#### A. *The "Extraordinary Case" Standard as an Exception to the ESA Prohibition Against Taking a Threatened Species*

The court in *Rathbone* recognized the inevitable difficulties between state regulated game and private property interests in Montana.<sup>54</sup> However, the inevitable problems that the state and private property owners would experience, as discussed in *Rathbone*, were not connected to dwindling habitat or declining species populations. Rather, the problems were rooted in an over-abundance of wildlife and a yet unrecognized national desire and need to conserve critical habitat and dwindling populations of wildlife.<sup>55</sup> The court in *Rathbone* relied on the common law to settle wildlife property damage disputes between the state and private interests without the more recent national efforts to conserve habitat and wildlife. Federal and state laws have increasingly curtailed the common law rule set out in *Rathbone*,<sup>56</sup> but have not nullified it.

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or endangered species absent narrowly defined exceptions. Thus, the Montana Constitution may be construed as recognizing that taking an ESA listed animal as unlawful and the state granted right to protect property is not absolute when federal law controls. The ESA "makes no mention . . . of a right to kill a member of a threatened species in defense of property." *Christy*, 857 F.2d at 1329. The ESA grants exceptions to civil penalties under 16 section 1540(a)(3) and criminal prosecution under section 1540(b)(3) for killing an endangered or threatened species in self defense or defense of others if the act was done based on a good faith belief that bodily harm may occur. *See also* 50 C.F.R. § 17.40(b)(1)(i)(B) (1987) (regulation specifically pertaining to the taking of grizzly bears in defense of person or others).

54.

Montana is one of the few areas in the nation where wild game abounds. It is regarded as one of the greatest of the state's natural resources. . . . Wild game existed here long before the coming of man. One who acquires property in Montana does so with notice and knowledge of the presence of wild game and presumably is cognizant of its natural habits. Wild game does not possess the power to distinguish between fructus naturales and fructus industriales . . . . Accordingly, a property owner in this state must recognize the fact that there may be some injury to property or inconvenience from wild game for which there is no recourse.

*State v. Rathbone*, 100 P.2d 86, 92-93 (Mont. 1940).

55. "Traditionally, wildlife in America has been regarded as an inexhaustible resource valued only for its economic utility to whoever succeeded in reducing it to possession." Keith Saxe, Note, *Regulated Taking of Threatened Species Under the Endangered Species Act*, 39 HASTINGS L.J. 399 (1988).

The farming and ranching interests nation-wide hunted predators that preyed on livestock or damaged crops. While game animals as a food, fiber, or source of revenue yielded an "economic utility," the destruction of predators was an "economic necessity" to the pioneers. James A. Little, *Historical Livestock Grazing Perspective*, RANGELANDS, Apr. 1992, at 89 (citing *Wolves in Relation to Stock, Big Game and the National Forest Reserves*, FOREST SERVICE BULLETIN NO. 72, Jan. 19, 1907, at 1 (discussing the best methods to destroy wolves causing enormous livestock and game losses on forest reserves)).

56. *See Cross v. State*, 370 P.2d 371 (Wyo. 1962) (plaintiff successfully demonstrated exhaustion of remedies, reasonable force, and reasonable means to the court, which dismissed the case).

The ESA precludes any state management practice or law that is not at least equal to federal law in meeting the objectives of the ESA.<sup>57</sup> However, the ESA provides a narrow provision — the “extraordinary case” standard — that accommodates the taking of a threatened species under some circumstances.<sup>58</sup> States have challenged the provision as too narrow on behalf of private interests within respective states to provide hunting or trapping opportunities to its citizens.<sup>59</sup>

The “extraordinary case” standard was initially settled in *Sierra Club v. Clark*.<sup>60</sup> However, the predecessor cases to *Sierra Club v. Clark* are useful to track the development of the application of this standard from the taking of wolves in Minnesota to the recent halting of grizzly bear hunting in Montana.

### B. *Historical Development of Case Law Leading to Sierra Club v. Clark*

Maneuvering by the Minnesota Department of Natural Resources (DNR) to skirt the intent of the ESA began within months of Congress' passing the ESA in 1973. The Minnesota DNR drafted an administrative order in May 1974<sup>61</sup> that essentially permitted taking wolves by trapping under the Minnesota Directed Predator Control Program.<sup>62</sup> In September 1974, The FWS informed the DNR that the administrative regulation violated the ESA and ordered the revocation of any authorization to take wolves in Minnesota.<sup>63</sup> The DNR then petitioned the FWS to exclude Minnesota from the endangered wolves' range.<sup>64</sup> The DNR also threatened to withhold funding and resources from the wolf management plan unless the FWS authorized a sport season for managing the timber

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*But see* State v. Webber, 736 P.2d 220, 221 (Or. 1981) (defendant failed to obtain a permit prior to killing deer and the state convicted Webber of killing and wasting game).

57. 16 U.S.C. § 1535(f) (1988).

58. *Id.* § 1532(3). The definition of conservation embraces the notion of a regulated taking of an endangered or threatened species under “extraordinary cases” where population pressures cannot be relieved by any other means. Section 1539 further allows for permits and exemptions to ESA provisions under other narrow circumstances.

59. Minnesota resisted federal control of the timber wolf because it effectively halted the opportunity for citizens to trap or hunt within the state. Similarly, Montana issued permits on a limited basis to citizens that enabled them to take grizzly bears lawfully in a designated region. *See* 48 Fed. Reg. 36,256 (1983) (regulations concerning wolf hunting); 50 C.F.R. § 17.40(b)(1)(i)(e) (1981) (regulations concerning grizzly bear hunting).

60. 755 F.2d 608 (8th Cir. 1985).

61. Keith J. Halleland, *Sierra Club v. Clark: The Government Cries Wolf*, 11 WM. MITCHELL L. REV. 969, 973 (1985).

62. Brian B. O'Neill, *The Law of Wolves*, 18 ENVTL. L. 227, 228 (1988).

63. Halleland, *supra* note 61, at 973 n.32.

64. *Id.* at 973 (citing *Sierra Club v. Clark*, 577 F.Supp. 783, 785 (D. Minn. 1984)).

wolves.<sup>65</sup> The FWS took no administrative action, pending a review by the Eastern Timber Wolf Recovery Team (ETWRT).<sup>66</sup> During this period, the FWS took over the wolf Depredation Control Program from Minnesota in early 1975.<sup>67</sup> In 1977, a Minnesota farmer filed the first case concerning livestock depredation by timber wolves.<sup>68</sup>

In *Brzoznowski v. Andrus*, plaintiff sought money damages for livestock losses and an injunction requiring the Secretary of the Interior (Secretary) to remove all timber wolves from plaintiff's land.<sup>69</sup> The Minnesota legislature responded to the litigation by passing a statute to compensate for livestock losses due to wolf predation.<sup>70</sup> In February 1978, the ETWRT recommended that the Secretary remove the eastern timber wolf from the endangered species list and reclassify the wolf as a threatened species.<sup>71</sup> The ETWRT also recommended that the Secretary permit a sport season to enhance the image of the timber wolf in the eyes of the public.<sup>72</sup> The recommendation also included returning management of the wolf population to Minnesota.<sup>73</sup> The FWS refused to adopt the sport season recommendation and likewise refused to turn over the management of the wolves to Minnesota.<sup>74</sup> However, the wolves were reclassified as threatened,<sup>75</sup> which allowed federal trappers to take wolves in response to reported livestock depredation.<sup>76</sup> In May 1978, federal trappers began

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65. *Id.* at 976 (citing SECTION OF WILDLIFE, MINN. DEP'T OF NATURAL RESOURCES, MINNESOTA TIMBER WOLF MANAGEMENT PLAN 3, at 15 (1980)).

66. The ESA mandates the formation of recovery teams to develop recovery plans for endangered and threatened species. 16 U.S.C. § 1533(f) (1988).

67. Halleland, *supra* note 61 at 974.

68. *Brzoznowski v. Andrus*, No. 5-77-19 (D. Minn. June 9, 1978).

69. O'Neill, *supra* note 62, at 229 (citing *Brzoznowski v. Andrus*, No. 5-77-19 (D. Minn. June 9, 1978)).

70. MINN. STAT. ANN. § 97.488 (repealed 1986).

71. O'Neill, *supra* note 62, at 230 (citing U.S. FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR, *Wolf Depredation on Livestock in Minnesota* 3, RESOURCE PUBLICATION No. 145, at 4 (1982)).

72. *Sierra Club v. Clark*, 577 F. Supp. 783, 790 (D. Minn. 1984).

73. Halleland, *supra* note 61, at 976 (citing Proposed Regulations Governing the Grey Wolf in Minnesota, 47 Fed. Reg. 30,528 (1982). These regulations were drafted after the FWS had rejected prior proposals from the DNR to turn over management of the wolf to Minnesota. The proposed regulations reversed the previous position of the FWS on wolf management in Minnesota. *Id.* at 977 (citing letter from Harvey K. Nelson, Regional Director of the FWS, to Joseph N. Alexander, DNR Comm. (Aug. 6, 1980)) (refusal of FWS to turn over control of the wolf management in Minnesota to the DNR).

74. Halleland, *supra* note 61, at 977 (citing letter from Harvey K. Nelson, Regional Director of the FWS, to Joseph N. Alexander, DNR Comm'r (Aug. 6, 1980)).

75. The eastern timber wolf is classified as endangered in the lower 48 states outside of Minnesota. 50 C.F.R. § 17.11(h) (1986).

76. *Saxe*, *supra* note 55, at 414 (quoting 43 Fed. Reg. 9,607, 9,615 (1978)) (codified as amended at 50 C.F.R. § 17.11(h) (1986)).

indiscriminately trapping wolves "in advance of depredation,"<sup>77</sup> resulting in more wolves being taken than were actually causing livestock losses.<sup>78</sup> The authorization for indiscriminate trapping did not go unchallenged. As the *Brzoznowski* litigation continued, a coalition of environmental groups moved the court to intervene in the case in late May 1978.<sup>79</sup> The court denied the motion.<sup>80</sup> The coalition filed an independent lawsuit to challenge the trapping procedures.

In *Fund for Animals v. Andrus*,<sup>81</sup> plaintiffs argued that any rationally based control effort would take as few wolves as possible and that the FWS regulations permitted the taking of offending animals only.<sup>82</sup> The court, relying on expert testimony, held:

- 1). Control measures are strictly limited to cases where wolf depredation losses were significant,
- 2). Control measures restricted federal trappers to known wolf offenders,
- 3). Federal trappers could not trap beyond one-quarter mile from the kill site, and
- 4). Trappers could not take wolf pups.<sup>83</sup>

The FWS granted permission for the taking of wolves in cases of confirmed livestock depredation, for research purposes, or for humane reasons.<sup>84</sup> *Fund for Animals* spelled out the working rules for wolf predation control.

Although *Fund for Animals* set out strict wolf control guidelines, the status quo was short lived. At the request of Secretary James Watt, the DNR drafted a proposed state management plan in 1982.<sup>85</sup> The plan included a sport season on wolves, legalized sales of wolf pelts, and a target level for harvesting wolves that met DNR management goals for state deer populations.<sup>86</sup> The FWS adopted the Minnesota Wolf Management Plan and modified the guidelines set out by the court in *Fund for Animals*.<sup>87</sup>

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77. Proposed Regulations Governing the Grey Wolf in Minnesota, 47 Fed. Reg. 30,528, 30,530 (1982) (codified at 50 C.F.R. pt. 17 (1982)).

78. O'Neill, *supra* note 62, at 231.

79. *Id.*

80. *Id.*

81. *Fund for Animals v. Andrus*, 11 Env't Rep. Cas. (BNA) 2189 (D. Minn. 1978).

82. O'Neill, *supra* note 62, at 231 (interpreting 11 Env't Rep. Cas. (BNA), at 2200-01).

83. *Id.* (interpreting 11 Env't Rep. Cas. (BNA), at 2200-03).

84. *Id.* (referring to Final Regulations Governing Reclassification of the Grey Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9,706 (1978)).

85. *Id.* at 232 (citing Proposed Regulations Governing the Grey Wolf in Minnesota, 47 Fed. Reg. 30,528, 30,531 (1982)).

86. *Id.* (citing Proposed Regulations Governing the Grey Wolf in Minnesota, 47 Fed. Reg. 30,528, 30,531 (1982) (codified at 50 C.F.R. pt 17 (1982)).

87. *Id.* at 233.

The modifications the FWS adopted included: (1) expanding the trapping zone from a one-quarter mile radius to a one-half mile radius of livestock kill sites, (2) reinstating of non-selective trapping, and (3) dropping the requirement that wolves must be taken in a humane manner.<sup>88</sup> The DNR and FWS could not implement the modifications without petitioning the court to reopen *Fund for Animals*.<sup>89</sup> The Sierra Club, Defenders of Wildlife, and other environmental organizations immediately challenged the petition with new litigation in federal district court.<sup>90</sup> *Fund for Animals* became *Sierra Club v. Clark*.

### C. *Sierra Club v. Clark*: The Christening of the "Extraordinary Case" Standard

#### 1. The Decision

In *Sierra Club v. Clark*, plaintiffs sought to prevent the DNR and the FWS from implementing the FWS' proposed regulations.<sup>91</sup> These regulations, if allowed to take effect in Minnesota, authorized the DNR to manage the timber wolves through a sport hunting and trapping season. The proposed regulations also modified the existing livestock predation control program that the FWS managed at that time. These changes allowed wolves to be indiscriminately trapped without the use of humane trapping methods, contrary to regulations set out in *Fund for Animals v. Andrus*.

The court in *Fund for Animals v. Andrus*<sup>92</sup> set out regulations that prohibited the trapping of wolves unless significant depredation of livestock occurred and the FWS could identify and trap the specific wolves causing livestock depredation.<sup>93</sup> The court later amended the order by restricting trapping of wolves to within one quarter mile of livestock kill sites.<sup>94</sup> Following *Fund for Animals*, the DNR requested that the FWS transfer management of the wolf to Minnesota<sup>95</sup> and that the FWS authorize a sport hunting season as part of the management plan.<sup>96</sup> The FWS rejected the request because the ESA prohibited the taking of timber

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88. *Sierra Club v. Clark*, 577 F. Supp. 783, 786 (D. Minn. 1984) (citing 50 C.F.R. § 14.40(d)(2) (1982)).

89. *Id.* at 787.

90. *Id.* at 783.

91. *Id.*

92. 11 Env't. Rep. Cas. (BNA) 2189 (D. Minn. 1978).

93. O'Neill, *supra* note 62, at 231 (citing *Fund for Animals v. Andrus*, 11 Env't Rep. Cas. (BNA), at 2200-01).

94. *Id.* (citing 11 Env't Rep. Cas. (BNA), at 2203).

95. Proposed Regulations Governing the Grey Wolf in Minnesota, 47 Fed. Reg. 30,528 (1982).

96. *Id.*

wolves<sup>97</sup> and the proposal would violate *Fund for Animals*.<sup>98</sup> Under the Reagan Administration, the FWS reversed its position.<sup>99</sup> The FWS issued the final proposed wolf regulations on August 10, 1983,<sup>100</sup> which spawned the *Sierra Club* litigation in federal court.

The central issue in *Sierra Club v. Clark* was whether the Secretary had the authority, under the ESA statutes, to promulgate regulations permitting a sport hunting season for timber wolves.<sup>101</sup> A secondary issue addressed was whether the FWS could modify the livestock depredation program regulations without cause or explanation.<sup>102</sup> Both parties agreed the case presented only a question of law, making summary judgment appropriate. Because both sides relied on separate interpretations of several provisions within the ESA, the court turned to the ESA itself to settle the matter. The district court interpreted the plain language of the ESA and held that "[b]efore a threatened species may be taken [via sport hunting], a determination must be made that population pressures within the animals' ecosystem cannot otherwise be relieved."<sup>103</sup> The court further stated: "The government does not even attempt to argue that such an extraordinary case exists. Rather, the novel argument is asserted that the declaration of a sport season is within the Secretary's discretion"<sup>104</sup> and "a sport season would enhance the value of the wolf in the eyes of the public."<sup>105</sup> The court rejected the government's arguments and held that "conservation" as defined under the ESA prohibited a sport season unless the government could meet the "extraordinary case" standard within 16 U.S.C. section 1532(3) of the ESA.<sup>106</sup> The court further declared that the modifications the FWS instituted after *Fund for Animals* would not decrease the number of wolves taken, but would increase them.<sup>107</sup> In

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97. Halleland, *supra* note 61, at 977 (citing letter from Harvey K. Nelson, Regional Director of the FWS, to Joseph N. Alexander, DNR Comm'r (Aug. 6, 1980)).

98. *Id.* (citing letter from Elmer T. Nitzschke, Field Solicitor, U.S. Department of the Interior, to Harvey Nelson, Regional Director of the FWS, at 1 (Mar. 7, 1980); letter from Lynn A. Greenwalt, Director of the FWS to the Regional Director, at 4 (June 27, 1980); *Fund for Animals v. Andrus*, 11 Env't Rep. Cas. (BNA) 2189 (D. Minn. 1978)).

99. The reasons for the change in position might have been from political pressure within Minnesota. The public in Minnesota apparently harbored a great deal of antagonism toward the wolf as 250 wolves were illegally killed each year in the early 1980's. Halleland, *supra* note 61, at 977 (citing *Sierra Club v. Clark*, 577 F. Supp. 577, 790 (D. Minn. 1984) and the deposition of David Mech, at 9 (Oct. 25, 1983) (between 25-30% of the total wolf population in Minnesota is illegally killed each year)).

100. 48 Fed. Reg. 36,256 (1983).

101. *Sierra Club v. Clark*, 577 F. Supp. 783, 787-89 (D. Minn. 1984).

102. *Id.* at 790.

103. *Id.* at 787.

104. *Id.*

105. *Id.* at 790.

106. *Id.* at 789.

107. *Id.*

addition, the FWS illegally changed the depredation regulations without explanation.<sup>108</sup> The government then appealed the decision to the Eighth Circuit Court of Appeals.<sup>109</sup>

The Eighth Circuit affirmed the district court's ruling which restricted the discretion of the Secretary in allowing the taking of wolves absent the requirement of the "extraordinary case" standard.<sup>110</sup> The court reversed and remanded on the issue of whether the FWS's predation control program modifications were arbitrary, capricious, or an abuse of authority.<sup>111</sup> The parties then settled the case.<sup>112</sup> The only significant concession the FWS gained was the one-half mile radius extension from wolf depredation locations.<sup>113</sup> The other modifications were not adopted.

## 2. *Examining The Court's Reasoning*

The major issue in *Sierra Club* was whether the Secretary had the authority under the ESA to allow a sport hunting season on timber wolves. The Eighth Circuit affirmed the federal district court's holding that a sport season was not within the discretion of the Secretary unless extraordinary circumstances existed.<sup>114</sup> The district and Eighth Circuit courts derived their holdings from the plain language and a review of the legislative history of the ESA. Although the courts looked for legislative intent in the history of the ESA, the plain language of the ESA was determinative.<sup>115</sup>

The government argued that the ESA empowered the Secretary to exercise absolute discretion over promulgating regulations to conserve a threatened species.<sup>116</sup> Specifically, the government relied on the permissive term "may" to construe the language to mean "may or may not," thus creating an option as to whether the Secretary could authorize the taking of a threatened species.<sup>117</sup> Thus, the government relied upon the amplification of an ambiguity within individual statutes as the central strategy of its

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108. *Sierra Club v. Clark*, 577 F. Supp. 783, 790 (D. Minn. 1984).

109. *Sierra Club v. Clark*, 577 F. Supp. 783 (D. Minn. 1984).

110. *Sierra Club v. Clark*, 755 F.2d 608, 615 (8th Cir. 1985).

111. *Id.* at 619. *See Sierra Club v. Clark*, 607 F. Supp. 737, 738 (D. Minn. 1985) (on remand, parties discussed the issues and settled their differences).

112. O'Neill, *supra* note 62, at 236.

113. *Sierra Club v. Clark*, 607 F. Supp. 737, 738 (D. Minn. 1985).

114. *Sierra Club v. Clark*, 755 F.2d 608, 618 (8th Cir. 1985).

115. *Id.*

116. *Id.* at 614. Section 1533(d) states:

Whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The secretary *may* by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife . . .

16 U.S.C. § 1533(d) (1982) (emphasis added).

117. *Sierra Club v. Clark*, 577 F. Supp. 783, 788 (D. Minn. 1984).



case. The government avoided any argument concerning the current wolf populations in Minnesota.<sup>118</sup> The government actually conceded that wolf populations had been stable since 1975 — a stable population would not indicate an “extraordinary case” that would require the taking of wolves through a sport hunting season.<sup>119</sup>

In response to the government’s argument regarding the language of section 1533(d), the district court flatly stated that the argument ignored the intent of Congress.<sup>120</sup> Further, the court stated: “The only reasonable construction this court can place on the statutes in question is that *only* in the case of a threatened species can the Secretary *ever* order that a taking occur,” and never could such an order involve an endangered species.<sup>121</sup>

The Eighth Circuit was next faced with the task of interpreting the term “conservation.”<sup>122</sup> The Secretary relied upon the general definition of “conservation” in section 1532(3) to argue that endangered species may be taken when population pressures exceed the capacity of their ecosystems, while threatened species are subject to the regulatory measures that address the problems contributing to the species’ decline.<sup>123</sup> The argument focussed on the “or” connector to construe the term to mean that endangered species may be taken when populations exceed the carrying capacity of the ecosystem. The central point of this argument is that the definition of conservation allows the taking of endangered species and enjoys priority over the prohibition of taking endangered species under section 1538(a)(1).<sup>124</sup> The Secretary argued that the definition of conservation provides for discretion in whether or not a threatened species could be taken to alleviate the problems that contribute to the wolf’s decline. The purpose of this argument was to justify a sport season to enhance the wolves’ public image and elicit public support for conservation of the species.<sup>125</sup>

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118. *Id.* at 789.

119. *Id.*

120. *Id.* at 788.

121. *Id.*

122. The ESA definition of “conservation” states:

‘[C]onserve,’ ‘conserving,’ and ‘conservation’ mean to use and the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resource management such as research, . . . live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

16 U.S.C. § 1532(3) (1982).

123. *Sierra Club v. Clark*, 755 F.2d 608, 614-15 (8th Cir. 1985).

124. *Id.*

125. *Sierra Club v. Clark*, 577 F. Supp. 783, 790 (D. Minn. 1984). The idea behind the sport hunting and trapping was to encourage support for conservation of the wolf in order to provide a

The Eighth Circuit also rejected the government's interpretation of "conservation" because it ignored the interrelations of the provisions of the ESA.<sup>126</sup> The court determined that section 1532(3)<sup>127</sup> *generally* limited the discretion of the Secretary and section 1538(a)(1)<sup>128</sup> *specifically* limited the Secretary with regard to endangered species.<sup>129</sup> The court noted that the general definition of conservation in section 1532(3) does not override section 1538(a)(1)(b), which prohibits the taking of endangered species.<sup>130</sup> The Eighth Circuit stated: "To fail to use Congress' definition of [conservation] would refuse to give effect to a crucial part of the enacted statutory law."<sup>131</sup> The court firmly established that all the provisions of the act must be read together, and the definitions set out by Congress applied to the provisions of the ESA.<sup>132</sup> The court concluded that the statutory language of the provisions at issue concerning the ESA were clear and the statutes limited the Secretary's discretion to allow a public sport season for timber wolves.<sup>133</sup>

#### D. *Christy v. Hodel: Sport Hunting of Grizzly Bears Under the ESA "Extraordinary Case" Standard*

*Christy* examined the "extraordinary case" standard in the context of whether sport hunting of grizzly bears had a rational basis in light of ESA mandates to conserve rather than take endangered or threatened species.<sup>134</sup> Specifically, the court analyzed the sport hunting issue by applying an equal protection construction of the Fifth Amendment due process clause to the issues raised by the plaintiffs.<sup>135</sup>

Plaintiffs argued that the ESA prohibitions against taking grizzly bears and penalties for taking grizzly bears in defense of property created two classifications of citizens. Plaintiffs argued these two classes of citizens violated the equal protection clause under the U.S. Constitution. The first classification allegedly created was between livestock producers near

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renewable opportunity each year for the citizens of Minnesota to hunt and trap. A secondary effect of hunting eliminates wolves that no longer fear humans. 48 Fed. Reg. 36,256 (1983). The FWS considered hunting a primary tool to instill fear in grizzly bears to reduce bear-human conflicts. 51 Fed. Reg. 33,753 (1986).

126. *Sierra Club v. Clark*, 755 F.2d at 614-15.

127. 16 U.S.C. § 1532(3) (1982).

128. 16 U.S.C. § 1538(a)(1) (1982).

129. *Sierra Club v. Clark*, 755 F.2d at 614.

130. *Id.*

131. *Id.* at 613.

132. *Id.*

133. *Id.* at 615.

134. *Christy v. Hodel*, 857 F.2d 1324, 1331 (9th Cir. 1988), *cert. denied sub. nom. Christy v. Lujan*, 490 U.S. 1114 (1989). (White, J., dissenting).

135. *Id.* (citing *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974)).

grizzly bear habitat and the rest of the U.S. citizens and taxpayers. The court quickly dismissed this argument for lack of any evidence or a showing that the ESA creates a classification as plaintiffs alleged.<sup>136</sup>

The second classification allegedly created by the ESA allowed a select group of sport hunters to kill grizzlies legally under certain circumstances while penalizing livestock producers who could not legally kill grizzlies to protect their property from immediate harm.<sup>137</sup> Plaintiffs argued that killing grizzly bears for sport hunting purposes could not be related to the goals of the Act and was a derogation of the purposes of the ESA. Thus, plaintiffs argued as a matter of law there could be no rational basis for hunting grizzly bears.<sup>138</sup> The court turned to section 1532(3) and found that Congress had provided for the limited taking of a threatened species in the "extraordinary case" where population pressures within a given ecosystem could not otherwise be reduced.<sup>139</sup> The court concluded that Congress authorized the Secretary to allow the taking of grizzly bears through sport hunting in "extraordinary cases."<sup>140</sup> Further, the court stated that the Secretary had a rational basis in allowing grizzly bear hunting as a conservation tool.<sup>141</sup>

The Secretary relied on studies and data suggesting that a controlled sport hunt would lead to the taking of bears that were less than wary of humans, thus decreasing grizzly bear-human contact and promoting bear conservation.<sup>142</sup> It is important to note that the court did not review the adequacy of the data on which the Secretary relied to regulate sport hunting. *Christy* only addressed the issue of whether the Secretary had a rational basis to allow sport hunting of grizzly bears in Montana. The issues of whether data concerning grizzly bear population was adequate and whether subsequent regulations supporting a grizzly bear hunt were arbitrary or capricious were recently addressed in *Fund for Animals v. Turner*.<sup>143</sup>

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136. *Id.* at 1332. The court found that as a matter of logic, livestock producers are more subject to regulation than urban citizens. The court analogized to the difference between motorists and bicyclists — both are obligated to obey the speed limit but motorists are much more likely to be in peril of violation more frequently. There is no equal protection violation when no suspect class exists and the regulation is applied evenly to all citizens even though a small identifiable group finds the regulation more frequently applied to their group. *Id.* at 1332 n.6.

137. Plaintiffs cited 50 C.F.R. § 17.40(b)(1)(i)(E) (1981) as creating the classification on its face. Plaintiffs did not contend that the classification created was suspect, thus the "rational basis" test applied and the court would uphold the regulation if any rational basis supported the regulation. *Christy*, 857 F.2d at 1332.

138. *Id.* at 1332-33.

139. *Id.* at 1333.

140. *Id.*

141. *Id.*

142. Revision of Special Regulations for the Grizzly Bear, 51 Fed. Reg. 33,755-57 (1986).

143. No. 91-2201, 1991 WL 206232 (D.D.C. Sept. 27, 1991).

E. *Fund For Animals v. Turner: Putting a Halt to the Grizzly Bear Hunting in Montana Unless the "Extraordinary Case" Standard is Based On Reasonable Data*

The case law concerning the "extraordinary case" standard has revolved around issues concerning private interests and predatory threatened species such as the grizzly bear and timber wolf. In *Sierra Club v. Clark*, the state of Minnesota and ultimately the FWS under the Reagan Administration argued that sport hunting of wolves would "enhance wolves in the eyes of the public."<sup>144</sup> The basis for a hunting and trapping program was that it was a desirable and advisable conservation tool. No argument was even attempted that an "extraordinary case" existed where too many wolves were present for available habitat. In *Christy v. Hodel*, plaintiffs argued that the Secretary of the Interior had no rational basis for allowing sport hunting of grizzly bears and that allowing such a hunt directly conflicted with ESA goals and mandates. The court deferred to the data the Secretary presented indicating that there was an "extraordinary case" where too many bears existed in particular areas and a sport hunt was rationally based upon eradicating bears that had lost their fear of humans. The Ninth Circuit Court did not question the adequacy of the data. In contrast, in *Fund For Animals v. Turner*, the court reviewed the adequacy of the "extraordinary case" data to determine whether the sport hunting regulations were arbitrary and capricious or rationally related to conservation goals of the ESA. In *Turner*, plaintiffs sought a preliminary injunction to stop the grizzly bear hunting in Montana. The court granted the injunction pending a final determination of the case.

To issue a preliminary injunction, the court must evaluate four factors: (1) plaintiffs' likelihood of success, (2) the potential for irreparable injury in the absence of an injunction, (3) the balance of hardships among the parties, and (4) the public interest.<sup>145</sup> The likelihood of success was the key factor in *Turner* and is the only factor discussed.

The FWS issued regulations which allowed grizzly bear hunting under certain circumstances in accordance with Montana Law in 1975.<sup>146</sup> The FWS found that the Bob Marshall Wilderness Ecosystem (BME) grizzly bear population was excessive for the ecosystem<sup>147</sup> and met the

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144. *Sierra Club v. Clark*, 577 F. Supp. 783, 790 (D. Minn. 1984).

145. *Turner*, 1991 WL 206232, at \*1 (citing *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 834-35 (D.C.Cir. 1984)).

146. See 40 Fed. Reg. 31,735 (1975).

147. "[The] grizzly bear population [in the BME] is large enough that bears are now wandering into settled areas where they threaten human safety and commit significant depredations on legally present livestock. Thus, grizzly bear pressures definitely exist in the [BME]." *Turner*, 1991 WL 206232, at \*2 (citing 40 Fed. Reg. 31,735 (1975)).

"extraordinary case" test set out in the ESA. In 1985, the FWS revised the regulations on an emergency basis and reduced the total number of allowable grizzly bear deaths from 25 to 15.<sup>148</sup> The revised regulations also redefined the boundaries of the hunting zone and renamed the ecosystem the Northern Continental Divide Ecosystem (NCDE).<sup>149</sup> In 1986, the FWS permanently revised the regulations and allowed only 14 grizzly bears or six females to be taken by any means.<sup>150</sup>

The central issue in *Turner* was whether the FWS determination that the NCDE represents an "extraordinary case" of grizzly bear "population pressures" was arbitrary and capricious.<sup>151</sup> The court reviewed the merits of the case with a strong presumption in favor of upholding the validity of the regulation.<sup>152</sup> The court determined that plaintiffs successfully showed a degree of likelihood of success on the merits of their claim.<sup>153</sup>

The court found it significant that the Secretary and the state of Montana as intervenors could not produce any direct evidence of actual numbers of grizzly bears in relation to the carrying capacity of the ecosystem.<sup>154</sup> Rather, the defendants argued the hunt was rationally based upon evidence in the administrative record of more bear-human contact and increased incidents of property damage and livestock depredation.<sup>155</sup> To meet their burden of proof, the defendants offered two theories of why the bear hunt was rationally based upon the data in the administrative record.

First, the "defendants argued that the movement of bears outside of their natural range is a 'secondary effect' of population pressures" and an indication that too many bears were residing within the ecosystem.<sup>156</sup> The court took notice of FWS statements that there may be a multitude of reasons why bears may move out of natural areas to more settled areas.<sup>157</sup>

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148. *Id.* at \*2 (citing 50 Fed. Reg. 35,087 (1985)). This reduction was applicable only to the 1985 hunting season.

149. *Id.*

150. *Id.* at \*3 (citing 51 Fed. Reg. 33,753 (1986)). The FWS has not modified the revised regulations, thus 50 C.F.R. §17.40(b)(1)(i)(E) (1986) is the regulation which plaintiffs challenged in this case. Ultimately, the FWS removed 50 C.F.R. §17.40(b)(1)(i)(E) and precluded any possibility of hunting grizzly bears. 57 Fed. Reg. 37,478 (1992).

151. *Turner*, 1991 WL 206232, at \*3,4.

152. *Id.* at \*4.

153. *Id.*

154. "Specifically lacking are better data on habitat condition or carrying capacity, total numbers, annual reproduction, and most importantly, annual turnover and population trends." *Id.* (citing 40 Fed. Reg. 31,734 (1975)).

155. *Turner*, 1991 WL 206232, at \*4.

156. *Id.*

157. *Id.* This movement may be attributable to one or a combination of factors, such as availability of foods along riparian zones, artificial food sources (livestock carcass dumps, beehives, etc.), climatic changes, loss of previously utilized habitat, or an actual increase in the size of the overall

The court rejected defendants' argument because they failed to present any evidence that the bears moved out of their ecosystem due to population pressures as opposed to any other factor.<sup>158</sup>

Second, the defendants argued that "population pressure" should be broadly defined to include not only bears per unit area but also other pressures which create conflict between bears and humans living in the same area.<sup>159</sup> The court turned to the legislative intent behind the ESA and determined that Congress intended a narrow construction of what "population pressure" meant.<sup>160</sup> The court concluded that FWS' and Montana's argument was not likely a rational basis for the FWS and Montana to conclude that bear population pressures had exceeded their ecosystem in the sense Congress intended by as of 1986.<sup>161</sup>

Since 1975, the FWS has repeatedly stated in its policy statements that grizzly bear hunting is a desirable conservation tool.<sup>162</sup> The FWS maintained that hunting instills in bears a wariness of humans and effectively restricts the bears to their native range, consequently reducing bear-human contact.<sup>163</sup> The defendants argued that this rationale for hunting grizzly bears is a sound tool for conserving the grizzly bear.<sup>164</sup> However, the court rejected this argument. The court concluded that the plain language of the ESA does not authorize the taking of a threatened species even though the taking might be a desirable conservation tool.<sup>165</sup> Rather, threatened species may be taken only when an "extraordinary case" exists and the species expands beyond the carrying capacity of its

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bear population and consequent dispersal. 51 Fed. Reg. 33,755 (1986).

158. *Turner*, 191 WL 206232, at \*3, 4.

159. *Id.* at \*5.

160. *Id.* The court reviewed language found within the congressional record and concluded: "[t]his language indicates that congress was referring to 'population pressures' in a limited ecological sense—where the animal 'exceeds the carrying capacity of its particular ecosystem'—rather than in a looser sense of any pressures creating conflict between bears and persons in surrounding communities." *Id.*

161. *Id.* The court examined the administrative record on its own to determine whether any evidence existed to support a finding that population pressures existed. After reviewing the record, the court stated that more evidence existed to corroborate the conclusion that no pressures existed in 1986. *Id.*

162. *Id.* at \*6.

The [FWS] continues to hold that regulated hunting is necessary and advisable for the conservation of the of the grizzly in northwestern Montana . . . . Such hunting would tend to eliminate those bears that are unwary of humans and thus most likely to come into conflict with people. The remaining bears would likely be wary of humans and less likely to become involved in depredations or bear-human conflicts that would lead to control actions and possible [grizzly] mortality.

51 Fed. Reg. 33,753 (1986).

163. *Turner*, 1991 WL 20632, at \*6.

164. *Id.* at \*3,4.

165. *Id.*

ecosystem.<sup>166</sup>

The defendants' final argument was that the court should review the treatment of the authorization for the grizzly bear hunt in *Christy v. Hodel* where a federal judge had concluded there was a rational basis for the hunt.<sup>167</sup> The court in *Turner* distinguished the *Christy* case. The court reasoned that in *Christy* plaintiffs had confronted the court with a constitutional attack claiming there was no rational basis for hunting grizzlies and that the hunt was inconsistent with ESA goals and objectives.<sup>168</sup> The plaintiffs had not challenged the adequacy of the data upon which the grizzly bear hunt rested.<sup>169</sup> In contrast, the court in *Turner* had to determine whether there was a rational basis for the hunt based upon the adequacy of the data. Therefore, the court concluded that *Christy* did not apply to this issue.<sup>170</sup>

#### F. *The Final Result of Turner: Grizzly Bear Sport Hunting is No Longer Possible Under Any Circumstance*

The federal government dropped its suit in federal district court as a result of *Turner*. Because the regulation permitting a sport hunt was not valid under the injunction, the FWS extinguished the regulation.<sup>171</sup> As a result, the issue of whether or not grizzly bears should be hunted is moot. The removal of the regulation absolutely bars any possibility of the sport hunting of grizzly bears. Until scientific data exists that clearly indicates that the grizzly bear population has expanded beyond the carrying capacity of the ecosystem, the bears are safe from hunters.

### IV. CONCLUSION

*Sierra Club* limits the discretion of the Secretary in authorizing the taking of a threatened species to research purposes, depredation control, or in extraordinary cases where populations exceed the carrying capacity of the ecosystem. This is a reasonable construction of the ESA, and follows the intent of Congress when it passed the ESA in 1973.<sup>172</sup> The court in

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166. *Id.* (citing *Sierra Club v. Clark*, 577 F.Supp. 783, 790 (D. Minn. 1984); *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985)).

167. *Id.* at \*7.

168. *Id.*

169. *Id.*

170. *Turner*, 1991 WL 206232, at \*7.

171. 57 Fed. Reg. 37,478 (1992). (Effective Aug. 19, 1992). "The [FWS] removes 50 [C.F.R.] 17.40(b)(i)(E), the special rule that allows [the taking] of grizzly bears through a special hunt in northwestern Montana in order to respond to a memorandum opinion of the U.S. District Court." *Id.*

172. See *Christy v. Hodel*, 857 F.2d 1324, 1336-37 (9th Cir. 1988), cert. denied sub nom. *Christy v. Lujan*, 490 U.S. 1114 (1989). (White, J., dissenting). The court held that the Secretary of the Interior had the authority to promulgate regulations authorizing a limited sport hunt on grizzly bears in designated geographic areas in Montana. The authorization was based on a determination by

*Sierra Club* effectively set out the circumstances in which a threatened species may be taken, and required that proof must be shown that an extraordinary case exists which justifies the taking of a threatened species. The court in *Turner* expanded *Sierra Club* by reviewing the adequacy of the data required to show that an "extraordinary case" existed. Both the courts in *Sierra Club* and *Turner* firmly established that the ESA is clear on its face and further attempts to skirt the intent of Congress will fail.

Further, the importance of *Sierra Club*, *Christy*, and *Turner* is apparent as the issue of wolf reintroduction heats up in Montana and other states.<sup>173</sup> If reintroduction efforts succeed, authority exists to guide courts in determining under what circumstances a threatened species may be taken. Although there has been a lull in litigation concerning wolves in Minnesota since *Sierra Club*, controversy is on the horizon. In 1990, Minnesota livestock producers reported record losses due to depredation by wolves.<sup>174</sup> In addition, the annual fund that compensates livestock producers for proven depredation losses to wolves was depleted within four months.<sup>175</sup> The wolf population swelled to an estimated 1,750 animals in 1990.<sup>176</sup> As wolf numbers increase, contact between wolves and the public will surely increase, resulting in friction between livestock producer and hunting interests and the public interests protected under the ESA. Sport hunting of wolves will again be the most likely issue to arise in Minnesota if the population continues to increase and the wolves' range expands. Specifically, the courts may be faced with the issue of whether the wolf population has exceeded the carrying capacity of the ecosystem and sport hunting is the only means remaining to reduce the population. Ultimately, a compromise between private and public interests which compensates livestock producers equitably for losses and in return fosters producer cooperation may be the answer. Predation problems will not disappear, but

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the FWS that population pressures within the grizzly bear ecosystem could not be reduced by any other means than a sport hunt. A determination of this kind was not made in *Sierra Club v. Clark*. Thus, creating a sport season was not within the discretion of the Secretary.

173. Wolf packs from Glacier National park are migrating south along logging trails to western Montana. Approximately 40 to 50 wolves exist in this region of Montana, and another 10 to 20 exist in central Idaho. The re-introduction of wolves is a hotly contested issue and will grow more fierce in the future. Sharon Begley et al., *Return of the Wolf*, NEWSWEEK, Aug. 12, 1991, at 44. The goal of the wolf recovery team in Montana is to reach ten breeding pairs of wolves. In February 1993, an employee of the Sun River Wildlife Management Area spotted a fifth breeding pair. The wolf could be taken off the endangered list when ten confirmed pairs are known to exist in Montana. *State has Fifth Wolf Pack*, MISSOULIAN, Mar. 3, 1993, at B-1.

174. Michael Booth, *Predator's Success Endangers Wildlife Truce; Resurgence of Gray Wolf in Northern Minnesota Raises Outcry Among Livestock Growers*, WASHINGTON POST, Nov. 21, 1990, at A4.

175. *Id.*

176. *Id.*



will likely increase with increasing numbers of wolves and grizzly bears.<sup>177</sup> In any event, cooperation from all parties concerned is necessary to increase threatened predator populations efficiently. Viable populations of threatened species such as the eastern timber wolf in Minnesota and the grizzly bear in Montana depend on a negotiated solution.

Until the wolves in Minnesota and the grizzly bears in Montana recover to a point where they no longer need protection or multiply beyond the carrying capacity of their ecosystem, there will be no sport hunting season on these predators. Further, the case law firmly establishes that the FWS and the state administering a sport hunting season for ESA listed predators must show a rational basis for the hunt based upon data which supports an "extraordinary case" where the species has populated beyond the carrying capacity of the ecosystem.

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177. A Montana state game warden killed a grizzly bear near Lincoln, Montana after the bear killed 35 sheep over a five day period. Wildlife officials relocated the grizzly bear twice in the last two years after the bear caused problems with sheep and pigs. The game warden shot the bear as a last resort after Montana Fish, Wildlife and Parks personnel attempted, but failed, to trap the bear. *Game Warden Kills Marauding Grizzly*, MISSOULIAN, July 14, 1993, at A-1.