Environmental Protection Information Center v. the Simpson Timber Company: Who Is the Ninth Circuit Really Protecting with Section 10 of the Endangered Species Act

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ENVIRONMENTAL PROTECTION INFORMATION CENTER v. THE SIMPSON TIMBER COMPANY: WHO IS THE NINTH CIRCUIT REALLY PROTECTING WITH SECTION 10 OF THE ENDANGERED SPECIES ACT?

I. INTRODUCTION

Environmental Protection Information Center v. The Simpson Timber Company (EPIC II)\(^1\) is one of the most recent obstacles in Congress’ pursuit to protect endangered and threatened species under the Endangered Species Act (ESA).\(^2\) Congress and the United States Supreme Court have worked jointly to ensure full compliance with ESA.\(^3\) The decision of the Court of Appeals for the Ninth Circuit, in EPIC II, however, purports to protect commercial activity at the expense of endangered and threatened species.\(^4\) EPIC II is thus an example of a conflict arising between the Ninth Circuit’s ESA interpretation and Congress’ intent in enacting the statute.\(^5\)

This Note discusses the Ninth Circuit’s protection of economic interests at the expense of endangered and threatened species. Section II of this Note summarizes the facts of EPIC II.\(^6\) Section III discusses important Supreme Court and Ninth Circuit cases regarding ESA, as well as federal agencies’ duties under the statute.\(^7\)

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1. 255 F.3d 1073 (9th Cir. 2001) [hereinafter EPIC II] (discussing various obligations and duties of federal agencies under Endangered Species Act).


3. See TVA, 437 U.S. at 184 (observing Congress’ intent to halt and reverse trend toward species extinction at any cost is literally in every section of ESA). For a discussion on the facts and holding of TVA, see infra notes 52-58 and accompanying text.

4. See EPIC II, 255 F.3d at 1081 n.6. The EPIC II court denied an injunction to halt a logging company’s activities on 380,000 acres of timberland despite the listing of two threatened species inhabiting the land. See id. at 1075.

5. See id. at 1076 (interpreting ESA, Consultation Procedures, Reinitiation of Consultation, 50 C.F.R. § 402.16 (2000) to require sufficient discretionary federal involvement to trigger duty to reinitiate consultation); see also Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995) [hereinafter Sierra Club] (holding duty to reinitiate consultation was not triggered because insufficient discretion retained). For a discussion on Sierra Club, see infra notes 59-64 and accompanying text.

6. For a summary of EPIC II’s facts, see infra notes 10-30 and accompanying text.

7. For a discussion of important Supreme Court and Ninth Circuit ESA decisions as well as federal agencies’ duties under ESA, see infra notes 31-74 and accompanying text.
tion IV of this Note follows with an examination of the Ninth Circuit’s opinion, including a critique of the EPIC II court’s analysis in Section V. Finally, Section VI hypothesizes the impact of this case.

II. FACTS

EPIC II arose out of a dispute concerning the logging activities that The Simpson Timber Company (Simpson) conducted in northern California. Simpson carries out logging activities on 380,000 acres of timberland, an area inhabited by the northern spotted owl. In 1990, the Secretary of the Interior (Secretary) listed the northern spotted owl as a threatened species pursuant to Section 4 of ESA. The Fish and Wildlife Service (FWS) issued Simpson an incidental take permit for the northern spotted owl on September 17, 1992. In issuing the incidental take permit, FWS

8. For an analysis and critique of the EPIC II court’s opinion, see infra notes 75-141 and accompanying text.

9. For a discussion of the impact and likely effects of EPIC II, see infra notes 142-53 and accompanying text.


11. See EPIC II, 255 F.3d at 1075. The Environmental Protection Information Center [hereinafter EPIC] sought an injunction to stop Simpson’s logging activities until the Fish and Wildlife Service [hereinafter FWS] reinitiated internal consultation regarding the effects the logging activities would have on species other than the northern spotted owl that were threatened or endangered. See id. The District Court for the Northern District of California denied EPIC an injunction because FWS did not retain enough discretion to trigger its duty to reinitiate internal consultation. See EPIC I, 1999 WL 183606, at *5; see also Eric Fisher, Comment, Habitat Conservation Planning Under the Endangered Species Act: No Surprises & The Quest For Certainty, 67 U. COLO. L. REV. 371, 372 n.7 (1996). Fisher explains the northern spotted owl nests almost exclusively in the old-growth forests in the Pacific Northwest. See id. The logging industry values this area for the quantity and quality of its lumber, however, logging there places the industry at a potential risk of violating ESA. See id. (citations omitted).


13. See EPIC II, 255 F.3d at 1077. The permit was issued to Simpson after FWS completed an internal consultation process as required by Section 7(a)(2) of ESA. See id. The issuing agency must consult with FWS if the issuance of an incidental take permit may affect other species listed as threatened or endangered. See id. at 1075. Since FWS acted as both the issuing agency and the agency with which it must consult, it was necessary for FWS to conduct an internal consultation process following the subsequent listing of the marbled murrelet and the coho salmon as threatened species. See id. For a further discussion on the consultation process, see infra note 36. For a discussion on the terms of Simpson’s incidental take permit, see infra notes 22-23 and accompanying text.
acted pursuant to Section 10 of ESA, authorizing FWS to grant permits to applicants who may "take" an endangered or threatened species incidental to an otherwise lawful act.14 ESA defines "take" to include harassing, hunting, shooting or wounding an endangered or threatened species.15

The Environmental Protection Information Center (EPIC) is a non-profit organization involved in combating environmental degradation of California's North Coast.16 In 1999, EPIC named FWS as a defendant in their claim against Simpson.17 EPIC contended that FWS violated Section 7 of ESA by not adequately investigating the possible effects that Simpson's incidental take permit may have on two species subsequently listed as threatened or endangered.18 The two species at issue, the marbled murrelet and the coho salmon, inhabit Simpson's timberland along with the northern spotted owl.19 EPIC relied heavily on ESA Section 7(a)(2), requiring all federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."20 EPIC alleged that FWS had a duty, trig-


15. See 16 U.S.C. § 1532(19) (2000). Section 3 of ESA broadly defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Id.


17. See id. EPIC argued that FWS's failure to complete an internal consultation regarding the effects that Simpson's incidental take permit would have on the marbled murrelet and the coho salmon was grounds for an injunction of Simpson's logging activities. See id.

18. See EPIC II, 255 F.3d at 1074-75. Section 7 of ESA requires federal agencies to ensure that any action they authorize, fund or carry out will not likely jeopardize an endangered or threatened species. See 16 U.S.C. § 1536(a)(2) (2000).

19. See EPIC II, 255 F.3d at 1076. FWS added the marbled murrelet, a bird, to the threatened species list months after it issued Simpson its permit. See id. One resource states "[t]his species is still abundant, but qualifies as vulnerable owing to a rapid population reduction, equivalent to 31-48% in ten years, owing to a variety of threats. This decline will continue until the principal breeding habitat, the old-growth forest, is adequately protected." See United Nations Environment Programme, World Conservation Monitoring Centre, UNEP-WCMC Database, at http://www.unep-wcmc.org/species/animals/animal_redlist.html (last visited January 21, 2002). National Marine Fisheries Service [hereinafter NMFS] listed the coho salmon as threatened nearly five years after the marbled murrelet was listed as threatened. See EPIC II, 255 F.3d at 1076. For a discussion on the distinction between FWS and NMFS, see infra note 33.

20. 16 U.S.C. § 1536(a)(2) (2000). "Action" is defined as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies . . . ." Joint Regulations, Endangered Species Act, Definitions, 50

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gered when the two species were listed as threatened, to reinitiate internal consultation in order to evaluate possible effects that Simpson's logging activities may have on the marbled murrelet and coho salmon.  

Simpson applied for its incidental take permit in 1990 because the company was exposed to potential liability under Section 9 of ESA for "taking" northern spotted owls when FWS listed them as a threatened species.  

ESA required Simpson to submit a Habitat Conservation Plan (HCP) and an Implementation Agreement (IA) as part of its permit application. These two documents were incorporated into the incidental take permit when FWS approved Simpson's application. Simpson's HCP included reporting requirements, mitigation measures and monitoring by FWS and state

C.F.R. § 402.02 (2000). The issuance of an incidental take permit qualifies as agency action under Section 7(a)(2) according to the parties involved in the litigation. See EPIC II, 255 F.3d at 1075. If an agency determines that an action "may affect" an endangered or threatened species, 50 C.F.R. § 402.14 mandates that the agency must consult with either FWS or NMFS. See id. Title 50 C.F.R. § 402.16 further states that reinitiation of formal consultation is required where federal involvement or control over an action is retained or authorized by law. See Joint Regulations, Endangered Species Act, Consultation Procedures, Reinitiation of Consultation, 50 C.F.R. § 402.16 (2000). The Joint Regulations state:

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

Id. (emphasis added).

21. See EPIC II, 255 F.3d at 1076. FWS, according to EPIC, retained sufficient discretionary involvement or control over Simpson's spotted owl permit to trigger its duty to reinitiate consultation. See id.

22. See id. The permit was to last for thirty years and allowed Simpson to "take" up to fifty pairs of northern spotted owls during the first ten years. See EPIC I, 1999 WL 183606, at *2.

23. See EPIC II, 255 F.3d at 1076-77. The Habitat Conservation Plan [hereinafter HCP], which FWS requires in order to issue an incidental take permit, explains "(i) the impact which will likely result from [the] taking; (ii) what steps the applicant will take to minimize and mitigate such impacts; and . . . (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan." Id. at 1077 (citing 16 U.S.C. § 1539(a)(2)(A) (1994)). The Implementation Agreement [hereinafter IA] outlines the permit holder's plan to carry out its obligation in the HCP. See id.

24. See id. Simpson submitted the HCP on April 15, 1992 and the IA on September 17, 1992. See id. at 1076-77 nn.3, 4.
agencies. Further, Simpson provided research showing its intended measures would not have a significant adverse impact on the northern spotted owl and "its conservation program would contribute to the survival and recovery of that species." FWS retained some ongoing involvement and authority over Simpson's permit.

The District Court for the Northern District of California rejected EPIC's claims that provisions in the permit were sufficient to trigger FWS's duty to reinitiate internal consultation. Accordingly, the district court dismissed the case with prejudice for failure to state a claim. The Ninth Circuit affirmed the lower court's decision.

III. BACKGROUND

Congress enacted ESA in 1973 and the statute remains "our primary federal law for the protection of biological diversity." Congress intended "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation

25. See id. at 1077. Simpson's mitigation measures stated that it would "modify silvicultural systems as appropriate to ensure compatibility with the habitat requirements of other species found within Simpson's ownership that are considered sensitive by state and federal regulatory agencies." Id. at 1077. For a discussion of the EPIC II court's interpretation of this language, see infra notes 89-91 and accompanying text.

26. See EPIC II, 255 F.3d at 1077; see also Fisher, supra note 11, at 373 (commenting "[l]egislators believed that the adverse impacts of an incidental take could be offset by the benefits of developing a plan designed to set aside habitat necessary to ensure the long-term viability of an endangered species.").

27. See EPIC II, 255 F.3d at 1078. For example, FWS is entitled to review the permit ten years after its issuance and to evaluate whether Simpson has complied with its terms before allowing its logging operation to continue. See id. FWS may suspend the permit for "any significant violation or breach" at any time or may revoke it if a threatened species which is not the subject of the permit is taken. See id.

28. See id. The district court categorized the provisions as evidence that FWS only had "involvement in the continuing administration of the permit." Id.

29. See EPIC I, No. C 98-3740 CRB, 1999 WL 183606, at *8 (N.D. Cal. Mar. 30, 1999). The district court stated, "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." Id. at *3 (citing Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997)). The district court further stated, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (citing Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)).

30. See EPIC II, 255 F.3d at 1075.

of such endangered species and threatened species.”

Section 4 of ESA empowers the Secretary to determine whether a species is endangered or threatened based solely on the best scientific or commercial data available. The Secretary’s analysis focuses on several factors, including “the present or threatened destruction, modification, or curtailment of [a species’] habitat.”

A. Federal Agencies’ Duties Under ESA

Section 7 of ESA requires federal agencies, such as FWS and National Marine Fisheries Service (NMFS), to ensure that any action they authorize, fund or carry out “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”

ESA Section 7 also mandates federal agencies to consult with the Secretary to ensure that destruction or adverse modification does not result from federal action.

32. ESA, 16 U.S.C. § 1531(b) (2000). Congress desired to halt the rate at which various species of plants, fish and wildlife were being brought to the point of extinction as a result of uncurbed economic growth and development. See 16 U.S.C. § 1531(a)(1) (2000).

33. See 16 U.S.C. §§ 1533(a), (b)(1)(A) (2000). Both the Departments of Interior and Commerce have a role in implementing ESA. See John W. Steiger, The Consultation Provision of Section 7(A)(2) of the Endangered Species Act and Its Application to Delegable Federal Programs, 21 Ecology L.Q. 243, 246 (1994). The Secretary of the Interior acts through FWS and is responsible for terrestrial and freshwater species. See id. The Secretary of Commerce acts through NMFS and oversees marine species. See id. In this Note, the term “Secretary” refers to the Secretary of the Interior unless otherwise specified. Congress defined “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6) (2000). A “threatened species” is defined as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20) (2000).

34. 16 U.S.C. § 1533(a)(1)(A) (2000). The Secretary may not consider the economic impact when listing a species as endangered or threatened. See New Mexico Cattle Growers Ass’n v. Norton, 248 F.3d 1277, 1282 (10th Cir. 2001) (stating ESA specifically requires listing determinations be based on best scientific and commercial data available).


36. See Steiger, supra note 33, at 274 (citing Oliver A. Houck, The “Institutionalization of Caution” Under § 7 of the Endangered Species Act: What Do You Do When You Don’t Know?, 12 Envtl. L. Rep. 15,001 (1982)) (stating duty to consult has been called “heart” of ESA § 7). Consultation must be initiated when a federal action, such as issuing an incidental take permit, may affect a listed species. See Joint Regulations, Endangered Species Act, Consultation Procedures, Formal Consultation, 50 C.F.R. § 402.14(a) (2000). The consultation process ends with a biological opinion, issued by FWS or NMFS, stating whether the agency action is likely to jeopardize the listed species or adversely affect its critical habitat. See Steiger, supra note 33, at 252. Parties may not make “any irreversible or irretreivable commit-
Section 9 makes it unlawful to "take" an endangered species. The Secretary may issue incidental take permits under Section 10 of ESA "if [the] taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." ESA also allows any person to commence citizen-suits to enjoin any other person, including the federal government, for violations of the statute.

B. Supreme Court Decisions on ESA

The United States Supreme Court has decided several important cases interpreting the obligations and elements of ESA. In Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, the Supreme Court held that the Secretary of the Interior had not exceeded the scope of his authority when interpreting "harm" as it appears in the definition of "take" to include "significant habitat modification or degradation where it actually kills or injures wildlife." In Sweet Home, various parties who were dependent on the forest industries of Oregon filed suit to challenge the Secretary's


38. See id. at 708. The District Court for the District of Columbia held that the Secretary's interpretation was reasonable based on its finding "that Congress intended an expansive interpretation of the word 'take,' an interpretation that encompasses habitat modification." Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 806 F. Supp. 279, 285 (D.D.C. 1992). The Court of Appeals for the District of Columbia initially affirmed the district court's holding. See Sweet Home Chapters of Communities for a Great Or. v. Babbitt, 1 F.3d 1, 2 (D.C. Cir. 1993). The panel reversed that holding, however, after granting a petition for rehearing. See Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 17 F.3d 1463, 1472 (D.C. Cir. 1994).
regulation, claiming they had suffered economic harm when the
definition was applied to two species of birds. The Supreme
Court concluded that the Secretary’s interpretation was reasonably
based upon three elements: (1) the ordinary meaning of the word
“harm”; (2) the broad purpose of ESA to protect against harm that
Congress had attempted to remedy by enacting ESA; and (3) Con-
gress’ authorization of the issuance of permits for incidental tak-
ings. As a result of the holding in *Sweet Home*, the term “harm”
was extended to indirect as well as deliberate takings.

In *Bennett v. Spear*, the Supreme Court recognized a private
party’s right to file citizen-suits for violations of ESA. Two irriga-
tion districts brought suit against FWS and the Secretary challeng-
ing a decision to maintain minimum water levels in two reservoirs
to avoid adversely modifying the critical habitat of two endangered
fish species. The irrigation districts claimed that the decision was

43. See *Sweet Home*, 515 U.S. at 692. The two species of birds included in the
Secretary’s regulation were the red-cockaded woodpecker, listed as endangered,
and the northern spotted owl, listed as threatened. See id.

44. See id. at 697-700. The Supreme Court defined “harm” as “to cause hurt
or damage; injure.” Id. at 697 (citing WEBSTER’S THIRD INTERNATIONAL DICTIONARY
1034 (1966)). In determining the broad purpose of ESA, the Supreme Court re-
lied on its previous language that described ESA as “the most comprehensive legis-
lation for the preservation of endangered species ever enacted by any nation.” Id.
at 698 (citing TVA, 437 U.S. 153, 180 (1978)). For a discussion of TVA, see infra
notes 52-58 and accompanying text. Discussing Congress’ authorization of the is-
suance of permits for incidental takings, one commentator stated that, in *Sweet
Home*, the Supreme Court “recognized that Congress, through §10 of the ESA
Amendments of 1982, attempted to address the need to provide landowners with a
way to mitigate the potentially harsh effects of the ESA on the use and value of
their property.” Fisher, supra note 11, at 380.

45. See *Sweet Home*, 515 U.S. at 697-98. The respondents, in *Sweet Home*, ar-
gued that, unless the Supreme Court recognized an extension of the term “take”
to include indirect and deliberate takings, statutory terms would duplicate other
terms. See id.


47. See id. at 155 (recognizing ESA provision as possible avenue to remedy
violations of Act). Section 11 of ESA provides “[a]ny person who knowingly viol-
ates . . . any provision of this Act, or any provision of any permit or certificate
issued hereunder . . . may be assessed a civil penalty by the Secretary.” 16 U.S.C.

48. See *Bennett*, 520 U.S. at 159. The two types of fish whose critical habitats
were in danger of being adversely affected were the Lost River Sucker and the
Shortnose Sucker. See id. The Secretary of the Interior [hereinafter Secretary]
entered the litigation when it took over a reclamation project entitled the Klamath
Project. See id. FWS consulted with the Bureau of Reclamation [hereinafter BR],
the administrator of the Klamath Project, regarding possible effects on the two
species of fish. See id. Ultimately, FWS determined that the Klamath Project could
affect the two species and that maintaining a minimum level of water on the Clear
Lake and Gerber Reservoirs was the best alternative to avoid any jeopardy to the
species. See id. at 158-59.
not based on scientific or commercial data. The Supreme Court reversed the Ninth Circuit's dismissal of the claim and held that the irrigation districts had standing under the citizen-suit provision of ESA because their claims satisfied the zones of interest test. Consequently, the citizen-suit provision was expressly recognized as a possible remedy for ESA violations.

The Court's holding in *Tennessee Valley Authority v. Hill (TVA)* is evidence that the Supreme Court is unwilling to undermine Congress' ultimate goal in enacting ESA. The Supreme Court affirmed an injunction on the construction of the Tellico Dam, a federally-funded project, in order to avoid destruction of the critical habitat of an endangered fish. Congress had authorized the dam's construction prior to enacting ESA. Tennessee Valley Authority argued that because Congress had continued to fund the project after 1973, Congress implicitly repealed ESA, at least as to the Tellico Dam. The Supreme Court held that Congress had al-

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49. See id. The irrigation districts asserted that BR was following the same procedures for storing and releasing water from the two reservoirs throughout the twentieth century; nonetheless, BR followed FWS's Biological Opinion. See id.

50. See id. at 179. The district court dismissed the claim for lack of jurisdiction, reasoning that the petitioners' interests did not fall within the zone of interest ESA seeks to protect. See id. at 160-61. The Ninth Circuit affirmed the decision, holding that plaintiffs must allege an interest in the preservation of endangered species to have standing under ESA. See id. (citing Bennett v. Plenert, 63 F.3d 915, 919 (9th Cir. 1995)).

51. See Preeti S. Chaudhari, Comment, Bennett v. Spear: Lions, Tigers and Bears Beware; The Decline of Environmental Protection, 18 N. ILL. U.L. REV. 553, 564 (Summer 1998). Chaudhari stated that the Supreme Court based its recognition on two considerations: (1) that the environment is an area in which everyone has an interest; and (2) that the citizen-suit provision was enacted to encourage enforcement by citizens. See id.


53. See id. at 153 (commenting that Section 7 of ESA applies to ongoing, federally-funded projects even if projects were approved before ESA's enactment). One commentator noted that "[a]lthough Congress enacted [ ] ESA in 1973, the scope of ESA Section 7 was not fully realized until the Supreme Court's sweeping interpretation of the provision in *TVA*." Steiger, supra note 33, at 267 (footnotes omitted).

54. See TVA, 437 U.S. at 195. The snail darter and its critical habitat were at issue in *TVA*. See id. at 158. In the Court's analysis, the majority included the Secretary's warning that "[t]he proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat." Id. at 162 (emphasis omitted) (citing 40 Fed. Reg. 47,506 n.12).

55. See id. at 157 (noting Congress appropriated funds for Tellico Dam in 1967).

56. See id. at 156. The Congressional appropriations committee reports of 1975, 1976 and 1977 "stated the committees' belief that Section 7 did not apply to the dam, primarily because construction began before the snail darter was listed." See Steiger, supra note 33, at 268 (footnotes omitted). The Supreme Court rejected the Tennessee Valley Authority's attempt to support its argument with statements
lotted endangered species the utmost protection under ESA, which justified halting a federal project even though it was ninety percent complete.\(^{57}\) The TVA holding demonstrated that both Congress and the Supreme Court acknowledged that the value of threatened and endangered species cannot be calculated in dollar amounts.\(^{58}\)

C. The Ninth Circuit and ESA

The Ninth Circuit's ESA decisions focus on the circumstances giving rise to a federal agency's duty to reinitiate consultation regarding endangered or threatened species.\(^{59}\) The Ninth Circuit, in *Sierra Club v. Babbitt*,\(^{60}\) held that a federal agency was not required to reinitiate consultation with FWS because FWS did not retain sufficient discretion and involvement in a private agreement.\(^{61}\) In *Sierra Club*, the Bureau of Land Management (BLM) entered into a

from the House and Senate Appropriations Committees' Reports because the Court refused to assume that the Committees were advising federal agencies to ignore ESA. *See TVA*, 437 U.S. at 189. The *TVA* majority assumed that the "Committees believed that the Act simply was not applicable in this situation. But even under this interpretation of the Committees' actions, [the Court was] unable to conclude that the Act has been in any respect amended or repealed." *Id.*

57. *See TVA*, 437 U.S. at 184. Since Congress did not explicitly address whether a nearly-completed project would be halted if an endangered species was found in its path, the Supreme Court did not rely solely on the legislative history of ESA to determine the appropriate course of action. *See id.* The Court, however, resolved the issue based on the totality of congressional action. *See id.*

58. *See id.* at 187. The *TVA* majority refused to engage in a weighing process between a certain sum of money and the "incalculable" value of endangered species. The Court reasoned:

\[\text{neither the [ESA] nor Art[icle] III of the Constitution provides federal courts with authority to make such fine utilitarian calculations. On the contrary, the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.' Quite obviously, it would be difficult for a court to balance the loss of a sum certain — even $100 million — against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not.}\]

*Id.* at 187-88.

59. *Compare Sierra Club v. Babbitt*, 65 F.3d 1502, 1502-03 (9th Cir. 1995) (holding Bureau of Land Management's [hereinafter BLM] duty to reinitiate consultation with FWS was not triggered because sufficient discretion and involvement was not retained over private right-of-way agreement), *and EPIC II*, 255 F.3d 1073, 1073 (9th Cir. 2001) (holding FWS was not required to reinitiate internal consultation because sufficient discretion and involvement was not retained over private incidental take permit), *with Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1050 (9th Cir. 1994) [hereinafter *PRC*] (holding Forest Service had duty to initiate consultation with NMFS because Land Resource Management Plans [hereinafter LRMPs] are ongoing agency action).

60. 65 F.3d 1502 (9th Cir. 1995).

61. *Id.* at 1502-03 (holding BLM did not retain sufficient discretion and involvement over right-of-way agreement to trigger duty to reinitiate consultation with FWS).
private right-of-way agreement with a logging company in which BLM retained the right to object to the logging company’s activities if the proposed route: (1) was not the most direct; (2) if it substantially interfered with existing or planned facilities; or (3) if it resulted in excessive soil erosion. The Ninth Circuit concluded that Section 7 of ESA did not confer authority on BLM to reinitiate consultation with FWS since BLM had not originally retained sufficient discretion over the right-of-way agreement, because none of the circumstances involved the protection of subsequently listed protected animals. Consequently, Sierra Club demonstrated that the Ninth Circuit focused on the amount and the nature of discretion a federal agency retains to determine whether the duty to reinitiate consultation is triggered.

In contrast, the Ninth Circuit, in Pacific Rivers Council v. Thomas (PRC), required the Forest Service to reinitiate consultation with NMFS. The PRC court analyzed the effects of the Forest Service’s Land Resource Management Plans (LRMPs) on species of salmon that had been added to the threatened list. The Ninth Circuit determined that LRMPs constitute ongoing agency action based on their duration and the far-reaching effects on national forests. By requiring that the Forest Service reinitiate consultation with NMFS, the Ninth Circuit clarified that determinations regarding the duty to reinitiate consultation may be triggered if the action is deemed

62. See id. at 1505. A reciprocal right-of-way agreement is an exchange of grants between the United States government and a private landowner. See id. at 1505 n.4. Parties to these agreements may use each other’s existing roads and may construct roads over each other’s lands. See id.

63. See id. at 1509. Sierra Club provided the EPIC II court with the applicable test: “Where . . . the federal agency lacks the discretion to influence the private action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species.” Id.

64. For a discussion on how the Ninth Circuit weighed factors such as the nature and amount of discretion a federal agency retains in determining whether the duty to reinitiate consultation is triggered in EPIC II, see infra notes 83-87 and accompanying text.

65. 30 F.3d 1050 (9th Cir. 1994).

66. Id. The Ninth Circuit considered the far-reaching effects of LRMPs based on their time duration and expansive impacts on forests after their adoption as grounds for distinguishing LRMPs from incidental take permits. See EPIC II, 255 F.3d at 1080.

67. See PRC, 30 F.3d at 1051. The district court and the Ninth Circuit rejected the argument that LRMPs were not agency actions requiring consultation under Section 7(a)(2) because they were adopted before the salmon were listed as threatened. See id.

68. See id. at 1053 (rejecting Forest Service’s argument that LRMPs are only ongoing agency action when adopted, revised, or amended in future).
an ongoing agency action and the regulations have expansive impacts.\textsuperscript{69}

Further, in \textit{Natural Resources Defense Council v. Houston},\textsuperscript{70} the Ninth Circuit held that the Bureau of Reclamation (BR) violated ESA by not assessing the environmental impact of water contract renewals on endangered fish species.\textsuperscript{71} The \textit{Houston} court found that the renewal of water contracts constituted agency action under a broad definition.\textsuperscript{72} The Ninth Circuit held that BR's renewal of water contracts violated ESA Section 7 by not requesting formal consultation with FWS.\textsuperscript{73} Overall, the \textit{Houston} court's analysis focused on a federal agency's unique and affirmative duty to ensure that its actions did not jeopardize endangered species.\textsuperscript{74}

\section*{IV. NARRATIVE ANALYSIS}

\subsection*{A. Determining Standing and the Appropriate Test}

The Ninth Circuit applied \textit{de novo} review to the district court's dismissal of Plaintiffs' case for failure to state a claim.\textsuperscript{75} The \textit{EPIC II} court first determined that EPIC had standing to bring suit against FWS under the citizen-suit provision of ESA.\textsuperscript{76} This finding was primarily based on the Ninth Circuit's reading of the United States

\begin{itemize}
  \item[69.] \textit{See id.} at 1053-54. The Ninth Circuit rejected the Forest Service's contrary arguments that LRMPs did not constitute an ongoing agency action based on its interpretation of the statute. \textit{See id.} at 1053. The PRC court opined that Congress' intent on the precise issue was ascertainable and must be given effect. \textit{Id.} at 1054.
  \item[70.] 146 F.3d 1118 (9th Cir. 1998).
  \item[71.] \textit{See id.} at 1133. The government entered into forty-year water service contracts with non-federal defendants. \textit{See id.} at 1123. Congress mandated that renewals of the water contracts be "under stated terms and conditions mutually agreeable to the parties." \textit{See id.} (citing 43 U.S.C. § 485h-1(1) (2002)).
  \item[72.] \textit{See id.} at 1125 (citing \textit{TVA}, 437 U.S. 153, 173 (1978) (stating "negotiating and executing contracts is 'agency action.'").
  \item[73.] \textit{See id.} at 1127-28. The Ninth Circuit agreed with the district court's finding that Section 7(d) was violated because the forty-year renewal contract constituted "an irreversible and irretrievable commitment of resources." \textit{Id.} at 1128. Further, the district court found BR was not permitted to proceed in executing the contracts until FWS found that a protected species would not be affected. \textit{See id.}
  \item[74.] \textit{See id.} at 1127 (discussing BR's clear legal obligation to request formal consultation with NMFS despite NMFS's opinion that consultation was unnecessary).
  \item[75.] \textit{See EPIC II}, 255 F.3d 1073, 1078 (9th Cir. 2001). Section 706 of the Administrative Procedure Act [hereinafter APA] governs judicial review of administrative decisions involving ESA. \textit{See id.} Section 706 allows a court to set aside an agency action if that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (2000).
  \item[76.] \textit{See EPIC II}, 255 F.3d at 1079. For the text of the citizen-suit provision, \textit{see supra} note 39.
\end{itemize}
Supreme Court’s decision in Bennett.\textsuperscript{77} The Ninth Circuit disagreed with Simpson’s reading of Bennett, which argued that the citizen-suit provision of ESA does not apply to maladministration of ESA.\textsuperscript{78} The Ninth Circuit admitted that this element was part of Bennett’s final holding but distinguished the two cases in that EPIC sought to enforce FWS’s substantive obligation to ensure that FWS did not authorize any activity that would likely jeopardize a threatened species.\textsuperscript{79}

In its analysis to determine the applicable test, the Ninth Circuit focused on two pertinent cases, PRC and Sierra Club, ultimately concluding that Sierra Club governed.\textsuperscript{80} Further, the EPIC II court determined that FWS did not exercise enough federal control or involvement to trigger its duty to reinitiate internal consultation after the marbled murrelet and coho salmon were listed as threatened species because the permit only protected the northern spotted owl.\textsuperscript{81}

B. The Majority’s Analysis of EPIC’s Claim

Although the court disagreed with EPIC’s contention that PRC should govern, EPIC argued in the alternative that if Sierra Club provided the appropriate test, the test would be satisfied because FWS’s discretionary power could benefit the marbled murrelet and the

\begin{footnotesize}
\textsuperscript{77} Bennett v. Spear, 520 U.S. 154, 173 (1997). The Supreme Court stated that the citizen-suit provision “is a means by which private parties may enforce the substantive provisions of the ESA against regulated parties — both private entities and Government agencies.” \textit{Id.} at 173.

\textsuperscript{78} See EPIC II, 255 F.3d at 1079 (discussing Simpson’s reliance upon and mis-reading of Bennett in arguing that citizen-suit provision does not apply to EPIC’s suit because it falls within category of maladministration of ESA). For the statutory language pertaining to citizen-suits under ESA, see supra note 76.

\textsuperscript{79} See \textit{id}. The Ninth Circuit also stated that, even if it found EPIC did not have citizen-suit standing under ESA, EPIC would still have standing to sue under APA because EPIC sought to protect interests that clearly fall within the zone of interests test required by APA. \textit{Id.}

\textsuperscript{80} See EPIC II, 255 F.3d at 1079. The PRC court found that the Forest Service had the duty to reinitiate consultation with NMFS because LRMPs constitute ongoing agency action. See PRC, 30 F.3d 1050, 1050 (9th Cir. 1994). Conversely, the Ninth Circuit, in Sierra Club, held that BLM did not retain sufficient discretionary involvement and control over the right-of-way agreement with a private logging company to trigger the duty to reinitiate consultation with FWS. See Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995). For a discussion on the applicable test from Sierra Club, see supra note 63.

\textsuperscript{81} See EPIC II, 255 F.3d at 1079. EPIC’s counter argument was based upon its contention that FWS’s duty to reinitiate consultation was triggered when the Ninth Circuit's holding, in PRC, was combined with the plain language of 50 C.F.R. \textsection 402.16 (2000) and the subsequent listing of the marbled murrelet and the coho salmon. See \textit{id}. For the language of 50 C.F.R. \textsection 402.16 (2000), see supra note 20.
\end{footnotesize}
coho salmon. The Ninth Circuit rejected the argument that potential aid to an unlisted species would satisfy the Sierra Club test because FWS, like BLM in Sierra Club, could not influence the private party’s activities based upon the insufficient level of federal involvement or control it had retained. The Ninth Circuit analogized Simpson’s incidental take permit with the right-of-way agreement in Sierra Club, since agency authorization in both cases pertained to a private action with the federal agency having only a limited role. The Ninth Circuit reasoned that it rejected PRC as the controlling test due to the nature of the federal regulation and the fact that LRMPs are comprehensive management plans that govern agency action in forest planning decisions. “LRMPs have an ongoing and long-lasting effect even after adoption . . . [and] represent ongoing agency action.” The EPIC II court stated that the Forest Service had plenary control in the area of LRMPs which was not the case for FWS’s control over Simpson’s permit.

One of EPIC’s arguments regarding the test established in Sierra Club focused on the language of Simpson’s HCP. EPIC drew the Ninth Circuit’s attention to language in a section in the HCP concerning mitigation measures, stating “Simpson’s [Timber Harvesting Plans] . . . will be designed to . . . [m]odify silvicultural systems as appropriate to ensure compatibility with the habitat

82. See EPIC II, 255 F.3d at 1079. The EPIC II court noted that despite EPIC’s contention that FWS met the Sierra Club test, EPIC’s first line of attack was to avoid that test by arguing that PRC controlled the outcome. See id. at 1080.

83. See Sierra Club, 65 F.3d at 1505. Sierra Club involved a right-of-way agreement between BLM and a private timber company. See id. There were only three limited instances under which BLM could object to the timber company’s activities. See id. at 1509 n.10. None of the instances involved the protection of a threatened species. See id. The Sierra Club court considered the activities private action and concluded “the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species.” Id. at 1509.

84. See EPIC II, 255 F.3d at 1080. The district court outlined similarities that EPIC drew between Simpson’s incidental take permit and LRMPs. See EPIC I, No. C 98-3740 CRB, 1999 WL 183606, at *5 (N.D. Cal. Mar. 30, 1999). For example, EPIC focused on the time duration of the permit and LRMPs as a similarity and emphasized that FWS has a right to revoke the permit if Simpson fails to comply with its terms. See id. However, both the lower court and the Ninth Circuit rejected the purported analogies between Simpson’s permit and the LRMPs. See id. at *6; see also EPIC II, 255 F.3d at 1080.

85. See EPIC II, 255 F.3d at 1080 (distinguishing LRMPs from right-of-way agreement in Sierra Club).

86. PRC, 90 F.3d 1050, 1053 (9th Cir. 1994). The Ninth Circuit discussed how LRMPs are very comprehensive and govern a multitude of individual projects in national forests. See id.

87. See EPIC II, 255 F.3d at 1080 (discussing differences between LRMPs and incidental take permits).

88. See id. For an explanation on what an HCP entails, see supra note 23.
requirements of other species found within Simpson’s ownership that are considered sensitive by state and federal regulatory agencies.” The Ninth Circuit disagreed with EPIC’s contention that Simpson’s assurance extended to species that might be listed in the future and interpreted the language to mean that “Simpson will modify silvicultural systems to accommodate other currently listed species, not species that might subsequently be listed.” The EPIC II court observed that FWS did not retain discretionary control to create new requirements in the permit documents for the protection of species that might subsequently be listed as endangered or threatened.

The Ninth Circuit next addressed and rejected EPIC’s argument that other provisions in the HCP and IA authorized FWS to protect other species in addition to the northern spotted owl. The EPIC II court found that none of the provisions of the HCP or IA afforded FWS the authority to reinitiate internal consultation because FWS’s scope of control did not extend to species other than the northern spotted owl.

89. EPIC II, 255 F.3d at 1080-81. A section captioned “Overall Resource Management” in the HCP concerned mitigation measures. Id. at 1080. The HCP referred to Timber Harvesting Plans which were also designed to:

[r]etain 50 to 70 percent canopy and 50 percent ground cover along Class I and large Class II streams; . . . Protect ponds, swamps, bogs, and seeps as separate riparian areas and identify them . . . as habitat retention areas; . . . Protect resource values during site preparation through [various] measures; . . . [and] design, construct, and maintain roads to minimize impacts and the number of stream crossings through riparian areas.

Id. at 1077.

90. Id. at 1081 (referring to language EPIC cited as “one of numerous mitigation measures set forth in the HCP.”).

91. Id. EPIC also claimed that a statement in FWS’s Biological Letter undercut FWS’s position in the litigation and its interpretation of the permit documents. See id. According to the statement: “[r]einitiation of formal consultation is required if . . . a new species is listed or critical habitat designated that may be affected by this action.” Id. (quoting Biological Opinion Letter at 7). The EPIC II court interpreted this language as restating the requirements of 50 C.F.R. § 402.16 and ultimately concluded that FWS’s duty to reinitiate consultation still was not triggered under the circumstances because the agency did not retain sufficient discretionary involvement or control. Id.

92. See EPIC II, 255 F.3d at 1081. EPIC referred to provisions that “identify thresholds for the owl population that trigger plan modifications and corrective measures, and establish a contingency plan when thresholds are exceeded or unforeseen events occur.” Id. However, the Ninth Circuit still maintained that these provisions did not expand FWS’s scope of authority to any other species besides the northern spotted owl. See id.

93. See id. Other provisions that the EPIC II court rejected as evidencing an expansion of FWS’s scope of authority included the agency’s ability to suspend the permit for significant violations or breaches and its power to incorporate revisions to the HCP to ensure that the HCP’s conservation goals are met. See id.
Next, the Ninth Circuit analyzed EPIC’s argument that, under Houston, a permitting agency has a duty to reconssult, under Section 7(a)(2), if the permitting agency maintains “some” discretionary control.\textsuperscript{94} The Ninth Circuit rejected EPIC’s reading of Houston because Houston did not suggest that BR had continuing discretion to amend water contracts at any time in order to address the needs of endangered or threatened species.\textsuperscript{95}

As its final point, the EPIC II court decided that FWS did not have the right to amend Simpson’s permit for just cause under 50 C.F.R. § 13.23(b) if FWS had not retained sufficient discretion under the permit to impose such an amendment.\textsuperscript{96} The Ninth Circuit stated that the relevant regulation did not give FWS a power that it had not retained for itself.\textsuperscript{97} The Ninth Circuit explained that if it had come to a contrary conclusion, an agency would not need to retain any discretion or involvement in any permit it issued because the agency would always have a right to amend.\textsuperscript{98} In EPIC II, the Ninth Circuit nevertheless concluded that Simpson was not allowed to take the marbled murrelet or coho salmon without an incidental take permit for those species also.\textsuperscript{99}

\textsuperscript{94} See id. at 1082 (noting importance of continuing discretion). The Ninth Circuit, in Houston, held that BR was required to consult with NMFS because negotiating and executing water contracts constitute “agency action.” See Nat. Res. Def. Council v. Houston, 146 F.3d 1118, 1125-26 (9th Cir. 1998).

\textsuperscript{95} See EPIC II, 255 F.3d at 1082. The Ninth Circuit distinguished the water contracts involved in Houston with relative ease because the water contracts were statutorily mandated to be on “mutually agreeable” terms between BR and NMFS. See id. In concluding its discussion, the Ninth Circuit labeled Houston as “inapposite.” Id.

\textsuperscript{96} See id. The right to amend for just cause is reserved by FWS and may be exercised at any time during a permit’s term, upon written finding of necessity. See Amendment of Permits, 50 C.F.R. § 13.23(b) (2000).

\textsuperscript{97} See EPIC II, 255 F.3d at 1082 (refusing to grant FWS power under federal regulation that FWS did not retain previously).

\textsuperscript{98} See id. The Ninth Circuit explained that the requirement of 50 C.F.R. § 402.16 that the duty to reinitiate consultation is contingent upon retention of discretionary control or involvement would be rendered irrelevant if the Ninth Circuit adopted EPIC’s sought-after interpretation. See id.

\textsuperscript{99} See id. at 1083. The majority noted that Simpson submitted draft HCPs to NMFS and FWS in 1996 and 1997 for the marbled murrelet and coho salmon. See id. at 1076 n.2. At the time of the decision, Simpson’s applications for these incidental take permits were still pending. See id. Section 9 of ESA is a tool with which FWS or EPIC may seek relief against Simpson if Simpson’s activities threaten either the marbled murrelet or coho salmon with imminent harm. See id. at 1083. The EPIC II court offered the alternative option for FWS to revoke the permit on the grounds that Simpson’s activities would violate ESA if the two subsequently listed species were put in imminent danger. See id. (citing Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995)).
C. The Dissenting Opinion

In his dissent, Judge Nelson disagreed with the majority decision, stating it "contradict[ed] the plain language of [50 C.F.R. Section 402.16], misapplie[d the] holding in Sierra Club, and frustrate[d] the purpose of the consultation requirement." 100 The dissent's primary contention with the majority's analysis centered on whether FWS had substantial discretionary control over Simpson's permit. 101 The dissent argued that FWS retained sufficient involvement and control to mandate its duty to reinitiate internal consultation. 102 The majority avoided this fact, according to the dissent, by "creating a new requirement that the agency explicitly reserve the right to implement measures to protect new species in the permit." 103 The dissent agreed with EPIC's reading of the plain language of 50 C.F.R. § 402.16 as requiring only that FWS have some discretionary control over Simpson's permit and that a new species listed after the permit's issuance may be affected by the permit. 104 According to the dissent, "[S]ection 7 of [ ] ESA and 50 C.F.R. Section 402.16 require FWS to determine whether . . . [the marbled murrelet or coho salmon are] likely to be harmed before [FWS] continues to authorize Simpson's activities." 105

The dissent focused on IA's language granting FWS authority to suspend the permit in certain situations. 106 The dissent further

100. EPIC II, 255 F.3d at 1083 (Nelson, J., dissenting). Judge Nelson considered aiding and protecting endangered species as per the purpose of the consultation requirement. See id. The plain language of 50 C.F.R. § 402.16 only requires some discretionary control over a permit because requiring more control than is explicitly necessary would contradict the statute. See id.


102. See EPIC II, 255 F.3d at 1083 (Nelson, J., dissenting) (discussing how, until this point, FWS's duty to reconsult was triggered if consultation could benefit subsequently listed species).

103. Id. (Nelson, J., dissenting). The majority contested the dissent's accusation by asserting that, rather than requiring an incidental take permit to explicitly grant FWS the power to protect the marbled murrelet and coho salmon, the majority only required the permit to reserve some discretion for FWS to act to protect any other threatened or endangered species. See id. at 1081 n.6.

104. See id. at 1083 (Nelson, J., dissenting). Judge Nelson remarked that 50 C.F.R. § 402.16 did not mention any additional requirements nor specify that an agency's discretionary control be of a certain nature to trigger the consultation requirement. See id.

105. Id. at 1083-84 (Nelson, J., dissenting) (noting majority's acknowledgment that FWS had some discretion over permit and that two listed species may be affected).

106. See id. at 1084 (Nelson, J., dissenting) (arguing that, under Sierra Club test, FWS has duty to reinitiate consultation because "it could take steps which 'inure to the benefit' of the coho salmon and marbled murrelet.").
argued that FWS's authority was not limited to protecting only the northern spotted owl.107 Instead, the language of the HCP should be given its intended broad meaning.108 The dissent opined that even if the majority's narrow reading of the HCP's language was given effect, the marbled murrelet would be covered because it was considered sensitive before FWS issued Simpson's permit.109

The dissent contested the majority's assertion that FWS had no right to amend the permit due to the language incorporated into the permit, overriding any contrary agreement.110 The dissent rejected the majority's conclusion that here, as in Sierra Club, consultation would be a meaningless exercise.111 In contrast to the majority, the dissent gave considerable weight to the fact that BLM had far more limited discretion in Sierra Club and there was no connection to newly listed species as distinguishing grounds between the two cases.112 Additionally, unlike the incidental take permit, the right-of-way agreement did not have an equivalent clause allowing amendment.113

Judge Nelson argued that FWS could benefit the marbled murrelet and the coho salmon by reinitiating internal consultation.114 FWS's failure to do so, therefore, violated Section 7 of ESA and the Administrative Procedure Act (APA).115 The dissent sug-

107. See EPIC II, 255 F.3d at 1084 (Nelson, J., dissenting) (citing HCP's language as evidence that FWS's authority was not limited to northern spotted owl).
108. See id. (Nelson, J., dissenting). The dissenting judge argued to place the marbled murrelet and the coho salmon under the ambit of "other species of concern." Id.
109. See id. (Nelson, J., dissenting). The language of the HCP required Simpson to "ensure compatibility with the habitat of other species . . . that are considered sensitive by state and federal regulatory agencies." Id. "The marbled murrelet was considered 'sensitive' by federal and state regulatory agencies as early as June 1991" before FWS issued Simpson's permit. Id.
110. See id. (Nelson, J., dissenting). The dissent referred to language that was incorporated into the permit which stated FWS "reserves the right to amend any permit for just cause at any time during its term, upon written finding of necessity." Id.
111. See id. at 1085 (Nelson, J., dissenting) (stating consultation would not be futile because FWS could take measures that would benefit marbled murrelet and coho salmon).
112. See EPIC II, 255 F.3d at 1085 (Nelson, J., dissenting) (comparing limited circumstances available to BLM to halt construction to wider discretion available to FWS to suspend permit).
113. See id. (Nelson, J., dissenting) (emphasizing limited authority of BLM compared to broader authority of FWS).
114. See id. (Nelson, J., dissenting) (stating FWS could suspend harvesting until Simpson developed method that would mitigate damage).
115. See id. (Nelson, J., dissenting). The dissent argued that FWS violated Section 7 by failing to ensure that FWS, as a federal agency, did not authorize action that was likely to jeopardize the continued existence of two listed species. Id. The
gested that the majority seemed concerned about whether Simpson had sufficient notice that FWS might exercise its discretion for the benefit of the newly listed species. The dissent contended that Simpson’s expectations were irrelevant because FWS had an affirmative duty under Section 7 to ensure that listed species would not be harmed before it acted or authorized any activity. Further, the plain language of the regulation and Simpson’s own commitments in the permit application were sufficient to supply Simpson with adequate notice. The dissent asserted that the majority did not appreciate the unique duty that Section 7 imposed because the majority discussed alternative remedies available to EPIC. The dissent concluded that by not requiring Simpson to conform with conditions the company had accepted to make its application more attractive, the Ninth Circuit allowed the permit to be rewritten and granted Simpson extra assurances for which it had not bargained in the original agreement.

V. CRITICAL ANALYSIS

A. Going Beyond the Plain Language

The EPIC II majority consistently justified its holding on FWS’s insufficient discretion regarding Simpson’s logging activities. The plain language of the regulation, however, does not require or specify that the discretion be “sufficient.” A statute’s plain lan-

basis for the dissent’s APA argument was that FWS had “acted without observance of the procedure required by law” by failing to reinitiate formal consultation. Id. The dissent’s APA analysis focused on 5 U.S.C. § 706(2)(A). See id.

116. See EPIC II, 255 F.3d at 1085 (Nelson, J., dissenting) (stating such concern obscures consultation requirement’s purpose of protecting endangered and threatened species that may be affected by federal action).

117. See id. at 1085-86 (Nelson, J., dissenting) (describing prohibited actions under Sections 7 and 9 of ESA).

118. See id. at 1086 (Nelson, J., dissenting) (negating majority’s concern that Simpson did not have adequate notice).

119. See id. (Nelson, J., dissenting). The dissent did not believe that EPIC would find a remedy after the species were injured and that EPIC should not have to wait for an injury to occur before it could bring suit or seek an injunction if Section 7’s duty to consult had been properly followed. See id.

120. See id. (Nelson, J., dissenting). The dissent criticized the outcome of allowing Simpson’s activities subject to certain conditions but ultimately not enforcing these conditions. See id.

121. See EPIC II, 255 F.3d at 1079-82 (applying Sierra Club test to hold FWS did not retain enough discretion to trigger duty to reinitiate internal consultation).

guage is the first tool used in its interpretation. By not strictly following this basic statutory interpretation approach, the majority exposed itself to criticism.

The dissent correctly pointed out that the plain language of the regulation does not require discretion to be of a certain nature. The majority's interpretation, however, presents a more rational and prudent approach than the dissenting opinion because the purpose of the permit is given effect under the majority view. After spending the initial time and money necessary for the permit's issuance, FWS can protect itself from having to do so again through narrow and vague provisions. The Ninth Circuit thus correctly held that certain requirements must be met before FWS will be required to interfere with commercial activities that do not conflict with the purpose of the permit.

B. Interpretation of Case Law

Ultimately, the majority correctly found that Sierra Club governed the case because the incidental take permit was issued to a private party and did not constitute ongoing agency action. The EPIC II court's analysis of the Sierra Club's test, however, is problem-

123. See Steiger, supra note 33, at 266 (commenting "[a]ny analysis of the meaning of a statute must begin, of course, with its words.").

124. See EPIC II, 255 F.3d at 1083 (Nelson, J., dissenting). In his dissent, Judge Nelson commented upon the majority's contradiction of the plain language of 50 C.F.R. § 402.16. See id. For a discussion of the dissenting opinion, see supra notes 100-20 and accompanying text.

125. See id. (Nelson, J., dissenting) (arguing majority acknowledged FWS retained some discretion over permit, thereby satisfying regulation's plain language requirement); but see Steiger, supra note 33, at 279. Steiger's analysis of Section 7 can be applied to Section 10 because neither regulation nor its preamble explain the meaning of "discretionary Federal involvement or control." See id.; see also Deborah Freeman, Reinitiation of ESA § 7 Consultations Over Existing Projects, 8 Nat. Resources & Env't 17, 18 (Summer 1993) (commenting "it is commonplace that a literal interpretation of the words of a statute is not a always a safe guide to its meaning.") (internal citations omitted).

126. For a detailed discussion of the differing opinions, see supra notes 82-120 and accompanying text.

127. See Fisher, supra note 11, at 400. Fisher discusses the four-fold increase in HCP applications due to increases in land development and listings under ESA. See id. at 399. Fisher argues FWS's funding and staffing is not matched to the increase in HCP applications, impeding FWS from quickly processing the applications. See id. at 400.

128. See Freeman, supra note 125, at 19 (arguing reinitiation should not be required for previously permitted projects under Section 7 without retained jurisdiction provision in approvals or underlying statute).

129. See EPIC II, 255 F.3d at 1079 (concluding that Sierra Club provides appropriate test). For a discussion of the facts and holding of Sierra Club, see supra notes 60-64 and accompanying text.
atic. BLM, unlike FWS, is not a federal agency that specifically deals with protecting endangered and threatened species. Therefore, FWS should be held to a higher standard when implementing measures to benefit protected species in a private agreement. By not discussing the important difference between FWS's purpose and BLM's purpose, the majority seems to ignore FWS's critical role in protecting endangered and threatened species.

The EPIC II majority failed to fully explain why Houston was inapposite. The Ninth Circuit should have analyzed its prior holding in Houston more thoroughly because the case dealt with agency action and an agency's affirmative duty to reinitiate consultation in some situations. If the EPIC II court had analyzed Houston more thoroughly, its opinions would have been more consistent. The majority spent a great deal of time discussing Sierra Club and PRC; its cursory mention of Houston arguably may have given the impression that Houston was more difficult to distinguish than PRC.

C. Should FWS Have Done More?

While the case law in EPIC II was properly interpreted, a legitimate question arises whether FWS should have suggested that Simpson include the coho salmon and the marbled murrelet in the

130. See Steiger, supra note 33, at 256-57. Steiger discusses FWS and NMFS's expertise in assessing human impacts on wildlife, which agencies like BLM may lack. See id. Steiger states "[t]he assessment of biological data is entrusted to FWS and NMFS, which Congress created primarily to protect and conserve wildlife and which consequently have developed expertise in assessing human impacts on wildlife." Id.

131. See id. at 257. "Congress sought to eliminate the temptation for biological decision-making to be treated superficially or to be influenced by nonbiological factors" when it required agencies to consult with FWS. Id.

132. For a further discussion of the purposes and responsibilities of FWS regarding endangered species, see supra note 33 and accompanying text.

133. See EPIC II, 255 F.3d at 1082. In a single paragraph, Judge Thompson recounted the facts and the Ninth Circuit's holding of Houston and stated EPIC's basis for relying on the case. See id. Judge Thompson simply concluded, "[w]e do not read Houston as supporting EPIC's argument . . . Houston is inapposite." Id.

134. For a discussion of Houston's facts and holding, see supra notes 70-74 and accompanying text.

135. See EPIC II, 255 F.3d at 1080-83. The EPIC II court may have wanted to downplay the difference in time duration of the agency actions; LRMPs last for fifteen years. See id. at 1080. The water renewal contracts in Houston lasted for forty years. See Nat. Res. Def. Council v. Houston, 146 F.3d 1118, 1123 (9th Cir. 1998). The duration of Simpson's incidental take permit, therefore, is more analogous to the facts of Houston than PRC. See EPIC II, 255 F.3d at 1077 (stating Simpson's permit lasted for thirty years).
original permit. A chapter in the Handbook, published jointly by FWS and NMFS, discusses "[o]ne of the most common questions asked by [Section 10] permit applicants. . . . 'What happens if a new species is listed after [a] [S]ection 10 permit has been issued?" Congress grappled with the issue as well, but its conclusions seem to apply only to species which were addressed in the approved HCP. The marbled murrelet and the coho salmon were not addressed in the HCP, making Congress' findings inapplicable to them. The EPIC II court should have considered whether Simpson should have included the marbled murrelet and the coho salmon in the incidental take permit or whether any alternatives were possible. The Ninth Circuit could have discussed this aspect of the case in dictum for guidance in future disputes. In this respect, the majority opinion is too narrow, especially given the circumstances of the substantial amount of land affected by the permit, the amount of wildlife conceivably at risk of being affected, and the guidelines FWS sets for itself.

136. See Handbook, at 4-1, at http://fws.gov.hcp/hcpbook.htm (last updated July 25, 2001) (establishing guidelines for FWS when setting up HCPs). For a time frame of the listing of these species, see supra note 19 and accompanying text. In the Handbook, FWS and NMFS state:

[the inclusion of proposed, candidate, or unlisted species in an HCP is voluntary and is the decision of the applicant. The Services should explain to any applicant the benefits of addressing unlisted species in the HCP and the risks of not doing so, and should strongly encourage the applicant to include as many proposed and candidate species as can be adequately addressed and covered by the permit.


137. See id. (referring to treatment of unlisted species as "crucial issue" for HCP and Section 10 of ESA incidental take permits).

138. See id. When debating the 1982 amendments to ESA, Congress stated: the Committee intends that conservation plans may address both listed and unlisted species. . . . In the event that an unlisted species addressed in the approved conservation plan subsequently is listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act.

Id. (emphasis added).

139. But see EPIC II, 255 F.3d at 1084 (Nelson, J., dissenting). The dissent argued the marbled murrelet was considered "sensitive" prior to the issuance of the permit. See id. The dissent's argument would therefore seemingly fail Congress' test. For a discussion of Congress' test, see supra note 138.

140. See Handbook, at 4-4, at http://fws.gov.hcp/hcpbook.htm (last updated July 25, 2001) (offering alternatives that applicants, like Simpson, could have considered regarding marbled murrelet and coho salmon, such as addressing species to extent information is available while agreeing to reduced coverage under permit in absence of further study or data).

141. See Handbook, at 4-3, at http://fws.gov.hcp/hcpbook.htm (last updated July 25, 2001) (stating applicant may decide whether or not to address unlisted
VI. IMPACT

ESA’s goal will not be realized if courts follow the Ninth Circuit’s lead of affording commercial activities more protection than endangered and threatened species.142 *EPIC II* will lead courts to afford federal agencies, like FWS, better protection in litigation against organizations like EPIC.143 The Ninth Circuit did not penalize FWS for not suggesting that other species be included in Simpson’s permit; therefore, FWS will likely not take any further steps to protect other species that are not included in an incidental take permit or in an HCP.144 Other circuit courts will face this question as more permits are issued and even more species are listed as endangered and threatened.145 If other circuits follow the Ninth Circuit’s holding, FWS will retain discretionary powers very limited and specific to one species while courts will require nothing more.146

Some courts will criticize FWS for giving too much consideration to economic and commercial activities when it issues incidental take permits.147 However, it is Congress’ responsibility, not the judicial responsibility of the courts, to return FWS’s focus to protecting

species based on likelihood of listing in foreseeable future); but see Fisher, *supra* note 11, at 382 (arguing substantial time-consuming biological investigations may be necessary to address unlisted species because considerably less is known about unlisted species).

142. See Fisher, *supra* note 11, at 378. “Congress intended that the [a]mendment’s actual effect would, in the aggregate, provide more effective protection of endangered species.” *Id.; see also TVA, 437 U.S. 153, 184 (1978).* The Supreme Court commented that Congressional intent when enacting ESA “was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the [ESA], but in literally every section of the statute.” *Id.*

143. See *Sierra Club*, 65 F.3d 1502, 1509 (9th Cir. 1995). If the Ninth Circuit applies the *Sierra Club* test in future litigation, FWS will not have to reinitiate consultation unless it will inure to the benefit of a protected species. For a discussion of this test, see *supra* note 63 and accompanying text.

144. For a discussion of treatment of unlisted species by Congress and FWS, *see supra* note 138 and accompanying text (maintaining permit applicant may voluntarily include proposed and candidate species but this is not mandated).

145. See Fisher, *supra* note 11, at 373-74. Fisher argues the number of HCPs developed and implemented between 1982 and 1991 was “wholly inadequate to alleviate the ever-burgeoning tensions created by the growing number of listed species.” *Id.* at 373. By 1991, over 650 species had been added to the endangered species list but FWS only approved eleven HCPs. See *id.* Presumably, more parties will apply for permits, as Simpson did, following a species’ listing to avoid violating Section 9. *See EPIC II*, 255 F.3d at 1076 (stating Simpson’s logging activities exposed company to potential liability under Section 9 following owls’ listing).

146. For a discussion of how this interpretation worked to FWS’s advantage in *EPIC II*, *see supra* notes 88-93 and accompanying text.

147. For a discussion of the functions that FWS and NMFS serve, *see supra* note 33 and accompanying text.
ing endangered and threatened species with legislation.\textsuperscript{148} Further, if there is little likelihood that other species will be listed in the near future, private actors will avoid including multiple species in their applications for incidental take permits.\textsuperscript{149}

Furthermore, if a claim is brought against FWS on similar facts, courts within the Ninth Circuit's jurisdiction will require FWS to take only those actions to protect other species that it took in \textit{EPIC II}.\textsuperscript{150} While the \textit{EPIC II} holding has far reaching and possibly negative repercussions for the protection of endangered and threatened species, it is Congress that has allowed this effect by not using clear, plain language in the statute and regulations.\textsuperscript{151} Other courts, however, will agree with the dissent and decide that FWS is not fulfilling its obligation to protect all species requiring its aid, regardless of the nature of discretion retained.\textsuperscript{152} In sum, the holding of \textit{EPIC II} will allow FWS to continue protecting itself but not species left from permit applications.

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\textsuperscript{148} See id.

\textsuperscript{149} See \textit{Handbook}, at 4-1 - 4-4, at http://fws.gov.hcp/hcpbook.htm (last updated July 25, 2001) (discussing voluntariness of including species and factors that contribute to species being excluded from permit).

\textsuperscript{150} For a discussion of the Ninth Circuit's analysis of permit provisions insufficient to trigger the duty to reinitiate consultation, see \textit{supra} notes 25, 27, 93 and accompanying text.

\textsuperscript{151} See Steiger, \textit{supra} note 33, at 279 (observing regulations and preambles governing Sections 7 and 10 of ESA do not give an explanation of "discretionary Federal involvement or control.").

\textsuperscript{152} See \textit{EPIC II}, 255 F.3d at 1083 (Nelson, J., dissenting) (arguing plain language of regulation mandates reinitiation of consultation).