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The Whooping Crane, the Platte River, and Endangered Species Legislation

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Comment

The Whooping Crane, The Platte River, And Endangered Species Legislation*

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> In the grim aspects of the features in the whole trim of the birds as they move, silently now, there is a dignity and a sense of unconquered wildness of an obstinate will to survive. We watch them in admiration and with hope. In spite of its glowing reality, it is like a brief and unexpected look at the World as it was in the beginning.[1]

I. INTRODUCTION

The whooping crane, perhaps more than any other species, symbolizes the tremendous public awareness and concern that exists in the United States for the preservation of endangered species. Successful recovery of the bird instills a vigorous faith in the endangered species program and engenders a gratifying national consensus in man's dedication to all wildlife. Former Secretary of the Interior, Stewart Udall,

* To Tyrone—a good quail dog but a better friend.

1. R. ALLEN, THE WHOOPING CRANE 87 (1952).

characterized the relationship between the whooping crane and the American public as "a love affair—between a civilized sophisticated Nation and an enormous, elusive bird."[2] Udall continued, "[we,] the people, who slaughtered the bison and exterminated the passenger pigeon, have had a shift of conscience in the last fifty years and have made the preservation of rare species of wildlife one of our national conservation purposes."[3] Indicative of America's "shift of conscience" has been the slow, but consistent, increase in the whooping crane population. The species' numbers sank to as low as 15 in 1941,[4] but by January of 1985 totalled 140 birds.[5] This Article analyzes the legal protection enjoyed by the whooping crane both under the federal Endangered Species Act of 1973 (ESA)[6] and the Nebraska Nongame and Endangered Species Conservation Act (NESCA).[7] Significantly, this Article focuses on current threats to the species posed by proposed Nebraska water projects and whether existing legal protection is indeed sufficient. The Article concludes with an analysis of Nebraska's new comprehensive water bill, LB 1106, which amended NESCA.

II. THE WHOOPING CRANE—A GENERAL DESCRIPTION

Unlike the passenger pigeon whose mighty flocks once darkened the skies and broke down large trees with the weight of their nests[8] or the enormous herds of bison that swept across the great plains,[9] the whooping crane has never been abundant. During the early to mid-1800s the maximum population of the species was estimated to be 1300.[10] The breeding range historically extended from central Illinois, northwestward through the northern half of Iowa, western Minnesota, northeastern North Dakota into Southern Manitoba and Saskatchewan. The winter range included Louisiana, northeastern Mexico, and most of the Gulf of Mexico coastline.[11]

Beginning in the latter half of the 1800s the whooping crane popu-

2. F. MCNULTY, THE WHOOPING CRANE 9 (1966).
3. *Id.*
4. Binkley & Miller, *Population Characteristics of the Whooping Crane, Grus Americana*, 61 CAN. J. ZOOL. 2768, 2769 (1983).
5. W. Bailey, Nebraska Game and Parks Commission Biological Opinion on Little Blue - Catherland Project 12 (Feb. 8, 1985).
6. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1543 (1985)).
7. NEB. REV. STAT. §§ 37-430 to -438 (1984).
8. C. CADIEUX, THESE ARE THE ENDANGERED 3 (1981). Some observers witnessed flocks of passenger pigeons that migrated by at a rate of 300 million birds per hour. Roosting colonies could extend forty miles long and several miles across. P. EHRLICH & A. EHRLICH, EXTINCTION 115 (1981).
9. P. EHRLICH & A. EHRLICH, *supra* note 8, at 116.
10. Binkley & Miller, *supra* note 4, at 2768.
11. U.S. FISH & WILDLIFE SERV., WHOOPING CRANE RECOVERY TEAM, WHOOPING CRANE RECOVERY PLAN 11 (1980).

lation suffered a dramatic decrease. Human settlement over much of the northern plains caused significant habitat modification. Wild prairie, potholes, and marshes were quickly converted to hay and grain production. Unrestricted hunting also took its toll.[12] This wholesale destruction of habitat and a reckless disregard for wildlife endangered many species. For example, there were only fifty white-tail deer in Nebraska in 1900.[13] The once-common trumpeter swan nearly became extinct.[14] Whoopers were forced northward to more secure territory, but their numbers continued to drop. By 1894, the species had deserted its United States breeding grounds and abandoned southern Canada by 1922.[15] Interestingly, the unique biological characteristics of the species also contributed to its demise. Whoopers mate for life, and sexual maturity occurs as late as the fourth to sixth year. In addition, only two eggs are normally produced in each clutch per year.[16] These factors and others inhibited rapid growth in the population both in pre-settlement days and more significantly in recent times as wildlife biologists struggled to save the bird.

Today, migratory whooping cranes breed only in the northern part of Wood Buffalo National Park in Northwest Territories, Canada.[17] The region lies between the headwaters of the Nyarling, Sass, Klewi, and Little Buffalo rivers. It is a vast and untouched wilderness covering 17,300 square miles—an area larger than the total combined area of Massachusetts, Connecticut, Rhode Island, and Delaware. Thousands of square miles of open marsh, high morainic ridge, and Arctic prairie make up Wood Buffalo—much of which has never been seen on the ground by mankind.[18] To the north, numerous potholes lined with forest-green bulrushes and separated by narrow stands of spruce, willow, and birch, characterize the remote corner of the park used by the whooping cranes.[19]

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12. *Id.* at 22-23.
13. Interview with Ross A. Lock, Wildlife Biologist with the Nebr. Game & Parks Comm., Lincoln, Nebr. (Jan. 22, 1986).
14. U.S. FISH AND WILDLIFE SERV., *supra* note 11, at 19.
15. THE WHOOPING CRANES' NORTHERN BREEDING GROUNDS xiv (R. Allen ed. 1956).
16. U.S. FISH & WILDLIFE SERV., *supra* note 11, at 19.
17. *Id.*
18. THE WHOOPING CRANE'S NORTHERN BREEDING GROUNDS, *supra* note 15, at 33.
19. *Id.* at 35-36. Allen's work concerns the dedicated international search for the breeding grounds of migratory whoopers that occurred between 1945 and 1955. It is a moving tribute to the many conservationists and laymen that aided in the intensive effort. Allen commented on the discovery of the remote breeding grounds:

> "The most dedicated joint detective job in U.S.-Canadian history—ornithological division that is—has been the post war search for the tall, beautiful and all-but vanished whooping crane. If *Grus Americana's* nesting area can be found, the region can be made an inviolate sanctuary and a number of other thoughtful measures attempted to save the species—once a sky-filling race but now reduced to hardly two dozen birds.

Ordinarily, the whooper arrives at Wood Buffalo in April. To anyone so fortunate to witness its arrival, the bird is a grand and wondrous creature—a sure intimation to the primitive beauty of nature. It has an enormous seven and one-half foot wingspan. Aside from being one of the rarest birds in North America, the whooping crane is the tallest. Males stand nearly five feet tall and weigh approximately sixteen pounds. Adult plumage is a satin, snowy white except for the wingtips which are dipped in black. The bird's head is often held high and crowned with several black feathers. The exposed skin of the face is colored raw crimson, but the whooper's eyes are cold, yellow, and bright, an "eloquent testimony of his fierce, untamed, and fearless nature."[20]

Once established at Wood Buffalo, adult mating pairs construct nests of roundstem bulrush with each nest separated from the other by approximately 10.8 kilometers. Eggs are laid in late April or early May and hatching occurs one month later.[21] The newly hatched chick, in stark contrast to its regal parents, is only eight inches tall.[22] However, young whoopers will reach full flight in about three months. Immature birds are initially cinnamon brown but gradually obtain the white plumage during the first two years.[23]

Family units and cranes that did not mate leave Wood Buffalo between September 12 and September 26 of each year.[24] The birds migrate south to their wintering grounds at Aransas National Wildlife Refuge on the southern coast of Texas.[25] Normally, most of the cranes reach Aransas by mid-November. At this time, the refuge is frequently flooded by heavy fall tides and rains creating extensive tidal flats and offering the birds an abundant supply of crabs and clams on which to forage.[26] In addition to loafing and fattening on the salt flats of Aransas, whoopers will engage in spectacular courtship dances signifying the beginning of a new breeding cycle.[27] Also, young whoopers reared during the past breeding season will be driven from

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> From Canada's remote Northwest Territories now comes a dispatch . . . which should thrill bird fans and conservationists roughly as much as the conquest of Everest and the four-minute mile thrilled adventurers, mountain climbers and track fans: the whooping cranes' nesting grounds have been found and North America's greatest ornithological puzzle has been solved."

Id. at xiii (quoting SPORTS ILLUSTRATED, July 18, 1955).

20. R. ALLEN, ON THE TRAIL OF VANISHING BIRDS 31 (1957).
21. U.S. FISH & WILDLIFE SERV., *supra* note 11, at 15.
22. *Id.* at 3.
23. *Id.*
24. *Id.* at 16.
25. R. ALLEN, *supra* note 20, at 40. The refuge was established in 1937.
26. *Id.* at 44.
27. *Id.* at 57.

territory ruled by the parents. Robert Porter Allen, former research director of the National Audubon Society explains:

> The proud regard of his parents, especially the tender care of his mother, has been such an unwavering flame that it must come as a decided shock to him when she abruptly turns on him one day and, with head lowered in the attacking posture, runs at him and sends him flapping off in frightened bewilderment. It is time to break the tie, to cut him loose from her apron! The youngster is driven off again and again, for he can't believe it's true. At length, accepting this new state of things, he sulks on his own pasture, finding his own tidbits, as he is now perfectly capable of doing.[28]

III. THE MIGRATION ROUTE

The migration route of the whooping crane between Wood Buffalo and Aransas is a rather straight path passing through northeastern Alberta, southwestern Saskatchewan, northeastern Manitoba, western and central North and South Dakota, central Nebraska, Kansas, Oklahoma, and east-central Texas.[29] The migration may extend over a period as long as forty-four days or as short as thirteen days.[30] Generally, the birds migrate in small flocks. Family units ordinarily fly separately, but some birds will cover the distance alone.[31] Although thousands of anxious birdwatchers and wildlife officials keep vigil during this period, the migration route is not without peril. Whoopers face a 2100 mile distance and a host of natural dangers ranging from curious farm dogs to late blizzards to treacherous electrical wires.[32] Author Charles Cadieux echoes the familiar frustration of many wildlife lovers:

> Although guarded by two nations, watched over by scientists of many disciplines, worried over by millions of people, and wintering at two separate wildlife refuges, the whooping crane is still a long way from survival as a species. . . . The choice of the whooping crane as a symbol of man's efforts to save endangered species was a poor one. The odds against its survival have always been very long. They still are. How discouraging to have the very symbol of the endangered species struggle perish! But there is hope that man's concern will enable the whooper to survive. That hope gives us reason for working even harder to ensure that survival becomes reality.[33]

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28. *Id.* at 58-59.
29. U.S. FISH & WILDLIFE SERV., *supra* note 11, at 11.
30. *Id.* at 17. Some birds will remain in Aransas throughout the summer.
31. *Id.* at 16-17.
32. Robert Porter Allen describes one letter from a Saskatchewan farmer:
    > He told of certain of his neighbors who were outspoken in their opinion that all this fuss about the whooping crane was a lot of nonsense. They proposed that the best way to put a stop to it would be to kill the few birds that remain and then forget the whole thing, thus saving the taxpayers a lot of money and, they implied, making them much happier about life in general. They likewise announced their intention of using their guns at every opportunity to promote such results.

    R. ALLEN, *supra* note 20, at 74-75.
33. C. CADIEUX, *supra* note 8, at 12. Most whoopers winter at Aransas National Wild-

Whooping cranes stop each night of the migration to rest and feed. But, they do require a particular habitat to satisfy their nightly roosting needs. The birds favor an open expanse of shallow water in lakes, rivers, and other wetlands—sites which typically provide protection from predators.[34] An evaluation of ten documented whooping crane roosting sites on rivers in the United States indicates several uniform characteristics:

> 1. Wide channel - 9 of the 10 sites were [at least] 155 [to] 365 meters (510 - 1,200 feet) wide.
> 2. Slow flow - a flow rate of approximately 1-4 mph at the roost site.
> 3. Shallow water - all sites were less than 30cm (12 inches) deep and 6 of 9 sites were 5 - 15cm (2 - 6 inches) deep.
> 4. Fine substrate, usually sand.
> 5. Unvegetated.
> 6. Good horizontal visibility unobstructed from river bank and at least a couple of hundred meters upstream and downstream (or to bend in the river). Whooping cranes are extremely wary birds and tend to avoid roosting in areas surrounded too closely with tall vegetation.
> 7. Good overhead visibility. No tall trees, tall or dense shrubs, or high banks in the immediate vicinity of the roost.
> 8. Close proximity, usually 1.6 km (1 mile) to suitable feeding sites. River feeding sites may be important in satisfying certain nutritional needs.
> 9. The presence of a certain type of sandbar in the immediate vicinity of the roost that would serve as a loafing and feeding area. Sandbars should have a gradual slope in to the water (1-2 degree slope), little topographic relief (less than 0.3 m)(1 foot), little or no vegetation and no banks over a few centimeters high.
> 10. Isolation from human development such as houses, roads, and railroad tracks of at least 0.4 km (0.25 miles).[35]

IV. THE IMPORTANCE OF NEBRASKA TO THE WHOOPING CRANE

In Nebraska, the Platte River, running in a west-east direction through much of the state, has historically provided the necessary characteristics required by whooping cranes for satisfactory roosting. In addition to whooping cranes, the river has long been a haven for other waterfowl, including geese, ducks, and sandhill cranes. It is a shallow, wide river. Sandbars appear and then drown the next year as the water slowly shifts and carves new channels.[36] Whoopers rest comfortably in shallows or on sandbars scoured smooth and clean by

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life Refuge on the southern coast of Texas. Several whoopers which are reared by wild sandhill cranes winter at Bosque del Apache National Wildlife Refuge in New Mexico. This foster parent program was implemented by the U.S. Fish and Wildlife Service. *Id.* at 9.

34. W. Bailey, *supra* note 5, at 13.
35. *Id.* at 13-14.
36. For a compassionate narrative of the Platte, see P. JOHNSGARD, THE PLATTE: CHANNELS IN TIME (1984).

steady currents.[37] Rich wet meadows lining the river contain a healthy supply of invertebrate foods (worms and snails), foods that provide the essential calcium and protein required for future successful reproduction.[38] Indeed, the wet meadows act as a natural barrier. The drone of heavy automobile traffic or the loud sounds of agricultural machinery are kept at bay, while whoopers and their waterfowl brethren find respite from the long journey.

The importance of the Platte River to whooping cranes has been officially recognized in Washington, D.C. The Secretary of the United States Department of Interior has designated the river between Lexington and Denman, Nebraska as "critical habitat" under Section 7(a) of the federal Endangered Species Act.[39] But noting the tremendous loss of other suitable wetlands in Nebraska and along the entire migration route, the Platte has become even more critical to the whooping crane's survival. It is clearly an essential stopover point for the bird's migration, offering distinct habitat requirements. In fact, the Platte is the first major stopping place en route to Canada.[40]

Unfortunately, the Platte is in trouble. Major upstream diversions have decreased normal flows by over seventy percent.[41] Currently, fifteen reservoirs have been constructed along the river and its Nebraska tributaries. Over 567,000 acres of land are now being irrigated from these sources as nearly two million acre-feet of water are diverted into forty canals and twenty-five streambank pipes.[42] Additional projects are in the planning stage.

The Platte, which once spanned over one to three miles in width, will often be dry in parts of Nebraska—dry of water, dry of fish, and dry of suitable waterfowl habitat.[43] Presently, the river between Lex-

37. *Id.* The author writes:

> Love for the Platte River is something like deep appreciation for the works of Thomas Hart Benton; it does not come immediately. [There] are no towering mountains to lift the spirit, and there are no raging cataracts or waterfalls to overwhelm the ear and eye. Instead, there is a sense of familiarity, of immediate if superficial recognition, and of simple middle-class Americanism about the scene. Both the Platte and Benton's works provide a kind of popular respectability and lack of ostentation that offer a strong sense of association and security but not of unrestrained excitement or grandeur.

Id. at xi.

38. W. Bailey, *supra* note 5, at 17.
39. 50 C.F.R. § 17.95 (1985).
40. R. ALLEN, *supra* note 20, at 61.
41. P. JOHNSGARD, *supra* note 36, at 82.
42. *Id.* at 82-83.
43. *Id.* at 82, 84. Other detrimental effects include: destruction of subirrigated and wet meadows near the river, reduction of river-dependent gravel-pit lake levels, deterioration of water quality due to return seepage of nitrate-rich waters, and reduction of flood control capacity as a result of vegetational encroachment on previously free-flowing channels. *Id.*

ington and Denman still offers the kind of habitat required by migratory whooping cranes, but most of the Platte in Nebraska is now unsuitable for whoopers.[44] River channels have shrunk considerably. Cottonwoods, willows, and other vegetation have developed on many sandbars and riverbanks. With a decrease in flows, wet meadows adjacent to the river have also disappeared; between Overton and Chapman, Nebraska, wet meadows declined from 81,000 acres in 1938 to 52,600 acres in 1976.[45] Due to the drastic change in the river's character, the survival of many wildlife species dependent on the Platte is in question. However, to evaluate any threat to the whooping crane caused by current and proposed depletion of Platte River flows, it is important to understand federal and state legislation designed to protect the bird and its habitat.

V. FEDERAL ENDANGERED SPECIES LEGISLATION

Out of widespread public concern for the very survival of many rare species of plants and animals, Congress enacted the Endangered Species Act of 1973 (ESA).[46] The ESA outlined a comprehensive federal program designed to protect these species. It established a procedure by which species of plants and animals were determined to be endangered or threatened with extinction. It also delineated how habitat considered critical to the survival of endangered species was to be classified.[47] It prohibited individuals from importing or exporting listed species; taking listed species within the United States, its territorial seas, or the high seas; and delivering, selling, possessing, carrying, transporting, or shipping listed species in interstate or foreign commerce.[48] The ESA also required federal agencies to insure that any action authorized, funded, or carried out by such agency was not likely to jeopardize endangered species or their habitat.[49] In fact, all federal agencies were required under the Act to consult the Department of Interior before initiating projects.[50] Moreover, the ESA allowed any person to file suit for violations of the Act or to compel the Department of Interior to carry out the provisions of the measure.[51] Finally, the ESA provided for stiff criminal and civil penalties for all violations.[52]

The ESA was directly preceded by the Endangered Species Protec-

44. W. Bailey, *supra* note 5, at 15-16.
45. *Id.* at 17.
46. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-34 (1985)).
47. S. YAFFEE, PROHIBITIVE POLICY 13 (1982).
48. 16 U.S.C. § 1538(a)(1) (1982).
49. Endangered Species Act, § 7(a)(2), 16 U.S.C. § 1536(a)(2) (1982).
50. Endangered Species Act, § 7(a)(2), (b), 16 U.S.C. § 1536(a)(2), (b) (1982).
51. S. YAFFEE, *supra* note 47, at 40.
52. 16 U.S.C. § 1540(a)(1) (1982).

tion Act of 1966[53] and the Endangered Species Conservation Act of 1969.[54] The 1966 Act was the first federal law that focused on species extinction. It required the Secretary of Interior to "provide a program for the conservation, protection, restoration, and propagation of selected species of native fish and wildlife . . . threatened with extinction . . . ."[55] In addition, Congress authorized the Secretary to use existing land acquisition authority to purchase endangered species habitat. Appropriations were limited to $5,000,000 per year with a maximum of $750,000 to be used for any one area.[56] Certainly this amount was inadequate, but many individuals were hopeful of the new bill and adamant in its necessity. Senator Warren Magnuson commented:

> There is no question in my mind that we should pass the bill in order that it will be an accomplishment—and an important one—of the 89th Congress.
> . . .
> Please indulge me a moment to express a bit of philosophy. Generally speaking, *man has done an exceptionally poor job in his stewardship over the earth and the living things on it.* We have polluted the water and the atmosphere with harmful and distasteful waste, the land with potent and long-lasting pesticide poisons. We have scarred the soil, burned the forests, and overgrazed the prairies. . . .
> All of us are familiar with the tragic losses of the passenger pigeon, the heath hen and the Carolina parakeet, and others. We know how close the buffalo, the grizzly, the whooping crane and the prairie chicken have come to extinction. . . . In my opinion, future generations of Americans well can hold us accountable and derelict if we allow them to vanish from the earth, never to return.[57]

Although the 1966 Act reflected an admirable Congressional concern for endangered species, the Act did have several weaknesses. It did not prohibit the transportation, sale, or exchange of endangered species in interstate commerce. It also failed to establish any pervasive federal agency obligation to protect such species.[58] Finally, the Act mentioned nothing of rare plants and non-vertebrate species threatened by chronic habitat destruction.

In response to these and other problems, Congress passed the Endangered Species Conservation Act of 1969.[59] The 1969 Act remedied several deficiencies in the 1966 Act. It recognized the global problem

53. Endangered Species Protection Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (repealed 1973).
54. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, §§ 1-6, 83 Stat. 275 (repealed 1973).
55. Endangered Species Act of 1966, § 1(a), 80 Stat. 926 (repealed 1973).
56. S. YAFFEE, *supra* note 47, at 40.
57. 112 CONG. REC. 19,766 (1966) (emphasis added).
58. Field, *The Evolution of the Wildlife Taking Concept from its Beginning to its Culmination in the Endangered Species Act*, 21 HOUS. L. REV. 457, 475 (1984). The Act required only that the Interior, Agriculture, and Defense Departments "seek to protect" endangered species. *Id.*
59. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, §§ 1-6, 83 Stat. 275 (repealed 1973).

of wildlife extinction by prohibiting the importation of endangered species into the United States.[60] It also extended protection under the 1966 Act to reptiles, mollusks, amphibians, and crustaceans.[61] Unfortunately, the 1969 Act did not protect any endangered species taken on private lands.[62] The 1966 Act prohibited takings on lands within the National Wildlife Refuge System;[63] but neither act prevented the actual killing of endangered species on private lands. Certainly, the 1969 Act and its predecessor were well-intended efforts to alleviate the plight of rare wildlife, but neither act offered the kind of protection necessary to stop the inevitable extinction of many species. As a result, Congress repealed both measures and enacted the most ambitious and comprehensive wildlife legislation in American history, the Endangered Species Act of 1973.[64]

VI. THE ENDANGERED SPECIES ACT OF 1973

The ESA represented tremendous Congressional commitment to the preservation of endangered species. An environmental consciousness had swept the country in the early 1970s. Political leaders motivated by greater public interest took note of the deficiencies of prior endangered species legislation in passing the measure.[65] Indeed, President Nixon in his Environmental Message of February 8, 1972, stated that "even the most recent act to protect endangered species, which dates only from 1969, simply does not provide the kind of management tools needed to act early enough to save a vanishing species."[66] The newly formulated ESA, however, rectified several glaring weaknesses of earlier legislation. Primarily, it expanded the obligation of federal agencies to avoid jeopardizing the existence of endangered species. As a result, all federal agencies were subject to the ESA.[67] The Act also prohibited takings of endangered species on all lands in the United States, its territorial waters, and the high seas.[68] More importantly, the ESA mandated a national policy of preservation. Broadly construed, the Act was designed to conserve all ecosystems essential to endangered and threatened species, promote the conservation of such species, and fulfill the purposes of international treaties and conven-

60. S. YAFFEE, *supra* note 47, at 42.
61. *Id.*
62. Field, *supra* note 58, at 476.
63. Endangered Species Act of 1966, § 4(c), 80 Stat. 926, 928 (repealed 1973).
64. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-43 (1985)).
65. S. YAFFEE, *supra* note 47, at 47.
66. *Id.* at 49.
67. Endangered Species Act, § 7(a)(2), 16 U.S.C. § 1536(a)(2) (1982).
68. Endangered Species Act, §§ 9(a)(1)(B), (C), 16 U.S.C. §§ 1538(a)(1)(B), (C) (1982). *See infra* notes 120-46 and accompanying text.

tions of the United States.[69] To do this, the ESA was characterized by three key sections: (1) the listing process, (2) the federal agency obligation under Section 7, and (3) the taking restrictions under Section 9.

A. The Listing Process

The ESA requires the Secretary of Interior to list all species threatened or endangered.[70] An endangered species is one in danger of extinction throughout all or a significant portion of its range.[71] A threatened species is one that is likely to become endangered.[72] The determination of whether to list a species is based on a number of factors: (1) present or threatened destruction or modification of the range or habitat of the species, (2) overutilization of the species for commercial and other purposes, (3) disease or predation harming the species, (4) adequacy of existing regulatory mechanisms, and (5) other natural or man-made factors affecting the species' continued existence.[73] The Secretary's determination must be made on the best scientific and commercial data available.[74] In addition, when listing a species, the Secretary is required to concurrently specify any habitat considered to be critical to the species.[75] However, the Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of including the area.[76] Not only may the Secretary specify critical habitat under the ESA, he may also develop recovery plans for the conservation of listed species, utilize existing land acquisition authority, and enter into cooperative agreements with any state in order to implement the purposes of the ESA.[77]

As mentioned earlier, the whooping crane has been designated as an endangered species by the Secretary of the Interior.[78] Its Platte River stopover point has also been designated as critical habitat essential to the species' survival. A Whooping Crane Recovery Plan created under the auspices of the ESA has as its prime objective the upgrading of the whooper to non-endangered status. The Plan specifically calls for the increase of the Wood Buffalo—Aransas population to at least forty nesting pairs and the establishment of two additional, separate and self-sustaining populations of at least twenty nesting pairs each.[79]

69. 16 U.S.C. §§ 1531(b), 1532(3) (1982).
70. 16 U.S.C. § 1533(c) (1982).
71. 16 U.S.C. § 1532(b) (1982).
72. 16 U.S.C. § 1532(20) (1982).
73. 16 U.S.C. § 1533(a)(1) (1982).
74. 16 U.S.C. § 1533(b)(1)(A) (1982).
75. 16 U.S.C. § 1533(a)(3)(A) (1982).
76. 16 U.S.C. § 1533(b)(2) (1982).
77. 16 U.S.C. § 1533(f) (1982).
78. 50 C.F.R. § 17.11 (1982).
79. U.S. FISH & WILDLIFE SERV., *supra* note 11, at 45.

Of course, in addition to the long range goals of the plan, the whooping crane and its Nebraska habitat should be entitled to the immediate protection of the ESA's Sections 7 and 9. Unfortunately, courts and Congress have struggled to interpret both sections. As a result the full extent of ESA protection is unclear.

B. Intra-agency Obligation—Section 7

Section 7 of the ESA requires that all actions undertaken by federal agencies comport with the purposes of the Act. The obligation imposed upon federal agencies has proven to be one of the most effective provisions in the statute, forcing all agencies to be cognizant of the endangered species problem. It specifically requires that all federal agency action be planned so as not to jeopardize endangered or threatened species. In fact, once a species has been listed and its critical habitat designated, agencies must review their actions, not only to determine potential harm, but also to take affirmative steps to preserve endangered species.[80] After this review is completed, federal agencies are required to consult with the Secretary of Interior if any action may affect an endangered species.[81] Where the Secretary determines that jeopardy to a listed species is unavoidable, a review procedure may be implemented in order to seek an exemption from the ESA.[82] The Endangered Species Committee comprised of cabinet officials may grant an exemption if the Committee finds that (1) there are no reasonable and prudent alternatives to the proposed action, (2) the action is in the public interest, as the project's benefits outweigh the benefits of the alternative cause of action, and (3) the action is of regional or national significance.[83] The proponent of the exemption, however, typically has a substantial burden in acquiring the exemption.

Generally, interagency cooperation under Section 7 has ameliorated many potential conflicts. Most agency actions that could affect an endangered species are modified to avoid violation of the ESA. Development agencies, such as the Army Corps of Engineers or the Bureau of Reclamation, do not want to stymie projects by litigating with angry intervenors, so they frequently consult and cooperate with the Secretary of Interior. However, different priorities exist. The Fish and Wildlife Service may seek to preserve wildlife and wildlife habitat. The Army Corps of Engineers may wish to build dams and dredge rivers. Inevitably, problems occur.

Although Section 7 has engendered cooperation between federal

80. 16 U.S.C. § 1536(a)(1), (2) (1982).
81. 16 U.S.C. § 1536(a)(3), (b) (1982).
82. 16 U.S.C. § 1536(e)-(h) (1982).
83. 16 U.S.C. § 1536(h)(1)(A) (1982). *See also* 16 U.S.C. § 1536(h)(1)(B) (1982).

agencies, the judiciary has witnessed endangered species litigation. Of course, the most famous endangered species case was *Tennessee Valley Authority v. Hill*.[84] In this famous or infamous "snail darter" case, the United States Supreme Court ruled that an agency action which would destroy the designated critical habitat of the snail darter would violate the agency's obligation under Section 7. As a result, the Court enjoined further construction of the Tellico Dam on the Little Tennessee River. Although the dam was later completed pursuant to subsequent congressional legislation, many people throughout the United States characterized the case as an absurd conflict between a $150 million hydroelectric dam and a two inch minnow.[85] That simplistic characterization was false. The dam was clearly a multi-million dollar fiasco that eventually destroyed rural communities, verdant farmland, and a lovely free-flowing river that ran through the heart of Tennessee. The endangered species argument was merely a last ditch effort to halt construction of an unnecessary project.[86]

In 1967, the Tennessee Valley Authority (TVA) a wholly-owned public corporation of the United States, began construction of the Tellico Dam.[87] Upon completion, the project would have inundated nearly 17,000 acres and created a deep reservoir approximately thirty miles in length.[88] In 1973, however, a University of Tennessee ichthyologist discovered a new species of perch, the snail darter,[89] that inhabited only the stretch of the Little Tennessee that would be impounded.[90] In 1965, the species was listed as an endangered species. The Secretary of Interior designated the Little Tennessee[91] as critical habitat in 1976.[92] Subsequently, the Secretary directed all federal agencies, including TVA, to halt completion of the dam and any other action that would harm the snail darter. Nevertheless, Congress continued to appropriate money for the project until the Sixth Circuit Court of Appeals enjoined further work on the dam.[93]

On appeal, the United States Supreme Court affirmed the lower court's judgment in granting the injunction.[94] Noting that Congress

84. 437 U.S. 153 (1978).
85. Erdheim, *The Wake of the Snail Darter: Insuring the Effectiveness of Section 7 of the Endangered Species Act*, 9 ECOLOGY L.Q. 629, 635 (1981); Plater, *Reflected in a River: Agency Accountability and the TVA Tellico Dam Case*, 49 TENN. L. REV. 747, 748 (1982).
86. For a bitter attack on the Tellico project, see Plater, *supra* note 85, at 747.
87. Tennessee Valley Authority v. Hill, 437 U.S. 153, 157 (1978).
88. *Id.*
89. *Id.* at 158.
90. *Id.* at 161.
91. 50 C.F.R. § 17.11(h) (1980).
92. 50 C.F.R. § 17.95(e) (1980).
93. Hill v. Tennessee Valley Authority, 549 F.2d 1064, 1069 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978).
94. Tennessee Valley Authority v. Hill, 437 U.S. 153, 195 (1978).

had already expended more than $100 million for the Tellico project,[95] the court ruled: "The plain intent of Congress in enacting this statute [ESA] was to halt and reverse the trend toward species extinction, whatever the cost."[96] Indeed, Section 7 commanded all federal agencies to insure that their actions, albeit authorized, funded, or carried out by them, did not *jeopardize* endangered species[97] or their critical habitat; "[T]his language admits of no exception."[98] Closing the gates on Tellico would drown the entire known habitat of the snail darter, obviously jeopardizing the species. Finally, Congress had viewed the value of endangered species as "incalculable". As a result, the Court had no right to balance the loss of any sum—even $100 million plus—against an incalculable value.[99]

The decision in *Tennessee Valley Authority v. Hill* saved the snail darter and its habitat for only a short period. The ESA was amended in 1978 to allow federal agencies, state governors, and permit applicants to seek exemptions from Section 7 whenever there is an "irresolvable conflict."[100] Senator Baker of Tennessee, who had ridiculed *Tennessee Valley Authority v. Hill* as an abuse of the ESA, co-drafted the amendments to grant flexibility to the statute and particularly to the snail darter "problem."[101] Baker argued that the ESA should apply only to "nonfrivolous" species[102]—a scientific designation which has not yet been officially recognized by wildlife specialists or endangered species. Accordingly, an exemption would be granted to a project of "regional or national significance" if there were no reasonable and prudent alternatives, and the project's benefits "clearly outweigh[ed] the benefits of alternative courses of action."[103] This review procedure would be conducted by the Endangered Species Committee.[104]

Ironically, on January 23, 1979, the Committee denied an exemp-

95. *Id.* at 172.
96. *Id.* at 184.
97. *Id.* at 173.
98. *Id.* at 187-88.
99. 16 U.S.C. §§ 1532(112), 1536(g)(1) (1982).
100. The ESA defined an "irresolvable conflict" as, "a set of circumstances under which, after consultation as required in [ESA section 7(a)], completion of such action would [violate ESA section 7(a)(2)]." 16 U.S.C. § 1532(11) (Cumm. Supp. I 1981) (repealed 1982).
101. Platter, *supra* note 85, at 778.
102. *Id.* at 771 n.83.
103. 16 U.S.C. § 1536(h)(A) (1982).
104. The Committee is composed of the Secretaries of Agriculture, Army, Interior; the Administrators of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration; the Chairman of the Council of Economic Advisors; and a Presidential appointee from an affected state. 16 U.S.C. § 1536(e)(3) (1982).

tion for Tellico.[105] It reasoned that the tremendous costs of the project (past and future) simply were not justified by its benefits. Unfortunately, Congress passed the Energy and Water Development Appropriations Act in 1979 which exempted the Tellico Dam from all federal law. A local Representative from Tennessee had attached a rider to the annual public works appropriation bill and in forty-two seconds the Little Tennessee was doomed.[106]

Although *Tennessee Valley Authority v. Hill* was a bittersweet victory for endangered species advocates, the case provided valuable precedent for an expansive reading of Section 7. It decided that "actions authorized, funded or carried out" applied to every decision made by a federal agency. Therefore, any federal participation in a development project, including a Platte River endeavor, would trigger Section 7 and its mandatory language. All federal agencies are required to insure that their actions do not jeopardize an endangered species or its critical habitat.[107] *Tennessee Valley Authority v. Hill* did not concentrate on the definition of "jeopardize" since all parties agreed that the Tellico Dam would harm the snail darter. However, it is reasonable to conclude that the Court would give an expansive interpretation to this term as well.

The importance of Section 7 and *Tennessee Valley Authority v. Hill* to the whooping crane and its Nebraska habitat was readily evident in *Nebraska v. Rural Electrification Administration*.[108] In this case, the defendant, the Rural Electrification Administration (REA), had made loan guarantees to the private sponsors of the Missouri Basin Power Project. The project, consisting of a three-unit, coal-fired electric generating station and the Grayrocks Dam and Reservoir,[109] was being constructed along the Laramie River. The Laramie is a tributary to the Platte. Another defendant, the Army Corps of Engineers (Corps), had issued a dredge-and-fill permit associated with the construction of Grayrocks.[110] The plaintiffs, the State of Nebraska and several conservation groups, brought suit to enjoin the project.[111] The plaintiffs argued that Grayrocks would deplete Platte River flows and harm the critical habitat of the whooping crane. They also maintained that the federal agencies had not satisfied the consultation requirements of Section 7 of the ESA. Although the REA and the Corps stressed that the project would not harm the whooping crane,[112] the

105. Plater, *supra* note 85, at 779.
106. *Id.* at 783.
107. In 1979, "do not jeopardize" was changed to "is not likely to jeopardize." Act of Dec. 28, 1979, Pub. L. No. 96-159, § 4(1), 93 Stat. 1225, 1226.
108. 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978).
109. *Id.* at 1157.
110. *Id.*
111. *Id.*
112. *Id.* at 1171.

Fish and Wildlife Service (FWS) had concluded that there was a possibility of adverse consequences.[113] The FWS had not completed a formal ESA study by the time of the suit.[114]

The United States District Court enjoined further construction on Grayrocks based on the ESA and other grounds.[115] The court reasoned that the REA had not met its burden of insuring that its actions would not jeopardize an endangered species. Despite the FWS's indolence, the court concluded that

> the difficulty is that the Endangered Species Act places the burden upon the agencies who are authorizing, funding, or carrying out programs to insure that those programs do not jeopardize endangered species or the habitat of the species. The burden is not upon someone else to demonstrate that there will be an adverse impact. It may well be true that REA was justified in concluding that no adverse impact had been demonstrated, but the question is whether it has met its burden of *insuring* that there will be no jeopardy. Unless REA has done that, it has not complied with the Act. That is true, even though the whooping crane issue was first raised well after many of the plans had been made and a great deal of money already spent.[116]

The court applied the same analysis to the Corps permit. Since the Corps had insufficient information to insure that the project would not endanger critical habitat, it could not proceed until it had acquired that information.[117] Moreover, the Corps had no discretion under Section 7. It was not the Corps' responsibility to determine whether saving the whooping cranes' habitat was "in the best public interest." Congress had already determined that it was. Indeed, as the court quoted *Tennessee Valley Authority v. Hill*:

> Agencies in particular are directed by . . . the Act to use all methods and procedures which are necessary to preserve endangered species. . . . In addition, the legislative history undergirding Section 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.[118]

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113. *Id.* at 1170.
114. *Id.* The Secretary of Interior may delegate authority under the consultation requirement of the ESA to the Fish and Wildlife Service.
115. *Id.* at 1181.
116. *Id.* at 1171.
117. *Id.* at 1173.
118. *Id.* (quoting Tennessee Valley Authority v. Hill, 437 U.S. 153, 185 (1978)). In an interesting twist, the Missouri Basin Power Project (owners of Grayrocks) agreed in an out-of-court settlement to release specified flows into the Platte, and to establish a $7.5 million trust fund to maintain critical habitat. The Platte River Whooping Crane Trust is a non-profit organization with the responsibility of administering the trust fund. The court settlement allowed the trust funds to be used to scientifically study, to acquire rights to water or land, and to manage water and land for the benefit of migratory birds. The trustees have already acquired Morman Island Crane Meadows, a 1900-acre wet meadow area adjacent to the Platte. The trustees have also begun mechanical and chemical removal of

The decision in *Nebraska v. Rural Electrification Administration* reinforced the overall strength of the ESA and the Supreme Court's interpretive mandate of Section 7. The agency-proponent of a potentially hazardous federal action now has the burden of showing that no harmful consequences will occur. Correspondingly, the duty to insure against "jeopardization" appears to encompass a broad range of federal activity despite the uncertain effects on critical habitat. If a federal agency cannot demonstrate that its actions will not harm a listed species, the agency will fail to carry its burden.

As a result of *Tennessee Valley Authority v. Hill* and *Nebraska v. Rural Electrification Administration*, any federal involvement in a Platte River project should trigger Section 7. Thus, if the Corps conducts dredging activity on the Platte or if the Bureau of Reclamation finances an irrigation project using Platte River water, the ESA should provide protection to the whooping crane and its habitat. Moreover, any federal involvement in the several proposed Platte River[119] projects will result in a Section 7 duty. However, the lessons of *Tennessee Valley Authority v. Hill* are clear. Exemptions, although difficult to obtain, are possible. Strong political pressure can also emasculate the protection of the ESA. Finally, it is critical to remember that Section 7 applies strictly to federal action. It is not pertinent to solely private efforts or state-supported projects.

C. The Taking Prohibition—Section 9

Section 9 of the ESA contains the "taking" prohibitions of the Act. It provides:

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to (A) import any such species into, or export any such species from the United States; (B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas; (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C) . . . .[120]

"Person" is broadly defined as an "individual, corporation, partnership, trust, association or any other private entity or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government."[121] Thus, Section 9 feasibly applies to any person or entity in the United States. "Take" is defined as "harass, harm, pur-

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encroaching vegetation on many riverbanks and sandbars. Interview with Ross A. Lock, Wildlife Biologist with Nebr. Game & Park Comm., Lincoln, Nebr. (Jan. 22, 1986).

119. *See infra* notes 194-209 and accompanying text.

120. 16 U.S.C. § 1538(a)(1) (1982).

121. 16 U.S.C. § 1532(13) (1982).

sue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[122]

Section 9 was initially not recognized as a potent element of the ESA. Potentially, however, Section 9 is only limited by the definition of "take". Certainly, if an individual shot and killed a roosting whooping crane, Section 9 would have been violated. The more difficult issue arises when that same individual drains a wet meadow adjacent to the whooper's Platte River stopover point. Can it be said that a taking has occurred? Although the harm is not as immediate, a succession of drainings would destroy critical habitat and leave the species without adequate roosting areas.

The courts first focused on Section 9 and its available protection in *Palila v. Hawaii Department of Land and Natural Resources*.[123] In *Palila*, the plaintiffs brought an action on behalf of the palila, a small finch-beaked bird, against the Hawaii Department of Land and Natural Resources (DLNR). The palila had been listed as an endangered species since 1967,[124] inhabiting only the limited mamane-naio forest along the ridge of Mauna Kea.[125] The bird's population had plummeted in recent years as a result of chronic deforestation by feral sheep and goats. The state maintained herds of the sheep and goats for sport-hunting.[126] The plaintiffs asserted that the DLNR's failure to eliminate these animals resulted in further habitat destruction and constituted a Section 9 taking.[127] The United States District Court ruled for the plaintiffs on a summary judgment.[128] The Ninth Circuit Court of Appeals affirmed.[129]

In rendering its judgment, the Circuit Court initially examined the statutory definition of "take." Noting that a "taking" included "harass" or "harm" the court concluded that the DLNR had failed to prevent significant habitat modification.[130] "Harass" was an intentional or negligent act or omission that strongly disrupted behavioral patterns of endangered species.[131] "Harm" included any activity that resulted in significant environmental modification or degradation of the species' habitat.[132] The DLNR's failure to remove the feral animals

122. 16 U.S.C. § 1532(19) (1982).
123. 471 F. Supp. 985 (D. Hawaii 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).
124. 50 C.F.R. § 17.11(h) (1985).
125. Palilia v. Hawaii Dep't of Land & Natural Resources, 471 F.Supp. 985, 988-89 (D. Hawaii 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).
126. *Id.* at 989.
127. *Id.* at 987.
128. *Id.* at 999.
129. Palila v. Hawaii Dep't of Land & Natural Resources, 639 F.2d 495, 498 (1981).
130. *Id.* at 497-98.
131. 50 C.F.R. § 17.3 (1980).
132. *Id.*

qualified as an "omission" which resulted in "significant degradation" of the palila's habitat. As a result, Section 9 had in fact been violated.

The court in *Palila* gave a broad reading to Section 9. Theoretically, any act of nonfeasance or malfeasance by a private person or a state agency could "harm" a listed species. If a landowner cleared wooded river-bottom that housed an endangered butterfly or if the state failed to pump water into a drought-stricken marsh that historically serviced a rare migratory bird, Section 9 may be applicable. The provision, under *Palila*, could place a tremendous responsibility on private landowners and state agencies. Some argue that such an extension of the ESA would be unwarranted. However, Congress gave utmost priority to the endangered species dilemma. Americans have tortured their land for many years.[133] Thousands of acres of prime habitat have been eliminated slowly yet methodically. This gradual disappearance of woodland, marsh, and prairie is the root cause of species extinction and the overall diminishment of our wildlife heritage. Yet, many, including our federal government, remain unconvinced.

In response to *Palila*, the FWS attempted to change the definition of "harm" by eliminating any mention of habitat destruction.[134] The Service was leery of the possible political ramifications that might accompany an expansive interpretation of Section 9. It did not believe the ESA was designed to hinder private land development. If the ESA became overly restrictive, a political backlash might weaken the Act—political pressure similar to that which followed the *Tennessee Valley Authority v. Hill* decision. However, the Service withdrew its redefinition after tremendous public criticism.[135] Nevertheless, the Service continues to stand behind its position. Today, "harm" is defined as any "act which *actually* kills or injures wildlife . . . [b]y significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[136] The Interior Department and the FWS maintain that "actual killing or injury" means the killing or injuring of individual wildlife. Therefore, according to federal agencies responsible for wildlife protection, habitat modification will probably not be prohibited under Section 9. Only when modification immediately causes harm will the Section be violated. It is quite unlikely that federal officials would view Platte River depletion as an unlawful taking. This position is understandable. Although the federal government is better equipped to prevent shootings of whooping cranes, subtle habitat loss may be too complex for federal management.

There is scant judicial interpretation of Section 9 since *Palila*, but

133. P. EHRLICH & A. EHRLICH, *supra* note 8, at 129-76.
134. 46 Fed. Reg. 29,490 (1981).
135. Smith, *The Endangered Species Act and Biological Conservation*, 57 S. CAL. L. REV. 361, 392 (1984).
136. 50 C.F.R. § 17.3 (1985).

no other court has expanded the case. Rather, a more restrictive notion of "taking" was subsequently followed in *California v. Watt*.[137] In *Watt*, the plaintiffs sought to prevent oil lease sales off the coast of California, which they argued threatened the sea otter.[138] The district court did grant relief but only under the Coastal Zone Management Act, not under the Endangered Species Act.[139] The court reasoned that the proposed sales did not threaten the sea otter despite its status as an endangered species.[140] Even if the leasing activity did constitute a threat to the sea otter, the court stated that such a threat would not qualify as a Section 9 taking. The court justified its conclusion by ruling that the ESA contemplated a more immediate injury than that caused by oil leasing activity. The Act applied to particular problems facing particular species, but it was not a comprehensive planning statute.[141] It can be said that many dams, irrigation projects, and suburbs have destroyed habitat and harmed endangered species. Yet, no one will argue that they should be dismantled to restore habitat. Thus, it may be preferable to avoid jeopardization of a listed species by carefully planning development before wasting money through last-minute litigation.

In 1982, Section 9 was amended. The amendments did not substantially alter the provision or its fundamental definitions. Primarily, Congress expanded Section 10 which lists exceptions to Section 9 prohibitions.[142] A permit procedure was also implemented whereby a private landowner (who did not require a federal permit under Section 7) could obtain an exemption from Section 9.[143] Congress was concerned that private landowners would be hindered by Section 9. Correspondingly, under Section 10, the Secretary of Interior may now permit any taking of an endangered species so long as the taking is "incidental" to carrying out an otherwise lawful activity.[144]

To acquire a permit, a landowner first develops a conservation plan. The plan will be reviewed by the Secretary who must determine that the taking "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild."[145] Section 10 also allows the Secretary to supervise the progress of the plan. He may revoke

137. 520 F. Supp. 1359 (C.D. Cal. 1981), *aff'd in part, rev'd in part, vacated in part, stayed in part*, 683 F.2d 1253 (9th Cir. 1982), *rev'd sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984). The United States Supreme Court reversed the district court's grant of relief under the Coastal Zone Management Act but did not address the Endangered Species Act issue.
138. California v. Watt, 520 F. Supp. 1359, 1366 (C.D. Cal. 1981).
139. *Id.* at 1389.
140. The sea otter is listed as a "threatened" species. 50 C.F.R. § 17.11 (1985).
141. California v. Watt, 520 F. Supp. 1359, 1388 (C.D. Cal. 1981).
142. Endangered Species Act Amendments of 1982, 16 U.S.C. § 1539 (1982).
143. *Id.*
144. 16 U.S.C. § 1539(a)(1)(B) (1982).
145. 16 U.S.C. § 1539(a)(2)(B)(iv) (1982).

the permit if the applicant does not comply with the prescribed terms of the permit.[146]

The application in Nebraska of Section 9 and its correlative exceptions in Section 10, is unclear at this time. Although *Palila* represents the potential reach of Section 9, it is unlikely that the Section will be stretched to include private landowner activity. *Palila* involved a clear problem of habitat destruction. Feral goats and sheep were devouring the forest. The palila inhabited only that area where the animals were maintained. The state had the power to eliminate the animals, but it refused to do so. Nevertheless, the problem was manageable—eliminate the sheep and goats and the critical habitat will be protected. Sure, the sport hunter may be irritated, but no other interest group was involved.

Whooping crane habitat along the Platte River involves complex questions of priority between agricultural interests and endangered species philosophy. The farmer who drains a wetland meadow and converts it to corn production will probably not be charged with an ESA violation.[147] The water developer may also avoid Section 9 by acquiring a permit. The permit is probably relevant solely to larger projects. However, even under the stringent standards of Section 10, the Secretary likely would not deny a permit application based on the depletion effects of any one project. It is difficult to calculate when Platte River depletion begins to "harm" the whooper and when it is merely an incidental taking. This calculation is made more difficult when reckoning economic interests, as opposed to sportsmen's fancy. Certainly, Congress recognized that habitat destruction was the leading cause of species extinction. But it is extremely doubtful that the federal government and the judiciary want to actively regulate private land use or draw fine distinctions in water appropriation under Section 9.

VII. NESCA—MECHANICS AND PURPOSE

In 1975, the Nebraska Legislature adopted the Nongame and Endangered Species Conservation Act (NESCA).[148] Under the provisions of the federal Endangered Species Act, states were required to implement comparable state endangered species legislation in order to receive federal funds.[149] As a result, NESCA is quite similar to the federal Act both in mechanics and legislative intent. The Nebraska

146. 16 U.S.C. § 1539(a)(2)(C) (1982).
147. Interview with Ross A. Lock, Wildlife Biologist with the Nebr. Game & Parks Comm., Lincoln, Nebr. (Jan. 22, 1986).
148. NEB. REV. STAT. §§ 37-430 to -438 (1984).
149. Little Blue Natural Resources Dist. v. Lower Platte N. Natural Resource Dist., 210 Neb. 862, 865, 317 N.W.2d 726, 729 (1982), *aff'd on other grounds*, 219 Neb. 372, 317 N.W.2d 726 (1985).

Legislature elucidated its overall purpose for the measure in Section 37-432.

> The Legislature finds and declares: (1) That it is the policy of this state to conserve species of wildlife for human enjoyment, for scientific purposes, and to insure their perpetuation as viable components of their ecosystems; (2) That species of wildlife and wild plants normally occurring within this state which may be found to be threatened or endangered within this state shall be accorded such protection as is necessary to maintain and enhance their numbers. . . .[150]

The Legislature further stated: "The Legislature hereby declares that nongame threatened and endangered species have need of special protection and that it is in the *public interest* to preserve, protect, perpetuate and enhance such species of this state through preservation of a satisfactory environment and an ecological balance."[151]

Section 37-431 lists the important definitions of NESCA. Important terms include:

> (1) *Conservation* shall mean the use of all methods and procedures for the purpose of increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such levels . . . .
> (2) *Commission* shall mean the Game and Parks Commission;
> . . .
> (4) *Endangered Species* shall mean any species of wildlife or wild plants whose continued existence as a viable component of the wild fauna or flora of the state is determined to be in jeopardy or any species of wildlife or wild plants which meets the criteria of the Endangered Species Act;
> . . .
> (8) *Person* shall mean an individual, corporation, partnership, trust, association, or any other private entity or any officer, employee, agent, department, or instrumentality of the federal government, any state or political subdivision thereof, or any foreign government;
> . . .
> (10) *Take* shall mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect . . . .[152]

Section 37-433 requires the Commission to develop conservation programs necessary to enable endangered wildlife to successfully sustain itself.[153] The section also provides: "Except as provided in regulations issued by the commission, it shall be unlawful for any person to take, possess, transport, export, process, sell or offer for sale, or ship nongame wildlife in need of conservation pursuant to this section."[154] NESCA repeats this taking provision in Section 37-434. This language is nearly identical to Section 9 of the ESA. Although no Nebraska court has interpreted the breadth of NESCA's taking clause, it is unlikely that a court will rely on it in evaluating private activity. The

150. NEB. REV. STAT. § 37-432 (1984).
151. *Id.* at § 37-432.01 (emphasis added).
152. *Id.* at § 37-431(1), (2), (4), (8), (10) (emphasis added).
153. *Id.* at § 37-433(1).
154. *Id.* at § 37-433(3).

concerns which motivated the federal government following the *Palila* decision will probably induce a Nebraska court to restrict the taking prohibition.[155] The Commission has not expounded on the meaning of "harm" or "harass" in NESCA, but its current endangered species expert believes that the FWS definitions will control.[156] As mentioned earlier, the FWS definitions restrict taking to habitat modifications that actually kill or injure an endangered species.[157] This is tenuous protection at best. Apparently, the federal government does not want to hinder private land development, and its conduct has reflected this policy. Indeed, it appears that the FWS is more concerned with the spontaneity of a harmful action rather than the actual causal effect. Bulldozers and bullets both kill wildlife; bulldozers just take longer.

Section 37-434 lays out the process whereby the Commission determines which species should receive protection under the Act. Interestingly, any species listed under the ESA is automatically listed under NESCA.[158] The section also provides several factors to be examined by the Commission in making its determination.[159] These factors affecting a species' population are analogous to factors incorporated in the federal Act.[160] Finally, the section mandates that the Commission make determinations based on the best scientific, commercial, and other data available.[161]

Section 37-435 requires the Commission to establish land acquisition or other programs necessary for the conservation of a listed species.[162] The Commission may enter into cooperative agreements with the federal government, other states, and even private individuals.[163] It may also conduct research, institute live trapping and transplantation procedures, and effectuate proper law enforcement measures. The Section prohibits the Commission from obtaining habitat by emi-

155. *See supra* notes 134-36 and accompanying text.
156. Interview with Ross A. Lock, Wildlife Biologist with Nebr. Game & Parks Comm., Lincoln, Nebr. (Jan. 22, 1986).
157. *See supra* note 136 and accompanying text.
158. NEB. REV. STAT. § 37-434(1) (1984).
159. *Id.* at § 37-434(2). These factors include:
> (a) The present or threatened destruction, modification, or curtailment of its habitat or range;
> (b) Overutilization for commercial, sporting, scientific, educational, or other purposes;
> (c) Disease or predation;
> (d) The inadequacy of existing regulatory mechanisms; or
> (e) Other natural or manmade factors affecting its continued existence within this state.

Id.
160. *See supra* note 73 and accompanying text.
161. NEB. REV. STAT. § 37-434(3) (1984).
162. *Id.* at § 37-435(1).
163. *Id.* at § 37-435(2).

nent domain, however.[164]

Section 37-435 also imposes an important obligation on all state agencies.

> (3) The Governor shall review other programs administered by him or her and utilize such programs in furtherance of the purposes of section 37-430 to 37-438. All other state departments and agencies, except as provided in section 2-15,111, shall, in consultation with and with the assistance of the commission, utilize their authorities in furtherance of the purposes of sections 37-430 to 37-438 by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 37-434 and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the commission to be critical.[165]

This state agency obligation under NESCA is reminiscent of Section 7 in the ESA. Both Acts impose a significant burden on government activity—ESA affecting the federal government and NESCA affecting state government. Under NESCA, a state agency cannot engage in any action that would be reasonably expected to directly or indirectly "reduce appreciably the likelihood of the survival or recovery of listed species within the State of Nebraska by reducing the reproduction, numbers, or distribution of a listed species or otherwise impacting the species."[166] Furthermore, all state agencies are required to consult with the Commission on endangered species questions, and, to "utilize their authorities to further the purposes of" NESCA.[167] As with the ESA, NESCA's state agency duty is the paramount provision of the Act. Certainly, the taking prohibitions in both Acts may be effective, but their current viability is in question.[168] However, agency obligations in both Acts *are* significant obstacles to ruinous development. Since most large scale projects are financed or constructed by governmental agencies, NESCA and ESA offer formidable protection to rare wildlife—protection absolutely critical to restoration efforts.

VIII. LITTLE BLUE II

NESCA has only been addressed by the Nebraska Supreme Court, twice on appeal from Department of Water Resources orders, in *Little Blue Natural Resource District v. Lower Platte North Natural Resource District*.[169] In this case, the court focused on NESCA's application to the Little Blue diversion project. In 1977, the Little Blue Natural Resource District proposed a water diversion and impound-

164. *Id.* at § 37-435(1).
165. *Id.* at § 37-435(3).
166. NEB. ADMIN. R. & REGS. § 6.012.01F (1985).
167. *See supra* note 165 and accompanying text.
168. *See supra* notes 134-47 and accompanying text.
169. 206 Neb. 535, 294 N.W.2d 598 (1980) (Little Blue I), appeal following remand, 210 Neb. 862, 317 N.W.2d 726 (1982) (Little Blue II).

ment project that would divert 125,000 acre-feet of water from the Platte River to a reservoir on the Little Blue River.[170] It advocated construction of the project in order to provide irrigation of farmland in several south-central counties in Nebraska.[171]

The Director of the Nebraska Department of Water Resources (DWR)[172] denied Little Blue's application for the project. He concluded that the project would divert flows away from the basin of origin, the Platte River, to the Little Blue River's basin.[173] Nebraska had long prohibited such interbasin transfers under an older Nebraska decision, *Osterman v. Central Nebraska Public Power District*.[174] In that case, the court held that there existed "no right to transport waters beyond or over the divide or watershed that enclosed the source from which obtained."[175]

The Little Blue NRD appealed the Director's decision to the Nebraska Supreme Court. The court reversed *Osterman* and remanded the case to the DWR. In *Little Blue Natural Resource District v. Lower Platte North Natural Resource District* (*Little Blue I*) the court concluded: "the unappropriated waters of every natural stream within the State of Nebraska may be diverted from one basin to another, except when such diversion is contrary to the public interest, in which case it shall be denied."[176] On remand, the Director of the DWR was instructed to determine if the Little Blue project was "contrary to the public interest."[177] Subsequently, the Director ruled that the diversion was acceptable, and he approved the Little Blue NRD application.

In response to the Director's approval, another appeal was filed with the Nebraska Supreme Court. Shortly after *Little Blue I*, the Nebraska Legislature had passed a measure which listed specific statutory criteria to be used in defining the "public interest" requirement for interbasin transfers.[178] The DWR did not use the statutory criteria in approving the Little Blue project. In *Little Blue Natural Resource*

170. Little Blue Natural Resource Dist. v. Lower Platte N. Natural Resource Dist., 206 Neb. 535, 538, 294 N.W.2d 598, 600 (1980).
171. *Id.* at 539, 294 N.W.2d at 600.
172. The Department of Water Resources (DWR) is an agency of the state. Its director is appointed by the governor. Basically, the DWR has jurisdiction over all matters involving water rights for irrigation, power or other useful purposes. NEB. REV. STAT. §§ 46-208 to -214 (1982).
173. Little Blue Natural Resources Dist. v. Lower Platte N. Natural Resource Dist., 206 Neb. 535, 540, 294 N.W.2d 598, 601 (1980). A basin is an area drained by a river or stream and its smaller tributaries. R. CLARK, WATER AND RIGHTS, 274, 278 (1976).
174. 131 Neb. 356, 268 N.W. 334 (1936).
175. *Id.* at 366, 268 N.W. at 339.
176. Little Blue Natural Resource Dist. v. Lower Platte N. Natural Resource Dist., 206 Neb. 535, 548, 294 N.W.2d 598, 604 (1980).
177. *Id.* at 548, 294 N.W.2d at 604.
178. NEB. REV. STAT. § 46-289 (1984).

District v. Lower Platte North Natural Resource District (Little Blue II),[179] the court again remanded the case to the DWR but this time to require the Director to use the prescribed statutory criteria.[180]

The court in *Little Blue II* also focused on a different question—the relevance of NESCA to the project controversy. The court conceded that the whooping crane and the endangered bald eagle used the Platte River.[181] It also noted that development of the project by the Little Blue NRD and the DWR qualified as agency action under Section 37-435(3).[182] It concluded that NESCA imposed two obligations on all state departments and agencies including the NRDs and the DWR:

> One is that all state departments and agencies must, *after consulting* with Game and Parks, carry out programs for the conservation of endangered species, and the second is that all state departments and agencies must not take any action that will result in jeopardizing the continued existence of endangered or threatened species or result in the destruction or modification of a habitat of such species.[183]

The court went on to rule that there was not enough evidence in the record to determine whether the whooper or the bald eagle was jeopardized by the proposed project.[184]

In analyzing NESCA, the court relied heavily on *Tennessee Valley Authority v. Hill*. The court acknowledged that it could not balance the benefits of the Little Blue project against the potential harm to endangered species.[185] Rather, NESCA in addition to the ESA, provided absolute protection. The court continued: "The requirements of the Act are absolute and must be met. That there may be offsetting or even enhancing circumstances derived from the operation of the project may be insufficient if the endangered species habitat is destroyed, as the Act now stands."[186] It was also stressed that no action could be permitted until the interested state department or agency consulted with the Commission *and* determined that the action would not jeopardize the continued existence of endangered species or modify critical habitat.[187]

The court noted that the consultation requirement of NESCA did not mean that the Commission had an absolute veto power.[188] The Act

179. 210 Neb. 862, 317 N.W.2d 726 (1982).
180. *Id.* at 874, 317 N.W.2d at 733-34. For an excellent discussion of the Little Blue controversy, see Pearson, *Constitutional Restraints on Water Diversions in Nebraska: The Little Blue Controversy*, 16 CREIGHTON L. REV. 695 (1983).
181. 210 Neb. 862, 866, 317 N.W.2d 726, 729 (1982).
182. *Id.* at 866, 317 N.W.2d at 730.
183. *Id.*
184. *Id.* at 867, 317 N.W.2d at 730.
185. *Id.* at 871, 317 N.W.2d at 732.
186. *Id.*
187. *Id.* (emphasis added).
188. *Id.* at 872, 317 N.W.2d at 733.

requires "meaningful consultation" as an absolute prerequisite to proceeding with any project. Moreover, a state agency could not ignore the Commission's opinion with impugnity.[189] In fact, the agency had the burden of proving that a proposed project would not harm an endangered species or its habitat. But, the final decision of whether to proceed with an action rested with each agency, subject to judicial review.

The court's broad reading of NESCA's state agency obligation was welcomed by conservationists. The court clearly aligned itself with the United States Supreme Court's position in *Tennessee Valley Authority v. Hill.* However, the court in *Little Blue II* qualified its ringing endorsement of NESCA by harkening to its earlier decision in *Little Blue I.* The *Little Blue I* court relied on article XV, section 6 of the Nebraska Constitution to overturn the *Osterman* ban on interbasin transfers. That provision provides: "the right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest . . . ."[190] In *Little Blue II,* the court refused to decide whether NESCA conflicted with article XV, section 6. Nevertheless, the court cautioned:

> We should note at this point that the provisions of the Act may not repeal the provisions of Neb. Const. art. XV, §§ 4, 5, and 6. To the extent that the prohibition contained in the Act denied to a citizen of the State of Nebraska a right otherwise guaranteed to the citizen, the Act would have to give way.[191]

The court further mentioned that "the substantive right to divert the waters unless the public interest demands otherwise is found in the Constitution and cannot be denied by statute."[192]

It is uncertain why the court did not reconcile the potential conflict between NESCA and article XV, section 6. The Nebraska Legislature in promulgating the Act explicitly stated that "[I]t is in the *public interest* to preserve, protect, perpetuate and enhance . . ."[193] endangered species. The court's failure to automatically recognize the public interest in endangered species protection is troubling. Under the court's rubric, water diversion has apparently risen to a constitutional right. Potentially, a project might be prohibited only when a diversion opponent forcefully asserted the public interest value of endangered species protection. Such a requirement could weaken NESCA's agency obligation and eviscerate any agency's burden to prove that its actions will not harm endangered species. A court might halt diversion or development based on the "public interest" only if the potential "je-

189. *Id.*
190. NEB. CONST. art. XV, § 6.
191. 210 Neb. 862, 867, 317 N.W.2d 726, 730 (1982).
192. *Id.* at 874, 317 N.W.2d at 733.
193. *See supra* note 151 and accompanying text (emphasis added).

opardization" is immediate and refuse to prevent the more gradual kinds of habitat destruction. The court will then be as hesitant in advancing NESCA's agency obligation as the federal government is in interpreting the taking prohibitions of the ESA. The court will have an opportunity to clarify its position when it hears the most recent appeal from the DWR order of approval.[194] It is hoped that the court will not derail NESCA. Rather, it should recognize the inherent public interest in endangered species protection—a position consistent with the court's otherwise expansive reading of the Act in *Little Blue II*.

IX. THE EFFECTIVENESS OF NESCA: POST-LITTLE BLUE II

The Nebraska Supreme Court in the third appeal of the Little Blue issue may resolve the difficult constitutional question involving article XV, section 6 and NESCA. In the meantime, NESCA has proved itself to be an effective tool in several other controversies involving proposed Nebraska water projects. Although no other court has examined NESCA, the Act has played an important role in the delicate negotiations between state agencies, project sponsors, and environmental advocates. However, the viability of NESCA is becoming increasingly more essential. As mentioned earlier, Platte River flows have already been diverted by over seventy percent. Yet, ground water tables in many Nebraska counties are dropping as a result of irrigation. Without more water, these counties may be forced to revert to dryland farming. Combining this with the currently ravaged farm economy, the impetus for Platte River water may be overwhelming. Therefore, only a strong legislative proscription can defeat vigorous diversion support. The few whooping cranes that rely on the Platte may be abandoned under a "priority decision" unless NESCA continues to provide the necessary protection it was designed to offer. The court in *Little Blue II* illuminated what the level of protection should be.

> "One might dispute applicability of these examples to the Tellico Dam by saying that in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. But neither the Endangered Species Act nor Art. III of the Constitution provide the 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

194. Catherland Reclamation Dist. v. City of Lincoln, No. 86-692 (Nebr. Sup. Ct.). Following the Nebraska Supreme Court's remand in Little Blue II, the Director of the DWR, on remand, approved the application. *See infra* note 237. Catherland Reclamation Dist. v. City of Lincoln is an appeal from that order of approval. The Little Blue NRD is no longer involved in the project; the project is now referred to as the Catherland Project.

weighing process, which we emphatically do not."[195]

A good example of NESCA's protection against harmful development occurred in the Enders project controversy. The Enders project was designed to divert 45,000 acre-feet of water annually from the South Platte River at a point just below Big Springs.[196] Water would be transported by canal or pipeline to the Frenchman River.[197] From there it would flow into the Enders Reservoir.[198] The project was proposed by the Frenchman Valley Irrigation District, the Frenchman-Cambridge Irrigation District, and the H & RW Irrigation District to replete irrigation supplies in southwest Nebraska.[199]

Pursuant to the consultation requirements of NESCA, the Game and Parks Commission completed a biological opinion on the Enders project on April 4, 1984. It first assumed that two other projects, Little Blue and Prairie Bend,[200] would be constructed before the completion of Enders because those projects were proposed prior to Enders. According to the Commission, Enders would jeopardize the continued existence of three endangered species—the whooping crane, bald eagle, and the least tern. The Commission declared:

> The project as currently proposed would be expected to reduce appreciably the likelihood of the survival or recovery of these species within the State of Nebraska by adversely modifying or destroying migration habitat (feeding, loafing and roosting) for the whooping crane, winter habitat (feeding) for the bald eagle, and summer habitat (nesting and feeding) for the least tern.[201]

In its opinion, however, the Commission also determined that Enders would not jeopardize the endangered species if Little Blue and Prairie Bend were not constructed but only if reasonable alternatives were developed.[202] One such alternative included mechanical and/or chemical removal of vegetation that would inevitably encroach into the river as a result of the diversion. Another alternative included precise monitoring of river flows to limit daily diversion into the Enders canal or pipeline. By insuring sufficient flows, wet meadows along the Platte could be preserved.[203]

On November 4, 1985, the Director of the DWR denied the sponsor's application for the Enders project.[204] Although, he gave addi-

195. 210 Neb. 862, 870-71, 317 N.W.2d 732 (1982) (quoting Tennessee Valley Authority v. Hill, 437 U.S. 153, 187-88 (1978)).
196. W. Bailey, Nebraska Game and Parks Commission Biological Opinion on Enders—South Platte Project at 2 (Apr. 4, 1984). The South Platte is a major tributary to the Platte.
197. *Id.*
198. *Id.*
199. *Id.* at 1.
200. *Id.* at 3.
201. *Id.* at 4.
202. *Id.*
203. *Id.* at 4-5.
204. Order of the Director of the Department of Water Resources, In the Matter of

tional reasons for the decision, the Director ruled that the sponsors had not overcome their burden of proving that the project would not harm endangered species.[205] There was conflicting evidence presented as to whether the Platte was essential to the whooping crane, bald eagle, and least tern. Nevertheless, the Director reasoned, "[t]he Nongame and Endangered Species Act places an obligation on Applicants to show that their proposal will not adversely impact endangered or threatened species."[206] The applicants had not sustained their burden by refuting the Commission's biological opinion.

The Director's denial of the Enders project application was an important step in the protection of the whooping crane in Nebraska. Clearly, state agencies are beginning to structure their decisions in recognition of NESCA. Any diminution of NESCA, however, would establish a poor precedent for endangered species protection. Already, the Enders project sponsors are appealing the Director's decision to the Nebraska Supreme Court.[207] More crucially, numerous other projects are in the planning stage. The Twin Valley project, proposed by the Central Platte NRD, will divert up to 378,800 acre-feet of water annually.[208] The Prairie Bend project will divert 210,000 acre-feet of water per year.[209] The Commission has already opined that both projects would "jeopardize" the whooping crane if constructed.[210] Certainly, as more proposals for Platte River diversion are initiated, the need for NESCA's protection is evident. Without courageous enforcement of the Act, the Platte River may dry to a trickle and leave the whooping crane that much farther to go on its difficult migration.

X. A NEW THREAT—LB 1106

In 1983, the Governor of Nebraska, Robert Kerrey, formed the Nebraska Water Congress. The Congress was enacted to develop principles and recommendations for future water policy in Nebraska.[211] Many in the state were dissatisfied with the bureaucracy that made water decisions. They felt that Nebraska needed a more efficient, effective, and coordinated means of settling state policy and resolving conflicts between competing uses of water. The Governor was con-

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Application A-15738 for a Permit to Divert Water From the South Platte River For Storage in Enders Reservoir (Nov. 4, 1985).

205. *Id.*
206. *Id.*
207. H & RW v. Central Nebr. Conservation Ass'n, No. 86-008 (Nebr. Sup. Ct. argued Oct. 7, 1986).
208. P. JOHNSGARD, *supra* note 36, at 83.
209. W. Bailey, *supra* note 196, at 3.
210. W. Bailey, Nebraska Game and Parks Commission Biological Opinion on Twin Valley Project 5 (May 20, 1985).
211. Nebraska Water Independence Congress, Final Report Submitted to Governor Robert Kerrey (Dec. 7, 1983).

cerned with the Reagan administration's current policy on water project financing.[212] Presently, the federal government will finance water projects only if the projects are in the "national interest". As a result, Nebraska irrigation projects designed to increase production of a highly surplus commodity, like corn, will probably not merit federal financing under the new policy.[213]

The Water Congress, made up of members representing a variety of interests, completed its task and submitted its recommendations to the Governor on December 6, 1983. Major recommendations among others included: (1) creation of a Water Management Board to coordinate major water decisions; (2) establishment of a Water Projects Development Fund; and (3) recognition of instream flow rights for fish and wildlife.[214] Forty members of the Congress supported the recommendations, but two members dissented. The dissenters argued that the state should not finance expensive water diversion and impoundment projects. Instead, the state should limit ground water withdrawals in order to conserve depleted supplies—an alternative not addressed by the Congress.[215]

Many of the recommendations from the Water Congress were later incorporated in Legislative Bill 1106 (LB 1106),[216] passed by the Nebraska Legislature in 1984. The bill provided a comprehensive restructuring of Nebraska's water policy decisionmaking. Of particular importance to the endangered species issue was the creation of the Water Management Board.[217] The Board is designed to expedite major water project development. As a result, any sponsor of a project costing more than $10 million, who seeks state financial support, state planning assistance, or an overall feasibility study, must submit an application to the Water Management Board.[218] The Board will determine if the project is consistent with state goals for water resource use; is technically, environmentally, financially, and economically feasible; and is in the state's interest.[219] The Board provides planning assistance and carries out the consultation requirements with the Game and Parks Commission under NESCA.[220] However, as man-

212. Letter from J. David Aiken to Governor Kerrey (Dec. 14, 1983) (discussing Water Independence Congress Recommendations).
213. *Id.*
214. Nebraska Water Independence Congress, Final Report Submitted to Governor Robert Kerrey (Dec. 7, 1983).
215. The dissent was filed by J. David Aiken, Water Specialist from the Dep't. of Agricultural Economics at the Univ. of Nebr.-Lincoln and Eric Pearson, Water Specialist at Creighton University, Omaha, Nebr.
216. Legislative Bill (LB) 1106, 88th Leg., 2nd Sess., 1984 Neb. Laws (codified in Neb. Rev. Stat. §§ 15,100-15,117 (Cumm. Supp. I 1986)).
217. *Id.* at § 2.
218. *Id.* at § 8.
219. *Id.* at § 4.
220. *Id.* at § 5.

dated in LB 1106, the Board will "identify, propose, support, advocate, resolve conflicts regarding and expedite water development projects in the state in the most efficient manner possible."[221]

To facilitate water planning, LB 1106 contains two revisions to NESCA that could affect future endangered species protection. Section 5 of the bill provides: "The Water Management Board shall, in reviewing a project, *consult and make determinations with* the Game and Parks Commission if such project is subject to the requirements of the Nongame and Endangered Species Conservation requirements of the act."[222] Section 22 specifically amends Section 37-435(3) of NESCA to read as follows:

> (3)
>
> The Governor shall review other programs administered by him or her and utilize such programs in furtherance of the purposes of section 37-430 to 37-438. All other state departments and agencies, *except as provided in section 5 of this act* shall in consultation with and with the assistance of the Commission, utilize their authorities in furtherance of the purposes of section 37-430 to 37-438 by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 37-434 and by taking such action necessary to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the Commission to be critical.[223]

The exact meaning of these revisions to the state's endangered species legislation is unclear. On November 27, 1985, the Water Management Board issued draft rules and regulations to clarify LB 1106. According to the Board, any water project under its supervision shall be considered environmentally acceptable "when the Board, in consultation with the Game and Parks Commission, has found that the project will not jeopardize the continued existence of . . . endangered species or result in the destruction or modification of the critical habitat of any such species."[224]

In a subsequent public hearing on the Board's proposed regulations, several environmental groups contested the Board's interpretation of NESCA. Michael E. Dennis of the Nebraska Wildlife Federation (NWF) argued that the new regulations enable the Board to determine that a project will not jeopardize a threatened or endangered species and its habitat. The NWF believed that LB 1106 merely qualified the Board as a state agency for purposes of NESCA's consultation requirements. The bill did not allow the Board to make a non-

221. *Id.* at § 1.

222. *Id.* at § 5 (emphasis added).

223. *Id.* at § 22 (emphasis in original).

224. Draft Regulations, Title 265—Nebraska Water Management Board § 005.04 (1985).

reviewable finding on the jeopardy issue.[225] Eric Pearson, one of the dissenters to the Water Congress, also criticized the proposed regulations. Acting on behalf of the Nebraska Chapter of the Sierra Club, Pearson mentioned that the "attempt in the regulations to wrest decision making authority in these matters away from the Game and Parks Commission is unwise and is unauthorized by the controlling legislation."[226] Pearson believed that a biological opinion issued by the Commission should be conclusive upon the Board.[227]

In a written response to the NWF and the Sierra Club, the Water Management Board recommended no change in the proposed regulations.[228] The Board reasoned that NESCA placed the burden for making jeopardization determinations on each state agency.[229] Game and Parks had to be consulted, but it acted only in an advisory role. Each agency had to make its own decision. It would be difficult for any sponsor to overcome an adverse biological opinion from the Commission, "[h]owever they [project sponsors] should be given a chance."[230] Moreover, nothing in the rules indicated that the Board's determination would not be subject to judicial review.

The Board's position is consistent with the Nebraska Supreme Court's interpretation of NESCA in *Little Blue II*. NESCA does not grant the Commission an absolute veto, but each individual agency is allowed to make its own decision subject to judicial review. Thus, the newly created Board should have the same rights and duties imposed under NESCA as all other agencies. Indeed, the Board should be required to "utilize [its] authorit[y] in furtherance of the purposes of sections 37-430 to 37-438 by carrying out programs for the conservation of endangered species . . . ."[231]

But the basic question remains: Why was NESCA amended? The agency obligation in NESCA requires all state agencies to use their authorities to further the purposes of the act, to consult with the Commission, and to insure that their actions will not jeopardize a listed species. In amending NESCA, LB 1106 apparently restates only a truism—that the Board shall consult with the Commission. Logically, the amendments are designed to coordinate agency review of water projects. But does that mean that the DWR, the local NRD, or any other agency that plays a role in developing a diversion project, will be

225. Letter from Michael E. Dennis to Dayle E. Williamson (Dec. 20, 1985) (discussing NESCA).
226. Letter from Eric Pearson to Dayle E. Williamson (Dec. 20, 1985) (discussing NESCA).
227. *Id.*
228. Memorandum from Dayle E. Williamson to Water Management Members (Dec. 30, 1985) (discussing Public Hearing on Draft Rules and Regulations).
229. *Id.*
230. *Id.*
231. NEB. REV. STAT. § 37-435(3) (1984). *See supra* text accompanying note 165.

immunized from NESCA once the Board has determined that the Act is not applicable? Is the Commission foreclosed from participating any further in the review of a project? What should be the Commission's role if a project subsequently jeopardizes a listed species?

The precise language in LB 1106 may also allow the Board more authority than it is willing to admit. Section 5 of LB 1106 provides: "The Water Management Board shall, in reviewing a project, *consult and make determinations with* the Game and Parks Commission if such project is subject to the requirements of (NESCA) . . . ."[232] Once the Board determines that NESCA is inapposite, the consultation requirements of the Act are no longer applicable. Therefore, LB 1106 enables the Board to decide if NESCA is ever triggered in a particular situation. Unfortunately, LB 1106 fails to address how to resolve any potential conflict between the Board and the Commission. The Board argues that its decisions are judicially reviewable, but this stance does not recognize the key philosophy behind NESCA. All state agency action is subject to the state's endangered species legislation. It does not give an agency the discretion to determine if NESCA is applicable at one point in time. If it had, then what can be the significance of allowing the Board to *"consult and make determinations with"* the Game and Parks Commission? NESCA only gives an agency the discretion to determine if the Act is violated. Moreover, it commands all state agencies to further the purposes of endangered species protection and "insure" that *all* actions (present and future) do not harm a listed species. At the very least, the federal ESA establishes a statutory procedure to resolve interagency conflict—a procedure that protects against rash agency action when wildlife specialists determine that an endangered species could be jeopardized.[233]

If LB 1106 merely streamlines the consultation requirements of NESCA, endangered species protection should not be affected. The Water Management Board will be subject to the same obligations as other agencies. Thus, all state agencies participating in a water project will have a continuing NESCA obligation. Each agency will not have to engage in a formal consultation with the Game and Parks Commission. However, if LB 1106 completely immunizes other agencies once the Board has made its determination, environmental advocates should be concerned. Agency action may not jeopardize whooping crane habitat at one point, yet actually harm the bird at a future date. If LB 1106 grants the Board the authority to ignore a Commission's opinion, environmental advocates should also be concerned.

Professor J. David Aiken, the second dissenter from the recommendations of the Water Congress, cautions that LB 1106 created a

232. Legislative Bill (LB) 1106, 88th Leg., 2nd Sess., 1984 Neb. Laws (emphasis added). *See supra* text accompanying note 223.

233. 16 U.S.C. § 1536(h) (1985).

pro-development framework.[234] Irrigation interests at the Congress applauded the changes made in NESCA. In fact, irrigation interests applauded the entire bill as an overall facilitation of impoundment, diversion, and depletion.[235] In the past, NESCA provided an environmental veto of proposed Platte River projects that might have harmed the whooping crane and its critical habitat.[236] Indeed, NESCA's influence in the Little Blue controversy prompted water development support for the Water Congress and its recommendations. Logically, LB 1106, as a pro-development measure, would be antagonistic to the only significant statutory hurdle to increased water use.[237]

234. NEBR. WATER LAW UPDATE, No. 68, Aug. 2, 1984, at 6 (J.D. Aiken ed.) (available from Dep't of Agric. Economics, Univ. of Nebr.-Lincoln).

235. Interview with J. David Aiken, Water Specialist with the Univ. of Nebr.-Lincoln (Jan. 22, 1986).

236. NEBR. WATER LAW UPDATE, *supra* note 234, at 8.

237. *Id.* Professor Aiken's worst fears may be realized. The philosophy behind LB 1106 may have already permeated state government. In a startling reversal, the Director of the DWR, on remand, recently approved the Catherland (Little Blue), *supra* note 194, project application. *See* Order of the Director of the Department of Water Resources, In the Matter of Application A-15145, A-15146, A-15147 For a Permit to Divert Water From the Platte River and Little Blue River For Storage in Campbell Reservoir (July 29, 1986). Although the Commission had concluded in its opinion that the project would clearly jeopardize the whooping crane, the Director disagreed. He reasoned:

> Thus, it is inconceivable that: (a) given the paucity of whooping crane use of Platte valley habitat, (b) given the evidence of whooping crane use of other locations in Nebraska, (c) given the fact Catherland intends diversion at a time when whooping cranes are unlikely to be passing through Nebraska during the spring, and (d) given the fact whooping crane numbers are increasing despite changes in Platte valley habitat, approval of Catherland's applications will jeopardize whooping cranes' habitat or their continued existence.

Id. at 15.

The Director's cursory examination of the endangered species issue is troubling. The Director determined that reduced river flows caused by the diversion would not jeopardize whooping cranes in spite of consistent biological evidence to the contrary. The Commission reiterated in its opinion that reduced flows in the Platte would only aggravate the habitat problems facing migratory whooping cranes since other stopover areas had been eliminated or substantially reduced, i.e. the Rainwater Basin area of Southcentral Nebraska. The Director, however, was unconvinced. He opined that whooping cranes will roost near "other rivers, wetlands, small ponds, Sandhill lakes, and the upstream, shallow ends of large reservoirs. In Nebraska they have even been reported standing in or near shallow water close to a cattle feed yard." *Id.* at 14. The Director did not address the apparent inconsistency. Perhaps, whoopers drop down to a cattle feed yard because there isn't enough water to support a natural roosting area. Moreover, it is important to remember that whoopers do not migrate to city lagoons or county recreational impoundments equipped with resident ski boats and weekend cyclists. Whoopers travel thousands of miles to reach an untouched primitive wilderness just below the Arctic Circle. Unfortunately, drainage from muddy cattle feed yards may be the only stopover points in future migrations.

The more difficult aspect of the Director's opinion is his argument that

XI. CONCLUSION

The whooping crane will probably never frequent the sandbars and shallow channels of the Platte River. Habitat restrictions and innate biological characteristics hinder rapid repopulation. Luckily, however, this noble creature is shy, stealthy, and protective of its atavistic existence. Its numbers increase slowly but surely; more family groups and solitary fliers pass through Nebraska each autumn and spring—a testament to the success of nationwide concern and proscriptive legislative policy.

Nevertheless, endangered species statutes may be compromised in the near future. Certainly, Section 7 of the ESA still provides viable protection against federal involvement in harmful activity. Yet, the taking prohibition in Section 9 is ambiguous and disfavored by the government. It is unlikely that Section 9 will be expanded or enforced with much vigor. NESCA fills in gaps left by the ESA in curtailing destructive state governmental conduct. But, Nebraska development concerns are clearly attempting to assuage NESCA's protection by enacting LB 1106, proposing legislation to repeal NESCA, and raising constitutional arguments against the Act's validity.

Endangered species laws work only if they absolutely prohibit harmful conduct. They cannot sanction or tolerate incremental habitat modification. They must not condone any balancing process that might dilute full protection, as well. Indeed, the laws must be courageously enforced to block economic interests that inevitably attack endangered species and their critical habitat. Both Congress and the Nebraska Legislature anticipated future threats from development interests. Both bodies recognized that man has historically been

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whooping cranes are increasing in number despite harmful changes in Platte River habitat. "Finally, despite what some characterized as long-term loss in habitat quantity and quality along the Platte River, the world's population of wild whooping cranes has increased over the past 40 years." *Id.* at 15. His conclusion represents a patent misunderstanding of the endangered species laws. Both the federal government and the state government have determined that the Platte River is *critical habitat* to the whooping crane. As a result, courts have maintained that it is the burden of the proponent of a project to prove that the proposed habitat destruction does not jeopardize the whooping crane. There is absolutely no discussion in the Director's opinion of the proponent's required burden of proof. Ironically, the Director in rejecting the Enders project application, *see infra* notes 196-210 and accompanying text, relied heavily on the failure of the project proponent to refute the Commission's biological opinion. As the Director so aptly stated: "The Nongame and Endangered Species Act places an obligation on Applicants (project proponents) to show that their proposal will not adversely impact endangered or threatened species." *See supra* note 206. Nevertheless, the Director, himself, ignored the Commission's opinion on the Catherland (Little Blue) project and personally concluded that whoopers do not need the Platte River as much as everyone thinks, and whoopers have made such dramatic increases (a 125-bird increase in a forty-four year span) that the Platte can now be drained.

an exceptionally poor steward of his environment. NESCA and the ESA reflect a conscious effort to reverse man's harmful influence. Only by upholding and strengthening these measures will the whooping crane and all endangered species have a realistic chance of surviving in this world—a world that once espoused all wild creatures and welcomed variety in the natural order.

Daniel C. Vaughn '86