CHAPTER EIGHT

WILDLIFE

A. INTRODUCTION AND HISTORICAL OVERVIEW

When Americans consider their natural environment, wildlife often comes to mind as an indispensable element. Wildlife encompasses an extremely broad group of animal and occasionally under certain statues plant species. These plants and animals constitute major cultural images from the Bald Eagle to the California Redwood trees. They appear in our art and literature as well as our product advertisements and packaging. As a matter of law American wildlife are often categorized in many ways including game and non-game animals, endangered and threatened species, predators, marine mammals, and furbearing animals. These varying categories reflect the differing purposes wildlife has in human existence. We hunt animals, keep them as pets, revere them as religious symbols, eat and wear them, and sometimes we just ignore them altogether. These varied, and often conflicting, human interests in wildlife have led to the development of an elaborate set of legal rules and public policies reflected in a mosaic of federal and state law. This chapter presents materials examining a selected group of modern wildlife law questions. As you enter the study of this field, consider trying to identify the true threats to animal and plant life in the United States. Is it an aspect of expanding population growth and the related pressure to intensify land use? Is it damaging personal, commercial, and industrial practices which ignore adverse wildlife impacts? Is it a general ignorance of nature and natural processes in an ecological context? If law is not the complete answer, what other steps should our society and individuals take to improve the future for wildlife.

As with most environmental issues, wildlife policy has a long history reaching back at least as far as biblical and Roman times. The following excerpts summarize that historical development until the present, and by so doing they lay the groundwork for modern wildlife law.

(2) Milestone in the History of Wildlife

The critical milestone for wildlife in the United States relate to its terrible decline in the early years of the Republic, to the efforts to secure its continued existence and protection, and to increases in understanding about the effects of human actions on populations and habitat. Because much of the understanding of wildlife and effort to protect it are expressed in law, these milestone are guides to the discussion of the evolution of wildlife law.

(a) The Era of Free Taking—1600s–1850s

The early history of European exploration and occupation of North America is one of virtually unrestrained slaughter of animals—for food, for fashion, and later to aid the settlement of the West by subduing Indians through the extermination of the buffalo. Wildlife species that today exist only in remnant populations on federal lands in the West once covered the continent. Wolves were so prevalent in Massachusetts in the early 1700s that local citizens seriously considered building a fence across Cape Cod to protect livestock from predation. Bison ranged through New York and Pennsylvania and as far south as Georgia. The last bison east of the Mississippi River was killed in 1801. Woodland caribou and other large and small mammals and hundreds of species of birds and fish existed in the forests and waters of the East Coast.

From the 1700s to the 1850s, many of these species, particularly those that could be eaten, were subjected to hunting pressures no population could withstand. Most of this hunting was carried out by market or “pot” hunters who sold venison, wild fowl, fish, and shellfish to a public with limited domestic sources of meat. Passenger pigeons, once the largest number of birds of one species ever known on one continent, were clubbed, netted, shot, and trapped for food and sport. So were the heath hen, wild turkey, ruffed grouse, and quail. In 200 years, the immense wealth of wildlife all but disappeared from the East.

Expansion westward in the 1800s was accompanied by wildlife losses as well. In 1806, the demand for beaver hats sent mountain men into the Oregon Territory and the Rocky Mountains, where they virtually trapped out the beaver in less than 40 years. When the market for beaver fell in the late 1830s, it was replaced by the demand for buffalo skins and meat.
In 1840, one fur company alone sent 67,000 buffalo skins down the Missouri River to St. Louis.

Once the Great Plains fell to the plow and the advance of the railroads in the 1860s and 1870s, the buffalo and the Indian culture that depended on it were doomed. By 1900, nearly 60 million buffalo had been destroyed to make way for settlers and agriculture.

(b) Gestures of Regret—1850s–1900

By the second half of the 19th century, the decimation of wildlife had taken its toll. Americans began to realize that the vast natural resources of their nation were not inexhaustible. The conservation of wildlife was acknowledged as an important goal, one that required public involvement. Private citizens created organizations dedicated to the welfare of wildlife. Among the earliest of these were groups of recreational hunters who believed in the "sport" of taking wildlife according to rules designed to avoid waste and prevent extinction. These groups supported enactment of state laws to protect wildlife and to restrain its exploitation. In the 1850s, many states passed game laws setting seasons and bag limits to stem the terrible decline of wildlife. Unfortunately, these laws were "largely gestures of regret," too late to save what had existed and without effective means of enforcement.

(c) The Rise of Conservation—1900–20

By the 1880s, it was clear that the states were unable to enforce their wildlife laws and that the alarming drop in wildlife populations was a national problem requiring federal action. In 1884, George Grinnell, a prominent sportsman and editor of Forest and Stream, began to advocate the establishment of interest groups to lobby Congress on behalf of wildlife. Grinnell founded the National Audubon Society (1886) and the Boone and Crockett Club (1888), both of which were instrumental in achieving passage of the Lacey Act of 1900, the first federal wildlife statue.

The Lacey Act, which prohibits the interstate shipment of wildlife taken in violation of state law, is one of the most important pieces of wildlife legislation ever passed. It not only put the market hunters out of business and prohibited the importation of foreign wildlife, except by permit, it gave real authority to the U.S. Biological Survey, predecessor to the U.S. Fish and Wildlife Service. The Survey, founded in 1885 to carry out a national biological survey and various bird studies, was charged with the administration and implementation of the Lacey Act. This signaled the beginning of active federal involvement in wildlife management and protection.

In the years following the enactment of the Lacey Act, Congress vested increasing authority over wildlife in federal agencies, thereby fostering the development of effective federal institutions for wildlife management and protection. Between 1900 and 1913, for example, Congress concluded the Fur Seal Treaty regulating the harvest of the Northern fur seal; enacted the Federal Tariff Act; which prohibited the importation of feathers and other parts of certain birds used in millinery; and enacted the Migratory
Bird Act of 1913, which gave control over migratory birds to the federal government.

The federal statues expressed a new theme in wildlife law: conservation. The recognition of the importance of conserving wildlife corresponded to the growing federal interest in the retention and conservation of other resources of the federal lands. In the late 1800s and early 1900s, the active disposition of federal lands into private hands pursuant to statutes like the Mining Law of 1872 and the Homestead Act was arrested by the recognition of the importance of retaining lands with special values in the public domain. Yellowstone Park was set aside in 1872 to protect its stunning natural resources, including its wildlife, and other park designations followed. Forest lands were reserved, initially by Presidents McKinley and Theodore Roosevelt, and then by Congress under the Forest Reserve Act of 1891 and other statutes. A few years later, in 1911, Congress enacted the Weeks Act, which called for the reacquisition of private lands to provide for federal forests in the East. Although these forests were not reserved explicitly for wildlife conservation, the protection of habitat that was accomplished was beneficial.

The conservation movement of the early 1900s reflected two strands of thought about conserving wildlife and other natural resources: a utilitarian view and a preservation view. The utilitarian view, represented by people like Gifford Pinchot, the creator of the Forest Service and head of Roosevelt’s National Conservation Committee, regarded conservation as “the use of natural resources for the greatest good of the greatest number for the longest time. Implicit in this outlook is the idea that natural resources should be managed in a sustainable way to assure continued human use.”

The preservation view was not utilitarian. Taking its antecedents from H.D. Thoreau, and listening hard to the words of John Muir, it called for a realization of the intrinsic value of wildlife and wild places not measured by human use.

Neither the utilitarian nor the preservation view, however, regarded conservation of predators, “pests,” and “vermin” with the same benevolent attitude extended to other wildlife. These species were systematically and ruthlessly attacked.

(d) Lessons of Failure—1920–40

Early conservation efforts focused on reintroduction of species and the elimination of predators. These efforts, along with controls on hunting and trapping, were thought to be appropriate to recover diminished wildlife populations. While the restrictions on hunting and trapping did halt the precipitous decline of target species, reintroduction and predator control were spectacularly unsuccessful wildlife management tools.

Efforts to introduce or reintroduce wildlife began in colonial times, but reached a fever pitch in the early 1900s. Hundreds of attempts were made to restore or stock species in areas where wildlife was diminished or extirpated. European variants of American species were released across
the United States. Game farms were established to raise animals for transfer to the wild. Animals were transported from one part of the country to another, regardless of whether the new area was appropriate range or habitat.

Most of these efforts failed. Where they succeeded, the results were often harmful or fatal to native species. Rarely did the introduced species function as intended in its new ecosystem. The English sparrow, for example, which was imported to eat cankerworms, turned out to be a voracious eater of agricultural seeds. The carp, brought in as a food source after the Civil War, so muddies a stream in its foraging for food that the waters are uninhabitable by other fish.

One of the most disastrous wildlife management efforts, and one that has been repeated across the West, was the elimination of the natural predators of the mule deer on the Kaibab Plateau in the 1920s. Following destruction of the wolves, bobcats, cougars, and coyotes that had kept the herd in balance, the Kaibab deer population exploded. Thousands died of starvation after overgrazing ruined the habitat.

By the 1920s it was apparent that other wildlife management techniques were required. The failures of reintroduction and predator control led to the development of the science of wildlife management and to an expanded role for the federal government in all aspects of wildlife regulation and protection.

Aldo Leopold, whose field experience later included the Kaibab deer situation, was the first person to work out the fundamental principles of wildlife management. In 1920, he began a study of the relationships among animal and plant species that altered the previously held assumptions about how wild animal populations function. Leopold articulated the principle of carrying capacity—the idea that an ecosystem can support only a certain number of a single species—which is now a central premise of wildlife biology. Leopold’s book, Game Management, published in 1929, remains a basic text in the field.

Leopold’s new approach to wildlife management fostered much scientific research and the recognition of wildlife management as a profession. In 1935, the Biological Survey established a network of wildlife research units at land grant universities. This Cooperative Wildlife Research Unit Program began training thousands of wildlife professionals. In 1936, the first North American Wildlife Conference was held, assembling biologists, agency administrators, hunters, and other persons interested in wildlife to discuss wildlife issues. In 1940, the Biological Survey and the Bureau of Fisheries were merged into the Fish and Wildlife Service and located in the Department of the Interior (DOI). It was an encouraging time for wildlife.

(c) A Corner Is Turned—1940–70

By 1940, a corner had been turned for many significant wildlife species. There was no longer danger of widespread extinctions of once common animals like the passenger pigeon. Game species, particularly elk and deer, were increasing in numbers and distribution. Waterfowl habitat was
being set aside in federal wildlife refuges, although the low numbers of waterfowl were still a concern. Other wildlife habitat became available, serendipitously, as Americans left the farm and moved to the city. In the late 1930s the rate of conversion of forest land to agriculture slowed and then reversed. In addition, the federal government was funding wildlife projects across the country through the Federal Aid to Wildlife Restoration Act.

This good news masked the plight of species dependent on water as development continued to encroach on wetlands and polluted habitat. It also masked the plight of species of no value to hunters and fishers, and those that continued to be the target of predator and pest control programs.

Perhaps the most significant factor in achieving wildlife protection during this period was the change in public attitude. By World War II, wildlife was used less for commercial production of furs and food than for consumptive and nonconsumptive recreation. The utilitarian view of wildlife that had prevailed through most of U.S. history, even during the conservation movement, gave way further to the idea that wildlife should be preserved for its own intrinsic value. The regard for wildlife extended to all species, with the exception of predators and pests, not just to those that could be hunted, trapped, and hooked.

The attitude change is seen most clearly in the efforts to protect species in danger of extinction. In North America, more than 500 species are known to have become extinct since 1600. In 1945, the Smithsonian Institute published the first endangered species list of 40 animals, including several that are recognizable today: the black-footed ferret, the California condor, and the whooping crane. The list was part of the Smithsonian’s program to identify and aid species in trouble.

Until 1966, endangered species’ protection, such as it was, was carried out in state and federal wildlife programs geared to other purposes, principally game management. The first federal law designed to protect endangered species was the Endangered Species Act (ESA) of 1966, which directed the Secretary of the Interior to conduct a program of endangered species protection and authorized the expenditure of $15 million from the Land and Water Conservation Fund for acquisition of endangered species habitat. The act did not prohibit or limit the taking of endangered species, and, therefore, was regarded as weak.

The 1966 ESA was superseded by the Endangered Species Act of 1973, which made a significant change in the federal approach to endangered species protection. The 1973 ESA declared it unlawful to take any member of an endangered species, regardless of where the species was found. Thus, the killing of endangered species was prohibited on private and state, as well as federal, lands. Critical habitat protection and a process for intergovernmental consultation to prevent federal actions from jeopardizing the continued existence of endangered species were also added.
(f) Awake After Silent Spring—1970—Present

Concern for endangered species carried forward to the 1970s, joining with the flowering of the environmental movement. Wildlife benefitted from the host of statutes passed during the beginning of the decade: the Clean Air Act, the Clean Water Act, the National Environment Policy Act, the Marine Mammal Protection Act, the National Forest Management Act, the Federal Land Policy and Management Act, and so on. These laws reflect a new understanding of the impact of human activities on the environment and direct significant federal resources to environmental clean up and to a change in industrial practices that cause pollution.

For wildlife, the single most important event of the period may well be the publication in 1962 of Rachel Carson’s Silent Spring, which described the terrible threat posed by DDT (dichloro-diphenyl-trichloro-ethane) and other pesticides to the osprey, brown pelican, peregrine falcon, and other birds, animals, and fish. Once again, common animals were at the brink of disappearing. Although it took 10 years from publication of the book, the Environmental Protection Agency (EPA) banned the use of DDT and related pesticides in 1972. In the years since then, the affected bird species, particularly the brown pelican, have made a remarkable comeback.

At the present time, the future for many species of American wildlife is uncertain. Understanding of wildlife needs has grown tremendously, but so has the human impact on wildlife habitat and water resources. More is known about the causes of species decline and extinction, but a corresponding understanding of how to solve these problems is lacking. Wildlife law will continue to be an important vehicle for grappling with these issues.

B. THE DEVELOPMENT OF THE LEGAL FRAMEWORK FOR WILDLIFE LAW

STATE LAW RESPONSE

As many beginning law students know from reading the case of Pierson v. Post, conflicts over the ownership and control of wildlife have existed nearly as long as our nation. Initially they were only as a matter of private law mediating disputes between individual parties. However, that soon would change.

Wildlife law began in the United States during the early nineteenth century when states enacted legislation to control the “taking” or harvesting of animals for food or sport. The state’s power to control wildlife emanated from the general conception of the sovereign police power occasionally augmented by public trust principles. In the American context, the state power over wildlife served as the analogue to English legal principles that the King had absolute control over similar resources. Throughout the 1800s numerous private landowners challenged the state’s right to control a variety of animal species. First, in Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 10 L.Ed. 997 (1842), the Supreme Court
rejected a riparian landowner’s asserted right to harvest river oysters and found the legal concept of a state public trust in wildlife. This position—later known as the State Ownership Doctrine—was reinforced by other decisions such as McCready v. Virginia 94 U.S. (4 Otto) 391 (1876) (authority of Virginia to exclude non-residents from planting oysters in Tidewater Virginia) and Manchester v. Massachusetts, 139 U.S. 240 (1891) (authority to control catching of fish within the bays of the state) and ultimately reading its clearest expression in Geer v. Connecticut, 161 U.S. 519 (1896) ruling that states have the exclusive rights of regulating wildlife within their jurisdiction. This view of state legal supremacy reached its apogee in The Abby Dodge case, 223 U.S. 166 (1912), where the Court suggested that even federal law was subordinate to state law with regard to the harvesting of sponges in the Gulf of Mexico or the Straits of Florida.

THE GROWTH OF THE FEDERAL INTEREST IN WILDLIFE

The State Ownership doctrine may have been successful by early state/individual conflicts over wildlife, commercial resource values, but it would soon find federal interest challenging it. By 1900, it was clear that exclusive state regulation appeared largely ineffective due to underenforcement and it would not save wildlife populations from destruction as the bison, carrier pigeon, and woodland caribou attest. Pressure mounted to react to the devastating wildlife reductions by enacting federal legislation. By the turn of the century wildlife protection was a national, not merely local, concern and conservation groups such as the National Audubon Society, the Boone and Crockett Club and the Sierra Club worked to enact federal legislation protecting wildlife. See H. Borland, The History of Wildlife in America 122 (1975). Beginning with the passage in 1900 of the Lacey Act, Congress became more active in asserting a federal interest in wildlife preservation. The exercise of federal power in the field of wildlife law was grounded on three theories: the commerce power, the treaty power and the property clause of the Constitution. This act, 16 U.S.C. § 701 et seq., prohibited the interstate transport of wild animals or birds killed in violation of state law. Congress employed its power to regulate interstate commerce to enforce state law protecting wildlife. Similar protections were extended to two species of black bass in the Black Bass Act of 1926—16 U.S.C. § 851–856—and this law has gradually been amended to apply to all fish taken contrary to American or foreign law.

In 1918 Congress enacted the Migratory Bird Treaty Act which implemented a treaty signed by the United States and Great Britain (for Canada) two years earlier. This act, a constitutional exercise of congressional power to implement treaties, prohibits the taking of any bird protected by the statute without a federally-issued permit. The Supreme Court upheld the act against a challenge by the State of Missouri which asserted ownership of migratory birds within its borders. In Missouri v. Holland, the Court rejected the state’s ownership argument and grounded its decision supporting federal regulation of wildlife on Congress’ treaty-making power.
The third constitutional basis for federal assertion of the power to protect wildlife was the Property Clause of Article IV of the Constitution. Congress had enacted a wide range of statutes as early as the 1860s which preserved many forms of wildlife on the lands owned or controlled by the federal government. For instance, laws were passed which barred the killing of fur bearing animals in Alaska (1868), protected and then prohibited the hunting of game in Yellowstone National Park (1882 and 1894) and restricted bird hunting on lands established for bird breeding (1906). In 1928 the Supreme Court ruled in Hunt v. United States, 278 U.S. 96, that the Forest Service could control the rapidly increasing deer population in the Kaibab National Forest without regard to the Arizona state game regulations. Justice Sutherland wrote that federal power to protect its property “does not admit of doubt * * * the game laws or any other statute of a state notwithstanding.” Id. at 100. With the increase in popular interest in the outdoors, parks and natural areas, and the environment in the post World War II period, it is hardly surprising that Congress would enact legislation identifying a strong federal interest in the preservation of wildlife.

The state ownership doctrine was finally repudiated by the Supreme Court through two decisions rendered in 1976 and 1979. In Kloppe v. New Mexico, 426 U.S. 529, the Court ruled constitutional the Wild Free Roaming Horses and Burros Act of 1971, which instructed federal land managers to protect unbranded and unclaimed feral horses and burros “as living symbols of the historic and pioneer spirit of the West” contributing “to the diversity of life forms within the Nation and enrich[ing] the lives of the American people.” 16 U.S.C. § 1331. In this case, the State of New Mexico had captured a number of wild burros from land granted by the Bureau of Land Management to a grazing permittee and the BLM wanted them returned. The Kloppe court held that the power granted to Congress by the Property Clause included the power to regulate and protect wildlife on public lands.

Three years later, the Supreme Court in Hughes v. Oklahoma, 441 U.S. 322, invalidated an Oklahoma statute prohibiting the export of minnows caught in the waters of the state. In Hughes the Court specifically overruled Geer v. Connecticut which had established the now discredited doctrine that states “own” wildlife within their borders and therefore exercise special power over it. Consequently, state wildlife regulation is subject to federal power under the Commerce Clause according to the same general rules that apply to state regulation of other natural resources. Consequently, states are not entirely powerless to adopt protective wildlife laws since they still are regarded as trustees of fish and wildlife even if they are not longer considered the actual owners. See G. Coggins, Public Natural Resources Law 18–5 (1989).

However, state wildlife law is subject to a federal “preemption” analysis if there is a conflict with federal law or policies. In United States v. Glenn–Colusa Irrigation Dist., 788 F.Supp. 1126 (E.D.Cal.1992), the court found that the winter-run chinook salmon, an endangered species, was irreparably harmed by the District’s act of pumping water from the
Sacramento River. The court found that the federal Endangered Species Act preempted the California state wildlife law against takings because the state law was less protective. In Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977), the Supreme Court invalidated discriminatory Virginia statutes that denied commercial licenses to aliens, and found that the federal enrollment and licensing system for fishing and the coastwise trade preempted the state laws. See also Baldwin v. Fish & Game Commn. of Montana, 436 U.S. 371 (1978), and Fouke Co. v. Mandel, 386 F.Supp. 1341 (D.Md.1974).

State wildlife law also is subject to other federal constitutional norms. Courts use both substantive due process and equal protection analyses to evaluate state laws affecting wildlife. In Burns Harbor Fish Co. v. Ralston, 800 F.Supp. 722 (S.D.Ind.1992), the court concluded that Indiana’s ban on gill net fishing in Lake Michigan did not violate substantive or procedural due process. Indiana was “simply exercising its sovereign right and responsibility to oversee and regulate the environment and wildlife within the State.” Id. at 726. Plaintiffs will frequently raise claims of constitutional violations if they have been denied permission to build or act under a state wildlife law. See e.g. Nestor Colon Medina & Sucesores, Inc. v. Custodio, 758 F.Supp. 784 (P.R. 1991). Many state regulations impose durational residence requirements that limit wildlife access to residents. See e.g., Sporbase v. Nebraska, 458 U.S. 941 (1982). The full extent of their validity remains to be clarified by future litigation. Compare McCready v. Virginia, 94 U.S. 391 (1876) [upholding a law limiting leasing of oysters to state residents], and Hassan v. Town of East Hampton, 500 F.Supp. 1034 (E.D.N.Y.1980) [one-year residency requirement for shellfish license violates fundamental right to travel in violation of Equal Protection Clause of the Fourteenth Amendment].

Indian treaty rights may also have an important impact in wildlife law. Traditional tribal cultures were often closely connected to the natural environment, including wildlife. Consequently, numerous treaties signed by tribes during the nineteenth and early twentieth centuries pertained to traditional hunting, fishing and harvesting practices. Courts following United States v. Winans, 198 U.S. 371 (1905), find treaty-based tribal fishing and hunting rights to be part of larger rights possessed by Indians and worthy of protection when the need exists. However, this position has not existed without challenge. Litigation has spanned over twenty-two years between the State of Washington and various Indian tribes over the right to take fish from the waters of the northwest United States. See United States v. Washington, 813 F.2d 1020 (9th Cir.1987), cert. denied, 485 U.S. 1034 (1988). The Supreme Court held that the tribes have treaty rights to take up to one-half of all harvestable fish, Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979), but litigation has continued in an attempt to define and enforce these rights. See, e.g., United States v. Washington, 873 F.2d 240 (9th Cir.1989). Subsequent federal law can change established Indian treaty rights to wildlife. See United States v. Fryberg, 622 F.2d 1010 (9th Cir.1980) [Eagle Protection Act applies to Indian tribe member who killed Bald Eagle within Indian reservation boundaries].
C. THE ENDANGERED SPECIES ACT—THE "FLAGSHIP" ENACTMENT ON WILDLIFE PROTECTION

While the term "wildlife management" radiates a bland aura and evokes little public interest, the idea of the extinction of a living species generates considerably more sympathy and popular support. Especially when applied to photogenic vertebrates such as the bald eagle, the whale or the grizzly bear, extinction has an evocative meaning in the public's collective consciousness and one which calls in a general way for species protection and the reversal of the march toward genetic oblivion. This "march" has extremely serious consequences and has been framed in the following terms:

The recent discovery of a biodiversity crisis that recognizes that humans are presiding over the greatest episode of extinction ever to occur on the planet (one species lost per ½ hour is the common prediction) adds a note of urgency (if one is needed) to contemporary reconsiderations of the human place in nature. Biological resources now being rapidly lost are nonreplicable sources of information, of wealth, of political stability, of human comfort, happiness, and joy.

William H. Rodgers, Jr., Environmental Law 995 (2nd ed. 1994). In the United States the public consciousness of endangered species issues are affected by the presentation of these images in the popular culture through such films as "The Freshman" where Marlon Brando and Matthew Broderick combine to thwart an international ring offering wealthy patrons the opportunity to dine on the last known example of several endangered animals and in "The Medicine Man" where Sean Connery seeks the cure for cancer in rainforest plants. As appealing as these popular views might seem to be, they mask the controversial nature of endangered species regulation as an area of public policy and environmental law. In the 1990s protection of species—that is, ordinary and unsympathetic species—has been pictured as an anti-human environmental extravagance. Over the nearly twenty years since the U.S. Supreme Court's decision in Tennessee Valley Authority v. Hill (upholding 187 of the ESA and protecting the snail darter) has been viewed in some quarters as an excessive and unjustified form of environmental overregulation. As the cases below indicate, the effect of the Endangered Species Act has expanded to create serious land use conflicts when species critical habitat is also desirable for commercial or residential development. A problem of truly constitutional proportions has emerged. In the materials which follow consider the values at stake as well as the means chosen by Congress and the Executive branch with which to achieve them.

William H. Rogers, Jr., Environmental Law 1002–23 (2nd ed. 1994).

The legal particulars of the ESA are clearly discernible in the proliferation of verbiage the Act has become. The key provisions are Sections 4,
7, 9, and 10. These sections require, in language “remarkably plain” for federal legislation “that endangered species be identified, that their essential habitat be designated, that federal agencies not jeopardize these species, or adversely modify their habitat, that federal actions likely to jeopardize be exempted only in extraordinary circumstances, that plans be prepared and implemented for species recovery, and that private parties not harm these species without undertaking remedial planning. Each of these sections is a stage in the process. Each is described in language that has been clarified and strengthened over twenty years of congressional review and amendment. Together, they represent a blue-print for how the federal government is to ensure co-existence with those parts of nature most vulnerable to human activity. Rephrased, this section will discuss the listing process and habitat designation, consultation and the protective limits of Section 7, the takings and other enforcement provisions, and the habitat conservation and recovery plans.”

a. Listing and Habitat Designation

(i) Listing

Although the creatures may not care, it is the listing process under the ESA that triggers the important protections of law—the designation of critical habitat, consultation to avoid jeopardy, prohibitions against taking, and the planning for habitat conservation and recovery. The entity that is listed is a “species,” which includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” This definition obviously dives enthusiastically into the peculiarities of taxonomy, and it contains a policy choice to protect local populations of vertebrates that are isolated by the fragmented habitat that today has become the norm. There is some debate about whether the ESA makes a mistake in units by defining the world in terms of species rather than ecosystems or biodiversity or something else. A species can be listed when it is “endangered,” which means “in danger of extinction throughout all or a significant portion of its range,” or when it is “threatened,” which means that it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” These definitions make the prospects of permanent loss the overriding criterion of conservation in lieu of any number of other criteria of species significance (e.g., “indicators, keystones, umbrellas, flagships and vulnerable”) mentioned by ecologists. In terms of numbers, as of 1991 “a total of 651 domestic species were listed as threatened or endangered under the ESA.” An additional 600 species were considered serious candidates, and another 3,000 species were identified as potentially eligible. It is possible for a species to be struck from the list as well as added to it, for the sad occasion of extinction, for the happy occasion of recovery (the brown pelican and the American alligator), and for the fortuities of miscalculation.

The Secretary of Interior is obliged to make listing determinations “solely on the basis of the best scientific and commercial data available to him ** and after taking into account *** efforts *** being made
* * * to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices * * *.” Among the factors to be considered are:

(A) the present or threatened destruction, modification or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms;

(E) other natural or manmade factors affecting its continued existence.

The most celebrated feature of the listing criteria is that they are economically-oblivious and inattentive to the social consequences that might ensue in the wake of listing. What is anticipated is a scientific call on how close the species is to the brink. But considerable discretion is bound up in the judgment about the “inadequacy” of other regulation endeavors or the credibility of other protective measures “being made.”

* * *

The “best scientific and commercial data” standard that shows up in Subsection 4(b) is found elsewhere in the Act, and is best understood as an indicator that the courts will take the usual hard look at agency actions. This “best data” test merely “prohibits the Secretary from disregarding available scientific evidence that is in some way better than the evidence he relies on.” Its role is not paralytic and does not therefore require exhaustive study before choices are made, and it does not prevent the Secretary from making predictions about dangers to the species, about the populations that will be included in listing decisions, about the prospects of benefits from listing, and about the necessity for a quick action. The ESA list, moreover, is “not a list of animals to be written off,” and listing does not suspend other protections that might be in place.

The ESA makes available initiation rights to outsiders who may file listing and delisting petitions with the Secretary who is supposed to act in accordance with a strict timetable. A decision not to list will be arbitrary and capricious where “the Service disregarded all the expert opinion on population viability, including that of its own expert, that the owl is facing extinction, and instead merely asserted its expertise in support of its conclusions.” But one suspects that success rates in challenging listing judgments will not be high.

Substantiated listing petitions can result in one of three findings: that the requested action is warranted, that it is not warranted, or that it is warranted but listing is precluded by other pending listing proposals. This “warranted but precluded” category was conceived as a triage-type process for giving a higher priority to species in greater need, but it has become “a black hole” for unlisted endangered species. Several species “have been ‘warranted but precluded’ for the past sixteen years. A petition to list the Puerto Rican Broad Winged Hawk was filed in 1980 and has been ‘warrant-
ed but precluded' every year since. According to a 1992 [GAO] report, 105 species have been declared 'warranted but precluded' for more than two years, fifty-six of which have languished in this category for more than eight years.” Species that are proposed for listing (do these include those in the warranted but precluded category?) get some procedural protection under the ESA but considerable less than the full arsenal. One way this listing logjam could be undone by the stroke of the legislative pen is to follow the example of the National Historic Preservation Act whose protections were extended in 1976 from listed properties to all “eligible” properties.

The endangered/threatened distinction grew out of Nathaniel P. Reed’s analogy to the “hospital where the patient is transferred from the intensive care unit to the general ward until he is ready to be discharged.” For the most part, the “taking” of endangered species is flatly prohibited, while threatened species are protected only to the extent the Secretary issues regulations deemed “necessary and advisable” for the species’ “conservation.” This means as a practical matter that hunting and fishing of threatened species is an allowable outcome. From the earliest days when the endangered/threatened distinction first appeared in the 1973 Act, it has been strongly suspected that “threatened” listings have been driven more by the political advantages of the hunting option than the biological conditions of species recovery. Proponents of this view cite the grizzly bear and the Eastern Timber Wolf listings as prime exhibits although there are other examples of “downlisting” to allow for fishing and hunting. The legal limits of any administrative practice of this sort stem from the definition of “conservation” that provides the outer bounds of the regulatory restrictions on threatened species. Thus, in the Eastern Timber Wolf case the court invalidated rules that authorized sport trapping and other takings that would be permissible only in the “extraordinary case where population pressures within the animal’s ecosystem cannot otherwise be relieved.”

(ii) Habitat Designation

The designation of critical habitat is a pivotal issue for the biological reason that habitat is the crucial parameter for species survival, for the legal reason that critical habitat is protected from impairment or modification under Section 7, and for the political reason that the geography staked out as “critical” suddenly is burdened by servitude for the benefit of the protected species. It is hardly surprising, then, that the critical habitat issue has been embroiled in controversy and the focus of legislative attention throughout the history of the ESA. At this moment in legal time, “critical habitat” is defined by law to include “the specific areas within the geographical area occupied by the species” at the time it is listed and other areas determined by the Secretary to be “essential for the conservation of the species.” Unless it is determined to be essential, critical habitat “shall not include the entire geographical area which can be occupied by the threatened or endangered species.” This language casts at least a pale light on the question of how much habitat is enough: certainly the
geographical toeholds into which the species has been squeezed, most assuredly not the extensive ranges it may have historically enjoyed (the Gray Wolf, after all, could occupy all of the American West if given a chance), and something in between to the extent it is necessary to bring the species back from the brink.

Critical habitat designations "shall be made on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." The sentiments behind this cost-benefit qualifier are easy enough to detect: does it make sense to include a shopping center with the "critical habitat" of, say, an endangered salamander and in the process create extraordinary management burdens with few benefits for the protected species? Still, the balancing of economic convenience against the incommensurable values of entire species always has been awkward for cost-benefit theory, and perhaps for this reason the administrators have been slow to resort to the economic escape-route. One collateral consequence of expanding the critical habitat inquiry to include economics and anything else that comes to mind is to keep alive the question of whether NEPA applies to habitat-designation decisions. Despite strong precedent to the contrary, a district court in Oregon held recently that the designation of approximately 6.9 million acres as critical habitat for the Spotted Owl could not be undertaken without consideration of the socio-economic effects of the decision.

Understandably, one might suspect that the designation of critical habitat would coincide with the listing of the species. The creatures, not surprisingly, do not exist apart from their environment and the better rescue missions presuppose that there will be room at the inn for the would-be-savers. Indeed, any species that succeeds in hanging on in the face of human judgments of "threatened" and "endangered" is obviously hanging on somewhere, and this somewhere would appear by definition to be critical habitat. Whatever the outer bounds of a species' range or potential range, its core "habitat" would seem to be identifiable. In an approximate way, the ESA contains a strong linkage between species listing and habitat designation. Subsection 4(a)(3) makes clear that critical habitat designations ordinarily are made "concurrently" with the listing decisions, but with a qualifier ("to the maximum extent prudent and determinable"). The legislative background has been read authoritatively by Judge Thomas Zilly in the Spotted Owl case to mean that "the designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances" and, moreover, that habitat designation is not an "indeterminable" task without a convincing account of why the question was not answerable. A few failures to designate have been upheld for want of adequate information, or because the species would not be benefited, or
because Congress made the case-specific call. But the governing assump-
tion is that listings and habitat designations will remain closely wed.

The empirical surprise in this account is not the frequency and scope of
critical habitat designations but their infrequency. Indeed, critical habitats
have been designated for only 16% of listed species, and there is little
activity that suggests closure of this gap. The legal leak through which
most habitat designations have escaped has been the “prudent” reference
in Subsection 4(a)(3). One recent study shows that 317 (of 320) decisions
decinging to designate critical habitat did so on the ground that “it would
not have been ‘prudent.’” The more specific reasons, often given in concert,
were ‘vandalism’ (63%), ‘takings’ (48%), and ‘collectors’ (30%). A subse-
quent review of listings from December, 1988 through May, 1992 demon-
strated the same pattern. Of nearly 200 notices for listing examined, 174
decined to designate critical habitat. Of these refusals, 159 were said to be
‘not prudent,’ and fifteen ‘not determinable.’ During the same time, only
ten species were identified that received critical habitat designation.”

Debate continues over the importance of the administrative failures to
designate critical habitat. Subsection 7(a)(2), after all, forbids both actions
that jeopardize the species and those that destroy or modify designated
habitat. To the extent the actions that jeopardize coincide with those that
destroy, the protections are redundant. But, one suspects, as an evidenti-
ary and scientific matter it is easier to answer the question of whether
habitat will be unacceptably modified than whether jeopardy is set into
motion. Courts, moreover, are likely to be more comfortable in protecting
habitat as defined by an expert agency than in making more global choices
about probable species survival. Empirically, though the case sample is not
large, no court has approved a litigated intrusion into designated critical
habitat, while several have refused to enjoin actions where no critical
habitat has been designated.

b. Consultation and Protection Under Section 7

(i) Consultation

Whatever the secret ingredients of a successful consultation process
(clear goals, reciprocal benefits, adequate resources), Section 7 consultation
has succeeded at least to the point where the principal players consider it
advantageous to engage in the process. Judicial willingness to enforce the
rules has contributed to these assessments of agency interest. The more
difficult question is whether the consultation has made life easier for
endangered species.

The ESA envisages a “three-step” process for consultation: first, the
acting agency must inquire of the Fish & Wildlife Service (or the National
Marine Fisheries Service, as the case may be) if listed species “may be
present” in the area affected. If the answer is “yes,” then the acting
agency must prepare a “biological assessment” that is a preliminary
inquiry into effects that can be folded into the NEPA compliance docu-
ments. If a listed species is likely to be affected, then formal consultation
ensues under Subsection 7(a)(2). This consultation process “is normally to
be completed with 90 days and is to result in a "biological opinion" of the Secretary detailing how the proposed action will affect the species or its critical habitat. If the action is likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of its critical habitat, the biological opinion must also suggest reasonable and prudent alternatives, if any, to avoid those effects."

The empirical experience with Section 7 consultation can be summed up simply: large numbers, few project stoppages. Within a five-year period covering 1987–92, the F & WS conducted 71,560 informal and 2,000 formal consultations. "Jeopardy" opinions ordinarily are forthcoming in less than 1% of all formal consultations. And these "jeopardy" opinions themselves invariably identified a "reasonably prudent alternative" (RPA) that allowed the project to proceed, not infrequently with charitable assumptions about the behavior and consequences that would allow the project to co-exist with the species. The number of projects stopped in their tracks by the Section 7 process is vanishingly thin. Mitigation and project modification invariably offer a way around the sharper conflicts:

For example, developers of a landfill in San Jose, California, agreed to a number of mitigation measures to offset the project's impact on the Bay checkerspot butterfly—creation of a conservation trust fund, ongoing research, habitat acquisition and management, restoration and revegetation when the landfill is at capacity, and off-site reintroduction and recovery. Similarly, biological opinions on several marina projects on the intracoastal waterway in Florida have prescribed a variety of measures to offset impact on the West Indian manatee, including reducing the number of power boat slips, reducing boat speed limits, conditioning slip rent agreements, and informing boat owners about the threat to the manatee.

Courts enthusiastically have enforced the Section 7 consultation process, specifying the types of actions for which consultation and reinitiation of consultation is required. They have spelled out the nature of the effects that must be addressed in the consultation process. Courts have taken a hard look at biological assessments and opinions that are incomplete, hide behind a lack of data, or are based upon inadequate research. Courts make clear that agencies will run substantial risks of project interruption if they proceed without any consultation at all, or with tardy consultation, or contrary to the mitigation recommendations in a no-jeopardy opinion, or the RPA conditions in a jeopardy opinion. On the other hand, courts have made clear that the consultation process is advisory only and does not give a veto to the biological agency. The courts will be tolerant of agency actions that are compatible with the no-jeopardy opinion, commendably experimental, or show some original signs of mitigation. And they are unlikely to intervene if the biological advice is confused, disjointed, or inconsistent, or where the agency commitments are informal. As was said in Friends of the Payette v. Horseshoe Bend Hydroelec. Co.:

[The court] is troubled by the lack of a specific Biological Assessment, and by the absence of a formal approval by the U.S. F. & WS Regional Director. But the Court ultimately finds that these requirements have been met even if not so formally labeled. The U.S. F & WS Regional
Director has given his approval of the project, and the studies conclude that the bald eagle will not be affected. That is sufficient.

(ii) Protection

Subsection 7(a)(1) states that the federal agencies “shall * * * utilize” their authorities “in furtherance of the purposes of this chapter” by carrying out programs for the “conservation” of endangered and threatened species. This language is suggestive of the charter-supplementation purpose of the NEPA, and it is read commonly as imposing affirmative duties on the agencies to assist the recovery of the species so that the protections of the Act are no longer necessary. This obliges agencies to refashion hunting regulations to protect endangered species and it allows the Secretary of Interior to conserve the fish rather than sell the water from the Stampede Dam and Reservoir on the Little Truckee River. On the other hand, Subsection 7(a)(1) does not extend an open-ended duty to “do what it takes” to protect threatened and endangered species. And it does not circumscribe the Secretary’s discretion to experiment for the benefit of protected species, as in the decision refusing to shut down a campground presenting hypothetical risks to grizzly bears.

Subsection 7(a)(2) is the best known example of environmental law gone draconian. Other provision of ESA contain the procedural duty to consult, which is strictly enforced by the courts. But it is Subsection 7(a)(2) that makes clear that each federal agency “shall * * * insure” that any of its actions “is not likely to jeopardize the continued existence of any endangered species” or result in “the destruction or adverse modification” of critical habitat. This language appears to impose two substantive prohibitory duties not one (a duty to avoid jeopardy and a duty to avoid adverse modification of habitat) although there is considerable discussion about the extent to which the two duties are coextensive. The exemption language of Subsection 7(a)(2) that was inspired by the Tellico Dam imbroglio is close to dysfunctional since it is so rarely employed in the real world.

The operative terms of Section 7 (“not likely to,” “jeopardize,” “destruction,” “adverse modification”) have their own special histories and definitions; and “critical habitat” is frequently not designated. But when all is said and done, a federal project that intrudes too enthusiastically upon the home or the survival-prospects of a listed species is in deep trouble. This lesson has been taught repeatedly in the context of dam- and road-building, timber-harvesting, and many other activities. Projects that survive the gauntlet of Subsection 7(a)(2) must show convincing scientific signs that the species and its members will be untouched.

c. Takings and Other Enforcement Provisions: Of Citizen Suits and Remedies

(i) Takings

Section 9 of ESA makes it unlawful for “any person” subject to the jurisdiction of the United States to do a number of activities (e.g., import, take, possess, sell, deliver, carry, violate a regulation) pertaining to endan-
gered species. Somewhat different restrictions apply to endangered plants and threatened species. On this laundry list easily the greatest attention has been directed at the term to "take," which means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." This is a broadly worded prohibition, and it took a phase-change outwards when the famous Palila cases read the anti-take provisions as forbidding habitat modification that worked to the disadvantage of the protected species. This approach has not swept the field of wildlife protection law. But it is now ensconced in the ESA definition of "harm" (which is part of the definition of "take"):

[An] act which actually kills or injures wildlife. Such act may include
significant habitat modification or degradation where it actually kills or
injures wildlife by significantly impairing essential behavioral patterns,
including breeding, feeding, or sheltering.

In this spirit, the "takings" prohibited by the ESA can be effected by the
tolerance of herbivores whose browsing can impair habitat, by continued
registration of a pesticide containing strychnine that can hit endangered
nontargets, by approval of the use of lead-shot ammunition that can result
in secondary poisoning of bald eagles by irrigation pumping operations, by
even-aged forest-harvesting activities that bring about a decline in the
population of red-cockaded woodpeckers, and by sundry other activities.
Conclusions of "taking" can be defeated by showing that the activity is not
likely to result in mortality or habitat modification.

The ESA allows for civil penalties (of not more than $25,000 for each
offense) for any person who "knowingly" violates the ESA and for exporters
and importers who commit violations regardless of knowledge. Forfeitures
are possible, and is the remedy of preference for innocent violations
by tourists and hunters. Criminal sanctions are available also for persons
who "knowingly" violate the provisions of the ESA, and some interesting
case law is beginning to appear. But the conspicuous markers in this legal
world are paltry penalties that are unlikely to deter future offenders. The
endangered species enforcement game is a deadly serious business known
for its high volume and daredevil undercover operations. The legal designer
that can make compliance the norm in these distant corners of the
planet will deserve the first Nobel Prize in law.

The ESA has a standard citizen-suits measure inviting enforcement of
nondiscretionary official duties and of the rules and regulations issued
under the Act. The usual close attention in the courts is given to the
questions of standing and other administrative preliminaries, notice, and
attorneys' fees. The search for enforceable obligations is an inescapable
component of these types of lawsuits. The tradition of unqualified injunction
was established in the Supreme Court's Tellico dam decision, and a
number of other strong and sweeping decrees can be found. While discretion
is ever-present, the courts understand that they are protecting living
things that are unique on this earth. Judges in this business are slow to
assume the cloak of arrogance that might encourage them to draw the fine
lines that could lead to the terrible finality of extinction.
d. Habitat Conservation and the Species Recovery Plans

(i) Habitat Conservation Plans (HCPs)

In 1982, Congress added requirements under Section 10 “that allow private parties to ‘take’ listed species, provided that the take is ‘incidental’ to otherwise lawful activity and is accompanied by a ‘conservation plan’ approved by the Department of Interior. The plan must specify the projected impacts, the means to ‘minimize and mitigate’ them, and reasons why ‘alternatives’ to the taking are not employed. The provisions were seen by Congress as a way of accommodating private development and promoting ‘creative partnerships’ between private developers and local, state, and federal governments.”

From 1982, when the process was approved, through the end of Fiscal Year 1991, only twenty incidental take permit applications were filed with the F & WS. Of these, eleven had been issued and one formally denied. The process obviously is being used “selectively” and “experimentally” to develop plans for conserving endangered species. The best known and prototypical plan is the one growing out of a “private development on the last mountain habitat of the Mission Blue Butterfly and San Bruno Elfin Butterfly.” In the resulting compromise, eighty-seven percent of the Butterfly habitat was permanently conserved and the remaining thirteen percent made subject to limited housing development, reducing the species’ chances for survival by only an estimated two to five percent. This model—and this level of security—was approved and relied on by Congress in enacting the Section 10 habitat conservation planning provisions. Subsequent plans, however, have been less secure. * * *

(ii) Species Recovery Plans

Endangered species recovery plans have been an important feature of the ESA for a number of years. As presently written, Subsection 4(f) directs the Secretary to develop plans “for the conservation and survival of endangered species and threatened species” unless he finds “that such a plan will not promote the conservation of the species.” The secretary is obliged to put into the plans a “description” of “site-specific management actions” as may be necessary to achieve the plan’s goal and “objective measurable criteria” that can be used to determine species recovery. Authority is granted to draw on experts in the field to appoint recovery teams. The Secretary is obliged also to report to Congress biannually on the status of efforts to develop plans, and to monitor the condition of “recovered” species. Interestingly, prior to the approval of a recovery plan, the Secretary is obliged to “provide public notice and an opportunity for public review and comment on such plan.”

The recovery plan process has lagged for many of the same reasons (shortages of funding, political reluctance, hard choices) that have slowed down the listing process. Sixty-one percent of listed species have plans approved; thirty percent of species have been listed for more than three years without an approved plan. The Fish & Wildlife Reference Services publishes and disseminates the documents, which cover more than 500
species in a variety of plans—some revised, some in draft, some unavailable, some replaced. Observers of the process of plan development and implementation identify predictable problems of organization struggles, conflicting goals, intelligence failures, and striving for control. Plans that are produced typically suffer also from generality, vacuity, and imprecision. The visual problems of enforceability are aggravated by the holding in National Wildlife Federation v. National Park Service, which was a suit challenging the NPS decision to leave open the Fishing Bridge Campground that was identified in the recovery plan as being a threat to the grizzly bear that should be closed. The court upheld the Service's decision to leave open the campground, reasoning that the Secretary had a duty to implement the plan only if "he reasonably believes that it would promote conservation." One suspects that in the longer run duties identified in the plans will be enforced by the courts if the obligations can be characterized as "not discretionary."

Planning documents designed to bring species back from the brink of extinction are among the most ambitious and commendable interventions in the history of environmental law. Unfortunately, good law and policy often is not enough. Every student of the subject should read the recovery plan for the Dusky Seaside Sparrow, which was declared extinct in 1987.
O'SCANNLAIN, Circuit Judge:

This is the fourth round of judicial activity involving a six-inch long finch-billed bird called palila, found only on the slopes of Mauna Kea on the Island of Hawaii.

An endangered species under the Endangered Species Act ("Act"), 16 U.S.C. § 1531–43 (1982), the bird (Loxioides bailleui), a member of the Hawaiian honeycreeper family, also had legal status and wings its way into federal court as a plaintiff in its own right. The Palila (which has earned the right to be capitalized since it is a party to this proceeding) is represented by attorneys for the Sierra Club, Audubon Society, and other environmental parties who obtained an order directing the Hawaii Department of Land and Natural Resources ("Department") to remove mouflon sheep from its critical habitat. Sports hunters, represented by the Hawaii Rifle Association, among others, had intervened to dispute the contention that the Palila was "harmed" by the presence of mouflon sheep. Hence, these appeals.

* * *

I

The Department argues that the district court construed the definition of "harm" in 50 C.F.R. § 17.3 too broadly.... The scope of the definition of harm is important because it in part sets the limit on what acts or omission violate the Act's prohibition against "taking" an endangered species....

In making this argument, the Department suggests dichotomy between "actual" and "potential" harm. The Department believes that actual harm only includes those acts which result in the immediate destruction of the Palila's food sources; all other acts are "potential" harm no matter how clear the casual link and beyond the reach of the Act. Thus, the Department challenges the district court's finding that habitat destruction which could drive the Palila to extinction constitutes "harm."

We inquire whether the district court's interpretation is consistent with the Secretary's construction of the statute since he is charged with enforcing the Act, and entitled to deference if his regulation is reasonable and not in conflict with the intent of Congress. See United States v. Riverside Bayview, Inc., 474 U.S. 121, 131 (1985).

While promulgating a revised definition of harm, the Secretary noted that harm includes not only direct physical injury, but also injury caused by impairment of essential behavior patterns via habitat modification that can have significant and permanent effects on a listed species. 46 Fed. Reg. 54,748, 54,750 (1981)(codified at 50 C.F.R. § 17.3). Moreover, in that same promulgation notice, the Secretary let stand the
district court’s construction of harm in *Palila I. Id.* at 54749-50. In *Palila I*, the district court construed harm to include habitat destruction that could result in the extinction of the Palila—exactly the same type of injury at issue here. *See generally Palila I*, 471 F.Supp. at 985. We conclude that the district court’s inclusion within the definition of “harm” of habitat destruction that could drive the Palila to extinction falls within the Secretary’s interpretation.

The Secretary’s inclusion of habitat destruction that could result in extinction follows the plain language of the statute because it serves the overall purpose of the Act, which is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...” 16 U.S.C. § 1531(b). The definition serves the overall purpose of the Act since it conserves the Palila’s threatened ecosystem (the mamane-naio woodland).

The Secretary’s construction of harm also consistent with the policy of Congress evidenced by the legislative history. For example, in the Senate Report on the Act: “‘Take’ is defined in ... the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” S. Rep. No. 307, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2989, 2995. The House Report said that the “harassment” form of taking would “allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.” H.R. Rep. No. 412, 93d Cong., 1st Sess. (1973), *reprinted in* 4 House Miscellaneous Reports on Public Bills, 93d Cong., 1st Sess. 11 (1973). If the “harassment” form of taking includes activities so remote from actual injury to the bird as birdwatching, then the “harm” form of taking should include more direct activities, such as the mouflon sheep preventing any mamane from growing to maturity...

II

The Department contends that the district court erred when it found an unlawful “taking” within the meaning of section 9 of the Act. (Section 9—codified as 16 U.S.C. § 1538—lists the conduct prohibited by the Act). The Department argues that no taking exists because the evidence shows that (1) a huntably number of sheep (a flock large enough to sustain sports hunting) could co-exist with the Palila; and (2) the Palila are doing poorly because of the recently removed feral sheep and goats, not the mouflon sheep. Our review is for clear error. *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 493 (9th Cir.1987).

A. Co-existence

The Department’s witnesses conceded that a large number of mouflon sheep in one area could significantly damage the mamane-naio woodlands and thereby drive the Palila to extinction. However, these witnesses maintained that a huntably number of mouflon sheep could co-exist with the Palila. In support of its co-existence thesis, the Department makes four arguments. First, since the removal of the feral sheep
and goats, the mamane-naio woodland has regenerated. This regeneration will support both the mouflon sheep and the Palila. Second, the Department has begun a number of regeneration projects (replanting, fertilizing, etc.). Third, the mouflon sheep would not cause significant degradation if the Department controlled their density. Fourth, the population of the Palila has increased since January 1985.

The Sierra Club’s witnesses controverted the Department’s thesis of co-existence. First, although regeneration (new mamane seedlings and sprouts) has occurred in many areas, it takes twenty-five years for the mamane seedlings and sprouts to become mature trees capable of providing food and shelter for the Palila. However, for the first ten to fifteen years of this growth period, the mouflon sheep can kill the mamane trees and no significant regeneration would occur, at least not sufficient to sustain the Palila unless the trees survive to twenty-five years of age. Second, the Sierra Club’s witnesses showed that the Department’s additional programs as an alternative to removal of the mouflon sheep would not work. Third, they disagreed with the premise that the mouflon sheep population could co-exist with the Palila if the Department controlled their density. Fourth, the Sierra Club witnesses stated that the Palila’s population, despite short-term fluctuations, has been static over the long term.

The Sierra Club witnesses put forth their own thesis: Because the grazing and the browsing habits of the mouflon sheep destroy the mamane woodland upon which the Palila depend entirely for their existence, the sheep must be removed. This thesis received the support of the one of the state’s witnesses. This witness conceded that he believes that the mouflon sheep must be removed to ensure the survival of the Palila.

The Sierra Club’s witnesses are not contradicted by the documentary evidence (i.e., studies of the Palila, mouflon sheep, etc.), and the Sierra Club witnesses advanced a coherent and plausible thesis. On the issue of co-existence, then, the district court’s decision to accept the Sierra Club’s witnesses’ testimony as more credible cannot be clearly erroneous.

B. Feral Sheep and Goats Versus Mouflon Sheep

The Department’s witnesses asserted that there had been significant regeneration wherever the feral animals had been removed. The Sierra Club’s witnesses agreed, but they went on to argue that where mouflon sheep have appeared, no significant regeneration has occurred.

On the question of which animals—the feral sheep and goats or the mouflon—damage the mamane, the district court again gave more credibility to the Sierra Club’s witnesses; this preference cannot be clearly erroneous where the Sierra Club’s witnesses were not contradicted by documentary evidence. Indeed, the testimony given by the Sierra Club witnesses—noticeable regeneration has occurred only where the feral animals have been removed and no mouflon sheep have appeared—is both plausible and consistent.
We affirm the district court's finding that the Department's permitting mouflon sheep in the area constitutes a "taking" of the Pallila's habitat. The district court made its findings based on the testimony of the Sierra Club witnesses, which was not contradicted by extrinsic evidence. Therefore, the district court's findings should not be held clearly erroneous. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575 (1985)("When a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error").

III

Under this resolution of the appeal, we do not reach the issue of whether harm includes habitat degradation that merely retards recovery. The district court's (and the Secretary's) interpretation of harm as including habitat destruction that could result in extinction, and findings to that effect are enough to sustain an order for the removal of the mouflon sheep.

Conclusion

The district court's finding of habitat degradation that could result in extinction constitutes "harm." The district court's finding of a "taking" was not clearly erroneous. We do not reach the issue of whether the district court properly found that harm included habitat degradation that prevents recovery of an endangered species.

CHRISTY v. HODEL

857 F.2d 1324 (9th Cir.1988), cert. denied., 490 U.S. 1114, 109 S.Ct. 3175, 114 L.Ed.2d 1038 (1989)

ALARCON, CIRCUIT JUDGE.

Plaintiffs-Appellants Richard P. Christy (Christy), Thomas B. Guthrie (Guthrie), and Ira Perkins (Perkins) appeal from the district court's grant of summary judgment in favor of Defendants-Appellees Donald P. Hodel, Secretary of the Interior (Secretary) and the United States Department of Interior (Department). The district court rejected plaintiffs' claim that the Endangered Species Act (ESA) and certain regulations promulgated thereunder are unconstitutional as applied because they prevent plaintiffs from defending their sheep by killing grizzly bears. The court also rejected plaintiffs' claims that the ESA unlawfully delegated legislative authority to the Secretary and that the Secretary exceeded his lawful authority in promulgating the regulations at issue. We affirm.

I. FACTS

Christy owned 1700 head of sheep. On or about June 1, 1982, he began grazing the sheep on land he had leased from the Blackfeet Indian Tribe. The land was located adjacent to Glacier National Park in Glacier County, Montana.
Beginning about July 1, 1982, bears attacked the herd on a nightly basis. The herder employed by Christy frightened the bears away with limited success by building fires and shooting a gun into the air. Christy sought assistance from Kenneth Wheeler, a trapper employed by the United States Fish and Wildlife Service. Wheeler set snares in an attempt to capture the bears.

By July 9, 1982, the bears had killed approximately twenty sheep, worth at least $1200. That evening, while Christy and Wheeler were on the leased land together, Christy observed two grizzly bears emerge from the forest. One of the bears quickly retreated to the trees. The other bear moved toward the herd. When the animal was 60–100 yards away, Christy picked up his rifle and fired one shot, which hit the bear. It ran a short distance, fell to the ground. Christy approached the bear and fired a second shot into its carcass to ensure that it was dead.

Wheeler’s subsequent efforts to capture any bears were unsuccessful. On July 22, 1982, the Tribe agreed to terminate the lease and to refund Christy’s money. On July 24, 1982, Christy removed his sheep from the leased land, having lost a total of 84 sheep to the bears during the lease term.

Pursuant to authority conferred by the ESA, the Secretary has listed the grizzly bear (Ursus arctos horribilis) as a threatened species throughout the 48 contiguous states. 50 C.F.R. § 17.11(h)(1987). Regulations promulgated by the Department forbid the “taking” of grizzly bears, except in certain specified circumstances. See id. § 17.40(h)....

The Department assessed a civil penalty of $3,000 against Christy for killing a grizzly bear in violation of the ESA and the regulations. On August 13, 1984, at Christy’s request, the Department held an administrative hearing. At the hearing, Christy admitted that he had killed the bear knowing it to be a grizzly, but contended that he did so in the exercise of his right to defend his sheep. The administrative law judge (ALJ) upheld the imposition of a penalty but lowered the amount to $2,500.

Christy filed an administrative appeal, arguing that the imposition of a penalty violated his alleged constitutional right to defend his sheep. The appeal was denied on the ground that the Department had no jurisdiction to determine the constitutionality of federal laws or regulations.

On January 30, 1986, Christy instituted the present action. Also named as plaintiffs are Guthrie and Perkins, who have pastured flocks of sheep in Teton County, Montana. Guthrie and Perkins allege that they, too, have lost sheep to grizzly bears. They allege that they were informed by the United States Fish and Wildlife Service that they would be fined if they harmed or killed a grizzly bear, even in defense of their sheep. Guthrie alleges that, “[a]s a result of his losses to the grizzly bears and the harassment of the flock by the bears in the years 1984 and 1985, Guthrie sold all the merchantable sheep from his flock in 1985.”
Plaintiffs seek a permanent injunction restraining defendants from enforcing the ESA and the grizzly bear regulations against them. Christy seeks a declaration that the Department’s application of the ESA and the regulations to him in the administrative proceeding deprived him of “his fundamental right to possess and protect his property,” deprived him of his property and liberty without just compensation or due process, and deprived him of equal protection of the laws. Guthrie and Perkins seek a declaration that the promulgation of the regulations was unconstitutional on the same grounds asserted by Christy. All plaintiffs seek a declaration that application of the ESA and the regulations to them in circumstances where they are defending their property is unconstitutional. Plaintiffs also seek declarations that the ESA contained an unconstitutional delegation of legislative power to the Secretary and that the Secretary exceeded his delegated authority in promulgating the regulations.

The Department filed a counterclaim against Christy seeking judgment in the amount of $2,500, plus interest, representing the unpaid penalty assessed against him by the ALJ. The Department lodged the administrative record with the district court.

On July 23, 1986, the defendants filed a motion for summary judgment. The defendants relied on the facts alleged in the complaint and on the administrative record. In response, plaintiffs asserted that “genuine issues of material fact exist as to allegations of Plaintiffs’ Complaint.” Plaintiffs, however, submitted no affidavits or other evidence in opposition to the defendants’ motion.

On May 4, 1987, the district court issued a Memorandum and Order granting the defendants’ motion for summary judgment. The court found that “the material facts preceding and arising from this lawsuit are not in dispute.” The court ruled that the defendants were entitled to judgment as a matter of law. The court rejected plaintiffs’ argument that there is a fundamental right to possess and protect property. Accordingly, the court evaluated the ESA and the grizzly bear regulations under the “rational basis” test and found that they satisfied that test. The court next rejected plaintiffs’ contention that the loss of their sheep constituted a taking of their property by the federal government without just compensation. The court held that damage to private property by protected wildlife does not constitute a taking.

The court further concluded that “the ESA is a valid delegation of legislative authority,” and that “the regulations at issue are a rational reflection of Congressional will, properly promulgated under the authority vested in the Secretary of the Interior.” Finally, the court affirmed the penalty assessed against Christy by the ALJ, finding that it was supported by substantial evidence contained in the administrative record. Plaintiffs now appeal from the judgment entered against them.

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III. Discussion

A grant of summary judgment is reviewed de novo. Coverdell v. Department of Social & Health Services, 834 F.2d 758, 761 (9th Cir. 1987). We must determine, "viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." Id. at 761–62.

Plaintiffs contend that entry of summary judgment was improper because "many genuine issues of material fact are unresolved." In their motion for summary judgment, the defendants relied on facts set forth in plaintiffs' own complaint, together with the administrative record. Plaintiffs submitted no evidence, by affidavit or otherwise, in opposition to the defendants' motion.

When a defendant's motion shows that there are no genuine issues of material fact, a plaintiff's unsupported assertion to the contrary is insufficient to forestall summary judgment. "Once the moving party shows the absence of evidence [to support the nonmoving party's case], the burden shifts to the nonmoving party to designate "specific facts showing that there is a genuine issue for trial."" Id. at 769 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986), quoting Fed. R. Civ. P. 56(e)). Because plaintiffs failed to demonstrate the existence of any genuine issues of material fact, ... we need only determine whether the district court correctly applied the relevant law to the facts of record.

A. Do the ESA and the Regulations, as Applied, Deprive Plaintiffs of Property Without Due Process?

Plaintiffs contend that application of the ESA and the regulations so as to prevent them from defending their sheep against destruction by grizzly bears deprives them of property without due process, in violation of the fifth amendment.... The first step in our analysis is to determine the standard to be applied in reviewing the challenged legislation.

Strict judicial scrutiny of legislation that allegedly violates the due process clause is reserved for those enactments that "impinge upon constitutionally protected rights." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973). When legislation impairs the exercise of a "fundamental" right, the government "must prove to the Court that the law is necessary to promote a compelling or overriding interest." 2 Rotunda § 15.4, at 59; accord Beller v. Middendorf, 632 F.2d 788, 808 (9th Cir.1980), cert. denied, 452 U.S. 905, 454 U.S. 855 (1981).

On the other hand, when the legislative enactment infringes on no fundamental right, "the law need only rationally relate to any legitimate end of government." 2 Rotunda § 15.4, at 59; accord Beller, 632 F.2d at 808. The law will be upheld if the court can hypothesize any possible basis on which the legislature might have acted. See supra note 2.

The right claimed by the plaintiffs in this action is the right "to protect their property from immediate destruction from federally protected wildlife." In their opening brief, plaintiffs characterize this as a
"natural and fundamental constitutional right." In their reply brief, plaintiffs backtrack somewhat, arguing that the right "should be deemed fundamental."

Certain state courts have construed their own constitutions to protect the sort of right claimed by the plaintiffs in this case. See, e.g., Cross v. State, 370 P.2d 371, 376, 377 (Wyo.1962) (due process clause in state constitution construed to guarantee "the inherent and inalienable right to protect property"); State v. Rathbone, 110 Mont. 225, 230, 100 P.2d 86, 90 (1940) (state constitution expressly guaranteed the right "of acquiring, possessing, and protecting property"); see generally Annotation, Right to Kill Game in Defense of Person or Property, 93 A.L.R.2d 1366 (1964). No court, however, has construed the United States Constitution to protect such a right. See Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1428 n. 8 (10th Cir.1986) (en banc) (noting the absence of authority on the question), cert. denied, 107 S.Ct.

The ESA expressly provides that no civil penalty shall be imposed on a defendant who proves that, in killing a member of a threatened species, the defendant was acting in self-defense or in defense of others. 16 U.S.C. § 1540(a)(3)(1982); see 50 C.F.R. § 17.40(b)(1)(i)(B)(1987) ("Grizzly bears may be taken in self-defense, or in defense of others . . ."). The defendant may raise the same defense in criminal prosecutions under the ESA. 16 U.S.C. § 1540(b)(3)(1982). The ESA makes no mention, however, of a right to kill a member of a threatened species in defense of property . . . One circuit court has opined that this omission evinces a congressional view that no such right exists under the United States Constitution. See Mountain States, 799 F.2d at 1428 . . .

The U.S. Constitution does not explicitly recognize a right to kill federally protected wildlife in defense of property. Plaintiffs, nevertheless, urge that we infer such a right, in much the same way that the Supreme Court has inferred a constitutional right to privacy despite the absence of language expressly recognizing such a right. See Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (state law forbidding married couples from using contraceptives violated constitutional right to privacy).

The Supreme Court has recently expressed reluctance "to discover new fundamental rights imbedded in the Due Process Clause." Bowers v. Hardwick, 478 U.S. 186, 194 (1986). The Court explained:

There should be . . . great resistance to expand the substantive reach of [the due process clauses of the fifth and fourteenth amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Id. at 195. The Court in Bowers refused to recognize a fundamental constitutional right of homosexuals to engage in sodomy, rejecting the argument that the constitutional right to privacy extended to protect such conduct. Id. at 190–94. The Court's reticence to "redefine[e] the
category of rights deemed to be fundamental” is further manifested by
the Court’s refusal to find a fundamental right to such necessities as
education, Rodriguez, 411 U.S. at 37, and adequate housing, Lindsey v.

The Supreme Court’s teaching is clear and unmistakable—federal
courts should refrain from divining new fundamental rights from the
due process clauses of the fifth and fourteenth amendments, at least
when the claimed right is neither “implicit in the concept of ordered
other grounds, Benton v. Maryland, 395 U.S. 784 (1969), or “deeply
rooted in this Nation’s history and tradition,” Moore v. City of East
Cleveland, 431 U.S. 494, 503 (1977) (op. of Powell, J.). Thus, we recently
“heed[ed] the Supreme Court’s counsels of caution” and refused to
extend the right to privacy to include the right of a prison inmate to be
free from a state official’s unauthorized disclosure of intimate photo-
graphs of the inmate’s wife. Davis v. Bucher, No. 87–3694, slip op. 9397,
9401, 9403 (9th Cir. Aug. 2, 1988).

In light of the Supreme Court’s admonition that we exercise re-
straint in creating new definitions of substantive due process, we decline
plaintiffs’ invitation to construe the fifth amendment as guaranteeing
the right to kill federally protected wildlife in defense of property. In so
doing, we do not minimize the seriousness of the problem faced by
livestock owners such as plaintiffs nor do we suggest that defense of
property is an unimportant value. We simply hold that the right to kill
federally protected wildlife in defense of property is not “implicit in the
concept of ordered liberty” nor so “deeply rooted in this Nation’s history
and tradition” that it can be recognized by us as a fundamental right
guaranteed by the fifth amendment.

Because of our determination that the killing of grizzly bears to
protect sheep is not a fundamental right enjoyed by the plaintiffs, we are
not required to subject the ESA and the grizzly bear regulations to strict
scrutiny. Instead, we must determine whether those enactments ration-
ally further a legitimate governmental objective.

Plaintiffs do not argue that preservation of threatened species is an
impermissible objective, or that Congress lacks authority to pursue that
objective. Plaintiffs contend, rather, that the ESA and the grizzly bear
regulations do not rationally further that objective. Plaintiffs’ position
appears to be that regulations preventing citizens from protecting their
property against depredating bears will inevitably generate a backlash,
including “unlawful killings resulting from the gross unfairness of the
existing system.”

We do not agree that the ESA and the regulations have no rational
basis. Congress’s intent in enacting the ESA was “to halt and reverse
the trend towards species extinction, whatever the cost.” Tennessee
issue plainly advance this goal by forbidding the killing of grizzly bears,

The regulations recognize the concerns and accommodate the needs of owners of livestock and other property by authorizing the killing of nuisance bears by government officials when efforts to live-capture such bears have been unsuccessful. See id. § 17.40(b)(1)(i)(C). The regulations are reasonable in requiring private citizens to seek the assistance of experienced government officials, who may be expected to protect the public interest, rather than leaving every individual free to kill a "nuisance bear" whenever he or she deems it necessary. See State v. Webber, 85 Or. App. 347, 350–51, 736 P.2d 220, 222 (state statute requiring owner to obtain permit before killing depredating wildlife was "a reasonable restraint on defendant's right to protect his property"), review denied, 304 Or. 56, 742 P.2d 1187 (1987).

Moreover, the regulations do not forbid plaintiffs from personally defending their property by means other than killing grizzly bears. See supra note 4; see also Barrett v. State, 220 N.Y. 423, , 116 N.E. 99, 101–02 (1917)(state statute forbidding molestation or disturbance of wild beavers held constitutional because it left property owners free to fence their land or to drive away destructive beavers).

For the foregoing reasons, the ESA and the grizzly bear regulations, as applied to prevent plaintiffs from killing such bears in defense of their property; do not deprive plaintiffs of their property without due process of law.

B. Do the ESA and the Regulations, as Applied, Deny Plaintiffs Equal Protection of the Laws?

Plaintiffs also argue that the ESA and the grizzly bear regulations, as applied to prevent them from killing grizzly bears to protect their sheep against imminent destruction, deny them equal protection of the laws.

The due process clause of the fifth amendment has been construed to require the federal government to accord every person within its jurisdiction equal protection of the laws. See Jimenez v. Weinberger, 417 U.S. 628, 637 (1974)(referring to "the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment"); Bolling v. Sharpe, 347 U.S. 497, 499 (1954)(invalidating racial segregation of public schools under the fifth amendment); Eskra v. Morton, 524 F.2d 9, 13 (7th Cir.1975)("The United States, as well as each of the several States, must accord every person within its jurisdiction the equal protection of the laws.").

"In order to subject a law to any form of review under the equal protection guarantee, one must be able to demonstrate that the law classifies persons in some manner." 2 Rotunda § 18.4, at 343–44. A classification may be demonstrated in one of three ways: by showing that the law, on its face, employs a classification; by showing that the law is applied in a discriminatory fashion; or by showing that the law is
"in reality ... a device designed to impose different burdens on different classes of persons." Id. at 344.

Once a legislative classification has been demonstrated, it will be subjected to strict judicial scrutiny if it employs a "suspect" class or if it classifies in such a way as to impair the exercise of a fundamental right. 2 Rotunda § 15.4, at 60; id. § 18.3, at 323; see Clark v. Jeter, 108 S.Ct. 1910, 1914 (1988) ("Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny.") (citations omitted). On the other hand, "where the law classifies persons on a non-suspect basis for the exercise of liberties which are not fundamental constitutional rights," the law will be upheld if it rationally relates to a legitimate governmental objective. 2 Rotunda § 15.4, at 60; see Dandridge v. Williams, 397 U.S. 471, 485 (1970) (in the area of economics and social welfare, legislative classification satisfies requirements of equal protection if it has some "reasonable basis" and if any state of facts can be conceived to justify it) ....

Plaintiffs argue that the ESA and the grizzly bear regulations classify persons along two lines. "The first classification," they contend, "is between a group of persons who, like Plaintiffs, are raising livestock near grizzly bear habitat and all remaining citizens and taxpayers of the U.S." Plaintiffs have made no showing, however, that the ESA or the grizzly bear regulations employ such a classification. This is certainly not a classification that appears on the face of the challenged enactments. Nor have the plaintiffs proffered any evidence to suggest that the prohibition on the killing of grizzly bears is applied with greater severity against persons raising livestock near grizzly bear habitat ... Finally, plaintiffs do not contend that the enactments constitute a device for imposing excessive burdens on such persons. In short, the first so-called classification identified by plaintiff—persons raising livestock near grizzly bear habitat—is simply not a classification made by the ESA or by the grizzly bear regulations.

The second classification identified by plaintiffs "is that which allows a certain group of people to hunt and kill grizzly bears under certain conditions for sport while withholding this same authority to livestock owners like Plaintiffs, even in immediate defense of their stock." This classification appeared on the face of the regulations as they read at all times relevant to this case:

Northwestern Montana. If it is not contrary to the laws and regulations of the State of Montana, a person may hunt grizzly bears in the Flathead National Forest, the Bob Marshall Wilderness Area, and the Mission Mountains Primitive Area of Montana: Provided, that if in any year in question 25 grizzly bears have already been killed for whatever reason in that part of Montana, including the Flathead National Forest, the Bob Marshall Wilderness Area and the Mission Mountains Primitive Area, which is bounded on the north by the United States-Canadian Border, on the east by U.S. Highway 91, on the south by U.S. Highway 12, and on the west by
Montana–Idaho State line, the Director shall post and publish a notice prohibiting such hunting, and any such hunting for the remainder of that year shall be unlawful... 50 C.F.R. § 17.40(b)(1)(i)(E)(1981).

Plaintiffs do not contend that the foregoing classification is "suspect," and no case so holds. Nor does this classification impair the exercise of any fundamental constitutional right. See Part III(A) supra. Accordingly, the classification should be upheld if it satisfies the "rational basis" test, i.e., if any state of facts can be conceived to justify it.

Plaintiffs argue that no rational basis supports the provision for sport hunting of grizzly bears: "Not only is the hunting of a threatened species unrelated to the goals of the Act, it is in complete derogation of its purposes, i.e. the preservation of threatened species. Indeed, given the threatened nature of their existence, allowing hunters to take even one [grizzly bear] arguably would be in direct conflict with the Act. Since this classification is in complete contradiction of the purposes of the Act, it can in no way have even a rational relationship to the purposes of the Act, as a matter of law."

Plaintiffs' argument is premised on the unsupported assumption that a program of carefully controlled killings of bears in limited geographic regions cannot promote "conservation" and, therefore, necessarily conflicts with the purpose of the ESA. On the contrary, Congress expressly contemplated that "in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved," conservation may require "regulated taking." 16 U.S.C. § 1532(3)(1982). Further, although it expressly prohibited the killing of endangered species, Congress delegated to the Secretary the task of determining whether the killing of threatened species should also be prohibited. Compare id. § 1538(a)(1)(B)(imposing general prohibition on killing of endangered species) with id. § 1533(d)(Secretary "shall issue such regulations as he deems necessary and advisable to provide for the conservation of" threatened species). Congress authorized, but did not require, the Secretary to forbid the killing of threatened species. Id. § 1533(d). This legislative scheme reflects Congress's conclusion that certain killings of a threatened species could be consistent with the goal of conserving that species.

The Secretary had a rational basis for authorizing "regulated taking" of grizzly bears, by means of sport hunting, in those regions specified in the regulations. The basis is set forth in Amendment Listing the Grizzly Bear of the 48 Coterminous States as a Threatened Species, 40 Fed. Reg. 31,734–35 (1975) [hereinafter Amendment]. Briefly, relying on investigations by Fish and Wildlife Service biologists, data submitted by the Governors of Colorado, Idaho, Montana, Washington, and Wyoming, and comments filed by interested members of the public, the Director of the Fish and Wildlife Service, on behalf of the Secretary, determined that "grizzly bear population pressures definitely exist in the Bob Marshall Ecosystem." Id. at 31,735. The Director considered easing
such pressures through live-trapping and transplantation of the animals but rejected that approach as "too dangerous and too expensive to be used with sufficient frequency to relieve ... the population pressures." Id. The Director concluded that "[a] limited amount of regulated taking is necessary." Id.

The Director then considered whether such regulated "taking" should be accomplished through the isolated killing of nuisance bears or through seasonal sport hunting. The Director concluded that isolated killings, while necessary, were "not sufficient to prevent numerous depredations and threats to human safety. This is because the occasional killing of one bear does not create a fear of man among the grizzly bear population in general." Id. A carefully controlled seasonal hunt, on the other hand, would both relieve the population pressures and condition the bears "to avoid all areas where humans are encountered," thus minimizing human-bear contact and the resultant risks to both. Id. Accordingly, the Director ruled that the best system of relieving the population pressures in the Bob Marshall Ecosystem would be "to combine limited taking of specific nuisance bears with a closely regulated sport hunt." Id. The promulgated regulations strictly controlled the total number of bears killed each year by mandating the cessation of hunting in any year "where the total number of bears killed for whatever reason ... reaches 25 bears for that year." Id....

In light of the foregoing, the regulations authorizing a carefully controlled and limited sport hunt of grizzly bears in designated geographic regions had a rational basis. Plaintiffs have proffered no evidence to suggest otherwise. The classification employed by the regulations, therefore, does not deny plaintiffs equal protection of the laws.

C. Do the ESA and the Regulations Effect a "Taking" of Plaintiffs' Property Without Just Compensation, in Violation of the Fifth Amendment?

The fifth amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. This prohibition applies only to takings by the federal government. See Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 533 (8th Cir.1967)(citing Koch v. Zuieback, 316 F.2d 1, 2 (9th Cir.1963)) ... Plaintiffs contend that by protecting grizzly bears, the Department has transformed the bears into "governmental agents" who have physically taken plaintiffs' property.

The defendants analyze this case under the principles applicable to regulatory takings. Plaintiffs, on the other hand, insist that their property has been physically taken, because their sheep have been "destroyed, killed, and rendered absolutely useless by the bear's act."

The defendants properly focus on the regulations, promulgation of which constituted governmental action. The regulations themselves, however, do not purport to take, or even to regulate the use of, plaintiffs' property. The regulations leave the plaintiffs in full possession of the complete "bundle" of property rights to their sheep. Perhaps because
plaintiffs recognize this fact, they choose to focus on the conduct of the bears. Undoubtedly, the bears have physically taken plaintiffs' property, but plaintiffs err in attributing such takings to the government.

Numerous cases have considered, and rejected, the argument that destruction of private property by protected wildlife constitutes a governmental taking. The pertinent cases were recently summarized by the Tenth Circuit:

Of the courts that have considered whether damage to private property by protected wildlife constitutes a “taking,” a clear majority have held that it does not and that the government thus does not owe compensation. The Court of Claims rejected such a claim for damage done to crops by geese protected under the Migratory Bird Treaty Act in Bishop v. United States, 126 F.Supp. 449, 452–53 (Ct.Cl.1954), cert. denied, 349 U.S. 955 (1955). The United States Court of Appeals for the Seventh Circuit rejected a similar claim under the Federal Tort Claims Act in Sickman v. United States, 184 F.2d 616 (7th Cir.1950), cert. denied, 341 U.S. 939 (1951). Several state courts have also rejected claims for damage to property by wildlife protected under state laws. See, e.g., Jordan v. State, 681 P.2d 346, 350 n. 3 (Alaska App.1984)(defendants were not deprived of their property interest in a moose carcass by regulation prohibiting the killing of a bear that attacked the carcass because “their loss was incidental to the state regulation which was enacted to protect game”); Leger v. Louisiana Department of Wildlife & Fisheries, 306 So.2d 391 (La.Ct.App.), writ of review denied, 310 So.2d 640 (La.1975)(because wildlife is regulated by the state in its sovereign, as distinct from its proprietary [sic] capacity, the state has no duty to control its movements or prevent it from damaging private property); Barrett v. State, 220 N.Y. 423, 116 N.E. 99 (N.Y.Ct.App.1917)(damage to timber by beavers not compensable because the state has a general right to protect wild animals as a matter of public interest, and incidental injury by them cannot be complained of); see also Collopy v. Wildlife Commission, Department of Natural Resources, 625 P.2d 994 (Colo.1981); Maitland v. People, 93 Colo. 59, 63 23 P.2d 116, 117 (1933); Cook v. State, 192 Wash. 602, 74 P.2d 199, 203 (1937); Platt v. Philbrick, 8 Cal.App.2d 27, 30, 47 P.2d 302, 304 (1935). But see State v. Herwig, 17 Wis.2d 442, 117 N.W.2d 335 (1962); Shellnut v. Arkansas State Game & Fish Commission, 222 Ark. 25, 258 S.W.2d 570 (1953).

Mountain States, 799 F.2d at 1428–29. The Tenth Circuit held that damages to private property caused by federally protected wild burros did not constitute a taking under the fifth amendment. Id. at 1431.

Plaintiffs do not challenge the constitutional power of Congress to enact legislation to protect threatened species. Yet plaintiffs would, in effect, require that the government insure its citizens against property damage inflicted by such species. The federal government does not “own” the wild animals it protects, nor does the government control the
conduct of such animals ... See Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977) ("It is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the State nor the Federal Government ... has title to these creatures until they are reduced to possession by skillful capture."). Plaintiffs assume that the conduct of the grizzly bears is attributable to the government but offer no explanation or authority to support their assumption.

Plaintiffs cite the following language from a recent Supreme Court opinion in support of their argument that the government should compensate them for the killing of their sheep by grizzly bears: "It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." First English Evangelical Lutheran Church v. County of Los Angeles, 107 S.Ct. 2378, 2388 (1987) (quoting Armstrong v. United States, 364 U.S. 40, 49(1960)). The foregoing principle is inapplicable to the present case, because neither the ESA nor the grizzly bear regulations "force" plaintiffs to bear any burden. The losses sustained by the plaintiffs are the incidental, and by no means inevitable, result of reasonable regulation in the public interest. As one state court has aptly noted:

Wherever protection is accorded [to wild animals] harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the Legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the benefit of the public at large, and no one can complain of the incidental injuries that may result.


For the foregoing reasons, we hold that the ESA and the grizzly bear regulations do not effect a taking of plaintiffs' property by the government so as to trigger the just compensation clause of the fifth amendment, and that the government is not answerable for the conduct of the bears in taking plaintiffs' property.

* * *

CHRISTY v. LUJAN

OPINION: The petition for a writ of certiorari is denied.

Justice White, dissenting.

Petitioner is a herder who grazed his sheep on leased land near Glacier National Park. Between July 1 and July 9, 1982, grizzly bears from the park killed 20 of petitioner's sheep. Requests for assistance
from park rangers yielded no results, and efforts to frighten away the bears were unsuccessful. On July 9, when two grizzlies emerged from the forest and approached petitioner's sheep, he shot and killed a bear. Grizzlies, however, are "endangered species;" petitioner's killing of the bear thus violated the Endangered Species Act, which makes it unlawful to "harass, harm pursue, hunt, shoot, wound, kill, trap, capture, or collect" grizzlies and other animals protected by the statute. 16 U.S.C. § 1538(a)(1). Petitioner was consequently assessed a $2,500 penalty for shooting the bear.

Petitioner then filed this action in District Court, seeking to enjoin enforcement of the Act against herders like himself, and resisting payment of the $2,500 penalty. Petitioner claimed, *inter alia*, that his actions in defense of his livestock were protected by the Due Process Clause of the Fifth Amendment; alternatively, petitioner contended that the Act resulted in an uncompensated "taking" of his property. Both the District Court and the Ninth Circuit rejected these claims, and this petition ensued.

I would grant the petition for certiorari to consider petitioner's constitutional claims. Petitioner's claim of a constitutional right to defend his property is not insubstantial. A man's right to defend his property has long been recognized at common law, see W. Blackstone, *Commentaries* *138–140, and is deeply-rooted in the legal traditions of this country, see, e.g., *Beard v. United States*, 158 U.S. 550, 555 (1895). Having the freedom to take actions necessary to protect one's property may well be a liberty "deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)(opinion of Powell, J.), and therefore, entitled to the substantive protection of the Due Process Clause. In any event, petitioner's claim to such protection presents an interesting and important question-the proper resolution of which is not altogether clear-that merits plenary review.

Even more substantial is petitioner's claim that the Endangered Species Act operates as a governmental authorization of a "taking" of his property; leaving him uncompensated for this taking violates the Fifth Amendment, petitioner contends. There can be little doubt that if a federal statute authorized park rangers to come around at night and take petitioner's livestock to feed the bears, such a governmental action would constituted a "taking." The Court of Appeals below, and the United States in its submission here, distinguish such a case from this one, by noting that the United States "does not 'own' the wild animals it protects, nor does the government control the conduct of such animals." 857 F.2d 1324, 1335 (C.A.9 1988); see Brief of the Respondents 7.

Perhaps not; but the government does make it unlawful for petitioner to "harass, harm, [or] pursue" such animals when they come to take his property-and perhaps a government edict barring one from resisting the loss of his property is the constitutional equivalent of an edict taking such property in the first place. Thus, if the government decided (in lieu of the food stamp program) to enact a law barring
grocery store owners from "harassing, harming, or pursuing" people who wish to take food off grocery shelves without paying for it, such a law might well be suspect under the Fifth Amendment. For similar reasons, the Endangered Species Act may be suspect as applied in petitioner's case.

In sum, sustaining grizzly bears is a worthwhile and important governmental objective. But it "is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318–319 (1987)(quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). Here, petitioner has been asked to bear the burden of feeding endangered grizzlies-or at the least, has been estopped from taking measures necessary to prevent the use of his property for this purpose. Thus, it seems quite possible that petitioner has been denied the Fifth Amendment's protection against uncompensated takings.

Because I think that petitioner's constitutional claims present interesting and important questions that merit our attention, I dissent from the Court's denial of review in this case.
United States Court of Appeals,
Fifth Circuit.
GDF REALTY INVESTMENTS, LTD.; Parke
Properties I, L.P.; Parke Properties II,
L.P., Plaintiffs-Appellants,
v.
Gale A. NORTON, Secretary, U.S. Department of
the Interior; Marshall P. Jones,
Director, U.S. Fish and Wildlife Service, Defendants-
Appellees.
No. 01-51099.
March 26, 2003.

Before DAVIS, BARKSDALE and DENNIS, Circuit
Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

1531 et seq. (ESA), contains a "take" provision, 16
U.S.C. § 1538(a)(1)(B). A challenge to Congress' Commerce Clause power, U.S. Const. art. 1, § 8, cl. 3, at issue is whether ESA's take provision is unconstitutional as applied to six species of subterranean invertebrates found only within two counties in Texas (Cave Species). Central to this question is whether, to demonstrate the requisite substantial effect on interstate commerce, Cave Species "takes" may be aggregated with those of all other endangered species. They can be; the judgment is AFFIRMED.

I.

In 1983, Dr. Fred Purcell and his brother purchased
an interest in 216 acres in Travis County, Texas, near
the City of Austin (the property). The property (lying
within approximately 1,200 acres known as the
Parke) consists of seven tracts in which the Purcells,
as the limited partners in Parke Properties I, L.P., and
Parke Properties II, L.P., hold a 70 percent interest.
GDF Realty Investments, Ltd., holds the remaining
interest in the property. It is located at the
intersection of two major highways in what is,
commercially and residentially, a rapidly growing
area.

The property is part of the Jollyville Plateau and is
classified by karst topography, in which water
percolating through limestone rock creates caves,
sinkholes, and canyons. The property contains a
number of caves, including Tooth, Kretschmar,
Root, Gallifer, and Amber, as well as a collection of
caves known as the Cave Cluster.

Since acquiring the property, the Purcells and their
partners (Purcella) have attempted to develop it
commercially, including the installation of water and
wastewater gravity lines, force mains, lift stations,
and other utilities. These improvements have been
dedicated to the City of Austin; a right-of-way, to
Travis County.

In 1988, the United States Fish and Wildlife Service
(FWS), an agency under the auspices of the Department of the Interior, issued a Rule listing five
subterranean invertebrate species as endangered
Reg. 36,029 (16 Sept. 1988). A sixth species was
similarly listed in 1993. 53 Fed. Reg. 43,818 (18
Aug. 1993). These six species are found on the
property; they are the Bee Creek Cave Harvestman,
the Bone Creek Harvestman, the Tooth Cave
Pseudoscorpion, the Tooth Cave Spider, the Tooth
Cave Ground Beetle and the Kretschmar Cave Mold
Beetle. The Rules were issued in order to protect the
Cave Species from increasing dangers, primarily new
36,029.

The Bee Creek Cave Harvestman, the Bone Creek
Harvestman, and the Tooth Cave Pseudoscorpion are
subterranean, eyeless arachnids (arthropods bearing
four pairs of legs and no antennae); they range in size
from 1.4 to 4 mm. The Tooth Cave Spider, a
subterranean arachnid with eyes, measures 1.6 mm in
length. The Tooth Cave Ground Beetle and the
Kretschmar Cave Mold Beetle are subterranean
insects, the latter being eyeless; they vary in size
from 3 to 8 mm.

The Cave Species were listed as endangered for a
number of reasons. First, as noted, they were
primarily being threatened with "potential loss of
habitat owing to ongoing development activities". 53
Fed. Reg. 36,031. Second, no state or federal laws
were in place to protect them or their habitat. Id. at
36,031-32. Finally: [The Cave Species] require the
maximum possible protection provided by [ESA]
because their extremely small, vulnerable, and
limited habitats are within an area that can be expected to experience continued pressures from economic and population growth. *Id. at 83.032.*

Pursuant to § 9(a)(1) of ESA, 16 U.S.C. § 1538(a)(1)(B), it is unlawful to "take" a member of a species listed as endangered. ESA defines "take" as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect..." 16 U.S.C. § 1532(19). Pursuant to authority given it by § 4(d) of ESA, 16 U.S.C. § 1533(d), FWS has defined "harass" to include significant modifications or degradations of a habitat which kill or injure protected wildlife "by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

The Cave Species are found only in underground portions of Travis and Williamson Counties, Texas. There is no commercial market for the Cave Species. At least 14 scientific articles concerning the Cave Species have been published in journals or other publications by 15 scientists. Some of them have visited Texas in order to study the Cave Species. For this research, members of the Cave Species have been transported to and from museums in New York, California, Pennsylvania, Illinois, and Kentucky.

In 1989, FWS notified the Purcell's that their development plans might constitute a Cave Species take. In 1990, in an effort to alleviate FWS' concerns, the Purcell's deeded approximately six acres of the property to Texas Systems of Natural Laboratories, Inc., a non-profit environmental organization. The gifted acres included various caves and sinkholes in which the Cave Species were known to live. The Purcell's also constructed gates covering the most ecologically sensitive caves. These acts conformed to recommendations made by an expert on the Cave Species.

In 1991, the Purcell's contracted to sell a portion of the property. Because FWS refused to state, however, that future development would not constitute a take, the agreement fell through. After clearing brush from the property in 1993, Dr. Purcell was advised by FWS that he was under federal criminal investigation for possible endangered species takes.

Subsequent to these incidents, the Parke's owners (including plaintiffs) filed in federal court for a declaratory judgment that development of the Parke would not constitute an endangered species take. *Four Points Util. Joint Venture v. United States*, No. 93-CA-655 (W.D.Tex.1993). The district court ordered FWS to conduct an environmental review of the Parke.

In a 1994 letter summarizing that review, FWS notified the Parke's owners that the proposed development would likely constitute a take of the Cave Species, as well as of two bird species (golden-cheeked warbler and black-capped vireo). FWS' letter also noted that the Purcell's property within the Parke "could be developed without causing a take if development, among other things, [was] scaled back from the canyons, and surface and subsurface drainage and nutrient exchange [was] provided for".

The district court dismissed the action in September 1994. It ruled that FWS had to first determine whether a take had occurred; as FWS' letter indicated, it had not made that determination.

In 1997, the Purcell's attempted to obtain ESA § 10(a) incidental take permits. See 16 U.S.C. § 1539(a). These permits allow takes of endangered species under certain circumstances, as listed in 16 U.S.C. § 1539(a)(2)(B).

The Purcell's first sought the permit from the Balcones Canyonlands Conservation Plan, a regional body from which landowners obtain § 10(a) permits to develop protected land by paying "mitigation fees". It refused the application, however, because the relevant land was entirely within a protected area.

The Purcell's next applied to FWS for the permit. See 16 U.S.C. § 1539(a)(1). Their applications stated they planned to develop a shopping center (including a Wal-Mart), a residential subdivision, and office buildings (commercial development). FWS decided that the deeded preserves were inadequate to protect the Cave Species. As a result, the Purcell's were unable to contract for the purchase and development of the property.

In July 1998, FWS advised the Purcell's that the permits would be denied, but did not issue the denials. This effectively prevented the Purcell's from challenging FWS' action.

Therefore, the Purcell's filed suit in federal court, seeking a declaration that the permits had been denied *de facto*. *GDF Realty, Ltd. v. United States*, No. 98-CV-772 (W.D.Tex.1998). FWS then issued a formal statement, denying the permits based on its conclusion that, *inter alia*, Cave Species takes would occur if development were allowed. The district court ruled the permits had been denied. It also admonished FWS for delaying the denials when it
had never intended to grant the permits.

In 1999, plaintiffs filed two actions in federal court. In the instant Commerce Clause action, they claim that, pursuant to *United States v. Lopez*, 514 U.S. 559, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), amplified post-filing of this action by *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), the ESA take provision, as applied to the Cave Species, is unconstitutional. (The second action, in the Court of Claims, No. 99-CV-513 (Fed.Cl.1999), claims an unconstitutional taking under the Fifth Amendment. It has been stayed pending this action.) In 2000, Parke Properties I, L.P., and GDF Realty Investments, Ltd., filed for bankruptcy under Chapter 11. *In re Parke Properties I, L.P.*, No. 00-12588FM (Bankr.W.D.Tex.2000); *In re GDF Realty Investments, Ltd.*, No. 00-12588FM (Bankr.W.D.Tex.2000).

For this action, the parties agreed there are no factual disputes. Therefore, they filed cross-motions for summary judgment. In 2001, the district court granted summary judgment to defendants (FWS), holding the take provision constitutional under the Commerce Clause. *GDF Realty Investments, Ltd. v. Norton*, 169 F.Supp.2d 648 (W.D.Tex.2001). The district court analyzed the application of the take provision in the light of plaintiffs' proposed property development. Being "hard-pressed to find a more direct link to interstate commerce than a Wal-Mart [(as noted, one was to be located on the property)]", id. at 662, the court held the take provision's incorporation of the Cave Species, as applied to plaintiffs, was substantially related to interstate commerce, id. at 664.

II.

A summary judgment, reviewed de novo, e.g., *Horton v. City of Houston*, 179 F.3d 188, 191 (5th Cir.), cert. denied, 528 U.S. 1021, 120 S.Ct. 530, 145 L.Ed.2d 411 (1999), is proper if "there is no genuine issue as to any material fact and ... the [movant] is entitled to a judgment as a matter of law". Fed.R.Civ.P. 56(c). E.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Because there are no material fact issues, the only question is the constitutionality *vel non* of the take provision as applied to the Cave Species and pursuant to the power granted Congress under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.

"In reviewing an act of Congress passed under its Commerce Clause authority, we apply the rational basis test as interpreted by the *Lopez* court." *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 203 (5th Cir.2000). In other words: "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Morrison*, 529 U.S. at 607, 120 S.Ct. 1740 (emphasis added).

Recently, our court extensively discussed the history of the Commerce Clause and the earlier noted landmark *Lopez* and *Morrison* decisions relied upon by plaintiffs. *United States v. Ho*, 311 F.3d 589 (5th Cir.2002). We need only briefly revisit that discussion.

*Ho* concerned using less expensive procedures for removal and disposal of asbestos than necessary to comply with, *inter alia*, 42 U.S.C. §§ 7412(a) and 7414(a) of the Clean Air Act, 42 U.S.C. §§ 7401 et seq., and implementing regulations, 40 C.F.R. § 61.145. Ho claimed these statutes and regulations, as applied to him, violated the Commerce Clause. Our court held the sections of the Clean Air Act were constitutional exercises of Congress' power to regulate interstate commerce. *Ho*, 311 F.3d at 603-04. In doing so, our court described "first principles" of commerce clause jurisprudence. Id. at 596-601. No authority need be cited for the fundamental and well-known limitation on the power of our Federal Government: the Constitution grants it limited and enumerated powers; those powers not so granted the Federal Government are retained by the States.

This division of powers was thought necessary "to ensure protection of our fundamental liberties". Id. at 596 (quoting *Lopez*, 514 U.S. at 552, 115 S.Ct. 1624 (internal citation omitted)). Justice Kennedy summarized this point in his *Lopez* concurrence:

Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

514 U.S. at 576, 115 S.Ct. 1624 (Kennedy, J., concurring) (quoting THE FEDERALIST NO. 51, at 323 (James Madison)(C. Rossiter ed., 1961)). In keeping with the subject at hand, the strength of this governmental system is aptly described by Kipling: "For the strength of the pack is the wolf and the

As noted, one of the Federal Government's enumerated powers is "to regulate Commerce ... among the several States ..." (Interstate commerce). U.S. Const. art. I, § 8, cl. 3. Since NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), "Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause" than it had previously been afforded. Morrison, 529 U.S. at 608, 120 S.Ct. 1740. On the other hand, our constitutional structure mandates a distinction between "what is truly national and what is truly local". Id. at 617-18, 120 S.Ct. 1740; Lopez, 514 U.S. at 567-68, 115 S.Ct. 1624.

The Court's fairly recent decisions in Morrison and Lopez have defined the outer limits of Commerce Clause power. Lopez described three categories of activity which Congress may regulate under it: "the use of the channels of interstate commerce"; "the instrumentalities of interstate commerce"; and "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce". 514 U.S. at 558-59, 115 S.Ct. 1624. As the parties note, at issue is the third category—"those activities that substantially affect interstate commerce".

The Cave Species exist only in Texas. Therefore, at issue are ESA takes concerning intrastate, not interstate, activity. Pursuant to Lopez, Morrison identified four considerations for use in deciding whether intrastate activity substantially affects interstate commerce. 529 U.S. at 609, 120 S.Ct. 1740.

The first consideration is the economic nature vel non of the intrastate activity. Id. at 610-11, 120 S.Ct. 1740. Along this line, Morrison cited Lopez's cautionary language:

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause will always engender "legal uncertainty". Id. at 610, 120 S.Ct. 1740 (quoting Lopez, 514 U.S. at 566, 115 S.Ct. 1624).

The second consideration is the presence vel non of a jurisdictional element in the statute, which limits its application to instances affecting interstate commerce. Id. at 611-12, 120 S.Ct. 1740.

The third consideration is any Congressional findings in the statute or its legislative history concerning the effect the regulated activity has on interstate commerce. Id. at 612, 120 S.Ct. 1740.

The final consideration is the attenuation of the link between the intrastate activity and its effect vel non on interstate commerce. Id.

As described in Ho, there are two ways in which intrastate activity might substantially affect interstate commerce. 311 F.3d at 598-99. FWS urges that Cave Species takes have this effect under each method.

First, the activity alone might have such an effect. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937). Second, in some circumstances, the activity's effects may be aggregated with those of other similar activities, the sum of which might be substantial in relation to interstate commerce. Morrison, 529 U.S. at 613, 120 S.Ct. 1740 (striking down civil remedy provision of Violence Against Women Act, 42 U.S.C. § 13981, while not adopting "a categorical rule against aggregating the effects of any noneconomic activity"). See also, e.g., Lopez, 514 U.S. at 559-61, 115 S.Ct. 1624; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964).

Whether and how Congress may apply the aggregation principle are controversial questions. The pitfalls are apparent. For example, any imaginable activity of mankind can affect the alertness, energy, and mood of human beings, which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic productivity. Such reasoning would eliminate any judicially enforceable limit on the Commerce Clause, thereby turning that clause into what it most certainly is not, a general police power.

Ho, 311 F.3d at 599 (emphasis added).

In other words, and as the Supreme Court has made quite clear, the aggregation principle has limits. For example, Lopez held that gun possession near schools could not be regulated under the Commerce Clause power. The statute at issue proscribed knowing possession of "a firearm at a place that [an individual]
It bears reminding that at issue is the power to regulate interstate commerce. In that sense, commerce is "[t]he exchange of goods and services" or "[t]rade and other business activities". BLACK'S LAW DICTIONARY 263 (7th Ed. 1999). Commerce is traffic, "but it is something more: it is intercourse". Lopez, 514 U.S. at 553, 115 S.Ct. 1624 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90, 6 L.Ed. 23 (1824)). In Wickard, for example, the intrastate activity (wheat produced solely for producer's personal use) was held "commercial" because it affected market conditions. 317 U.S. at 128, 63 S.Ct. 82. In this regard, Groom et al noted the "broad reading [to be given] commercial and economic activities under the Commerce Clause". 234 F.3d at 208-09.

As mentioned, Morrison noted, for aggregation purposes, the importance of the economic nature of the regulated activity: "While we need not adopt a categorical rule against aggregating the effects of noneconomic activity in order to decide these cases, thus far ... our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature". 529 U.S. at 613, 120 S.Ct. 1740 (emphasis added).

Lopes did, however, approve the standard provided in Maryland v. Wirtz, 392 U.S. 183, 88 S.Ct. 1995, 20 L.Ed.2d 1020 (1968) (holding constitutional the 1961 and 1966 extensions of the Fair Labor Standards Act, 29 U.S.C. §§ 203, 206, and 207). Lopez stated: "Where a general regulatory scheme bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence". 514 U.S. at 558, 115 S.Ct. 1624 (emphasis in original; internal citation omitted). The de minimis instance, however, must be "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated". Id. at 561, 115 S.Ct. 1624 (emphasis added). See also Hodel v. Indiana, 452 U.S. 314, 329 n.17, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981); United States v. Ballinger, 312 F.3d 1264, 1270 (11th Cir.2002); Freier v. Westinghouse Electric Corp., 303 F.3d 176, 201-03 (2nd Cir.2002), petition for cert. filed (U.S. Jan. 6, 2003) (No. 02-1036); United States v. Cortes, 299 F.3d 1030, 1035 (9th Cir.2002).

Ho held such a regulatory scheme existed with regard to asbestos removal:

First, the regulated intrastate activity, asbestos removal, is very much a commercial activity in today's economy. It is a booming industry, given the hazardous nature of asbestos and its seeming ubiquity in older buildings. There is nothing inherently criminal or disfavored about asbestos removal; in fact, it might be considered a public service, and many reputable and certified businesses exist solely to remove asbestos from contaminated buildings. Both the state and federal governments license businesses and individuals in the field. Most, if not all, asbestos removal projects have a commercial purpose, because handling toxic carcinogens is not something many people enjoy for its own sake. Unless the owner of an asbestos-containing building needs to renovate the building or demolish it for use of the land on which it sits, he is very likely to let sleeping dogs lie and not incur the costs or dangers of asbestos removal. 311 F.3d at 602. Moreover, by using methods less expensive than those required to comply with the regulatory scheme, Ho was able to gain a commercial advantage over his competitors, thereby substantially affecting, or undercutting, the economic regulatory scheme. Id. at 603. In addition to the economic nature of the activity, Ho examined the other three Morrison considerations in holding aggregation proper. 311 F.3d at 602-04.

[51] In the light of Lopez and Morrison, the key question for purposes of aggregation is whether the nature of the regulated activity is economic. As noted, Morrison and Lopez recognize this question is likely to generate "legal uncertainty". Morrison, 529 U.S. at 610, 115 S.Ct. 1740; Lopez, 514 U.S. at 556, 115 S.Ct. 1624. One way in which the regulated activity might be economic is when, as discussed earlier, the intrastate activity is part of an economic regulatory scheme which could be undercut but for the particular intrastate regulation. Lopez, 514 U.S. at 561, 115 S.Ct. 1624.

Post-Lopez, our court has faced these questions. A pre-Morrison decision, United States v. Bird, 124 F.3d 667 (5th Cir.1997), amended by 1997 U.S.App. LEXIS 33988, cert. denied, 523 U.S. 1006, 118 S.Ct. 1189, 140 L.Ed.2d 320 (1998), affirmed a conviction under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248. Bird held that noncommercial, intrastate activity (threats and intimidation directed at provider of abortion services) may be aggregated to find a substantial effect on interstate commerce. Id. at 676-82. For that holding, the determining factor
was that "there is a national commercial market in abortion-related services such that the regulated conduct—considered in light of the size and scope of the benchmark market—substantially affects interstate commerce". *Id.* at 677. See *id.* at 681-82.

Noting *Bird* was decided pre-*Morrison*, *Ho* seems to leave open the question whether aggregation can be extended to non-economic activity. 311 F.3d at 600, n. 10. Further, in *United States v. Hickman*, 179 F.3d 230 (5th Cir.1999)(pre-*Morrison*), cert. denied, 530 U.S. 1203, 120 S.Ct. 2195, 147 L.Ed.2d 232 (2000), and *United States v. McFarland*, 311 F.3d 376 (5th Cir.2002)(post-*Morrison*), *petition for cert. filed,* (U.S. Jan. 7, 2003) (No. 02-8338), our evenly divided en banc court addressed aggregating individual, intrastate robberies to find a substantial effect on interstate commerce under the Hobbs Act, 18 U.S.C. § 1951 (criminalizing efforts to "obstruct [,] delay [,] or affect[ ] commerce or the movement of any article or commodity in commerce, by robbery or extortion ... ").

The dissent in *Hickman*, adopted by half of our en banc court, stated:

> Individual acts cannot be aggregated if their effects on commerce are causally independent of one another. That is, if the effect on interstate commerce directly attributable to one instance of an activity does not depend in substantial part on how many other instances of the activity occur, there is an insufficient connection—in other words, an interactive effect—and the effect of different instances cannot be added. If, on the other hand, the occurrence of one instance of the activity makes it substantially more or less likely that other instances will occur, then there is an interactive effect and the effects of different instances can be added.

179 F.3d at 233 (Higginbotham, J., dissenting).

This "interactive effect" requirement flows from the requirement in *Lopez* that failure to regulate the intrastate activity could "undercut" the entire scheme. Along this line, *Ho* held that the instance of intrastate asbestos removal had an effect on the larger economic regulation of the asbestos industry. 311 F.3d at 602.

In addressing the Hobbs Act issue faced in *Hickman*, one dissent in *McFarland*, again adopted by half of our en banc court, stated:

> Assuming, arguendo, that there is a class of [*Lopez*] category three cases [substantial effect] as to which there are no restraints whatever on aggregation, we conclude that such a class would exclude instances where "the regulated activity" is not properly described as "commercial" or "economic" in the same general sense as "commercial."

311 F.3d at 396 (Garwood, J., dissenting) (emphasis in original). In the intervening light of *Morrison*, that dissent agreed with the *Hickman* dissent.

Where the Supreme Court has applied aggregation to uphold federal regulation of intrastate conduct against constitutional challenge under the Commerce Clause, there has always been a rational basis to find sufficient interrelationship or commonality of effect on interstate commerce among the discrete intrastate instances regulated and between them and a scheme of regulation (protection, enhancement or restriction) of some particular interstate market or activity such that the regulation of those intrastate activities can rationally be viewed as necessary to the effectiveness of or a meaningfully supporting part of the scheme of regulation of that particular interstate activity or market.

*Id.* at 401 (emphasis added).

Plaintiffs maintain that Cave Species takes have no relationship, let alone a substantial one, to interstate commerce. They concede, however, that all takes of endangered species, if aggregated, would have the requisite substantial effect; but, they maintain, aggregation is not proper because Cave Species takes are non-economic in nature and not an essential part of a regulatory scheme.

ESA was enacted in 1973 in response to threats to fish, wildlife, and plants (wildlife). 16 U.S.C. § 1531(a)(1). These threats arose principally from "pollution, destruction of habitat and the pressures of trade ". H.R. Rep. No. 93-412, at 2 (1973) (emphasis added). Congress noted that "the pace of disappearance of species is accelerating". *Id.* at 4. This acceleration was troubling because, inter alia, "it is in the best interest of mankind to minimize the losses of genetic variations". *Id.* at 5. That interest, Congress said, was "simple: [the genetic variations] are potential resources". *Id.*

They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.

To take a homely, but apt, example: one of the critical chemicals in the regulation of ovulation in humans was found in a common plant. Once
discovered and analyzed, humans could duplicate it synthetically, but had it never existed—or had it been driven out of existence before we knew its potentialities—we would never have tried to synthesize it in the first place.

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk ... those potential cures by eliminating those plants for all time? Sheer self-interest impels us to be cautious.

*Id.*

*Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) (*TVA*), the famous snail darter decision, reviewed ESA's legislative history in the process of upholding an injunction pursuant to the Secretary of the Interior's determination that the operation of a federal dam would eradicate an endangered species. At issue was 16 U.S.C. § 1536, which requires federal agencies to consult with the Secretary regarding projects and to "utilize their authorities in furtherance of the purposes of [ESA]...." The Court recognized Congress' "newly declared national policy of preserving endangered species", *id.* at 176, 98 S.Ct. 2279, and held: "The plain intent of Congress in enacting [ESA] was to halt and reverse the trend toward species extinction, *whatever the cost*," *id.* at 184, 98 S.Ct. 2279 (emphasis added).

Of course, notwithstanding this "plain intent", ESA's take provision as applied in this case must have firm footing in the Commerce Clause. In this regard, ESA's take provision has no jurisdictional requirement that might otherwise limit its application to species bearing some relationship to interstate commerce. Nor does the take provision list the species to be protected. Instead, ESA incorporates listings, promulgated from time to time by FWS, that determine which species are covered by the take provision. 16 U.S.C. § 1533(c).

A.

Aggregation or no, the first of the four *Morrison* considerations concerns the economic nature *vel non* of the *regulated activity*. On this key point, at issue is what constitutes the "regulated activity". Plaintiffs assert that, for evaluating substantial effect, we should lock only to the expressly regulated activity—Cave Species takes. FWS responds that, in addition, we should consider such regulation in the light of plaintiffs' planned commercial development and, by extension, its effect on interstate commerce.

The district court agreed with FWS and looked *primarily* to plaintiffs' planned development:

[The regulated activity in this case is plaintiffs' alleged take of the Cave Species by their planned development of the Property. This development includes plans to build "a shopping center, a residential subdivision, and office buildings" on the Property.... This activity, standing alone, "would easily be classified as substantially affecting interstate commerce."

169 F.Supp.2d at 658 (internal citations omitted).

The district court characterized plaintiffs' challenge as being "as-applied". Whether it is "as-applied" or "facial", the district court correctly concluded it should evaluate plaintiffs' conduct in determining whether the take provision, as applied to the Cave Species, was unconstitutional. *See City of Chicago v. Morales*, 527 U.S. 41, 78 n. 1, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (Scalia, J., dissenting) (aside from First Amendment "overbreadth" cases, "a facial attack, since it requires unconstitutionality in all circumstances, necessarily presumes that the litigant presently before the court would be able to sustain an as-applied challenge"); *see also United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The above-quoted passage from the district court opinion reflects, however, that the court extended the scope of this relevant conduct beyond plaintiffs' Cave Species takes; it *primarily* considered plaintiffs' commercial motivations that would underlie the takes. As discussed below, and consistent with the Supreme Court's interpretation of the Commerce Clause, we conclude that the scope of inquiry is primarily whether the *expressly regulated activity* substantially affects interstate commerce, i.e., whether takes, be they of the Cave Species or of all endangered species in the aggregate, have the substantial effect.

In this regard, neither this court, nor the Supreme Court, has explicitly determined the scope of the substantial effects analysis. Nonetheless, the Supreme Court has expressed concerns about this issue. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001), under § 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), the Corps of Engineers claimed jurisdiction over abandoned sand and gravel pits which had become seasonal ponds and, concomitantly, habitats for migratory birds. As a result, the Corps prevented construction of a landfill on a site. The landfill developers contended that, through such regulation, the Corps overstepped its statutorily-prescribed jurisdictional bounds, and, alternatively, Congress
exceeded its Commerce Clause power.

Resolving the case by interpreting the Clean Water Act, the Court avoided the constitutional issue. Nevertheless, it shed light on the scope-issue at hand:

[The Government] ... note[s] that the protection of migratory birds is a national interest of very nearly the first magnitude, and that, as the Court of Appeals found, millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, post litem motam, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is plainly of commercial nature. But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.

Id. at 173, 121 S.Ct. 675 (emphasis added; internal citation and quotation omitted).

Again, we must resolve the question of which activities are to be primarily considered in order to determine substantial effect vel non. Each of the three Lopes categories recognizes Congress' power to regulate where the object of regulation relates to interstate commerce: channels, instrumentalities, or activities. Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning substantial effect vel non, Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.

In expanding its scope-inquiry to plaintiffs' commercial motivations, the district court relied on Groom, which evaluated Congress' Commerce Clause power to regulate under the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B). Groom stated that, in Lopez and Morrison, "neither the 'actors' nor the 'conduct of the regulation' had a commercial character". 234 F.3d at 204 (emphasis added). Groom recognized that, in analyzing the effect on interstate commerce, courts look only to the expressly regulated activity. In Groom, that was the sale and rental of housing. The actor's conduct was commercial in nature, but that characteristic was only relevant insofar as it fell within the regulated activity.

Id. at 205-16.

Unlike Groom, the district court in this case looked primarily beyond the regulated conduct—Cave Species takes—in order to assess effect on interstate commerce. It looked to plaintiffs' planned commercial development of the property where the takes would occur. True, the effect of regulation of ESA takes may be to prohibit such development in some circumstances. But, Congress, through ESA, is not directly regulating commercial development.

To accept the district court's analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.

Along this line, looking primarily beyond the regulated activity in such a manner would "effectually obliterating" the limiting purpose of the Commerce Clause. Jones & Laughlin Steel Corp., 301 U.S. at 37, 57 S.Ct. 615. Concomitantly, the facial challenges in Lopez and Morrison would have failed. For instance, regulation of gun possession near schools, at issue in Lopez, would arguably pass constitutional muster as applied to a possessor who was a significant gun salesman. Therefore, § 922(g)(1)(A) could not have been facially unconstitutional. See Salerno, 481 U.S. at 743, 107 S.Ct. 2095. Similarly, the Violence Against Women Act, at issue in Morrison, would arguably have been a constitutional exercise of Congressional power if it were used to prosecute a person who committed violence against women and then sold a substantial number of videotapes of the encounter in interstate markets. It too would have withstood a facial attack. Such results, of course, run contrary to Lopez and Morrison.

Ho ruled that "the regulated intrastate activity, asbestos removal, is very much a commercial activity in today's economy... Both the state and federal governments license businesses and individuals in the field. Most, if not all, asbestos projects have a commercial purpose..." 311 F.3d at 602. Thus Ho primarily analyzed the expressly regulated activity. Only after doing so did Ho note: "Moreover, [plaintiff's] activities were driven by commercial considerations". Id.

Two circuits have published opinions upholding ESA's constitutionality; they looked, at times, to the

In NAHB and Gibbs, however, the actor's general conduct was not the sole basis for finding economic activity or a substantial effect on interstate commerce. To this extent, NAHB and Gibbs are consistent with the analysis in Ho.

NAHB, decided pre-Morrison, considered whether Congress had the power to regulate takes of the Delhi Sands Flower-Loving Fly, a species found only in California. The takes were caused by a planned hospital renovation. For a divided panel, two members held ESA constitutional, each on different grounds; one member opined it was unconstitutional.

In the main opinion, Judge Wald upheld ESA on two bases: as a valid regulation of the channels of interstate commerce; and because the takes substantially affected interstate commerce. For the substantial effect analysis, she did not look beyond the expressly-regulated activity. She did so, however, for the "channels of interstate commerce" analysis. 130 F.3d at 1048. There is, of course, good reason to look beyond the regulated activity to determine whether such channels are being used; whether an actor deals in these channels is directly relevant.

In her NAHB concurrence, Judge Henderson concluded the takes affected biodiversity, which in turn substantially affected interstate commerce. She briefly noted, however, that the regulation plainly affected interstate commerce because "[i]t relates to both the proposed redesigned traffic intersection and the hospital it is intended to serve..." NAHB, 130 F.3d at 1059 (Henderson, J., concurring).

Of course, the ESA regulation at issue in NAHB did not relate to traffic intersections; it related to fly takes. Judge Henderson relied, in part, on the following language from Heart of Atlanta Motel to support her conclusion: "The facilities and instrumentalities used to carry on this commerce such as railroads, truck lines, ships, rivers, and even highways are also subject to congressional regulation, so far as is necessary to keep interstate traffic upon fair and equal terms." 379 U.S. at 271, 85 S.Ct. 348 (emphasis added). This statement provides an example of Congress' power to regulate the use of the channels of interstate commerce, rather than those activities having a substantial effect on interstate commerce.

While the take provision may have prevented the hospital renovations in NAHB or the commercial developments in the case at hand, ESA does not directly regulate these activities. The NAHB dissent noted:

An alternative reading of Judge Henderson's second justification with its stress on the effect of the regulation upon the highway and hospital is that she concludes that Congress may regulate purely intrastate activities—e.g., the habitat modification of the fly—where the regulation will then affect items which are arguably in interstate commerce. Again, I do not see the stopping point. Congress is not empowered either by the words of the Commerce Clause or by its interpretation in Lopez to regulate any non-commercial activity where the regulation will substantially affect interstate commerce.... Nowhere is it suggested that Congress can regulate activities not having a substantial effect on commerce because the regulation itself can be crafted in such a fashion as to have such an effect.

Id. at 1067 (Santelle, J., dissenting) (emphasis added). As noted, however, Judge Henderson did not rely primarily on the commercial development, but instead analyzed the expressly regulated activity—the takes' effect on biodiversity.

Gibbs held Congress did not exceed its Commerce Clause power by regulating red wolf takes. 214 F.3d at 487. The wolves had been reintroduced on federal land, but had roamed onto private land in North Carolina and Tennessee. In holding the wolves had a substantial effect on interstate commerce, a divided panel noted that the take provision limited the ability to protect livestock and other agricultural products from the wolves: "The regulation here targets takings that are economically motivated—farmers take wolves to protect valuable livestock and crops." Id. at 495 (emphasis added). As discussed infra, Gibbs held primarily, however, that the expressly regulated activity—red wolf takes, regardless of farmers'
motivations—was economic in nature.

In the light of the successful facial challenges in Lopez and Morrison and the emphasis our court and sister circuits have placed on the economic nature vel non of the expressly regulated activity, the district court erred in looking primarily to plaintiffs' commercial motivations.

B.

As discussed earlier, there are two ways in which intrastate activity can substantially affect interstate commerce: the activity can be of a nature and scope that it, alone, has such an effect; and, in certain circumstances, the activity can be aggregated with similar activities, so that the sum of the activities has the requisite substantial effect. As also discussed, FWS contends regulation of Cave Species takes is proper under either method. For either, the goal remains the same: distinguishing between "what is truly national and what is truly local". Morrison, 529 U.S. at 617-18, 120 S.Ct. 1740; Lopez, 514 U.S. at 567-68, 115 S.Ct. 1624; Ho, 311 F.3d at 601.

1.

In urging Cave Species takes, alone, have a "direct relationship" with, and substantial effect on, interstate commerce, FWS claims two significant effects: the "substantial" scientific interest generated by the Cave Species; and their possible future commercial benefits.

a.

Concerning the scientific interest effect, some scientists have studied the Cave Species. In doing so, some of them have traveled to Texas. In coordination with this research, some Cave Species have been transported to and from museums in five States. Finally, articles about the Cave Species have been published in scientific journals.

According to FWS, this demonstrates the Cave Species "play a role in interstate commerce". Obviously, even assuming this is true, this does not necessarily constitute the substantial effect mandated by Lopez and Morrison. To the extent FWS contends that the loss of the Cave Species would affect the scientific travel or publication industries, it offers no evidence that it would substantially do so. In fact, the minimal evidence presented by FWS indicates such an effect would be negligible.

In upholding the red wolf take provision, Gibbs held the takes "implicate[d] a variety of commercial activities and [was] closely connected to several interstate markets". 214 F.3d at 492. Chief among them were red-wolf-related tourism, "scientific research", and the "commercial trade" in pelts. Id. at 493-95. Gibbs held the "takings of red wolves in the aggregate have a sufficient impact on interstate commerce". Id. at 493. (As discussed, Gibbs also observed that the takes were motivated by commercial incentives.)

Obviously, the commercial impact of red wolves is significantly greater than that of the Cave Species. See id. at 493-94 ("According to a study ... the recovery of the red wolf and increased visitor activities could result in a significant regional economic impact. [The study's author] estimates that northeastern North Carolina could see an increase of between $39.61 and $183.65 million per year in tourism-related activities" (internal citation omitted)).

In the case of the Cave Species, any connection between takes and impact on the scientific travel or publication industries is, as noted, negligible. Under Morrison's fourth consideration, any claim that the connection rises to a "substantial relationship" is far too attenuated to pass muster.

b.


FWS posits here:

The value of the cave species... may be even more significant than those of the pupfish and the manatee, given the unique features of cave species. Although little is yet understood about these particular species, scientists have long observed that cave species, because of their peculiar habitats, often exhibit incredibly low metabolic rates and possess extremely long life-spans... compared to other invertebrates. Such characteristics suggest that further study of these species could lead to
important developments in our understanding of longevity.

(Emphasis added; internal citations and quotations omitted). In short, this claim is not supported by evidence concerning Cave Species. It is conjecture.

This contention, whatever its merits may ultimately be, runs afoul of the attenuation consideration. The possibility of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster. See Morrison, 529 U.S. at 612, 120 S.Ct. 1740.

2.

In the alternative, FWS contends that Cave Species takes may be aggregated with those of all other endangered species. As noted, plaintiffs concede this aggregation would have the requisite substantial effect on interstate commerce. See NAHB, 130 F.3d at 1053-54 ("In the aggregate, however, we can be certain that the extinction of the species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce.").

At issue is what circumstances must be present in order to justify aggregation when, as in this case, intrastate activity has a de minimis effect on interstate commerce. As noted, Lopez and Morrison instruct courts to consider, inter alia, the activity's economic or commercial nature. And, as discussed supra, one key way by which intrastate activity may be considered "economic" or "commercial" is through its importance to an economic regulatory scheme.

As noted earlier, whether an activity is economic or commercial is to be given a broad reading in this context. Groome, 234 F.3d at 208-09. Nevertheless, in a sense, Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture. If the speculative future medicinal benefits from the Cave Species makes their regulation commercial, then almost anything would be. Moreover, unlike the red wolves (and their pelts) in Gibbs, there is no historic trade in the Cave Species, nor do tourists come to Texas to view them.

FWS posits that, because, in the aggregate with other endangered species, Cave Species takes will have a substantial effect on interstate commerce, these takes can be classified as commercial. To accept such a justification would render meaningless any "economic nature" prerequisite to aggregation. An activity cannot be aggregated based solely on the fact that, post-aggregation, the sum of the activities will have a substantial effect on commerce. This would vitiate Lopez and Morrison's seeming requirement that the intrastate instance of activity be commercial. Noneconomic and noncommercial activity could be aggregated so long as, if aggregated, it would have a substantial effect. Lopez and Morrison stand against such a proposition.

On the other hand, the regulation of the Cave Species is part of a larger regulation of activity. The take provision as applied to the Cave Species is part of the take provision generally and ESA as a whole. More is required, however. As discussed earlier, noncommercial, intrastate activities must be "essential" to an economic regulatory scheme's efficacy in order, under this rationale, for aggregation to be appropriate.

First, the larger regulation must be directed at activity that is economic in nature. Lopez, 514 U.S. at 561, 115 S.Ct. 1624. See also Morrison, 529 U.S. at 610, 120 S.Ct. 1740. ESA states that endangered species are of "esthetic, ecological, educational, historical, recreational, and scientific value...." 16 U.S.C. § 1531(a)(3). Along this line, courts may also look to ESA's legislative history. Morrison, 529 U.S. at 612, 120 S.Ct. 1740. In this light, ESA's protection of endangered species is economic in nature. As noted, ESA's drafters were concerned by the "incalculable" value of the genetic heritage that might be lost absent regulation. See H.R. Rep. No. 93-412, at 4. With regard to a precursor to ESA, the Senate Report observed:

From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time. Potentially more important, however, is the fact that with each species we eliminate, we reduce the [genetic] pool ... available for use by man in future years. Since each living species and subspecies has developed in a unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contamination,

Aside from the economic effects of species loss, it is obvious that the majority of takes would result from economic activity. See, e.g., 16 U.S.C. § 1533(a)(1) ("various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation"); 16 U.S.C. § 1533(f) (recovery plans should give priority to species that are in "conflict with construction or other development projects or other forms of economic activity ... "). Indeed, Congress' findings are reflected in the case at hand: the Cave Species takes would occur as a result of plaintiffs' planned commercial development.

Moreover, ESA is "truly national" in scope. See Morrison, 529 U.S. at 617-18, 120 S.Ct. 1740; Lopez, 514 U.S. at 567-68, 115 S.Ct. 1624. This is the case, despite the concerns raised by amicus State of Texas. It is true that land use and wildlife preservation are traditional areas of state concern. Nevertheless, "this authority is shared with the Federal Government when it exercises one of its enumerated constitutional powers". Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204, 119 S.Ct. 1187, 143 L.Ed.2d 279 (1999).

Second, in order to aggregate, the regulated intrastate activity must also be an "essential" part of the economic regulatory scheme. Judge Wald's opinion in NAHB held ESA's take provision constitutional as applied to an intrastate species of insect. Key to this conclusion, and challenged by the other two panel members, was the determination that individual takes of the species could be aggregated. The opinion assumed aggregation, holding that, because "biodiversity has a ... substantial ... effect on ... interstate commerce, the de minimis character of individual instances arising under [ESA] is of no consequence". 130 F.3d at 1053, n. 14 (quoting Lopez, 514 U.S. at 558, 115 S.Ct. 1624).

The opinion did not discuss, however, Lopez' earlier requirement that de minimis instances of activity subsumed within a regulatory scheme must be essential to that scheme, so that it could be undercut without the particular regulation. 514 U.S. at 561, 115 S.Ct. 1624. Along this line, the NAHB dissent noted: "There is no showing, but only the rankest of speculation, that a reduction or even complete destruction of the viability of the [species] will in fact affect land and objects that are involved in interstate commerce". 130 F.3d at 1065 (Sentelle, J., dissenting) (internal citations and quotations omitted).

In TVA, however, the Court recognized that "Congress was concerned [not only] about the unknown uses that endangered species might have, but also about the unforeseeable place such creatures may have in the chain of life on this planet". 437 U.S. at 178-79, 98 S.Ct. 2279 (emphasis in original). Citing that portion of TVA, Gibs reaffirmed Congress' power to "manage the interdependence of endangered animals and plants in large ecosystems". 214 F.3d at 496. See also NAHB, 130 F.3d at 1052 n. 11; id. at 1058 (Henderson, J., concurring) ("The effect of a species' continued existence on the health of other species within the ecosystem seems to be generally recognized among scientists.").

FWS contends: "Allowing a particular take to escape regulation because, viewed alone, it does not substantially affect interstate commerce, would undercut the ESA scheme and lead to piecemeal extinctions". Along this line, it maintains that takes of any species threaten the "interdependent web" of all species. Congress described this "critical nature of the interrelationships of plants and animals between themselves and with their environment". H.R. Rep. No. 93-412, at 6. In fact, according to Congress, the "essential purpose" of ESA is "to protect the ecosystems upon which we and other species depend". Id. at 10.

ESA's take provision is economic in nature and supported by Congressional findings to that effect. Although, as noted, there is no express jurisdictional element in ESA, our analysis of the interdependence of species compels the conclusion that regulated takes under ESA do affect interstate commerce. In this sense, ESA's take provision is limited to instances which "have an explicit connection with or effect on interstate commerce". Morrison, 529 U.S. at 611-12, 120 S.Ct. 1740 (internal quotations omitted).

Finally, the link between species loss and a substantial commercial effect is not attenuated. This holding will not allow Congress to regulate general land use or wildlife preservation. See id. at 612-13, 120 S.Ct. 1740. ("We rejected these ... arguments because they would permit Congress to regulate not only all violent crime, but all activities that might lead to violent crime ....") (quoting Lopez, 514 U.S. at 564, 115 S.Ct. 1624).

ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is
an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes. As noted, plaintiffs concede such aggregation substantially affects interstate commerce. In sum, application of ESA's take provision to the Cave Species is a constitutional exercise of the Commerce Clause power.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

DENNIS, Circuit Judge, concurring:

....

51/56
United States Court of Appeals,
Fifth Circuit.
GDF REALTY INVESTMENTS, LTD.; Parke
Properties I, LP; Parke Properties II,
LP, Plaintiffs-Appellants,
v.
Gale A. NORTON, Secretary, U.S. Department of
the Interior; Marshall P. Jones,
Director, U.S. Fish & Wildlife Service, Defendants-
Appellees.
No. 01-51099.
Appeal from the United States District Court for the
Western District of Texas; Sam Sparks, Judge.

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion March 26, 2003, 5th Cir. 326 F.3d 622)

Before DAVIS, BARKSDALE and DENNIS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the court
having been polled at the request of one of the
members of the court and a majority of the judges
who are in regular active service not having voted in
favor (FED. R.APPL. P. and 5TH CIR. R. 35) the
Petition for Rehearing En Banc is also DENIED.

EDITH H. JONES, Circuit Judge, joined by E.
GRADY JOLLY, JERRY E. SMITH, DeMOSS,
EDITH BROWN CLEMENT and PICKERING.
Circuit Judges, dissenting from the denial of
rehearing en banc:

A majority of the court has refused to rehear this
significant Endangered Species Act case en banc. I
respectfully dissent. For the sake of species of 1/8-
icech-inch-long cave bugs, which lack any known value in
commerce, much less interstate commerce, the panel
crafted a constitutionally limitless theory of federal
protection. Their opinion leads new meaning to the
term reductio ad absurdum.

The panel holds that because "takes" of the Cave
Species ultimately threaten the "interdependent web"
of all species, their habitat is subject to federal
regulation by the Endangered Species Act. Such
unsubstantiated reasoning offers but a remote,
speculative, attenuated, indeed more than improbable
connection to interstate commerce. Chief Justice
Wheat.) 264, 5 L.Ed. 257 (1821), that Congress has
no general right to punish murder or felonies
generally. Surely, though, there is more force to an
"interdependence" analysis concerning humans, and
thus a more obvious series of links to interstate
commerce, than there is to "species." Yet the panel's
"interdependent web" analysis of the Endangered
Species Act gives these subterranean bugs federal
protection that was denied the school children in
Lopez and the rape victim in Morrison. The panel's
commerce clause analysis is in error.

I. Background

II. Discussion

Congress's power "to regulate commerce ... among
the several states ..." is, like all enumerated powers,
subject to outer limits. See United States v. Lopez,
514 U.S. 549, 556-57, 115 S.Ct. 1624, 131 L.Ed.2d
626 (1995); Solid Waste Agency of Northern Cook
County v. U.S. Army Corps of Engineers, 531 U.S.
159, 173, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001)
(reiterating that "the grant of authority to Congress
under the commerce clause, though broad, is not
unlimited"). The commerce clause "may not be
extended so as to embrace effects upon interstate
commerce so indirect and remote that to embrace
them, in view of our complex society, would
effectually obliterate the distinction between what is
national and what is local and create a completely
centralized government." NLRB v. Jones and
Laughlin Steel, 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed.
893 (1937).

It is unnecessary to recapitulate the Supreme Court's
Lopez and Morrison cases at any length. See,
generally, United States v. Morrison, 529 U.S. 598,
120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). Lopez
defines three categories of federal regulation that are
consistent with the commerce clause. Lopez, 514
U.S. at 558, 115 S.Ct. 1624. At issue here is whether
federal regulation of the Cave Species is permissible
under the third Lopez category--i.e., whether takes of
the Cave Species "substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59, 115 S.Ct. 1624, *fn1*.

*fn1* The panel found, and the parties do not dispute, that the first two *Lopez* categories, involving the channels or instrumentalties of interstate commerce, do not justify regulation of the Cave Species. *GDF Realty*, 326 F.3d at 629.

In *Lopez*, reiterated in *Morrison*, the Court outlined four considerations in determining whether purely intrastate activity substantially affects interstate commerce: (1) the commercial or economic nature of the intrastate activity; (2) the presence of a jurisdictional element in the statute; (3) the existence of congressional findings or legislative history demonstrating a link between the regulated activity and interstate commerce; and (4) how attenuated is the link between the intrastate activity and its effect on interstate commerce. *See Morrison*, 529 U.S. at 609-12, 120 S.Ct. 1740 (2000), *fn2*.

*fn2* Pertinent parts of the Endangered Species Act contain no statutory jurisdictional link between federal regulation and interstate commerce. Likewise, legislative history and congressional findings fail to tie species protection to commerce. These parts of the analysis concerning federal regulation of intrastate activity do not favor FWS.

In certain instances, an intrastate activity alone may substantially affect interstate commerce. *See Jones and Laughlin Steel*, 301 U.S. at 22, 57 S.Ct. 565 (NLRB order concerning unfair labor practices at a steel mill directly affected interstate commerce). In other instances, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir.2002); *see also Wickard v. Filburn*, 317 U.S. 111, 127-28, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

As an initial matter, the panel correctly determined, unlike other courts, that the "regulated activity" under the ESA is Cave Species *takes*, not the appellants' planned commercial development of the land. *GDF Realty*, 326 F.3d at 633-34 (recognizing that "looking beyond the regulated activity ... would 'effectually obliterate' the limiting purpose of the Commerce Clause") (citing *Jones and Laughlin Steel*, 301 U.S. at 37-38, 57 S.Ct. 619); *Ho*, 311 F.3d at 602 (recognizing that the regulated activity at issue was asbestos removal, rather than the plaintiff's commercial enterprise); *but see Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C.Cir.2003) (finding that the regulated *in situ* activity was not the ESA take but rather the "construction of a commercial housing development").

Next the panel examined whether Cave Species takes, alone, have a "direct relationship" with and substantial effect on interstate commerce. *GDF Realty*, 326 F.3d at 637. FWS offered two theories for such a "direct relationship": (1) the "substantial" scientific interest the Cave Species generate; and (2) possible future commercial benefits. The panel properly rejected each argument as speculative or too attenuated to commerce.

The panel finally turned to FWS's argument that Cave Species takes, although intrastate and non-economic in themselves, may be aggregated with all other endangered species, permitting the entirety of the regulatory scheme to pass constitutional muster. *fn3* "At issue is what circumstances must be present in order to justify aggregation when, as in this case, intrastate activity has a de minimis effect on interstate commerce." *GDF Realty*, 326 F.3d at 638.

The panel concluded that this case warranted aggregation under *Lopez* and *Morrison*, because FWS's actions are essential to preserving an "economic" regulatory program. *Id. at 639.* I respectfully disagree. The panel's approval of aggregation in this case would not only sustain every conceivable application of the ESA, but entirely undercut *Lopez* and *Morrison*.

*fn3* The appellants concede that, if aggregated with all endangered species, the Cave Species takes would have a substantial effect on interstate commerce.

To explain the problem, a brief historical review of the aggregation principle is required. This court recognized in *Ho* that the aggregation principle "reached its zenith in *Wickard*, perhaps the most far-reaching example of commerce clause authority over intrastate activity." *Ho*, 311 F.3d at 592 (quoting *Lopez*, 314 U.S. at 560, 115 S.Ct. 1624). In *Wickard*, the Supreme Court upheld regulation of an intrastate farmer's personal consumption of home-grown wheat under the Agricultural Adjustment Act of 1938 because, "... his contribution [to the wheat market], taken together with that of many others similarly situated, is far from trivial." *Wickard*, 317 U.S. at 127-28, 63 S.Ct. 82. A primary purpose of the act in
question was, as the Court noted, "to increase the market price of wheat and to that end to limit the volume thereof that could affect the market." *Id* at 90-91.

After *Wickard*, the Court has sustained commerce clause legislation using aggregation in instances where Congress was regulating commercial activity.

In both *Lopez* and *Morrison*, by contrast, the federal government's efforts to sustain non-economic criminal laws under the commerce clause through aggregation were rebuffed. In *Lopez*, only Justice Breyer's dissent accepted the theory that 290 discrete instances of gun possession in a school zone, when aggregated, increased the costs of crime and reduced national productivity so as to justify the Gun-Free School Zones Act of 1990. *See Lopez*, 514 U.S. at 618-624, 115 S.Ct. 1624 (Breyer, J. dissenting). The Court majority rejected aggregation, because it would allow Congress to regulate "all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id* at 564, 115 S.Ct. 1624. The Court concluded that, "if we were to accept the government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id*.

Likewise, in *Morrison*, the Court rejected arguments concerning the aggregate effects of sex-based crime on national productivity, increased medical and other costs, and a decreased supply and demand for interstate goods. *Morrison*, 529 U.S. at 615, 120 S.Ct. 1740. Again, the Court concluded that aggregation "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption." *Id* (adding that "the concern we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well-founded") (citing *Lopez*, 514 U.S. at 564, 115 S.Ct. 1624).

Together, these cases strongly suggest that when the Supreme Court has sustained Commerce Clause regulation under the aggregation principle, "the regulated activity was of an apparent commercial character." *Morrison*, 529 U.S. at 611, 120 S.Ct. 1740. Nevertheless, *Morrison* declined to create a categorical rule "against aggregating the effects of non-economic activity," even as it observed, "thus far in our nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic in nature." *Id* at 613, 120 S.Ct. 1740.

The panel recognized that "[i]n light of *Lopez* and *Morrison*, the key question for purposes of aggregation is whether the nature of the regulated activity is economic." *GDF Realty*, 326 F.3d at 630. The panel conceded that "in a sense, Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture." *GDF Realty*, 326 F.3d at 638. The panel added that "[i]f the speculative future medical benefits from Cave Species makes their regulation commercial, then almost anything would be." *Id*. Furthermore, "there is no historic trade in the Cave Species, nor do tourists come to Texas to view them." *Id*. Finally, the panel rejected the government's argument that Cave Species takes become commercial in character once aggregated with other endangered species. *Id*. "To accept such a justification would render meaningless any 'economic nature' prerequisite to aggregation." *Id*.

Nevertheless, the panel aggregated the Cave Species takes with all takes of all endangered species because: (1) they are part of a larger regulation that is "directed at activity that is economic in nature" and (2) the intrastate activity (Cave Species takes) is an "essential part of the economic regulatory scheme." *Id* at 639 (internal citations and quotations omitted).

How the panel's conclusion follows from its generally excellent preceding discussion of *Lopez* and *Morrison*, I cannot fathom. The panel offers little reasoning why any take of a Cave Species is (a) part of a larger "economic" regulatory scheme; (b) so essential to the larger national scheme that the accidental crushing of one Cave Species underfoot (or even the diminutive species' destruction) threatens to undo the national program; and (c) so significant to the commerce clause that Congress, for the first time in U.S. history, is authorized to aggregate purely intrastate, non-economic activity.

It is undeniable that many ESA-prohibited takings of endangered species may be regulated, and even aggregated, under *Lopez* and *Morrison* because they involve commercial or commercially-related activities like hunting, tourism and scientific research. On this basis, the Fourth Circuit decision in *Gibbs v. Babbitt*, 214 F.3d 483, 493-96 (4th Cir.2000), approved federal red wolf regulations. Under reasoning like that in *Gibbs*, aggregation may be sustained on a species-by-species basis or across certain categories of species. The pursuit of hunting trophies, for instance, affects markets for hunting,
outfitting, taxidermy, etc. Where the link between endangered species takes and commercial or economic activity is plain, courts need not be concerned about the limits of the aggregation principle.

But in this case, there is no link—as the panel concedes—between Cave Species takes and any sort of commerce, whether tourism, scientific research, or agricultural markets. Compare Gibbs, 214 F.3d at 493-95. The cautious expressed in Morrison about aggregation of wholly intrastate non-economic activity should be taken seriously by the courts. See GDF Realty, 326 F.3d at 628. Elsewhere in its opinion, the panel was quite emphatic about this, saying "the possibility of future substantial effects of the Cave Species on interstate commerce ... is simply too hypothetical and attenuated from the regulation to pass constitutional muster." Id. (citing Morrison, 529 U.S. at 612, 120 S.Ct. 1740) (emphasis in original).

When the panel nevertheless approves the application of the ESA to these Cave Species, its opinion becomes confusing and self-contradictory. First, the panel attempts to convert the ESA to an economic regulatory statute by opining that the majority of species takes would result from economic activity, and "the Cave Species takes would occur as a result of plaintiffs' planned commercial development." GDF Realty, 326 F.3d at 639. The panel had, however, rejected this argument earlier, when it found that the regulated activity is the take, not the planned commercial land development. GDF Realty, 326 F.3d at 633-34. As the panel itself understood, this "analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." Id. at 634.

FN4. Arguably, Congress could pass a statute prohibiting anyone engaged in interstate commerce from "taking" endangered species. But Congress did not do so in these parts of the statute.

Second, the panel states that Cave Species takes are essential to the ESA, because any take of any species "threaten[s] the interdependent web of all species." GDF Realty, 326 F.3d at 640 (internal quotations omitted). Under the panel's approach, "the essential purpose of the ESA is to protect the ecosystems upon which we and other species depend." Id. (quoting H.R.Rep. No. 93-412, at 10). Further, every take is "essential" to the ESA because the extinction of any species risks the extinction of all species, and the extinction of all species could lead to the extinction of ecosystems. GDF Realty, 326 F.3d at 640. At one level, this is no more than the "but-for causal chain" approach twice rejected by the Supreme Court in Lopez and Morrison. Hence, "the Lopez Court declined to apply the aggregation principle in conjunction with long chains of causal inference that would have been necessary to arrive at a substantial effect on interstate commerce." United States v. Wang, 222 F.3d 234, 239 (6th Cir.2000). An even more obvious dissonance between the panel opinion and Lopez, Morrison and the Constitution is that the Commerce Clause regulates commerce, not ecosystems. [FN5]

FN5. That a true, not merely conjectural, economic activity must be the subject of Congress's regulation is reinforced by our court's debates over the Hobbs Act. In United States v. Robinson, 119 F.3d 1205 (5th Cir.1997), the panel reasoned that any robbery of a business that has an effect on interstate commerce under the Hobbs Act's express jurisdictional requirements may be aggregated with other similar crimes for purposes of establishing a "substantial effect." Here, there is no jurisdictional element, and the only aggregate effect articulated by the panel is on biodiversity, which the panel somehow equates with "economic" or commercial activity. It seems clear, though, that biodiversity is a condition of nature, not a human activity. The panel's opinion goes farther than Robinson in permitting aggregation to overcome a commerce clause challenge.

Third, while the panel acknowledges the Supreme Court's concern that federal legislation under the Commerce Clause must have a limiting principle so as not to obliterate the distinction between that which is truly national and that which is local, the panel's conclusion tramples that precept. The panel concludes, summarily, that its "interdependent web" approach "will not allow Congress to regulate land use or wildlife preservation." GDF Realty, 326 F.3d at 640. I disagree. Once the FWS designates a species as endangered, the Government has functional control over the land designated as its habitat. If such authority is not justified by a federal interest in regulating interstate commerce, it "would result in a significant impairment of the States' traditional and primary power over land and water
FN6. Contrary to recent Supreme Court authority, the panel interprets the Endangered Species Act extremely broadly to permit the federal government to regulate a matter of unique local concern. ... Further, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Id. ... Regulation of land use is traditionally the province of state and local governments. 


Perversely, federal protection of the Cave Species has become a device to thwart not only these appellants' prospects of land development but also the State's construction of a highway, the quintessential modern artery of commerce. See "Dateline Texas: Officials at Odds over Spider Habitat," Houston Chron., Feb. 22, 2004, at 35A (to get federal approval for highway construction over two limestone caverns housing the Cave Species, "state highway administrators must find a site in Williamson County that is also home to the endangered species and permanently preserve that site").

The panel also concludes, without explanation, that "the link" between Cave Species takes "and a substantial commercial effect is not attenuated." GDF Realty, 326 F.3d at 640. The panel's reasoning—all takes are essential, therefore, all takes have a substantial commercial effect—is circular. Even aside from this problem, the Fifth Circuit and other courts have recognized that in an otherwise constitutional federal regulatory scheme, some applications may go too far. See e.g., United States v. Collins, 40 F.3d 95, 99 (5th Cir.1994) (robbery of an individual citizen not covered under the Hobbs Act); United States v. Wang, supra (same); United States v. Quigley, 53 F.3d 909, 910-11 (8th Cir. 1995). In fact, the panel's reasoning contradicts Collins, inasmuch as it would authorize federal criminal prosecution under the ESA of a landowner, or even an FWS agent, who climbed down into one of the caves in order to study the Cave Species and crushed one. See 16 U.S.C. §§ 1538-1540; compare Rancho Viejo, supra, 323 F.3d at 1080 (Ginsburg, J.), concurring ("... our rationale for concluding the take of the arroyo toad affects interstate commerce does indeed have a logical stopping point ... Just as important, however, the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.").

In the end, the panel is unable to refute the attenuation concern of Lopez and Morrison because its analysis rests on the false implication that all takes of all species necessarily relate to an ecosystem, which by its very grandiosity must at some point be "economic" in actuality or in effect. This is precisely the reasoning rejected by the Supreme Court. Not all crime is "economic" for commerce clause purposes, in actuality or effect, even though any or all of its human victims may become impoverished. Not all crimes against women are "economic" in practicality or effect, despite the same possible consequences. The Commerce Clause does not regulate crime, sexual inequity, or ecosystems as such—it regulates commerce. Thus, I reiterate: many applications of the ESA may be constitutional, but this one simply goes too far. To be faithful to the Supreme Court's principles in Lopez and Morrison and this court's Commerce Clause decisions, we should rehash this case en banc.