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The International Applicability of Section 7 of the Endangered Species Act of 1973

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THE INTERNATIONAL APPLICABILITY OF SECTION 7 OF THE ENDANGERED SPECIES ACT OF 1973

I. INTRODUCTION

In a hypothetical case, the United States votes in the World Bank\(^1\) to authorize loans to Brazil for a development project in Brazil's tropical rainforest. The project is an effort by the Brazilian government to get its people out of the poverty of its cities and resettled into the country where the government will clear out large areas of forest and convert them into farmland.\(^2\) Suppose further that this

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\(^1\) See COUNCIL ON ENVIRONMENTAL QUALITY, 16TH ANNUAL RPT. (1985) [hereinafter 1985 CEQ RPT.]. The World Bank is composed of several nations. The United States is represented by an Executive Director who represents the vote of the United States Treasury Department. According to the Council on Environmental Quality:

Development loans by the International Bank for Reconstruction and Development (World Bank) and other multilateral lending agencies inevitably have significant impacts on the environment. In the most positive terms, such loans can be used for development of conservation strategies or to restore, maintain, or protect the environment and natural resources. On the other hand, loan-supported development of a road through the tropical forest, for example, can lead to forest destruction and loss either directly or because uncontrolled settlement of a road through a forest area is stimulated. The international focus on the environmental impact of development assistance has shifted from concentration on the activity of bilateral agencies to that of multilateral organizations in recent years.

\(^2\) This is a common occurrence in tropical countries. These development projects result from both overpopulation and the unequal distribution of land in countries where a few wealthy landowners normally control most of the productive agricultural land. Government is thus forced to borrow money to keep the economy growing faster than population and to get the populations out of the cities and into the land that remains—tropical rainforests. SMITHSONIAN INST. TRAVELING EXHIBITION SERVICE, TROPICAL RAINFORESTS A DISAPPEARING TREASURE 23 (1988) (on file in the Santa Clara Law Review office).

Tropical countries are heavily dependent on loans. Brazil, for example, spent almost
project area is the known critical habitat for an endangered migratory bird, and thus development would destroy the species. Because the bird spends its non-winter months in the United States, not only will the world's ecosystem be the lesser from the development, but specifically the United States will be affected by the action. Is this federal action (i.e., the vote for authorization of money for the Brazilian project) subject to the consultation requirements of section 7 of the Endangered Species Act?

"forty percent of its export earnings to pay the annual interest on loans totalling more than $100 billion." Id.

In addition, many of the projects on which the money is spent fail. Not only do the projects fail, but it is projected that every year, twenty million acres of undisturbed tropical rainforest is cleared for cultivation of farmland. This is an area approximately the size of South Carolina. Id. at 20.

3. Migratory birds were used in the hypothetical to demonstrate a situation in which a United States project abroad could affect the United States directly. Using native foreign species as an example instead of migratory birds poses the same question as to whether the appropriation of money is subject to section 7. Some examples of the situation in which the United States contributes to native foreign species extinctions through federal agency action are found in *Defenders of Wildlife Fact Sheet: Implementation of the Endangered Species Act Overseas* (Aug. 1986). This fact sheet gives examples of unnecessary extinctions through road building, deforestation, and poorly planned damming.

For example, in a project partly funded by the Agency for International Development (AID), 400 of the 2,500 Asian Elephants will be killed near a hydroelectric project site in the Maheweli Basin of Sri Lanka. The entire habitat of the Asian Elephant is at risk. *Defenders of Wildlife Fact Sheet, supra*, at 1.

The Bureau of Reclamation is assisting in the proposed building of the Three Gorges Dam, which would be the world's highest dam and would affect the Chinese Alligator whose habitat lies along the Yangtze River. *Defenders of Wildlife Fact Sheet, supra*, at 1.

As part of a colonization project, the World Bank and the United States Army Corps of Engineers, which funds the Brazilian Army, is funding the construction of a highway through the rich rainforest of the Amazon Basin. The endangered jaguar will be adversely affected. *Defenders of Wildlife Fact Sheet, supra*, at 1-2.

Because of a population resettlement project in Indonesia, the orangutan, Clouded Leopard, Probiscis Monkey, Sumatran Elephant and Tiger, and the Sumatran and Javan Rhinos will be affected. This project is funded by the World Bank. *Defenders of Wildlife Fact Sheet, supra*, at 2.

As people are relocated to more rural areas of the country, tropical rainforests are destroyed. One-fifth of Indonesia's mammals are found nowhere else in the world. Indonesia harbors 1,480 species of birds, 25% of which are native. Of the 63 threatened species of mammals, birds and reptiles in the country, 17 are native. *Defenders of Wildlife Fact Sheet, supra*, at 2.

4. Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . .

Global diversity in plant and animal species is decreasing at a phenomenal rate. Though extinction itself is largely a natural process, the alarming rate of extinction as a result of industrialization has been the cause of grave concern. It has been estimated that development is causing extinction at the rate of one species per day around the world. This accelerated extinction rate is due to world-
wide habitat destruction and the hunting and trading of species. In 1985, the Council on Environmental Quality in its annual report to Congress, stated that the increasing lack of biological diversity is perhaps the most serious problem facing the world today. The most significant threat to the preservation of biological diversity is the rapid loss of the Earth’s tropical rainforests. The tropical rainforests, which are located on the equator, contain approximately

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9. Council on Environmental Quality, 11th Annual Rpt. (1980) [hereinafter 1980 CEQ Rpt.]. This report states that the elimination of habitat “is the greatest threat to biological diversity today.” Id. at 43.

10. The value of international trade is tremendous. This is a result of the burgeoning illicit trade in endangered species, which become more valuable as they decrease in population and are lawfully protected.

11. 1985 CEQ Rpt., supra note 1, at 273. The Council defined “biological diversity” as follows:

Biological diversity is a broad catchall term including the interconnected and related concepts of genetic diversity, including the genetic variability within individuals, races and populations of a species; species or ecological diversity, including the number or richness of species within a community or habitat; and habitat or natural diversity, including the variety and number of natural habitats and ecosystems.

1985 CEQ RPT., supra note 1, at 273.

12. The issue of biological diversity, in its broadest sense, has become one of the most important and pressing environmental concerns of the 1980’s. What DDT was to the 1960’s, and air and water pollution to the 1970’s, biological diversity promises to be for at least the next decade. Increasing numbers of biologists, taxonomists, ecologists, naturalists, environmentalists, and natural resources managers have quickly come to agreement that the preservation of biological diversity is arguably the most serious problem facing the nations of the Earth.

1985 CEQ RPT., supra note 1, at 273.

The eminent Harvard biologist, E.O. Wilson, commenting on this threat, wrote:

The worst thing that could happen—will happen—is not energy depletion, economic collapse, limited nuclear war, or conquest by a totalitarian government. As terrible as these catastrophes would be for us, they can be repaired within a few generations. The one process ongoing in the 1980’s that will take millions of years to correct is the loss of genetic and species diversity by the destruction of natural habitats. This is the folly our descendants are least likely to forgive us.

1985 CEQ RPT., supra note 1, at 273.

one-half of all species of plants and animals.\textsuperscript{14} One estimate of the rate at which tropical rainforests are disappearing projects that 50 percent of the earth's rainforest will be lost by the year 2000 and the remainder by the year 2020.\textsuperscript{16}

As a result of the United States' growing recognition and concern for accelerated species extinction around the world, Congress enacted the Endangered Species Act (ESA) of 1973.\textsuperscript{16} Congress' purpose in passing the Act was "to provide a means whereby the ecosystems upon which endangered species\textsuperscript{17} and threatened species\textsuperscript{18} may be conserved."\textsuperscript{19} Congress' policy was to require all agencies to utilize their full authority to conserve both endangered species and threatened species.\textsuperscript{20} The United States Supreme Court hailed the Endangered Species Act as representing "the most comprehensive legislation for the preservation of endangered species ever enacted by

\begin{itemize}
  \item \textsuperscript{14} 1985 CEQ Rpt., supra note 1, at 276.
  \item \textsuperscript{15} 1985 CEQ Rpt., supra note 1, at 277. To understand the role that humans have played in the extinction of certain species, see 1985 CEQ Rpt., supra note 1.
  Much of the activity of the Earth's growing human population to obtain food, clothing, shelter, and energy involve actions which result in the simplification, degradation, and loss of habitats such as forests, grasslands, and wetlands . . . .
  \textsuperscript{14} 1985 CEQ Rpt., supra note 1, at 277.
  One of the principal reasons [for species degradation] emanates from the status of wildlife as a common property resource. Wildlife are considered to be in the public domain, to be owned by all and hence by none, to be common property. Common property status for wildlife puts almost the entire burden for preserving wildlife on the public sector. It does nothing to motivate the self-interest of individuals and create private incentives to husband wildlife or preserve habitat . . . .
  \textsuperscript{14} 1985 CEQ Rpt., supra note 1, at 286.
  For international and foreign species the problems are legion: politically unstable and corrupt governments, unreliable biological information, and primitive permitting procedures . . . .
  \textsuperscript{14} 1985 CEQ Rpt., supra note 1, at 300.
  \item \textsuperscript{16} 16 U.S.C. §§ 1531-1543 (1982 & Supp. IV 1986) [hereinafter ESA or the Act].
  \item \textsuperscript{17} Id. § 1532(6). "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." Id.
  \item \textsuperscript{18} Id. § 1532(20). A threatened species is a species "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id.
  \item \textsuperscript{19} Id. § 1531(b).
  \item \textsuperscript{20} Id. § 1531(c). This section states: "It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." Id.
any nation."\(^{21}\)

The United States, because of its tremendous wealth and technical resources, has taken the lead in recognizing that species destruction is a worldwide problem that recognizes no borders.\(^{22}\)

A most crucial and, therefore, controversial provision of the ESA is section 7, which declares the policy of Congress to protect endangered and threatened species against "\textit{any action}" taken by federal agencies.\(^{23}\) This requirement raises an important and virtually unaddressed question concerning the scope of section 7: Do the section 7 consultation requirements apply to federal agency actions taken in foreign countries?

In spite of its apparently inclusive language, section 7 has given rise to some disagreement among the branches of government, specifically as to whether the section's consultation requirements apply to agency actions taken in foreign countries. Congress, in the language and legislative history of the ESA, and the judiciary, in its interpretation of the ESA, imply that section 7 does reach federal action in foreign countries.

On the other hand, the Department of Interior, which is responsible for carrying out the Act, has recently determined that section 7 does not reach federal activities in foreign countries.\(^{24}\)

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\(^{22}\) H. Kooopowitz & H. Kaye, Plant Extinctions: A Global Crisis 199 (1983).

\(^{23}\) 16 U.S.C. § 1536(a)(2) (1982 & Supp. IV 1986) (emphasis added). The heart of the ESA lies in section 7 and section 4. \textit{Id.} § 1533(c). Section 4 requires the Secretary of Interior to list all species around the world as endangered or threatened. Section 7 protects those endangered and threatened species listed pursuant to section 4. \textit{Id.} § 1533(c)(1).

Section 4 reads in pertinent part: "The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species." \textit{Id.}

\(^{24}\) 50 C.F.R. § 402.01(a) (1987). "Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, \textit{in the United States or upon the high seas}, is not likely to jeopardize the continued existence of any listed species . . . ." \textit{Id.} (emphasis added).

Compare the changes this 1987 rule made to the original regulations published in 1978. The 1978 regulations read in pertinent part: "Section 7(a)(2) requires every Federal agency to insure that its activities or programs, in the United States, upon the high seas, and in the foreign countries will not jeopardize the continued existence of listed species . . . ." 50 C.F.R.
This comment argues that section 7 establishes a duty for federal agencies to consult with the Secretary of the Interior when the United States takes actions abroad that may affect any of the listed endangered or threatened species. To reach this conclusion, this comment will demonstrate that section 7 does not distinguish between species listed whose range falls within the territorial boundaries of the United States and those whose range falls outside those boundaries.

This comment will analyze the ESA by examining its development in history, its plain statutory language, its legislative history and its treatment by the judiciary. In addition, this comment will address the Fish and Wildlife Services' interpretation of the ESA. Finally, this comment proposes that while it is necessary for Congress to clarify its position, the Fish and Wildlife Service (FWS) must return its regulations to its prior position maintaining that section 7 of the ESA applies extra-territorially.

II. Background

A. History of the Act

The Endangered Species Act of 1973 was based on the Endangered Species Act of 1966.26 The 1966 Act represented the first time that Congress focused on species extinction. It directed the Secretary of Interior to "provide a program for the conservation, protection, restoration, and propagation of selected species of native fish and wildlife, . . . that are threatened with extinction."27 The Act obligated the Department of Interior to establish an endangered species program. In addition, section 2(d) of the original Act required the Secretary to consult with other agencies to coordinate the policies of the Act. However, no program was ever developed because the Act lacked substance and the Act's policy applied only "to the extent practicable" and "in furtherance of the purpose of this Act."28 Al-

§ 402 (1978) (emphasis added).

25. The word "range" is used throughout the ESA to describe the area that the animal or plant species encompasses. For example, section 4(c), which describes the listing process states: "Each list shall refer to the species contained therein . . . [and] specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range." 16 U.S.C. § 1533(c) (1982 & Supp. IV 1986).


27. Id. § 1(a).

28. Id. § 2(d). The one substantive provision of the Act was to acquire lands for protection of the species listed in section 2(b).
though no conservation program developed, section 2(d) played a significant role in the evolution of section 7 of the 1973 Act.\textsuperscript{29}

Three years after the original Act, Congress strengthened the 1966 legislation by enacting the Endangered Species Conservation Act of 1969.\textsuperscript{30} This Act extended protection to foreign species and prohibited the importation of these foreign species.\textsuperscript{31} Nevertheless, there was still not enough protection because the Act did not affect the impact on endangered species from federal activities. Furthermore, the 1969 Act focused only on species that were severely endangered and on the brink of world-wide extinction.\textsuperscript{32}

In 1973, Congress responded to the worldwide ecological crisis and expanded the scope of species protection by passing the Endangered Species Act of 1973.\textsuperscript{33} This new law protected all plants and animals and classified them either as threatened or endangered.\textsuperscript{34} The most significant new provision of the Act was section 7, entitled "Interagency Cooperation."\textsuperscript{35}

Section 7 created a substantive and procedural duty for federal agency actions that affect endangered or threatened species. Threatened species are those species likely to become endangered "within the foreseeable future,"\textsuperscript{36} while endangered species are any species that are threatened with extinction through all or a significant portion of their range.\textsuperscript{37} All federal agencies are required to use their powers in consultation with the Fish and Wildlife Service in order to further the purposes of the Act.\textsuperscript{38}

Federal agencies essentially have two obligations under section 7. First, they are required to take positive actions in carrying out programs to conserve species.\textsuperscript{39} Second, these agencies are to avoid taking actions which may jeopardize listed species or their critical habitats.\textsuperscript{40} Section 7 thus states:

7(a)(1)—The Secretary shall review other programs administered by him and utilize such programs in furtherance of the

\begin{itemize}
  \item \textsuperscript{31} Id. §§ 2-3(a).
  \item \textsuperscript{32} Id.
  \item \textsuperscript{34} Id. §§ 1532(6), 1532(20).
  \item \textsuperscript{35} Id. § 1536.
  \item \textsuperscript{36} Id. § 1532(20).
  \item \textsuperscript{37} Id. § 1532(6).
  \item \textsuperscript{38} Id. § 1536(a)(1).
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} Id. § 1536(a)(2).
\end{itemize}
purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.

7(a)(2)—Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . .

While the ESA has been amended four times, the procedural and substantive requirements of section 7 have remained basically intact. This historical development indicates that Congress approved the scope of section 7 and the broad duties it placed on federal agencies.

B. The Section 7 Consultation Process

The scope of review under section 7(a)(2) currently covers both domestic and foreign species. In January 1986, the endangered and threatened list contained 883 species. Of these species, 493 were

41. Id. §§ 1536(a)(1)-1536(a)(2). The Legislature failed to realize how broad-sweeping and potent section 7 would become. Section 7 has evolved into the most powerful provision of the ESA. The 1973 legislative history contains only two sentences of discussion regarding section 7. See S. REP. No. 307, 93d Cong., 1st Sess. 2, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2989, 2997. It was not until the 1978 amendments that Congress realized the potent effect of section 7. Congress said, "This one small section has developed into one of the most significant portions of the entire statute." H.R. REP. No. 1625, 95th Cong., 1st Sess. 2, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 9453, 9457.


43. The most significant changes of section 7(a)(2) occurred in 1979 when Congress substituted the "does not jeopardize" standard with the softer standard that an agency insure that action "is not likely to" effect endangered species. 16 U.S.C. § 1536(a)(2) (1982 & Supp. IV 1986). This was done as a legislative response to the Supreme Court ruling in TVA v. Hill, 437 U.S. 153 (1978).

As one commentator stated, "[T]he general tenor of the amendments from 1978 to 1982, for the most part, was to reduce the rigidity of the original legislation by allowing exemptions and exceptions from the general rules against taking and jeopardizing listed species, and by making the listing process more deliberate." Fitzgerald, Wither the Wildlife: Wither the Endangered Species Act? A Review of Amendments to the Act, Vol. 5, No. 10, ENDANGERED SPECIES UPDATE 27 (1988).

44. 50 C.F.R. § 17.11 (1986). The listed endangered wildlife includes: Jaguar, San
foreign species. Before section 7 is implemented, a species must be either listed as threatened or endangered pursuant to section 4(b).

Once a species, domestic or foreign, is listed as endangered, it is subject to broad substantive legal protection. Two major safeguards are triggered. First, under section 7(a)(2) (hereinafter referred to as section 7), all federal agencies must ensure that any action they authorize, fund, or carry out is not likely to jeopardize those species on the section 4 list, or have an adverse impact on their habitat. The section 7 consultation process is activated only when those species listed pursuant to section 4 may be jeopardized.

The listing process is initiated in two ways. First, a species, domestic or foreign, can be listed by either the Department of Interior or Commerce, based on the best available scientific and commercial data. Section 4(b)(1) reads in pertinent part:

The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation . . . .

Second, any “interested person” may petition the Secretary to list a particular species. Section 4(b)(3)(A) states in pertinent part: “To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of Title 5 to add a species to, or to remove a species from, either of the lists . . . “ Id. § 1533(b)(3)(A).

Once the process is initiated, the Secretary must conduct a review based on five criteria. The five criteria 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; or
(E) other natural or man-made factors affecting its continued existence.

Id. § 1533(b)(1)(A).

In addition, the Secretary must consider efforts taken by states and foreign nations. Id. § 1533(b)(3)(B).

Third, if the agency decides that a particular species is in need of protective regulation, the agency will propose the listing by publishing it in the Federal Register. This must be done within twelve months after receiving the petition and only if the Secretary finds substantial information. If so, the Secretary “shall promptly publish such finding in the Federal Register.” Id. § 1533(b)(6)(A).

Finally, the reviewing agency must make a final determination based on public comments. Section 4(b)(6)(A) states in pertinent part:

Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

(i) if a determination as to whether a species is an endangered or threatened species, or a revision of critical habitat, is involved, either—


Endangered plants include: Contra Costa Wallflower, Arizona Hedgehog Cactus, Minnesota Trout Lily, Texas Wild-rice, and the Maguire Primrose. Id.

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(i) if a determination as to whether a species is an endangered or threatened species, or a revision of critical habitat, is involved, either—
ond, under section 9, the ESA imposes civil and criminal penalties for the importation and exportation of listed species.\(^4\)

When a federal agency discovers that it may be taking an action that will have an adverse impact on an endangered species, it must begin a consultation process.\(^4\) This is mandated by section 7. The plain statutory language of section 7 is void of any restrictions on the consultation requirement; actions are not restricted to those affecting only domestic listed species. The ESA, on its face, includes protection of all species listed pursuant to section 4, domestic or foreign.

Once an agency discovers it may be affecting an endangered species, it must contact the FWS.\(^5\) Once contacted, the FWS is required to assist the project agency to determine if there is a possible violation of section 7. The duration of the consultation process is to be ninety days.\(^5\) The FWS then issues a biological opinion which is

\[\text{(I) a final regulation to implement such determination,}\]  
\[\text{(II) a final regulation to implement such revision or a finding that such}\]  
\[\text{revision should not be made,}\]  
\[\text{(III) notice that such one-year period is being extended under subpara-}\]  
\[\text{graph (B)(ii),}\]  
\[\text{(IV) notice that the proposed regulation is being withdrawn under para-}\]  
\[\text{graph (B)(ii), together with the finding on which such withdrawal is based; or}\]  
\[\text{(ii) subject to subparagraph (C), if a designation of critical habitat is involved,}\]  
\[\text{either—}\]  
\[\text{(I) a final regulation to implement such designation, or}\]  
\[\text{(II) notice that such one-year period is being extended under such}\]  
\[\text{subparagraph.}\]  

\[\text{Id. § 1533(b)(6)(A).}\]

\[\text{48. Id. § 1538(a). This section makes it unlawful for any person of the United States to:}\]  
\[\text{(A) import any such species into, or export any such species from the}\]  
\[\text{United States;}\]  
\[\text{(B) take any such species within the United States or the territorial sea of}\]  
\[\text{the United States;}\]  
\[\text{(C) take any such species upon the high seas;}\]  
\[\text{(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagranh (B) and (C);}\]  
\[\text{(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any}\]  
\[\text{such species;}\]  
\[\text{(F) sell or offer for sale in interstate or foreign commerce any such species; or}\]  
\[\text{(G) violate any regulation pertaining to such species or to any threatened}\]  
\[\text{species of fish or wildlife listed pursuant to Section 4 of this Act and promul-}\]  
\[\text{gated by the Secretary pursuant to authority provided by this Act.}\]  

\[\text{Id.}\]

\[\text{49. Id. § 1536(a)(2).}\]

\[\text{50. The agency may have to contact the National Marine Fisheries Service if a marine}\]  
\[\text{species is involved.}\]

\[\text{51. 16 U.S.C. § 1536(b)(1)(A) (1982 & Supp. IV 1986). "Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period}\]
a determination as to whether the action is likely to jeopardize the listed species or adversely modify its critical habitat. However, the FWS does not make the final determination to go forward with the project, it merely suggests a way to mitigate. The acting agency decides whether the proposed activity will proceed. If the action agency, the governor of a state, if any, or a permit or license applicant decides to proceed with the originally proposed project, that person or agency may seek an exemption from section 7 if there is an "irreversible conflict."

C. Cases Interpreting Section 7

While the specific issue regarding section 7's international application has not yet been decided by the judiciary, there are several cases which have interpreted section 7. There are no court rulings addressing the question of whether or not federal agencies must consult with the DOI when they take actions in foreign countries. However, in the landmark Supreme Court case of TVA v. Hill, the beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency." Id.

52. Id. § 1536(d). The agency is prohibited from making any "irretrievable commitment of resources," after the consultation has started. After the 90 day consultation period, the Secretary is to "provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, . . . ." Id. § 1536(b)(3)(A).

53. BLACK'S LAW DICTIONARY 904 (5th ed. 1979). "Mitigation" means "[a]llleviation, reduction, abatement or diminution of penalty or punishment imposed by law." Id.

54. One can interpret this as meaning foreign countries. Congress contemplated actions where there is no governor involved because the action is extraterritorial. 16 U.S.C. § 1536(g) (1982 & Supp. IV 1986).

55. Id. The 1982 amendments established the "Endangered Species Committee" giving the Committee the power to exempt federal projects for the ESA as long as certain conditions were met. The following criteria are necessary for an exemption: (1) no reasonable and prudent alternatives to the agency action exist; (2) the action is in the public interest and its benefits clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat; (3) the action is of regional or national significance; (4) reasonable measures are taken to minimize the adverse effects of the action on the endangered species. Id. § 1536(h)(1)(A).


High Court implied that such a duty exists. Chief Justice Burger stated: “One would be hard pressed to find a statutory provision whose terms are any plainer than those in section 7 of the Endangered Species Act. This language admits of no exception.”

Prior to TVA v. Hill, between the years 1973 and 1978, there were surprisingly only two cases interpreting section 7. Both cases involved citizen suits brought against a project agency to enforce section 7. Neither case involved the interpretation of section 7 in an international context. However, all subsequent cases interpret section 7 and support an international scope for section 7, as does this comment.

1. Cases Interpreting Section 7 Before TVA v. Hill

In Sierra Club v. Froehlke, the plaintiffs challenged construction of the Meramec Park Lake Dam in Missouri. In challenging the Corps of Engineer’s construction, the plaintiffs contended that the project would jeopardize the existence of the endangered Indiana bat by destroying its habitat. The Eighth Circuit Court of Appeals, however, held that because only a few bats would be affected, the evidence was insufficient to preclude construction. Since the balance weighed in favor of the dam, the substantive authority of section 7 was ignored. Besides, the court held that “consultation under section 7 does not require acquiescence.” In other words, once the project agency has consulted with the Department of Interior, the agency can make the final decision on whether to proceed.

In the same year, another section 7 case was decided by the

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58. Id. at 173.
60. There is a citizen suit provision to the ESA. 16 U.S.C. § 1540(g) (1973 & Supp. III 1982). This provision states in pertinent part that “any person may commence a civil suit on his own behalf.” Id. Following this are the grounds and limitations for citizen suits.
61. 534 F.2d 1289 (8th Cir. 1976).
62. Id. at 1290.
63. Id. at 1291. Specifically, plaintiffs alleged that the caves of the endangered bats would be flooded. The Fish and Wildlife Service (FWS) had not made a final determination as to whether the bats’ caves would be inundated. Id.
64. Id. at 1303. Of 700,000 bats, only 10,000 would be affected. The small number of adversely affected bats convinced the court not to halt the project. Id.
65. Id.
66. Id. Two factors weighed against the plaintiffs. First, the National Environmental Policy Act environmental impact statement had been approved and only a small percentage of the bats were threatened. Id. at 1301. In addition, the Froehlke court viewed section 7 as a weak procedural device. Specifically, once consultation has occurred, the obligations of section 7 are fulfilled and the project can go forward regardless of its effect. Id.
Fifth Circuit Court of Appeals. In National Wildlife Federation v. Coleman, the issue was the proposed construction of a federally assisted interstate highway which would run through the habitat of the endangered Mississippi Sandhill Crane. The Fifth Circuit reversed the district court and held that the Federal Highway Administration (FHA) had failed to comply with its substantive duty under section 7 to ensure that federal agencies do not jeopardize endangered and threatened species. After the plaintiff's requested injunction was granted, the highway was moved to avoid the crane's habitat and ensure its continued existence as mandated by section 7.

A third case prior to TVA v. Hill deals less with the interpretation of section 7 and more with regulations made pursuant to section 7. In Defenders of Wildlife v. Andrus, plaintiff brought a declaratory action challenging DOI regulations which governed the sport hunting hours of migratory birds as a violation of section 7(a)(1) of the ESA. The plaintiff contended that the regulations which permitted hunting before sunrise and after sunset would possibly affect endangered birds because hunters could not be able to distinguish between endangered birds and permitted birds.

The Defenders of Wildlife court agreed and held that the regulations were arbitrary and unlawful based on section 7(a)(1) due to the Secretary's affirmative duty to review programs administered by him. Further, the Secretary must "utilize such programs in furtherance of the purposes" of the Act. The regulation was held to be

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68. Id. at 361.
69. National Wildlife Fed'n, 529 F.2d at 371. The court stated that "[a]ll of the evidence indicates that the 5.7 mile segment of I-10 will undoubtedly [sic.] affect the crane and its habitat in addition to the mere taking of 300 acres of right-of-way." Id. at 373. In addition, the FHA failed to consider the indirect effects the highway would have on the Mississippi Sandhill Crane, principally the "residential and commercial development" that eventually accompanies highway construction. Id. Furthermore, although the Secretary of FHA has final veto power over the decision to proceed, the Secretary failed to properly consult with the DOI to find possible modifications to the project. Id. at 371.
71. Id. at 168-69.
72. Id. at 169.

The rulemaking proceedings did not concern themselves with the amount, extent or nature of such killing and, especially since plaintiff by its affidavits presents a substantial argument that the destruction of protected species may be considerable, it is apparent that the rulemaking process was not adequately focused upon the obligation of the Fish and Wildlife Service to conserve and increase the population of these species. In this sense, then, the regulations must be said to be arbitrary.
inconsistent with a broad reading of section 7.\textsuperscript{74}

2. \textit{TVA v. Hill}

One year after \textit{Defenders of Wildlife}, the Supreme Court decided \textit{TVA v. Hill}.\textsuperscript{75} TVA involved the successful challenge to construction of the 80\% completed Tellico Dam. The complaint was based on the dam's effects on the now famous snail darter, a three-inch long endangered fish species.\textsuperscript{76} Plaintiffs, mostly citizen groups, sued the Tennessee Valley Authority, the developer of the dam, to halt further construction. The plaintiffs claimed that section 7 of the ESA would be violated if the dam were completed. Although the trial court concurred in the plaintiffs' allegation that the dam would destroy the snail darter, the court held section 7 inapplicable "retroactively" because the dam was almost completed.\textsuperscript{77}

The Sixth Circuit Court of Appeals reversed the trial court and stated that the district court misinterpreted section 7 to contain an
exemption for ongoing projects.\textsuperscript{78} The court of appeals ruled that the district court had abused its discretion and violated section 7 by not issuing an injunction. In issuing a permanent injunction, the court of appeals provided that "the detrimental impact of a project upon an endangered species may not always be clearly perceived before construction is well underway."\textsuperscript{79}

On April 15, 1978, the United States Supreme Court granted certiorari in \textit{TVA v. Hill}. The majority opinion was written by Chief Justice Warren Burger in a 6-3 vote in favor of the plaintiffs.\textsuperscript{80} On June 15, 1978, the Supreme Court affirmed the decision of the circuit court. In rejecting TVA's position, the Supreme Court based its decision upon the plain statutory language of the ESA and its legislative history. The \textit{TVA} Court stated that "the Act can reasonably be interpreted as applying to a federal project which was well underway when Congress passed the ESA of 1973. To reject this position, we would be forced to ignore the ordinary meaning of plain language."\textsuperscript{81}

According to Chief Justice Burger, the mandate of the language of section 7 was clear and unambiguous. He stated that "examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."\textsuperscript{82}

Powell's dissent asserted that application of section 7 would produce an "absurd result" which made it "unreasonable to believe" that Congress intended that the Act should apply to an almost com-


We conclude that the on-going nature of a project does not preclude enforcement of [section] 1536 . . . TVA claims to have done everything possible to save the snail darter, short of abandoning work on the dam. That alternative is deemed by TVA to be innately unreasonable. We do not agree. It is conceivable that the welfare of the endangered species may weigh more heavily upon the public conscience, as expressed by the final will of Congress, than the writeoff of those millions of dollars already expended for Tellico in excess of its present salvageable value.

\textit{Id.} at 1072, 1074.

\textsuperscript{79} \textit{Id.} at 1071.


\textsuperscript{81} \textit{Id.} at 174. The Court held that the Act does not contemplate a balancing between the snail darter and the dam. Instead, the court held that the dam could not be completed without violating the ESA. Monetary loss was irrelevant to its decision because the Court indicated that it did not have the power to engage in a balancing when Congress provided such unequivocal language. \textit{Id.} at 187-88.

\textsuperscript{82} \textit{Id.} at 173.

\textsuperscript{83} \textit{Id.} at 174. But see the dissenting opinion by J. Powell, stating that this was an "extreme example of a literalist construction." \textit{Id.} at 202 (Powell, J., dissenting).
pleted multimillion dollar dam because of a three inch fish. In re-
response, Burger declared that the "legislative proceedings in 1973 are,
in fact, replete with expressions of concern over the risk that might
lie in the loss of any endangered species." In perhaps Burger's
most famous passage in the opinion, he countered the dissent by
articulating:

While there is no discussion in the legislative history of pre-
cisely this problem, the totality of congressional action makes it
abundantly clear that the result we reach today is wholly in
accord with both the words of the statute and the intent of Con-
gress. The plain intent of Congress in enacting this statute was
to halt and reverse the trend toward species extinction, whatever
the cost. This is reflected not only in the stated policies of the
Act, but in literally every section of the statute. . . . In addi-
tion, the legislative history undergirding [section] 7 reveals an
explicit congressional decision to require agencies to afford first
priority to the declared national policy of saving endangered
species. The pointed omission of the type of qualifying language
previously included in endangered species legislation reveals a
conscious decision by Congress to give endangered species prior-
ity over the "primary missions" of federal agencies.

Hence, the TVA Court could not find specific language or legislative
intent to apply the Act to the Tellico Dam. Nonetheless, the majority
based its decision to save the snail darter on a general legislative
intent that the ESA's primary goal was to halt species extinction at
"whatever the cost." 87

In the end, the Tellico Dam was built. Chief Justice Burger
defered to Congress to make the political decision in its "relative
priority" between completing the dam and environmental protec-
tion. 88 One month after the decision, Congress not only appropriated

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84. Id. at 205 (Powell, J., dissenting).
85. Id. at 177 (emphasis in original). Chief Justice Burger scrutinized the legislative
history, quoting hearing statements. Burger even quoted a law review article interpreting the
ESA. Id. at 177 n.23. In addition, the Chief Justice emphasized the word "any" endangered
species again when he stated, "Indeed, the repeated expressions of congressional concern over
what it saw as the potentially enormous danger presented by the eradication of any endangered
species suggest how the balance would have been struck had the issue been presented to Con-
gress in 1973." Id. at 186 (emphasis in original).
86. Id. at 184-85. This passage is consistent with the Chief Justice's view that Congress
considered the value of endangered species as "incalculable." Id. at 187.
87. Id. at 184.
88. Id. at 194. Burger quoted from the play A Man for All Seasons, "I know what's
legal, not what's right. And I'll stick to what's legal. I'm not God. The currents and eddies of
right and wrong, which you find such plain-sailing, I can't navigate." Id. at 195 (emphasis in
money to exempt the Tellico project from all laws, but reacting to political pressure, adopted an amendment to the ESA establishing an exemption process to prevent any similar future problems. Despite this new exemption process, the 1982 amendment reaffirmed the broad mandate of section 7.

As a result of the strong and inflexible interpretation given to section 7 by Chief Justice Burger, the few section 7 cases that have arisen since TVA have consistently followed its precedent.

3. Cases Interpreting Section 7 After TVA v. Hill

In Conservation Law Foundation v. Andrus, the First Circuit Court stayed the Secretary of Interior's opening of bids for oil and gas exploration until the Secretary complied with the section 7 requirements. The court held that the ESA, "by its terms applies to all action by the Secretary." Likewise, in North Slope Borough v. Andrus, the D.C. Circuit Court of Appeals affirmed the Supreme Court's expansive definition of section 7. The North Slope court stated that the "famous snail darter case, TVA v. Hill, made abundantly clear that ESA is a potent environmental control...[the categorical force of ESA is plain enough from TVA v. Hill]."

At issue in North Slope, was the lease sale of federal properties with oil and gas potential off the north coast of Alaska in the Beaufort Sea. The primary concern was the impact this would have on the annual migration of the endangered Bowhead whales. The majority held that while the critical habitat of the snail darter in TVA was completely in jeopardy, the proposed agency action in the

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90. See supra note 54 and accompanying text in which the exemption process is discussed.


92. 623 F.2d 712 (1st Cir. 1979).

93. Id. at 715. "Thus, the Secretary claims, if he cannot, for example, insure that exploration will not jeopardize the continued existence of the right and humpback whales, he will not approve exploration plans." Id.

94. 642 F.2d 589 (D.C. Cir. 1980).

95. Id. at 607.
lease sale was unlikely to jeopardize the Bowhead whale.96

Several years later, in Village of False Pass v. Clark,97 the proposed sale of oil leases and their effect on endangered whales was again before the court. As in North Slope, the Clark court found that the lease sale decision would not jeopardize endangered whales.98 The opinion followed TVA’s broad reading of section 7 to apply to “every federal action.”99

While the judiciary has interpreted section 7 broadly, the executive branch has recently interpreted congressional intent in a more restrictive manner. By omitting the words “foreign countries” from the definition of “agency action,” the Secretary of Interior has re-defined section 7 narrowly.100

96. Id. The court held:
   In short, ‘agency action’ in this case may signify the lease sale and all subsequent activities, but satisfaction of the ESA mandate that no endangered life be jeopardized must be measured in view of the full contingent of OCSLA [Outer Continental Shelf Lands Act] checks and balances and all mitigating measures adopted in pursuance thereof. In light of the above discussion, we further hold that the Secretary 'did perform a comprehensive analysis of all the ramifications of the lease sale.'
   
   Id. at 609 (citing Hughes Tool Co. v. Meier, 489 F. Supp. 333, 351 (C.D. Utah 1977)).

97. 733 F.2d 605 (9th Cir. 1984).

98. Id. at 611. “The lease sale decision itself could not directly place gray or right whales in jeopardy, and the plan insures that many agency actions that may follow indirectly from the sale will not either.” Id.

99. Id. For other cases since TVA v. Hill resulting from the consultation duty under section 7 see Riverside Irrigation Dist. v. Andrews, 758 F.2d 508, 512 (10th Cir. 1985) (the ESA "imposes on agencies a mandatory obligation to consider the environmental impacts of the projects that they authorize or fund"); Sierra Club v. Clark, 577 F. Supp. 783 (D. Minn. 1984) (Secretary of Interior has an affirmative duty to bring Eastern Timber Wolf back to point where section 7 protection is no longer needed); Village of False Pass v. Clark, 733 F.2d 605, 611 (9th Cir. 1983) (“both the Supreme Court and the implementing regulations to the ESA interpret ‘agency action’ broadly”); Romero-Barcelo v. Brown, 643 F.2d 835, 857 (1st Cir.), rev’d on other grounds, 456 U.S. 305 (1982) (Navy failed to obtain a section 7 biological opinion with respect to operations affecting five listed species); Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 261-62 (9th Cir. 1984) (appellants rely solely on ESA § 7(a)(2) when § 7(a)(1) “directs that the Secretary ‘shall’ use programs to further the conservation purposes of ESA,” thus directing the Secretary to “pursue a species conservation” program); Roosevelt Campobello Int’l Park Comm’n v. United States EPA, 684 F.2d 1041, 1057 (1st Cir. 1982) (case remanded to determine if EPA met its “statutory obligation to use the best scientific data available”).


100. See supra note 23.
D. Department of Interior’s Interpretation of Section 7

The issue of whether section 7 applies extraterritorially has arisen because the DOI has recently interpreted section 7 as not applicable to Federal action overseas. The current DOI decision in response to the previously mentioned hypothetical is apparent. The DOI would not require the Department of Treasury to consult with it before the Department of Treasury voted to appropriate money to Brazil for a resettlement project in its tropical rainforests. These endangered and threatened species listed pursuant to section 4 located in the tropical rainforests would be unprotected. Furthermore, these listed species would remain just that, merely names on a list.

1. Broad Congressional Delegation to Department of Interior To Carry Out Section 7

When Congress passed the ESA in 1973, it gave broad legislative appropriation to the Federal agencies to “utilize their authorities in furtherance of the purposes” of the Act. Moreover, Congress granted a large degree of discretion to the Department of Interior. It imposed the duty on the Secretary of Interior to carry out the section 7 consultation program and to define Department of Interior responsibilities through public rulemaking.

Within a year after passage of the Act, the Secretary of Interior and Secretary of Commerce began a series of meetings with otherFederal agencies to help establish guidelines to fulfill the section 7


102. 16 U.S.C. § 1531(c)(1) (1982 & Supp. IV 1986). This section states: “It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” Id.

103. Id. § 1532(15). This section defines “Secretary” as the “Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested . . . .” The Secretary of Commerce handles section 9 of the Act which involves the import and export of species, otherwise known as “takings.” The Secretary of Interior handles section 7 of the Act, which begins with the words, “The Secretary . . . .” Id. § 1536(a)(1).

104. Id. § 1536(a)(1). “The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of the Act.” Id.

105. Administrative Procedure Act, 5 U.S.C. § 553 (1982). This is the notice and comment section. Section 553(c) states: “After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, . . . .” Id. In the 1978 amendments, Congress required public rulemaking according to section 553 for most DOI rulemaking. 16 U.S.C. § 1533(b)(4) (1973 & Supp. III 1982). “Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5, United States Code (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act.” Id.
consultation requirements. On April 22, 1976, “Guidelines to Assist the Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973” were transmitted to all Federal agencies by the Secretary of the FWS. These guidelines were described as “a starting point for the development and promulgation of regulations.”

2. 1978 Department of Interior Regulations

Soon after the guidelines were handed down, on January 26, 1977 the Secretary of Interior issued a proposed rulemaking. In this rulemaking, the Secretary adopted the position, which was strongly supported by the Council on Environmental Quality, that section 7 has extraterritorial application. The Secretary provided that federal agency actions not jeopardize the continued existence of listed species “wherever occurring.” In addition, he maintained:

Section 7 applies to all listed species of fish, wildlife, or plants 
. . . [and] requires every Federal agency to insure that its activities and programs in the United States, upon the high seas, and in foreign countries will not jeopardize the continued existence of a listed species.

These proposed rules were adopted verbatim by the final rulemaking on January 4, 1978. Federal agencies were thereafter

106. On October 16, 1974, the DOI defined its responsibilities. On December 3, 1974, a joint Commerce and Interior letter conveyed to other federal agencies their responsibilities and asked for cooperation. On May 29, 1975, the FWS and the National Marine Fisheries Service convened a conference to discuss the Act for affected agencies. From this conference, a committee was formed to advise the two agencies on guidelines. On April 22, 1976, guidelines were presented. Comments were due on August 1, 1976. On September 28, 1976, forty comments were obtained. The revised guidelines became the proposed rule.


108. Id.


110. Id.

111. Id.

112. Id. (emphasis added). This position was also strongly suggested by the Interior Department Solicitor’s Office. The Interior Department Solicitor’s Office supported the FWS by saying, “[W]e believe the Service’s position is correct and conclude that the jeopardy clause applies to federal activities in foreign countries.” Memorandum from Associate Solicitor, Conservation and Wildlife to Director, Fish and Wildlife Service (Apr. 12, 1977).

113. 50 C.F.R. § 402 (1978). Several organizations and agencies supplied comments. Among environmental organizations supporting section 7 application extraterritorially was the Natural Resources Defense Council, Inc. (NRDC). The NRDC commented that they were “gratified” for FWS “recognition of the extraterritorial application of the prohibition against
responsible for their actions taken overseas and all species listed pursuant to section 4 were protected accordingly.

In 1978, Congress amended section 7 with these new regulations in mind. The amendments contained more specific language detailing the duties under section 7.114

3. 1986 Department of Interior Regulation Rescinding the 1978 Regulations

Five years later, in 1983, the Secretary issued a proposed regulation cutting back the scope of section 7 to encompass only the United States.115 On June 3, 1986, the Secretary of Interior published a final regulation confirming the 1983 proposal for a new definition for the word “action” (“Federal agency action”). The new definition includes agency actions taken only in the United States or upon the high seas.116 The Secretary omitted the words “foreign countries” in its new definition of agency action. The definition states that “‘action’ means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.”117

The Secretary’s rationale for restricting the scope of consulta-

actions which might jeopardize the continued existence of protected species.” Letter from Ruby I. Compton, Johanna A. Wald, and Thomas B. Stoe, Jr., Natural Resources Defense Council, Inc. to Lynn Greenwalt, Director, Fish and Wildlife Service, Department of Interior (Mar. 31, 1977).

Among agencies supporting the section 7 application was the Department of State which stated, “We believe that this Section should call explicitly for the other agencies and the FWS and NMFS [National Marine Fisheries Service] to consult with the Secretary of State, when foreign countries or the high seas are involved . . . .” Letter from Donald R. King, Director, Office of Environmental Affairs, Department of State, Bureau of Oceans and International Environmental and Scientific Affairs to Lynn Greenwalt, Director of United States Fish and Wildlife Service, Department of Interior (Mar. 25, 1977).

One of several other comments was written by the Council on Environmental Quality. The CEQ maintained: “In particular, the Council commends the Service for proposing procedures which provide for the application of Section 7 to federal activities and programs beyond the geographical jurisdiction of the United States . . . .” Letter from Council on Environmental Quality to Associate Director of the Fish and Wildlife Service (Jan. 5, 1977).

See also Bean, The Evolution of National Wildlife Law, prepared for the Council on Environmental Quality (1977). Michael Bean proclaims that “section 7 clearly requires that federal actions not jeopardize the continued existence of endangered or threatened species in foreign countries.” Id. at 417.

114. While section 7 was expanded to establish an Endangered Species Interagency Committee to review federal actions that may jeopardize listed species, section 7(a)(2) remained intact.


116. 50 C.F.R. § 402.02 (1986).

117. Id. (emphasis added).
tion to protect only domestic listed species, was that: (1) section 7 appeared to have only a “domestic orientation,” and (2) the potential interference with the sovereignty of foreign nations. Furthermore, the Secretary decided to rescind the 1978 regulations regarding the scope of section 7 until such time as Congress enacts more specific language outlining the duties of federal agency consultation abroad. The Secretary did add that despite this move, foreign species would continue to be listed.

E. Legal Issue Presented

The legal issue presented for consideration is whether the Endangered Species Act, specifically section 7, requires federal agencies to consult with the Secretary of the Interior on United States government actions taken in foreign countries that may affect species of wildlife and plants that are listed pursuant to section 4. The 1986 Department of Interior regulations interpreting section 7 as containing no duty to consult, demonstrates the current debate surrounding this issue. The implications of these regulations are that the United States no longer has to scrutinize the environmental impact of its actions abroad on endangered and threatened species.

In applying this implication to the proposed hypothetical, wherein the United States voted to authorize loans to Brazil for a redevelopment project in the rich ecosystem of the tropical rainforests, it is apparent that the federal action can be accomplished without any environmental evaluation. Before 1986, this was not possible. To determine if the Department of Interior was correct in its interpretation of the Act, it is necessary to analyze the Act’s plain statutory language and legislative history.

118. Id. The Secretary stated:
The 1978 rule extended the scope of section 7 beyond the territorial limits of the United States to the high seas and foreign countries. The proposed rule cut back the scope of section 7 to the United States, its territorial sea, and the outer continental shelf, because of the apparent domestic orientation of the consultation and exemption processes resulting from the amendments, and because of the potential for interference with the sovereignty of foreign nations.

Id.

119. Id.

120. Id.
III. Analysis

A. Plain Language of ESA Supports Application of Section 7 Consultation Requirements to Federal Agency Actions in Foreign Countries

1. Plain Language of Section 7 and Section 4

Section 7 of the ESA contains broad language. Congress was not specific in writing section 7. It delegated broad rulemaking powers to the Department of Interior to fill in the gaps and specify how the procedural consultation requirements are to operate. The ESA contains no language explicitly mandating that section 7 shall apply to federal agency action taken in foreign lands. This interpretation must be inferred by the broad, non-restrictive language Congress employs. Besides looking at the precise language of section 7, it is also necessary to look at the language of the entire Act for references to Congress' intent.

First, section 7 of the Act, specifically section 7(a)(2), states that federal agencies are required to consult before taking “any action”121 to ensure that agency actions do not jeopardize “any endangered species or threatened species.”122 A significant interpretation issue, then, is how to construe the words “any action” and “any species.” Do the words “any action” mean “any action,” or do they mean something else? In other words, are these terms to be given their plain statutory meaning, or are they to be construed as being limited to “any domestic action” or “any domestic species?” The Secretary of the Interior has recently construed “any action” to refer only to United States actions that may jeopardize listed species on American soil or upon the high seas.123 However, on its face, the plain meaning of section 7(a)(2) is clear. No limitation involving these restrictions exists.

Second, when section 7(a)(2) is considered in conjunction with section 4, it is especially difficult to find any merit to the claim that section 7(a)(2) is limited in its scope. The vital question arises; why would Congress intentionally include foreign species in the section 4 listing process if it did not intend to protect them under section 7? Listing species as an end lacks logic. Section 4(b) provides a listing process for species of foreign countries which allows these countries to help determine the list. Section 4(b) reads in pertinent part:

(1) (A) The Secretary shall make determinations . . . solely on

122. Id. (emphasis added).
123. See supra note 23.
the basis of the best scientific and commercial data available to
him after conducting a review of the status of the species and
after taking into account those efforts, if any, being made by
any State or foreign nation . . . to protect such species . . .

(B) In carrying out this section, the Secretary shall give consid-
eration to species which have been

(i) designated as requiring protection from unrestricted
commerce by any foreign nation, . . . pursuant to any interna-
tional agreement; or

(ii) identified as in danger of extinction . . . by any State
agency or by any agency of a foreign nation that is responsible
for . . . conservation . . .

Also in section 4 is a notice requirement which requires the Secre-
tary to notify each country when a species will be listed.

2. Other Provisions of the ESA That Support a Reading of
Section 7 As Applying Internationally In Scope

When the Act is viewed in its entirety, the congressional intent
in having the ESA apply to the maximum extent possible becomes
even more apparent. Section 7 cannot properly be interpreted
without reference to the entire congressional scheme of which section
7 is merely a part. In understanding Congress’ purposes, it is neces-
sary to refer to the national goals, findings, purposes and policies
which Congress adopted.

First, Congress recognizes its “findings” of international obliga-
tions in the beginning of the Act. Section 2(a) states that “the
United States has pledged itself as a sovereign state in the interna-
tional community to conserve . . . the various species . . .”
Furthermore, in the “purposes” of the Act, Congress declared that
the Act is to “provide a means whereby the ecosystems upon which

125. Id. § 1533(b)(5)(B). “Insofar as practical, and in cooperation with the Secretary of
State, give notice of the proposed regulation to each foreign nation in which the species is
believed to occur or whose citizens harvest the species on the high seas, and invite the comment
of such nation thereon.” Id. (emphasis added).
126. In the 1982 legislative history, Congress made the ESA international in scope
when it stated, “The international aspects of the 1969 Act were the most noticeable improve-
Rep. No. 418, 97th Cong., 2d Sess. 2 (1982). The intent of the 1973 Act was to carry these
international obligations even further.
128. Id. § 1531(a)(4).
... species depend may be conserved, to provide a program for the conservation of ... species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions ...

Furthermore, Congress declares a policy for all federal agencies to "seek to conserve ... species and shall utilize their authorities in furtherance of the purposes of this chapter." In its findings, policy, and purposes, as throughout the Act, Congress fails to distinguish between domestic and foreign listed species. Rather, it refers to all "endangered and threatened species," presumably indicating foreign listed species as well.

Second, section 7(n) is designed to provide an answer to conflicts that occur extraterritorially. Specifically, this section implements a judicial review procedure in the Court of Appeals for the D.C. Circuit. This court is to review decisions made by the Endangered Species Committee where the proposed agency action is to be carried on outside the United States. Congress, thus, explicitly provides a forum for extraterritorial conflicts that happen outside of any of the court of appeals circuits.

129. 16 U.S.C. § 1531(b) (1982 & Supp. IV 1986). The treaties and conventions Congress refers to are:
(A) migratory bird treaties with Canada and Mexico;
(B) the Migratory and Endangered Bird Treaty with Japan;
(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;
(D) the International Convention for the Northwest Atlantic Fisheries;
(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;
(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and
(G) other international agreements.

Id. § 1531(a).

130. Id. § 1531(c)(1).

131. Id. §§ 1531(a), (b), (c)(1).

132. Id. § 1536(n). Section 7(n) is not considered under the Section 7 analysis because it may cause confusion. Section 7(a)(2), the subject of this comment, has been referred throughout as Section 7.

133. Id. § 1536(n). This is the judicial review section.

JUDICIAL REVIEW—Any person, as defined by section 3(13) of this Act, may obtain judicial review, under Chapter 7 of title 5 of the United States Code, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being carried out outside of any circuit, the District of Columbia, by filing in such Court within 90 days after the date of issuance of the decision, a written petition for review.

Id. (emphasis added).
Third, the ESA contains an exemption process to federal agency action that may adversely affect foreign policy. This exemption process indicates that Congress was anticipating some possible problems with sovereignty or foreign policy when it required federal agencies to consult with the Department of Interior regarding activities in foreign countries.

Fourth, section 7(a)(1) demonstrates a congressional intent to protect all listed species by requiring federal agencies to implement conservation programs. This important section mandates federal agencies to "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of . . . species listed pursuant to section 4." Here again, Congress does not insert the word "domestic" in front of "species." Congress intends to protect all listed species, foreign and domestic.

Finally, section 8 of the ESA, entitled "International Cooperation," in addition to implementing an important treaty, asks the United States to set an example in encouraging foreign conservation. Section 8(b) requires that the Secretary of State encourage "foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 4." Included in this encouragement, is a call for the United States to set an example for other nations by having the Secretary consult with the acting agency when the United States may

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134. Id. §§ 1536(g)(1), (h), (i).
135. The Secretary can forbid an exemption from section 7(a)(2) if "the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States." Id. § 1536(i). For this section to have meaning, Congress must have intended consultation to be taking place from action in foreign countries.
136. Id. § 1536(a)(1).
137. Id.
138. Erdheim, The Wake of the Snail Darter: Insuring the Effectiveness of Section 7 of the Endangered Species Act, 9 Ecology L.Q. 629, 645 (1981). Mr. Erdheim says, "This provision [7(a)(1)] has been largely overlooked, perhaps because attention has been focused on other parts of Section 7." Id. at 645.
140. The treaty referred to is the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (YEAR, ETC.) Section 4(a)(3) amended section 8(e) to implement the Convention. The Secretary of the Interior is required to implement the Convention by cooperating with other nations to develop programs for endangered species, to identify migratory birds that fly between signatories, to implement measures to ensure the recovery of species, and to identify measures that can address the protection of wild plants.
141. Another treaty implemented in section 8 of the ESA is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This treaty was signed by seventy-seven nations and it functions to control the trade (import/export) of endangered species. The treaty contains appendices listing the species to be protected from trade.
jeopardize foreign listed species.

The plain meaning of the statutory language of the ESA shows that it should be interpreted very broadly. There exists a continuing reference to international obligations. Regardless of these apparent obligations, the Secretary of Interior recently contradicted this position with its 1986 rule restricting the application of section 7 to the United States and the high seas. In light of that decision, it is necessary to further examine the ESA by reviewing its legislative history.

B. Legislative History of ESA

1. The Original Enactment: 1973

In its congressional discussions regarding the ESA, neither house confronted the issue of whether or not section 7 applies extraterritorially. Congress did not specifically address the scope of section 7 in terms of geography or boundaries. Therefore, the consultation requirement of section 7 must be analyzed with regard to congressional intent concerning the ESA's overall purpose and history.

While Congress' general goal in worldwide species protection was made clear, its method of carrying out that goal was not as apparent. Congress explicitly directed all federal agencies to use whatever procedures necessary to protect all endangered species, national and foreign. Representative John Dingell stated:

[W]e have substantially amplified the obligation of both agencies, and other agencies of Government as well, to take steps within their power to carry out the purposes of this act. The purposes of the bill include the conservation of the species and of the ecosystems upon which they depend, and every agency of Government is committed to see that those purposes are carried out. It is a pity that we must wait until a species is faced with extermination before we begin to do those things that we should have done much earlier, but at least when and if that unfortunate stage is reached, the agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.

In TVA v. Hill, Chief Justice Warren Burger, stated: "The dominant theme pervading all Congressional discussion of the pro-

142. 50 C.F.R. § 402 (1986).
posed [Endangered Species Act of 1973] was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide resources.147 The Chief Justice continued to add: “The legislative proceedings in 1973 are, in fact, replete with expressions of concern over the risk that might lie in the loss of any endangered species”148 (emphasis in original). This emphasis on “any” indicates the Chief Justice’s belief that Congress intended both domestic and international species to be protected.

The 1973 legislative history of the ESA does not discuss section 7 at length.149 As previously mentioned, Congress intended the agencies to take the broad mandate of the ESA and use whatever methods were necessary to achieve those mandates. After the ESA was enacted in 1973, the Department of Interior (DOI) consequently began consultations. These consultations were conducted with other federal agencies in order to formulate procedural regulations governing interagency consultation as mandated by section 7.149 In 1978, the DOI issued regulations through rulemaking, thus interpreting Congress’ broad mandate to protect endangered and threatened species worldwide. The DOI required consultation for federal actions in foreign countries that might jeopardize listed species.150

2. Amendments to the ESA

In the 1978, 1979, and 1982 amendments to the ESA, Congress, aware of the regulations interpreting section 7 to apply abroad, approved these regulations. In the legislative history of the 1978 amendments, Congress recognized that since agencies are now familiar with the requirements of section 7, these requirements should not be altered.151

In addition, Congress stressed the importance of section 7 and

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147. Id. (emphasis in original).
148. See supra note 40.
150. See supra note 23. This regulation is an interpretation of section 7 for inter-agency consultation.
151. H.R. CONF. REP. NO. 1804, 95th Cong., 2d Sess. 17, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 9484, 9486. “The Conferes felt that the Senate provision by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.” Id.
recognized the large number of listed species that were foreign and in need of protection. First, it stated that as of August 1978, the endangered list contained 228 domestic and 457 foreign species.\textsuperscript{185} Congress asserted: "The ultimate goal of the Endangered Species Act is to focus sufficient attention on listed species so that, in time, they can be returned to a healthy state and removed from the list."\textsuperscript{186} Second, Congress looked at the section 7 protection of this list and provided: "This one small section has developed into one of the most significant portions of the entire statute."\textsuperscript{187}

The legislative history of the 1979 amendments reinforced Congress' commitment to endangered species and focused primarily on the exemption process.\textsuperscript{188} The legislative history of the 1982 amendments suggests a recognition of the all-encompassing impact of section 7. Congress stated that "[l]isting a species, subspecies, or population implies several responsibilities created by other sections of the Act, the most wide-ranging, effective and controversial of which are encompassed in section 7."\textsuperscript{189}

In 1982, Congress again demonstrated its recognition of the DOI regulations interpreting section 7, including its application extraterritorially. Congress could have taken the opportunity to restrict the scope of section 7. Instead, Congress decided not to alter section 7 and reaffirmed the substantive duty it places on federal agencies to consult when any action may affect any endangered or listed species, domestic and foreign.\textsuperscript{190} The legislative history maintains that section 7 did not result in "inordinate burdens upon Federal agencies . . . [i]n fact, the consultation provisions have functioned extremely well . . ."\textsuperscript{191} Furthermore, "the requirement that the Secretary consider for listing those species that states or foreign nations have designated or identified as in need of protection also remains unchanged."\textsuperscript{192}

Furthermore, in the 1987 appropriations bill for the DOI, Con-

\begin{itemize}
\item \textsuperscript{152} H.R. REP. No. 1625, 95th Cong., 2d Sess. 1, 6, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 9453, 9456.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id. at 9457.
\item \textsuperscript{155} H.R. REP. No. 167, 96th Cong., 1st Sess. 1, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 2557. See also Congress' emphasis on the large number of foreign species listed. Id. at 2560.
\item \textsuperscript{156} H.R. REP. No. 567, 98th Cong., 1st Sess. 1, 10, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2807, 2810.
\item \textsuperscript{157} Id. at 2824.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id. at 2861.
\end{itemize}
gress made the following statement: "[T]he Committee also expects the [United States Fish and Wildlife] Service to continue to provide consultation on endangered species to United States agencies dispensing foreign assistance."\textsuperscript{160}

It is the 1988 amendments to the ESA, however, that provide the undeniable evidence that Congress intends for the United States to consult for projects it authorizes or funds overseas.\textsuperscript{161} This recent reauthorization has laid to rest any arguments to the contrary.

The Senate report on the Endangered Species Act Amendments of 1987 states:

An additional area of concern with current implementation of the Act relates to the regulations promulgated by the Secretary on June 3, 1986, which appear intended to limit the recovery and protection of the species under section 7 of the Act. To the extent that these regulations attempt to restrict the Act's requirements that each federal agency consult with the Secretary to ensure that its actions are not likely to jeopardize the continued existence and recovery of any listed species, the regulations 
\textit{have no statutory basis, are contrary to congressional intent, and are contrary to the law}.\textsuperscript{162}

In addition, Senator John Chaffee in a floor statement summarized the Senate's position when he said:

[United States actions overseas are] not limited to actions within the United States. It is covered whenever our Federal agencies operate. Last year, however, these regulations were rescinded.

This was done despite increasing concern about the destruction of tropical rain forests and the loss of biological diversity. . . . Congress is not in any way ratifying or approving that rescission of the regulations. With or without those specific regulations, the law is clear.

\textit{It applies to federal agencies that are operating within or outside of the United States. Any other interpretation is intolerable and I believe illegal.}\textsuperscript{163}

\textsuperscript{162} S. REP. No. 100-240, 100th Cong., 2d Sess. 6-7, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 9260, 9262 (emphasis added).
C. Judiciary Supports the Interpretation That Section 7 Requires Federal Agencies to Consult When They Take Actions In Foreign Countries

The judiciary has been clear in its interpretation of section 7 to be unequivocal in its language. This action supports a broad reading of the Act to apply to non-American soils. For example, the Court in TVA v. Hill read section 7 to apply to on-going domestic projects because, according to the Court, the Act was to apply to all federal projects. Under the same rationale, the Act applies to projects authorized or funded by the United States in foreign countries. As stated in TVA, the Act does not distinguish between types of action in that the "language admits of no exception." In holding that section 7 is plain and unambiguous, Chief Justice Burger has given full effect to the provision. This holding implies that section 7 does not draw geographical boundaries.

The only requirement in triggering section 7 is that there must be a federal action that may jeopardize listed species, domestic or foreign. This argument is strengthened by the 1978 amendments which included an exemption process, recognizing that there may be some actions that should be omitted from compliance as determined on a case by case basis. Since the Act was clear on its face, Chief Justice Burger saw the irrelevancy in the fact that the Tellico Dam construction was near completion. Likewise, it is irrelevant whether the species are foreign or domestic. It is still an agency action that requires the same amount of consultation.

D. Department of Interior Acted Arbitrarily and Capriciously in Issuing Its 1986 Regulations

1. The Statute Mandating Consultation For Federal Agency Action Abroad Controls Over DOI Regulations

The four amendments to the ESA illustrate a clear and convincing affirmation of the DOI regulations interpreting section 7 to apply internationally. The sequence of events is as follows: 1) the DOI complies with the law by issuing regulations consistent with congressional intent; 2) the DOI maintains these regulations for over eight years; 3) Congress effectively approves of these regulations all

164. 437 U.S. 153, 173 (1978). Chief Justice Burger discerned no limitation to the words "any action." One could argue, then, that Burger's interpretation of "any action" includes all actions, both foreign and domestic. Id.
165. See supra notes 150-163 and accompanying text.
four times that it amends the ESA in this period; and 4) without a reasoned explanation, the Secretary of Interior changes the regulations to exclude foreign countries.

The important point derived from this sequence is that the statute, as affirmed by subsequent congressional intent, overrules the executive branch regulations. This is not a situation where Congress passes a law, the executive branch issues regulations and then Congress is never heard from again. In this instance, Congress on three separate occasions has reinforced its approval of the section 7 consultation requirements "as [they are] presently structured." This affirmation includes the requirement of consultation for agency actions in foreign countries. Support for the conclusion that the 1978 regulations correctly interpret the ESA and that the statute controls over the 1986 rules can be found in basic statutory construction rules. In *Statutes and Statutory Construction*, it is stated:

> Where reenactment of a statute includes a contemporaneous and practical interpretation, the practical interpretation is awarded greater weight than it ordinarily receives, as it is regarded as presumptively the correct interpretation of the law. . . . This rule is based upon the theory that the legislature is familiar with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing that statute. Therefore, it impliedly adopts the interpretation upon re-enactment. . . . It does not apply when nothing indicates that the Legislature had its attention directed to the Administrative interpretation upon re-enactment.\(^{167}\)

In any case, the Legislature did have its attention on the regulation. In addition, the above principle is further validated by the Supreme Court, which held that when Congress reenacts a statute, without material change, this serves as congressional approval of the administrative interpretation of the statute and gives it the force of law. Therefore, in the instant case, congressional amendments to the ESA gave the 1978 DOI regulations the force and effect of law. As a result, the 1986 regulations are unlawful.


2. Secretary of Interior Failed to Give a Reasoned Explanation: Sovereignty Will Not Be Effected

The Secretary’s rescission of the 1978 rule was arbitrary and capricious and an abuse of discretion in violation of the Administrative Procedure Act. The Secretary failed to give a reasoned explanation as to why the 1986 rule was to restrict the scope of section 7(a)(2) to the United States and the high seas. The Secretary simply stated that the rescission was based upon the Act’s apparent domestic orientation and its possible interference with the sovereignty of foreign nations. Both of these reasons are merely stated and not elaborated upon or explained.

First, as has been demonstrated by the plain language and legislative history of the Act, the ESA was written for international as well as domestic purposes. The purposes and findings of the Act set this out explicitly.

Second, regarding the sovereignty rationale for rescinding foreign application, the Secretary again failed to undertake a serious examination. The foreign country consultation requirement will have no effect on the sovereignty of the foreign country where the action takes place. The consultation process is a planning process. This planning process is the same regardless of the project’s location. Besides, the consultation and planning process would take place in the United States. Moreover, this planning process merely limits the United States’ power to take actions which might jeopardize listed species. This limitation on the power of the United States imposes no limitation on the foreign country.

The hypothetical previously presented demonstrates this analysis clearly. The decision for a federal agency to plan and evaluate the effect of authorizing money for a project in Brazil that may affect

168. 5 U.S.C §§ 551, 706(2)(a), (c) (1972). As one author aptly stated, “this 1986 regulation officially and publicly turned a blind eye to actions that harm endangered foreign species and were funded or carried out by U.S. agencies.” This was done in spite of the fact that the United States loans and grants often trigger large developments in foreign countries which threaten those species. Fitzgerald, supra note 43, at 32. See also Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983) (“an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance”).

169. See supra note 116.

170. See supra notes 125-30.

171. Even assuming that the United States needs access to a foreign country to perform planning and consultation and the country refuses to cooperate, the worst result is that the planning will be less complete and the United States will have to rely on the immediately available information.
listed endangered species is a decision of the United States. This decision may result in the withdrawal of United States participation or the attachment of conditions to a United States loan which would certainly be within the power of the federal government. The recent congressional appropriation by the House Appropriations Committee supports this position. In addition, the applicable nation can still take its own action, regardless of, and independent of United States involvement.

Additionally, international common-law principles do not prohibit Congress from affording extraterritorial effect to its enactments. This is particularly true when the overseas activity has direct domestic effects. The hypothetical introduces a factual situation where migratory birds will be affected. In this situation, the United States activity abroad will have a direct impact on this country.

It is also a principle of international law that unless there is a clearly expressed intent, there is a presumption against application of a United States statute to a foreign jurisdiction. However, this presumption is inappropriate to the substantive requirements of the ESA because these requirements only attach to federal government decisions in the United States.

Contrary to the Secretary of Interior's position, the requirement of consultation and planning does not interfere with laws and customs of foreign sovereigns. In addition, when a statute does not infringe on a foreign sovereign, the Supreme Court does not demand a clear congressional purpose. Intent can be inferred from construction

172. See supra note 159 and accompanying text.
173. See Steele v. Bulova Watch Co., 344 U.S. 280, 285-86 (1952), in which the Supreme Court reiterated its rule that "the United States is not debarred by any rule of international law from governing the conduct of its citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed."
175. This is not to say that the rest of the world will not be any lessor for the extinction of the migratory bird. Again, this hypothetical was used solely to demonstrate a situation in which a species in the United States is directly affected by United States action on foreign soils.
176. Restatement (Second) of Foreign Relations Law, supra note 174, § 38. "Rules of the United States statutory law . . . apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute." Id.
177. This presumption usually applies to private citizens overseas. See, e.g., Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) which involved the issue as to whether the Eight Hour Law should apply to American workers employed in Iran and Iraq. The United States Supreme Court held that the law was inapplicable.
of the statute. The congressional intent to apply section 7 of the ESA has been examined through the Act's language and legislative history. The Secretary's reasons for rescinding the 1978 rule are inadequate.

IV. PROPOSAL

This comment proposes that the legal issue of whether section 7 has extraterritorial application be resolved through legislative and administrative action. First, Congress needs to clarify its position on the international application of section 7. Congress should amend section 7 to read:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action, both domestic and foreign, authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species . . . .

Second, the Department of Interior needs to rescind its 1986 regulations and to restore its original 1978 regulations which properly interpret the international scope of the ESA. Otherwise, in the very least, the DOI should provide a reasoned explanation for its change. The DOI is charged with implementation of the ESA. This responsibility is severely abrogated when over 50% of the listed species will go unprotected. Hence, the DOI has a public responsibility to demonstrate how section 7 distinguishes between those species whose primary range is within the territory of the United States and those whose primary range is outside the territory of the United States. Within this explanation, the DOI must demonstrate why the 1978 regulations failed. Furthermore, the DOI must legally explain why it is continuing to list foreign species while not affording them protection from federal agencies.

Third, until the 1986 DOI regulations are rescinded, federal agencies should continue to consult when their actions may affect foreign species.

Finally, if Congress and the DOI do not make these proposed changes, judicial resolution is inevitable.

178. See supra note 174.

V. Conclusion

This comment reviews the legal issue of whether section 7 of the Endangered Species Act should apply internationally. Furthermore, it proposes that while the extraterritorial reach of section 7 is apparent on its face and in its legislative history, because the Department of Interior takes a contrary position, Congress should clarify section 7. After a close examination of the entire Act, this comment concludes that the Department of Interior acted arbitrarily and capriciously in its interpretation of section 7.

Since its enactment in 1973, the Endangered Species Act has proved to be an effective tool in protecting endangered and threatened species. The 1978, 1979, 1982, and 1988 amendments to the Endangered Species Act represent a congressional reappraisal of the substantive duty contained in section 7. Each amendment reaffirmed Congress’ commitment to preserving endangered species, both domestic and international. The judiciary also supports this commitment with a broad reading of section 7. The Supreme Court decision in TVA v. Hill sent the strong message that the ESA applies to all federal actions, whatever the cost and that the language of Section 7 “admits of no exception.”\(^{180}\)

Congress provided broad, non-restrictive language in both its policy statement and the action-forcing mechanism of section 7. Public policy favors application of the ESA abroad; it is in the interest of the United States to avoid environmental damage from its projects. The United States, as supplier of goods and services to developing countries, should not disregard environmental concerns. On the contrary, it has a duty to set an example for these countries. In an increasingly interdependent world, the ESA is a powerful tool to help slow down the process of global species extinction.

The Department of Interior regulations have the effect of setting back several years the commitment of the United States to the preservation of species around the world. Based on the ESA, judicial rulings and public policy, the Department of Interior’s implementation of the Act is unlawful. The regulations promulgated pursuant to this implementation which restrict the scope of section 7 to federal activities on American soil must be overturned.

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