Environmental Law (Spring 2001 – Squillace)

Course Outline

5 Constitutional Issues: (1) Active Commerce Clause; (2) Dormant Commerce Clause; (3) 10th Amendment; (4) Procedural Due Process; and (5) Takings Clause of 5th Amendment.

Hodel v. Virginia Surface Mining, pre-enforcement challenge to surface mining act, to interim federal and permanent federal or state authority. "Cooperative Federalism" model where states are given incentive to develop a program conforming to the federal standard. Primary responsibility is given to the states, oversight is given to the federal government. Commerce Clause – Whether land as such can be regarded in commerce. Whether an instrumentality of interstate commerce, persons or things in commerce, activities affecting commerce, etc. Rational basis test is okay. State regulation of environmental laws would not insure interstate competition, fear that it would create race to the bottom, therefore need uniform national standards. (Rhenquist's concurrence thought that commerce clause was stretched to the nth degree). 10th Amendment – land use traditionally subject to state power to regulate, here the statute did not: (1) regulate the states as states; (2) address matters that are attributes of state sovereignty or (3) impair state's ability to structure integral operations. State participation (burden) is voluntary, if states don't administer, feds will. Takings – test for taking is if it denies an owner of an economically viable use of his land. Remedy for takings depends on congressional intent (compensation paid or regulation not enforced). *N.Y. v. U.S.*, -- 10th Amendment is violated where federal government forces (coerces) a state to take a particular action. Rather feds must give states a choice to act, or the feds must regulate themselves.. Procedural Due Process – Act gave power of immediate cessation orders, claimed that it would be a denial or due process prior to deprivation or a property right. No, here power is for emergency action and they are clearly entitled to a post-deprivation hearing.

Chem. Waste Management v. Hunt, dormant commerce clause question where Alabama surcharged out of state hazardous waste disposers. Court said that a state may not attempt to isolate itself from a common problem to the several states. If it tries, a state must pass strict scrutiny (legitimate purpose & no less discriminatory alternative). Test is to ask: (1) does state

discriminate against out of state commerce, if yes, then (2) does it serve a legitimate local purpose that cannot be served by less discriminatory means. (If no, courts generally uphold unless it can be shown that the burdens on commerce are clearly excessive).

Maine & Taylor, out of state baitfish might introduce parasite, no way to detect, therefore no less discriminatory alternative.

Takings

Lucas v. S. C. – no restrictions on property at time of purchase. Subsequent regulation by state prohibited development. Lucas alleged that his property was taken (rendered valueless) by the regulation. Court suggested two circumstances where takings will occur: (1) physical invasion; or (2) denial of economic benefit or productive use. A total taking occurs where entire value of property has been taken by the regulation. An ad hoc analysis in takings cases of several factors like the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, the relative ease with which the alleged harm can be avoided through measures taken by the claimant & the government, the fact that landowners similarly situated are permitted to continue the use denied the claimant. A partial taking can be determined (whether or not total) by segmentation where the numerator = the property at issue, over the denominator = how to define. If the denominator is less than the numerator, then there is not a total taking. *Keystone Bituminus* found total taking (denominator was entire value of property) where coal overridden by a permanent structure could not be removed. Taking was whole property interest owned at time regulation was enacted.

In *Nollan v. Calif.*, the Court said that the state's interest was legitimate, but the regulation did not substantially advance the state's purpose and was effectively extortion of the landowner.

Standing:

Sierra Club v. Morton – Sierra Club sought injunction to development in the Mineral King basin. Failed to allege injury to its members (that members used the area in question). Court said that to have standing a plaintiff must (1) state an injury in fact that (2) is within the zone of interests to be protected or regulated. Injury must be to the person seeking review.

Three-part test for organizational standing: (1) members would have standing in their own right; (2) interests sought to be protected are germane to the organization's purpose; and (3) claim and relief requested does not require the participation of an individual member (would likely exclude a claim for money damages *Hunt v. Wash. Apple*). Typically, plaintiffs also name individuals in complaint.

Lujan v. Defenders of Wildlife – (standing under the ESA for project in Egypt and Sri Lanka) to have constitutional standing, must state: (1) an injury (procedural injury, need not show immediacy); (2) causation – traceability; (3) redressability (if injury is denial of a procedural right). When relying on APA to bring action, must have prudential standing – that the claimed injury is within the zone of interests protected by the statute. The APA does not confer jurisdiction, but can be used to bring suit when citizen suit not expressly provided for by statute.

Exhaustion:

Overton Park – Language of DOT act prohibited construction through parks if feasible alternative route existed. No administrative record to review. Post-hoc rationalizations will be no good to show information during decision making. Inquiry into mental processes of decision maker should be avoided. Administrators should furnish record or face having decision overturned.

Vermont Yankee v. NRDC – Agency held hearing that did not require discovery. NRDC claimed this made hearing deficient & court grafted additional procedures not in statute or in APA. Here, agency resolved potential adjudication problem in rulemaking and avoided discovery and cross-examination. Here, classic § 553 notice and comment rulemaking (informal hearing).

Deference to Agency: (if arguing against an agency, always argue Chevron step 1)

Chevron v. NRDC – how to construe definition of "stationary source" (informal rulemaking). All areas are either non-attainment or PSD. Industry wanted all stacks at one facility to fit under a bubble so that sources could be traded within a facility. EPA originally

agreed to dual definition, but then new administration changed. Two-step analysis when assessing an agency's interpretation of a statute: (1) has congress directly spoken to the precise question at issue? If intent is clear, court and agency must give effect to the unambiguously expressed intent of congress. If congressional intent is not clear, then (2), the question is whether the agency's interpretation is based on a permissible construction of the statute. (Agencies frequently lose step 1, but if goes to step 2, agencies almost always win.)

The less formal the agency process is, the less deference it will receive from the courts (like a policy memo gets no deference). A formal process generally gets deference.

NEPA:

§ 102(2)(C) requires an EIS (interdisciplinary process) for major federal actions that significantly affects the human environment. NEPA is a procedural statute that requires federal agencies to follow certain procedures. § 101 says goals for statute are "horatory" or "advisory" only. Does not impose enforceable obligations. § 202 Creates the CEQ to promulgate NEPA regulations binding on all federal agencies. All federal agencies are supposed to have their own NEPA-type regulations that are consistent with the CEQ's. 40 CFR § 1508.14 requires that effects to natural and physical environment be interrelated with economic or social effects to require discussion of latter.

40 C.F.R. § 1502 applies to EIS but not to EAs. § 1502.14 requires alternatives analysis. Alternatives analysis is the "heart" of the EIS. Must include reasonable alternatives, a no action alternative (not necessarily no development) and the preferred alternative and information on mitigation. (See also, *NRDC v. Morton*, predating regs.). 40 Q's about NEPA says reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense rather than simply desirable for the applicant.

§ 1502.4 may include broad federal actions, § 1502.5 is the timing definition; § 1508.8 major federal action, § 1508.23 includes proposal. Tiering of reports at § 1508.28 (do broader EIS, then do EAs for smaller more specific projects under say the land use plan. § 1502.25 says EISs should be integrated with other federal actions, etc.

The twin aims of NEPA are (1) consider significant aspects of potential impacts, and (2) to inform the public of the agency's considerations of concerns in the decision making process.

Whether to prepare an EIS at 40 CFR § 1501.4. Scope at 1508.25. Draft, Final and Supplemental EIS at § 1502.9. NEPA requires analysis of mitigation for adverse affects for each alternative at § 1502.14(f), and 1502.16(h), not implementation of mitigation. No requirement for worst case analysis. § 1502.22 applies where incomplete information is essential to a reasoned choice among alternatives. If costs to obtain not exorbitant, the agency shall include. If too expensive to justify, state that it is incomplete and include reasonably foreseeable impacts which have catastrophic effects even if the probability of occurrence is low.

A state receiving federal funding may prepare the EIS by § 102(2)(D), subject to federal review. Success of defederalizing certain sections of a project is limited because most actions are "connected" or "cumulative" by 40 CFR §§ 1508.25(a)and .28.

Can often argue that an agency should have prepared an EIS rather than an EA because the scope of the project is larger, it includes, connected, cumulative and similar actions. However, revenue sharing is generally not within the scope of major federal action. By § 1508.7 and .8, agencies must consider cumulative effects.

Calvert Cliffs – AEC's implementation of NEPA was lacking, its promulgation of internal NEPA rules was deficient. What is to be considered by the hearing board? AEC claimed that unless a party raised a particular environmental concern, then it would not become a part of the hearing process. Court said no, agencies have an affirmative duty under NEPA to consider environmental effects and produce detailed statement that is considered at each stage of the decision making process. AEC also claimed that if a particular environmental issue had been addressed by another agency, then it did not need to consider those impacts so long as regulating agency's requirements were met. Court said no, because regulatory agencies did not have to balance potential damage against the opposing benefits by § 102(2)(c).

ESA:

Listing process at § 4. Consultation at § 7(a)(2) for federal agency action, like NEPA requires consultation with FWS or NMFS. Conservation at § 7(a)(1) obligation to conserve on all federal agencies, also recovery plans. § 9 of the ESA makes it unlawful for any person to make a "taking" – harass, harm, capture, kill or attempt (Reg. § 1533). ESA has teeth. Not just a procedural statute like NEPA. Habitat conservation plans § 10.

Designation of listing criteria for species at § 4(b)(3)(A); for critical habitat at § 4(b)(2). Circuits are split whether NEPA compliance is necessary for critical habitat designation. It generally is not for critical habitat listing. Listing is to be based on best scientific and commercial data. The designation of critical habitat may consider economics. The DOI has three options upon a request for listing: (1) list; (2) refuse to list; or (3) listing is warranted but precluded.

Exemption Process from ESA at § 7(g).

§ 7 requires formal consultation and preparation of BO – must be addressed to time and place, must use best scientific and commercial data available. An action is considered first in time, first in right. Scope of review is limited only to present actions and those that are connected, reasonably certain to occur (funded, authority granted, contracting initiated).

Informal consultation at 50 CFR § 402.13, under statute, may discuss with FWS prior to EIS process. Very important to agency (majority of processes) get them to agree to mitigation measures that will avoid adverse impacts to listed species, then avoid B.O. and formal consultation. Probably still have to do B.A. first to identify presence of listed species.

Northern Spotted Owl v. Hodel – Greenworld petitioned FWS to list the spotted owl under the ESA. Listing decision is informal rulemaking under APA § 553. FWS decided not to list, contrary to expert opinions. G/R with battle of the experts, if agency expert says so, it generally is (part of deference to agency under the arbitrary and capricious standard0.

Defenders of Wildlife v. Andrus – claimed that twilight duck shooting violated ESA because the policy did not adequately protect species because can't distinguish properly in the dark. Record was bare, so court used arbitrary and capricious review under § 706 of APA. Court said that ESA conservation required all methods and procedures which were necessary. Therefore, administrative record must show affirmative duty to establish such procedures.

NHPA:

Mostly a procedural statute. If an undertaking is going to affect a listed or eligible site (national historic register) then must notify appropriate offices.

Pueblo of Sandia – FS to upgrade road. Claimed no impact to potentially designated historical sites. Got concurrance of SHPO by hiding 2 affidavits. Court concluded that FS failed

to make reasonable effort to determine impacts and did not make a good faith effort to notify SHPO.

Substantive Effects on Decisionmaking:

Strycker's Bay Neighborhood Council – low income housing did not include alternatives analysis under § 102(2)(E) of NEPA. Issue was whether the project affected the human environment. C.A. cited the "background of urban environmental factors and required HUD to do an alternatives analysis. HUD claimed that to review alternatives would cause a 2 year delay to move to another site. S. Ct. said that where agency had considered alternatives, the reviewing court's only role was to ensure that agency had complied. Here, agency had (citing Yankee Vermont).

Baltimore Gas & Elec. – Tabled values were used to quantify the front end and back end of the uranium fuel cycle. Answered a generic question to any plant permitting procedure and estimated a zero release for long term storage. NRDC argued that adoption of the generic table preempted consideration of the pros and cons of individual licensing decisions. Twin aims of NEPA are to (1) consider significant aspects of potential impacts, and (2) to inform the public of the agency's considerations of concerns. The generic method chosen by the agency was an appropriate way of conducting the hard look required by NEPA.

TVA v. Hill – snail darter case, endangered species discovered one year after commencement of the dam's construction. Congress kept funding the dam regardless of the fish. The dam put the fish in "jeopardy" in violation of the ESA. TVA argued that congress impliedly exempted this project from the ESA by continuing to fund it and the dam came before the ESA, therefore it didn't apply. S. Ct. said no. Repeals by implication don't work. Bill didn't say that ESA didn't apply because house rule says no provision in an appropriations bill can change existing law. Also, equity argument from Hecht v. Bowles doesn't work, ESA is explicitly clear, congress decided that endangered species should take priority, therefore it is not for the courts to decide.

West Michigan v. Natural Resources Comm. – state agency approved drilling in state forest. State court reversed, refused to defer to agency on issue of impairment of natural resources. Here, there was evidence of impact to elk herd.

That was under a state statute that was more substantive than NEPA. If an environmental group was arguing the case under NEPA: (1) claim that agency decision was arbitrary and capricious (enviro group would likely lose battle of the experts); (2) argue that cost benefit analysis was too low. The project would be losing money anyway, is it rational to proceed with a losing project and lose habitat and species? (3) a losing project is arbitrary and capricious.

The Decision to Prepare Environmental Documents:

Hanly v. Kleindienst – effort to stop construction of jail across from apartment building – an urban dispute. What does significant mean, because if not significant, then no EIS required May be even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory may be the straw that breaks the camel's back. Court's test: (1) extent of environmental effects in excess of existing conditions; and (2) absolute quantitative adverse effects of the action itself. To determine whether an EIS is needed (threshold determination of significance) the agency should include the public to get their response to the proposed action.

Conner v. Buford – FS did EA for leasing of 1.3M acres. Resulted in some 700 leases, some contained NSO provisions, others did not. Claimed not enough data for biological opinion. 9th Circuit said that no need to do EIS for NSO parcels because there was no irretrievable commitment of resources. However, non-NSO required EIS prior to point of commitment.

Marsh v. ONRC – dam on Elk Creek, did new information obtained during construction require supplement to existing EIS? 40 CFR § 1502.9(c) requires when substantial changes or significant new circumstances or information. Here, alleged significant new information. Standard of review was arbitrary and capricious under § 706 of the APA. Agency has obligation to take a "hard look" at new information. Sometimes SIRs not prepared until litigation (post hoc rationalizations like in Overton?).

Defenders of Wildlife v. Andrus – aerial wolf shooting by state on federal lands. Decision not to act by DOI was not a major federal action. Decided wrongly. 40 CFR § 1508.18 and § 551(13) of the APA define failure to act as a federal action. Failure to act is reviewed under § 706 of APA.

Metro. Edison v. PANE – whether NRC permit to allow resumption of operation at 3-mile island should have considered psychological harm to surrounding population. Agency decided

that psycho effects are beyond the scope of NEPA. S. Ct. agreed, NEPA only requires consideration of effects to physical environment. An effect must be closely causally connected to a physical attribute of environment.

SIPI – did breeder reactor program, still under development require an EIS when no specific undertaking was yet identified? If a program just under development did require an EIS, then when? Should be based on a 4-part test: (1) how likely is it that the technology will become feasible; (2) extent of information regarding the effects and alternatives; (3) to what extent are irretrievable commitments being made; and (4) how sever will be the environmental effects if it becomes viable?

Lane County Audobon v. Jamison – Jamison strategy developed as interim timber program document that was created prior to listing of spotted owl. Issue was whether strategy was ever submitted to FWS for consultation as required by § 7(a)(2) of ESA. 9th Circuit considered the strategy to be a federal action and required that consult occur before individual timber sales could proceed.

AT & SF v. Callaway – (legislative EIS, proposal for legislation) challenged EIS for lock and dam system on Mississippi river. ATSF said that EIS should be done prior to legislation, makes decision fairer because after money appropriated, no reason to consider alternatives. Generally, appropriation requests do not get an EIS.

EDF v. Massey – extraterritorial effects, extent to which NEPA requires compliance. At issue, whether the NSF needed to comply with NEPA prior to incinerating trash at the McMurdo station in Antarctica. Here, because NSF's decision would actually be made in the U.S. and AA is under significant legislative control, compliance with NEPA is required.

NEPA Coalition of Japan v. Aspin – said that Massey analysis did not apply to actions within a foreign sovereign territory.

Scope of NEPA and ESA Documents:

Vermont Yankee v. NRDC – interevenors claimed that commissioner did not consider energy conservation as a reasonable alternative. Also claimed that utility pimped increased consumption. S. Ct. said decision not to consider energy conservation was not arbitrary and capricious. Agency doesn't need to consider every alternative, only those that are bounded by some notion of feasibility.

Citizens Against Burlington v. Busey – air freight carrier offer prompted Toledo airport to propose expansion. Toledo was proponent of application to FAA as proprietor. EIS considered only expansion or no action. Action was characterized as proposal to build cargo hub at airport. Citizens claimed that action should be selection of site for hub construction, and therefore violated NEPA. Court said that alternative was limited to go/no go at Toledo, therefore alternatives considered were appropriate.

Conner v. Burford – Agencies did not violate NEPA by use of staged EAs. But, under ESA, there was sufficient information to perform biological assessments/opinions. The agency consideration may require projections of activities and estimates of impacts. Here, FWS could have determined whether connected activities (future development) was fundamentally incompatible with development. FWS argued that stipulation process was equivalent to EIS and consultation, but court refused to allow because it would create an exception to the ESA.

Thomas v. Peterson – FS prepares ESA that only considers a timber road. Court said that FS needed to consider more than the road because no purpose for it except to access timber. Will tip scales in cost/benefit analysis when evaluating timber sales. Road and timber sales are connected, cumulative and there is a potential for and irreversible and irretrievable commitment of resources. Species at issue here was the grey wolf. Should have employed a 3-step process: (1) inquire whether listed species are present, (2) agency must prepare BA and determine if action will affect; (3) prepare B.O and consult. Here, failure to prepare B.O. was fatal, not a de minimus violation of ESA.

Taxpayer's Watchdog v. Stanley – larger plan for L.A. subway was for 18.6 miles, stated minimum was for 8.8 miles. Plan was frustrated by methane risk zones. Plan was revised to 4 mile "independent project." If a project could not stand on its own, then must consider larger project and not just segments – piecemeal analysis is not acceptable under NEPA.

Sylvester v. COE – small federal handle, wetlands in Squaw Valley required § 404 permit for construction of golf course. Plaintiffs claimed that project was much broader – that COE must condsider cumulative effects, golf course did not have independent utility from the mountain resort. COE had its own regs with its own definition of scope. EPA and CEQ had approved the COE regs. The regs limited scope to COE's jurisdiction. Court said here that limited scope was in balance with needs of NEPA and COE's jurisdictional limitations.

Robertson v. Methow Valley – Sandy Butte ski resort proposal, at site review stage – prior to selecting permitee and prior to development of master plan. Here, numerous uncertainties limited analysis of offsite impacts. Mitigation plan was likewise limited. Issue as to what mitigation measures are required and whether a worst case analysis was required? NEPA requires an analysis of mitigation measures for adverse affects of each alternative. Here, effects were to air quality and mule deer by increase in traffic and wood stoves, offsite developments over which FS has no control. Plan did discuss mitigation measures. Court said that was all that was required because NEPA is procedural not substantive, therefore no requirement to implement any measures.

Cabinet Mtn. – mineral drilling on wilderness lands. FS did and EA and BA. Triggered formal consultation under § 7(a)(2) of ESA. From formal consult, FWS developed BO that was a jeopardy opinion. By statute, FWS was to describe alternatives to proposed action that would not cause jeopardy. FS incorporated BO into EA and issued FONSI. Issue was whether EIS was needed and whether EIS was violated. Here, the court developed 4 criteria to determine whether or not to prepare an EIS: (1) whether the agency took a hard look at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) whether the agency made a convincing case that the impact was insignificant; and (4) if there was impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum. Here, it was okay.

Roosevelt Campobello v. EPA – EPA to issue NPDES permit, therefore NEPA and ESA apply to federal action. EPA decided to issue permit after formal consult with FWS and NMFS (both had issued jeopardy opinions and no alternatives). EPA ALJ said to issue permit by 50 CFR § 402.15. Court reversed and remanded, said that needed more information like real-time study and dry runs. Without, decision was not based on best commercial and scientific data available.

Conflicts With Other Statutes:

Flint Ridge -- Whether HUD approval of disclosure statement requires an EIS under NEPA. HUD and NEPA statute conflict – which rules? S. Ct. said that in a conflict, NEPA must give way to other statute.

S.D. v. Andrus – application for mineral patent in national forest. State contested, claimed that must consider environmental costs of environmental compliance in "valuable" discovery calculation. ALJ & and D.C. said no, that granting of permits was a purely ministerial act, therefore not an action under NEPA. To argue that it is not purely a ministerial act, the agency might argue that there are connected actions and cumulative effects, costs to mine ore, cost to dispose of waste, transportation costs and road building/permitting, mine design and reclamation costs.

Weinberger v. Catholic Action of Hawaii – claimed that because bunkers could have stored nukes, EIS should have discussed that alternative. Gov't said no, that nukes are classified information. C.A. said that Navy should have made hypothetical EIS. S. Ct. said no need for hypo EIS that is publically disseminated. Navy has nuke regs that require EI studies. Plaintiff's might have argued for disclosure of alternatives analysis and kept decision whether to store nukes or not private. FOIA would have allowed in camera review by judge.

Riverside Irrigation – dam on S. Platte river in Colorado. COE denied nationwide permit for construction small reservoir (dredge and fill). Could not issue nationwide permit if project was going to cause jeopardy to a listed species. Here, whooping crane was downstream. Could have argued that denial of permit was a denial of water right (a property right) and raised takings argument under the 5th Amendment. If the argument wins, a constitutional right should take precedence over a ESA right. Would have to prove that right was taken, etc. That congress intended a remedy and that compensation was appropriate for the water right.

Remedies:

Generally, an agency is engaged in an activity and there is an allegation that the agency failed to comply with a statute (ex. EA when EIS claimed necessary, or failure to supplement). File the case in federal court (federal question jurisdiction, declaratory judgment, mandamus). Agency action review should be on the record (EA, documents, BO, EIS, BA). Sometimes held as a trial but not correct. Should be held on the record. If record is insufficient, should be remanded to agency to develop a record. If going on the record, plaintiff should file: (1) a motion for summary judgment – limit review to the record because no factual issues in dispute (or could be found for plaintiff); (2) seek a preliminary injunction (probably not a TRO, only good for 10 days) – injunction is equitable relief, discretionary to court, not mandatory. But,

environmental harm can seldom be remedied by damages; (3) court or a party may move to consolidate with a hearing on the merits – so may be for all the marbles (the whole case) – be ready to present entire case.

Massachusetts v. Watt – oil and gas leases on George's Bank – original EIS estimated nearly double the amount of oil in DEIS than in FEIS. Significant changed circumstance where getting only ½ the oil for the same level of environmental damage. Toget PI, plaintiff must show: (1) likelihood of success on the merits; (2) irreparable harm caused by the action; (3) balancing the harm (harm to plaintiffs vs. harm to defendants); and (4) effect on public interest. Here, harm was to decision makers if leases sold prior to NEPA compliance. NEPA is intended to promote consideration, in balancing test, no losers if injunction is granted.

Wisconsin v. Weinbeger – Navy reactivated ELF program. Did not prepare a SEIS. Plaintiffs claimed that new information regarding effects required one. No presumption that injunction should be issued. Here, in balancing the only harm was to the decision makers. The competing goal of national security outweighed need for strict NEPA compliance. Navy had already incorporated environmental concerns into the reactivated program.

Ogunquit Village – SCS replaced dune with non-native material in contravention to EIS. What to do if agency doesn't do mitigation specified in EIS: (1) could file arbitrary and capricious under § 706 of APA; (2) done in violation of law (ignored mitigation); or (3) maybe a contract claim. The flaw in NEPA is that there is no obligation for follow up. Only requirement is to influence decision making, not the execution.

Takings Under the ESA:

Babbitt v. Sweet Home – whether "harm" included habitat regulation under § 9 of ESA. Definition of take in regulation § 1533 included harm, harass, etc. Court gave Chevron deference to secretary's interpretation. Dissent (Scalia) would require an intentional directed act. O'Connor would require proximate cause, that harm was reasonably foreseeable.

§ 9(a)(1) take species prohibition to endangered species of fish or wildlife, extended to listed species by reg. 50 CFR § 17.31. No "take" for plants at § 9(a)(2). Take for plants generally only applies to federal lands.

Babbitt's new regs under the ESA were to avoid congressional amendments, particularly not to allow cost to become a consideration. By § 10, could prepare HCP. An approved HCP

gives incidental take permit. Babbitt promoted "landscape level," multi-species HCPs to avoid fragmentation. Promoted no-surprises policy. If agreement to HCP, no additional measures would be imposed on a private landowner. Complaints that plan is harmful, can't be changed, DOI says plans are internally flexible. Safeharbor policy by candidate conservation agreements. To make net benefits.

Wyoming Farm Bureau v. Babbitt -- § 10(j) of ESA classified reintroduced wolves as non-essential, experimental species. Allows greater flexibility for the taking of wolves if predating on livestock. D.C. said that reintroduction was inappropriate because populations would not be geographically distinct. C.A. said no overlap by definition of population in FWS regulations.

Christy v. Hodel – Grizzly bears near Glacier, lost sheep and shot a bear. Claimed constitutional right to protect his property. A 5th Amendment takings claim, that grizzlies are instrumentality of federal government – if not for endangered status, he could shoot.