

# HAMMOND V. NORTH SLOPE BOROUGH: THE ENDANGERED SPECIES ISSUE—AN EXERCISE IN JUDICIAL LETHARGY

## I. INTRODUCTION

In *Hammond v. North Slope Borough*,<sup>1</sup> the Alaska Supreme Court reviewed the propriety of Alaska's decision to lease offshore tracts in the Beaufort Sea for oil and gas exploration and development. The lease decision was alleged to violate federal and state environmental statutes.<sup>2</sup> This note will analyze the *Hammond* court's interpretation of one such statute, the federal Endangered Species Act of 1973 (ESA).<sup>3</sup>

The Beaufort Sea and surrounding areas are habitat of the bowhead and gray whales,<sup>4</sup> species listed as endangered under the ESA.<sup>5</sup> Section 7(a)(2) of the ESA protects these species from harm caused by federally sponsored activities. The section requires each federal agency to insure that any action "authorized, funded, or carried out

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1. 645 P.2d 750 (Alaska 1982).

2. The federal statutes involved included: the Endangered Species Act, 16 U.S.C. §§ 1531-43 (1982), the Marine Mammal Protection Act, *id.* §§ 1361-84 (1982), and the Migratory Bird Treaty Act, *id.* §§ 703-12 (1982). The state statutes alleged to have been violated were: Alaska's Endangered Species Act, ALASKA STAT. §§ 16.20.180-.210 (1983), Alaska's Coastal Management Act, *id.* §§ 46.40.010-.210 (1982), the Alaska Public Meetings Act, *id.* §§ 44.62.310-.312 (1980), and the Alaska Lands Act, *id.* §§ 38.05.005-.370 (1977). *Hammond*, 645 P.2d at 756-57.

For an overview of the *Hammond* court's analysis of the alleged state violations, see Note, *Environmental Law: Oil, Eskimos and the Beaufort Sea — Round II — Hammond v. North Slope Borough (Alaska 1982)*, 12 U.C.L.A.-ALASKA L. REV. 167 (1983).

3. 16 U.S.C. §§ 1531-43 (1982). Specifically, the court dealt with an alleged violation of section 7(a)(2) of the Act, 16 U.S.C. § 1536(a)(2) (1982) (amending the Endangered Species Act of 1973, § 7, 16 U.S.C. § 1536 (1976)).

4. For a general discussion of the bowhead and gray whales, see *Alaska Whales and Whaling*, 5 ALASKA GEOGRAPHIC (1978).

5. 50 C.F.R. § 17.11(h) (1982).

by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."<sup>6</sup> Because the exploration activities stemming from the joint federal-state lease sale would have had a direct impact on the endangered whales' environment, it was contended that the Commissioner of the Alaska Department of Natural Resources failed to satisfy the section 7(a)(2) requirement.<sup>7</sup>

Whether an agency will be judged to have complied with section 7(a)(2) depends in large part on the standard of review applied by the courts. If the courts subject agency compliance to a reasonableness standard of review,<sup>8</sup> then the burden is placed on a *third party* to show that the agency action is likely "to jeopardize the continued existence of any endangered species" (hereinafter referred to as "jeopardize").<sup>9</sup> If the courts employ a scrutinizing standard of review,<sup>10</sup> the burden is placed on the *agency* to show its action is not likely to "jeopardize."

In deciding to apply a reasonableness standard of review, the *Hammond* court adopted the United States District of Columbia Court of Appeals' holding in *North Slope Borough v. Andrus*.<sup>11</sup> The *Hammond* court concluded: "[In *Andrus*] the United States Court of

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6. 16 U.S.C. § 1536(a)(2) (1982) (amending the Endangered Species Act of 1973, § 7, 16 U.S.C. § 1536 (1976)).

7. Section 7(a)(2), by its terms, applies only to a "Federal agency." 16 U.S.C. § 1536(a)(2) (1982). "Federal agency" is defined to include "any department, agency, or instrumentality of the United States." 16 U.S.C. § 1532(7) (1982). Ordinarily, then, the Alaska Department of Natural Resources would not be considered a "Federal agency." Nonetheless, there are situations when state and federal involvement is sufficiently intertwined that a plausible argument can be made that the state is an "instrumentality of the United States." *Hammond*, involving a joint federal-state lease sale, presents this situation. Because of the substantial interaction between federal and state agencies, it is at least debatable that the Alaska Department of Natural Resources was an "instrumentality of the United States." Since the *Hammond* court did not address the issue, this note will treat the Alaska Department of Natural Resources as a "Federal agency" for the purposes of section 7(a)(2) and the *Hammond* litigation.

8. A reasonableness standard of review refers to a court examining section 7(a)(2) compliance in terms of the following inquiry: did the agency "reasonably conclude" that its actions would not be likely to jeopardize endangered species? *See infra* notes 45-54 and accompanying text.

9. 16 U.S.C. § 1536(a)(2) (1982) (amending the Endangered Species Act of 1973, § 7, 16 U.S.C. § 1536 (1976)).

10. A scrutinizing standard of review refers to a court examining section 7(a)(2) compliance in terms of the following inquiry: did the agency amply demonstrate that its actions would not be likely to jeopardize endangered species? *See infra* notes 55-61 and accompanying text.

11. 642 F.2d 589, 607 (D.C. Cir. 1980). *See infra* text accompanying notes 45-51.

Appeals, District of Columbia Circuit, held that there was no violation of federal acts with regard to the federal portion of the Beaufort Sea lease sale . . . . *For the same reasons, we hold likewise in the case at bar.*"<sup>12</sup> The Alaska Supreme Court neither discussed nor explained its basis for adopting the *Andrus* holding. Instead, the *Hammond* court treated the *Andrus* reasoning as black letter law, universally accepted by all courts.

This note will show that by adhering to the *Andrus* reasoning and applying a reasonableness standard of review, the Alaska Supreme Court has perpetuated the error of the District of Columbia Court of Appeals — a misreading of the congressional mandate in and intent behind section 7 of the ESA. In order to demonstrate that Congress intended more than a reasonableness standard of review, that in fact Congress affirmatively placed the burden on agencies to prove that their actions do not jeopardize endangered species, this note will examine the legislative history behind the 1973 ESA, cases interpreting section 7 of the ESA, the 1978 and 1979 amendments to the ESA, and cases interpreting Section 7(a)(2) of the amended ESA.

## II. THE ENDANGERED SPECIES ACT OF 1973

Section 7 of the 1973 ESA provides:

All other Federal departments and agencies shall . . . utilize their authorities in furtherance of the purposes of this Act . . . by taking such action necessary to insure that actions authorized, funded, or carried out by them *do not jeopardize* the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species . . . .<sup>13</sup>

The historical development of Section 7 demonstrates that Congress sought to provide maximum protection for endangered species. Consistent with this goal is an imputed intent of Congress to place on the agency the affirmative burden of insuring that its actions do not jeopardize endangered species.

The ESA of 1973 followed earlier attempts to protect endangered species. In 1966, Congress passed the first endangered species legislation.<sup>14</sup> Section 1(b) of the Endangered Species Act of 1966 declared:

The Secretary of Interior, the Secretary of Agriculture and the Secretary of Defense, together with the heads of bureaus, agencies, and services within their departments, *shall seek to* protect species

12. 645 P.2d at 763 (emphasis added).

13. The Endangered Species Act of 1973, § 7, 16 U.S.C. § 1536 (1976) (emphasis added), amended by 16 U.S.C. § 1536(a)(2) (1982).

14. Endangered Species Act of 1966, Pub. L. No. 89-669, 80 Stat. 926, repealed by Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, 903.

of native fish and wildlife . . . that are threatened with extinction, and, *insofar as is practicable and consistent with the primary purposes* of such bureaus, agencies, and services, shall preserve the habitats of such threatened species on lands under their jurisdiction.<sup>15</sup>

The qualifying language in the 1966 Act, "shall seek to," "insofar as is practicable," and "consistent with their primary purpose," gave substantial discretion to agencies to determine the amount of protection they needed to afford endangered species. The Endangered Species Conservation Act, enacted in 1969, broadened restrictions on the commercial taking of endangered species, but did not alter the requirements imposed on agencies by the 1966 Act.<sup>16</sup>

The enactment of the ESA of 1973 was a recognition by Congress that the agency guidelines set forth in the 1966 Act were insufficient to ensure the protection of endangered species. Thus, even though a substantial majority of bills introduced into the hearings contained a qualification similar to that found in the earlier 1966 statute,<sup>17</sup> the final version of section 7 contained no qualifying language. Under section 7 of the 1973 ESA, agencies no longer were directed to conserve species "insofar as practicable" or "consistent with their primary purposes;"<sup>18</sup> rather, agencies had an affirmative obligation to ensure that their actions "do not" jeopardize endangered species.<sup>19</sup> The manager of the House bill, Representative Dingell, commented on the protection offered by the version of section 7 that was eventually adopted:

We 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 . . . . It appears

15. Endangered Species Act of 1966, Pub. L. No. 89-669, § 1(b), 80 Stat. 926 (emphasis added).

16. Endangered Species Conservation Act, Pub. L. No. 91-135, 83 Stat. 275 (1969), *repealed by* Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, 903.

17. See H.R. 37, 470, 471, 1511, 2669, 3696, 3795, 93d Cong., 1st Sess. § 5(d) (1973) ("All other Federal departments and agencies shall . . . utilize, *wherever practicable*, their authorities in furtherance of the purposes of this Act by carrying out programs for the protection of endangered species and by taking such actions as may be necessary to insure that actions . . . do not jeopardize the continued existence of endangered species." (emphasis added)); *id.* § 2(c) (policy of Congress that agencies protect endangered species "wherever practicable"); H.R. 1461, 4755, 93d Cong., 1st Sess. § 3(d) (agencies to utilize their authorities, "where practicable," to accomplish goals of Act); H.R. 4758, 93d Cong., 1st Sess. §§ 2(b), 3(d) (agencies to carry out purposes of Act "insofar as is practicable and consistent with [their] primary purposes"); H.R. 2735, 93d Cong., 1st Sess. § 5(d) (agencies to insure protection of endangered species "wherever practicable"); S. 1983, 93d Cong., 1st Sess. § 5(d) (agencies to insure protection of endangered species "wherever practicable").

18. Endangered Species Act of 1966, Pub. L. No. 89-669, § 1(b), 80 Stat. 926.

19. Endangered Species Act of 1973, § 7, 16 U.S.C. § 1536 (1976).

that the whooping cranes of this country . . . are being threatened by Air Force bombing activities along the gulf coast of Texas. Under existing law, the Secretary of Defense has some discretion as to whether or not he will take the necessary action to see that this threat disappears . . . . The point that I wish to make is that once this bill is enacted, he or any subsequent Secretary of Defense would be required to take the proper steps. . . .

[T]he agencies of Governments can no longer plead that they can do nothing about it. They can, and they must. The law is clear.<sup>20</sup>

Representative Dingell's remarks, as well as the plain language of section 7 of the 1973 ESA, evince Congress' objective to place the burden on agencies to prove that agency actions do not "jeopardize" endangered species. Failure by the judiciary to adhere to this approach is plainly inconsistent with congressional intent.

### III. JUDICIAL REVIEW UNDER SECTION 7 OF THE 1973 ESA

Four cases interpreted section 7 of the 1973 ESA prior to the 1978 and 1979 amendments; all but one placed the burden of proof on the agency to show that agency actions were not "jeopardizing" endangered species.<sup>21</sup> The only case that did not place the burden on the agency was *Sierra Club v. Froehlke*.<sup>22</sup> In light of the analyses offered by the other three courts, the *Sierra Club* court's interpretation of section 7 must be regarded as a misguided aberration.

At issue in *Sierra Club* was the construction of a dam alleged to jeopardize the endangered Indiana bat. The biological opinion received by the acting agency, the Corps of Engineers (Corps), recommended that construction of the dam not proceed until the effects of the dam could be ascertained.<sup>23</sup> Ignoring this opinion, and asserting that "the Project would probably have no more than an infinitesimal effect upon the Indiana bat population,"<sup>24</sup> the Corps proceeded immediately with construction. In review of the Corps' decision, the *Sierra Club* court concluded that construction of the dam would not violate section 7 because "the evidence failed to show that any of the defendants' present activities . . . are adversely affecting Indiana bats in the project area."<sup>25</sup> In effect, the court held that because the

20. 119 CONG. REC. 42, 913 (1973).

21. *TVA v. Hill*, 437 U.S. 153 (1978); *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976); *National Wildlife Fed'n v. Coleman*, 529 F.2d 359 (5th Cir.), cert. denied, 429 U.S. 979 (1976); *Nebraska v. Rural Electrification Admin.*, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978).

22. 534 F.2d 1289 (8th Cir. 1976).

23. See *id.* at 1305.

24. *Id.*

25. *Id.* (quoting the lower court opinion, *Sierra Club v. Froehlke*, 392 F. Supp. 130, 138 (E.D. Mo. 1975)).

Sierra Club had not produced sufficient evidence to show "jeopardization" of the Indiana bat, the agency had fulfilled its section 7 obligations. Thus, the burden was placed by the court on a third party, the Sierra Club, to show "jeopardization," rather than on the acting agency, the Corps of Engineers, to prove "no jeopardization."

*National Wildlife Federation v. Coleman*,<sup>26</sup> decided at approximately the same time as *Froehlke*, provides a different interpretation of section 7. Although the *Coleman* opinion might appear to have placed the burden on a third party to demonstrate "jeopardization," the court in fact placed the burden on the agency to demonstrate "no jeopardization." The court stated that "appellants have the burden of proving that the appellees have failed to take the action necessary to insure that the 5.7 mile segment of I-10 does not jeopardize the continued existence of the Mississippi Sandhill Crane . . . ."<sup>27</sup> To satisfy this burden, the National Wildlife Federation (NWF) had only to show that the acting agency, the Federal Highway Administration (FHWA), had failed in its "burden of insuring that its actions would not jeopardize the continued existence of the crane."<sup>28</sup> The FHWA was deemed to have failed in its burden of proof when sufficient evidence was adduced by the NWF to show that it was "questionable" whether the crane could survive the additional loss of habitat caused by the indirect effects of the highway.<sup>29</sup> By adopting the "questionable" standard, the *Coleman* court clearly placed the burden on the agency to show "no jeopardization."

*Nebraska v. Rural Electrification Administration*,<sup>30</sup> the third case which interpreted section 7, is in accord with the *Coleman* court's interpretation of section 7. The *Nebraska* court, however, went further than the *Coleman* court by explicitly rejecting the reasoning in *Sierra Club*. Responding to the defendant's contention that no adverse impact on the whooping crane had been demonstrated, the *Nebraska* court emphasized:

The [ESA] places the burden upon the agencies who are authorizing, funding, or carrying out programs to insure that those programs do not jeopardize endangered species or the habitat of the species. The burden is not upon someone else to demonstrate that there will be an adverse impact . . . . Unless [the Rural Electrification Administration has met this burden,] it has not complied with the Act.<sup>31</sup>

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26. 529 F.2d 359 (5th Cir.), cert. denied, 429 U.S. 979 (1976).

27. *Id.* at 372.

28. *Id.* at 374.

29. *Id.* at 373.

30. 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978).

31. *Id.* at 1171.

Consistent with the interpretation accorded section 7 by the courts in *Nebraska* and *Coleman*, the Supreme Court implied in *TVA v. Hill*<sup>32</sup> that the burden is on the acting agency to demonstrate that it is not jeopardizing any endangered species.<sup>33</sup>

*TVA*, *Coleman*, and *Nebraska* illustrate the proper interpretation of section 7: consistent with the plain language of the section and its legislative history, the burden is placed on an acting agency to demonstrate that its actions do not jeopardize the continued existence of any endangered species.

Following the *TVA* decision, the 1973 enactment of the ESA was amended. Section 7, as amended,<sup>34</sup> continues to place the responsibility on agencies to prove that their activities do not threaten endangered species.

#### IV. THE 1978 AND 1979 AMENDMENTS TO SECTION 7 OF THE 1973 ESA

The primary goal of Congress in amending section 7 of the 1973 ESA was to insert flexibility into the decisionmaking process.<sup>35</sup> To accomplish this purpose, amended section 7 set forth elaborate pro-

32. 437 U.S. 153 (1978).

33. The Court undertook an extensive review of the legislative history and concluded that the "plain intent of Congress in enacting the statute was to halt and reverse the trend toward species extinction, whatever the cost," *id.* at 184, and that section 7 "reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. . . ." *Id.* at 185. Because the Court was willing to enforce this congressional directive, it follows that the Court interprets section 7 as placing the burden of insuring "no jeopardy" on agencies.

*See also* *Nebraska v. Rural Electrification Admin.*, 12 Env't Rep. Cas. (BNA) 1156, 1171 (D. Neb. 1978) (placement of the burden on an agency to show it has insured the safety of endangered species "is one of the principal teachings" of *TVA v. Hill*).

34. 16 U.S.C. §§ 1536a-1536p (1982).

35. In discussing the reason for its proposed amendments, the House report stated:

The purpose of the legislation is . . . to introduce some flexibility into the Act. To accomplish this purpose, the legislation adopts a procedure through which Federal agencies may be considered for an exemption from the Act's mandate that they not jeopardize the continued existence of any endangered or threatened species . . .

H.R. REP. NO. 1625, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9453. The House concluded that the exemption process is necessary in order to "allow consideration of those cases where a Federal action cannot be completed or its objectives cannot be met without directly conflicting with the requirements of Section 7." H.R. REP. NO. 1625, 2d Sess. 13, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9463.

The Senate echoed the House's belief that an exemption process is necessary and would result in the desired degree of flexibility. S. REP. NO. 874, 95th Cong., 2d Sess. 2-3 (1978).

cedures for obtaining an exemption from the requirements of the Act.<sup>36</sup>

The language of the amended section 7 demonstrates Congress' continuing intent to place the burden on the agency to show "no jeopardization." The section provides:

Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . *is not likely* to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species . . . .<sup>37</sup>

The only substantial change between the revised section 7(a)(2) and the original section 7 is that the original "does not jeopardize" standard is replaced by an "is not likely to jeopardize" mandate. Because there is no legislative history explaining the rationale for this change, one can only speculate as to its purpose. The most logical explanation is that this new language provides section 7 with the desired flexibility that was the dominant theme throughout the 1978 and 1979 amendment hearings.<sup>38</sup> For example, the original "does not jeopardize" language gave agencies no leeway; they were required to take actions to protect endangered species even against unforeseeable contingencies. In contrast, the revised language, "is not likely to jeopardize," is a more attainable requirement since it does not require agencies to guard against unforeseeable contingencies. If the sole effect of the change in language, then, is to protect against unforeseeable happenings, it must be concluded that the amended section 7 still imposes on agencies an affirmative obligation to ensure protection of endangered species. It therefore follows that the bur-

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36. To obtain an exemption from the section 7(a)(2) mandate, an agency must first apply to the Secretary of Interior (or, under certain situations, the Secretary of Commerce). 16 U.S.C. § 1536(g)(1) (1982). An application will be processed only if the agency has been issued a negative biological opinion (that is, the opinion indicates that the agency action would violate section 7(a)(2)). *Id.* § 1536(g)(1). The Secretary is to recommend exemption if he finds the following requirements are satisfied: the agency has carried out its statutory responsibilities in "good faith," it has attempted to find alternatives which would not violate section 7(a)(2), it has conducted the necessary biological assessments, and it has refrained from making prohibited irreversible commitments of resources. *Id.* §§ 1536(g)(3)(A)(i)-(iii). The Secretary is to deny an exemption if these requirements are not met. *Id.* § 1536(g)(3)(B). If the Secretary recommends exemption, the application is then reviewed by the Endangered Species Committee. *Id.* § 1536(g)(4). The Committee is to grant an exemption if it finds: there are no alternatives to the agency action, the benefits of allowing the action are much greater than the benefits of conserving the species or its critical habitat, the agency action is in the public interest, the action is of regional or national consequence, and there has been no irretrievable commitment of resources. *Id.* §§ 1536(h)(1)(A)(i)-(iv).

37. 16 U.S.C. § 1536(a)(2) (1982) (emphasis added).

38. *See supra* note 35.

den remains on an acting agency to demonstrate compliance with section 7(a)(2).

Congress' objective to continue to place the burden on agencies to insure that their actions do not jeopardize endangered species is also evidenced by congressional hearings. Throughout the 1978 and 1979 amendment process, Congress analyzed and discussed the judicial opinions which had interpreted section 7.<sup>39</sup> Had it disapproved of the judicial practice of placing the burden on the agency to show "no jeopardization," Congress could have explicitly rejected this requirement by an appropriate provision in the amended Act. Instead, Congress expressed approval of the interpretation given section 7 by the courts.<sup>40</sup> Congress emphasized that the amended language of the section "continues to give the benefit of the doubt to the species and it would continue to place the burden on the action agency to demonstrate . . . that its action will not violate section 7(a)(2)."<sup>41</sup>

#### V. JUDICIAL INTERPRETATION OF SECTION 7(a)(2): DIVERGENT APPROACHES

Even though the 1978 and 1979 amendments to the ESA reflect a congressional intent to place the burden on agencies to prove compliance with section 7(a)(2), subsequent judicial opinions have been inconsistent in the standard of review applied to agency actions under this section. Conflicting approaches include the District of Columbia's reasonableness standard of review<sup>42</sup> and the First Circuit's probing inquiry analysis.<sup>43</sup> A third approach, originating in the Alaska District Court,<sup>44</sup> combines the District of Columbia and First Circuit standards of review by analyzing certain agency actions under a reasonableness standard and others under a more probing standard.

##### A. The District of Columbia Court of Appeals Approach: A Reasonableness Standard of Review

Ignoring congressional intent to the contrary, the District of

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39. See, e.g., H.R. CONF. REP. NO. 697, 96th Cong., 1st Sess. 12, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2572, 2576; H.R. CONF. REP. NO. 1804, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9484, 9486; H.R. REP. NO. 1625, 95th Cong., 2d Sess. 10-11, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9453, 9460-61.

40. See *supra* note 39.

41. H.R. CONF. REP. NO. 697, 96th Cong., 1st Sess. 12, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2572, 2576.

42. See *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 686 (D.C. Cir. 1982); *North Slope Borough v. Andrus*, 642 F.2d 589, 609 (D.C. Cir. 1980).

43. See *Roosevelt Campobello Int'l Park v. EPA*, 684 F.2d 1041 (1st Cir. 1982).

44. See *Village of False Pass v. Watt*, 565 F. Supp. 1123 (D. Alaska 1983).

Columbia Court of Appeals applies a minimal level of review to agency compliance with section 7(a)(2).<sup>45</sup>

The court first applied deferential review in *North Slope Borough v. Andrus*,<sup>46</sup> which involved the federal portion of the same leasing program challenged in *Hammond*.<sup>47</sup> Similar to *Hammond*, the issue in *Andrus* was whether the leasing program interfered with the endangered bowhead whales' migration through the Beaufort Sea to such an extent as to violate the requirements of section 7(a)(2). In holding that the Secretary of Interior had not violated section 7(a)(2), the *Andrus* court concluded: "The proposed 'agency action' in the Beaufort Sea *has not been found* likely to jeopardize an endangered species . . ."<sup>48</sup> There is a substantial difference between the *Andrus* conclusion that an action has not "been found likely to jeopardize" and the section 7(a)(2) mandate that an agency "insure that any action . . . is not likely to jeopardize." The former standard imposes the burden on a third party to show that an agency action is likely to jeopardize an endangered species; the latter places the burden on the agency to demonstrate that its affirmative actions are not likely to jeopardize an endangered species.

Additional proof that the *Andrus* court placed the burden not on the acting agency to demonstrate "no jeopardization," but on a third party to show "jeopardization," is the standard of review employed by the *Andrus* court in analyzing section 7(a)(2) compliance. In holding that the Bureau of Land Management (BLM) had fulfilled its section 7(a)(2) responsibilities by complying with the mitigation measures recommended by the National Marines Fisheries Services

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45. Another court that applies a minimal level of review is the Hawaii District Court. In *Stop H-3 Association v. Lewis*, 538 F. Supp. 149 (D. Hawaii 1982), the controversy centered around the construction of Interstate Defense Highway H-3, alleged to jeopardize the continued existence of the endangered Oahu creeper. The Department of Transportation (DOT) relied on a biological opinion by the United States Fish and Wildlife Service (USFWS) in order to justify its decision to construct the highway. *Id.* at 174. To determine if DOT had complied with section 7(a)(2), the court did not require the agency to come forward with sufficient evidence to prove "no jeopardization." The court instead subjected the evidence on which DOT relied to a bare minimum review:

While it is true that conditions for bird sighting were suboptimal at the time of the survey, it cannot be concluded that *as a matter of law* the survey data was insufficient to support a biological opinion or that the conclusion drawn from the data was clearly erroneous. Based upon the survey, the USFWS *could reasonably have concluded* that the H-3 project is not likely to jeopardize the existence of the Oahu Creeper.

*Id.* at 174 (latter emphasis added).

46. 642 F.2d 589 (D.C. Cir. 1980).

47. 645 P.2d 750 (Alaska 1982). See *supra* notes 1-12 and accompanying text.

48. *Andrus*, 642 F.2d at 607 (emphasis added).

(NMFS),<sup>49</sup> the court employed the deferential standard: reasonableness.<sup>50</sup> If the court had subjected the BLM's actions to any stricter review under section 7(a)(2), it would have concluded that the agency had not fulfilled the mandate of section 7(a)(2). There was substantial evidence, including warnings by NMFS, which indicated that even with mitigation measures the bowhead whale might still be jeopardized by oil exploration and drilling.<sup>51</sup>

The *Andrus* standard of review was subsequently affirmed in *Cabinet Mountains Wilderness v. Peterson*.<sup>52</sup> *Cabinet Mountains Wilderness*, which concerned mineral leasing in the Cabinet Mountains Wilderness Area, further illustrates the deferential approach that the District of Columbia Court of Appeals applies to determine compliance with section 7(a)(2). Had the court in *Cabinet Mountains Wilderness* placed the burden on the Forest Service to show "no jeopardization," the mineral leasing would have been disallowed. Two of the three principal problems which formed the basis for the conclusion in the biological opinion — that the leasing was likely to jeopardize the endangered grizzly bear — were not mitigated in the final Forest Service contract.<sup>53</sup> The court avoided this result and upheld the lease by subjecting the Forest Service's decision to a reasonableness standard of review, thereby shifting the burden to a third party to show that the Forest Service's actions would be likely to "jeopardize" the grizzly bear.<sup>54</sup>

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49. *Id.* at 610.

50. *Id.* at 609.

51. The Environmental Impact Statement prepared by the Bureau of Land Management (BLM) indicated that oil spills could have a devastating effect on the endangered bowhead and gray whales: "Based on the worst case assumptions identified in Section III, the bowhead and gray whales could be severely affected." BLM-Environmental Impact Statement, *quoted in* *North Slope Borough v. Andrus*, 486 F. Supp. 332, 341 (D.D.C.), *aff'd in part and rev'd in part*, 642 F.2d 589 (D.C. Cir. 1980). In addition, the National Marine Fisheries Service (NMFS) indicated that insufficient evidence existed to determine whether the lease sale would jeopardize the whales. *North Slope Borough*, 486 F. Supp. at 341. Moreover, NMFS advised BLM that based on the available data NMFS did have, the BLM should adopt certain mitigation measures. One measure, prohibition of all drilling between March 31 and November 1 (whale migration season), was not incorporated by the BLM in its final lease sale contract. *Id.* at 342. The district court concluded that in the wake of this evidence, the BLM "would have no grounds for insuring the safety of the Bowhead," and if the BLM allowed the lease sale to proceed, this would be a "flagrant violation of Section 7(a)(2)." *Id.* at 358.

52. 685 F.2d 678, 686 (D.C. Cir. 1982).

53. These two problems were the already "precarious status" of the grizzly bear population in the Cabinet Mountains Wilderness Area, and the decreasing amount of habitat available to the grizzlies. *Id.* at 680.

54. The court held: "The Forest Service *reasonably concluded* that the project would not jeopardize the continued existence of the grizzly bears." *Id.* at 687 (emphasis added).

B. The First Circuit Approach: A Probing Inquiry into Actions Alleged to Violate Section 7(a)(2)

Unlike the District of Columbia Court of Appeals, the Court of Appeals for the First Circuit analyzes section 7(a)(2) compliance in a manner consistent with congressional intent:<sup>55</sup> the court subjects agency actions to rigorous review, thereby placing the burden on agencies to demonstrate that their actions are not likely to "jeopardize."<sup>56</sup>

In *Roosevelt Campobello International Park v. EPA*,<sup>57</sup> the Environmental Protection Agency's (EPA) decision to grant a construction permit to Pittston Oil Refinery was reviewed by the First Circuit in order to determine if the agency had complied with the section 7(a)(2) "is not likely to jeopardize" requirement. The EPA granted the permit based on conclusions of the Administrative Law Judge (ALJ) who had presided over the permit application hearing.<sup>58</sup> Whether the EPA complied with section 7(a)(2) thus depended directly on the adequacy and correctness of the ALJ's conclusions.

If the *Roosevelt Campobello* court had followed the District of Columbia Court of Appeals' approach and inquired into the reasonableness of the ALJ's findings, it would have upheld the decision: sufficient evidence existed to support the ALJ's determinations.<sup>59</sup> Ignoring the reasonableness standard of review, the *Roosevelt Campobello* court adopted a more probing standard of review. The court required the agency to show that the ALJ's finding insured "no jeopardization." The court emphasized that the precise effects of the refinery on the humpback whale and bald eagle could not be determined absent "real time simulation studies."<sup>60</sup> As a result of the EPA's failure to conduct these studies, the ALJ could not insure the

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55. See *supra* notes 13-20 and accompanying text, notes 35-41 and accompanying text.

56. *Roosevelt Campobello Int'l Park v. EPA*, 684 F.2d 1041 (1st Cir. 1982). A district court in California is in accord with *Roosevelt Campobello* in placing the burden on the acting agency to show "no jeopardization." In *Pacific Legal Found. v. Watt*, the court held that the Environmental Protection Agency had not "demonstrated compliance" with section 7(a)(2); that is, it did not insure "that the requirements contained in the permit will not jeopardize the continued existence of any endangered or threatened species." *Pacific Legal Found. v. Watt*, 539 F. Supp. 841, 847 (C.D. Cal. 1982), *modified*, 703 F.2d 567 (9th Cir. 1983).

57. 684 F.2d 1041 (1st Cir. 1982).

58. *Id.* at 1050. Specifically, the ALJ found that the "overwhelming weight of evidence pointed to the feasibility of safe transit" of the oil tankers. *Id.* at 1054.

59. *Id.* at 1051-52 (the ALJ's conclusion that the risk of a major oil spill was negligible was based on four sources: the Coast Guard, computer simulation studies, evidence concerning weather patterns in Eastport, Maine, and portions of the Environmental Impact Statement).

60. *Id.* at 1055. The court defined "real time simulation studies" as "tests run

safety of the endangered species.<sup>61</sup> Because the ALJ could not insure "no jeopardization," the court held that the EPA did not satisfy its burden of showing "no jeopardization."<sup>62</sup>

C. The Alaska District Court Approach: Judicial Confusion in  
*Village of False Pass v. Watt*

The most recent decision interpreting section 7(a)(2), *Village of False Pass v. Watt*,<sup>63</sup> suffers from a form of schizophrenia: a reasonableness standard of review is intertwined with a more probing level of review. In one part of the opinion, the court used strong language reminiscent of the *Roosevelt Campobello* level of review:

[The agency] must insure that agency actions are not likely to jeopardize the continued existence of the species . . . . This duty is violated if the agency fails to initiate feasible and necessary tests or studies . . . . The amendments continue to give the benefit of the doubt to the species . . . .<sup>64</sup>

Yet, in resolving whether the Secretary of Interior actually complied with section 7(a)(2), the court sporadically ignored the searching level of review mandated by the above passage in favor of the deferential reasonableness inquiry.<sup>65</sup>

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with actual tanker pilots on a device capable of simulating the responses of a ship to certain conditions of wind, tide, fog, [and] current." *Id.* at 1051 n.6.

61. *Id.* at 1055.

62. *Id.* at 1057.

63. 565 F. Supp. 1123 (D. Alaska 1983).

64. *Id.* at 1154.

65. To understand the various levels of review exhibited by the court in *Village of False Pass v. Watt*, 565 F. Supp. 1123 (D. Alaska 1983), a brief digression into the facts is necessary. The plaintiffs alleged that offshore oil exploration in the St. George Basin of Alaska's Bering Sea would jeopardize the continued existence of the endangered right and gray whales. *Id.* at 1131. The biological opinion issued by the National Marine Fisheries Service (NMFS) for the St. George Basin indicated that an oil spill or blowout in either spring or fall would jeopardize the gray whales. *Id.* at 1158. Further, the opinion noted that geophysical seismic surveys would also jeopardize the whales depending on the existence of certain unknown contingencies. *Id.* at 1159. To alleviate the jeopardization presented by the oil exploration activities, the biological opinion recommended two mitigation measures: (1) an assurance by the Secretary of Interior that there be no oil spills in the area of right and gray whale migration; and (2) regulation of seismic operations in such a manner as not to disturb the essential activities of the whales. *Id.* at 1159. These mitigation measures could have been fulfilled only with substantial monitoring systems and readily available emergency equipment, neither of which was specifically provided for in the lease stipulations. *See id.* at 1161-62. Nevertheless, the court held that the Secretary had fulfilled the first mitigation requirement by including in the contract the various lease stipulations. *Id.* In contrast, the court held that the lease stipulations were insufficient to comply with the second mitigation measure. *Id.* at 1162. To arrive at these inconsistent conclusions, the court must have deferred to the Secretary's decision as to the fulfillment of the first mitigation recom-

There is only one plausible explanation for the judicial schizophrenia exhibited by the *False Pass* court: it was uncertain whether, under section 7(a)(2), it should place the burden on the agency to show "no jeopardization" or on a third party to show "jeopardization." If the court had examined the legislative intent behind the ESA, it would have ascertained that Congress desires a probing level of review, that the legislative directive is to the agencies to insure that their activities are not likely to jeopardize the continued existence of endangered species.<sup>66</sup>

## VI. CONCLUSION

Even though judicial opinions after the 1978 and 1979 ESA amendments are in disagreement concerning the standard of review applicable to alleged section 7(a)(2) violations, the congressional intent is clear: agencies have a duty to insure that their actions are not likely to "jeopardize" endangered species. A deferential, reasonableness standard of review, one that places the burden on a third party to show that agency action is "jeopardizing" an endangered species, is insufficient to hold agencies to this affirmative duty. Courts must be willing to actively scrutinize agency actions by placing the burden on the agency to demonstrate that its actions are not likely to "jeopardize" an endangered species. Only then will the judiciary fulfill the unequivocal intent of Congress.

The Alaska Supreme Court in *Hammond* ignored congressional intent by accepting the reasoning of the District of Columbia Court of Appeals in *Andrus*; that is, applying a reasonableness standard of review to agency actions alleged to violate section 7(a)(2). No explanation or justification was offered by the *Hammond* court for its seemingly blind adherence to *Andrus*. The court's only statement on the issue was that it was adopting the holding of the *Andrus* case. For this reason, the holding must be regarded as an exercise in judicial lethargy.

*Lou Harrison*

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mentation, while at the same time having subjected compliance of the second mitigation measure to a more searching review.

66. See *supra* notes 13-20 and accompanying text, notes 35-41 and accompanying text.