The Extraterritorial Application of Section 7 of the Endangered Species Act*

I. INTRODUCTION

The pressures of population growth and economic expansion have led to the mass extinction of plant and animal species all over the world.[1] Motivated by a concern for decreasing biological diversity,[2] Congress passed the Endangered Species Act of 1973[3] (the Act), its express purpose being the preservation and protection of endangered species.[4] In 1986 the Secretaries of the Interior and Commerce[5] promulgated regulations reversing their longstanding rule that the consultation requirements of section 7 of the Act apply to federal agency actions abroad[6] as well as actions within the United States.

This Note argues that Congress intended the consultation requirements of section 7 of the Act to apply to agency actions abroad. Thus, the 1986 rule is contrary to the intent of Congress and should be rescinded.[7] Part II of the Note sets forth the basic requirements of section 7. Part III provides the background for the 1986 reversal and Part IV states the general law of extraterritoriality. Part V of the Note argues that facially, sections 4 and 7 of the Act support application of the consultation requirements to federal agency actions abroad and part VI demonstrates how the legislative history of sections 4 and 7 further supports this conclusion. Part VII of the Note examines other sections of the Act and legislative history and Part VIII concludes that the 1986 rule should be rescinded.

* The author would like to thank Brian B. O'Neill, Esq. and Steven C. Schroer, Esq. for their assistance.

1. N.Y. Times, Feb. 15, 1987 at A4, col. 1.

2. *See* Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D.L. REV. 315, 321 (1974).

3. 16 U.S.C. §§ 1531-1543 (1982 & Supp. III 1985).

4. S. REP. No. 307, 93d Cong., 1st Sess. 1, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2989.

5. The Secretaries charged with enforcement of the Act.

6. 51 Fed. Reg. 19,926, 19,929 (1986).

7. *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), discussed *infra* at note 65.

II. SECTION 7 REQUIREMENTS

In order to insure that none of its actions are "likely to jeopardize the continued existence of any endangered . . . or threatened species . . . ,"[8] section 7 of the Act[9] requires that a federal agency consult with the Secretaries of the Interior and Commerce (the Secretary) "on any prospective agency action . . . [in which there is] reason to believe that an endangered species or a threatened species may be present in the area affected by . . . [the] project and that implementation of such action will likely affect such species."[10] Any species listed[11] or proposed to be listed[12] by the Secretary is subject to the consultation requirements of section 7.[13]

After consulting with an agency, the Secretary must provide the agency with a written statement outlining the Secretary's opinion as to how the agency's action would affect the species.[14] If the Secretary finds that the agency's action is "likely to jeopardize the continued existence of the species,"[15] the Secretary is required to

8. 16 U.S.C. § 1536(a)(2) (1982).

9. 16 U.S.C. § 1536 (1982).

10. *Id.* § 1536(a)(3). It should be noted that private lawsuits figure as the only means for enforcing the consultation requirements set forth in section 7. Consequently, when an agency fails to consult or opts to proceed with a project that may jeopardize a threatened or endangered species, it exposes itself to suit from private groups or individuals. Telephone interview with Nancy Sweeney, Section 7 Coordinator for the Department of the Interior, Fish and Wildlife Service, Office of Endangered Species (Oct. 15, 1987).

11. 16 U.S.C. § 1533. Section 1533 sets forth the procedure for the determination of endangered and threatened species and directs the Secretary to publish in the Federal Register a list of such species. *Id.* § 1533(c).

12. "Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of a critical habitat proposed to be designated for such species. . . ." *Id.* § 1536(a)(4).

13. Under section 1533 and the regulations promulgated in accordance with that section, the Secretary determines whether any species is endangered or threatened. Once a species has been listed as an endangered or threatened species (section 1533(c)) or has been proposed to be listed (section 1536(a)(4)) the consultation provisions of section 7 become applicable. "Each Federal agency shall . . . insure that any action . . . is not likely to jeopardize the continued existence of any endangered species or threatened species. . . ." 16 U.S.C. § 1536(a)(2).

14. *Id.* § 1536(b)(3)(A). Either the federal agency or the Director of either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (the services responsible for carrying out the provisions of the Act) may initiate consultations. After consultations have concluded, the appropriate Service must provide the federal agency with its opinion. 50 C.F.R. § 402.14(g) (1987). For detailed information regarding what the Service must include in its opinion, consult 50 C.F.R. § 402.14(g) (1987).

15. " 'Jeopardize the continued existence of' means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both

suggest "reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of [section 7] and can be taken by the Federal agency . . . in implementing the agency action."[16]

III. The 1986 Reversal

On January 4, 1978 the Department of Commerce and the Department of the Interior promulgated regulations that interpreted and implemented section 7 of the Endangered Species Act.[17] The 1978 rule recognized that "the responsibilities of the Federal agencies under section 7 [are] to carry out conservation programs for listed species, and to insure that their activities and programs do not jeopardize the continued existence of listed species. . . ."[18] The rule also affirmed "that the prohibition against 'jeopardy' applie[d] extraterritorially."[19] Thus, for example, when a federal agency such as the Army Corps of Engineers planned to build a dam in a foreign country it was required to consult with the Secretary if its actions were likely to jeopardize any endangered or threatened species.[20]

On June 3, 1986 the Secretary published a final rule that changed the 1978 regulation.[21] In addition to implementing the changes in the Act required by the 1982 Congressional amendments,[22] the final rule "cut back the scope of section 7 to the United States, its territorial sea, and the outer continental shelf. . . ."[23] Henceforth, agencies acting abroad would not be subject to the consultation requirements of section 7. The only

the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (1987).

16. 16 U.S.C. § 1536(b)(3)(A).

17. 43 Fed. Reg. 870 (1978).

18. *Id.* at 873-74.

19. *Id.* at 874.

20. A federal agency is required to consult with the Secretary with regard to "any action *authorized, funded,* or *carried out* by such agency" that may jeopardize an endangered or threatened species. 16 U.S.C. § 1536(a)(2) (1986) (emphasis added). Consequently, consultation was required with regard to any federal agency action abroad that was "authorized," "funded" or "carried out" by, for example, the State Department, the Armed Forces or any other federal agency. Telephone interview with Nancy Sweeney, Section 7 Coordinator for the Department of the Interior, Fish and Wildlife Service, Office of Endangered Species (Oct. 15, 1987).

21. 51 Fed. Reg. 19,926 (1986) (codified at 50 C.F.R. § 402).

22. Endangered Species Act Amendments of 1982, Pub. L. 97-304, 96 Stat. 1417 (1982). The Act was further amended in 1986: Endangered Species Act Amendments of 1986, Pub. L. 99-659, 100 Stat. 3741 (1986).

23. 51 Fed. Reg. 19,926, 19,929 (1986).

explanations provided for this reversal were the "apparent domestic orientation of the consultation and exemption processes . . . and . . . the potential for interference with the sovereignty of foreign nations."[24]

Although the Secretary was concerned that requiring federal agencies acting abroad to comply with the consultation requirements of section 7 would interfere with the sovereignty of foreign nations, the consultation requirements of section 7 apply only to federal agencies, not to foreign nations or their citizens. Even if the Act barred a federal agency from engaging in activities that would potentially have an adverse affect on protected species, the Act would in no way bar a foreign government from taking such action on its own. As a result, the Secretary's concern that the imposition of the consultation requirement on federal agencies acting abroad will interfere with the sovereignty of foreign nations seems unfounded. This Note now turns to the Secretary's second contention that the consultation process of section 7 is domestically oriented.

IV. EXTRATERRITORIALITY

"Extraterritoriality has been defined as a term used to describe the act by which a state extends its jurisdiction beyond its own boundaries into the territory of another state, and exercises it over its nationals. . . ."[25] The consultation requirement of section 7 is an example of Congress extending its jurisdiction to cover the actions of federal agencies acting abroad.[26]

Generally, unless the contrary intent is manifested, United States law applies only to conduct occurring within the territorial jurisdiction of the United States.[27] Courts will examine both the

24. *Id.*

25. 15A C.J.S. *Conflict of Laws* § 6 (1967).

26. It may be argued that the application of the consultation requirement of section 7 to agency actions abroad is not an extraterritorial application of United States law, but rather is merely a recognition that federal agencies, before acting anywhere, must consult with the Secretary in order to avoid harm to endangered or threatened species. In other words, the consultation regarding actions taken abroad occurs in the United States, not abroad, therefore, this is not a matter of extraterritoriality. Even if one were to accept this conclusion, the following argument regarding Congress' intent to require consultation with regard to federal agency actions taken abroad applies.

27. Blackmer v. United States, 284 U.S. 421, 437 (1932) ("[T]he legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States. . . ."); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965).

statute and its legislative history in order to ascertain whether Congress intended the statute to be applied extraterritorially.[28] This Note argues that the Endangered Species Act, both by its statutory language and its legislative history, manifests Congress' intent that the consultation requirements of section 7 apply to federal agency actions abroad. Consequently, the Secretary's contention that section 7 is domestically oriented is contrary to the intent of Congress.

V. The Statutory Language of Sections 4 and 7

Section 7 of the Act states that:

> *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 . . . is not likely to jeopardize the continued existence of *any endangered species* or *threatened species* . . . unless such agency has been granted an exemption for such action by the Committee. . . .[29]

The language of section 7, therefore, requires every agency to consult with the Secretary regarding *any action* which is likely to jeopardize *any endangered* or *threatened* species *regardless* of where that action takes place.

In the 1986 rule, however, the Secretary restricted the scope of section 7 consultations to the "United States, its territorial sea, and the outer continental shelf. . . ."[30] Nowhere does the language of section 7 limit the scope of the consultation requirements. On the contrary, the language of section 7 commands agencies to consult with the Secretary regarding any action which is likely to adversely affect any endangered or threatened species.

An endangered or threatened species is defined by the Act as any species that the Secretary lists pursuant to section 4.[31] Section 4(b)(1)(A) sets forth the basis for determining whether a particular species is threatened or endangered:

> 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

28. *See* Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (examining both the statute at issue and its legislative history and finding no evidence that Congress intended it to apply extraterritorially).

29. 16 U.S.C. § 1536(a)(2) (1982) (emphasis added).

30. 51 Fed. Reg. 19,926, 19,929 (1986).

31. 16 U.S.C. § 1533 (1982).

> those efforts, if any, being made by any State or *foreign nation*, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.
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> (B) In carrying out this section, the Secretary shall give consideration to species which have been—
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> (i) designated as requiring protection from unrestricted commerce by any *foreign nation*, or pursuant to any *international agreement*; or
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> (ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.[32]

The face of the statute, therefore, expresses Congress' intent that the Secretary list species found outside as well as within the United States. This conclusion follows from the fact that Congress directed the Secretary to consider listing species which foreign nations have designated as being in need of protection,[33] and the fact that the Secretary is to take "into account those efforts . . . being made by any . . . foreign nation . . . to protect such species."[34]

In addition, the Secretary himself has interpreted the section 4 requirements to include the listing of endangered or threatened *foreign* species. In the 1986 rule, immediately following the Secretary's decision not to apply the consultation requirements of section 7 extraterritorially, the Secretary affirmed that:

> although consultations on Federal actions in foreign countries will not be conducted under this rule, the Service maintains its strong commitment to the preservation of species and habitat worldwide. The Service will continue to list species which are found outside of the United States jurisdiction when they are determined to be endangered or threatened.[35]

The Secretary's declared commitment to worldwide species preservation, and his determination to continue listing foreign species that he determines to be endangered or threatened, appears difficult to reconcile with his decision to restrict the territorial scope of the section 7 consultation requirements to "the United States, its territorial sea and the outer continental shelf."[36]

32. *Id.* at § 1533(b) (emphasis added).
33. *Id.* at § 1533(b)(1)(B)(i).
34. *Id.* at § 1533(b)(1)(A) (emphasis added).
35. 51 Fed. Reg. 19,926, 19,930 (1986).
36. *Id.* at 19,929.

Section 7 requires each federal agency to consult with the Secretary in order to insure that its actions are "not likely to jeopardize the continued existence of *any endangered or threatened species*. . . ."[37] The Act, therefore, indicates that once the Secretary has listed or proposed to list[38] a species, a federal agency that wishes to take an action that may jeopardize the species must comply with the section 7 consultation requirements. Since the Secretary himself agrees that Congress intended foreign species to be listed, it is contrary to the clear intent of Congress not to require consultation for federal agency actions abroad that are likely to jeopardize the listed foreign species.

By reading section 4 and section 7 of the Act together, and by recognizing their interrelationship, it becomes clear that the 1986 rule regarding section 7 is contrary to the purpose of the Act, and that Congress intended section 7 to apply extraterritorially. The legislative history of sections 4 and 7 further supports this reading of the Act's consultation requirements.

VI. The Legislative History of Section 4 and Section 7

The Conference Committee for the 1982 amendments to the Endangered Species Act stated that "the requirement that the Secretary consider for listing those species that states or *foreign nations* have designated or identified as in need of protection . . . remains unchanged."[39] Thus, in the most recent amendments to the Act, Congress reaffirmed its wish that the Secretary consider foreign species for listing. In accordance with this requirement, the Secretary has consistently listed species whose range is both without and within the United States jurisdiction. In fact, as of October 1, 1986, the historic range of 66% of the wildlife species listed was foreign.[40] Congress has, therefore, demonstrated that it is concerned with the preservation of foreign as well as domestic species.

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

38. *Id.* § 1536(a)(4).

39. H.R. Rep. No. 835, 97th Cong., 2d Sess. 20, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807, 2861 (emphasis added).

40. Out of the 785 wildlife species listed in 50 C.F.R. § 17.11(h) (1987), 521 are foreign. "The 'historic range' indicates the known general distribution of the species or subspecies reported in the current scientific literature." 50 C.F.R. § 17.11(e) (1987).

The 1973 Senate Report, commenting on what is now section 4(d),[41] stated that once the Secretary has listed a species as threatened he must issue regulations to protect that species.[42] This requirement expresses the desire of Congress to take affirmative action to protect threatened species. It would be illogical, on the one hand, for Congress to require the Secretary to promulgate regulations protecting threatened species under section 4(d) and, on the other hand, not require federal agencies that are likely to jeopardize the very same species to consult with the Secretary. Consequently, it follows that Congress meant for the listing of a species to trigger the full protections of the Act, including the consultation requirements of section 7.

The House Report of the 1982 amendments to the Act supports this conclusion. It states that "[t]he protective measures to counter species extinction take effect when a species is listed. . . ." "Listing a species," it continues, "implies several responsibilities created by other sections of the Act, the most wide-ranging, effective and controversial of which are encompassed in Section 7."[43] From this it appears that Congress intended a species listed under section 4 to come under the full protection of the Act, especially the consultation requirements of section 7. Since it appears evident that Congress intended foreign species to be listed, it follows that such species should be protected by the consultation requirements of section 7.

The evolution of section 7 also supports the conclusion that the consultation requirements were intended to apply to federal agency actions abroad. The original section 7 of the Act was quite short. It stated in full that:

41.

> Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any state which has entered into a cooperative agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been adopted by such state.

16 U.S.C. § 1533(d) (1982).

42. S. REP. No. 307, 93d Cong., 1st Sess. 8, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2989, 2996.

43. H.R. REP. No. 567, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. CODE CONG. & AD NEWS 2807, 2810.

> the Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.[44]

On April 22, 1975 the Secretary held a meeting with federal agencies to discuss the Act and its effect on the operation of the agencies. At that time, the agencies requested that guidelines be issued to clarify their responsibilities under the Act.[45] On April 22, 1976 the Secretary issued "Guidelines to Assist the Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973." These guidelines were later modified by the Secretary and issued as a proposed rule.[46] The proposed rule,[47] which was the subject of considerable comment by federal agencies, led to the promulgation of the final rule on January 4, 1978.[48] Both the proposed rule and the final rule made it very clear that federal agencies acting abroad were to consult with the Secretary to insure that their actions did not jeopardize foreign species.[49] Thus, by the time the rule was promulgated in 1978 it was generally understood that section 7 applied to federal agency actions abroad.

Section 7 was amended by Congress in 1978,[50] 1979,[51] and 1982.[52] Although these amendments have substantially changed section 7, Congress has never explicitly or implicitly rejected the

44. 43 Fed. Reg. 870 (1978).
45. *Id.*
46. *Id.*
47. 42 Fed. Reg. 4868, 4870 (1977).
48. 43 Fed. Reg. 870 (1978).
49. *See* 42 Fed. Reg. 4869 (1977); 43 Fed. Reg. 873-74 (1978).
50. Endangered Species Act Amendments of 1978, Pub. L. 95-632, 92 Stat. 3752 (1978).
51. Endangered Species Act Amendments of 1979, Pub. L. 96-159, 93 Stat. 1226 (1979).
52. Endangered Species Act Amendments of 1982, Pub. L. 97-304, 96 Stat. 1417 (1982).

Secretary's determination that section 7 should apply extraterritorially. In fact, Congress on numerous occasions has expressed its approval of the Secretary's regulations. In October of 1978, the Conference Committee:

> adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. Conferees did restore a phrase which had been omitted from the Senate language, to clarify that Federal agencies shall consult with the Secretary to insure that their actions do not adversely impact threatened and endangered species or their critical habitat. *The Conferees 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.*[53]

In this way, Congress manifestly approved of the 1978 rule, including the Secretary's determination that the Section 7 consultation protections applied extraterritorially.

In 1982 the House Committee "in considering other amendments to Section 7(a) . . . *decided not to change the substantive duty of Section 7(a)(2).*"[54] The Committee noted that compliance with section 7(a)(2) had not been overly burdensome to federal agencies; in fact, they noted, the consultation provisions had served as a way to avoid conflicts between species conservation and federal agency action.[55] Accordingly, the Committee not only approved of the existing law, which included the Secretary's 1978 regulation applying the section 7 requirements to federal agency actions abroad, but also stated that compliance with section 7 had not proven overly burdensome.

Even after the Secretary reversed the 1978 rule, the House Committee on Appropriations expressed its desire that federal agencies continue to consult with the Secretary regarding actions taken abroad.[56] In recommending an increase of $300,000 to fund consultations, the Committee stated that it "expects the [Secretary] . . . to continue to provide consultation on endan-

53. H.R. REP. No. 1804, 97th Cong., 2d Sess. 18, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 9453, 9486 (emphasis added).

54. H.R. REP. No. 567, 97th Cong., 2d Sess. 24, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2807, 2824 (emphasis added).

55. *Id.*

56. H.R. REP. No. 714, 99th Cong., 2d Sess. 19 (1986).

gered species to United States agencies dispensing foreign assistance."[57]

In sum, the legislative history shows that Congress has consistently approved of the Secretary's 1978 interpretation of section 7. This, in conjunction with the language of the statute, leads to the inescapable conclusion that the consultation requirements of section 7 were meant to apply to federal agency actions abroad as well as those occurring within the territory of the United States. Additional support for this conclusion can be uncovered through an examination of other sections of the Act.

VII. Other Provisions of the Endangered Species Act

Thus far this Note has examined the language and legislative history of sections 4 and 7 of the Act. Other sections of the Act and their legislative history also demonstrate Congress' commitment to international wildlife preservation. These sections, read in conjunction with sections 4 and 7 further support the conclusion that the consultation requirements of section 7 were meant to apply to federal agency actions abroad.

Section 1(a) of the Act,[58] which contains the legislative findings, expresses Congress' concern for world species preservation. In one of these findings:

> Congress finds and declares that—
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> . . .
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> (4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—
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> (A) migratory bird treaties with Canada and Mexico;
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> (B) the Migratory and Endangered Bird Treaty with Japan;
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> (C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;
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> (D) the International Convention for the Northern Atlantic Fisheries;
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> (E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;
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> (F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and
>
> (G) other international agreements.[59]

57. *Id.*
58. 16 U.S.C. § 1531(a) (1982).
59. *Id.* § 1531(a)(4).

In section 1(b) Congress further declared that:

> the purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.[60]

Congress, by the language of the Act acknowledges that the United States is dedicated to world wildlife preservation and declares its intent to support the Government's international commitments. Permitting federal agencies to act abroad without consulting with the Secretary would be a poor way for the United States to honor these commitments; thus, Congress must have intended to apply section 7 extraterritorially.

The legislative background for the Endangered Species Act of 1973 specifically addressed congressional concern for the preservation of world wildlife. The Senate Commerce Committee commented that "it ha[d] become increasingly apparent that some sort of protective measures . . . [had to] be taken to prevent the further extinction of the *world's* animal species."[61] The Committee further noted that since "the federal government ha[d] already acknowledged the need for international cooperation in the protection of endangered wildlife by entering into several agreements with other nations . . . the bill [would] provide a means for implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. . . ."[62] Thus, from its inception, the Endangered Species Act has been integrally connected with the United States' international efforts to preserve endangered species. The legislative history, further, illustrates Congress' general concern that something be done to prevent the further extinction of world wildlife resources. As one commentator has written: "the dominant theme pervading all congressional discussion of the proposed Act was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources."[63]

60. *Id.* § 1531(b).

61. S. REP. No. 307, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2989, 2990 (emphasis added).

62. *Id.* at 5, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS at 2993.

63. Coggins, *supra* note 2, at 321.

In light of the United States' treaty commitments and Congress' desire to help implement those agreements, and in light of Congress' general concern for the plight of endangered species all over the world, it seems contrary to the policies expressed in the Act to conclude, as the Secretary has done,[64] that the consultation requirements of section 7 do not apply to federal agencies acting abroad.

VIII. Conclusion

This Note concludes that Congress intended the consultation requirements of section 7 to apply to federal agency actions abroad. As a result, the Secretary's finding that the consultation requirements apply only to federal agency actions within United States territory violates the intent of Congress. A court reviewing the Secretary's 1986 rulemaking should, therefore, give effect to the intent of Congress, reinstate the 1978 regulation, and apply the section 7 requirements extraterritorially.[65]

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64. 51 Fed Reg. 19,926, 19,929 (1986).

65. Although this Note does not address administrative law issues in detail, it should be noted that when a reviewing court is presented with administrative regulations that interpret the agency's governing statute, the court may invalidate the regulations if they exceed the agency's statutory authority or do not reflect reasoned decisionmaking. The Administrative Procedure Act states that:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;
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> (E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. . . .

5 U.S.C. § 706 (1982).

This Note has demonstrated that the Secretary's regulation is contrary to the intent of Congress. The Supreme Court in Chevron U.S.A. v. Natural Resources Defense Council,

467 U.S. 837, 842 (1984) held that "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Thus, a reviewing court would be required to rescind the 1986 rule and reinstate the 1978 rule applying section 7 extraterritorially.

Even assuming that the Secretary could show that the 1986 regulation was not contrary to the intent of Congress, the Secretary would still be required to supply, which he has not done, a reasoned analysis for his decision to restrict the scope of section 7. Thus, a reviewing court should at least require the Secretary to provide a reasoned analysis for the 1986 reversal. *See* Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile Insurance Co., 463 U.S. 29, 41 (1983).