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Have We All Gone Batty? The Need for a Better Balance Between the Conservation of Protected Species and the Development of Clean Renewable Energy

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HAVE WE ALL GONE BATTY? THE NEED FOR A BETTER BALANCE BETWEEN THE CONSERVATION OF PROTECTED SPECIES AND THE DEVELOPMENT OF CLEAN RENEWABLE ENERGY

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My face is all cut up cause / My radar's all shut up /
Nurse I need a check-up from the neck up / I'm Batty![1]

INTRODUCTION

Fears of collision with blades and radar interference have caused a stir in the world of renewable energy.[2] Animal rights activists argue that wind farms have an adverse effect on bat populations across the country.[3] In a recent Maryland circuit court decision, *Animal Welfare Institute v. Beech Ridge Energy* ("*Beech Ridge*"), a judge granted a preliminary injunction against the continued development of a mountain top wind farm in favor of a citizen activist group on behalf of the Indiana bat.[4]

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[1] FERN GULLY, *The Batty Rap* (Kroyer Films 1992).

[2] *See* Press Release, Animal Welfare Inst., Federal Court Rules Massive Wind Energy Project in Violation of Endangered Species Act: Judge Prevents Project That Will Kill Hundreds of Thousands of Bats From Proceeding Without Federal Permit (June 11, 2009), http://www.awionline.org/content/federal-court-rules-massive-wind-energy-project-violation-endangered-species-act [hereinafter Animal Welfare Inst., Judge Prevents Project]. "This court has made clear to Beech Ridge and its parent company, Invenergy, that the ESA [Endangered Species Act] has teeth, that the Indiana bat will be harmed by this project, and that these companies don't get a free pass to violate the ESA." (quoting Dave Cowan, "an avid spelunker who is experienced with West Virginia's caves"). *Id.*

[3] *See* Animal Welfare Inst., Judge Prevents Project, *supra* note 2.

[4] Animal Welfare Inst. v. Beech Ridge Energy, LLC (*Beech Ridge*), 675 F. Supp. 2d 540, 581 (D. Md. 2009).

While desirable to protect the endangered species of our nation, it is equally important to encourage the research and development of clean renewable energy. This Note proposes that Congress enact new legislation to better balance these interests. The court in *Beech Ridge* believed that "[t]he two vital federal policies at issue . . . [were] not necessarily in conflict."[5] The history of the Beech Ridge project, however, tells a different story.[6] Several years of litigation on the issues of siting, neighbor conflict, and the Indiana bat was time consuming and costly, not just because of the litigation, but also the prolonged starting date of turbine operation.[7]

In order to prevent situations like *Beech Ridge* and require judges to grant injunctions with a very low burden of proof, this Note proposes new legislation to better balance the interests of affected species with efficient renewable energy development. By putting an end to citizen suits and the resulting litigation, companies will be better able to spend money on thorough research and mitigation techniques and technologies. Ultimately, this will enable faster development of renewable energy and better species conservation.

First, this Note will trace the history of the Beech Ridge Energy litigation and the uncertainty regarding the bats' presence.[8] Secondly, the note will set up the importance of renewable energy and the necessity of allowing its development without fear of the Endangered Species Act ("ESA") litigation.[9] The fourth section will provide an overview of the ESA by detailing certain components within and how the common law has in effect broadened the reach of the ESA.[10] The final section will address why and how Congress should carve out a new provision within the ESA to encourage this development and protect it from sometimes impractical litigation.[11]

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[5] *Id.* at 581.
[6] *See infra* Part I.
[7] It took over five years before Beech Ridge could successfully complete their project. *See infra* Part I.B. It began the permit application in 2005 and it was not until January 2010 that it could begin construction. *See* Press Release, Invenergy, Invenergy to Complete Construction of West Virginia Wind Farm Following Agreement to Protect Indiana Bat (Jan. 27, 2010) *available at* http://www.invenergyllc.com/news/Greenbrier_County_Agreement_F2doc.pdf.
[8] *See infra* Part II.C.
[9] *See infra* Part III.
[10] *See infra* Part IV.
[11] *See infra* Part V.

I. THE INDIANA BAT VERSUS BEECH RIDGE

Deep in the mountains of Greenbrier County, West Virginia, exist a number of high elevation ridgelines popular not only to the local residents and tourist hikers, but also to wind farm developers.[12] These ridgelines exist at an altitude where wind quickly generates speed as it passes over and through the valleys below.[13] Because of the speed at which the wind whirls through the county, these ridgelines have become a desirable location for wind turbine development.[14] This popularity, however, created tension among the county residents.[15]

A. Selecting Beech Ridge for a Wind Farm

Beech Ridge Energy ("Beech Ridge"), a subsidiary of Invenergy Wind LLC, spent time and money looking for a location "absen[t] of any known critical habitats for threatened or endangered species."[16] What began as a small company dedicated to creating cleaner energy,[17] Beech Ridge found itself as the defendant in a number of lawsuits aimed at ending the project altogether.[18]

In an attempt to be environmentally friendly, Beech Ridge purposefully looked for a location that would ensure the wind turbines would be used to the maximum capacity while minimizing the impact on the surrounding community.[19] The site needed to be close to a previously existing

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[12] Cristina Opdahl, *Chasing Wind Mills*, BLUE RIDGE OUTDOORS MAG., Dec. 1, 2007, http://www.blueridgeoutdoors.com/eco/news-issues/chasing-wind-mills/.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Mountain Cmtys. for Responsible Energy v. Pub. Serv. Comm'n, 665 S.E.2d 315, 319 n.3 (W. Va. 2008). Before litigation even began on behalf of the Indiana bat, Beech Ridge faced substantial litigation after receiving proper siting approval. *See generally id.* (in which a non-profit group, Mountain Communities for Responsible Energy, and two individuals, Alicia A. and Jeffrey C. Eisenbeiss, appealed the decision of the Public Service Commission); Public Service Commission of West Virginia Charleston, Beech Ridge Energy LLC, Commission Order, Case No. 05-1590-E-CS (Aug. 28, 2006), *available at* http://www.fws.gov/westvirginiafieldoffice/PDF/WVPSC-ord20060828181204%5B1%5D.pdf (the Public Service Commission of West Virginia granted Beech Ridge Energy's application for a siting certificate).
[17] Telephone Interview with David Groberg, Vice President, Development, Invenergy LLC (Oct. 20, 2010).
[18] *See infra* Part I.B.
[19] *See* Telephone Interview with David Groberg, *supra* note 17.

power grid so as to allow its immediate use and energy distribution.[20] Beech Ridge also wanted a location that had been or was still in use for other purposes such as hunting, natural gas collection, coal mining, or radio tower sites.[21]

The company found an ideal piece of property, meeting all the above criteria, on Beech Ridge in the mountains of West Virginia, situated on a large tract of privately owned land.[22] While local residents often fear that wind turbines may be built on the edge of the property, in this instance, development was to be set back a minimum of one mile from nearby property owners.[23] Beech Ridge chose a location that would not only include favorable wind conditions, but also had a minimal impact on nearby property owners.[24] With all these factors in their favor, Beech Ridge began implementing its plan for development.[25]

B. Siting Permits and Litigation

In 2005, Beech Ridge applied to the West Virginia Public Service Commission ("Commission") to receive a siting certificate so it could build the mountaintop wind farm.[26] In April of 2006, the Commission opened up two public hearings on the matter to the community in order to gain feedback from county residents.[27] The Commission held evidentiary hearings in May and granted Beech Ridge a siting certificate that August.[28]

Meanwhile a group of county residents had banded together in the form of a non-profit organization, Mountain Communities for Responsible

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[20] *See id.*

[21] *See id.* Sites that have been or are currently in use have developed roads and land making less of an impact on the neighboring properties and reforming the uses for which may no longer be wanted. *See id.*

[22] *See id.* In this case, MeadWestvaco owned the majority of the affected property. *West Virginia Gives Go-Ahead for Beech Ridge Wind Farm*, GO WIND SOLUTIONS, Feb. 14, 2011, http://gowindsolutions.com/home/index.php?option=com_content&view=article&id=190:west-virginia-gives-go-ahead-for-beech-ridge-wind-farm&catid=34:latest-news&Itemid=50.

[23] Telephone Interview with David Groberg, *supra* note 17.

[24] *Id.* Groberg explained that this is one of the best areas to develop wind energy on the East Coast due to its unique location. *Id.* As mentioned, Beech Ridge is set back more than a mile from other property owners whereas other parts of the East Coast proposals have been considered with a much smaller margin. *See supra* notes 22–23 and accompanying text.

[25] *See* Telephone Interview with David Groberg, *supra* note 17.

[26] Mountain Cmtys. for Responsible Energy v. Pub. Serv. Comm'n, 665 S.E.2d 315, 320 (W. Va. 2008).

[27] *Id.*

[28] *Id.*

Energy ("MCRE"), to object to the Commission's granting of a siting certificate.[29] Their ultimate goal was to "assess and disclose the impacts of . . . [the Beech Ridge project] in Greenbrier County."[30] Less than a month later, MCRE filed a petition for reconsideration.[31] The Commission found that Beech Ridge had met all the obligations imposed upon it by the certificate and MCRE had presented no evidence to the contrary.[32] The motion for reconsideration was denied by the Commission.[33]

In February of 2007, MCRE filed a petition for appeal with the Supreme Court of West Virginia, as did Alicia and Jeffrey Eisenbeiss.[34] The petitions were granted and consolidated,[35] and an appeal followed in June of 2008.[36] Beech Ridge, however, prevailed when the Commission's decision to grant the siting certificate was affirmed.[37] Unsatisfied with the outcome, the plaintiffs tried once again to appeal the court's decision, but the court refused the motion on September 2, 2009 and once again the path was clear for Beech Ridge.[38] Before beginning development on the wind turbines, Beech Ridge began researching whether any listed species would be affected by the development.[39]

C. The Indiana Bat and the Efforts to Determine Local Presence

In March of 1967, the Indiana bat (*myotis sodalis*) became one of the first species listed under the ESA.[40] A decline in the numbers gathered

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[29] *See* Animal Welfare Inst. v. Beech Ridge Energy, LLC, 675 F. Supp. 2d 540, 559 (D. Md. 2009).
[30] *Id.*
[31] *Mountain Cmtys.*, 665 S.E.2d at 322.
[32] *Id.* at 324–25.
[33] *Id.* at 322.
[34] *Id.*
[35] *Id.* at 322.
[36] *Id.* at 315–16.
[37] *Mountain Cmtys.*, 665 S.E.2d at 322.
[38] Public Service Commission of West Virginia, Beech Ridge Energy, LLC, Commission Order entering the Supreme Court Order refusing the petition for appeal filed by Alicia and Jeffrey Eisenbeiss, Case No. 05-1590-E-CS (Sept. 9, 2009), *available at* http://www.psc.state.wv.us/WebDocket (search by Case Number, enter "05-1590-E-CS") (last visited Apr. 5, 2012); Public Service Commission of West Virginia, Beech Ridge Energy, LLC, Commission Order entering the Supreme Court Order refusing the petition for appeal filed by Mountain Communities for Responsible Energy, Case No. 05-1590-E-CS (Sept. 9, 2009), *available at* http://www.psc.state.wv.us/WebDocket (search by case number, enter "05-1590-E-CS") (last visited Apr. 5, 2012).
[39] *See* Telephone Interview with David Groberg, *supra* note 17.
[40] Endangered and Threatened Wildlife, 50 C.F.R. § 17.11 (2009); *BCI Species Profiles: Myotis Sodalis*, BAT CONSERVATION INT'L, http://www.batcon.org/index.php/all-about-bats

at known hibernation sites indicated a serious decline in the species.[41] Although scientists later realized that the Indiana bat also nests in tree trunks during the mating season,[42] which suggested the existence of previously unrecorded numbers, the Indiana bat remains listed under the Endangered Species Act.[43] The Indiana bat's decline in population has been the result of various factors including cave commercialization, pesticides, and a recently discovered disease called white-nose syndrome.[44]

To establish whether the project would impact the bats, Beech Ridge hired the environmental consulting firm BHE Environmental, Inc. To "assess[] potential risks to bat species at the Beech Ridge Project site" and the bats' mortality rates.[45] In surveying the county, BHE found that the two closest hibernacula[46] known to contain Indiana bats are Snedegar's Cave[47] and Martha's Cave, which are located 6.7 and 9.6 miles, respectively, from the closest turbines.[48] Departure from the hibernacula, however, during spring and fall is normally within a radius of about ten miles.[49]

In order to ascertain whether Indiana bats lived near enough to the location Beech Ridge intended to build such that they would be at risk of flying too close to the turbines,[50] BHE employed mist netting to capture any bats that would be at risk of injury.[51] BHE captured seventy-eight bats in

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/species-profiles.html?task=detail&species=2323&country=43&state=all&family=all&start=25 (last visited Apr. 5, 2012).

[41] *BCI Species Profile: Myotis Sodalis*, *supra* note 40.

[42] *Id.*

[43] 50 C.F.R. § 17.11.

[44] *Indiana Bat* (Myotis Sodalis), U.S. FISH & WILDLIFE SERV., ENDANGERED SPECIES, http://www.fws.gov/midwest/endangered/mammals/inba/index.html (last visited Apr. 5, 2012).

[45] Animal Welfare Inst. v. Beech Ridge Energy, LLC, 675 F. Supp. 2d 540, 547–49.

[46] A bat hibernacula is a place in which bats hibernate during the winter months. Bat Hibernaculum (*Bat Hibernaculum*), Wisc. Dep't of Nat. Res. (June 1, 2011), http://dnr.wi.gov/org/land/er/biodiversity/index.asp?mode=info&Grp=5&SpecCode=OBATCOLONY. These sites may be old mines, caves, or hollowed trees. *Id.*

[47] Snedegar's cave had a population of approximately 287 Indiana bats in the winter of 2008 and is "located approximately 6.7 miles east of the nearest turbine." *Beech Ridge*, 675 F. Supp. 2d at 567.

[48] *Id.* Martha's cave had a population of approximately 251 Indiana bats in the winter of 2008 and is "located approximately 9.6 miles east of the nearest turbine."

[49] *See Indiana Bat (*Myotis Sodalis*) [Endangered]*, U.S. FISH & WILDLIFE SERV.—N.J. FIELD OFF. (June 27, 2011), http://www.fws.gov/northeast/njfieldoffice/Endangered/Ibat.html ("Studies indicate that Indiana bats typically forage within 10 miles of hibernacula before and after hibernation.").

[50] *See* Telephone Interview with David Groberg, *supra* note 17.

[51] Mist netting is made of small mesh and attached to ropes and poles twenty to thirty feet high and twenty to sixty feet across in an effort to catch bats flying through a particular area. *Beech Ridge*, 675 F. Supp. 2d at 549, 549 n.9.

July of 2006.[52] While six different species were represented, none were the Indiana bat and none were endangered.[53] After the nets failed to trap any Indiana bats, Beech Ridge moved forward with development.[54] Because of these findings, Beech Ridge did not apply for an Incidental Take Permit ("ITP"),[55] but continued to research and implement measures designed to mitigate potential bat mortality.[56]

Both the company and the state were comfortable with the due diligence done by Beech Ridge and their plan for moving forward with development.[57] Even the Fish and Wildlife Service ("FWS") "considered Beech Ridge as a 'lower risk' project, and that the developers should not be concerned about receiving negative input from the FWS if the project remained on track."[58] With all the hard work and concern for the best interest of the environment, species, and neighbors in the county,[59] Beech Ridge did not expect to find itself in yet another lawsuit.

D. Beech Ridge Energy, LLC v. Animal Welfare Institute

Despite its loss in the West Virginia Supreme Court,[60] MCRE now had a new forum to end the Beech Ridge project development. A neighboring landowner, David Cowan, and the Animal Welfare Institute ("AWI")[61] were in the process of pursuing litigation with Beech Ridge

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[52] *See id.* at 550. When bats fly in an area where mist netting has been employed, they become tangled in the mesh and researchers can more easily determine which species are present at the site. *Id.* at 549 n.9.
[53] *Id.* at 550.
[54] *Id.*; *see also* Telephone Interview with David Groberg, *supra* note 17.
[55] *See infra* Part III.C for a definition and discussion of how an ITP can allow developers to continue with projects even if an endangered species is harmed or killed.
[56] Telephone Interview with David Groberg, *supra* note 17; *see also* Mountain Cmtys. for Responsible Energy v. Pub. Serv. Comm'n, 665 S.E.2d 315, 322 (W. Va. 2008).
[57] Telephone Interview with David Groberg, *supra* note 17.
[58] *Beech Ridge*, 675 F. Supp. 2d at 552. Further, Christy Johnson-Hughes, a Senior Biologist for the FWS, said that after reviewing the reports regarding the Indiana bat studies, the FWS "would write a letter to the WV PSC indicating that it had no significant concerns regarding the project's impact on threatened and endangered species." *Id.*
[59] *See id.* at 549–52.
[60] *See supra* notes 30–34 and accompanying text.
[61] AWI is an organization dedicated to "alleviat[ing] the suffering inflicted on animals by people." *Who We Are*, ANIMAL WELFARE INST., http://www.awionline.org/about-awi/who-we-are/who-we-are (last visited Apr. 5, 2012).

regarding the Indiana bat.[62] After joining forces,[63] they initiated an action for declaratory and injunctive relief against completion of the energy project on behalf of the Indiana bat.[64] There were two issues in dispute: 1) were Indiana bats present at the site; and 2) whether "the project [was] reasonably certain to imminently harm, kill, or wound Indiana bats."[65]

In considering the first issue, the court applied a "reasonable certainty standard"; to "require absolute certainty . . . would frustrate the purpose of the ESA to protect endangered species."[66] Beech Ridge had already conducted research on this issue and had found that the potential presence of Indiana bats was not such that they would be impacted by the wind farm.[67]

First, the court considered the relationship between the hibernacula, the sites, and the likelihood that bats would fly in the proximate vicinity of the turbines.[68] A few studies presented showed that the Indiana bats travel beyond that five mile radius,[69] and the court noted that the "absence of hibernacula within five miles does not eliminate the possibility that Indiana bats are present."[70]

The court next considered a series of acoustic data collected by an Anabat detector.[71] These detectors have the ability to record the ultrasonic pulses made by bats' echolocation as a means to determine their presence.[72] Because bats use echolocation[73] as they fly, scientists recommend the use of this technology (acoustic detection) to measure bat

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[62] Plaintiffs filed their action for declaratory and injunctive relief on June 10, 2009. *See Beech Ridge*, 675 F. Supp. at 542.
[63] Following several discussions, the parties agreed to treat the hearing on the preliminary injunction as one on the merits and set the date for Oct. 21, 2009. *Id.* at 543.
[64] *Id.* at 542.
[65] *Id.* at 564.
[66] *Id.* at 563–64.
[67] *See supra* Part I.C.
[68] *Beech Ridge*, 675 F. Supp. 2d at 567.
[69] *See id.* at 568.
[70] *Id.*
[71] *See id.* at 570–75.
[72] *Id.* at 557. David Groberg also mentioned in the interview that it was the first and only time a court has ever granted an injunction based on acoustic data alone. Telephone Interview with David Groberg, *supra* note 17.
[73] Echolocation is the way in which bats locate objects around them as they fly, by emitting sound waves that reflect off the object and back to the bat to determine how close those objects may be. *See Echolocation Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/echolocation (last visited Apr. 5, 2012).

activity in an area of potential wind farm development.[74] The Anabat detector records these pulses to a computer which then analyzes the data to determine the number and proximity of regional bats.[75] The collection of acoustic data, however, was neither solicited by the company[76] nor was it required.[77] Although potentially useful, this technology does not come without its share of problems.

One problem is that detectors require regular maintenance in order to accurately collect data. The detectors need to be placed at a height of approximately thirty meters where the blades will be present,[78] which makes installation and upkeep more challenging. Furthermore, if there are to be more than five turbines, it suggests that the survey use multiple detectors at the peripheries of the siting location as well as in the center,[79] adding to the number that need to be maintained. Because of their location, the detectors run on batteries and thus require constant attention to ensure that the batteries have not weakened.[80] When the power decreases, the effectiveness and sensitivity of the detector weakens,[81] and as a result, fails to be as accurate. Another problem is the microphones themselves; exposure to rain and wind can interfere with the collection of ultrasound data.[82] Any number of sounds may trigger the detector,

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[74] Cori Lausen et al., *Bats and Wind Turbines. APPENDIX 5. Bats and Wind Turbines. Pre-siting and Pre-construction Survey Protocols* 3 (Univ. of Calgary May 2006), *reprinted as an appendix in* MAARTEN VONHOF, HANDBOOK OF INVENTORY METHODS AND STANDARD PROTOCOLS FOR SURVEYING BATS IN ALBERTA (Alberta Fish & Wildlife Div. rev. ed. 2005), *available at* http://www.wbwg.org/conservation/papers/TurbineProtocol15May06R.pdf [hereinafter Lausen et al., *Pre-siting and Pre-construction Survey*].

[75] *Beech Ridge*, 675 F. Supp. 2d at 557 n.18.

[76] "No one instructed Libby to use AnaBat detectors during the summer 2005 survey." *Id.* at 557. "Groberg testified at trial that he did not prohibit BHE from performing acoustic detection, but that acoustic studies would be outside the scope of the work that BHE was hired to conduct." *Id.* at 557 n.20.

[77] *See Bat Survey Protocol for Assessing Use of Potential Hibernacula*, U.S. FISH & WILDLIFE SERV.—INDIANA BAT (MYOTIS SODALIST) 1 (Mar. 16, 2012), http://www.fws.gov/midwest/endangered/mammals/inba/pdf/inba_srvyprtcl.pdf. The Fish and Wildlife Service sets forth guidelines for determining whether the species is present in a particular hibernacula. While it mentions that failure to catch a particular species does not confirm its absence, it lists the means by which surveys should be conducted to determine their existence in a particular location. *Id.* at 2. Among the list of methods, Anabat detectors are not enumerated as a potential method. *Id.*

[78] Lausen et al., *Pre-siting and Pre-construction Survey*, *supra* note 74, at 3.

[79] *Id.*

[80] *Id.* at 4.

[81] *Id.*

[82] *Id.* at 3.

such as wind noise,[83] and the memory card used to record the echolocation noises must be large enough to capture long periods of data.[84]

A second major problem lies with the software programs used to interpret the data once it is collected. Gary Libby, the man responsible for supervising the mist netting, voluntarily collected acoustic data on two out of the three days on which mist netting was deployed.[85] He testified that the Anabat technology is not sufficient to confirm that the recording is that of an Indiana bat and that he can only know with certainty when he is holding it in his hand.[86]

Using a Britzke filter on the data collected by Libby during the mist netting, BHE found that no Indiana bats had been recorded during the two nights that Libby used the Anabat detector.[87] Lynn Robbins, an expert for the plaintiffs,[88] referred to the Britzke method as the "filter for dummies."[89] Determining that BHE's use of the Britzke filter was insufficient due to its conservative nature,[90] Robbins altered the means through which the Britzke filter identifies bat calls.[91] Robbins tested known Indiana bat calls against the filter as BHE had used it and found that only twenty-seven percent resulted in a positive match.[92] By altering the filter to match only one pulse rather than five as required by the original design, Robbins obtained a seventy-four percent positive result.[93] It was only after modifying

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[83] *Id.*
[84] Lausen et al., *Pre-siting and Pre-construction Survey*, *supra* note 74, at 4.
[85] Animal Welfare Inst. v. Beech Ridge Energy, LLC, 675 F. Supp. 2d 540, 557 & n.19 (D. Md. 2009). Libby's reasoning for conducting the Anabat test was that it was routine procedure. *Id.* at 557. In his deposition, Libby explained that it was required in Kentucky to use AnaBat technology when conducting a mist netting survey. Deposition of Garry Libby at 140, Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540 (2009), 2009 WL 6423719 [hereinafter Deposition of Garry Libby].
[86] Deposition of Garry Libby, *supra* note 85, at 141.
[87] *Beech Ridge*, 675 F. Supp. 2d at 571. In Kentucky, the Britzke is the second of two filters used in determining the presence of bats. *Id.*
[88] His declaration statement contained language that he is charging "far lower than an expert with equivalent experience." Rebuttal Declaration of Lynn W. Robbins at 10, Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d (2009), 2009 WL 6038591.
[89] *Beech Ridge*, 675 F. Supp. 2d at 571.
[90] *See id.* ("Robbins explained that the Britzke filter is a very conservative filter because it makes a positive match only if five individual pulses in a sequence have the 'ideal characteristics' of an Indiana bat call.").
[91] *See id.* at 572.
[92] *Id.*
[93] *Id.*

the filter that Robbins achieved a positive result for possible Indiana bat presence at the Beech Ridge site.[94]

Libby explained during his deposition that the software was designed to assist in determining whether more mist netting should be employed but not to determine the "presence or absence" of a particular species.[95] Based on Robbins's testimony regarding his data analyses using a manipulated filter, "the Court conclude[d] by a preponderance of the evidence that there [was] a virtual certainty that Indiana bats are present . . . during the spring, summer, and fall."[96] Because other species of bats were known to have been killed by wind turbines, the court assumed it was equally likely that the Indiana bat would be harmed.[97]

The second issue addressed by the court was whether "the project is reasonably certain to imminently harm, kill, or wound Indiana bats."[98] One concern regarding bat mortality is the potential for actual harm caused by collision with the blades.[99] Beech Ridge introduced evidence showing that the Indiana bat does not usually fly to the elevation of the turbine blades:

> The towers are 263 feet tall and the rotors have a diameter of 253 feet. When the blade is pointing straight up at twelve o'clock, the turbine is 389 feet tall, and when the blade is pointing straight down at six o'clock, the bottom point of the blade is 137 feet off the ground.[100]

The Indiana bat is an "edge forager[,]" which means they tend to stay below the canopy line when they forage for food.[101] The canopy level was estimated to sit around sixty to eighty feet above ground[102]—well below the 137 foot line that marks the bottom of a turbine blade.[103] Although the bats are known to fly anywhere between six to one hundred feet

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[94] *See id.* at 571–72.
[95] Deposition of Garry Libby, *supra* note 85, at 141.
[96] *Beech Ridge*, 675 F. Supp. 2d at 575.
[97] *Id.* at 576.
[98] *Id.* at 564.
[99] NAT'L WIND COORDINATING COLLABORATIVE, WIND TURBINE INTERACTIONS WITH BIRDS, BATS, AND THEIR HABITATS: A SUMMARY OF RESEARCH RESULTS AND PRIORITY QUESTIONS 2 (2010), https://www.nationalwind.org/assets/publications/Birds_and_Bats_Fact_Sheet_.pdf.
[100] *Beech Ridge*, 675 F. Supp. 2d at 548 (citations omitted).
[101] *Id.* at 576.
[102] *Id.*
[103] *See supra* note 100 and accompanying text.

above ground level, Michael Lacki, an expert witness, testified that it is unlikely the bats would make themselves vulnerable by flying above the canopy.[104] Once again, however, plaintiffs' assertion that new research shows bats' ability to fly at altitudes as high as a kilometer above ground and "that Indiana bats may also fly at these altitudes" satisfied the court.[105]

During trial, Beech Ridge pointed out that "no Indiana bat ha[d] been confirmed dead at any wind power project in the country."[106] Furthermore, at the time of trial no Indiana bat had been captured in mist netting surveys, and more than a year later, no additional surveys have resulted in a capture.[107] Relying on other bat species' deaths should not be conclusive evidence. Because more research needs to be conducted, it is unclear why certain bats are more likely to be impacted than others.[108]

While it is important to study and better understand the impact of wind farm development on bats, there is very little evidence to find that the Indiana bat certainly resided in the siting location at Beech Ridge or that it would have certainly been harmed. The court concluded that "[t]he development of wind energy can and should be encouraged, but wind turbines must be good neighbors."[109] From the very beginning, Beech Ridge wanted to be a good neighbor and continue research to ensure that no Indiana bats would be harmed.[110] The court, "albeit reluctantly," granted the injunction because of the mandate imposed by the Endangered Species Act.[111] It is because of the development of endangered species litigation that has led to this seemingly unjust result.

The Beech Ridge saga makes it apparent that steps need to be taken to allow sustainable development to occur without fear of unexpected litigation. While treating the interest in protecting endangered species as paramount may be appropriate in some instances,[112] it causes unnecessary delay in the development of renewable energy[113]—an otherwise

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[104] *Beech Ridge*, 675 F. Supp. 2d at 577.
[105] *Id.*
[106] *Id.*
[107] Telephone Interview with David Groberg, *supra* note 17.
[108] *See* NAT'L WIND COORDINATING COLLABORATIVE, WIND TURBINE INTERACTIONS WITH BIRDS, BATS, AND THEIR HABITATS, *supra* note 99, at 4.
[109] *Beech Ridge*, 675 F. Supp. 2d at 583.
[110] *See supra* Part I.C.
[111] *Beech Ridge*, 675 F. Supp. 2d at 583.
[112] *See, e.g.*, Loggerhead Turtle v. County Council, 896 F. Supp. 1170, 1182 (M.D. Fla. 1995) (in which plaintiffs sued on behalf of the loggerhead turtle and were granted injunctive relief against nighttime beach drivers who were inadvertently killing the turtles).
[113] *See generally Beech Ridge*, 675 F. Supp. 2d 540.

environmentally friendly and useful technological advance which may ultimately protect more animals and ecosystems than a narrow focus on one particular species.[114]

II. THE NEED FOR CLEAN RENEWABLE ENERGY AND THE CONFLICT ARISING FROM ITS DEVELOPMENT

As we become more aware of the problems caused by dependence on oil, the need for more renewable energy development and implementation has become increasingly apparent. Clean renewable energy will not only stop emission of greenhouse gases, but ultimately help to reduce their presence and reduce our dependence on oil.[115] The continued development of clean renewable energy facilities and their positive effects on the environment are desirable. It seems logical that the benefits from these facilities are substantial enough to merit balancing against the interest in protecting endangered species in the judicial process.

Wind energy has the power to impact our nation's economy.[116] Because it is a solely domestic form of energy, it would not only provide Americans with jobs but internal revenue as well.[117] As some of the most advantageous locations for wind turbine development tend to be rural, this would bring new manufacturing jobs to and generate local business and revenue in these communities.[118] While some people may be adverse to the sight of turbines from their own property, they take up little space and the surrounding land may be used for other purposes such as farming or ranching.[119] Although it may be aesthetically undesirable to some, there are numerous benefits that may outweigh this narrow interest.

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[114] *See Renewable Energy Technologies*, U.S. DEP'T OF ENERGY, ENERGY EFFICIENCY & RENEWABLE ENERGY (Aug. 12, 2011), http://www.eere.energy.gov/basics/renewable_energy/index.html.

[115] *See Develop and Secure America's Energy Resources*, THE WHITE HOUSE, http://www.whitehouse.gov/energy/securing-american-energy#energy-menu (last visited Apr. 5, 2012).

[116] *See Advantages and Challenges of Wind Energy*, U.S. DEP'T OF ENERGY: WIND PROGRAM (Nov. 7, 2012), http://www1.eere.energy.gov/wind/m/wind_ad.html.

[117] *Id.*

[118] *See id.*; *see also* Todd Woody, *Revival of Iconic California Condor Threatens State's Wind Farm Boom*, FORBES, Jan. 4, 2012, http://www.forbes.com/sites/toddwoody/2012/01/04/revival-of-iconic-california-condor-threatens-states-wind-farm-boom/ ("The hotels are now full, the people who work in the restaurants now have someone to wait on . . . . If you were laying concrete for a house, now you're laying concrete for a turbine.").

[119] *Advantages & Challenges of Wind Energy*, *supra* note 116.

While it is important to encourage renewable energy development, it is imperative that Congress enable the most environmentally friendly forms to succeed. The U.S. Department of Energy ("DOE") divides renewable energy into six categories.[120] While each source of renewable energy is considered sustainable by the DOE,[121] it is arguable that not each listed category is a "clean" or efficient source of energy.[122]

A clean energy source should be produced through the input of a clean natural resource such as wind, sun, or water and result in an output that does not pose a threat to the environment. Not all scholars agree as to what constitutes renewable energy.[123] While biomass is consistently replenished, it is an "organic waste[] . . . produced by society," and to transform it into energy, it is burned which results in the emission of greenhouse gases.[124] Wind, water, and solar power, however, are produced from natural resources, and because there is no fuel combustion required to generate electricity, there are no harmful emissions.[125]

Clean renewable energy sources should also be those which do not have the potential for mass destruction. In order to promote the creation of energy sources that are unlikely to result in such an impact, proposed legislation should include only those forms of clean renewable energy that pose little risk of causing a large-scale disaster. For example, with nuclear power, which also fails the clean test because of its radioactive waste, there is a fear of greater public harm should a meltdown occur due to malfunction or terrorist activity.[126] The more nuclear power plants built, the higher probability that such an event could occur. Similarly, dams, in the event of a break, could cause catastrophe to the neighboring

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[120] The categories are: biomass, geothermal, hydrogen, water, solar, and wind. *Renewable Energy*, U.S. DEP'T OF ENERGY: ENERGY EFFICIENCY & RENEWABLE ENERGY, http://www.eere.energy.gov/topics/renewable_energy.html (last visited Apr. 5, 2012).

[121] To be considered sustainable, the earth must naturally replenish the source "at a rate equal to or greater than the depletion." John Arnold McKinsey, *Regulating Avian Impacts Under the Migratory Bird Treaty Act and Other Laws: The Wind Industry Collides with One of Its Own, The Environmental Protection Movement*, 28 ENERGY L.J. 71, 74 (2007).

[122] *Id.* at 74.

[123] *Id.* "The term 'renewable energy' . . . is not without debate as to its meaning." *Id.*

[124] *Non-Hydroelectric Renewable Energy*, U.S. ENVTL. PROT. AGENCY (Aug. 5, 2010), http://www.epa.gov/cleanenergy/energy-and-you/affect/non-hydro.html.

[125] *Id.*

[126] *See* Scott Sklar, *Nuclear Debacle—Not Clean, Not Safe*, RENEWABLEENERGY (Mar. 18, 2011), http://www.renewableenergyworld.com/rea/news/article/2011/03/nuclear-debacle-not-clean-not-safe.

lands, people, and animals.[127] It would be counterproductive to implement projects that could result in greater harm to species in a particular region in one fell swoop.

In order to truly protect the future of endangered species, clean renewable energy should be of a variety that will not result in the death of multiple species should an accident occur. It is also important to begin using energy sources that do not have a lasting negative impact on the environment in the same manner as greenhouse gasses.[128] It is with the benefits of clean renewable energy in mind that Congress should act to balance these benefits with those of the ESA.

III. THE HISTORY OF THE ENDANGERED SPECIES ACT AND ITS IMPACT ON THE GROWTH AND DEVELOPMENT OF RENEWABLE ENERGY

The Beech Ridge Energy Project is but one example of the tensions between current environmental policy and the need and desire to develop renewable energy. This section will focus on the history and text of the ESA to provide a deeper understanding of the law applied in the *Beech Ridge* decision. In the mid-twentieth century, Congress realized that "rapidly escalating economic" growth and development had become increasingly devastating to the nation's wildlife.[129] It determined that industrial development was a significant contributor to species extinction and passed the Endangered Species Act of 1966[130] to prevent continued species depletion.[131]

Previously, there had been little protection afforded to animals.[132] The Lacey Act of 1900[133] was an early attempt at protection; it prohibited interstate commerce involving animals killed in violation of state law.[134] The majority of these state laws, however, focused on narrow issues and it became apparent that a broader federal policy was needed.[135] The

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[127] *See Develop Improved Guidance for Dam Break Forecasting*, NAT'L WEATHER SERV., Oct. 24, 2011, http://www.nws.noaa.gov/oh/hrl/hsmb/hydraulics/dam_break.html.
[128] *See Advantages and Challenges of Wind Energy*, *supra* note 116 and accompanying text.
[129] LAWRENCE R. LIEBESMAN & RAFE PETERSEN, ENDANGERED SPECIES DESKBOOK 5 (Envtl. Law Inst. 2010).
[130] Endangered Species Protection Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (repealed 1973).
[131] LIEBESMAN & PETERSEN, *supra* note 129, at 6.
[132] *See id.* at 5.
[133] 16 U.S.C. §§ 3371–3378 (1900).
[134] LIEBESMAN & PETERSEN, *supra* note 129, at 5.
[135] *Id.*

Endangered Species Protection Act of 1966 attempted to enact sweeping legislation in an effort to fill the holes left by the Lacey Act.[136] Congress reworked the law again in 1969[137] before the current form of the Endangered Species Act was passed in 1973.[138]

This section will address the 1973 version of the ESA and the ways in which it has evolved over the last several decades. First, it will examine the provision that prohibits the taking of an animal, how the definition of the term "take" has broadened over time, and the way in which a citizen may bring a claim on behalf of the affected species.[139] Next, it will examine the ensuing litigation that has expanded the reach of the ESA.[140] Finally, it will describe the Incidental Take Permit ("ITP") process, and how despite its intent to balance interests, it fails to adequately assist otherwise productive and environmentally friendly developers.[141]

A. Takings and Citizen Suits Under the ESA

The takings provision is considered both the predominant strength and most controversial provision within the ESA.[142] The ESA defines a taking as an action that will "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or [] attempt to engage in any such conduct."[143] This phrase, however, left much room for debate and has resulted in significant litigation and modification.

One such change was the expansion of the word "harm" to include habitat modification.[144] In order for habitat modification to be considered a taking, the modification must be significant, impair essential behavioral patterns, and result in actual injury to a protected species.[145] Despite the Secretary of the Interior's attempt to clarify the understanding of the definition of a taking, disagreements continued to arise.

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[136] *Id.* at 5–6.
[137] Endangered Species Conservation Act of 1969, Pub. L. No. 91-35 § 1-5, 83 Stat. 275 (repealed 1973).
[138] *Id.* at 6 (citing Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543 (1973)).
[139] *See infra* Part IV.A.
[140] *See infra* Part IV.B.
[141] *See infra* Part IV.C.
[142] ENDANGERED SPECIES ACT—LAW, POLICY, & PERSPECTIVES 5 (Donald C. Baur & Wm. Robert Irvin eds., Am. Bar. Ass'n 2d ed. 2010) [hereinafter ENDANGERED SPECIES—LPP].
[143] ESA § 16 U.S.C. 1532(19) (2006).
[144] *See* Endangered and Threatened Wildlife and Plants: Definitions, 50 C.F.R. § 17.3 (2002).
[145] *Id.* ("[S]ignificant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing behavioral patterns.").

The words "actually kills or injures," included as part of the habitat modification provision,[146] created further tension as to what exactly resulted in a taking. Questions, however, began to arise as to whether this also included impacts on mating rituals, birthing rates, and other historical behavioral traits.[147] Additionally, did the phrase apply to a population as a whole or only to individual members of a particular species?[148]

The open-ended nature of the takings clause of the ESA did not limit its scope to intentional violations. Regardless of the taker's intent, a taking of a listed species violates the Act and results in liability.[149] This means that an otherwise lawful activity, not intended to cause any harm, still violates the ESA should that activity result in the taking of a listed species.[150] While the constitutionality of this provision has been affirmed,[151] litigation over how it may be used has strengthened its effectiveness as a tool.

While the takings clause is considered the strength of the ESA because of the expansive breadth of protection it affords listed species, it is the citizen suit provision that encourages litigation.[152] The power of the citizen suit is the ability of an individual or person to file suit on behalf of an endangered species and to obtain injunctive relief against the purposeful or incidental taking.[153]

The ESA reads that the person commencing the suit may (A) "enjoin any person . . . who is alleged to be in violation of any provision of this chapter . . . or" (B) "compel the Secretary [of the Interior] to apply . . . the prohibitions set forth in or authorized pursuant to [the Act]."[154] When seeking to obtain an injunction, a plaintiff must show that the undesirable action is "reasonably certain to immediately harm, kill, or wound" the affected species.[155] In *Beech Ridge*, however, the judge himself was not

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[146] *Id.*
[147] *See* ENDANGERED SPECIES—LPP, *supra* note 142, at 163.
[148] *Id.*
[149] *See* 16 U.S.C. § 1538 (2006).
[150] *See id.* at § 1538(g).
[151] ENDANGERED SPECIES—LPP, *supra* note 142, at 148 (the Supreme Court rejected certiori in five distinct cases challenging the constitutionality of the take prohibition.).
[152] *See generally* 16 U.S.C. § 1540(g) (2006).
[153] *Id.* at § 1540(g)(1)(A)–(C); *see also* Bennett v. Spear, 520 U.S. 154, 155, 165–66 (1997), (defining "person" broadly based on the expressed intent of Congress. "[Congress] provid[ed] that 'any person may commence a civil suit,' . . . The quoted phrase is an authorization of remarkable breadth when compared with the language Congress ordinarily uses.")
[154] 16 U.S.C. § 1540(g).
[155] *See* Babbit v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 700 (1995) (refining the statute's broad language). Later cases saw "corporations, federal agencies,

pleased with the adequacy of the evidence.[156] Furthermore, he believed there needed to be a weighing of the equitable principles on each side, but under the current law, statutory and common, he was unable to do so.[157] It was because of the ways in which courts have interpreted the ESA that the judge felt compelled to grant the injunction in *Beech Ridge*.[158]

B. Litigation and Its Effects on the Strength of the Takings Clause

One of the first cases to have an impact on the reading of the ESA takings clause was *Tennessee Valley Authority v. Hill* ("*TVA v. Hill*").[159] The conflict began when a small and previously unknown species of darter fish, named the snail darter, was found living in the Little Tennessee River.[160] While the discovery of the new darter fish was not surprising, this particular species was estimated to have a population of only 10,000–15,000 and lived in an area that would soon be devoid of water.[161]

The Tellico Dam was a federally subsidized project designed to "stimulate shoreline development, generate . . . electric current . . . improve economic conditions" and open up new land for farming.[162] Construction on the Tellico Dam began in 1967 and the lawsuits began a few years later, alleging that the project did not meet the requirements of the National Environmental Policy Act of 1969 ("NEPA").[163] It was during the NEPA litigation that the snail darter was discovered and drew attention to other environmental impacts the dam might have.[164] In the midst of this legal battle, the Secretary of the Interior declared the

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state agencies, towns, school districts, . . . and even members of Indian tribes" named as defendants. ENDANGERED SPECIES—LPP, *supra* note 142, at 149.

[156] *See supra* note 111 and accompanying text.

[157] *See supra* notes 109–10 and accompanying text.

[158] *See Beech Ridge*, 675 F. Supp. 2d at 583. The opinion in *Beech Ridge* begins almost immediately with a description and reiteration of the importance of *Tennessee Valley Authority v. Hill*. *Id.* at 543. For information relating to *TVA. v. Hill* see *infra* Part III.B.

[159] Tenn. Valley Auth. v. Hill (*TVA v. Hill*), 437 U.S. 153 (1978), *superseded by statute*, Endangered Species Act Amendments, Pub. L. No. 95-632, § 5, 92 Stat. 3760, *as recognized in* Bd. of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986).

[160] *Id.* at 158.

[161] *Id.* at 158–59.

[162] *Id.* at 157. The Court noted that "[w]hen fully operational, the dam would impound water covering some 16,500 acres—much of which represents valuable and productive farmland. . . ." *Id.*

[163] *Id.* at 157–58.

[164] *Id.* at 158–60.

snail darter to be an endangered species and identified the area of the river in which it lived to be a critical habitat.[165]

After the species was listed as endangered, informal negotiations began to determine the best course of action regarding the final completion and closing of the dam and simultaneous protection of the snail darter.[166] Tennessee Valley Authority ("TVA") wanted to transplant the fish to the Hiwassee River in an effort to aid in the species' recovery while allowing for completion of the dam.[167] The Secretary of the Interior, however, was not persuaded that this could be done successfully, resulting in various congressional hearings to determine the fate of the dam.[168]

During this time, the first suit was filed to gain an injunction against completion of the dam.[169] The District Court for the Eastern District of Tennessee held in favor of TVA and denied the injunction,[170] but the Sixth Circuit soon reversed the decision.[171] The case was appealed to the Supreme Court and became one of the leading cases on the Endangered Species Act.[172] In a decision by Justice Berger, the Supreme Court upheld the injunction against completion of the Tellico Dam in favor of the snail darter.[173] Despite later supersedure by congressional action,[174] *TVA v. Hill* ended judicial discretion in weighing the interests of both sides and began an era in which numerous cases upheld this type of injunction.[175]

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[165] *TVA v. Hill*, 437 U.S. at 161.
[166] *See id.* at 162–63.
[167] *Id.* at 162.
[168] *Id.* at 162–63.
[169] *Id.* at 167.
[170] *See* Hill v. Tennessee Valley Authority, 419 F. Supp. 753 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978), *superseded by statute*, Endangered Species Act Amendments, Pub. L. No. 95-632, § 5, 92 Stat. 3760, *as recognized in* Bd. of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986).
[171] *See* Hill v. Tennessee Valley Authority, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978), *superseded by statute*, Endangered Species Act Amendments, Pub. L. No. 95-632, § 5, 92 Stat. 3760, *as recognized in* Bd. of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986).
[172] Since its decision, the case is consistently cited as describing the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Animal Welfare Inst. v. Beech Ridge Energy, LLC, 675 F. Supp. 2d 540, 543 (D. Md. 2009) (quoting *TVA v. Hill*, 437 U.S. at 180).
[173] *TVA v. Hill*, 437 U.S. at 194–95.
[174] Energy and Water Development Appropriations Act, Pub. L. No. 96-69, 93 Stat. 497 (1979); *see also infra* notes 188–90 and accompanying text.
[175] *See TVA v. Hill*, 437 U.S. at 184 ("[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction whatever the cost.").

In his dissent, Justice Powell opined on the true legislative intent of the ESA and predicted that "Congress will amend the Endangered Species Act to prevent the grave consequences made possible by [the] decision."[176] He also predicted, somewhat accurately,[177] that the decision would be "more far reaching than the adverse effect on the people of [the] economically depressed [region]."[178] Cases that have followed have relied on that decision's dicta to explain the legislative intent of the ESA rather than the holding of the case.

The Supreme Court's dicta within the opinion broadened the reach of the ESA and subsequent decisions have enabled, rather than limited, its scope.[179] In *Babbit v. Sweet Home Chapter of Communities for a Great Oregon* ("*Sweet Home*") for example, a group of small landowners, logging companies, and other members of the Pacific Northwest community (collectively "the respondents") brought an action against the Secretary of the Interior and the Fish and Wildlife Service Director alleging that the definition of the word "harm" was statutorily invalid for a number of reasons.[180]

The respondents first argued that had Congress intended "harm" to include habitat modification, the drafters of the bill would have included it in the text.[181] Rather, the Senate deleted the portion of the definition of "harm" that read "destruction, modification, or curtailment of [the] habitat" from the final piece of legislation.[182] Secondly, the respondents argued that the grant of express authorization to the federal government to purchase private land in response to habitat degradation was the "exclusive check against habitat modification . . . ."[183] Third, they argued that the inclusion of the word "harm" as part of the takings clause was adopted into the ESA through a floor amendment without debate, and consequently "the court should not interpret the term so expansively."[184]

The *Sweet Home* Court, however, looked back to its opinion in *TVA v. Hill* and explained: "we described the [ESA] as 'the most comprehensive legislation for the preservation of endangered species ever enacted by

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[176] *Id.* at 210 (quoting Justice Powell's dissent).
[177] *See supra* note 174 and accompanying text; *infra* notes 188–90 and accompanying text.
[178] KENNETH M. MURCHISON, THE SNAIL DARTER CASE : TVA VERSUS THE ENDANGERED SPECIES ACT 138 (2007) [hereinafter MURCHISON, THE SNAIL DARTER CASE].
[179] *See* Babbit v. Sweet Home Ch. of Cmtys. for a Great Or. (*Sweet Home*), 515 U.S. 687, 708 (1995) (granting "broad discretion" to the Secretary).
[180] *Id.* at 692–93.
[181] *Id.* at 693.
[182] *Id.* at 693.
[183] *Id.* at 693 (quotations omitted).
[184] *Id.* at 693.

any nation.'"[185] This application is based on dicta rather than the actual holding of the case. In an effort to tie the holdings together the Court said:

> Although the § 9 "take" prohibition was not at issue in *Hill*, we took note of that prohibition, placing particular emphasis on the Secretary's inclusion of habitat modification in his definition of "harm." In light of that provision for habitat protection, we could "not understand how *TVA intends to operate Tellico Dam without 'harming' the snail darter." Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the Secretary's "harm" regulation.*[186]

The Court ultimately concluded that, based on the history of the ESA, "harm" was intended to include habitat modification.[187]

It is important to note that although the Supreme Court's rulings have the ability to shape and direct the ESA, it is Congress who has the ultimate authority over legislation. As part of The Energy and Water Development Appropriations Act for the year 1980 ("1980 Act"),[188] Congress directed that the Tellico dam in issue in *TVA v. Hill* be completed not withstanding any other federal laws.[189] Once the 1980 Act was implemented, TVA relocated the snail darters and closed the dam on November 29, 1979.[190]

TVA's actions to relocate the snail darter population from the Little Tennessee River actually resulted in growing numbers.[191] The 1980

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[185] *Sweet Home*, 515 U.S. at 698 (quoting *TVA v. Hill*, 437 U.S. 153, 180, *superseded by statute*, Endangered Species Act Amendments, Pub. L. No. 95-632, § 5, 92 Stat. 3760, *as recognized in* Bd. of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986)).

[186] *Id.* at 699 (emphasis added) (citations omitted).

[187] *Id.* at 708. This decision was ultimately codified in 2002. 50 C.F.R. § 17.3 (2002) ("Such act may include significant habitat modification.").

[188] Energy and Water Development Appropriations Act, Pub. L. No. 96-69, 93 Stat. 497 (1979) (attached as a rider bill by a Tennessee Senator).

[189] MURCHISON, THE SNAIL DARTER CASE, *supra* note 178, at 141–42.

[190] Teresa Sparks, *TVA and the Snail Darters: A Case Study in Environmental Management*, UTC ENVTL. SCI. PROG., *available at* http://www.utc.edu/Faculty/John-Tucker/Courses/esc430/esc430mat/darter/tellico.html (last visited Apr. 5, 2012). Even before the Supreme Court decision and the Act, under congressional direction, the TVA had already begun transplanting the Little Tennessee River snail darters to the Hiwassee and Nolichucky rivers. *Id.*

[191] *See id.* There is some belief, however, that some of the populations existing in other rivers were naturally occurring prior to the transplantation. *Id.*; *see also* MURCHISON, THE SNAIL DARTER CASE, *supra* note 178, at 168.

Act resulted in the TVA doing exactly what it would have done without the years and resources spent on litigation; the snail darters were moved to another habitat and eventually flourished.[192] What *TVA v. Hill* shows is that an injunction may not always be in the best interest of the species and that Congress will act when necessary to prevent waste. Four years later, Congress amended the ESA to include the ITP so that conflicts like the one that resulted in Tellico Dam would be less likely to occur.[193] The next section discusses Congress's action in enacting the ITP provision and its application.

C. Incidental Take Permits and Habitat Conservation Plans

In an effort to provide private landowners and developers with the opportunity to use their land as they wish, Congress added a provision to the ESA under which private landowners could receive permission to incidentally take a listed species.[194] This action by Congress attempted to answer the problem created by *TVA v. Hill*, but it is not sufficient in all instances. The ITP application process is demanding, resource intensive, and inefficient at a time when efficient and speedy development is critical.

The most important part of the ITP process is the creation and development of a Habitation Conservation Plan ("HCP"). A HCP is the primary document required to apply for an ITP.[195] The applicant must describe in detail "the anticipated effects of the proposed taking; how those impacts will be minimized, or mitigated; and how the HCP is to be funded."[196] Additionally, the HCP must also demonstrate the following:

> (1) [the] taking will be incidental;
> (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking;
> (3) the applicant will ensure that adequate funding for the plan will be provided;
> (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

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[192] *See* MURCHISON, THE SNAIL DARTER CASE, *supra* note 178, at 168.
[193] LIEBESMAN & PETERSEN, *supra* note 129, at 73.
[194] *See* 16 U.S.C. § 1539(a)(1)(B) (2006).
[195] U.S. FISH & WILDLIFE SERV., HABITAT CONSERVATION PLANS UNDER THE ENDANGERED SPECIES ACT 1 (2011), *available at* http://www.fws.gov/endangered/esa-library/pdf/hcp.pdf.
[196] *Id.*

> (5) [any] other measures, as required by the Secretary, will be met.[197]

If private landowners can meet these five criteria, then they should be able to successfully obtain an ITP and conduct their development or operations as they wish.

Although Congress hoped to aid responsible developers in their endeavors, the application process has proven costly and time consuming.[198] Because of this, the courts have held that it is not mandatory for a private landowner to obtain an ITP.[199] When it is not "reasonably certain" that the alleged affected species will be injured, the courts cannot force an injunction on the private landowner, and the government cannot mandate that he obtain an ITP.[200] Rather, the landowner has three options.[201] The landowner can choose to not conduct the activity and bear the economic costs of forfeiture, apply for an ITP, or conduct the activity without a permit and face the risk of civil and/or criminal liability if a take occurs.[202]

The problem, however, is that in many instances, until the actual development has begun, there is no concrete way to know whether a take will occur.[203] Thus, the landowner must decide whether to risk liability or to spend years and a significant amount of money to determine how to mitigate injury that may not ever occur. Should a private landowner decide he wants to pursue an ITP, regardless of the time, energy, and cost, there remains uncertainty as to its obtainability and whether it will actually protect the landowner from future liability. The requirements for what constitutes mitigation are stringent. The proposed mitigation plan must be based on "sound biological rationale."[204] Additionally, its adequacy is based on (1) "the extent to which the proposed measures provide substantial benefits" to the affected species and (2) "whether the amount of mitigation is the maximum practicable in light of the costs and benefits of additional mitigation, the abilities of the applicant, and the amount provided . . . in similar situations."[205] Should the applicant fail

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[197] *Id.* at 1–2.
[198] ENDANGERED SPECIES—LPP, *supra* note 142, at 223.
[199] Defenders of Wildlife v. Bernal, 204 F.3d 920, 927 (9th Cir. 1999).
[200] *Id.*
[201] *See id.* at 927.
[202] *See id.*
[203] *See* ENDANGERED SPECIES—LPP, *supra* note 142, at 178.
[204] LIEBESMAN & PETERSEN, *supra* note 129, at 76.
[205] *Id.* In some instances, mitigation may require providing replacement land in double the amount used for a project. Telephone Interview with Joseph Rowley, Vice President-Project Development, Sempra U.S. Gas & Power (Jan. 19, 2012).

to sufficiently provide a plan incorporating all the above elements, the mitigation requirement has not been met and an ITP cannot be obtained.[206]

Moreover, when Congress enacted the legislation, the benefit of an ITP was that a permit holder would receive protection from liability in the form of a "[n]o [s]urprises [p]olicy."[207] Lawmakers wanted to give landowners reasonable regulatory certainty that their land use will not be disrupted so long as they undertook the appropriate measures to protect the species.[208] This certainty, however, can now be unraveled by the Permit Revocation Rule.[209] This rule enables the Fish & Wildlife Service to revoke an ITP as a last resort if a species is in jeopardy by unforeseen circumstances.[210] Without any real certainty, it is understandable why the ITP process is not as desirable as one may think.

IV. HOW TO BALANCE THE DEVELOPMENT OF RENEWABLE ENERGY WHILE PROTECTING ENDANGERED SPECIES

While the Supreme Court has the ability to shape and interpret the law, it is important to remember that Congress has the ultimate authority over the reach of the ESA. The dicta in *TVA v. Hill* is important, but at any moment this can be rendered moot by new legislation.[211] Congressional action after the decision in *TVA v. Hill* demonstrates their dissatisfaction with the overreaching arm of the Court. Furthermore, the fact that the Congressional action resulted in the eventual removal of the snail darter from the endangered species list shows that granting injunctions is not always the best remedy. Amending the ESA to allow developers to apply for and obtain ITPs was an attempt at balancing interests, but the costly and time-consuming process provides more hurdles than help.

This Note proposes that Congress act to carve out a new provision within the ESA to exempt clean renewable energy development from citizen suit litigation. First this section sheds light on the emerging conflict between the California Condor and its potential collision with both established and proposed wind farms.[212] Next, this Note uses the comparison between the problems faced in California with the Beech Ridge project

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[206] *See* 16 U.S.C. § 1539(a)(2)(A) (2006).
[207] LIEBESMAN & PETERSEN, *supra* note 129, at 77–78.
[208] *See id.* at 77.
[209] *Id.*
[210] *Id.* at 78.
[211] *See supra* notes 173–80 and accompanying text.
[212] *See infra* Part V.A.

to illustrate why it is better to create a new provision exempting companies from the citizen suit provision of the ESA than to continue using ITPs.[213] In conclusion, it will then address what Congress should include in this new provision to encourage responsible and environmentally friendly development in exchange for protection from future citizen lawsuits.[214]

A. Conflicts with the California Condor

"This is about two big successes—the successful reintroduction of the condor and the success of this technology. It's our responsibility on the wind-industry side to let these two coexist."[215] It is hard to believe that just twenty-five years ago, the last California condor disappeared from the wild.[216] The global population of condors was at a low of twenty-two and conservationists at the San Diego Zoo were given permission to make a "last-ditch effort to save the species" by taking them into captivity and attempting to grow their numbers through breeding.[217] By using techniques such as removing eggs from nests to encourage mothers to "lay replacement eggs" and taking the original fertilized eggs and caring for them using puppets, the San Diego Zoo was able to successfully reintroduce the condor into the wild in 1992.[218] The goal was and is to help the condor regain "self-sustaining populations" in its original habitat of "California, Arizona, and Baja, Mexico."[219]

"Thousands of years of evolution has fine-tuned this bird to be totally dependent on air for survival."[220] Condors can travel as many as 200 miles a day surfing the coastal winds foraging for food or simply taking in the scenery.[221] It is these same winds in the native habitat of the California condor that are appealing to wind developers.[222]

Until recently, condor collisions were barely a consideration due to its removal from captivity and slow expansion following reintroduction

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[213] *See infra* Part V.B.
[214] *See infra* Part V.C.
[215] Woody, *supra* note 118.
[216] *Id.* On April 13, 1987, the last wild California condor was removed from the wild. *Id.*
[217] *See id.*; *see also Birds: California Condor*, SAN DIEGO ZOO, http://www.sandiegozoo.org/animalbytes/t-condor.html (last visited Apr. 5, 2012).
[218] *See Birds: California Condor*, *supra* note 217.
[219] Woody, *supra* note 118.
[220] *Id.* (quoting Jesse Grantham, California Condor Coordinator for the Fish & Wildlife Service).
[221] *Id.*
[222] *See id.*

into the wild.[223] One example is the North Sky River Wind Project.[224] In May of 2011, Kern County determined that the project was low risk because "no birds had been detected within 18 miles of the site."[225] Last July, however, GPS signals showed that two condors flew near or potentially over another project in Kern County, North Sky Project.[226] Lessons learned from Beech Ridge suggest that this is more than enough to completely halt the project by a citizen suit.[227] The North Sky River Project developers continued to pursue the project, despite the FWS "urg[ing] the county to withhold its approval," the county approved the project on September 13, 2011,[228] and a month later the project developer was facing litigation.[229] The lawsuit was initiated by the Sierra Club, Center for Biological Diversity, and Defenders of Wildlife against the County of Kern and the Kern County Board of Supervisors and lists the various project developers as parties in interest.[230]

At this point, the developers can wait to see how the litigation turns out, but even if the court finds in favor of the county's approval of the site, if history repeats itself, these same plaintiffs can file suit against the project developers in federal court on behalf of the California Condor pursuant to the ESA's citizen suit provision. Rather than find itself in the midst of timely and costly litigation like Beech Ridge, this Note proposes that the company rethink how that money is spent and take a more proactive approach by spending a little more time seeing what happens with the condor repopulation and spending a little more money studying their behavior and how they could make the project and the condor coexist.

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[223] *Id.*

[224] Woody, *supra* note 118.

[225] *Id.*; *see also* KERN CNTY. PLAN. & CMTY. DEV. DEP'T, 4 DRAFT ENVIRONMENTAL IMPACT REPORT: NORTH SKY RIVER WIND ENERGY PROJECT AND JAWBONE WIND ENERGY PROJECT App. E.1 (2011), *available at* http://www.co.kern.ca.us/planning/pdfs/eirs/northsky_jawbone/Index.htm [hereinafter KERN COUNTY DRAFT ENVIRONMENTAL IMPACT REPORT].

[226] Woody, *supra* note 118.

[227] *See* Animal Welfare Inst. v. Beech Ridge Energy, LLC, 675 F. Supp. 2d. 540 (D. Md. 2009).

[228] Woody, *supra* note 118.

[229] *Id.*; *see* Press Release, Defenders of Wildlife, Wind-Energy Project Proposed in California Threatens Thousands of Birds (Oct. 21, 2011), http://www.biologicaldiversity.org/news/press_releases/2011/wind-energy-project-10-20-2011.html; *see also* Petition for Peremptory Writ of Mandate and Complaint for Declaratory and Injunctive Relief, Sierra Club v. County of Kern, No. S-1500-CV-275036KCT (Cal. Super. Ct. Oct. 20, 2011), *available at* http://docs.wind-watch.org/Sierra-Club-et-al-v-Kern-County.pdf [hereinafter Petition].

[230] *See* Petition, *supra* note 229, at 3–4.

A model example is found in the collaboration of Sempra U.S. Gas & Power ("Sempra USGP") and the San Diego Zoo.[231] Sempra USGP is developing large scale, renewable energy projects in the desert southwest that include several solar photovoltaic projects and one wind project.[232] Joseph Rowley, Vice President-Project Development, explained that "[they] don't want to make a large commitment to the wind project without understanding the larger environmental issues."[233] In determining whether to initiate development of a given project, Rowley explained that the company first applies a list of site screening criteria.[234] For example, if a potential solar project site was found to be habitat for threatened or endangered species such as the Mojave ground squirrel or desert tortoise, development efforts would not be initiated.

Rowley explained that this approach has generally led the company to purchase private land that has already been fully disturbed by human development.[235] However, prior to making such financial commitments, Sempra USGP conducts thorough site suitability analyses, including biological surveys.[236] They believe it is better to begin with a small financial commitment,[237] such as the cost of biological surveys,[238] rather than to face the greater environmental and financial risks posed by attempted development of a site that ultimately is going to be found environmentally unsuitable.[239]

After obtaining a lease option for land in Baja, California on which to potentially develop a wind farm, Sempra USGP partnered with the San Diego Zoo to study the California condor and its potential for reinhabiting the proposed development site.[240] The company wanted to learn more about the avian issues, and like many native southern Californians, Rowley and other Sempra USGP employees were familiar with the condors' near extinction and the zoo's work to recover the species and reintroduce them into the wild.[241] The partnership is structured such that Sempra USGP

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[231] *See* Woody, *supra* note 118; Telephone Interview with Joseph Rowley, *supra* note 205.
[232] *Solar, Wind, and Natural Gas Projects*, SEMPRA U.S. GAS & POWER, http://www.sempra usgp.com/energy-solutions/project-map.html (last visited Apr. 5, 2012).
[233] Woody, *supra* note 118.
[234] *See* Telephone Interview with Joseph Rowley, *supra* note 205.
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *See* Telephone Interview with Joseph Rowley, *supra* note 205.
[240] *See id.*; *see also* Woody, *supra* note 118.
[241] Telephone Interview with Joseph Rowley, *supra* note 205.

funds both on-the-ground studies of the condor as well as the research and analysis done in-office.[242]

Currently, the on-the-ground studies are focused on tracking the birds through GPS to determine what their range is, and then that information is analyzed to help predict where the species will exist as their numbers continue to grow.[243] These studies have been going on for the past couple of years and have initially determined that the condor is unlikely to range into the vicinity of the initial phase of the wind project.[244] Sempra USGP will continue to fund the zoo's analysis of whether or not there will be intersection between the condor and later phases of their proposed project, particularly as the condor population increases.[245] If studies moving forward show that there is a possibility of intersection, the company will then decide whether to halt development of later phases of the project or invest in more research into finding a mechanism to protect the condor such as radar that could shut down the turbines should a condor approach.[246]

In closing, Rowley shared several thoughts about how it is not only important but it is good business to keep an eye on the environment.[247] It is important for businesses to take long-term concerns into consideration and exercise caution by doing their homework before committing to these types of projects.[248] By keeping the big picture in mind and looking broadly into the future, companies will ultimately be more successful.

B. Forgoing the ITP in Favor of an Alternative Citizen-Suit Exemption

The ITP process forces developers to consider the consequences of their actions on endangered species and their habitats; but as seen earlier, it often occurs late in the game.[249] In some instances, the time

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[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] Telephone Interview with Joseph Rowley, *supra* note 205.
[247] *See id.*
[248] *Id.*
[249] *See* Press Release, Invenergy, Invenergy to Complete Construction of West Virginia Wind Farm Following Agreement to Protect Indiana Bat (Jan. 27, 2010), *available at* http://www.invenergyllc.com/news/Greenbrier_County_Agreement_F2doc.pdf. As part of the settlement agreement following *Beech Ridge*, the company agreed to move forward with an application to obtain an ITP. *Id.*

delays and high costs may be appropriate in order to force those developers to consider the environmental costs of their actions.[250] Clean renewable energy sources, however, have clear environmentally beneficial attributes. While the ITP process does not require or encourage repopulation,[251] it does not mean action should not be taken to help certain species, like the California condor, recover.

The removal of the snail darter to another river system allowed for species recovery, and it went from being endangered to threatened.[252] It is unknown what would have happened with the snail darter had the injunction stayed with the dam left incomplete. What is clear, is that an injunction is not the only way to protect affected species. By creating incentives for developers to engage in responsible behavior through the removal of the citizen suit provision, Congress can encourage otherwise environmentally friendly and responsible developers to not only protect species but also use money otherwise wasted in the application process or litigation to help with recovery.

The ESA and ensuing litigation history created a space in which the animal's interests outweigh the interest of any threatening land use regardless of whether that use may ultimately benefit the species. Even the judge in *Beech Ridge* noted his reluctance to grant an injunction and that this all could have been avoided had Beech Ridge applied for an ITP.[253] It did not go without recognition, however, that the Court was concerned with the length and delays in applying for and receiving an ITP.[254] It urged that should Beech Ridge decide to move forward with an ITP application that the FWS "act with reasonable promptness, but with necessary thoroughness, in acting upon that application."[255]

Furthermore, while mitigation is certainly one strategy for protecting endangered species, it would be equally if not more beneficial to require a species recovery plan as well.[256] The fact remains, however, that even with an ITP, Indiana bats would still die, regardless of mitigation, not just because of potential turbine interference but other factors such as white-nose syndrome, pesticides, and cave commercialization.[257]

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[250] *See supra* note 112 and accompanying text.
[251] LIEBESMAN & PETERSEN, *supra* note 129, at 78.
[252] *See* MURCHISON, THE SNAIL DARTER CASE, *supra* note 178, at 168.
[253] Animal Welfare Inst. v. Beech Ridge Energy, LLC, 675 F. Supp. 2d 540, 583 (D. Md. 2009).
[254] *Id.*
[255] *Id.*
[256] Currently, the process does not require a species recovery plan—only mitigation.
[257] *See supra* note 44 and accompanying text.

In order to maximize both development of renewable energy and species recovery, Congress should enact legislation that would balance the importance of clean renewable energy development with the ESA not only through mitigation, but recovery plans as well. In exchange for immunity from citizen suit litigation, developers would be required to complete more thorough studies in helping and understanding affected species just as Sempra USGP has done voluntarily.[258] Rather than waste money and time on HCPs and ITPs to potentially have them revoked, this provision will encourage a more environmentally friendly and forward-looking approach resulting in responsible development and facilitating coexistence between these projects and affected species.

C. Proposed Requirements for a Citizen-Suit Exemption

While the ultimate aim of investing in renewable energy is long-term profitability and not spending money on extraneous costs, it is more likely that investors would prefer to see money spent on species recovery rather than litigation. Should Congress enact an immunity provision to encourage development and species recovery, less money would be wasted on overhead litigation costs and more would go toward actually helping the species.

The proposed legislation would fall under the oversight of the FWS similar to the application of an ITP.[259] A trustee would be appointed to periodically check in with the developers to ensure they are complying and not otherwise taking advantage of the system. In order to receive immunity from citizen suits and the resulting injunctions, the developers would need to pass an initial test to show the trustee that their project qualifies as a clean renewable energy source as defined earlier.[260] If it meets those standards, it will be exempt from citizen suit liability.

Immunity from the citizen suit liability would ensure that if, taking the North Sky Project for example, those developers had been approved by the FWS under this provision and spent the money and research prior to the GPS detection of condors in the region, the company could not be sued on behalf of the species by community members or animal welfare groups. Instead, the company would be required to take a step back and conduct more research to assess the most appropriate course of action.

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[258] *See supra* notes 231–33 and accompanying text.
[259] *See* LIEBESMAN & PETERSEN, *supra* note 129, at 78.
[260] *See supra* Part III.

In exchange for this immunity, companies would be required to not only fund research to mitigate potential harm caused by their project now and in the future, but also support research designed to aid in species recovery. Because companies would be free from the hassle and expense of litigation under this new provision, they should channel those recovered expenses and follow the example of companies such as Sempra USGP. Whether they choose to hire internal researchers or partner with organizations such as the San Diego Zoo, these expenses toward additional research ensure a project's continued success free of inhibition while protecting and rehabilitating endangered species.

To prevent companies from shirking these responsibilities under such an immunity clause, penalties for non-compliance would be high. Not only would developers be criminally responsible, but they would suffer high monetary penalties as well. Developers are already subject to these sorts of liabilities with or without an ITP.[261] Without an ITP, following the *Beech Ridge* decision, regardless of whether a species has been taken, the project can be halted.[262] Even with an ITP, the "no surprises" clause has now been usurped in favor of an escape clause ("Permit Revocation Rule") that could take away the ITP and leave the developer open to liability despite the time and money spent to obtain the permit.[263]

The final piece of this legislation should be that the period to apply and begin conducting research expire after a certain amount of time to encourage faster development.[264] Clean renewable energy development is something that is needed in the immediate future. By offering short-term incentives and inviting investments now, it will enable more efficient developments and returns for investors. The ESA was created to help protect and preserve the variety of species living here in the United States and rather than permit their "takings" and subject these developers to the costs of permits and litigation, it makes both good environmental and economic sense to promote their well being and recovery.

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[261] *See, e.g.*, Animal Welfare Inst. v. Beech Ridge Energy, LLC, 675 F. Supp. 2d 540 (D. Md. 2009).
[262] *See id.*
[263] *See generally* LIEBESMAN & PETERSEN, *supra* note 129, 77–79.
[264] *Advantages and Challenges of Wind Energy*, *supra* note 116. Some examples of immediate benefits should we operate on twenty percent wind energy by the year 2030 are: reduction in natural gas demand and price by twelve percent, reduce cumulative water consumption in the electricity industry by eight percent, and generate millions of dollars in revenue for local landowners. *Id.*

CONCLUSION

Beech Ridge[265] tells a story that emulates what Justice Powell feared most about the majority opinion in *TVA v. Hill*.[266] The breadth of the ESA has been drawn out to such an extent that an injunction may be granted without any proven harm or injury to an animal.[267] Whether the judge actually had to grant the injunction based on little or no evidence that a bat had or would ever be harmed by the turbines at Beech Ridge, his reluctance arguably suggests he felt his hands were tied.

He writes that "development of wind energy can and should be encouraged, but wind turbines must be good neighbors."[268] If we expect renewable energy developers to be good neighbors, we must treat them with equal respect and deference. Beech Ridge did what it could to respect the surrounding community and the local bat population but there will always be a citizen suit alleging it is not enough. By providing these companies with immunity by mandating that they be good neighbors to the affected species, it will have several positive impacts on our country. Not only will it decrease our dependence on foreign energy sources, but increase our internal energy production, jobs, and revenue.

It is important both to the environment and our sense of humanity to protect the endangered species of our country. It is equally important, however, that we work to protect the land we use and live on every day. By narrowing the scope of this citizen suit immunity, it will ensure that only those companies who are truly invested in clean renewable energy development and willing to assist in species recovery will proceed.

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[265] *See generally Beech Ridge*, 675 F. Supp. 2d 540.
[266] *See supra* notes 176–78 and accompanying text.
[267] *See* Beech Ridge, 675 F. Supp. 2d at 563 ("reasonably certain threat of imminent harm").
[268] *Beech Ridge*, 675 F. Supp. 2d at 582.

AT THE CROSSROADS: BALANCING PUBLIC EDUCATION AND WILDLIFE PROTECTION

CHRISTOPHER JACKSON*

INTRODUCTION

Protecting America's wildlife and pristine wilderness areas has been a priority, in one form or another, of our nation's government since the administration of President Theodore Roosevelt.[1] In fact, Roosevelt did more for the long-term protection of our nation's wilderness areas than all of his predecessors in the Oval Office combined.[2] Roosevelt viewed protecting our nation's wildlife and environmentally sensitive lands as a moral obligation[3] and framed it as one that was not to be taken lightly by our national leaders.[4] As a result, President Roosevelt created the nation's first wildlife refuge in 1903.[5] His efforts to protect the American wilderness is widely considered to be one of the most enduring presidential initiatives in our nation's history.[6] While Roosevelt's intentions were good, and the park system is recognized as a national treasure, it has also caused problems that he could not have imagined.

Much of the wilderness that Roosevelt sought to protect is now situated on federally controlled lands in the western United States.[7] The federal government's landholdings are significant, with approximately

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[1] *See* DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA 20–21 (2009).

[2] *See id.* at 20.

[3] *Id.*

[4] *See id.* at 21.

[5] ERIC T. FREYFOGLE & DALE D. GOBLE, WILDLIFE LAW: A PRIMER 209 (2009).

[6] *See* BRINKLEY, *supra* note 1, at 21.

[7] Amy Stengel, *"Insider's Game" or Valuable Land Management Tool? Current Issues in the Federal Land Exchange Program*, 14 TUL. ENVTL. L.J. 567, 567–68 (2001).