

## ENDANGERED SPECIES PROTECTION IN NEW YORK AFTER *STATE V. SOUR MOUNTAIN REALTY, INC.*

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### INTRODUCTION

The passage of New York's Endangered Species Act<sup>1</sup> (ESA) in 1972 marked a significant effort by the Legislature to protect species whose continued survival is in jeopardy. Remarkably, the ESA failed to generate any case law in the first twenty-seven years of its existence. Recently, however, a conflict between Sour Mountain Realty, Inc. (Sour Mountain) and the New York State Department of Environmental Conservation (DEC) over a population of Eastern timber rattlesnakes<sup>2</sup> spawned both New York Supreme Court<sup>3</sup> and Appellate Division<sup>4</sup> decisions interpreting the ESA for the first time.

The decisions in *State v. Sour Mountain Realty, Inc.* are significant in two respects. First, they reaffirm the State's interest in protecting indigenous species and their habitat and, in doing so,

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<sup>1</sup> N.Y. Environmental Conservation Law (ECL) § 11-0535 (Consol. 1972).

<sup>2</sup> *Crotalus horridus*. See NEW YORK OFFICIAL COMPILATION OF RULES AND REGULATIONS [hereinafter NYCRR] tit. 6, § 182.6(b)(5)(v).

<sup>3</sup> *State v. Sour Mountain Realty, Inc.*, 703 N.Y.S.2d 854 (Sup. Ct. Dutchess Co. 1999), *aff'd*, 714 N.Y.S.2d 78 (A.D. 2 Dept. 2000) [hereinafter *Sour Mountain I*]. Please note that the Supreme Court of the State of New York is the trial court. The Appellate Division is the intermediate appellate court, and the Court of Appeals the highest court in New York.

<sup>4</sup> *State v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78 (2d Dept.), *leave to appeal den.*, 714 N.Y.S.2d 78 (A.D. 2 Dept. 2000) [hereinafter *Sour Mountain II*].

make clear that the State has authority to regulate activities on privately owned lands to ensure the conservation of protected species. Second, by explicitly recognizing the relation between habitat protection and species conservation, they demonstrate a judicial grasp of the fundamental principles of conservation biology.

This article provides an overview of the ESA and describes the historical events leading to the protection of timber rattlesnakes under the ESA. The article then recounts the rattlesnake controversy that resulted in the filing of the *Sour Mountain* case, explains the State's strategy in the case, and discusses the two resulting court decisions. The article compares New York's ESA with endangered species laws in other states, and concludes with a discussion of the implications of the *Sour Mountain* decisions for endangered species protection in New York.

## I

### NEW YORK'S ENDANGERED SPECIES ACT

As initially enacted in 1972, New York's ESA prohibited the "importation, transportation, possession or sale" of any endangered species, or parts of such species, and the sale, or possession with intent to sell, products made with parts of such species without a DEC permit.<sup>5</sup> In 1979, the ESA was amended to add the "taking" of an endangered species to the acts prohibited without a DEC permit.<sup>6</sup> The Act was amended again in 1981 to add threatened species<sup>7</sup> to the ESA's protections.<sup>8</sup>

At the heart of the ESA is its prohibition against the "taking" of any endangered or threatened species except under license or

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<sup>5</sup> N.Y. Environmental Conservation Law, ch. 664, § 2, art. 11-0535 (1972) (amended 1979, 1981).

<sup>6</sup> N.Y. Environmental Conservation Law, ch. 341, § 1 (1979) (amended 1981).

<sup>7</sup> Protected species fall into two categories: "endangered" defined as species "seriously threatened with extinction;" and "threatened," defined as species "which are likely to become endangered species within the foreseeable future throughout all or a significant portion of their range." ECL § 11-0535(1). DEC also designates certain fish and wildlife as "species of special concern," defined as species that are "at risk of becoming either endangered or threatened in New York." NYCRR tit. 6 § 182.2(i) (1999). However, the ESA's "taking" prohibition does not apply to species of special concern.

<sup>8</sup> N.Y. Laws, ch. 150, § 1 (1981).

permit from DEC.<sup>9</sup> The term “taking” is broadly defined to include “pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting . . . and all lesser acts such as disturbing, harrying or worrying. . . .”<sup>10</sup>

The ESA directs DEC to promulgate a list of protected “species of fish, shellfish, crustacea and wildlife.”<sup>11</sup> DEC is required to include on the State list those species listed as endangered or threatened by the Secretary of the Interior pursuant to the federal Endangered Species Act.<sup>12</sup> DEC may exclude any federally listed species, however, if after investigation it determines that the species is no longer endangered or threatened in the State. DEC is also specifically authorized by this section to include species on the State list that are not on the federal list.<sup>13</sup>

## II

### NEW YORK’S THREATENED TIMBER RATTLESNAKE

It is difficult to conceive of a less sympathetic member of the animal kingdom upon which to stake the outcome of endangered species<sup>14</sup> litigation than the rattlesnake. Although snakes in general do not enjoy widespread popularity, venomous snakes in particular are often regarded as dangerous, aggressive creatures that should be eradicated.<sup>15</sup> Like other populations of venomous reptiles throughout the world,<sup>16</sup> the rattlesnake population in New York State has suffered from systematic efforts at extermination. Hunting rattlesnakes in their dens was a regular past-time for early settlers.<sup>17</sup> In the 1940s, the State undertook an experimental rattlesnake eradication program that involved the blasting of den

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<sup>9</sup> ECL § 11-0535(2).

<sup>10</sup> *Id.* § 11-0103(13).

<sup>11</sup> *Id.* § 11-0535(1).

<sup>12</sup> 16 U.S.C. §§ 1531 *et seq.*

<sup>13</sup> NYCRR tit. 6, § 182.2(i).

<sup>14</sup> As used in this article, the phrase “endangered species” includes both endangered and threatened species as defined in ECL § 11-0535(1).

<sup>15</sup> Of the approximately 144 species of venomous snakes worldwide, more than half (80) are in danger of extinction. Malicious killing by humans has been identified as one of the major factors contributing to the current endangered status of these species. *See* WILLIAM S. BROWN, *BIOLOGY, STATUS AND MANAGEMENT OF THE TIMBER RATTLESNAKE (CROTALUS HORRIDUS)* 26 (1993).

<sup>16</sup> *Id.* at 26.

<sup>17</sup> *Id.* at 22.

sites.<sup>18</sup> For many years, two of the New York counties inhabited by timber rattlesnakes offered bounties for rattlesnake skins.<sup>19</sup> In the 1960s, the last decade the bounties were in effect, a single hunter collected bounties on thousands of timber rattlesnakes.<sup>20</sup> In addition, commercial collection, for display in reptile farms, museums, or other tourist attractions, caused significant declines in rattlesnake populations. One expert states that, between 1950 and 1980, a single commercial collector harvested more than 4,000 timber rattlesnakes in New York, New Jersey and Massachusetts.<sup>21</sup>

Systematic efforts at eradication, combined with increasing human incursions into rattlesnake habitat, behavioral disturbances caused by human activity, and vegetative changes, placed New York's timber rattlesnakes in serious jeopardy.<sup>22</sup> By the early 1980s, the decline of the rattlesnake was manifested in a demonstrated reduction in the species' historical range, and by population drops in nearly all of the observed rattlesnake dens in New York State.<sup>23</sup> These impacts, in combination with the rattlesnakes' low reproductive potential, led biologists to conclude that rattlesnake populations in New York were in need of protection. Consequently, in 1983 the Eastern timber rattlesnake was added to the State's list of threatened species.<sup>24</sup>

### III

#### THE SOUR MOUNTAIN CASE

##### A. *The Mine and the Rattlesnake Den*

In 1990, Sour Mountain applied to DEC for permits to operate a hard rock mine at its property located in Fishkill, Dutchess County, New York. As proposed, the mining would occur over 150 years on approximately 200 acres of land, and would involve the use of explosives to blast rock from a large area on Sour

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<sup>18</sup> *Id.* at 38.

<sup>19</sup> *Id.* at 27-28.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 28-29.

<sup>22</sup> The Eastern timber rattlesnake has already been extirpated from Maine and Rhode Island, and Vermont's population has been reduced from twenty-five known historical sites to two. *Id.* at 22.

<sup>23</sup> *Id.* at 21-24.

<sup>24</sup> NYCRR tit. 6, § 182.6(b)(5)(v).

Mountain's property. DEC issued a positive declaration for the project pursuant to the State Environmental Quality Review Act (SEQRA),<sup>25</sup> and required that Sour Mountain prepare an environmental impact statement (EIS).

The project's potential effects on timber rattlesnakes, which are known to inhabit that area of Dutchess County, were among the environmental impacts evaluated in the EIS. Information in a DEC database showed that the nearest rattlesnake den was located approximately one mile from Sour Mountain's property, and two surveys conducted by Sour Mountain's consultants failed to detect any rattlesnake dens on the property. As a result, Sour Mountain concluded in its draft EIS (DEIS) that mining or blasting activities in connection with the project were not expected to have a significant effect on any known timber rattlesnake den.

In September 1996, after the commencement of an adjudicatory hearing on Sour Mountain's DEIS, DEC received new information regarding the possible existence of a previously unknown timber rattlesnake den located on lands adjacent to the Sour Mountain property. Thereafter, two DEC employees and a Sour Mountain consultant confirmed the location of a den on Bald Hill, a small promontory on Fishkill Ridge. DEC subsequently determined that the den was located approximately 260 feet from the Sour Mountain property boundary.

In January 1997, based on the discovery of the Bald Hill den, DEC issued a positive declaration calling for the preparation of a supplemental EIS (SEIS) to assess the potential impacts of the Sour Mountain project on the newly discovered rattlesnake den.<sup>26</sup> Sour Mountain's subsequent court challenge to DEC's decision to

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<sup>25</sup> ECL art. 8. SEQRA requires state and local agencies to prepare an environmental impact statement (EIS) for actions they undertake, fund, or approve which may have a significant effect on the environment. ECL § 8-0109(2). An EIS must identify, inter alia, the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposed action be implemented, and mitigation measures proposed to minimize the environmental impact of the action. *Id.* §§ 8-0109(2)(b), (c), (f). Prior to undertaking, funding, or approving an action that has been the subject of an EIS, the agency must make a specific finding that its chosen course of action, "consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize[s] or avoid[s] adverse environmental effects, including effects revealed in the [EIS] process." *Id.* § 8-0109(1).

<sup>26</sup> The SEIS was required by DEC pursuant to NYCRR tit. 6 § 617.11(a)(7), which provides that a lead agency may require an SEIS to assess environmental impacts related to newly discovered information.

require an SEIS was unsuccessful.<sup>27</sup>

### B. *The Snake-Proof Fence*

In a letter dated January 20, 1999, Sour Mountain advised DEC that it intended to install a “snake-proof” fence along its property boundary, including the section adjacent to the Bald Hill rattlesnake den, in order to “prevent any timber rattlesnakes from the [recently discovered] den from entering onto the Sour Mountain property.”<sup>28</sup> DEC responded by letter dated January 28, 1999, warning that installation of such a fence would likely constitute a “taking” of timber rattlesnakes from the Bald Hill den, thereby violating the ESA.<sup>29</sup>

Despite DEC’s warning and without attempting to obtain an ESA permit, Sour Mountain began installation of the fence. On March 1, 1999, DEC inspected the boundary of the Sour Mountain property to confirm that a fence was being constructed, and to determine the degree to which the fence might impact rattlesnakes utilizing the Bald Hill den. During that inspection, DEC observed that a galvanized wire fence had been installed along part of Sour Mountain’s property boundary,<sup>30</sup> in a manner that made it impossible for all but the smallest of rattlesnakes to enter onto the property. Consequently, DEC referred the matter to the Attorney General for civil enforcement of the ESA against Sour Mountain.

### C. *The State’s ESA Enforcement Action*

On March 5, 1999, the State filed a complaint against Sour Mountain in Supreme Court, Dutchess County alleging that Sour

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<sup>27</sup> *Sour Mountain Realty, Inc. v. N.Y.S. Dep’t of Env’tl. Conserv.*, No. 97-1522 (Sup. Ct. Ulster Co., filed on May 20, 1997), *decision entered on* March 11, 1998 (Cobb, J.), *aff’d*, 260 A.D.2d 920 (3d Dept.), *leave to appeal den.*, 93 N.Y.2d 815 (1999).

<sup>28</sup> Letter from Laura Zeisel, Esq., Sour Mountain Realty, Inc., to John M. Kennedy, Assistant Regional Attorney, DEC Region 3 (Jan. 20, 1999) (on file with authors).

<sup>29</sup> Letter from Steven Governman, DEC Senior Attorney, to Laura Zeisel, Esq., Sour Mountain Realty, Inc. (Jan. 28, 1999) (on file with authors).

<sup>30</sup> The fence began approximately 100 feet west of Clove Creek, on the southern portion of the Sour Mountain property, and extended for approximately 2,000 feet up slope to the west toward the Bald Hill den. From the corner closest to the den, it ran at least another 1,500 feet north. Affidavit of Theodore A. Kerpez, Ph.D. in Support of Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction at ¶ 25, *Sour Mountain I* (Index No. 986/99).

Mountain's construction of the snake-proof fence constituted a violation of the ESA.<sup>31</sup> The State simultaneously moved for a preliminary injunction compelling defendant to remove the fence and for a temporary restraining order (TRO) enjoining Sour Mountain from installing any additional snake-proof fencing along or near the boundary of its property. The Supreme Court (Hillery, J.) granted the State's application for a TRO on March 5, 1999, and an evidentiary hearing on the State's motion for a preliminary injunction was held on March 19 and 22, 1999.

The State's objectives in the injunction hearing were threefold: (1) to correct popular misconceptions concerning rattlesnakes; (2) to explain basic behavioral patterns and habitat needs of timber rattlesnakes; and (3) to demonstrate how Sour Mountain's fence was likely to interfere with essential behaviors and adversely modify habitat. To achieve these objectives, the State's direct case relied on the testimony of two expert witnesses, Dr. Theodore Kerpez<sup>32</sup> and Dr. William S. Brown.<sup>33</sup> In order to

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<sup>31</sup> *Sour Mountain I*. The complaint also alleged that Sour Mountain's construction of the fence constituted an impermissible physical alteration related to a regulated project under SEQRA in violation of NYCRR tit. 6 § 617.3(a). This cause of action was subsequently dismissed by Supreme Court. 703 N.Y.S.2d at 863.

<sup>32</sup> Dr. Kerpez is a Senior Wildlife Biologist in the DEC Region 3 office, where he is in charge of the Endangered and Threatened Species Program and the Biological Diversity Program for the region. He is currently supervising long-term DEC research examining the female reproductive ecology of timber rattlesnake populations in the Shawangunk mountains. Dr. Kerpez was qualified by the *Sour Mountain I* court as an expert in assessing the impacts of human activities on the Eastern timber rattlesnake. Direct testimony of Dr. Theodore Kerpez, Transcript of Proceedings for March 19, 1999, Morning Session, at 3-8, *Sour Mountain I* (Index No. 986/99) [hereinafter Tr. Morning Sess.].

<sup>33</sup> Dr. Brown was employed for 23 years as a biology professor at Skidmore College where he taught courses on snake ecology, behavior, and life history, including two courses that specifically involved the Eastern timber rattlesnake. He has also been involved in long-term field research on timber rattlesnake populations in New York State involving denning characteristics, ecology, and behavior of timber rattlesnakes, timber rattlesnake movement, temperature relationships, hibernation characteristics, scent trailing by newborns, female reproductive ecology, and male reproductive ecology. Dr. Brown's field research has resulted in the publication in peer-reviewed scientific journals of ten articles pertaining to various aspects of timber rattlesnake ecology and behavior and he is the author of the only scientific monograph on the Eastern timber rattlesnake. Dr. Brown was qualified by the court as an expert in the ecology and behavior of the Eastern timber rattlesnake. Direct testimony of Dr. William S. Brown, Transcript of Proceedings for March 19, 1999, Afternoon Session, at 7-15, *Sour Mountain I* (Index No. 986/99) [hereinafter Tr. Afternoon Sess.].

overcome the popular prejudice against rattlesnakes, both experts explained the non-aggressive nature of timber rattlesnakes, noting that they seek to escape and hide when approached and thus pose little threat to humans.<sup>34</sup> The experts also sought to correct mistaken perceptions of rattlesnakes as a nuisance species by explaining the crucial role of rattlesnakes in the forest ecosystem, in which they act as important predators contributing to energy transfer in the food web.

In order to lay the biological groundwork for the State's case, Dr. Kerpez provided a detailed description of the life cycle and behavior of the timber rattlesnake, and explained that the den site is crucial to the rattlesnakes' annual cycle of behaviors.<sup>35</sup> Drs. Kerpez and Brown testified that timber rattlesnakes are migratory, and that seasonal migrations occur in two phases: (1) moving away from the den site in the spring (called "out-migration"); and (2) moving back toward the den in autumn (called "in-migration"). During out-migration, rattlesnakes migrate away from the den site in virtually all directions, moving into forested summer range habitats typically located up to two miles from the den.<sup>36</sup> Summer range habitats are part of the rattlesnake's "home range," an area in which the individual snake normally lives and engages in important behaviors such as foraging, reproduction and gestation. Perhaps most significantly, the State's experts testified that timber rattlesnakes are faithful to their den sites, returning to the same site year after year using several possible mechanisms of orientation and den location.<sup>37</sup> Den sites provide the "focal point" for rattlesnake migration, and individual snakes exhibit high fidelity to a particular den.

Building on this foundation of rattlesnake biology, the State's

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<sup>34</sup> The Appellate Division specifically noted that timber rattlesnakes are "not really dangerous to people and that an individual has more of a chance of being struck by lightning than being bitten by a rattlesnake." *Sour Mountain II*, 714 N.Y.S.2d at 81, quoting testimony of Dr. Kerpez.

<sup>35</sup> Dr. Kerpez explained that in New York, den sites are typically located on or near granitic escarpments with accumulations of talus rocks, and are usually located on mountain slopes with south-facing exposures. He also explained that, in this latitude, rattlesnake dens are communal, and the entire den population remains in hibernation together for approximately seven months of the year. Testimony of Dr. Theodore Kerpez, Tr. Morning Sess. at 15-18.

<sup>36</sup> Testimony of Dr. Theodore Kerpez, Tr. Morning Sess. at 12; Testimony of Dr. William S. Brown, Tr. Afternoon Sess. at 16.

<sup>37</sup> Testimony of Dr. Theodore Kerpez, Tr. Morning Sess. at 11; Testimony of Dr. William S. Brown, Tr. Afternoon Sess. at 16-17.

experts then explained how the Sour Mountain fence would interfere with the Bald Hill rattlesnakes. Both experts testified that, after emerging from hibernation, rattlesnakes from the Bald Hill den would disperse in all directions in which there is suitable habitat, and that the Sour Mountain fence would disrupt and prevent their normal dispersal, movement and migration patterns.<sup>38</sup> Furthermore, utilizing information from the DEIS submitted for the mining project, site maps, aerial photos, and personal observations, Dr. Kerpez calculated that Sour Mountain's property comprised approximately twenty percent of the most proximate<sup>39</sup> potential habitat for the Bald Hill rattlesnakes, and that the fence would prevent the rattlesnakes from gaining access to that habitat. Dr. Brown opined that the fence would adversely affect some of the Bald Hill rattlesnakes by denying them access to their traditional home ranges, and explained that this could disrupt normal foraging behavior. Based on the proximity of the den to the Sour Mountain property, the population of the den,<sup>40</sup> and the presence of timber rattlesnake habitat on and near Sour Mountain's property, Drs. Kerpez and Brown further concluded that it was extremely likely that rattlesnakes from the Bald Hill den would utilize the Sour Mountain property, absent the fence.

Sour Mountain offered no expert testimony on the effects of the Sour Mountain fence on migration of timber rattlesnakes from the Bald Hill den. Rather, its expert sought to discount the effects of the fence on the Bald Hill rattlesnakes, stating that it would merely redirect the snakes into other suitable habitat, and that such an effect would be insignificant.<sup>41</sup> Sour Mountain's expert further testified that no "taking" could occur because rattlesnakes had never been sighted on Sour Mountain's property, and he had observed no evidence of the presence of rattlesnakes on the property.<sup>42</sup>

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<sup>38</sup> Testimony of Dr. Theodore Kerpez, Tr. Morning Sess. at 66; Testimony of Dr. William S. Brown, Tr. Afternoon Sess. at 17-18.

<sup>39</sup> Within one-half mile of the den site. Testimony of Dr. Theodore Kerpez, Tr. Morning Sess. at 78-85.

<sup>40</sup> Dr. Brown used statistical analysis to estimate the population of the Bald Hill den to include approximately 60 individual snakes of all ages and size classes. Testimony of Dr. William S. Brown, Tr. Afternoon Sess. at 24-26.

<sup>41</sup> Testimony of Robert Zappalorti, Transcript of Proceedings for March 23, 1999, at 48-53, 112-115, 134-141, *Sour Mountain I* (Index No. 986/99).

<sup>42</sup> *Id.*

#### D. Supreme Court's Decision and Order

In its decision and order entered on March 31, 1999, the Supreme Court granted the State's motion for a preliminary injunction, holding that the State had met its burden of showing a likelihood of success on the merits, irreparable harm in the absence of injunctive relief, and a balancing of the equities in its favor. In assessing the likelihood of success on the merits, the court found that the State had proved that "it is extremely likely that some of the rattlesnakes from the Bald Hill den will intercept the Sour Mountain snake-proof fence and that the fence will interfere with their normal migration, foraging, shedding, mating, basking, and gestational activities."<sup>43</sup> The court also found that the State had proved the fence would deny access to foraging habitat and home range areas on the Sour Mountain property.<sup>44</sup>

Based on this evidence, the court concluded that Sour Mountain's snake-proof fence constituted an illegal "taking" of the Eastern timber rattlesnake in violation of ECL § 11-0535(2).<sup>45</sup> In doing so, the court specifically found that modification of a protected species habitat may constitute an illegal take of that species:

[g]iven the clear statement that "pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting" protected species are prohibited, the subsequent term "all lesser acts" must mean acts of less significance or impact than those enumerated. If this were not the case, the inclusion of "lesser acts" would be merely redundant. Moreover, the terms "disturbing, harrying or worrying" are merely examples of lesser included acts and do not encompass all lesser acts which are prohibited. . . .

Given . . . the plain language of the statute, which indicates that "all lesser acts" in a similar vein constitute a "taking," this court concludes that a modification of rattlesnake habitat constitutes a taking under [the ESA].<sup>46</sup>

In reaching this determination, the court explicitly rejected Sour Mountain's argument that the State was required to show that an actual taking of an individual snake had occurred, holding that

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<sup>43</sup> *Sour Mountain I*, 703 N.Y.S.2d at 861.

<sup>44</sup> *Id.* at 862.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 859.

“[t]his Court is not required to allow such a taking prior to enjoining acts in violation of [the ESA].”<sup>47</sup> On the issue of irreparable harm, the court found:

Plaintiffs are charged with the protection of all threatened species, including the timber rattlesnake. Harm to such species impacts upon the quality of life of all New York State residents and is not compensable by money damages.<sup>48</sup>

Finally, the court found that the balance of the equities favored the State, rejecting Sour Mountain’s argument that any harm to timber rattlesnakes from the snake-proof fence was purely speculative.<sup>49</sup>

Based on these findings, the court granted the State’s motion for preliminary injunction,<sup>50</sup> and ordered Sour Mountain to remove its fence by no later than April 3, 1999.<sup>51</sup> Subsequently, Sour Mountain filed a Notice of Appeal.<sup>52</sup>

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<sup>47</sup> *Id.* at 862.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> The terms of the preliminary injunction enjoined Sour Mountain from continuing to violate the ESA

by disturbing, harrying or worrying timber rattlesnakes [and] from unlawfully preventing, deterring or otherwise interfering with the normal dispersal, migration or movement of timber rattlesnakes, and from modifying and/or degrading the timber rattlesnake habitat in the vicinity of defendant’s property through the erection and maintenance of snake-proof fencing along and/or near the boundary of that property [and] to remove all snake-proof fencing it has erected along and/or near the boundary of its property . . . .

*Id.* at 863.

<sup>51</sup> The State commenced a contempt proceeding against Sour Mountain and its president, Jay Montfort, when Sour Mountain failed to remove the fence by the court-ordered deadline. *See State of New York v. Sour Mountain Realty, Inc.*, Index No. 99/1459 (Sup. Ct. Dutchess Co., filed April 7, 1999). Sour Mountain completed removal of the fence approximately two weeks later, on the eve of the contempt hearing.

<sup>52</sup> Judge Hillery’s decision created something of a sensation, with editorials and letters to the editor commenting on the Court’s decision appearing in newspapers across the country. *See, e.g., Mining Plan Combatants Should Seek a Compromise*, *POUGHKEEPSIE JOURNAL*, April 4, 1999, at 16A; *Physiological Stress’ for Snakes?*, *TARRYTOWN JOURNAL NEWS*, April 2, 1999; Andrew C. Revkin, *Losing a Battle to Rattles and Fangs*, *NEW YORK TIMES*, April 1, 1999, at A1; Jerome C. Jacobs, *Snakes in the Grass: Protect the Humans*, *ATLANTA JOURNAL CONSTITUTION*, March 27, 1999; Mike Redmond, *You Just Don’t Worry a Snake Unless You Smack it First*, *INDIANAPOLIS STAR*, March 27, 1999; Dick Feagler, *Snake in New York Grass Poses a Real Temptation*, *CLEVELAND PLAIN DEALER*, March 22, 1999. The case also became a *cause celebre* among property rights activists, who named Sour Mountain’s owner to the National Directory of Environmental Regulatory Victims maintained by one property

### E. *The Appeal*

The main issues on appeal<sup>53</sup> were: (1) whether the ESA authorizes DEC to protect the habitat of endangered or threatened species; and (2) whether modification of a protected species habitat could constitute an illegal taking of that species.

On October 4, 2000, the Appellate Division, Second Department issued a *per curiam* Opinion and Order unanimously affirming the preliminary injunction.<sup>54</sup> The Appellate Division not only affirmed Supreme Court's decision in all respects, but went further than the lower court in finding Sour Mountain's constitutional arguments to be meritless.

Of particular significance is the reasoning of the appellate court in rejecting Sour Mountain's argument that DEC lacks authority to protect the habitat of listed species:

In light of the broad language of [the ESA], including the prohibition against "all lesser acts such as disturbing, harrying or worrying" an endangered or threatened species, *we conclude that the DEC has the statutory authority to protect the habitats of such species . . . We agree with the Supreme Court that the proscribed "lesser acts" logically include habitat modification. . . . It is apparent from the statutory language at issue that the Legislature intended broad protection to be afforded protected species and that habitat protection may, under appropriate circumstances, be encompassed within that protection.*<sup>55</sup>

The appellate court also found support for its inclusion of habitat modification within the definition of "taking" in federal court decisions interpreting the federal Endangered Species Act.<sup>56</sup> In particular, the court cited to federal cases where habitat modification was found to constitute an illegal take under the

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rights group. The National Center for Public Policy Research, 2000 National Directory of Environmental and Regulatory Victims, *available at* <http://www.nationalcenter.org/VictimDirectory00.html>.

<sup>53</sup> Sour Mountain's appeal of Supreme Court's preliminary injunction generated as much interest as the original decision. Many groups sought and were granted leave to file briefs as *amicus curiae*. Pacific Legal Foundation, the New York State Builders Association, the New York Farm Bureau, and the Empire State Forest Products Association filed briefs in support of Sour Mountain; Putnam-Highlands Audubon Society, Scenic Hudson, Inc., Scenic Hudson Land Trust, Inc., and Environmental Advocates filed briefs in support of the State. *See Sour Mountain II*, 714 N.Y.S.2d 78.

<sup>54</sup> *Id.* at 78.

<sup>55</sup> *Id.* at 82 (emphasis added).

<sup>56</sup> 16 U.S.C. §§ 1531 *et seq.*

federal law, finding “the reasoning of these cases persuasive,”<sup>57</sup> and noting that the definition of “taking” under the federal act is “somewhat narrower” than the definition in New York’s ESA.

Turning to the particular facts of the *Sour Mountain*, the Appellate Division sustained the Supreme Court’s finding that New York State had satisfied the three-prong test for injunctive relief, finding that “the sole purpose of the fence on the perimeter of its property was to interfere with the normal migratory patterns of a threatened species,” and that DEC’s determination that the placement of the fence constituted a taking of the Bald Hill rattlesnakes was neither arbitrary nor capricious.<sup>58</sup> The court then went on to reject *Sour Mountain*’s constitutional arguments, finding that the removal of the fence did not constitute a regulatory taking of defendant’s property without just compensation because “any economic impact on the parcel would be tenuous at best.”<sup>59</sup> The court also found that no physical taking of defendant’s property had occurred because the State “has not physically occupied or appropriated any portion of the [*Sour Mountain*] parcel.”<sup>60</sup>

Finally, in rejecting *Sour Mountain*’s constitutional claims, the Court resoundingly affirmed the State’s interest in protection of endangered and threatened species:

[T]he State, through its exercise of its police power, is safeguarding the welfare of an indigenous species that has been found to be threatened with extinction . . . *The State’s interest in protecting its wild animals is a venerable principle that can properly serve as a legitimate basis for the exercise of its police power . . .*<sup>61</sup>

Thus, after a judicial drought of nearly thirty years, the ESA has had, within the space of a few months, the benefit of two judicial interpretations of DEC’s regulatory authority and the scope of the ESA’s prohibition against the taking of protected species.

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<sup>57</sup> *Sour Mountain II* at 83.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 84.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (emphasis added).

#### IV IMPLICATIONS FOR ENDANGERED SPECIES PROTECTION IN NEW YORK

The *Sour Mountain* decisions are significant in several respects. First, they place New York among a handful of states that explicitly recognize that adverse modification of habitat may jeopardize the continued existence of endangered species. Second, they continue and reaffirm the New York judiciary's tradition of recognizing the State's interest in protection of indigenous species and their habitat. Third, they evince a judicial understanding of the critical interplay between law and conservation biology in the field of endangered species protection.

##### A. *Comparison With Other States' Endangered Species Laws*

Most states have some form of statutory protection for endangered and threatened species of wildlife,<sup>62</sup> though the scope

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<sup>62</sup> See Alaska Endangered Species Act, ALASKA STAT. §§ 16.20.180–210 (Michie 2000); California Endangered Species Act, CAL. [FISH & GAME] CODE §§ 2050–2116 (West 1998 & Supp. 2001); Colorado Nongame and Endangered Species Conservation Act, COLO. REV. STAT. §§ 33-2-101 to -108 (2000); Connecticut Endangered Species Act, CONN. GEN. STAT. ANN. §§ 26-303 to -315 (West 1996 & Supp. 2001); Florida Endangered and Threatened Species Act, FLA. STAT. ANN. §§ 372.072–.073 (West 1997 & Supp. 2002); Georgia Endangered Wildlife Act, GA. CODE ANN. §§ 27-3-130 to -133 (2001); Hawaii Conservation of Aquatic Life, Wildlife and Land Plants Act, HAW. REV. STAT. §§ 195D-1 to -10 (1993 & Supp. 2000); Idaho Species Conservation Act, IDAHO CODE §§ 36-2401 *et seq.* (Michie 1994 & Supp. 2001); Illinois Endangered Species Protection Act, ILL. ANN. STAT. 520:10/2–11 (1993 & Supp. 2001); Iowa Endangered Plants and Wildlife Act, IOWA CODE ANN. §§ 481B.1–.10 (West 1999 & Supp. 2001); Kansas Nongame and Endangered Species Conservation Act, KAN. STAT. ANN. §§ 32-957 to -963, 32-1009 to -1012, 32-1033 (2001); Kentucky Endangered Species Act, KY. REV. STAT. ANN. § 150.183 (Michie 2001); Louisiana Threatened and Endangered Species Conservation Act, LA. STAT. ANN. §§ 56:1901–1907 (West 1987 & Supp. 2001); Maine Endangered Species Act, ME. REV. STAT. ANN. tit. 12, §§ 7751–7759 (West 1964 & Supp. 2000); Maryland Nongame and Endangered Species Conservation Act, MD. CDE ANN. [NAT. RES. I] §§ 10-2A-01 to -09 (2000); Massachusetts Endangered Species Act, MASS. GEN. LAWS ANN. ch. 131A §§ 1–6 (West 1991 & Supp. 2001); Michigan Endangered Species Act, MICH. COMP. LAWS ANN. §§ 324.36501–.36507 (West 1999 & Supp. 2001); Minnesota Endangered Species Act, MINN. STAT. ANN. §§ 84.0894–.0895 (West 1995 & Supp. 2001); Mississippi Nongame and Endangered Species Conservation Act, MISS. CODE ANN. §§ 49-5-01 to -119 (1999 & Supp. 2001); Missouri Endangered Species Act, MO. ANN. STAT. § 252.240 (West 2001); Montana Nongame and Endangered Species Conservation Act, MONT. CODE ANN. §§ 87-5-101 to -122 (2001); Nebraska Nongame and Endangered Species Conservation Act, NEB.

of protection afforded varies from state to state. A common component of state endangered species laws is a prohibition against the “take” of protected species.<sup>63</sup>

Vermont’s Protection of Endangered Species Act includes a

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REV. STAT. §§ 37-806 to -811 (1998); Nevada Endangered Species Act, NEV. REV. STAT. §§ 503.584–.589 (West 1964 & Supp. 2000); New Hampshire Endangered Species Conservation Act, N.H. REV. STAT. ANN. §§ 212A:1–:15 (2001); New Jersey Endangered and Nongame Species Conservation Act, N.J. STAT. ANN. §§ 23:2A-1 to -13 (West 1997 & Supp. 2001); New Mexico Wildlife Conservation Act, N.M. STAT. ANN. §§ 17-2-37 to -46 (Michie 2001.); North Carolina Endangered and Threatened Wildlife and Wildlife Species of Special Concern Act, N.C. GEN. STAT. §§ 113-331 to -337 (2000); North Dakota Endangered Species Act, N.D. CENT. CODE §§ 20.1-01 to -02 (1991); Ohio Endangered Species Act, OHIO REV. CODE ANN. §§ 1531.25-.26, 1531.99 (West 1996 & Supp. 2000); Oklahoma Endangered Species Act, OKLA. STAT. ANN. tit. 29, §§ 2-109, 2-135, 5-412, 7-601 to -602 (West 1991 & Supp. 2002); Oregon Threatened or Endangered Wildlife Species Act, OR. REV. STAT. §§ 496.171–.192, 498.026 (1999 & Supp. 2000); Pennsylvania Game and Wildlife Code, PA. CONS. STAT. ANN. §§ 101–102 (West 1997); Rhode Island Endangered Species of Plants and Animals Act, R.I. GEN. LAWS §§ 20-37-1 to -5 (1998); South Carolina Nongame and Endangered Species Conservation Act, S.C. CODE ANN. §§ 50-15-10 to -90 (Law. Co-op. 1999); South Dakota Endangered and Threatened Species Act, S.D. CODIFIED LAWS §§ 34A-8-1 to -13 (Michie 1978); Tennessee Nongame and Endangered or Threatened Wildlife Species Conservation Act, TENN. CODE ANN. §§ 70-8-101 to -112 (1995); Texas Endangered Species Act, TEX. [PARKS & WILD.] CODE ANN. §§ 68.001–.021 (Vernon 1991); Vermont Protection of Endangered Species Act, VT. STAT. ANN. tit. 10, §§ 5401–5410 (2001); Virginia Endangered Species Act, VA. CODE ANN. §§ 29.1-563 to -570 (Michie 2000); Washington Fish and Wildlife, WASH REV. CODE ANN. §§ 77.080.010, 77.12.040, 77.12.047 (West 2001); Wisconsin Endangered Species Act, WIS. STAT. ANN. §§ 29.65, 29.415 (West 1988).

<sup>63</sup> See ALASKA STAT. § 16.20.195 (Michie 2000); CAL. [FISH & GAME] CODE § 2080 (West 1998 & Supp. 2001); COLO. REV. STAT. § 33-2-105(3) (2000); CONN. GEN. STAT. ANN. § 26-311(a) (West 1996 & Supp. 2001); HAW. REV. STAT. § 195D-4(e)(2)(1993 & Supp. 2000); ILL. COMP. ANN. STAT. § 520:10/3 (West 1993); IOWA CODE ANN. § 481.B.5 (West 1999 & Supp. 2001); LA. CIV. CODE ANN. art. 56:1904(F)(2) (West 1987 & Supp. 2001); MD. CODE ANN. [NAT. RES. I ] § 10-2A-05(c)(2) (2000); MASS. GEN. LAWS ANN. ch. 131A, § 2 (West 1991 & Supp. 2001); MICH. COMP. LAWS ANN. § 324.36505(1)(West 1999 & Supp. 2001); MINN. STAT. ANN. § 84.0895(1) (West 1995 & Supp. 2001); MISS. CODE ANN. § 49-5-109(c) (1999 & Supp. 2001); MONT. CODE ANN. § 87-5-106 (2001); N.H. REV. STAT. ANN. § 212A:7(I)(b) (2001); N.J. STAT. ANN. § 23:2A-6 (West 1997 & Supp. 2001); N.M. STAT. ANN. § 17-2-41(C) (2001); N.C. GEN. STAT. § 113-337(a)(1) (2000); OHIO REV. CODE ANN. § 1531.25 (West 1996 & Supp. 2000); OKLA. STAT. ANN. tit. 29, § 5-412(A) (West 1991 & Supp. 2002); PA. CONS. STAT. ANN. § 2924(d) (West 2000); S.C. CODE ANN. § 50-15-30(c) (Law. Co-op. 1999); S.D. CODIFIED LAWS § 34A-8-9 (Michie 1978); TENN. CODE ANN. § 70-8-104(c) (1995); VT. STAT. ANN. tit. 10 § 5403(a); VA. CODE ANN. § 29.1-564 (Michie 2000); WIS. STAT. ANN. § 29.415(a) (West 1988).

definition of “take” that is virtually identical to the definition in New York’s law.<sup>64</sup> Vermont is also the only other state in which a court has interpreted “take” in the context of habitat modification. In *State v. Searles*,<sup>65</sup> the Vermont Supreme Court sustained a criminal conviction for an illegal “take” of fish resulting from the draining of a small pond. Although the case was decided prior to passage of Vermont’s endangered species law, the statutory definition of “take” interpreted by the court was the same. The court, after reciting the definition, concluded “we have no hesitation in holding that . . . the fish that died because of lack of water [resulting from draining the pond] were taken by respondent.”<sup>66</sup> Although it did not elaborate, it appears that the *Searles* court, like the *Sour Mountain* courts, found that modifying the fish habitat by draining the pond qualified as a “lesser act” included within the definition of “take.”

Several state law definitions of “take” closely follow the definition in the federal Endangered Species Act,<sup>67</sup> which defines the term to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>68</sup> Implementing regulations promulgated by the U.S. Fish and Wildlife Service further define “harm” as “an act which actually kills or injures wildlife. *Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.*”<sup>69</sup> The inclusion of significant habitat modification or degradation in the regulatory interpretation of the federal ESA’s “take” definition was sustained by the U.S. Supreme Court in *Babbitt v. Sweet Home*

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<sup>64</sup> Vermont’s law defines “take and taking” as “pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting fish, birds and quadrupeds and all lesser acts, such as disturbing, harrying or worrying or wounding or placing, setting, drawing, or using any net or other device commonly used to take fish or wild animals, whether they result in the taking or not; and shall include every attempt to take and every act of assistance to every other person in taking or attempting to take fish or wild animals, provided that when taking is allowed by law, reference is had to taking by lawful means and in lawful manner.” VT. STAT. ANN. tit. 10 § 4001 (1997).

<sup>65</sup> 108 Vt. 236 (1936).

<sup>66</sup> *Id.* at 241.

<sup>67</sup> 16 U.S.C. §§ 1531 *et seq.*

<sup>68</sup> *Id.* § 1532(19).

<sup>69</sup> 50 CFR § 17.3 (emphasis added).

*Chapter of Communities for a Great Oregon.*<sup>70</sup>

Of the states that generally follow the federal definition of “take,” eight include “harm” within their statutory definitions.<sup>71</sup> Most other states track the federal definition but, perhaps to avoid application of *Sweet Home*, omit “harm” from the definition of “take.”<sup>72</sup> Courts in the states adopting the federal definition of “take” have not yet been called upon to determine whether the term includes habitat modification.<sup>73</sup>

State laws that do not adopt the federal definition of “take” are generally less protective. Some simply prohibit the possession, importation or sale of protected species, and include no provisions

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<sup>70</sup> 515 U.S. 687 (1995).

<sup>71</sup> CONN. GEN. STAT. ANN. § 26-304(11) (West 1996 & Supp. 2001); HAW. REV. STAT. § 195D-2 (1993 & Supp. 2000); ILL. COMP. STAT. ANN. 520:10/2 (West 1993); IOWA CODE ANN. § 481B.1.9 (West 1999 & Supp. 2001); MD. CODE ANN. [NAT. RES. I ] § 10-2A-01(j) (2000); MASS. GEN. LAWS ANN. ch. 131A § 1 (West 1991 & Supp. 2001); MICH. COMP. LAWS ANN. § 324.36501(f) (West 1999 & Supp. 2001); NEB. REV. STAT. ANN. § 37-802(6) (Michie 1998). Colorado, Louisiana, Minnesota, New Hampshire, North Carolina, Ohio, Oklahoma, South Dakota, and Wisconsin, prohibit the “take” of protected species, *see supra* note 63, but do not include a definition of “take” in their statutes.

Although Virginia’s statute does not contain a definition of “take,” the term is defined in the state’s implementing regulations to include “harm.” *See* 4 VA. ADMIN. CODE § 15-20-140(4) (West 2000) (defining “harm” to include significant habitat modification or degradation whether it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering). Likewise, although Florida’s Endangered Species Act includes a limited definition of “take” that does not include habitat modification, *see* note 67 *infra*, the state’s regulations governing coastal construction permits incorporate a definition of “take” that is nearly identical to the Fish and Wildlife Service’s regulatory definition of “harm.” Florida’s regulations, which relate solely to impacts on marine turtles, define “take” as “an act that actually kills or injures marine turtles, and includes significant habitat modification or degradation that kills or injures marine turtles by significantly impairing essential behavior patterns, such as breeding, feeding, or sheltering . . . .” FLA. ADMIN. CODE ANN. r. 62B-41.002(57) (2000).

<sup>72</sup> CAL. [FISH & GAME] CODE § 86 (West 1998 & Supp. 2001); IDAHO CODE § 36-202(h) (Michie 1994 & Supp. 2001); MISS. CODE ANN. § 49-5-106(i) (1999 & Supp. 2001); MONT. CODE ANN. § 87-5-102(9) (2001); N.J. STAT. ANN. § 23:2A-3(e) (West 1997 & Supp. 2001); N.M. STAT. ANN. § 17-2-38(L) (Michie 2001); PA. CONS. STAT. ANN. § 34:102 (West 1997); S.C. CODE ANN. § 50-15-20(9) (Law. Co-op. 1999); TENN. CODE ANN. § 70-8-103(9) (1995).

<sup>73</sup> The California Attorney General has interpreted that state’s Endangered Species Act as not prohibiting indirect harm to a state-listed endangered or threatened species by way of habitat modification. 78 Op. Atty. Gen. 137, May 15, 1995.

prohibiting acts that directly harm protected species.<sup>74</sup> Others prohibit certain harmful acts, but significantly limit the scope of prohibited acts to direct killing, capturing or wounding of the species.<sup>75</sup> Although these statutes do not prohibit modification of habitat, some states have adopted implementing regulations that regulate habitat alteration,<sup>76</sup> or that incorporate consideration of impacts on endangered species habitat as part of the environmental review under other state laws.<sup>77</sup>

Although most state endangered species laws provide for agency acquisition of habitat deemed essential to the continued survival of protected species,<sup>78</sup> only a handful of states have laws

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<sup>74</sup> See, e.g., DEL. CODE ANN. tit. 7, § 601 (1991) (prohibiting “importation, transportation, possession or sale” of endangered or threatened species); KY. STAT. ANN. § 150.183(1) (1996) (unlawful to “import, transport, possess for resale or sell”); MO. ANN. STAT. § 252.240 (West 2001) (prohibiting “importation, transportation or sale”); R.I. GEN. LAWS § 20-37-3 (1998) (making it unlawful to “buy, sell, offer for sale, store, transport, import, export or otherwise traffic” in protected species); TEX. [PARKS & WILD.] CODE ANN. § 68.015 (Vernon 1991) (unlawful to “possess, sell, distribute, or offer or advertise for sale” protected species).

<sup>75</sup> See, e.g., FLA. STAT. ANN. § 372.0725 (unlawful to “intentionally kill or wound” protected species) (West 1997 & Supp. 2002); KAN. STAT. ANN. § 32-961(b) (West 2001) (requiring a permit to “capture or destroy” protected species); ME. REV. STAT. ANN. tit. 12, § 7756(1)(B) (West 1964 & Supp. 2000) (unlawful to “hunt, trap or possess”); NEV. REV. STAT. ANN. § 503.585 (West 1964 & Supp. 2000) (protected species may not be “captured, removed or destroyed”); WASH. ADMIN. CODE § 232-12-011 (2001) (protected species “shall not be hunted or fished”).

<sup>76</sup> See, e.g., KAN. ADMIN. REGS. § 115-15-3(a)(1) (defining “action” subject to permit requirements under Kansas Nongame and Endangered Species Conservation Act to include “an activity resulting in physical alteration of a listed species’ habitat . . .”).

<sup>77</sup> See, e.g., MICH. ADMIN. CODE r. 323.1057(2)(n)(i) (1999) (water quality standards “shall not . . . result in the destruction or adverse modification of [a protected] species’ critical habitat . . .”); NEV. ADMIN. CODE ch. 444 § 679(1)(b)(3) (2001) (requiring that construction and operation of a proposed municipal solid waste landfill must not “result in the destruction or adverse modification of a critical habitat [designated under the federal ESA]”); N.D. ADMIN. CODE § 69-05.2-08(2) (2001) (prohibiting any surface mining activity from being conducted if it “is likely to result in the destruction or adverse modification of designated critical habitat [under the federal ESA]”); OHIO ADMIN. CODE § 1501:13-5-01(G)(14) (2001).

<sup>78</sup> See, e.g., CAL. [FISH & GAME] CODE § 2061 (West 1998 & Supp. 2001); COLO. REV. STAT. §§ 33-2-103(1), 33-2-106 (2000); CONN. GEN. STAT. ANN. § 26-309 (West 1996 & Supp. 2001); FLA. STAT. ANN. § 372.074 (West 1997 & Supp. 2002); HAW. REV. STAT. § 195D-5(a) (1993 & Supp. 2000); ILL. COMP. STAT. ANN. § 520:10/11(a) (West 1993); IOWA CODE ANN. § 481B.4 (West 1999 & Supp. 2001); KAN. STAT. ANN. § 32-962(a) (2001); LA. STAT. ANN. § 1903(C)

that explicitly address habitat modification in the context of species protection. Of these, most provide dubious protection to habitat due to the vagueness of the statutory language. For example, Alaska's law simply requires the Commissioner of Fish and Game and the Commissioner of Natural Resources to "take measures to preserve the natural habitat" of protected species located on lands within their respective jurisdictions,<sup>79</sup> but does not specify the protective measures to be taken and contains no provisions concerning habitat located on privately owned lands. Florida makes it unlawful to "intentionally destroy the eggs or nest" of protected fish or wildlife,<sup>80</sup> but does not regulate other types of habitat alteration. Maine's Endangered Species Act authorizes the Commissioner of Inland Fisheries and Wildlife to "identify areas currently or historically providing physical or biological features essential to the conservation of the species and which may require special management considerations,"<sup>81</sup> but imposes no affirmative obligations once such habitat has been identified.

Nevada's law requires the Wildlife Commission to use its land management authority "to carry out a program for conserving, protecting, restoring and propagating selected species of native fish, wildlife and other vertebrates *and their habitats* which are threatened with extinction and destruction."<sup>82</sup> However, the law is silent regarding what protections, if any, are to be afforded such habitat. North Carolina's law creates a Nongame Wildlife Advisory Commission that is empowered to, among other things, "recommend critical habitat areas for protection or acquisition."<sup>83</sup>

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(West 1987 & Supp. 2001); ME. REV. STAT. ANN. tit. 12, § 7754(1)(A) (West 1994 & Supp. 2000); MD. CODE ANN. [NAT. RES. I] § 10-2A-06(a) (2000); MICH. COMP. LAWS ANN. § 324.36504(1) (West 1999 & Supp. 2001); MINN. STAT. ANN. § 84.0895(5)(b) (West 1995 & Supp. 2001); MISS. CODE ANN. § 49-5-111(a) (1999 & Supp. 2001); MONT. CODE ANN. § 87-5-108(1) (2001); NEB. REV. STAT. § 37-807(1) (1998); N.H. REV. STAT. ANN. § 212-A:9 (2001); N.J. STAT. ANN. § 23:2A-7(a) (West 1997 & Supp. 2001); N.M. STAT. ANN. §§ 17-2-42(A), 17-2-44(A) (Michie 2001); OHIO REV. CODE ANN. § 1531.26 (West 1996 & Supp. 2000); OR. REV. STAT. § 496.172(3) (1999 & Supp. 2000); S.C. CODE ANN. § 50-15-50(a) (Law. Co-op. 1999); TENN. CODE ANN. § 70-8-106(a)(1995); VT. STAT. ANN. tit. 10, § 5405 (2001).

<sup>79</sup> ALASKA STAT. § 16.20.185 (Michie 2000).

<sup>80</sup> FLA. STAT. ANN. § 372.0725 (West 1997 & Supp. 2002).

<sup>81</sup> ME. REV. STAT. ANN. tit. 12, § 7754(2) (West 1964 & Supp. 2000).

<sup>82</sup> NEV. REV. STAT. § 503.587 (West 1964 & Supp. 2000) (emphasis added).

<sup>83</sup> N.C. GEN. STAT. § 133-336(5) (2000).

The term “critical habitat” is undefined, as are the protective measures to be implemented once such habitat has been identified and recommended for protection. Tennessee’s statute directs the Wildlife Resources Commission to establish regulations concerning habitat alteration,<sup>84</sup> but does not include habitat alteration in its list of prohibited acts.<sup>85</sup>

The few states that afford broader protection for endangered species habitat generally follow the federal model. Like the federal ESA, Connecticut,<sup>86</sup> Nebraska,<sup>87</sup> and Oregon<sup>88</sup> require that, with respect to any project that they undertake, fund or approve,

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<sup>84</sup> TENN. CODE ANN. § 70-8-104(b) (1995).

<sup>85</sup> See *id.* § 70-8-104(c).

<sup>86</sup> Connecticut’s law includes a definition of “essential habitat,” modeled on the federal law’s definition of “critical habitat,” and provides that state agencies shall conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species . . . .

CONN. GEN. STAT. ANN. §§ 26-304(12), 26-310(a) (West 1996 & Supp. 2001).

<sup>87</sup> Nebraska’s law requires state agencies to “insure that actions authorized, funded or carried out by them do not jeopardize the continued existence of . . . endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.” NEB. REV. STAT. ANN. § 37-807(3) (Michie 1998). Nebraska’s implementing regulations define an “action” subject to endangered species consultation requirements as “all activities, directly or indirectly causing modifications to land, water, or air, . . . that may affect listed species or their critical habitat.” NEB. ADMIN. CODE § 163-4-012.01C (2000) The regulations define “critical habitat” as “any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species), the loss of which would appreciably decrease the likelihood of the survival and recovery of the listed species or a distinct segment of its population. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion . . . .” *Id.* 163-4-012.01J. The regulations also define “destruction or modification” as “a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for the survival or recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” *Id.* 163-4-012.01E.

<sup>88</sup> Oregon’s law requires that before a state agency “takes, authorizes or provides direct financial assistance for any action on land owned or leased by the state,” the agency must consult with the Department of Fish and Wildlife to determine “whether such action has the potential to appreciably reduce the likelihood of the survival or recovery” of a protected species. OR. REV. STAT. § 496.182(2) (1999 & Supp. 2000).

state agencies first determine that the project will not jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat.<sup>89</sup> In the event there is a finding of jeopardy, including a finding of jeopardy based on destruction or adverse modification of critical habitat, these state laws require that “reasonable and prudent alternatives” be implemented in order to prevent jeopardy.<sup>90</sup> However, like the federal ESA, the proposed project may nevertheless proceed if certain findings are made.<sup>91</sup>

Massachusetts’ Endangered Species Act is the only state law that does not closely follow the federal model, but nevertheless provides specific protection to endangered species habitat. Under Massachusetts’ law, the Director of the Division of Fisheries and Wildlife is authorized to designate significant habitat for listed species by regulation after public hearing, and such habitat may be designated on both public or private lands.<sup>92</sup> The law defines “significant habitat” as “specific areas . . . in which are found the physical or biological features important to the conservation of a threatened or endangered species population and which may

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<sup>89</sup> These laws do not, however, regulate habitat modification on private lands absent state agency funding, approval or involvement.

<sup>90</sup> CONN. GEN. STAT. ANN. § 26-310(c) (West 1996 & Supp. 2001); OR. REV. STAT. § 496.182(3) (1999 & Supp. 2000).

<sup>91</sup> CONN. GEN. STAT. ANN. § 26-310(c) (West 1996 & Supp. 2001) (permitting project to proceed if there has been no “irreversible or irretrievable commitment of resources made after initiation of consultation, the benefits of the proposed project “clearly outweigh” the benefits of the project if reasonable and prudent alternative are imposed, the action “is of regional or state-wide significance,” and “reasonable mitigation and enhancement measures” are implemented to minimize the project’s adverse impacts); OR. REV. STAT. § 496.182(4) (1999 & Supp. 2000) (project may proceed if “potential public benefits of the proposed action outweigh the potential harm from failure to adopt” reasonable and prudent alternatives, and “reasonable mitigation and enhancement measures” are implemented to minimize the project’s adverse impacts).

Nebraska’s law, however, appears to require that a project be abandoned in the event of a jeopardy finding. NEB. REV. STAT. ANN. § 37-807(3) (Michie 1998). *See* Central Platte Natural Resources Dist. v. City of Fremont, 250 Neb. 252 (1996) (upholding finding that proposed projects would jeopardize the continued existence of the endangered sandhill crane, requiring that applications be denied).

<sup>92</sup> MASS. GEN. LAWS ANN. ch.131A, § 4 (West 1991 & Supp. 2001). The act provides detailed procedures, including a right of appeal and a right to petition for state acquisition, in circumstances where private lands are designated as significant habitat. *Id.*

require special management considerations or protection.”<sup>93</sup> It is unlawful to “alter significant habitat” absent a special permit,<sup>94</sup> subject to certain enumerated exceptions.<sup>95</sup>

### B. *New York’s Tradition of Species Protection*

Compared to other states, New York has a relatively well-developed tradition of species protection. New York courts have long recognized the legitimate interest of the State in protection of species and their habitat.<sup>96</sup> In *Phelps v. Racey*,<sup>97</sup> an 1875 Court of Appeals decision, the court upheld an early New York State statute prohibiting the possession of game birds out of season. In doing so, the court recognized that such enactments were essential for conservation purposes, noting that “[t]he protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds. . . .”<sup>98</sup> Another nineteenth century case, *People v. Pierce*,<sup>99</sup> involved the use of dynamite for fishing in violation of a State fishing law. In

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<sup>93</sup> *Id.* § 1.

<sup>94</sup> In order to obtain a habitat alteration permit, a project applicant must submit detailed information concerning the proposed project, including, among other things, a description of the impacts of the proposed project on protected species, alternatives to the project, and mitigation measures to be taken to ameliorate the impact on protected species. MASS. GEN. LAWS ANN. ch. 131A, § 5(a) (West 1991 & Supp. 2001). A permit may be granted “only upon a finding . . . that the proposed action will not reduce the viability of the significant habitat to support the endangered or threatened species population involved.” *Id.*

<sup>95</sup> MASS. GEN. LAWS ANN. ch.131A, § 2 (West 1991 & Supp. 2001). “Alter” is further defined in the Act’s implementing regulations as “to change the physical or biological condition of a habitat in any way that detrimentally affects the capacity of the habitat to support a population of endangered or threatened species . . .” 321 MASS. REGS. CODE tit.10.02 (2001). The exceptions include taking pursuant to a permit issued for scientific or educational purposes or to address a public health hazard, and construction of a single family dwelling that meets certain specified conditions. MASS. GEN. LAWS ANN. ch.131A, § 3 (West 1991 & Supp. 2001).

<sup>96</sup> One commentator asserts that modern day restrictions on the use of private land that protect wildlife, such as those in the federal Endangered Species Act and similar state laws, “have roots deep in Anglo-American common law.” Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are?* 85 IOWA L. REV. 849, 860-61 (2000). As evidence for this proposition, Babcock points to early English laws alleviating human alterations to the natural landscape that threatened the existence of desirable species, and prohibiting particularly destructive methods of taking wildlife. *Id.* at 880-82.

<sup>97</sup> 60 N.Y. 10 (1875).

<sup>98</sup> *Id.* at 14.

<sup>99</sup> 18 Misc. 83 (Cattaraugus Co. Ct. 1896).

upholding the challenged statute, the court explicitly discussed the necessity of such regulations for the conservation of the species:

This fish law is the result of years of study and experience in the nature and habits of the finny tribe, with a view to prevent their destruction, and to promote, to the greatest extent, their growth and increase. . . . Experience has taught that, unless the methods of taking fish can be controlled, and the season for taking them regulated so as not to interfere with their propagation, all the fish in the waters of the State are doomed to destruction.<sup>100</sup>

In *People v. Bootman*,<sup>101</sup> another case involving a challenge to New York State fishing regulations, the Court of Appeals again had occasion to address the power of the State to regulate for the purpose of species conservation. As in the earlier cases, the court couched its analysis in terms of the economic and recreational value of the species:

For time out of mind and in all jurisdictions, laws passed for the protection of fish and game have been regarded as sanctioned by the police power which belongs to every sovereign state. . . . It is to the interest of the state that neither should be wasted or destroyed and that both should be carefully protected, especially during the breeding season. Without protection the fish and game will soon disappear and the people thus be deprived of an important source of food supply, as well as a delightful recreation which promotes health and prolongs life.<sup>102</sup>

The first New York case to directly address modification of habitat in the context of species preservation was *Matter of Delaware River at Stilesville*.<sup>103</sup> In *Stilesville*, the Appellate Division upheld an order of the Forest, Fish and Game Commissioner requiring the owner of a dam on the Delaware River to install a fishway to provide for passage to upstream spawning beds:

The people of the State have . . . as an easement in this stream the right to have fish inhabit its waters and freely pass to their spawning beds and multiply . . . and no riparian proprietor upon the stream has the right to obstruct free passage of fish up the stream to the detriment of other riparian proprietors or of

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<sup>100</sup> *Id.* at 86.

<sup>101</sup> 180 N.Y. 1 (1904).

<sup>102</sup> *Id.* at 8.

<sup>103</sup> 131 App. Div. 403 (3d Dept. 1909).

*the public.*<sup>104</sup>

*Stilesville* was followed by *Barrett v. State of New York*,<sup>105</sup> a seminal Court of Appeals decision. *Barrett* arose out of the State's efforts to protect dwindling beaver populations in northern New York, which had been decimated by intensive trapping. In 1900, the Legislature passed a law prohibiting the killing of beaver.<sup>106</sup> This was followed in 1904 by a law making it illegal to "molest or disturb any wild beaver or the dams, houses, homes or abiding places of same."<sup>107</sup> Subsequently, the Legislature appropriated funds for the reintroduction of beaver in the Adirondack region in Northern New York. Several of the reintroduced beavers and their progeny destroyed trees on private property in the Adirondacks. The landowners sued, alleging that the State had no authority to protect a "destructive" species such as the beaver, and that the 1904 law prohibiting the molesting of beavers was an unconstitutional exercise of the police power because it prevented the plaintiffs from protecting their property.

The Court of Appeals upheld the constitutionality of the statutes, finding the protection of species and their habitat to be a valid exercise of the State's police power:

[T]he general right of the government to protect wild animals is too well established to be now called in question. . . . Their preservation is a matter of public interest. They are a species of natural wealth which without special protection would be destroyed. . . . [The legislature] exercises a governmental function for the benefit of the public at large and no one can complain of the incidental injuries that may result. . . . The police power is not limited to guarding merely the physical or material interests of the citizen. His moral, intellectual and spiritual needs may also be considered. The eagle is preserved, not for its use but for its beauty.<sup>108</sup>

The significance of *Barrett* lies not only in its explicit recognition of the State's legitimate interest in protecting the habitat of species threatened with extinction, but also in its recognition, for the first time, that the continued survival of a species has an intrinsic value apart from the species' economic or

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<sup>104</sup> *Id.* at 411-12 (emphasis added).

<sup>105</sup> 220 N.Y. 423 (1917).

<sup>106</sup> L. 1900, ch. 20.

<sup>107</sup> L. 1904, ch. 674, § 1.

<sup>108</sup> 220 N.Y. at 427-28 (emphasis added).

recreational value.<sup>109</sup> In doing so, *Barrett* was a harbinger of the conservation philosophy that was to lead, more than fifty years later, to enactment of the ESA.

### C. *The Interplay Between Law and Biology*

The *Barrett* and *Sour Mountain* decisions are intriguing in that they recognize that interference with essential behaviors, and adverse modification of habitat, may result in identifiable harm to a protected species, as surely as a direct physical assault resulting in injury or death. In doing so, they demonstrate a judicial grasp of basic principles of conservation biology.

In the biological world, a species' survival does not depend solely upon its individual members remaining free from physical assaults. Conservation biology teaches that a range of behaviors, such as migration, foraging, breeding, and caring for young, may be essential to long-term survival.<sup>110</sup> In addition, conservation biology recognizes that a species cannot be viewed in isolation from its habitat. Indeed, many of a species' essential behaviors are intimately tied to environmental cues, and may also be dependent on the presence or absence of specific habitat conditions.<sup>111</sup>

Although *Barrett* was decided well before modern principles of conservation biology were articulated, the Court clearly recognized the vital connection between a species' survival and protection of its habitat:

The object is to protect the beaver. The destruction of dams and houses will result in driving away the beaver. The prohibition of such acts, being an apt means to the end desired, is not so unreasonable as to be beyond the legislative power.<sup>112</sup>

In recognizing the interplay between a species and its habitat, the *Sour Mountain* courts built upon the foundations laid by *Barrett*, and, in doing so, adopted analysis similar to those applied by federal courts interpreting the federal ESA. For example, in

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<sup>109</sup> The Court also rejected the landowners' argument that the law protecting beavers and their habitat was an unreasonable exercise of the police power, finding that "[t]he prohibition against disturbing dams or houses . . . is no greater or different exercise of power from that assumed by the legislature when it prohibits the destruction of the nests and eggs of wild birds *even when the latter are found upon private property.*" 220 N.Y. at 429 (emphasis added).

<sup>110</sup> See, e.g., *Brown*, *supra* note 15, at 39-52, 55-57.

<sup>111</sup> *Id.* at 39-52.

<sup>112</sup> 220 N.Y. at 429.

*Strahan v. Coxe*,<sup>113</sup> the First Circuit found deployment of commercial fishing gear that had led to entanglement of and injury to a protected whale species to constitute an impermissible modification of whale habitat. The Fifth Circuit came to a similar conclusion in *Sierra Club v. Yeutter*,<sup>114</sup> where the court found management of timber stands by the U. S. Forest Service that involved clear-cutting to constitute a taking of a protected species of woodpecker. In *Palila v. Hawaii Dep't of Land and Natural Resources*,<sup>115</sup> the Ninth Circuit ruled that "interpretation of harm as including habitat destruction that could result in extinction" was sufficient to sustain a lower court injunction.<sup>116</sup> And in *United States v. Town of Plymouth*,<sup>117</sup> the District Court preliminarily enjoined a town from allowing off-road vehicles to drive on a beach unless appropriate precautions were taken to protect piping plovers, a federally listed endangered species, holding that an illegal take could be shown "by proving that significant modification or damage to the habitat of an endangered or threatened species is likely to occur so as to injure that species."<sup>118</sup>

As the *Sour Mountain* courts did, federal courts have held that interference with behavioral patterns of a protected species may also constitute an illegal take under the federal ESA. In *Sierra Club*, the court found that the Forest Service's timber harvesting practices constituted an illegal take of the red-cockaded woodpecker by impairing its "essential behavior patterns."<sup>119</sup> And in *Loggerhead Turtle v. County Council of Volusia County*,<sup>120</sup> artificial beach lighting was found to be an illegal take of Loggerhead and Green sea turtles because it caused spatial disorientation in hatchlings attempting to reach the sea, and caused females to abort beach nesting attempts and return to the ocean.<sup>121</sup> The court also found that vehicle use on the beach resulted in an illegal take because tire ruts impeded and redirected the

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<sup>113</sup> 127 F.3d 155, 165 (1st Cir. 1997) *cert. denied*, 525 U.S. 1116 (1998).

<sup>114</sup> 926 F.2d 429, 438-39 (5th Cir. 1991).

<sup>115</sup> 852 F.2d 1106 (9th Cir. 1988).

<sup>116</sup> *Id.* at 1110.

<sup>117</sup> 6 F. Supp. 2d 81 (D. Mass. 1998).

<sup>118</sup> *Id.* at 90.

<sup>119</sup> 926 F.2d at 438.

<sup>120</sup> 896 F. Supp. 1170 (M.D. Fla. 1995).

<sup>121</sup> *Id.* at 1180-81.

movements of hatchlings.<sup>122</sup>

The *Sour Mountain* courts recognized that Sour Mountain's snake-proof fence was likely to interfere with the annual in-migration and out-migration. Acknowledging that the den is critical to the viability and survival of the population,<sup>123</sup> the courts found such a disruption of the snakes' annual behavioral cycle to be impermissible. Although not explicitly stated in either decision, the courts' understanding that such migratory behavior is essential to the long-term survival of the species is implicit in their holding that interference with that behavior constitutes an illegal take.<sup>124</sup>

Again following the lead of *Barrett*, the *Sour Mountain* courts also found that modification of a protected species' habitat may constitute an illegal take. Specifically, the courts found that defendant's snake-proof fence was impermissible because it would deny the Bald Hill rattlesnakes' access to available habitat for foraging, shedding, mating, basking or gestational activities.<sup>125</sup> In so finding, the courts recognized the importance of rattlesnake habitat on Sour Mountain's property as the site of essential behaviors that are crucial to the continued survival of the species.

In reaching these conclusions, the *Sour Mountain* courts explicitly rejected the defendant's argument that an illegal take could only occur by direct killing, poaching or harming individual members of a protected species.<sup>126</sup> Apart from their analyses of the statutory language, the courts based their rulings on an understanding of the biological relationship between a species and its habitat, and the role of essential behaviors to the continued

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<sup>122</sup> *Id.* at 1181. See also *Babbitt*, 515 U.S. at 696-704 (1995) (upholding a Department of Interior regulation defining "harm" to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering).

<sup>123</sup> See *Sour Mountain I*, 703 N.Y.S.2d at 861; *Sour Mountain II*, 714 N.Y.S.2d at 80-81.

<sup>124</sup> See *Sour Mountain I*, 703 N.Y.S.2d at 862; *Sour Mountain II*, 714 N.Y.S.2d at 81.

<sup>125</sup> See *Sour Mountain I*, 703 N.Y.S.2d at 861. The record contained conflicting estimates of the percentage of rattlesnake habitat lost through erection of Sour Mountain's fence. While the State's expert estimated a twenty percent reduction in habitat, Sour Mountain's consultant placed the reduction at between fifteen and seventeen percent. *Id.* Neither Supreme Court nor the Appellate Division found the difference in estimates to be determinative.

<sup>126</sup> See *Sour Mountain I*, 703 N.Y.S.2d at 858-59; *Sour Mountain II*, 714 N.Y.S.2d at 82-83.

survival of a species.<sup>127</sup>

D. *The Future of Endangered Species Protection in New York*

The *Sour Mountain* decisions send a clear message that New York courts will continue their traditional recognition of the public's interest in protection of endangered species, as well as the authority of the State to regulate private property to ensure their continued survival. Moreover, these decisions demonstrate the judiciary's grasp of fundamental principles of conservation biology, and a willingness to apply those principles in the context of endangered species litigation.

As a practical matter, the decisions illustrate that expert evidence concerning the range of behaviors essential to the survival of a protected species will play a pivotal role in future judicial determinations under the ESA. Courts will carefully weigh the potential effects of challenged activities on reproductive, foraging and other key behaviors in deciding whether an illegal take is likely to occur. Expert testimony concerning the significance of particular habitat to the continued survival of a protected species will also play an increasing role in endangered species litigation. Key issues are likely to include the role that the habitat at issue plays in the species' annual cycle of behavior, the amount of such habitat to be affected by the challenged action, and whether a proposed habitat modification will disturb or disrupt important behaviors.

V

CONCLUSION

The *Sour Mountain* litigation presented a difficult challenge because of the many misconceptions surrounding rattlesnakes. The State's strategy focused on dispelling popular myths

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<sup>127</sup> In an interesting epilogue to the *Sour Mountain* case, a DEC study of timber rattlesnake utilization of the Sour Mountain property conducted during the spring, summer and fall of 1999 pursuant to Supreme Court's order, *see* 703 N.Y.S.2d at 862, resulted in discovery of another previously unknown den site. The newly discovered den is located on Sour Mountain's property. *See* Edward M. McGowan, Jesse W. Jaycox, Theodore A. Kerpez and William S. Brown, Fishkill Ridge Timber Rattlesnake Study: Rattlesnake Use of Sour Mountain Realty, Inc. Property and Potential Impacts of a Proposed Snake Exclusion Fence, Prepared for the N.Y.S. Dept. of Env. Conerv. and the N.Y.S. Office of the Atty. Gen. (April 10, 2000).

2001]      *ENDANGERED SPECIES PROTECTION IN NEW YORK*      145

concerning the threat posed by rattlesnakes to humans and documenting the details of the timber rattlesnake's migratory, foraging, denning and reproductive behaviors. This strategy was ultimately successful in convincing the courts that Sour Mountain's fence had to be removed. The State was also able to reap the benefit of the New York judiciary's longstanding recognition of the public's interest in endangered species protection, and of the willingness of the courts to apply principles of conservation biology to endangered species litigation. This conscientious approach to species protection by the New York judiciary ensures that even a rattlesnake will have its day in court.