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Taking Words For Granted: Why Congress Should Expressly Define Terms Within the ESA's Takings Provision

by Douglas T. Cohen

When the government wants or needs to take the private property of its citizens through outright confiscation, or ruinous regulation, it simply must pay for these public benefits.¹

Endangered and threatened species "are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."²

I. INTRODUCTION

Like the animals it was designed to protect, for nearly four years the Endangered Species Act (ESA) has been living

on borrowed time. On October 1, 1992, the eve of its twentieth anniversary, authorization for spending under the Act expired.³ The 102nd Congress found itself caught in the cross fire between environmentalists and advocates of individual property rights over what changes should be made to the ESA. As a result, legislators failed to renew the Act.⁴ Since 1992, Congress has continued to pass the political hot potato, choosing each year to appropriate funds for the Act without reauthorizing it. No one doubts the Act eventually will be reauthorized; the question is when and in what form.

When the Clinton Administration took office in 1992, it appeared as if the political atmosphere in Washington would breathe new life into the ESA. Many assumed that Congress would reauthorize the ESA without any significant amendments.⁵ Vice President Al Gore had been in the forefront of the environmental movement and the Clinton Administration had strong environmental allies in the democratically controlled Congress. Property owners continued to complain however, claiming the ESA was interfering with their Fifth Amendment rights against the taking of property without just compensation.⁶ Using the environmental/property rights debate as one of the pivotal points in their Contract With America, the Republicans rode an anti-government wave into Congress in the 1994 elections, capturing the majority in both Houses.⁷ The mid-term election ushered in a significant number of property rights advocates who have pushed for substantial changes to the ESA before it is reauthorized.⁸

At the heart of the reauthorization debate in Congress lies § 9, the ESA's "takings" provision.⁹ Unlike other parts of the Act, § 9 is enforceable against both the federal government and private

¹ Kenneth B. Mehlman et al., Debate, *Taking "Takings" Rights Seriously: A Debate On Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 257 (1995) [hereinafter Debate, *Taking "Takings" Seriously*]. Mehlman's comments were part of a recorded debate on the takings issue held at American University. Mehlman is an environmental lawyer and at the time of the debate was legislative director for Congressman Lamar Smith of Texas. Others who took part in the debate include Thomas Sargentich, professor of Constitutional and Administrative Law at the Washington College of Law; Joseph Sax, counselor to Secretary of the Interior Bruce Babbitt; Roger Marzulla, an environmental lawyer and former assistant attorney general in charge of land and Natural Resources during the Reagan Administration; and Charles Tiefer, former deputy general counsel to the House of Representatives.

² The Endangered Species Act of 1973, 16 U.S.C. 1531(a)(3) (1988).

³ See 16 U.S.C. § 1542 (1988).

⁴ M. Lynne Corn, *Endangered Species: Continuing Controversy*, Cong. Res. Serv. Issue Brief, updated June 22, 1993, order code IB 93027.

⁵ See Larry Bradfish, *Recent Developments in Listings Decisions Under the Endangered Species Act And Their Impact on Salmonids In The Northwest*, 3 HASTINGS W.N.W.J. ENVTL. L. & POL'Y 77 (1995) [hereinafter Comment, *Recent Developments in Listings Decisions*].

⁶ The property rights movement also has gained hold in state government. Between 1992 and 1995, approximately 20 state legislatures passed new property rights legislation. Jerome M. Organ, *Understanding State and Federal Property Rights Legislation*, 48 OKL. L. REV. 191, 199 (1996). In addition, more than 500 groups have formed nationwide to oppose the government's right to take or control private property. See, e.g., Carolyn Pesce, *Private Property vs. Public Rights*, USA TODAY, Feb. 6, 1995, at 3A.

⁷ *Id.*

⁸ See *Endangered Species: Push on For Reform of Act During Reauthorization*, [1995] Daily Env't Rep. (BNA) No. 5, at *1 (Jan. 9, 1995), available in WESTLAW BNA-DEN [hereinafter Daily Reporter: *Push On For Reform*]. The article discusses H.R. 1490, a bill introduced in the 103rd Congress by Rep. Billy Tauzin (D-La.) that calls for compensating private property owners when they are "substantially deprived of the economically viable use of the property due to ESA restrictions."

In addition, the article discusses how Rep. Don Young (R-Alaska), the then-incoming House Resources Committee Chairman, supports an amended ESA that would make it easier to delist a species and make it more difficult to list "locally" endangered species such as Salmon of the Columbia and Snake Rivers that are in abundance in other states. *Id.*

⁹ 16 U.S.C. § 1538 (1988).

parties. The provision prohibits anyone from "taking" a species listed as endangered.¹⁰ Under the current version of the ESA, individuals are held criminally and civilly liable for the "taking" of an endangered species.¹¹ The ESA, however, left it in the hands of the Secretary of the Interior and the Fish and Wildlife Service (FWS)¹² to define what constitutes a "taking," including the definition of the term "harm."¹³ The fact that the ESA did not expressly define these terms has served to fuel the fire between environmentalists and property rights advocates over the intended and proper scope of the takings provision.

This argument culminated in the U.S. Supreme Court's 1995 decision in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*,¹⁴ in which the Court affirmed the broad, regulatory definition of a "taking" which encompassed indirect harm to species as a result of habitat modification.

Some environmentalists have proposed a broader, ecosystem-based approach to protecting wildlife. Generally, they favor a definition of "takings" that includes indirect as well as direct harm to species. Environmentalists argue that

private property development and modification is more lethal to wildlife than any direct human threat.¹⁵ However, based on the perspective that human welfare should come before the welfare of "lesser" species, property rights advocates call for a much narrower approach to the takings provision.¹⁶ They want the ESA to be amended so that parties are held responsible for violations of the "takings" provision only if their activities, such as hunting and fishing, pose a direct harm to protected species.¹⁷

This comment will argue that the courts should not be left to legislate the proper balancing test between ecosystems and economic property rights or make case-by-case determinations of whether the government has "gone too far."¹⁸ In light of the Act's overarching purpose of comprehensive protection at any cost for species at risk,¹⁹ when it reauthorizes the Act, Congress should expressly define the scope of the "takings" provision in a manner that reflects the ESA's broad intent.²⁰

The comment will conclude that Congress must take it upon itself to better define the parameters of the takings provision and establish the factors the

Secretary of the Interior and the courts must consider in deciding whether specific activity constitutes an illegal taking under the ESA.

II. LEGAL AND LEGISLATIVE HISTORY

A. Takings Under the Original and Amended ESA

Although many issues have arisen during the ESA's twenty years of existence, in recent years much of the reauthorization debate has centered on what constitutes a "taking" under § 9.²¹ The Departments of Interior and Commerce implement § 9 of the Act. The Fish and Wildlife Service (FWS) is responsible for terrestrial species and the National Marine Fisheries Service (NMFS) for marine species.²² Most of the debate over the takings issue concerns FWS regulations because the vast majority of complaints about the ESA's takings provision are brought by land developers and owners.

The ESA defines "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range."²³ It defines "threatened species" as any species which is likely to become an endangered species in the near future.²⁴ The

¹⁰ *Id.*

¹¹ 16 U.S.C. § 1540(a)(b) (1988).

¹² The regulatory definitions for these terms are found at 50 C.F.R. § 17.3 (1994).

¹³ 16 U.S.C. § 1531-44 (1988).

¹⁴ 115 S.Ct. 2407 (1995).

¹⁵ See Robert Meliz, *Where The Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369 (1994) [hereinafter Comment, *Where The Wild Things Are*]. See also, *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992).

¹⁶ Laura Spitzberg, Comment, *The Reauthorization of the Endangered Species Act*, 13 TEMP. ENVTL. L. & TECH. J. 193 (1994) (citing Bruce Fein & Edwin Meese III, *Endangered a Species of Our Own: The Act Should be Amended so Human Welfare Comes First*, L.A. TIMES, Mon. July 30, 1990 at B7) [hereinafter Comment, *Reauthorization of the ESA*].

¹⁷ See, e.g., H.R. 2275, 104th Cong., 1st Sess. § 202 (1995).

¹⁸ Debate, *Taking "Takings" Rights Seriously*, *supra* note 1, at 253 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) in which the Court held that "[t]he general rule at least is that while property may be regulated to a certain extent if regulation goes too far it will be recognized as a taking."). See also John Delaney, *What Does It Take to Make a Take? A Post-Dolan Look at the Evolution of Regulatory Takings Jurisprudence in the Supreme Court*, 27 URB. LAW. 55 (1995).

¹⁹ 16 U.S.C. § 1531(b) (1988); See, e.g., *TVA v. Hill*, 437 U.S. 153, 180 (1978).

²⁰ See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978), in which the Court stated that [t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute."

²¹ Debate, *Taking "Takings" Rights Seriously*, *supra* note 1, at 253.

²² Ray Vaughn, *State of Extinction: The Case of the Alabama Sturgeon and Ways Opponents of the Endangered Species Act Thwart Protection For Rare Species*, 46 ALA. L. REV. 569, 571 (1995) (quoting UNITED STATES GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES: MANAGEMENT IMPROVEMENTS COULD ENHANCE RECOVERY PROGRAM 12 (Dec. 1988), which states "[I]nterior is responsible for freshwater and land species. Commerce for sea and ocean (marine) species.") [hereinafter Comment, *Opponents Thwart Protection*].

²³ 16 U.S.C. § 1532(6) (1988).

takings provision prohibits anyone from taking a species that is listed as endangered.²⁵ The ESA states that “to take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”²⁶ At least one commentator has praised the clarity of the § 9 takings provision, stating it is “simple, unambiguous, and breathtaking in its reach and power.”²⁷ Although § 9 does not make it unlawful to take a threatened species, such as the Northern spotted owl, the FWS promulgated a regulation that affords threaten species the same protection the Act affords to endangered species.²⁸

The FWS has been called upon to do much more than just bring threatened species within the parameters of the statute’s protection. Because the ESA also fails to define what it means to “harm” or “harass” any listed species, definitions integral to determining whether an illegal

taking has occurred,²⁹ the FWS has had to take up the slack. Thus, the present version of the ESA has created fertile ground for the battle between environmentalists and the pro-property lobby over whether the government has gone too far in setting the parameters of the takings provision. The counselor to the Secretary of the Interior, himself, has stated that anytime legislation leaves it up to the Secretary to decide how far regulations should go, the politics of the day will dictate the scope of that regulation.³⁰

The definition of “harm” promulgated by the FWS covers any “act which actually kills or injures wildlife,” including indirect harm to species resulting from significant habitat³¹ modification or degradation where wildlife is actually killed or injured by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.³² The FWS has defined “harass” as “an

intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent so as to significantly disrupt normal behavior patterns, including, but not limited to, breeding, feeding or sheltering.”³³

Proponents of property rights have attacked the FWS definitions on two major fronts. First, they have argued that the FWS definitions are overly broad³⁴ and violate their Fifth Amendment rights against the arbitrary exercise of power by the government.³⁵ Second, they claim that the Act can have an irreversible, debilitating impact on local and state economies.³⁶

B. Legal History: A Conflict In Case Law

Since the passage of the ESA in 1973, courts generally have interpreted the takings provision and other sections of the ESA as comprehensive legislation for the preservation of endangered

²⁴ 16 U.S.C. § 1532(20) (1988).

²⁵ 16 U.S.C. § 1532 (19)(1988).

²⁶ *Id.*

²⁷ Comment, *The Reauthorization of The ESA*, *supra* note 16.

²⁸ 50 C.F.R. § 17.31(a). At least one commentator has argued that the § 9 takings provision covers threatened species based on the fact that its prohibitions apply to “any regulation pertaining...to any threatened species of fish or wildlife” that has been listed pursuant to § 4 and promulgated by the Secretary. See, e.g., Comment, *Opponents Thwart Protection*, *supra* note 22.

²⁹ 16 U.S.C. § 1532 (1988).

³⁰ Debate, *Taking “Takings” Rights Seriously*, *supra* note 1, at 265-66. Proposed legislation to narrow the scope of takings does not solve the problem of creating an endless debate:

I can tell you when Bruce Babbitt, as the Secretary of the Interior, has to reduce some regulation, he is going to reduce different regulation than would be reduced by James Watt, were he Secretary of the Interior. I cannot imagine why the Congress would want to create a situation where agencies would address the particular programs that are supposed to be the subject of excess regulation, and then decide whether and to what extent those programs ought to be modified. *Id.*

See also *supra* note 18 and accompanying text.

³¹ As part of the listing of a species as endangered or threatened, a determination of that species critical habitat also is left to the Departments of Interior and Commerce.

A critical habitat consists of specific areas worthy of protection because the habitat contains physical and biological features necessary for survival of a listed species. As a result, critical habitats may include areas that the listed species is not occupying at the time and may exclude terrain that the species can be found in but is not critical to its survival.

In addition to those guidelines, however, the ESA states the Departments of Interior and Commerce must take into account economic impact of designating areas critical habitats and publish a regulation concerning the critical habitat along with the regulation concerning the listing of the species as endangered or threatened.

³² 50 C.F.R. § 17.3 (1989).

³³ *Id.*

³⁴ One commentator has noted that the FWS definition of harm is narrower than the meaning the courts had attached to it. See John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 *Envl. L.* 501, 549 (1994) (citing *Palila v. Hawaii Dept. of Land Resources*, 471 F.Supp. 985 (D. Haw. 1979), *aff’d*, 639 F.2d 495 (9th Cir. 1981) in which the court held that the state was taking Palila birds in violation of § 9, based on a showing only that the Palila was almost extinct and that grazing was destroying the plant life the birds needed to survive). After *Palila*, the FWS narrowed its definition of harm, clarifying that adverse habitat modification must be shown. *Id.*

³⁵ Debate, *Taking “Takings” Seriously*, *supra* note 1, at 257-58.

³⁶ Comment, *Opponents Thwart Protection*, *supra* note 22, at 579 (citing Satterfield et al., *Who’s Afraid of the Big Bad Mouse?*, *NAT. RESOURCES & ENV’T* 13 (1993); William P. Pendley, *Real World Impact of Endangered Species Act Reads Like Science Fiction Thriller*, *PICK & SHOVE!*, Jan. 1993, at 17, 21).

species.³⁷ In coming to that consensus, however, courts continually have wrestled with the Fifth Amendment rights of individual property owners and the role indirect harm plays in the preservation of wildlife.³⁸

Three cases out of the Ninth, Fifth and D.C. circuits reveal how the courts have struggled to define the scope of the takings provision in § 9. The Ninth Circuit, in *Palila v. Hawaii Department of Land and Natural Resources*, was the first appellate court to tackle this issue.³⁹ In *Palila I*, goats and sheep were destroying plant life essential to the survival of the Palila bird by grazing on the Mamane-Naio forest.⁴⁰ The federal government had listed the bird, a finch-billed member of the Hawaiian Honeycreeper,⁴¹ as an endangered species in 1967. However, its habitat was not designated as critical for another ten years.⁴² The district court in *Palila I* found that the grazing was causing a “relentless decline of the Palila’s habitat” by foraging its food, shelter and nesting area.⁴³ This, the court determined, amounted to a taking under § 9 of the ESA.⁴⁴

Developers and landowners, concerned that modification to a critical habitat without any showing of actual death or injury would now constitute an

illegal taking under § 9, lobbied the Department of the Interior to reexamine its definition of harm.⁴⁵ The holding in *Palila I* caused the Secretary of the Interior to propose a narrower definition of “harm” that limited it to “an act or omission which kills or injures wildlife.”⁴⁶ Environmentalists immediately criticized the proposal as contrary to the intent of the ESA, forcing the Secretary of the Interior to back track.⁴⁷

In 1981, the Department of the Interior clarified its position. A statement released by the FWS declared that “harm” would not be limited “to direct physical injury to an individual member of the wildlife species.”⁴⁸ The statement further recognized the importance of including indirect damage to species in the definition of a “taking,” adding that death or injury as defined in the proposal after *Palila* “may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species.”⁴⁹

In its original form, § 9 had prohibited any taking whatsoever of any listed species. In the wake of *Palila I*, however, the pro-property movement convinced Congress in 1982 to amend the ESA, allowing the Secretary of the Interior to issue federal exemptions and “incidental take permits” under §§ 7

and 10.⁵⁰ Under the first, § 7 exemption, if a federal agency authorizes, funds, or approves a project, the land owner can receive protection against any ESA takings prohibitions. The federal agency that takes responsibility for the project must, within a 90-day framework, consult with the Secretary of the Interior or Commerce to ensure that the action will not jeopardize the continued existence of an endangered or threatened species.⁵¹

To qualify for the other exemption under § 10, applicants must submit a conservation plan that outlines how development or land use will benefit an endangered species.⁵² The plan, which requires approval by the Department of the Interior, must specify the expected impact on the species and the means the property owner will use to minimize and mitigate the damage.⁵³ The plan also must identify alternatives and explain why they should not be implemented.⁵⁴ The exemption is tailored specifically to encompass incidental takings by state agencies and private property owners.⁵⁵

The 1982 amendments to the ESA were a precursor to the present day debate over what changes should be made to takings provisions of the ESA before its reauthorization. § 10 deals with “incidental” takings, which by their

³⁷ See *TVA v. Hill*, 437 U.S. 153 (1978); *Palila v. Hawaii Dept. of Land Resources*, 639 F.2d 495 (9th Cir. 1981); *Babbitt v. Sweet Home Chapter Of Communities For A Great Oregon*, 115 S.Ct. 2407 (1995).

³⁸ *Id.*; See, e.g., *TVA v. Hill*, 437 U.S. 153 (1978).

³⁹ 639 F.2d 495 (9th Cir. 1981).

⁴⁰ *Palila I*, 471 F.Supp. 985, 990 (D.Haw. 1979).

⁴¹ Craig Robert Baldauf, Comment, *Searching for a Place to Call Home: Courts, Congress, and Common Killers Conspire to Drive An Endangered Species Into Extinction*, 30 WAKE FOREST L. REV. 847, 859 (1995) (citing 50 C.F.R. § 17.11 (1994)) [hereinafter Comment, *Killers Conspire*].

⁴² *Palila I*, 639 F.2d at 496. The state of Hawaii had kept flocks of sheep and goats on a game preserve and allowed the animals to roam along the slopes of the Mauna Kea in the Mamane-Halo forest. The Palila’s habitat was within the grazing area. *Id.*

⁴³ 471 F.Supp. at 990.

⁴⁴ 639 F.2d at 497.

⁴⁵ 46 Fed. Reg. 29,490 (1981); See also, Comment, *Where The Wild Things Are*, *supra* note 15, at 380.

⁴⁶ *Id.*

⁴⁷ *Id.* at 380.

⁴⁸ 46 Fed. Reg. 54,748 (1981).

⁴⁹ *Id.*

⁵⁰ 16 U.S.C. § 1539(a)(1)(A), (a)(2), (b) (1988).

⁵¹ *Id.* § 1536(a)(2).

⁵² *Id.* § 1536(h).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* § 1539(a).

nature involve indirect harm to species through the destruction or degradation of their habitat. § 10(a)(1)(b), amended in 1982, gives the Secretary of the Interior the power to issue permits to allow certain "takings" that are "incidental to, and not the purpose of, the carrying out of otherwise lawful activity."⁵⁶ Actions that constitute a direct taking are clearly defined under the ESA. The vast majority of problematic cases stem from indirect takings, those that adversely affect a species by depriving it of its critical habitat or sustenance.⁵⁷ Unlike § 7, the § 9 takings provision does not expressly prohibit indirect harm to species caused by the destruction of, or damage to, their habitat. As a result, courts have taken it upon themselves to interpret the language in § 10(a)(1)(b) of the ESA as a sign from Congress that it intended the Act to cover both indirect and direct takings.⁵⁸

The Palila bird landed back in the Ninth Circuit in 1986,⁵⁹ this time on the shoulders of the Sierra Club. The environmental group alleged that the state of Hawaii was allowing mouflon sheep, which it had maintained for recreational hunting, to feed on the Mamane plant.⁶⁰ The Palila relied on the Mamane seeds and pods for food.⁶¹ The Hawaii's

Department of Land and Natural Resources, attempting to rely on the new definition of harm promulgated by the FWS, argued that the Sierra Club had failed to show any actual death or injury to the birds.⁶²

The district court rejected the state's argument, holding that:

[s]ignificant habitat degradation is actually presently injuring the Palila by decreasing food and nesting sites, so that the Palila population is suppressed to its currently critical endangered levels.⁶³

The district court further stated that:

[i]f the habitat modification prevents the population from recovering, then this causes injury to the species and should be actionable under section 9.⁶⁴

Affirming the District Court's ruling,⁶⁵ the Ninth Circuit rejected the state's argument and focused on the actual as well as potential injury to the species as a whole.⁶⁶ The Ninth Circuit determined from the legislative history of the ESA that Congress intended the term "taking" to be all encompassing in order to provide proper protection for endangered species such as the Palila.⁶⁷ One crucial issue the Ninth Circuit failed to address,

however, was whether habitat destruction that slowed the recovery of a listed species also would constitute an illegal taking.⁶⁸

In the past two years, the Ninth Circuit has refined the definition of "harm" it established in *Palila*. In *National Wildlife Federation v. Burlington Northern Railroad*,⁶⁹ the court held that for a plaintiff to show that a harmful act ran afoul of § 9 it would have to show "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering."⁷⁰

A year later, however, in *Forest Park v. Rosboro Lumber Co.*,⁷¹ the court held that a listed species need not be threatened with extinction for harm to be considered a taking under § 9 and that imminent, as opposed to actual harm, was enough to trigger an illegal taking.⁷² At approximately the same time, the Fifth Circuit also found itself in the middle of the ESA fray. In *Sierra Club v. Lyng*,⁷³ the environmental group sought an injunction against the Secretary of Agriculture and the chief of the forest service to halt the cutting of pine trees in the southeastern United States.⁷⁴ The forest service was cutting certain trees to

⁵⁶ *Id.* See generally, Donald E. Soderberg & Paul E. Larsen, *Triggering Section 7: Federal Land Sales and "Incidental Take" Permits*, 6 J. LAND USE & ENVTL. L. 169, 177-80 (1991).

⁵⁷ See Comment, *Recent Developments in Listing Decisions*, *supra* note 5, at 83.

⁵⁸ 16 U.S.C. § 1539(a) (1988); See *Palila v. Hawaii Dept. of Land Resources*, 639 F.2d 495 (9th Cir. 1981).

⁵⁹ *Palila II*, 852 F.2d 1106 (9th Cir. 1988).

⁶⁰ *Id.* at 1109.

⁶¹ *Id.*

⁶² *Id.*

⁶³ 649 F.Supp 1070.

⁶⁴ *Id.* at 1077.

⁶⁵ 852 F.2d 1106, 1108 (9th Cir. 1988). See also, Comment, *Killers Conspire*, *supra* note 41, at 860 (citing *Palila II* and *TVA v. Hill*, 437 U.S. 153 (1978) for the proposition that Congress intended that the ESA apply to ecosystems upon which endangered species rely because habitat degradation poses more of a threat than direct killings).

⁶⁶ 852 F.2d at 1108.

⁶⁷ *Id.* (citing S. Rep. No. 307, 93d Cong. 1st Sess. §7 (1993), reprinted in 1973 U.S.C.C.A.N. 2989, 2995 which stated "take" was to be defined in the broadest possible manner to include every conceivable way in which a person could take or attempt to take any fish or wildlife.)

⁶⁸ *Id.* at 1110.

⁶⁹ 23 F.3d 1508 (9th Cir. 1994).

⁷⁰ *Id.* at 1511.

⁷¹ 50 F.3d 781 (9th Cir. 1995).

⁷² *Id.*

⁷³ 694 F.Supp. 1260 (E.D. Tex. 1988), *aff'd in part, reversed in part, remanded sub nom.*, *Sierra Club v. Yuetter*, 926 F.2d 429 (5th Cir. 1991).

⁷⁴ *Id.*

combat the spread of the southern pine beetle and also to maintain the Texas timber industry.⁷⁵ However, the management plan was having an adverse impact on the red-cockaded woodpecker, which nests in old pine trees and feeds on small fruits and seeds on the tree itself as opposed to foraging the ground.⁷⁶ From 1982 to 1987, the population of the woodpecker had declined more than 40 percent in several National Forests in Texas.⁷⁷ In its finding of facts, the court noted that if no changes were made to the forest management plan, the bird would be extinct by the year 1995.⁷⁸

As a result, the court held that the Forest Service's timber management practices were in violation of § 9 because the cutting of old-growth pines was systematically destroying the red-cockaded's habitat.⁷⁹ In its ruling, the court noted that the "goals and objectives of timber harvesting and protection of endangered species in some situations are at odds with one another."⁸⁰ However, it added that:

It is uncontested that a severe decline in the population of woodpeckers has occurred in the past ten years. "Harm" does not necessarily require proof of the death of specific or individual members of species.⁸¹

III. *BABBITT V. SWEET HOME PAVES THE WAY*

Until the summer of 1995, the *Lyng* and *Palila* decisions in the Fifth and Ninth Circuits defined what courts considered to be the proper scope of the word "harm". Then came the U.S. Supreme Court decision in *Babbitt v. Sweet Home Chapter of Communities For a Great Oregon*.⁸²

As the Ninth Circuit looked on, its broad definition of "harm" in *Palila* came under attack in the District of Columbia Court of Appeals. In *Sweet Home I*,⁸³ several non-profit citizens' groups banded together with Northwest lumber businesses to challenge the FWS regulation that had defined "harm" as it applied to § 9 of the ESA.⁸⁴

In this case, the controversy stemmed from the fact that the FWS's definition of "harm" as applied to the red-cockaded woodpecker⁸⁵ and northern spotted owl⁸⁶ was resulting in economic hardship for families dependent on the logging industry.⁸⁷ The plaintiffs contended that the regulation's inclusion of "habitat modification" within the meaning of "harm" violated the ESA.⁸⁸ In the alternative, they argued that the regulation was vague as to the types of habitat modification prohibited.⁸⁹

At first, a divided panel of the Court of Appeals upheld the FWS's definition of "harm," finding it lawfully included the mere modification of a habitat of an endangered or threatened species.⁹⁰ Property rights plaintiffs persisted, however, and the following year were granted a rehearing.⁹¹ In *Sweet Home II*, the Secretary of the Interior argued that the ESA was created in 1973 based on the realization that species whose numbers and habitats had been depleted needed protection from a wide range of acts that threatened their existence.⁹² In the alternative, the Secretary argued that the

⁷⁵ *Id.* at 1264.

⁷⁶ *Id.* at 1265. The court noted that the forestry management plan called for the cutting down of trees after they reached a maximum age of 60 to 80 years, a policy highly detrimental to the woodpecker since it thrived on older trees. *Id.*

⁷⁷ *Id.* at 1266.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1271.

⁸⁰ *Id.* at 1269.

⁸¹ *Id.* at 1270 [citing *Palila II* 649 F. Supp. at 1076-77]. The court further noted that the four factors cited in the FWS regulations that defined "harm" were present in the forest service management practices:

(1) The cutting of specified pines had created "islands" of older growth trees that isolated woodpecker colonies.

(2) Isolation of those colonies interfered with breeding practices, contributing to population decline, reduction in the gene pool and genetic problems.

(3) The management plan was hindering the woodpecker's recovery by making it difficult for the birds to find nourishment since they did not feed on the ground.

(4) The cutting of certain trees was endangering the livelihood of older trees in which woodpeckers carved their cavities and placed their nests.

Id. at 1271-72.

⁸² 115 S.Ct. 2407 (1995).

⁸³ 1 F.3d 1 (D.C. Cir. 1993), modified, 17 F.3d 1463 (D.C. Cir. 1994), cert. granted, 115 S.Ct. 714, rev'd, 115 S.Ct. 2407 (1995).

⁸⁴ *Id.* at 2.

⁸⁵ 115 S.Ct. at 2410 [citing 50 CFR § 17.11(h)(1994) and the Endangered Species Conservation Act of 1969, 83 Stat. 275]. The Conservation Act, which was the ESA's predecessor, listed the red-cockaded woodpecker as one of the first endangered species in 1970.

⁸⁶ *Id.* at n.4 [citing 55 Fed. Reg. 26114 (1990)], which brought threatened species within the parameters of § 9 takings).

⁸⁷ *Id.* at 2410.

⁸⁸ 1 F.3d at 2.

⁸⁹ *Id.*

⁹⁰ 1 F.3d 1 (D.C. Cir. 1993).

⁹¹ *Sweet Home v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), cert. granted, 115 S.Ct. 2407 (1995) [hereinafter *Sweet Home II*].

⁹² *Id.* at 1464.

1982 amendment to the ESA, which provided several exemptions for developers who filed approved habitat conservation plans (HCP's),⁹³ was evidence of the fact that the ESA, despite the absence of specific wording to the effect, contained built-in protections against destruction of a species habitat. Otherwise, the government argued, Congress would not have needed to enact an amendment that carved out such an exception.⁹⁴

This time, the plaintiffs convinced one judge to switch sides and tip the scales in their favor.⁹⁵ The court rejected both of the government's arguments, holding that the FWS' definition of harm went beyond the scope of the ESA by restricting various types of habitat modification.⁹⁶ The court simply refused to be bound by the secretary's interpretation of the legislative history and the political climate that led to the passage of the ESA. Instead, the court adopted its own interpretation of the legislative history,

stating that Congress could not have intended "harm" to be so broadly defined without due regard for the impact on private property rights.⁹⁷ The court pointed to the fact that the term "habitat modification" was conspicuously absent from the final version of the ESA bill that passed both Houses. In comparison, an earlier Senate version of the bill⁹⁸ had included, within a listing of prohibited takings, a provision on habitat modification.⁹⁹ The *Sweet Home II* ruling was in direct conflict with *Palila II*, which had held that the ESA's definition of "takings" included habitat modification.¹⁰⁰

The Court of Appeals in *Sweet Home II* bolstered its opinion by applying a rule of statutory construction called *noscitur a sociis*. The maxim stands for the proposition that a word's meaning, if unclear, must be based on its association with surrounding words in a statute.¹⁰¹ According to the court, the word "harm" as used in § 9 must be narrowly interpreted as a direct action verb because it is

accompanied by direct words such as "take."¹⁰² In support of applying *noscitur a sociis*, the court referred to a Ninth Circuit decision that had narrowly interpreted the word "harass" in the Marine Mammal Protection Act.¹⁰³

Environmentalists, feeling 20 years of progress under the ESA slipping away, immediately attacked the Ninth Circuit's ruling in *Sweet Home II*.¹⁰⁴ The Court of Appeals denied the Secretary's petition for rehearing and suggestion for rehearing en banc.¹⁰⁵ In early 1995, the U.S. Supreme Court granted certiorari to resolve the split in the circuits over the proper definition of "harm" as it applied to the § 9 takings provision.¹⁰⁶ The relevant question presented for review was whether the Secretary of the Interior exceeded his authority by promulgating a regulation that defines the ESA's prohibition on takings to include "significant habitat modification or degradation where it actually kills or injures wildlife."¹⁰⁷

⁹³ 16 U.S.C. § 1539(a)(1988).

⁹⁴ *Sweet Home II*, 17 F.3d at 1464.

⁹⁵ The vote had been 2-1 in *Sweet Home I*. Since the appellate court consists of a three-judge panel, a change of position by one of the two judges in the majority was enough to reverse the ruling.

⁹⁶ 17 F.3d at 1472-73.

⁹⁷ *Id.* at 1465. The court stated that:

The implications of the [FWS'] definition suggest its improbable relation to congressional intent. Species dependency may be very broad. One adherent of aggressive protection, for instance, notes that [s]ome scientists believe as many as 35 million to 42 million acres of land are necessary to the survival of the grizzlies, about as much land in the northern Rockies of the United States and Canada as is still usable grizzly habitat.

⁹⁸ *Id.* at 1467.

⁹⁹ *Id.* The court stated "we are mindful of the fact that Congress had before it, but failed to pass, just such a scheme." *Id.*

¹⁰⁰ *Palila II*, 852 F.2d at 1108; See *supra* note 59 and accompanying text.

¹⁰¹ BLACK'S LAW DICTIONARY, 1060 (6th Ed. 1990): literally, "it is known from its associates." In statutes, the meaning of questionable or doubtful words or phrases may be ascertained by reference to the meaning of words that accompany it.

¹⁰² *Sweet Home II*, 17 F.3d at 1465. The court stated as follows:

[t]he words of the definition contemplate the perpetrator's direct application of force against the animal taken: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." The forbidden acts fit, in ordinary language, the basic model "A hit B"...[t]he nine verbs accompanying "harm" all involve a substantially direct application of force, which the Service's concept of forbidden habitat modification altogether lacks.

In a harbinger of what was to come when the Supreme Court reviewed the case, Judge Mikva in his dissent stated that harm could have many different meanings along with the other so-called unambiguous direct action words in § 9 cited by the majority. *Id.* at 1475.

¹⁰³ 17 F.3d at 1464 (citing 16 U.S.C. § 1372(a)(2)(A)); *United States v. Hayashi*, 5 F.3d 1278, 1282 (9th Cir. 1993).

¹⁰⁴ Comment, *Killers Conspire*, *supra* note 41, at 863 (citing Supreme Court Wrap-up, THE RECORDER, Jan. 9, 1995, at 5).

¹⁰⁵ *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 30 F.3d 190 (D.C. Cir. 1994), cert. granted, 115 S. Ct. 714, rev'd, 115 S. Ct. 2407 (1995). In denying his petition for rehearing, the Court of Appeals chided Babbitt for advancing "ill-founded critiques of the panel opinion." *Id.* at 191.

¹⁰⁶ *Endangered Species: Supreme Court Grants Review to Ruling Limiting Definition of Harm*, [1995] DAILY ENV'T REP. (BNA) No. 5 at 1-2, Jan. 9, 1995, available in Westlaw BNA-DEN [hereinafter *Endangered Species*].

¹⁰⁷ 115 S.Ct. 2407, 2409 (1995); See also, Comment, *Killers Conspire*, *supra* note 41, at 864 (quoting Supreme Court Proceedings, Summary of Cases Granted Review, U.S.L.W. (BNA) *15, Jan. 10, 1995, available in WESTLAW USLWD). Question was whether "[t]he regulation promulgated by the Secretary of the Interior in 1975 and 1981 that defines 'harm' as used in the Endangered Species Act, and includes 'significant habitat modification or degradation' that 'actually kills or injures wildlife,' 50 C.F.R. 17.3, [is] valid on its face?" *Id.*

In a four-part decision that environmentalists heralded as a turning of the tide against the property rights movement, the Supreme Court reversed the Court of Appeals.¹⁰⁸ First, the Court took a no-nonsense, down-to-Earth approach to the long standing debate over the scope of the term “harm” as it applies to § 9: it looked the word up in the dictionary.¹⁰⁹ The court found that harm meant to “cause hurt or damage to: injure.”¹¹⁰ Writing for the 6-3 majority, Justice Stevens stated that the common definition of harm in the context of the ESA “naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.”¹¹¹ Stevens noted that the dictionary made no mention of injury having to be “direct” or “willful” in order to constitute harm.¹¹² Advancing a new argument not discussed by the lower courts, the majority added that if the word “harm” within § 9 was limited to direct injury, then it would serve to duplicate the meaning of other words the ESA used in § 3 to define the scope of the word “take.”¹¹³

In a footnote to the opinion, the majority even took the opportunity to deride the respondent for attempting to argue that a “taking” can only apply to the exercise of dominion over a creature.¹¹⁴

“This limitation,” the court stated, “ill serves the statutory text, which forbids not taking ‘some creature’ but tak[ing] any [endangered] species – a formidable task for even the most rapacious feudal lord.”¹¹⁵

Justice Stevens expounded upon past decisions which had held that the overarching purpose of the ESA supported a broad interpretation of the underlying terms in the § 9 takings provision.¹¹⁶ Except in regard to federal lands, the Endangered Species Conservation Act, the ESA’s predecessor, did not contain the sweeping prohibitions included in the 1973 Act.¹¹⁷ The Court pointed to language at the beginning of the ESA which clearly states the Act applies to ecosystems, not just direct harm to individual members of an endangered species.¹¹⁸

In effect, Justice Stevens relied on reasoning the Court had applied in the 1978 landmark decision in *TVA v. Hill*, where it enjoined the building of a dam that was damaging the critical habitat of the snail darter.¹¹⁹ Although the ruling in *TVA* concerned § 7 of the Act, Stevens noted the Court had recognized that the plain intent of halting species extinction “whatever the cost” was “reflected in every section of the statute.”¹²⁰ Furthermore, *TVA* specifically referred to the

Secretary’s definition of “harm” within the § 9 taking provision in reasoning that it could not understand how operation of the dam would not “harm” the snail darter.¹²¹

The Court went on to state that exemptions created by Congress in 1982 for certain “incidental” takings were a clear sign that the ESA, as enacted in 1973, applied to indirect as well as deliberate takings.¹²² As discussed earlier, the 1982 amendment to the ESA authorized the secretaries of the Interior and Commerce to issue permits for takings that otherwise would be prohibited under § 9(a)(1)(B) if the takings were ancillary to and not the sole purpose of lawful activity.¹²³ In effect, the Court stated, the narrow interpretation of “harm” proffered by *Sweet Home* would lead to the absurd result that the only ones applying for an incidental takings permit would be persons who feared running afoul of § 9 because they intended to directly harm an endangered species.¹²⁴

In short, the Court was saying it made no sense for Congress to create an exemption for indirect harm if the ESA prohibited only direct harm, even though *Sweet Home* had convinced the Court of Appeals to adopt its narrow definition of harm. Justice Stevens pointed out three major flaws in the lower court’s analysis.

¹⁰⁸ *Id.* at 2418.

¹⁰⁹ *Id.* at 2412-13.

¹¹⁰ *Id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1966)).

¹¹¹ *Id.* at 2412-13.

¹¹² *Id.* at 2413.

¹¹³ *Id.* (citing *Mackey v. Lonier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988), for the proposition that statutory terms each have independent significance and should not be interpreted as mere surplusage).

¹¹⁴ *Id.* at 2413, n. 10 (citing respondent’s brief 19 at 2422-23).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2413.

¹¹⁷ *Id.* at 2413 (citing *TVA v. Hill*, 437 U.S. 153, 180 (1978)). The Court in *TVA* described the ESA as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” In that case, the Court enjoined the Tennessee Valley Authority from completing a dam because its operation would have either eradicated the population of the snail darter or destroyed its critical habitat. The Court issued the injunction despite the fact the dam was near completion. 437 U.S. at 153.

¹¹⁸ *Id.* (citing § 2 of the Act which states that its purpose is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”). See 16 U.S.C. § 1531(b).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 2413 (citing 437 U.S. at 184).

¹²¹ 437 U.S. at 184-85.

¹²² *Sweet Home II*, 115 S.Ct. at 2414.

¹²³ 16 U.S.C. § 1539(a)(1)(B) (1988).

¹²⁴ *Sweet Home II*, 115 S.Ct. at 2414.

First, he stated that several words in the definition section of the Act often referred to indirect as well as direct action.¹²⁵ In a related argument, Justice Stevens held that the Court of Appeals had misapplied the maxim of *nascitur a sociis*, which stands for the proposition that a word redefines itself within changing contexts, but still retains its own distinct meaning from accompanying terms.¹²⁶ The Court of Appeals also erred by misinterpreting § 9 to require a higher standard of intent such as purposeful action, despite the fact the ESA had been modified¹²⁷ to state that an illegal taking could occur if the violator “knowingly” committed the harm.¹²⁸

The Court rejected Sweet Home’s argument that, given the FWS’s broad interpretation of “harm” in the takings provision, the government lacked any incentive to purchase land under § 5 or avoid destruction of habitats under § 7.¹²⁹ That argument, according to the Court, ignored several practical considerations. For one, buying private land to protect species may be much less costly than chasing down violators and issuing

finer under § 9.¹³⁰ In addition, § 5 is proactive in that it enables the government to purchase land before a species suffers any actual harm or before its critical habitat is modified in a way that could result in future harm.¹³¹

Justice Stevens further held that Sweet Home’s argument failed to address some crucial distinctions between § 7 and § 9.¹³² Most importantly, § 7 applies only to federal action while the § 9 takings provision applies to “any person.”¹³³ In addition, § 7 applies only to actions “likely to jeopardize the continued existence of an endangered species,” which holds the government to a higher burden of proof than the language in the § 9 takings provision.¹³⁴

Finally, the Court held that the legislative history of the ESA supported the Secretary of the Interior’s definition of “harm” within FWS regulations. While committee reports prior to the ESA’s passage did not refer specifically to “harm,” they did stress that the word “taking” should be interpreted to mean “any conceivable way” a person could injure or kill wildlife.¹³⁵ In addition, the Court

noted that a Senator introduced a floor amendment specifically to include the word “harm” within the defining terms of the § 9 takings provision, solid proof that the word plays a distinct and crucial role in the ESA and is worthy of a broad interpretation.¹³⁶

In a somewhat specious argument, Justice Stevens dismissed Sweet Home’s claim that this supported a narrow interpretation of “taking.” Sweet Home also advanced the argument that a Senate version of the ESA contained a broad definition of “take” that included the destruction, modification, or curtailment of a critical habitat but lawmakers removed that definition before sending the bill to the floor.¹³⁷ Using the leeway inherent in interpretation of legislative history, Stevens claimed there was no indication why the Senate removed that broad language.¹³⁸ In a stronger point, Stevens added that the actual language in the 1973 committee bill was much broader than the present FWS regulation.¹³⁹ Stevens used this distinction to label the present FWS definition of “harm” as a moderate form of habitat protection.

¹²⁵ *Id.* at 2414-15 (referring to the words “harass,” “pursue,” “wound,” and even “kill” that accompany “harm” in § 3 of the ESA).

¹²⁶ *Id.* (citing *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923)). The Court stated specifically that the Secretary’s interpretation of “harm” to include indirect injury to species through habitat modification enables the word to have “a character of its own not to be submerged by its association.” *Id.*

¹²⁷ See H.R. Conf. Rep. No. 95-1804, p. 26 (1978) in which Congress replaced “willfully” with the term “knowingly,” which requires a lower level of intent. The purpose of the change was to make criminal violations of the ESA a general as opposed to specific intent crime. As stated by the Court, Sweet Home never argued why the ESA or the FWS’ “harm” definition should not be read to incorporate ordinary standards of proximate cause and foreseeability. *Sweet Home II*, 115 S. Ct. at 2413, n.9. In other words, a person can commit an illegal taking not only if he acts with a specific purpose but if he should have known or reasonably could foresee that the resulting harm would occur.

¹²⁸ *Id.*

¹²⁹ *Id.* at 2415.

¹³⁰ *Id.*

¹³¹ *Id.* In a later footnote, the majority also stated that, contrary to Sweet Home’s contention, the legislative history of the ESA does not suggest that § 5 would be the Act’s exclusive remedy for habitat modification by private landowners. *Id.* at 2416, n.19.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* The Court found support for its argument in an amendment Congress made to the ESA in 1978 which distinguished between §§ 7 and 9. The amendment, made in the wake of the Court’s ruling in *TVA v. Hill*, added § 7(o), which provides that any federal project subject to exemption from § 7 also is exempt from § 9. *Id.* at 2416 (citing 16 U.S.C. 1536(o)).

¹³⁵ *Id.* at 2416 (citing S.Rep. No. 93-307, p. 7 (1973)). The House report used similar language, and further referred to intentional and unintentional harassment as an illegitimate taking. See H.R. Rep. No. 93-412, p. 15 (1973). The Court referred to a specific example of indirect harm mentioned in the House bill. The example said bird watchers who caused a disturbance and upset the birds egg laying could be subject to ESA regulations. *Sweet Home II*, 115 S.Ct. at 2416.

¹³⁶ *Id.* at 2416-17 (citing 119 Cong.Rec. 25683 (July 24, 1973)).

¹³⁷ *Id.* at 2417.

¹³⁸ *Id.*

¹³⁹ *Id.* The wording of Senate Bill 1983 would have caused any habitat modification to be considered a violation of the ESA because it did not include the provision that the modification must result in the death or injury of wildlife. Under the bill, any modification, not just those that were significant, would also have been a violation.

The Court garnered further support for its holding by looking to the legislative history behind the 1982 amendment that enabled land owners to apply for incidental taking permits.¹⁴⁰ Sweet Home had argued that Congress intended for the amendment to cover accidental as opposed to purposeful killings of listed species. The House Report, however, contained language almost identical to the wording in the present version of the ESA, which distinguishes between takings that are “incidental to, and not the purpose of, the activity.”¹⁴¹ The Court noted that Congress obviously intended to cover situations beyond hunting and fishing because it used as an example a construction project that would alter the habitat of an endangered butterfly.¹⁴²

In his conclusion, Justice Stevens made the observation that the proper interpretation of “harm” within the broad confines of the ESA involved a complex policy choice that should be left to the discretion of the Secretary of the Interior, not the courts.¹⁴³ He went on, however, to state that enforcement of the ESA raises difficult questions of “proximity and degree” involving economic and social values that must be addressed on a case-by-case basis.¹⁴⁴ In the end, the Sweet Home saga left property rights advocates and environmentalists with a

vision of a never ending war in which battles would arise across the nation on a regular basis. In fact, the Court had taken a somewhat moderate position, pulling back a bit from the Ninth Circuit’s broad interpretation of “harm” in *Palila*.¹⁴⁵ In her concurring opinion, Justice O’Connor stated that indirect harm will trigger a violation of § 9 only if the resulting harm is significant and the act is a proximate cause of the harm, meaning it results in actual or foreseeable injury or death to a listed species.¹⁴⁶ In effect, Justice O’Connor was saying that mere habitat destruction would not be enough for an illegal taking under § 9.

In a scathing and protracted dissent, Justice Scalia argued that the majority’s position that the hunting and killing provision of the FWS regulation incidentally preserves habitat on private lands imposed unfairness on land owners “to the point of financial ruin.”¹⁴⁷ In a three-pronged attack, Scalia asserted that the FWS regulation had defined “harm” in a manner that failed to comport with the purpose and scope of the ESA. First, he claimed that the regulation wrongly interpreted the statute to prohibit habitat modification that was merely the cause-in-fact as opposed to the intended or foreseeable cause of death or injury to an endangered species.¹⁴⁸ Second, he

alleged the regulation is unlawful because it fails to require an act for a “taking” to occur. Instead, the regulation as modified in 1981 removed the term “omission” based on the theory that an act is inclusive of both omissions and commissions.¹⁴⁹ Scalia sided with the petitioner, who had argued that for an omission to constitute a wrongful act a party must have a legal duty to act in the first place. Scalia reserved his final point for what he considered the most unlawful feature of the regulation defining “injury.” Scalia argued that the FWS attached far too broad an interpretation to “injury” by including significant impairment of essential behavior patterns, including breeding.¹⁵⁰ Impairment of breeding, Scalia stated, merely prevents animals from propagating. It does not injure living members of the species. In closing dicta, Scalia argued that the majority ruling was contrary to the intent of the ESA, legislation which had been carefully crafted to avoid holding individual landowners accountable for the cost of preserving endangered species.¹⁵¹

Despite Scalia’s lengthy dissent, the 6-3 decision in *Sweet Home II* temporarily settled the issue of whether the Secretary of the Interior had taken the takings provision too far.¹⁵² The core problem, the need for more concrete

¹⁴⁰ *Id.* at 2417-18.

¹⁴¹ *Id.* at 2418 (citing S.Rep. No. 97-418, p. 10 (1982)); H.R. Conf. Rep. No. 97-835, pp.30-32 (1982).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Comment, *Recent Developments in Listings*, *supra* note 5, at 91.

¹⁴⁶ *Sweet Home II*, 115 S.Ct. at 2418.

¹⁴⁷ *Id.* at 2421. Scalia further said the ruling unfairly would apply to not only the rich landowner but poor farmer “who finds his land conscripted to national zoological use.” Scalia was joined in his dissent by Chief Justice Rehnquist and Justice Thomas. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 2422.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 2431. Scalia also took aim at the majority’s four other main arguments. First, he criticized the majority opinion for as improperly assuming that whatever furthers the ESA’s primary objective must be upheld as law. *Id.* at 2426.

Second, he disagreed with the majority’s claim that legislative history of the 1973 Act supports the Secretary’s definition of a taking, arguing that legislators made clear distinctions between takings and habitat modification. *Id.* at 2426-27.

Third, Scalia stated that the 1982 amendments to the Act do not support a reading of the Act that calls for a prohibition on indirect as well as deliberate takings. *Id.* at 2428.

Lastly, he argued that the majority, in dismissing Sweet Home’s facial challenge, confused lawful application of the FWS regulation with application of a non-existent regulation that would require various elements of liability absent from the actual regulation. Scalia argued that the majority took this approach to circumvent the shortcomings in the regulation which fail to address the element of foreseeability of harm that the ESA takings provision requires. *Id.* at 2429.

definitions within the ESA itself, could not be solved by the Court.

III. POST-SWEET HOME COURTS FURTHER DEFINE SCOPE OF "TAKINGS"

Although environmentalists declared victory with *Sweet Home*, the debate over the proper scope of "harm" and the takings provision has continued to spill into the courts. Since the June 1995 ruling, courts have put their own twist on *Sweet Home*'s interpretation in an ongoing effort to define what constitutes a "taking" under the ESA and its supporting cast of regulations.

Less than a month after *Sweet Home* was decided, two new cases drew the Ninth Circuit back into the debate. Although the first case did not directly involve the "takings" provision, the court addressed the closely-related issue of whether property owners adversely affected by government action had standing to sue under the ESA's citizen-suit provision.¹⁵³ In *Bennett v. Plenert*, Oregon ranchers and irrigation districts, motivated by profit and recreational boating, wanted to maintain a reservoir at higher levels than that decided upon by the federal government.¹⁵⁴ The

government had conducted a study which showed that the lake's level needed to be lower to protect the Lost River and shortnose suckers, both endangered species.¹⁵⁵

The ranchers filed a claim for declaratory and injunctive relief under the citizen-suit provision of the ESA, alleging that the government was violating the ESA by obfuscating the consultation requirements¹⁵⁶ and failing to consider the economic impact of its decision to declare the lake a "critical habitat"¹⁵⁷ for listed species.¹⁵⁸

In a ruling that bodes poorly for property owners who want to have their grievances considered within the context of the ESA's takings provisions, the Ninth Circuit held that the ranchers did not have standing to sue under the citizen-suit provision.¹⁵⁹ Referring to *Sweet Home* and *TVA*, the Ninth Circuit held that the citizen-suit provision was designed solely to serve the goal of species protection, not protection of private property rights outside the "zone of interest" of the ESA.¹⁶⁰ *TVA* had stressed that the term "interested persons" was used to encourage citizens to be the eyes and ears for the Secretary in the listing of endangered and threatened species and to

bring suit in district court to force compliance on behalf of those species.¹⁶¹ In other words, if the northern spotted owl or red-cockaded woodpecker was faced with the threat of a "taking," the species obviously could not file a petition for injunctive relief with the clerk of court. An interested party, similar to a *guardian ad litem* in child abuse cases, needed to look out for the species' legal interests. Like a *guardian ad litem*, the interests the party is protecting must be that of the actual victim of "harm" - under the ESA an endangered or threatened species - not the interests of the party itself.¹⁶² Nothing in the ESA suggests the citizen-suit provision should apply conversely to property owners who suffer economic or other hardship due to ESA prohibitions. Applying the zone of interest test, the *Bennett* court found that the plaintiffs had no shared interest with the Lost River or shortnose suckers. In fact, their recreational and economic interests were at odds with the endangered fish.¹⁶³

The court conceded that to comply with the ESA, the government had to consider a variety of factors, including the economic impact on the community, in deciding whether to designate the reservoir as a critical habitat.¹⁶⁴ However,

¹⁵² Comment, *Killers Conspire*, *supra* note 41, at 865.

¹⁵³ *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995).

¹⁵⁴ *Id.* at 916.

¹⁵⁵ *Id.*

¹⁵⁶ 16 U.S.C. §§ 1536(a) and 1533(b)(2).

¹⁵⁷ As with the definition of "harm," the ESA left it up to the Departments of the Interior and Commerce to determine what constitutes a species' critical habitat. See U.S.C. § 1533(b)(6)(C).

As with "harm" and the § 9 takings provision, the proper scope of the term "critical habitat" is a crucial element in the listing of a species as endangered or threatened.

The ESA does define a "critical habitat" as a specific area worthy of protection because it contains physical and biological features necessary for survival of a listed species. *Id.* As a result, critical habitats may include areas that the listed species is not occupying at the time and may exclude terrain that the species can be found in but is not critical to its survival. See 16 U.S.C. §§ 1532(5)(A)(C) (1994).

However, in addition to those guidelines, the ESA states the Departments of Interior and Commerce must take into account economic impact of designating areas critical habitats and publish a regulation concerning the critical habitat along with the regulation concerning the listing of the species as endangered or threatened. See 16 U.S.C. § 1533(b)(2).

¹⁵⁸ 63 F.3d at 916.

¹⁵⁹ *Id.* at 921.

¹⁶⁰ *Id.* at 919-20 (citing *Sweet Home II*, 115 S.Ct. at 2413 and *TVA*, 437 U.S. at 181).

¹⁶¹ 437 U.S. at 181.

¹⁶² 63 F.3d at 920. The court stated specifically: "[G]iven that the clear purpose of the ESA is to ensure the protection of endangered species, we conclude that suits by plaintiffs who are interested only in avoiding the burdens of that preservation effort are more likely to frustrate than to further statutory objectives."

¹⁶³ *Id.*

¹⁶⁴ *Id.* (citing 16 U.S.C. § 1533(b)(3)).

in a unanimous decision, the court held that plaintiffs could not automatically obtain standing under the ESA by digging up a potentially adverse effect on them that the government failed to take into account.¹⁶⁵ Three weeks after issuing the ruling in *Bennett*, the Ninth Circuit in *Sierra Club v. Babbitt*¹⁶⁶ faced another suit involving the proper scope of the ESA "takings" clause. This time, the Sierra Club sought an injunction to halt construction of a logging road on a right-of-way controlled by the Bureau of Land Management (BLM), based on the potential adverse impact to the northern spotted owl.¹⁶⁷ The question before the court was whether an agreement¹⁶⁸ between the logging industry and BLM, entered into prior to the passage of the ESA in 1973, violated the statute's taking provision in § 7.¹⁶⁹

Under § 7(a)(2), the ESA requires federal agencies to consult with the FWS before engaging in any action which may adversely affect a protected species.¹⁷⁰ The court's analysis inherently involved a reading of § 7 in light of a § 9 taking, which is broader in scope because it involves violations by any person, not just the federal government.¹⁷¹ In addition, a taking by any party, including the federal government, does not constitute a violation under § 9 if that

party receives authorization under § 7 after consulting with the FWS.¹⁷² The Sierra Club alleged that the BLM violated §§ 7 and 9 by failing to consult with the FWS concerning the effects the road would have on the spotted owl and its critical habitat.¹⁷³ The BLM argued that the procedural requirements of the § 7 takings provision did not apply to any agreements made before the ESA's passage in 1973.¹⁷⁴

Both parties agreed that a project undertaken pursuant to the preexisting agreement would trigger the § 7(a) takings provision as long as the agreement required the BLM to take additional action after the ESA took effect which might have an impact on the spotted owl.¹⁷⁵ Although BLM was required to keep tabs on the project, its only involvement was to advise the logging company that the chosen route would not be the most direct one, might cause severe erosion, or would interfere with other BLM projects; nothing which directly related to protection of the threatened spotted owl.¹⁷⁶ Thus, the question became whether BLM's continued involvement under the preexisting agreement constituted a "takings" of the owl under the ESA.

Once again, the court held that interpretations by the Secretary of the Interior and language within FWS regulations,

not the ESA itself, settled the dispute.¹⁷⁷ The FWS regulation states that the § 7 "takings" provision requiring renewed consultations, kicks in only when a federal agency has retained control over the allegedly harmful action.¹⁷⁸ Referring to the analysis applied in *Sweet Home*, the Ninth Circuit stated that if the wording of the ESA or an accompanying regulation is ambiguous, then the court must defer to the interpretation of the Department of the Interior.¹⁷⁹ In this case, the Regional Solicitor for the Department had concluded that no further consultation by BLM was necessary under the agreement and, therefore, the agreement did not run afoul of the § 7 taking provision.¹⁸⁰

The Ninth Circuit's ruling, once again, highlighted the weakness inherent in the ESA; the need for ambiguous terms and omissions to be clearly defined.¹⁸¹ The decision by the Court of Appeals to defer to the Secretary of the Interior's interpretation of crucial ESA terms on a case-by-case basis left wide open the debate over how far the ESA's "takings" provisions should go. In closing, however, the court made a crucial distinction regarding the scope of the two "takings" provisions, indicating the Sierra Club might have sought relief for the spotted owl under the wrong section.¹⁸² The court stated that the § 7

¹⁶⁵ *Id.*

¹⁶⁶ 65 F.3d 1502 (9th Cir. 1995).

¹⁶⁷ *Id.* The district court had enjoined further road construction until either the BLM or sawmill company complied with the ESA's consultation requirements.

¹⁶⁸ *Id.* at 1505. The initial agreement dated back to 1962, when BLM granted the Wooley logging company use of certain right-of-way. In 1991, construction of the road in dispute began after Wooley assigned its rights under the agreement to another sawmill company.

¹⁶⁹ *Id.* at 1507.

¹⁷⁰ 16 U.S.C. § 1532(a)(2); 50 C.F.R. § 402.14(a). If, as in *Bennett*, the case involves potential harm to endangered or threatened marine life, then the federal agency must consult with the NMFS. See 50 C.F.R. § 1536(b)(3)(A).

¹⁷¹ *Id.*

¹⁷² 65 F.3d at 1505 (citing 16 U.S.C. § 1536(b)(4)). The purpose of the consultation procedure is to enable to the FWS and NMFS to determine if a party's action with jeopardize a listed species and allow the agencies to identify reasonable alternatives. See 16 U.S.C. § 1536(b)(3)(A).

¹⁷³ *Id.* at 1507.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1508 (citing numerous cases including *Conner v. Burford*, 848 F.2d 1441, 1454-58 (9th Cir. 1988); *O'Neill v. United States*, 50 F.3d 677, 680-81 (9th Cir. 1995); *Conservation Law Foundation v. Andrus*, 623 F.2d 712, 715 (1st Cir. 1979)).

¹⁷⁶ *Id.* at 1508, n.7.

¹⁷⁷ *Id.* at 1509.

¹⁷⁸ *Id.* (citing 50 C.F.R. §§ 402.3 and 402.16).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1507.

¹⁸¹ See *supra* notes 144-145 and accompanying text.

¹⁸² *Id.* at 1511.

"takings," provision, which applied only to federal agencies, exacted the high burden of proof requiring agencies to conserve listed species, to consult with the FWS and to refrain from adversely modifying critical habitats.¹⁸³ In comparison, the § 9 takings provision, which applies to private parties as well as government agencies, requires parties to avoid acts that are reasonably likely to harm an endangered species and merely encourages them to report violations.¹⁸⁴

Subsequent to *Sweet Home*, district courts outside of the Ninth Circuit also attempted to tackle the takings issue. The first case, *Loggerhead Turtle v. County Council of Volusia County, Florida*, arose out of a dispute over the effect night driving on Daytona Beach was having on the endangered loggerhead sea turtle.¹⁸⁵ Two residents sought an injunction against the county under the citizens suit provision of the ESA.¹⁸⁶ The plaintiffs alleged that local ordinances allowing nighttime driving on the beach were posing immediate harm to and resulted in an illegal "taking" of the sea turtles.¹⁸⁷ In Florida, the official sea turtle nesting season lasts from May 1st through October 31st.¹⁸⁸ During that period, sea turtles dig cavities under the sand where they lay their eggs. Once the hatchlings break free from their shells, they will perish within minutes unless they reach the sea.¹⁸⁹ The district

court noted that artificial lighting from cars, streets and homes can cause sea turtle hatchlings to become disoriented and crawl inland instead of out to sea. In addition, the mother turtles often abort nesting attempts because of the artificial lighting.¹⁹⁰

Despite the fact that the loggerhead sea turtle is known to inhabit the Atlantic Ocean off the coast of Florida, the U.S. Fish and Wildlife Service did not include the forty-mile stretch of beach along Volusia County as a "critical habitat" for the turtles. County officials relied on the exclusion to argue that, even if the local ordinances were detrimental to the turtle's environment, there was no "taking" under § 9 of the ESA. The court disagreed, holding that a showing by the plaintiffs that it was reasonably likely the county's actions would result in future "harm" to the endangered turtles would create an irrebuttable presumption that the threatened harm would be irreversible and, therefore, must be stopped.¹⁹¹ The plaintiffs met that burden by showing that lights from cars had caused the hatchlings to be disoriented and that cars also had crushed the emerging hatchlings in the sand.¹⁹² In short, the court held that the issue of whether the beaches in question were "critical habitats" was irrelevant to the issue of whether a "taking" had occurred under § 9;¹⁹³ one death of the endangered

loggerhead was enough to trigger an illegal "taking."¹⁹⁴

Relying on the Supreme Court's analysis in *Sweet Home*, Judge Conway added that it was not within the court's purview to balance the economic interests of Volusia County against the social value of protecting the turtles.¹⁹⁵ Volusia County claimed Justice Stevens' dicta at the end of *Sweet Home* required courts to conduct a case-by-case analysis of such interests in determining whether an illegal taking had occurred.¹⁹⁶ The district court read *Sweet Home* more narrowly. Judge Conway stated that *Sweet Home* stood for the proposition that the ESA gave the Interior Secretary, not the courts, the power to balance those factors when issuing regulations and taking permits.¹⁹⁷ Repeating Stevens' dicta, the district court stated that complex policy decisions such as how to define "harm" under the ESA are best left to the Secretary of the Interior.¹⁹⁸

By finding that direct injury had befallen the sea turtles and by narrowly interpreting Justice Steven's words, the Florida district court avoided the problem of having to define "harm." Instead, it left that burden where the ESA had placed it by default, in the lap of the Secretary of the Interior. The exact definition of what constituted a "taking" under § 9 of the ESA has proven to be an elusive animal.

¹⁸³ *Id.* at 1511 (citing 16 U.S.C. § 1536).

¹⁸⁴ *Id.* (citing 16 U.S.C. §§ 1538 and 1540(g)).

¹⁸⁵ *Loggerhead Turtle v. County Council of Volusia County, Florida*, 896 F.Supp. 1170 (M.D. Fla. 1995).

¹⁸⁶ *Id.* at 1170.

¹⁸⁷ The county, with permission of the state, had allowed people to drive their cars on the beach itself an hour before sunrise until one hour after sunset, with restricted hours during sea turtle nesting season. In addition, cars were allowed to park on the beaches until midnight, and issued special permits to fisherman to drive on the beach after dark. *Id.* at 1174; Fla.Stat. Ann. § 161.58 (West 1990).

¹⁸⁸ *Id.* at 1172.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1173-74.

¹⁹¹ *Id.* at 1180.

¹⁹² *Id.* at 1181-82.

¹⁹³ *Id.* at 1180.

¹⁹⁴ *Id.* (citing H.R. Rep. No. 93-412, p. 4-5 (1973); U.S. Code Cong. & Admin. News 1973, p. 2989).

¹⁹⁵ *Id.* at 1180.

¹⁹⁶ *Id.* at 1179.

¹⁹⁷ *Id.* at 1179-80.

¹⁹⁸ *Id.* at 1180.

V. ANALYSIS & CONCLUSION: TAKING THE AMBIGUITY OUT OF TAKINGS

For years, the property rights movement has combined political pressure with often-inflated claims of economic devastation to ward off the ESA's protection of endangered species.¹⁹⁹ In recent years, however, property owners have increasingly looked to the legal system for relief, filing lawsuits under the Federal Advisory Committee Act²⁰⁰ to stall new listings under the ESA. More importantly, they have alleged Fifth Amendment violations, arguing that the listing of endangered species under the ESA constitutes a "taking" of their property; an argument that is only possible because of the ambiguous nature of the ESA's "takings" provision.²⁰¹ To date, their attempts largely have been unsuccessful. As long as the § 9 "takings" provision remains in its present form, however, the property rights movement will push the ESA's ambiguity to the limit.²⁰²

In 1992, for example, a property owner in the Supreme Court case of *Lucas v. South Carolina* successfully argued that a zoning law which barred him from building a house on adjoining beach parcels, but did not compensate him for his loss, constituted a "taking" in violation of his Fifth Amendment rights.²⁰³ Distinguishing between real and personal property, Justice Scalia stated

that the government traditionally has exercised a much higher degree of control over personal property. But when it comes to land - the property most often at issue in ESA takings - Scalia said the government cannot apply the same "police power" mentality:

[t]he notion...that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.²⁰⁴

The Court noted, however, that the "total taking" standard requires an analysis of the degree of harm a property owner's actions pose to public lands and resources.²⁰⁵ Add to the analysis the fact that property owners rarely face total economic loss due to the ESA and the "total taking" standard is one most landowners still cannot meet.²⁰⁶ Scalia's opinion did not change the Court's previous interpretation of the Fifth Amendment takings clause. However, his strong language did give credence to the property owners' contention that the ESA "takings" provision, under appropriate circumstances, could infringe on their 5th Amendment rights.

Two years later, in *Dolan v. Tigard*, Justice Rehnquist advanced the property owners' argument by adopting a more stringent test for determining whether government regulations amount to an unconstitutional taking of land.²⁰⁷ In *Dolan*, the city of Portland, Oregon, agreed to grant a building permit to the owner of a plumbing store on the condition that she donate part of her property to the city for drainage improvements and a bicycle path.²⁰⁸ Writing for a 5-4 plurality, Rehnquist held that the city failed to show its actions were "roughly proportional" to its goal of land use planning.²⁰⁹ Although Rehnquist stated that "no precise mathematical equation is required,"²¹⁰ the new rough proportionality test requires the government to show that the scope of a regulation is related in both the "nature and extent" to the impact of the land development.²¹¹ If the government fails to meet that burden, it must pay the landowner for the value of the lost property or allow the owner to go ahead with the proposed land use.²¹² With the *Dolan* decision, the court moved one step closer to attacking the broad interpretation of the ESA's takings provisions. As one commentator has stated, *Dolan* has the potential of creating a litany of environmental litigation designed to make the public pay potential polluters, developers and property owners not to develop their land.²¹³

¹⁹⁹ Comment, *Opponent Thwart Protection*, *supra* note 22, 586-87 [citing Michelle Desiderio, *The ESA: Facing Hard Truths and Advocating Responsible Reform*, 8 NAT. RESOURCES & ENV'T 37 (1993)].

²⁰⁰ 5 U.S.C. app. §§ 1-15 (1988 & Supp. IV 1993); See also, Comment, *Opponents Thwart Protection*, *supra* note 22, at 586-87.

²⁰¹ One commentator states that environmentalists have also seized on the ambiguity within the ESA to stall land development by finding a species that is listed or has the potential of being listed. See John Charles Kunich, *The Endangered Species Act at 21: Issue of Reauthorization Species & Habitat Conservation*, 24 ENV'T. L. 501, 568 (1994) [hereinafter Comment, *The ESA at 21*].

²⁰² *Id.* at 568 ("the fogginess of standards allows for lax and ineffective implementation of the ESA if the Administration is disinclined to be aggressive in its conversation efforts.")

²⁰³ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

²⁰⁴ *Id.* at 1028.

²⁰⁵ *Id.* at 1030.

²⁰⁶ Comment, *Killers Conspire*, *supra* note 42, at 871 [citing *Lucas*, 112 S. Ct. at 2894 n.7]. This standard is similar to the "whole parcel" rule established by the Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-31 (1978).

²⁰⁷ 114 S. Ct. 2309, 2319 (1994).

²⁰⁸ *Id.* at 2313-14.

²⁰⁹ *Id.* at 2319.

²¹⁰ *Id.* at 2321.

²¹¹ *Id.* at 2319-20.

²¹² *Id.*

The only remaining barrier property owners must overcome to win the ESA-Fifth Amendment takings war in the courts is the prevailing rule in *Sweet Home*, that complex policy decisions involved in defining ambiguous terms such as "harm" and "harass" should be left to the Secretary of the Interior.²¹⁴ Meanwhile, buoyed by *Lucas* and *Dolan*, property rights advocates continue to chip away at the vague parameters of the ESA's "takings" provisions in an attempt to weaken its effectiveness. The logging industry and other landowners have lobbied legislators to pass new laws that would compensate them when ESA prohibitions result in decreased property values.²¹⁵ Early last year, lawmakers passed H.R. 925, which requires the government to reimburse landowners when any action taken pursuant to the ESA and the Wetlands Act impairs the value of their land by more than twenty percent.²¹⁶ A host of other recently passes Congressional bills call for a moratorium on adding new species to the endangered list until the ESA is reauthorized.²¹⁷ Only a few of the proposals

introduced would actually strengthen the ESA.²¹⁸

A recent indication of the shaky political ground on which the ESA's "takings" provision now stands is Senate Bill 768.²¹⁹ Introduced in May of 1995 by Senator Slade Gorton (R-Wa.), the bill would limit the definition of "harm" to direct acts that kill or injure individual members of an endangered or threatened species.²²⁰ The Gorton Bill reels in the FWS's definition of "harm," allowing property owners to destroy or degrade habitats of listed species as long as their actions do not directly result in the death or injury of those species.²²¹ A few months after Gorton came out with his bill, three congressman proposed H.R. 2275.²²² The companion bill also limits the definition of "harm" to direct acts that result in injury or death.²²³

As the 1996 elections approach, the ESA's "takings" provision will continue to shift with the prevailing political climate. The ESA's opponents are fighting the "takings" war on two major fronts: in the courts and in Congress. If the ESA's opponents can pass amendments that

curtail the scope of key terms such as "harm" and "harass," and compensate property owners who suffer losses resulting from enforcement of the ESA, they will have succeeded in severely weakening the Act.²²⁴

When Congress amends the ESA, and in particular the "takings" provisions under §§ 7 and 9, it needs to adhere to the stated purpose of the Act. The ESA was enacted in 1973 to:

[p]rovide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in [the Act].²²⁵

Numerous legislators, scholars and commentators have come up with intricate, often unrealistic remedies for "fixing" the ESA before its reauthorization.²²⁶ For example, one commentator

²¹³ Comment, *Opponents Thwart Protection*, *supra* note 22, at 593.

²¹⁴ See *supra* note 144 and accompanying text.

²¹⁵ See, e.g., Debate, Taking "Takings" Seriously, *supra* note 1, at 267-70.

²¹⁶ *Id.*

²¹⁷ See, e.g., S. 191, H.R. 490 and H.R. 571, 104th Cong., 1st Sess. (1995); S. 2451, 103d Cong., 2d Sess. (1994).

²¹⁸ For example, S. 921, introduced in 1993, places the emphasis on ecosystem conservation instead of species-based preservation. The bill also encourages private land owners to preserve species by creating incentives and new permitting programs. Landowners who take early action to preserve species would be awarded with federal land planning assistance.

H.R. 2043, also takes an ecosystem approach by calling for wildlife that would aid in the recovery of endangered species to be added to the list as well. The bill also would set aside \$25 million for incentive programs that encourage landowners to preserve species. See also, Comment, *The Reauthorization of the ESA*, *supra* note 16.

²¹⁹ S. 768, 104th Cong., 1st Sess. (1995).

²²⁰ *Id.*

²²¹ *Id.*

²²² H.R. 2275, 104th Cong., 1st Sess. § 202 (1995). The bill was introduced by Billy Tauzin (D-La.), John Doolittle (R-Calif.) and Richard Pombo (R-Calif.).

²²³ *Id.* In 1993, Tauzin had introduced H.R. 1490, which calls for compensating private property owners who lose substantial value in their land due to the takings provision in § 7 of the ESA or denial of a § 10 incidental takings permit. H.R. 1490, 103d Cong., 2d Sess. § 306 (1994). In 1994, Doolittle had introduced H.R. 3997, which required the agency that listed a species as endangered to compensate the effected property owner and called for a three-part economic impact analysis before a federal agency could implement a species recovery plan. H.R. 3997, 103d Cong., 2d Sess. § 2 (1994).

²²⁴ Charles Tiefer, former Deputy General Counsel of the House of Representatives from 1984 to 1995, and Solicitor for the House of Representatives from 1993 to 1995, recently called much of the anti-ESA legislation "The Sham Takings Bill(s)." Tiefer points out that while the bills fail to earmark billions of dollars that would be needed to compensate all landowners affected economically by the ESA. See Debate, *Taking "Takings" Seriously*, *supra* note 1, at 273.

²²⁵ 16 U.S.C. s. 1531(b) (1988).

²²⁶ See, e.g., William Snape, III & Heather Weiner, *Recipe For Reauthorization of the Endangered Species Act*, 5 DUKE ENVTL. L. & POL'Y F. 61 (calling for a National Commission on Species Extinction, Proactive measures such as computer mapping of species, greater state involvement, regional planning to achieve ecosystem management); Comment, *Endangered Species At 21*, *supra* note 201, at 571-8 [suggesting an ecosystem approach, intensive scientific research about the extinction and evolution, conservation incentives, tax breaks for "ecosystem enterprise zones," subsidized controlled raising, just compensation, special allowances and exemptions, Adopt-a-Species programs, fostering of Eco-tourism, and private ownership of listed species.]

suggests that the government start an Adopt-a-Species program that would give groups money and recognition for helping preserve species and an Eco-tourism plan to encourage support for the environment and wildlife.²²⁷ While such proposals may be nice ideas, they fail to bridge the philosophical gap between environmentalists and the property rights movement. Congress and others in the midst of the debate need to come to terms with the fact that this chasm between the two groups will remain as wide and exist as long as the Grand Canyon. Incentive programs for developers will never cause them to abandon an opportunity to make a million dollars off their land. Similarly, gathering better scientific data on species will never convince environmentalists that the government is doing enough to protect wildlife. The values behind the Fifth Amendment Takings Clause will always conflict with those behind the ESA's "takings" provisions.

Congress can resolve a major part of the debate, however, by clearing up ambiguous language that has survived in

the ESA's takings provisions since its inception twenty-three years ago. The ESA is enormously powerful. The federal government can wield this power to disable major developments and local economies. Yet the ESA "contains no clear, objectively verifiable criteria to govern when it should and should not be applied."²²⁸ The vagueness within the "takings" provisions in particular has encouraged the property rights movement to argue that the § 9 prohibitions against development and other discretionary uses of private property constitute a "taking" under the Fifth Amendment.²²⁹ When Congress reauthorizes the ESA, it must keep in mind that the Constitution does not confer an ultimate, unfettered right on property owners to do whatever they wish on their land. It has been long established that property owners in the United States hold their land under the "implied obligation" that they use it without injury to the community.²³⁰

So far, the U.S. Supreme Court has rightly refused to take on the task of defining terms within the ESA. The Court in *Sweet Home*, for example, only decided

whether definitions in FWS regulations exceed the scope of the ESA and whether the task of interpreting the ESA should have been vested in the FWS in the first place.²³¹ The Court added to the present conflict, however, by making the specious argument that the task of defining the scope of "takings" was best left to the Secretary of the Interior because it involved complex policy matters. Courts routinely decide issues based on policy considerations and the political climate of the day. Justice Stevens said that when Congress entrusted the Secretary of the Interior with the job of defining "harm" to endangered species, the Court was reluctant to second guess the

Secretary's definitions.²³² This does not, however, preclude Congress from defining more clearly the meaning of "takings" and other underlying definitions such as "harass" and "pursue". Above all, Congress must keep in mind the ESA's broad, overarching purpose of protecting endangered and threatened species, as well as safeguarding the habitats and ecosystems in which they exist.

²²⁷ *Id.* The Adopt-A-Species idea is based on the Adopt-A-Highway program. Ironically, many of the battles between the timber industry and environmentalists involve logging roads that cut through critical habitats of endangered and threatened species.

²²⁸ Comment, *The Endangered Species Act*, *supra* note 201, at 21, at 567.

²²⁹ See, e.g., *United States v. Hill*, 896 F.Supp. 1057 (D. Colo. 1995), where the plaintiff attempted to sell the artifacts of several endangered species, including the black rhinoceros, tiger, clouded leopard and snow leopard, which his father had given him 15 years earlier. Hill moved to dismiss criminal sanctions filed against him under the ESA, arguing that several terms in the Act were nebulous and gave the Secretary of the Interior too much discretion in determining what "in danger of extinction" meant. The court disagreed, holding that the task of defining endangered and threatened species requires expertise outside the province of Congress and thus was properly left in the hands of the Secretary of the Interior. Applying the analysis in *Sweet Home*, the court looked in the dictionary to define "danger" as the state of being exposed to harm. Interestingly, neither the court nor the plaintiff addressed the issue of whether the FWS regulations had defined "harm" too broadly. *Id.* at 1061.

The court held that government action under the ESA which resulted in a reduction in the value of Hill's artifacts did not rise to the level of a "taking" under the Fifth Amendment. *Id.* at 1062.

²³⁰ See, *Mugler v. Kansas*, 123 U.S. 623, 668-9 (1887) (held that prohibitions against uses injurious to the health, morals and safety of the community do not violate the Takings Clause.)

²³¹ 115 S. Ct. 2407, 2417 (1995).

²³² *Id.*