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CONSERVING THEIR KINGDOM: HABITAT MODIFICATION AS A HARM UNDER THE ENDANGERED SPECIES ACT

I. INTRODUCTION

The need for the Endangered Species Act is clear. Not only are species leaving our earth that will never return, but the speed at which this extinction is occurring is alarming. In fact, more than half of the known extinctions over the last 2000 years occurred during the last 60 years.¹ Congress directed its attention to this need in 1966² by passing The Endangered Species Conservation Act giving the Secretary of the Interior the authority to acquire wildlife habitat lands for preservation.³ Three years later, Congress gave the Secretary the authority to promulgate a list of species threatened worldwide with extinction in the Endangered Species Conservation Act of 1969.⁴ Congress embraced the goals of each of these statutes in the Endangered Species Act of 1973 (ESA), which clarified ambiguities resulting from the previous statutes and gave the Secretary broader power than its predecessors, such as to define what acts constitute a violation as well as to list species as endangered.⁵ It was seen as the "first federal statute to embody a truly comprehensive federal effort at wildlife preservation."⁶ The relevant portions of the ESA for the purposes of this article, embodied in § 9, state that a person subject to the jurisdiction of the United States may not "take any such [endangered] species within the United States or the territorial sea of the United States" The statute defines the term "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct."⁸ One term causing great confusion is "harm" since it has no concrete action within its definition. To suppress this confusion, the U.S. Fish and Wildlife Service (FWS) devised the following definition:

Harm in the definition of "take" in the [ESA] means 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.⁹

1. Mark Sagoff, *On the Preservation of Species*, 7 COLUM. J. ENVTL. L. 33, 42-45 (1980).

2. Congress had previously enacted statutes aimed at specific species such as The Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1982) (enacted 1918); The Bald and Golden Eagles Protection Act, 16 U.S.C. §§ 668-668d (1982) (enacted 1940). See also Saxe, *infra* note 22 for a history of species conservation in the United States.

3. Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926 (repealed 1973).

4. Pub. L. No. 91-135, 83 Stat. 275 (§§ 1-6 repealed 1973) (remainder codified as amended in scattered sections of 16 U.S.C. and 18 U.S.C.).

5. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (1994).

6. Michael J. Bean, *The Evolution of National Wildlife Law* 319 (rev. ed. 1983).

7. 16 U.S.C. § 1538 (a)(1)(B) (1994).

8. 16 U.S.C. § 1532 (19) (1994).

9. 50 C.F.R. 17.3 (1994) (emphasis added).

The term "harm" and the FWS definition of it have created a great struggle between private property rights advocates and environmentalists.

Environmentalists seemed to be prevailing in this struggle since even before the FWS codified the inclusion of habitat modification in its definition of harm, courts interpreted habitat modification as a taking, citing the overall intent of the ESA.¹⁰ The Ninth Circuit held in *Palila v. Hawaii Dept. of Natural Resources*, also known as *Palila IV*, that the release of sheep that ultimately destroyed the mamane trees, those depended upon by an endangered species, was a taking.¹¹ The court reached its decision by defining this destruction as habitat modification and interpreting it as a harm since it depleted the already small population. Even as recent as 1993, the DC Circuit upheld this interpretation in *Sweet Home v. Babbitt (Sweet Home I)*.¹² However, in March, 1994, the DC Circuit overruled this decision and decided in *Sweet Home II* that the FWS incorrectly included habitat modification as a harm resulting in a taking of an endangered species.¹³ The DC Circuit found the regulation to be unconstitutional since it went against the intent of Congress. Thus, the DC Circuit created a split between itself and the Ninth Circuit.¹⁴ While environmental advocates in the Ninth Circuit believe the decision in *Sweet Home II* simply does not apply in that part of the country and is therefore insignificant, it represents a difference that has the dangerous potential to cost the nation valuable natural resources.¹⁵

The primary effects of the split are twofold. First, it promises to add fire to the arguments of private property owners.¹⁶ This will increase the current heavy load of litigation concerning compensation for property owners whose land loses value due to a government regulation such as the FWS inclusion of habitat modification. Second, and more importantly, the split may have a deleterious effect on conservation efforts. With the DC decision, the habitats of endangered species lose their significance under the weight of private property owners' rights.¹⁷ With habitats no longer protected, endangered species lose their foundations and, in turn, their "essential behavior patterns, including breeding, feeding or sheltering" as referred to by FWS.¹⁸ Without appropriate habitats, the species lose their terrain and methods by which they can recover to the point of removal from the endangered list, the basic goal of putting species on the list.

10. *Palila v. Hawaii Dept. of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988).

11. *Id.*

12. *Sweet Home v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993) [hereinafter *Sweet home I*].

13. *Sweet Home v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994) [hereinafter *Sweet Home II*].

14. The DC Circuit is joined by the Eight Circuit in *Sierra Club v. Froehle*, 534 F.2d 1289 (8th Cir. 1976) (building of a dam was not an attempt to harass or harm the species and thereby did not violate § 9 of ESA). The Ninth Circuit is joined by the Fifth Circuit in *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (Forest Service's practices violated ESA by impairing the endangered woodpecker's essential behavioral patterns, including sheltering); and in *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976) (Under § 7 of ESA, actions of federal agency must not jeopardize the continued existence of the Mississippi Sandhill Crane); and by the Sixth Circuit in *Hill v. Tennessee Valley Authority*, 549 F.2d 1064 (6th Cir. 1977), aff'd in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (see *infra* note 24 and accompanying text).

15. Todd Woody, *D.C. Environmental Ruling Creates Split in Circuits*, THE RECORDER, March 17, 1994.

16. See *infra* note 51. See also Lynda Graham Cook, *Comment: Lucas & Endangered Species Protection: When "Take" and "Takings" Collide*, 27 U.C. DAVIS L. REV. 185 (1993).

17. *Id.*

18. 50 C.F.R. 17.3 (1994).

In addition to the increased number of extinct species, the decision to preclude habitat modification from the definition of harm runs contrary to the moral foundation of our country. Robert Dworkin notes that

in our culture, we tend to treat distinct animal species as sacred. We think it very important, and worth considerable economic expense, to protect endangered species from destruction at human hands or by a human enterprise We consider it a kind of cosmic shame when a species that nature has developed ceases, through human actions, to exist.¹⁹

Not only will one species cease to exist, but the ecosystem to which the species was formerly a member will be damaged. In fact, the purpose of the bill includes "the conservation of the species and of the ecosystems upon which they depend"²⁰ The term "ecosystem" refers to the concept that "[t]he predatory species evolved side-by-side with prey species; their mutual dependence is critical to the elusive stasis called the balance of nature."²¹ By eliminating one species from the "complex of subtly balanced interrelationships," other species suffer, thereby damaging the ecosystem as a whole.²² This will in turn prevent the surrounding communities from realizing the long-term benefits of ecosystem-based management.²³

With these possible results at risk, the split begs for resolution. The Supreme Court has yet to directly address the split. The Court may be waiting to see the results of the planned reauthorization of the Endangered Species Act.²⁴ However, the Supreme Court may believe it already decided this question in *Tennessee Valley Authority v. Hill*.²⁵ In this controversial case, involving the endangered snail darter, the Secretary of the Interior, under authority of § 7, listed the area surrounding the almost-completed multi-million dollar Tellico Dam as the fish's critical habitat. The Court relied on the language of the Act stating that "[a]gencies in particular are directed . . . [to] 'use . . . all methods and procedures which are necessary' to preserve endangered species."²⁶ The Court also stated that "[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, *whatever the cost*."²⁷ Whatever the reason, the split is still unresolved and Congress should, in the upcoming reauthorization, clarify the language of the statute to include habitat modification and settle the split.

19. Robert Dworkin, *LIFE'S DOMINION* 75 (1993).

20. 199 Cong. Rec. 42913 (1973). See also 16 U.S.C. § 1531(b) (1994).

21. George C. Coggins & Parthenia B. Evans, *Predators' Rights and American Wildlife Law*, 24 ARIZ. L. REV. 821, 824 (1982).

22. Keith Saxe, *Regulated Taking of Threatened Species Under the Endangered Species Act*, 39 HASTINGS L.J. 399, 403 (1988).

23. Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 295 (1994).

24. Nancy Kubasek, et. al., *The Endangered Species Act: Time for a New Approach?*, 24 ENVTL. L. 329 (Spring 1994).

25. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

26. *Id.* at 185, citing 16 U.S.C. §§ 1531(c), 1532(2) (1976 ed.).

27. *Id.* at 184 (emphasis added).

II. THE CONTROVERSY OVER HARM

A. *Palila IV*: ESA Calls for Habitat Modification as a Harm

The case that best lays out the notion that habitat modification does constitute a harm, and therefore an illegal taking, is *Palila v. Hawaii Dept. of Land & Natural Resources*, also known as *Palila IV*.²⁸ Here, the Ninth Circuit upheld the district court's decision in *Palila I*²⁹ to remove mouflon sheep from the critical habitat of the Palila, a six-inch bird found only on the slopes of Mauna Kea on the Island of Hawaii.³⁰ The court found that the sheep, who were introduced to the area by the Department of Land & Natural Resources for the enjoyment of sport hunters, fed upon and ultimately destroyed the mamane trees upon which the Palila depended.³¹ The court found that the presence of the sheep constituted a harm because

(1) the eating habits of the sheep destroyed the mamane woodland and thus caused habitat degradation that could result in extinction; (2) were the mouflon [sheep] to continue eating the mamane, the woodland would not regenerate and the Palila population would not recover to a point where it could be removed from the Endangered Species list.³²

Through this holding, the court upheld the FWS definition of harm and yielded to the authority of the Secretary because the Secretary is "entitled to deference if his regulation is reasonable and not in conflict with the intent of Congress."³³ The court also reasoned that the Secretary's inclusion of habitat modification serves the overall purpose of the Act which is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . ."³⁴ Conserving the Palila's woodland is also consistent with the legislative history of the policy. The Senate Reporter on the Act stated that "'Take' is defined in . . . the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."³⁵ Finally, the court looked to the reaction of Congress to support its decision. Since Congress was aware of the judicial and codified interpretation of harm when it amended the ESA in 1982 and did not change the definition of "take" so as to exclude habitat modification, Congress implied its acceptance and satisfaction with the inclusion.³⁶

Generally, commentators who agree that habitat modification is a harm recognize the importance of a species' habitat in its recuperation and survival. Commentator Keith Saxe states that "[w]hile hunting and predator control pose a direct and significant threat, human population growth and economic development present a much greater threat to wildlife species . . . [by depriving] wildlife of essential habi-

28. *Palila v. Hawaii Dept. of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988).

29. 471 F. Supp. 985 (D. Haw. 1979).

30. 852 F.2d at 1107.

31. *Id.*

32. *Id.*

33. *Id.* at 1108, citing *United States v. Riverside Bayview, Inc.*, 474 U.S. 121, 131 (1985).

34. 16 U.S.C. § 1531(b) (1994).

35. S. Rep. No. 307, 93rd Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.C.A.N. 2989, 2995.

36. See *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (congressional inaction after interpretation may be probative of approval).

tat”³⁷ Commentators also rely on the legislative history, similar to the *Palila IV* court. The original acts, amendments, and reauthorization support the concept that a species’ habitat is crucial to its recovery. Courts and commentators rely on sections that broadly define conservation to include “habitat maintenance.”³⁸ Other sections recognize the importance of habitat requiring that the Secretary use “present or threatened destruction, modification, or curtailment of [a species’] habitat or range” in determining whether to list a species as threatened or endangered.³⁹ Also, Congress directed the Secretary to designate “critical habitat” for any endangered or threatened species for the purposes of § 7 of the Act to prevent federal agencies from using property in ways that would prevent the species’ recovery or increase the chance of extinction.⁴⁰ The affirmative appearance of habitat within the statute evidences the intent of the creators of the ESA to take account not only of the survival of the species, but also the geographic territory that keeps the species existing. Finally, one commentator agreed with the ESA’s overall intent and purpose stating that “[l]aws which grant private property rights in water and mineral resources with little or no consideration of the public interest are a major cause of the enormous amount of environmental destruction”⁴¹ The *Palila IV* decision espouses this intent and effectively elevates habitat conservation above individualized concerns.

B. *Sweet Home II*: Habitat Modification is a Right, Not a Harm

Recently, however, the DC Circuit “altered” its previous view that the FWS regulation correctly included habitat modification as a harm⁴² and created a circuit split in 1994 by finding the regulation unconstitutional in *Sweet Home II*.⁴³ In *Sweet Home II*, several citizens’ organizations concerned about over-regulation by government and decreasing rights of private property owners sued the Secretary of Interior to invalidate the FWS regulations under the ESA prohibition of taking endangered species. The court decided that the FWS’s definition of harm was “neither clearly authorized by Congress nor a ‘reasonable interpretation’ of the statute,” as required by *Chevron USA, Inc. v. Natural Resources Defense Council*.⁴⁴ The *Sweet Home II* court found that the legislative history was ambiguous, not spelling out a congressional intent of habitat modification to be a harm and not specifically including habitat modification into the Act during the Reauthorization in 1982.⁴⁵ In addition, the Court found the interpretation to be unreasonable by relying on the concept of *noscitur a sociis* (a word is known by the company it keeps).⁴⁶ Harm, therefore, requires a more direct action toward the animal within the meaning of the surrounding words (hunt, shoot,

37. *Supra* note 22, at 405.

38. 16 U.S.C. § 1532(3) (1994).

39. 16 U.S.C. § 1533(a) (1994).

40. 16 U.S.C. § 1532(5)(b) (1994) (applying to actions by the federal government, not by individual parties).

41. Michael C. Blumm, *Public Choice Theory and the Public Lands: Why “Multiple Use” Failed*, 18 HARV. ENVTL. L. REV. 405, 406 (1993).

42. *Sweet Home I*, 1 F.3d 1 (D.C. Cir. 1993).

43. *Sweet Home II*, 17 F.3d 1463, 1464 (D.C. Cir. 1994).

44. *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984), *cited in* 17 F.3d at 1464.

45. 17 F.3d at 1467.

46. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961), *cited in* 17 F.3d at 1465.

wound, kill).⁴⁷ Finally, the court found this definition to be too broad, even encompassing a farmer who may be kept from harvesting crops.⁴⁸

Commentators on this issue are plentiful. Most yield to the need for private property owners' rights. In fact, writer Ike Sugg explains that "the essential point to understand is that the [definition of harm has] been greatly expanded with deleterious effect on human liberty."⁴⁹ He suggests that the federal government, through the Department of Agriculture could provide "funds for the acquisition of critical habitat and . . . [cooperate] with landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves."⁵⁰ This removes the responsibility from the property owner and permits the owner to do with the property as she wishes. Finally, one commentator does not believe in the viability of the ESA because it violates the Fifth Amendment.⁵¹ Commentator Mark Pollot argues that if the inclusion of habitat modification in the definition of harm renders the property substantially less valuable, then the government has taken the property unconstitutionally and owes the property owner compensation.⁵² *Sweet Home II* championed this reasoning leaving the question behind "harm" to Congress.

III. THE NECESSARY STATUTORY REVISION

Both economists and environmentalists criticize the ESA but it remains the most comprehensive act aimed at the goal of wildlife conservation and retains its original design of sparing endangered and threatened species. This circuit split, however, jeopardizes this goal. To bypass this problem, when reauthorizing the ESA, Congress should alter § 1532 (19) of the statute to read as follows:

The term "take" means:

- a. to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or
- b. to engage in any conduct that significantly modifies the habitat of an endangered species, or
- c. to attempt to engage in any of the above conduct.⁵³

This reauthorization will have many positive effects. First, it will nullify the current circuit split and uphold a FWS regulation judicially confirmed for many years. Second, the reauthorization will push the ESA back toward its goal of conserving endangered wildlife by recognizing the necessity of conserving the habitat of the species, not only the species itself. Finally, the ESA will officially recognize that the great loss of our species is primarily due to loss of habitat. The relatively small loss of economic opportunity in development cannot justify the profoundly wrong occurrence of loss of habitat and of a species.⁵⁴ Congress will merely acknowledge the promise of conservation

47. 16 U.S.C. § 1532(19) (1994).

48. 17 F.3d at 1464-65.

49. Ike Sugg, *Caught in the Act: Evaluating the ESA, Its Effects on Man & Prospects for Reform*, 24 CUMBERLAND L. REV. 1, 35 (1993-94).

50. *Id.*, citing 199 Cong. Rec. 30162 (1973).

51. Mark L. Pollot, *GRAND THEFT & PETIT LARCENY: PROPERTY RIGHTS IN AMERICA* 125 (1993).

52. *Id.*

53. See *supra* note 7 and accompanying text for current version of statute.

54. Nancy Kubasek notes that "[w]hile a few notable projects have been temporarily delayed or modified, with a great deal of attendant publicity, almost ninety percent of consultations are disposed of informally." *Supra* note 24, at 338.

underlying the ESA and create stability surrounding “harm.”

In the words of great naturalist Aldo Leopold, endangered species “depend for their perpetuation on protection and a favorable environment. They need ‘management’—the perpetuation of good habitat.”⁵⁵

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55. Aldo Leopold, *Threatened Species*, reprinted in *THE RIVER OF THE MOTHER OF GOD* 230, 231 (Susan L. Flader & J. Baird Callicot eds. 1991).

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