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Continuing a Broad Application of Section 9 of the ESA to Prevent Future Mass Extinctions

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Recent studies show a rising need to protect endangered and threatened species from events of mass extinction.[1] The Endangered Species Act of 1973 (ESA) is the primary mechanism to protect both species and habitats through the application of civil and criminal penalties.[2] One of the two main habitat protection provisions found in the ESA is Section 9.[3] This Section is a criminal provision prohibiting the "taking" of endangered fish or wildlife under section 9(a)(1), and endangered plants under section 9(a)(2).[4] The statutory definition of "taking" includes "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[5]

This Article explores the ESA's section 9 habitat protection provisions and argues that courts have consistently applied the *Palila*[6] and *Sweet Home*[7] decisions in cases where broad findings of proximate cause and foreseeability were needed to prove a Section 9 taking.[8] This Article also emphasizes how courts and agencies have narrowly and erroneously interpreted the proximate cause requirement to limit Section 9 takings protection in climate change cases. This Article recommends that the federal government and the public, via citizen suits, use this provision as a main tool in fighting mass extinctions by applying a broader scope to Section 9 takings cases including those concerning climate change and emissions pollution.

I. Background

Two federal agencies, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), carry out the ESA's mandate to list and protect endangered and threatened species.[9] The first step to ensure the protection of a species is for the FWS and the NMFS to follow the delineated regulatory steps to list a species as threatened or endangered.[10] Sections 7 and 9 of the ESA then protect the listed threatened and endangered species and their habitats.[11] Section 9 of the ESA makes it a criminal offense for any private or public entity to take a listed species.[12] Under the ESA, the taking of an endangered species is a violation of the Act that can incur a civil penalty of up to $25,000 and criminal penalties of up to $50,000 and up to one-year imprisonment.[13]

The Supreme Court has adequately addressed Congress's intent to provide broad protection to listed species through the ESA's section 9 takings prohibition.[14] In *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon,* the Court clarified that a taking includes intentional and direct threats to species and confirmed that a "harm" impacting a species' habitat also counts as a prohibited taking under the ESA.[15] In this case, the Court determined that harm included altering a species' habitat in a way that harms the species itself.[16] The Court reasoned that Congress intended to provide broad protection to listed species that included indirect or unforeseeable actions that could negatively impact listed species.[17] Furthermore, both the FWS and the NMFS have codified the Court's definition of harm and its application to an endangered or threatened species' habitat through the promulgation of "Harm Rules."[18]

In addition to the Court's clarification, two influential cases from Hawaii provided the framework for future Section 9 habitat harm cases. In the first case, *Palila I*, plaintiffs brought a suit on behalf of the endangered palila bird.[19] The district court found that the negative impact caused by the management program was consistent with the regulatory definitions of harm in *Sweet Home*.[20] In the second case, *Palila II*, the district court once again held that the state's game management program continued to constitute harm by negatively impacting the palilas' habitat.[21]

II. Analysis

Most courts continue to correctly follow the *Palila* and *Sweet Home* decisions and apply a broad reading to the proximate cause and foreseeability elements required to prove a Section 9 taking.[22] This broad application is consistent with Congress's intent to define a taking "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."[23] However, some Section 9 takings cases concerning climate change are erroneously decided in circumstances where it is difficult to establish a concise link between the activity that causes harm and the actual harm.[24] In *Arizona Cattle Growers' Association v. United States Fish & Wildlife*,[25] the court erred in applying a narrow proximate cause and foreseeability analysis that resulted in a finding that the activity did not constitute a Section 9 taking.[26]

This narrow application of the proximate cause requirement is incorrect "considering that the policy goal of the ESA is to conserve species, any injury likely to substantially impact a species' long-term survival should be considered a proximate cause of harm."[27] In addition, cases such as *Defenders of Wildlife v. Administrator*[28] and *National Wildlife Federation v. Hodel*[29] clearly demonstrated how to follow the analytical framework set out by the *Palila I* and *Palila II* cases.[30] In *Defenders of Wildlife*, the court found that the direct or indirect poisoning of eagles by a registered pesticide constituted a taking.[31] In *National Wildlife Federation*, the court found that lead poisoning caused by bald eagles ingesting other birds who consumed or were hit with lead shots constituted a taking.[32] Both court's findings that "indirect"

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and "secondary" harm to endangered species still constitute takings under Section 9 permissibly follow and broaden the application of the *Palila* framework. By deciding not to follow this broad framework in climate change cases, courts deliberately ignore the ESA's statutory intent as established by Congress and clarified by *Sweet Home*.[33]

The enforcement of Section 9 takings as intended by Congress and clarified by the Supreme Court provides a powerful tool to protect more habitats and ecosystems from harm.[34] Therefore, courts should continue to apply this broad scope to future cases in which a threatened or endangered species taking occurred due to adverse harm to that species' environment, including cases in which this adverse harm was caused by climate change.

III. Conclusion

The broad application of Section 9's prohibition to include harms threatening broader ecosystems that may cause "indirect" and "unforeseeable" harm to threatened and endangered species is a permissible reading of Congress's intent to protect these species.[35] The prevention of harm should extend to protect a broader scope of ecosystems that could still foreseeably cause harm to a protected species if the habitat is harmed.[36] Enforcing agencies should continue to use the Section 9 takings prohibition as a mode of prevention against impending but avertable mass extinctions of species.

Endnotes

1 *See, e.g.*, Michelle Innis, *Australian Rodent Is First Mammal Made Extinct by Human-Driven Climate Change, Scientists Say*, N.Y. Times (June 14, 2016), https://www.nytimes.com/2016/06/15/world/australia/climate-change-bramble-cay-rodent.html; Carl Zimmer, *Ocean Life Faces Mass Extinction, Broad Study Says*, N.Y. Times (Jan. 15, 2015), https://www.nytimes.com/2015/01/16/science/earth/study-raises-alarm-for-health-of-ocean-life.html.

2 *See* Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or., 515 U.S. 687, 707 (1995) (referring to Congress's intent to include habitat modification as an incidental taking).

3 *See* 16 U.S.C. §§ 1536, 1538 (2012) (applying to all persons while the other main provision, section 7's "duty to insure," applies only to the federal government).

4 *Id.* § 1536(a)(1)-(2).

5 *Id.* § 1532(19) (including the word "harm" in its definition of taking).

6 649 F. Supp. 1070 (D. Haw. 1986) [hereinafter Palila II]; 639 F.2d 495 (9th Cir. 1981) [hereinafter Palila I].

7 515 U.S. 687 (1995).

8 *See, e.g.*, Defenders of Wildlife v. Admr. of Evntl. Prot. Agency, 882 F.2d 1294 (8th Cir. 1989); Nat'l Wildlife Fed'n v. Hodel, 1985 U.S. Dist. LEXIS 16490, *17 (E.D. Cal. 1985).

9 The FWS oversees the listing and protection of land-based fish and animals. The NMFS is within the Department of Commerce and is tasked with listing and protecting ocean-based fish and animals. 16 U.S.C. § 1532(15) (defining the term "Secretary" to mean the Secretary of the Interior or Commerce, thus allowing the delegation to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service).

10 *Id.* § 1533(a), (b) (outlining the process for placing a species on the endangered or threatened lists and designating the critical habitats for the listed species including going through a thorough risk review using the best commercial and scientific data available).

11 *Id.* §§ 1536, 1538.

12 *Id.* § 1533(d) (authorizing the FWS and NMFS to extend Section 9 prohibitions to threatened species through the promulgation of regulations).

13 *Id.* § 1540(a), (b) (outlining the ESA's civil and criminal violation penalties).

14 *See* Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or., 515 U.S. 687, 707-11 (1995).

15 *See id.* at 708 (reasoning that adverse habitat modification constitutes a harm and thus a possible violation of the section 9 takings prohibition).

16 *See id.* at 707 (holding that any adverse changes to a species' habitat are a legitimate application of harm under the section 9 takings prohibition).

17 *See id.* at 704 (determining that Congress intended for the ESA to apply "broadly to cover indirect as well as purposeful actions").

18 50 C.F.R. § 17.3 (codifying the FWS Harm Rule); *see also id.*§ 222.102 (codifying the NMFS Harm Rule).

19 *See* Palila v. Haw. Dep't. of Land and Nat. Res., 639 F.2d 495, 495-96 (9th Cir. 1981) (arguing that the state's game management program had a negative impact on the palila's habitat).

20 *See Babbitt*, 515 U.S. at 707; (resulting in the FWS's attempt to update their Harm Rule to clarify that any actions that constitute harm must result in the actual killing of a protected species; however, this attempt did not result in any substantial change as intended).

21 *See* Palila v. Haw. Dep't. of Land and Nat. Res., 649 F. Supp. 1070, 1082-83 (D. Haw. 1986).

22 *See* Nat'l Wildlife Fed'n v. Hodel, 1985 U.S. Dist. LEXIS 16490 at *17 (E.D. Cal. 1985) (applying the expansive reading of the Palila cases to prohibit the use of lead shot in hunting waterfowl because bald eagles were poisoned after consuming contaminated birds).

23 *See Babbitt*, 515 U.S. at 726 (quoting S. Rep. No. 93-307 at 7 (1973) to support the Court's reasoning that Congress intended for a broad application of Section 9).

24 *See* Morrill v. Lujan, 802 F. Supp. 424, 432 (S.D. Ala. 1992) (holding that "proof of a taking requires the plaintiff to establish a causal link between the habitat modification of a proposed project and the potential harm alleged").

25 273 F.3d 1229 (9th Cir. 2001).

26 *See id.* at 1242 (holding that there was no "rational basis" for concluding that a Section 9 taking would occur if the cattle continued to graze in areas where endangered species could be found).

27 *See* Ethan Mooar, Note, *Can Climate Change Constitute a Taking? The Endangered Species Act and Greenhouse Gas Regulation*, 21 Colo. J. Int'l Envtl. L. & Pol'y 399, 403-04 (2010).

28 882 F.2d 1294 (8th Cir. 1989).

29 No. S-85-0837, 1985 U.S. Dist. LEXIS 16490, at *1 (E.D. Cal. 1985).

30 *See Defenders of Wildlife*, 882 F.2d at 1300-01 (following *Palila I* and *Palila II* which conclude that a taking occurs when an act has "some prohibited impact on" or "significantly impairs" an endangered species); *Nat'l Wildlife Fed'n*, 1985 U.S. Dist. LEXIS at *17 (following the *Palila I* and *Palila II* framework that allows for a more indirect or "secondary" link between a harming activity and the actual harm caused to the species).

31 *See Defenders of Wildlife*, 882 F.2d at 1301.

32 *See Nat'l Wildlife Fed'n*, 1985 U.S. Dist. LEXIS 16490 at *2, *12.

33 *See* Babbitt v. Sweet Home Chapter of Communities for Greater Or., 515 U.S. 687, 707 (1995) (holding that the Secretary's broad interpretation of the word "harm" to included habitat modification was a permissible reading under the ESA).

34 *See id.* at 698 (taking the intended broad purpose of the ESA and the Court's support of this broad purpose to "extend protection against activities that cause the precise harms Congress enacted the statute to avoid" to include adverse impact to broader ecosystems that then causes harm to endangered and threatened species).

35 *See id.* at 698, 700; *see also* Palila v. Haw. Dep't. of Land and Nat. Res., 649 F. Supp. 1070, 1075 (D. Haw. 1986).

36 *See* Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 783 (9th Cir. 1995) (arguing that failing to consider any foreseeability of future harm under the ESA is "antithetical to [its] basic purpose").