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Judicial Application of the Endangered Species Act and the Implications for Takings of Protected Species and Private Property

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JUDICIAL APPLICATION OF THE ENDANGERED SPECIES ACT AND THE IMPLICATIONS FOR TAKINGS OF PROTECTED SPECIES AND PRIVATE PROPERTY

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> *It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million . . . . We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.*

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

> *[T]he broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid . . . . [A]mong its central purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." . . . . [A]s all recognize, the Act encompasses a vast range of economic and social enterprises and endeavors.*

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2413, 2418 (1995).

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INTRODUCTION

The substantive provisions of the Endangered Species Act (ESA)[1] have been construed by the United States Supreme Court on only two occasions.[2] The range of these Supreme Court decisions, separated by 17 years and quoted above, mirrors the evolution in the application of the ESA. In *TVA v. Hill*, the Court enjoined the construction of the Tellico Dam to protect the snail darter, based in part on what the Court perceived to be congressional intent to reverse the trend of species extinction, "whatever the cost." This decision demonstrates the initial focus of both ESA litigation and the agency application of the statute. In the early years of the program, the agencies implementing the Act, the public, and reviewing courts largely focused on individual species and specific projects. Recently, however, with the growing focus on concepts of conservation biology, biodiversity, and ecosystem management, administration of the ESA has increasingly turned to the conservation and management of multiple species and habitats as a common denominator. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Supreme Court upheld the U.S. Fish and Wildlife Service's (FWS) regulatory interpretation of the Section 9 prohibition on taking listed species to apply to significant habitat modification activities on nonfederal land.

This shifting focus for judicial application of the ESA has set the foundation for discussions concerning changes to the Act's implementation for two interrelated yet distinct aspects: the scope of takings of listed species prohibited by Section 9, and the constitutional limits of ESA regulation of private property without just compensation. This article examines the background of these two components of the ESA's application and reauthorization debate. First, we provide a brief outline of the ESA statutory framework to better understand where the species taking provisions come into play, and also to identify potential sources of government regulatory authority that could lead to an uncompensated taking of private property. Second, we survey the development of the Act's application through the case law to illustrate the growing focus on habitat and ecosystem conservation. Third, we highlight some of the current

1. 16 U.S.C. §§ 1531-1544 (1994).

2. In the current October 1996 Term, the Supreme Court held on March 19, 1997, that resource development interests as well as those persons who allege an interest in the preservation of endangered species may fall within the zone of interest protected by the ESA and have standing to sue under the statute. Bennett v. Spear, No. 95-813, 1997 WL 119566 (Mar. 19, 1997). The Supreme Court also addressed ESA standing issues in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), where it held that wildlife and conservation organization plaintiffs failed to demonstrate the requisite injury in fact to challenge a rule interpreting ESA Section 7 to apply only within the United States and on the high seas.

issues in ascertaining whether habitat-altering activities may constitute a prohibited Section 9 taking of protected species. Lastly, we describe the Fifth Amendment constitutional takings framework and evaluate its potential application to ESA regulatory actions.

THE STATUTORY FRAMEWORK

Application of the Endangered Species Act is triggered by the listing of a species under Section 4.[3] The ESA protects "endangered" species (those in danger of extinction throughout all or a significant portion of their range) and "threatened" species (those likely to become endangered within the foreseeable future).[4] The federal agencies responsible for implementing the ESA are the Fish and Wildlife Service of the Department of Interior and the National Marine Fisheries Service (NMFS) of the Department of Commerce.[5] If the FWS or NMFS lists a species under Section 4, the listing agency generally must also designate "critical habitat" for the species.[6] Critical habitat includes those areas essential to the conservation of a listed species that require special management or protection.[7]

ESA Section 7 requires federal agencies to consult with the FWS or NMFS to determine whether agency action may affect listed species or their habitat.[8] An "action" is defined very broadly to include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies in the United States or upon the high seas," including the "granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid."[9] Section 7 proscribes federal agencies from taking any action that is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat.[10] If the agency determines that its action will affect listed species or critical habitat, it must undertake formal consultation with the FWS or NMFS.[11]

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3. 16 U.S.C. § 1533.
4. *Id.* § 1532(6), (20).
5. 16 U.S.C. § 1532(15). In general, the FWS is responsible for terrestrial and freshwater species. The NMFS is responsible for marine species, including anadromous fish such as salmon and steelhead trout that hatch in fresh water, spend most of their adult life in the ocean, and then return to fresh water to spawn. *See* 50 C.F.R. §§ 17.2(b), 402.01(b) (1995).
6. 16 U.S.C. § 1533(b)(2).
7. 16 U.S.C. § 1532(5).
8. *Id.* § 1536(a)(2).
9. 50 C.F.R. § 402.02 (1995).
10. 16 U.S.C. § 1536(a)(2).
11. 50 C.F.R. § 402.14(a) (1995).

The product of the consultation process is generally a biological opinion issued by the FWS or NMFS indicating whether or not the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy" opinion), or is not likely to result in such effects (a "no jeopardy" opinion).[12] A "jeopardy" biological opinion must include reasonable and prudent alternatives, if any, that would alter the action to avoid the likelihood of jeopardizing a listed species or resulting in the destruction or adverse modification of critical habitat.[13]

Section 9 of the ESA broadly prohibits the taking of any listed species of fish or wildlife by "any person."[14] Both federal and nonfederal (i.e. private and state) actions are within the statutory prohibition. The statute defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[15] The Supreme Court's *Sweet Home* decision upheld the Fish and Wildlife Service's regulatory interpretation of Section 9 to apply the take prohibition to significant habitat modification activities on nonfederal land.[16] The Section 9 protections for listed plants are distinct and incorporate state plant protection law requirements. Section 9 makes it unlawful for any person to "remove and reduce to possession" any listed plant from federal land areas, or to "maliciously damage or destroy any such species on any such area."[17] That section also prohibits any person to "remove, cut, dig up, or damage or destroy any [listed plant] species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law."[18]

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12. *See id.* § 402.14(h)(3).

13. *Id.* §§ 402.14(h)(3), 402.02.

14. 16 U.S.C. § 1538(a)(1). The statutory prohibition applies only to endangered species, *id.*, but has been extended to threatened species by regulation, 50 C.F.R. § 17.31(a) (1995).

15. 16 U.S.C. § 1532(19).

16. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2418 (1995). In *Sweet Home*, private property owners and logging companies dependent on the forest products industries challenged the statutory validity of the FWS regulation defining "harm" to include habitat modification activities that actually kill or injure wildlife. The challengers argued that Congress did not intend for the word "take" to include habitat modification. *Id* at 2410. The Court found support for the FWS definition in the statutory language and legislative history. *Id* at 2412-13, 2416-18. The Court also noted that the Act authorizes the issuance of permits for the unintended, incidental "take" of an endangered species as a result of an otherwise lawful activity. Congress' inclusion of this provision in the Act supported the Secretary of the Interior's conclusion that activities not directly intended to harm an endangered species, such as habitat modification from land-use development or natural resource extraction activities, may result in an unlawful indirect taking unless the FWS authorizes the taking. *Id* at 2414, 2417-18.

17. 16 U.S.C. § 1538(a)(2)(B).

18. *Id.*

The Service may issue a permit under ESA Section 10(a) to authorize the "incidental take" of protected species. An incidental taking is one that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[19] Similarly, for activities subject to the federal consultation requirement of Section 7, the biological opinion may include an incidental take statement authorizing such incidental take where it will not jeopardize the species' continued existence.[20] The statement must include reasonable and prudent measures that the Service deems necessary or appropriate to minimize the impact of any incidental take on the species.[21]

Two provisions of the Endangered Species Act are of special interest for the Act's developing application to habitat and ecosystem conservation purposes. First, Section 2(b) provides that one purpose of the Act is to "provide a means whereby the ecosystems upon which listed species depend may be conserved."[22] Second, Section 7(a)(1) directs all federal agencies to use their authorities to further the purposes of the ESA by carrying out programs for the conservation of listed species.[23] Although conserving the ecosystems upon which endangered species depend is one of the identified purposes of the ESA, there is no specific ESA program to implement this purpose.[24] The critical habitat provisions of the ESA are not coterminous with an ecosystem conservation approach because critical habitat often is not designated for listed species.[25] Also, the critical habitat designation and protections focus only on the essential elements of the habitat for the listed species and not all of the ecosystem functions of that habitat.

Nevertheless, despite the absence of a specific ESA program for ecosystem conservation, at least one federal court has indicated that the Section 2(b) purposes and Section 7(a)(1) obligations form the basis for a required ecosystem management approach. In *Seattle Audubon Society v. Lyons*,[26] Judge Dwyer upheld the President's Forest Plan for the Pacific

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19. *Id.* § 1539(a)(1)(B).

20. 50 C.F.R. § 402.14(i) (1995).

21. *Id.*

22. 16 U.S.C. § 1531(b). The Supreme Court noted in *Sweet Home* that this ecosystem conservation purpose is one of the "central purposes" of the ESA. *Sweet Home*, 115 S. Ct. at 2413.

23. *Id.* § 1536(a)(1).

24. *See, e.g.*, NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT at 179 (1995) (noting that while "ecosystem protection is of paramount importance to the overall preservation of species," the ESA focuses on listing species and any policy for implementing ecosystem protection is "untested").

25. *Id.* at 76 ("That nearly 80% of all species listed do not have critical habitat designations is a cause for concern.").

26. 871 F. Supp. 1291, 1311 (W.D. Wash. 1994), *aff'd on other grounds sub nom.* Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401 (9th Cir. 1996).

Northwest old growth forests in the range of the northern spotted owl, and stated that the Bureau of Land Management and the Forest Service *had* to plan on an ecosystem basis to address forest conditions in that area. Thus, the ESA at times can be, as Professor Houck has observed, "a surrogate law for ecosystems."[27]

SHIFTING FOCUS OF THE ESA FROM INDIVIDUAL SPECIES TO HABITAT CONSERVATION

A series of judicial decisions through the 1980s and 1990s highlights the changing role of the ESA. It has evolved from a program focusing on individual species, specific projects and proposals to its present application integrating endangered species impact and habitat conservation evaluations into programmatic decisions made at the regional or ecosystem level. *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*[28] provides an example of the initial form of ESA litigation. In that case, environmental interests challenged the FWS biological opinion for a proposal to conduct exploratory drilling for copper and silver deposits in the Cabinet Mountains wilderness area in northwestern Montana. The FWS biological opinion concluded that the drilling was likely to jeopardize the threatened grizzly bear, but included alternative measures to "completely compensate" for the adverse effects on the grizzly bear population. Based on these alternative measures, the Forest Service concluded that the impacts of the drilling program would ensure that the bears' continued existence was not threatened nor its critical habitat adversely modified.[29] The D.C. Circuit upheld the Forest Service's action, finding that sufficient evidence existed to support the agency's determination that the drilling proposal would not endanger the grizzly bear population.[30]

Next, in *Thomas v. Peterson*,[31] the Ninth Circuit ruled that the Forest Service violated the ESA when it failed to prepare a biological assessment to determine whether the endangered Rocky Mountain gray wolf might be affected by the construction of the Jersey Jack Road in the Nez Perce National Forest in Idaho. The court concluded that this ESA violation must be remedied by an injunction of the road-building project

27. *Nature, Nurture and Property Rights*, Economist, July 8, 1995, at 24, 25 (quoting Professor Oliver Houck, Tulane University).

28. 685 F.2d 678 (D.C. Cir. 1982).

29. *Id.* at 681.

30. *Id.* at 686-87.

31. 753 F.2d 754 (9th Cir. 1985).

pending ESA compliance.[32] The Ninth Circuit also rejected the Forest Service request that the court make a finding that the project was not likely to affect the threatened wolf, noting that Congress had assigned that determination to FWS and had prescribed specific procedures for the evaluation.[33]

Later ESA cases began to review natural resource management projects on a broader scale with more wide-ranging implications. In a challenge to Forest Service timber management practices in the East Texas National Forests, environmental interests established that even-aged timber management violated Section 7 because the Forest Service had not taken the steps necessary to ensure its activities did not jeopardize the continued existence of the red-cockaded woodpecker.[34] The court also concluded the timber management practices resulted in "harm" giving rise to a Section 9 taking based on a severe decline in the woodpecker population over ten years resulting from significant habitat modification on Forest Service lands.[35] The district court enjoined these violations and required reconsultation with FWS.[36]

The programmatic reach of ESA restrictions achieved new levels in the Pacific Northwest with the northern spotted owl cases. This litigation has forced the federal government to take action at each of the key stages of the ESA process, listing and critical habitat designation under Section 4 and consultation on regional management plans under Section 7.[37] For instance, in *Lane County Audubon Society v. Jamison*,[38] the Ninth Circuit enjoined future timber sales on Bureau of Land Management (BLM) forest land until BLM consulted with FWS under Section 7 on the "Jamison Strategy," the agency's management guidelines for the conservation of the northern spotted owl. The Ninth Circuit held that the Jamison Strategy itself was an agency action because it developed a "detailed management strategy" that established total annual allowable harvest from BLM forest lands in northern spotted owl habitat. Until consultation occurred on the strategy and the underlying plans for BLM timber sales, new sales were enjoined from proceeding.[39]

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32. *Id.* at 764 (citing TVA v. Hill, 437 U.S. 153 (1978)).

33. 753 F.2d at 765.

34. Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in part, vacated in part*, Sierra Club v. Yeutter, 926 F.2d 429, 439 (5th Cir. 1991).

35. *Id.* at 437-39.

36. 926 F.2d at 440.

37. *See generally* Mark Bonnett & Kurk Zimmerman, *Politics and Presentation: The Endangered Species Act and the Northern Spotted Owl*, 18 ECOLOGY L.Q. 105 (1991).

38. 958 F.2d 290 (9th Cir. 1992).

39. *Id.* at 295.

After certain stocks of Snake River salmon were listed as threatened or endangered in 1991 and 1992, litigation over potential effects on these species from resource management activities helped further define the habitat conservation application of the ESA. A key focal point for this expansion was the *Pacific Rivers Council v. Thomas* litigation brought in two similar lawsuits, one in Oregon[40] and one in Idaho.[41] The cases alleged that the Forest Service had violated Section 7 of the ESA by failing to consult with the National Marine Fisheries Service regarding the effect of various national forest management plans on listed Snake River salmon. In the Oregon case, the district court held that the two forest plans at issue were agency "actions" requiring consultation under ESA Section 7, and that the Forest Service watershed or site-specific consultation approach with NMFS was inadequate to satisfy the forest-plan-level consultation obligation.[42] The court also enjoined the Forest Service from undertaking additional timber, range, or roadbuilding projects pending full compliance with the ESA consultation requirements. On appeal, the Ninth Circuit upheld the initial injunction and also reversed and remanded the portion of the district court's order excluding ongoing and announced timber, range, and road projects from the injunction pending ESA compliance by the Forest Service.[43]

Prior to the Ninth Circuit decision, the plaintiffs had filed a similar action in Idaho. After the Ninth Circuit ruling, the Council moved for a preliminary injunction based on that precedent. In January 1995, the Idaho district court enjoined all ongoing, announced, and proposed logging, grazing, mining, and road-building activities that might affect endangered Snake River salmon on six Idaho national forests.[44] Faced by the actual or pending shutdown of numerous operations across these eight Oregon and Idaho forests, the Forest Service, resource development interests, and local communities were forced into a state of urgent response. Ultimately, within ten days of the entry of the Idaho injunction, a stay of the injunction was agreed to between the plaintiffs and the government after the plaintiffs received assurances from the Forest Service that it and NMFS would complete the required Section 7 consultations within an expedited 45-day time frame. Because of the stay, no forest activities

40. Pacific Rivers Council v. Robertson, 854 F. Supp. 713 (D. Or. 1993), *aff'd in part, rev'd in part sub nom.* Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995).

41. *Pacific Rivers Council v. Thomas*, 873 F. Supp. 365 (D. Idaho 1995), *appeal dismissed as moot*, Nos. 95-35068, -35171, -35208 (9th Cir. July 10, 1995).

42. *Pacific Rivers Council v. Robertson*, 854 F. Supp. at 723.

43. 30 F.3d at 1056.

44. *Pacific Rivers Council v. Thomas*, 873 F. Supp. at 370, 372.

were actually forced to shut down. Nevertheless, the injunction order demonstrated the powerful reach of the ESA consultation requirements to disrupt resource management activities on the national forests.

The salmon issues on the national forests of the inland Pacific Northwest have led the Forest Service to expand Endangered Species Act-based management requirements beyond listed species to consider all species of anadromous and resident native fish and habitat. The agency has now gone far beyond the basic ESA requirements of ensuring the continued existence of listed species and preventing adverse modification or destruction of critical habitat. Instead, the Forest Service is now implementing an expansive view of the Endangered Species Act to conserve aquatic ecosystems and related species on federal forest lands. This situation demonstrates the current expansive focus of the ESA as an ecosystem conservation law.

These cases highlight the judicial emphasis on certain aspects of the ESA that have combined in a powerful fashion in the litigation over endangered species habitat protection on federal lands in the Pacific Northwest. The cases emphasize that even broad planning decisions must be treated as agency "actions" requiring consultation under the ESA, that injunctive relief is generally available to allow the consultation process to function, and that species protection concerns will be incorporated into judicial review of challenged actions. As described below, the application of similar habitat conservation planning concerns to private projects and activities on private lands presents issues of both Section 9 ESA takings and potential governmental Fifth Amendment constitutional takings of private property.

WHAT ACTIVITIES CONSTITUTE A TAKE OF A PROTECTED SPECIES

The *Sweet Home* decision upheld the Service's "harm" regulation against a broad facial challenge to all possible applications of the regulation to habitat-altering activities. The decision thus leaves for later case-by-case resolution the "difficult questions of proximity and degree" of determining what circumstances establish a prohibited Section 9 taking of protected wildlife.[45] Even prior to the *Sweet Home* decision, the lower courts were struggling with this question, and the Supreme Court's ruling appears for the time being to leave the determination of these matters for the lower courts without much guidance on the specific application of the ESA Section 9 take prohibition to habitat-altering activities.

45. *See Sweet Home*, 115 S. Ct. at 2418.

Prior to *Sweet Home*, the Ninth Circuit had indicated that the Service's inclusion of habitat modification within the "harm" regulation followed the plain language of the statute and was consistent with the Act's legislative history. In *Palila v. Hawaii Dep't Land and Natural Resources*,[46] the Ninth Circuit upheld the district court's determination that the State of Hawaii's maintenance of feral goats and sheep in the Palila bird's critical habitat constituted an unlawful ESA taking. In that case, the State of Hawaii argued that the district court had construed the Service's harm definition too broadly, but Hawaii did not directly challenge the harm regulation as beyond the scope of the Service's discretion to promulgate.[47] The Ninth Circuit concluded that the district court properly construed the harm regulation.[48] In doing so, the Ninth Circuit reviewed whether the regulation was reasonable and consistent with congressional intent to ascertain whether the district court's interpretation of the regulation was consistent with the Service's construction of the statute.[49]

Other decisions construing the "harm" regulation have focused primarily on how harm to a listed species might be established through habitat modification. These cases generally address the quantum of proof required to establish a taking through habitat modification, and do not address whether the Service permissibly could treat habitat modification as giving rise to a taking. For instance, in *Sierra Club v. Yeutter*,[50] the appellate court upheld the district court's determination that Forest Service even-aged management practices in red-cockaded woodpecker habitat in Texas National Forests resulted in harm to the species giving rise to a Section 9 take.[51] The district court had concluded that a severe decline in the woodpecker population over ten years resulting from the Forest Service's significant habitat modification was sufficient to establish harm. This overall population decline was adequate proof since "'[h]arm' does not necessarily require the proof of the death of specific or individual members of the species."[52]

Next, in a Section 9 challenge to Forest Service road building activities and the resultant impact on listed grizzly bears caused by forest road densities, the reviewing district court concluded that the "pivotal element of Plaintiffs' claim is a showing of injury to the listed species."[53] Howev-

46. 852 F.2d 1106, 1108 (9th Cir. 1988).
47. *See* 852 F.2d at 1107-08.
48. *Id.* at 1108.
49. *Id.*
50. 926 F.2d 429 (5th Cir. 1991).
51. *Id.* at 438.
52. Sierra Club v. Lyng, 694 F. Supp. 1260, 1270 (E.D. Tex. 1988) (citations omitted), *aff'd* 926 F.2d 429, 439 (5th Cir. 1991).
53. Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 939 (D. Mont. 1992).

er, the court held that scientific evidence supporting the conclusion that current road densities were interfering with essential behavioral patterns was insufficient to demonstrate harm without the additional showing that "the degree of impairment is so significant that it is actually killing or injuring grizzly bears."[54] In *Morrill v. Lujan*,[55] the court held that the modification or degradation of suitable habitat for the Perdido Key beach mouse was insufficient to establish a Section 9 taking without establishing the link between habitat modification and injury to the species. Similarly, in *American Bald Eagle v. Bhatti*,[56] the appellate court ruled that there must be an actual injury to the listed species for there to be harm under the ESA. The challengers failed in *Bhatti* to show harm to bald eagles arising from use of lead slugs in deer hunting and the court rejected the option of establishing a risk-based approach to determining a Section 9 taking.

A series of recent Ninth Circuit cases continues this line of analysis and emphasizes the degree of proof and causation required to establish a prohibited Section 9 taking arising from habitat-altering activities. In *National Wildlife Federation v. Burlington Northern Railroad, Inc.*,[57] the court held there must be a sufficient likelihood of future harm to obtain relief under ESA Section 9. To establish a taking, a plaintiff must show actual significant impairment of a species' breeding or feeding habits *and* prove that the alleged habitat degradation prevents recovery of the species. Thus, there was no actionable Section 9 taking from the railroad's failure to take further measures (such as reducing train speeds, equipping trains with air bags or other protective devices for train-bear collisions, and obtaining an incidental take permit) to address a corn spill on its tracks where the immediate potential harm to listed grizzly bears had passed. Also, the habitat impact was localized and did not significantly affect the grizzlies' feeding behavior.

Next, in *Forest Conservation Council v. Rosboro Lumber Co.*,[58] the court ruled that to establish a Section 9 taking, a plaintiff has the burden of demonstrating that harm to a listed species will, to a reasonable certainty, result from the defendant's habitat-altering activities. The mere possibility that these actions could cause harm to a listed species is insufficient. Lastly, in *Marbled Murrelet v. Babbitt*,[59] decided after *Sweet*

54. *Id.*
55. 802 F. Supp. 424, 430 (S.D. Ala. 1992).
56. 9 F.3d 163, 166 (1st Cir. 1993).
57. 23 F.3d 1508, 1511 (9th Cir. 1994).
58. 50 F.3d 781, 787-88 (9th Cir. 1995).
59. 83 F.3d 1060 (9th Cir. 1996).

Home, the court upheld the district court's injunction against a private company's timber harvest operations on its own lands that would have significantly modified the habitat of the listed seabird in northern California old-growth forests. The court specifically rejected the lumber company's contention that *Sweet Home* indicates that harm to a species must already have occurred before injunctive relief is warranted. Instead, the Ninth Circuit reiterated its conclusion from *Rosboro* that "a showing of *future injury* to an endangered or threatened species is actionable under the ESA."[60] In the *Marbled Murrelet* case, the appellate court concluded that the plaintiffs had presented sufficient evidence to support the district court's conclusion that "there was a reasonable certainty of imminent harm to [the birds] from Pacific Lumber's intended logging operation."[61]

In sum, these cases emphasize that despite the broad pronouncement of *Sweet Home*, the individualized inquiries into the proof and causation established by the specific facts of each case will continue to control what habitat-altering actions will be considered Section 9 takings. In turn, this requirement for fact-specific inquiry and proof may, as discussed below, limit the range of instances when an ESA habitat protection regulation concerning habitat protection will result in a governmental taking of private property.

ESA TAKINGS AND CONSTITUTIONAL TAKINGS

The broad reach of the developing ESA habitat protection focus and the application of the Section 9 take prohibition to habitat-altering activities on private lands raises the Fifth Amendment constitutional takings issue.[62] Perhaps recognizing this possibility, each of the principal ESA reform or reauthorization bills introduced in the 104th Congress addresses the constitutional takings issue in some manner. Those proposals ranged from prohibiting government action under the ESA that results in more than a 20 percent diminution in value of nonfederal property unless compensation is offered, to creating a statutory entitlement to fair market value compensation for declines in property value resulting from ESA-

60. 83 F.3d 1064-65 (quoting *Rosboro*, 50 F.3d at 783) (emphasis added).

61. 83 F.3d at 1067-68. The evidence presented showed that logging operations in the marbled murrelet's habitat would likely harm the birds by impairing their breeding (e.g. by substantially reducing nesting opportunities and habitat), and by increasing the likelihood of attack by predators such as stellar jays because of more open and fragmented forest stands resulting from logging. *See* Marbled Murrelet v. Pacific Lumber Co., 880 F. Supp. 1343, 1366 (N.D. Cal. 1995), *aff'd sub nom.* Marbled Murrelet v. Babbitt, 80 F.3d 1060 (9th Cir. 1996).

62. The Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V.

imposed requirements (without barring such agency action) or simply preserving a private landowner's constitutional takings claims based on ESA requirements imposed after the landowner purchased the property.[63]

Recent judicial developments, including the Supreme Court decisions in *Lucas v. South Carolina Coastal Council*,[64] and *Dolan v. City of Tigard*,[65] have increased the potential for successful Fifth Amendment takings cases arising from government regulation of private property. While the regulatory takings area continues in a state of transitional development, these recent developments suggest the federal courts' receptivity to takings claims arising from environmental regulations, possibly including ESA regulatory activities. For instance, courts have found regulatory takings arising from a wetlands permit denial,[66] enactment of the Surface Mining and Reclamation Act,[67] and the installation of groundwater monitoring wells near a Superfund site.[68]

Constitutional Takings Principles

Background Takings Principles

The Supreme Court's takings decisions have generally applied one of two tests to ascertain whether a compensable taking exists. In *Penn Central Transportation Co. v. City of New York*,[69] the Court examined three factors to determine whether a government regulation comprises a taking: the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations.[70] Subsequently, in *Agins v. Tiburon*,[71] the Court stated that a law would effect a taking if it "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."[72] Although there is some overlap between these two tests, more recent decisions suggest a trend toward *Agins*' two-part standard.[73]

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63. *See* S. 1364, 104th Cong., 1st Sess. (1995); S. 768, 104th Cong., 1st Sess. (1995); H.R. 2275, 104th Cong., 1st Sess. (1995). The draft version of the Endangered Species Act Reauthorization Act of 1997 circulated by Senators Kempthorne and Chaffee in the first session of the 105th Congress does not contain any provisions requiring compensation for landowners affected by ESA regulatory activity. Rocky Barker, *Kempthorne Drafts ESA Reform*, IDAHO STATESMAN, Feb. 4, 1997 at 1A.

64. 505 U.S. 1003 (1992).

65. 129 L. Ed. 2d 304 (1994).

66. Loveladies Harbor, Inc. v. United States, 28 F.3d 1711 (Fed. Cir. 1994).

67. Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991).

68. *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

69. 438 U.S. 104 (1978).

70. *Id.* at 124.

71. 447 U.S. 255 (1980).

72. *Id.* at 260 (citations omitted).

73. *E.g.*, *Lucas*, 505 U.S. at 1015, 1024.

An important issue is the level of governmental action necessary to trigger a taking. For example, restrictions on a land-use activity may flow from development conditions imposed as permit conditions, from mitigation requirements, or from a permit denial. In *United States v. Riverside Bayview Homes*,[74] the Supreme Court suggested that "[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."[75] Under this approach, as in *Penn Central*, mere regulation of natural resource or land development projects, e.g. through permit conditions, would not give rise to a taking so long as economically viable uses of the property remain. However, the Court has since held that government regulation could give rise to a compensable temporary taking for losses resulting from the deprivation of the use of property during the time a regulatory taking is imposed.[76] Also, in *Dolan*, a building permit condition was held to be a compensable regulatory taking.[77] Thus, permit conditions or regulations, short of an outright permit denial, may give rise to a takings claim if they preclude certain economically viable development alternatives.

The *Lucas* Decision

The Lucas case involved the South Carolina Beachfront Management Act, which (to prevent beach erosion and protect the coastal dune systems of the barrier islands) prohibited the development of habitable improvements seaward of a baseline representing the inland most point of erosion during the past forty years. The Court accepted the state trial court's determination that the Act deprived Lucas of all economically viable use of his land.[78] Based on this assumption, the Court developed a categorical rule that such total regulatory takings must be compensated unless the use restriction has a foundation in a state's common law of property or nuisance in effect when a landowner acquired the parcel.[79] Regulations which "leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[80]

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74. 474 U.S. 121 (1985).
75. 474 U.S. at 127.
76. First Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987).
77. 114 S. Ct. at 2321.
78. 505 U.S. at 1020, n.9.
79. *Id.* at 1027-29.
80. *Id.* at 1018.

If state property or nuisance law holds that the regulated activity was a nuisance for which abatement could be sought or was a use inconsistent with the property owner's title interest in the land, then the regulation will not give rise to a taking. Determining whether underlying state law previously regulated the activity will ordinarily require an analysis of (1) the degree of harm to public lands and resources or adjacent private property posed by the proposed development; (2) the social value of the proposed action and its suitability to the environment in question; and (3) the relative ease with which the alleged harm can be avoided by measures taken by the developer and the government or adjacent private landowners.[81]

The *Dolan* Decision

In Dolan v. City of Tigard,[82] the Court addressed the required relationship between permit conditions and projected impacts of proposed development to determine whether a taking occurred. In *Dolan*, a landowner sought a permit to redevelop her 1.67 acre commercial property partly located within the 100-year floodplain along Fanno Creek in Tigard, Oregon. The applicable city ordinance and comprehensive plan required the landowner to dedicate a portion of her property within the floodplain for storm drain improvements, and also required the dedication of a 15-foot strip of land as a pedestrian/bicycle pathway along the creek.

The Court framed the issue as a two-part inquiry. First, based on its earlier decision in *Nollan v. California Coastal Commission*,[83] does the "essential nexus" exist between the "legitimate state interest" and the permit condition exacted by the government?[84] Second, is there a "rough proportionality" between the required exaction and the proposed project? No precise mathematical calculation is required, but the regulatory entity must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.[85]

Applying this standard, the Court found first that the essential nexus was present for both permit conditions, the floodplain dedication and the greenway. However, while the floodplain dedication for storm sewer

81. *Id.* at 1030-31.

82. 129 L. Ed. 2d 304 (1994).

83. 483 U.S. 825 (1987).

84. *Dolan*, 114 S. Ct. at 2317. In *Nollan*, the Court held that California's requirement for a lateral public easement across Nollan's beachfront property in exchange for a coastal area development approval was a taking because the condition was not sufficiently connected to the legitimate state purpose of preserving ocean views by regulating housing development. 483 U.S. at 837.

85. 114 S. Ct. at 2319-20.

improvements survived the second prong of the standard, the greenway dedication did not. The city never stated how a public greenway was required for its flood control purposes, and this requirement resulted in Dolan's loss of her ability to exclude others from her property. According to Chief Justice Rehnquist, "[i]t is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing floodplain problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request."[86] Thus, in a 5-4 decision, the Court held the required greenway dedication to be a compensable taking.

ESA Regulatory Action As a Governmental Taking

Despite the political discourse which has linked the constitutional takings-private property rights debates, there has been little litigation addressing the subject under the ESA. In *Christy v. Hodel*,[87] a Montana sheep grower challenged the ESA and regulations forbidding the "taking" of grizzly bears except under certain circumstances. The grower's sheep grazed on land leased from the Blackfeet Indian Tribe. In July 1982, the sheep herd was attacked by grizzly bears on a regular basis. Before the month was out, Christy lost 84 sheep to the grizzly bears, but he had killed one of the ESA-listed bears while protecting his flock. When the government fined him $3,000 for killing a protected species, Christy (together with other sheep growers) decided to sue the government, claiming among other things that by protecting grizzly bears, the Department of Interior had transformed the bears into "governmental agents" who had physically taken his property. In denying this constitutional taking claim, the court held that the regulations complained of did not take, or even regulate the use of, Christy's sheep. Furthermore, the actions of the grizzly bears could not be attributed to the government, and "the losses sustained by the [sheep grower] are the incidental, and by no means inevitable, result of a reasonable regulation in the public interest."[88] Thus, there was no constitutional taking claim for the actions of the depredating bears since the government was "not answerable for the conduct of the bears."[89]

In *United States v. Kepler*,[90] Kepler agreed with an undercover Department of Interior agent to transport a leopard and a cougar from

86. *Id.* at 2320-21.
87. 857 F.2d 1324 (9th Cir. 1988).
88. 857 F.2d at 1335.
89. *Id.*
90. 531 F.2d 796 (6th Cir. 1976).

Florida to Kentucky. When he arrived in Kentucky, Kepler was arrested and charged with two violations of Kentucky law which prohibited the transportation of a leopard and cougar in interstate commerce without obtaining a written permit. He was also charged with transporting in interstate commerce a leopard in violation of the Endangered Species Act. The animals were seized by the Department of Interior. Kepler alleged that the ESA deprived him of the use of his property because his animals were seized. The Sixth Circuit held that the ESA does not effect an unconstitutional taking because the Act does not prevent all sales of endangered wildlife, but only those sales in interstate or foreign commerce. Thus, Kepler presumably could have sold the animals within Florida without violating the ESA. The court also noted that the Act allows the transportation or sale of endangered species if the Secretary of the Interior approves it for "scientific purposes or to enhance the propagation or survival of the affected species."[91] Based on these provisions, the court found the Act did not result in a taking.

These two ESA cases are of limited value in evaluating the potential for successful takings claims by private property owners following the *Sweet Home* decision and the Supreme Court's takings pronouncements in *Lucas* and *Dolan*. Importantly, the *Christy* and *Kepler* cases did not involve land-use issues, but instead concerned the losses of individual animals that were alleged to be an unconstitutional deprivation of private property. As the *Dolan* and *Nollan* cases illustrate, the courts are generally more receptive to constitutional takings claims that involve some physical invasion of the claimant's right to use his or her own land, such as the greenway easement in *Dolan* or the beachfront access easement in *Nollan*. Also, as in *Lucas*, a regulation that results in the total denial of all economically viable use of private property will generally be considered to work a Fifth Amendment taking.

Two cases from the federal wetlands permitting context demonstrate the application of these principles. The wetlands permitting examples may be a better predictor for claims of regulatory takings based on ESA requirements since the wetlands context similarly involves land-use restrictions imposed in the name of public natural resource protection. Also, the wetlands permitting requirement provides a direct analog to the ESA Section 10 incidental take permit process or the Section 7 biological opinion process for private property use or development involving some federal approval or assistance.

91. *Id.* at 797 (quoting 16 U.S.C. §1539).

In *Loveladies Harbor, Inc. v. United States*,[92] the Federal Circuit Court of Appeals held that denial of a Clean Water Act Section 404 wetlands permit by the Army Corps of Engineers for a 12.5-acre development in New Jersey resulted in a compensable taking. The appellate court stated the issue as whether "when the Government fulfills its obligations to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large."[93] The Federal Circuit determined that the wetland permit denial deprived the landowner of all economically viable use of its land, and it upheld the Court of Federal Claims' compensation award of $2.6 million.[94]

By contrast, in *Florida Rock Industries v. United States*,[95] the Federal Circuit overturned a trial court decision finding a taking from the denial of a wetlands permit for a limestone mining operation. The decision was remanded "for determination of what economic use as measured by market value, if any, remained after the permit denial, and . . . whether, in light of the properly assessed value" the plaintiff had a valid taking claim.[96] If, upon remand, there is some (but not a total) reduction in overall market value of the property, the inquiry must focus on whether that partial reduction rises to the level of taking or is instead the result of permissible government regulation, based on application of general takings principles, e.g. the *Penn Central* and *Agins* tests.[97]

The cases discussed above demonstrate the likely need for some type of physical invasion of private property or a regulation that denies an owner of all economically viable use of his or her land (or at least all economically viable use of some distinctly identified portion of the owner's land) to give rise to an unconstitutional taking for ESA-imposed restrictions for land-use or habitat conservation. Significantly, the *Christy* case supports the proposition that actions of the protected wildlife itself (grizzly bears in that instance) would not be considered a "physical invasion." This conclusion is consistent with the general premise of state wildlife law that all wildlife is owned by the state and managed for the public's benefit.[98] Thus, under the *Lucas* framework, private landowners

92. 28 F.3d 1171 (Fed. Cir. 1994).
93. *Id.* at 1175.
94. *Id.* at 1178, 1182-83.
95. 18 F.3d 1560, 1573 (Fed. Cir. 1994).
96. *Id.* at 1565.
97. *Id.* at 1568, 1570.
98. *See, e.g.*, WYO. STAT. ANN. § 23-1-103 (Michie 1991). *But see* Hughes v. Oklahoma, 441 U.S. 322, 335-36 (1979) (terming state ownership concept a "legal fiction" and limiting its application to those regulatory measures that do not discriminate against interstate commerce; thus, states

take their title to property subject to this extant state-law recognition of wildlife's access to and use of existing habitat on that property. For example, an early Massachusetts decision recognized the public's right to have rivers kept open and free for anadromous fish such as salmon "to pass from the sea, through such rivers, to the ponds and headwaters, to cast their spawn."[99]

Nevertheless, the government's own physical invasion or regulation of private property under the guise of the ESA (other than through the mere use of private property by wildlife) could still give rise to a compensable taking under certain circumstances. Certainly, the lesson of *Sweet Home* is that private property-related activities may be regulated under the Section 9 take prohibition or the Section 7 consultation requirement and jeopardy prohibition. Section 9 could (and has been) applied directly to prohibit a broad array of habitat-related activities: the clearing of nesting habitat for endangered birds such as the California gnatcatcher or the golden-cheeked warbler in anticipation of real estate development; the harvesting of timber used as nesting habitat by species such as the northern spotted owl, marbled murrelet, or red-cockaded woodpecker; and the pumping of groundwater affecting springs used by the San Marcos salamander.[100] The Section 9 prohibition has also been applied to enjoin an irrigation district from pumping water from the Sacramento River where that pumping killed listed winter-run chinook salmon.[101]

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can still promote wildlife conservation within their borders); Kleppe v. New Mexico, 426 U.S. 529, 545 (1976) ("Unquestionably the States have broad trustee and police powers over wild animals within their jurisdiction. But . . . those powers exist only in so far as their exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution.") (citation and internal quotation omitted).

99. Commonwealth v. Alger, 7 Cush. 53, 98 (Mass. 1851).

100. *See, e.g.*, 61 Fed. Reg. 50,503 (1996) (issuance of incidental take permits for California gnatcatcher based in part on establishment of natural reserves for coastal sage scrub ecosystem where development will not occur); 61 Fed. Reg. 11,859 (1996) (proposed issuance of incidental take permit for endangered golden-cheeked warbler and other listed species in Balcones Canyonlands, Travis County, Texas based on establishment of minimum of 30,428 acres of reserve areas to minimize impacts of incidental take resulting from land clearing and real estate development); *Rosboro Lumber Co.*, 50 F.3d at 788 (remanding for consideration of whether proposed timber harvest activity would result in § 9 taking of threatened northern spotted owls); *Marbled Murrelet v. Babbitt*, 83 F.3d at 1070 (upholding injunction against private land timber harvest to prevent harm to and § 9 taking of threatened marbled murrelets and habitat); *Sierra Club v. Yeutter*, 926 F.2d at 438-39 (upholding district court ruling that government timber management practices resulted in § 9 violation by significant habitat modification resulting in impairment of essential behavioral patterns and decline of red-cockaded woodpecker populations); 59 Fed. Reg. 40919, 40920 (1994) (draft San Marcos and Comal Springs and Associated Ecosystems Recovery Plan notice of availability indicating need to manage groundwater withdrawals and other measures to protect threatened San Marcos salamander and related listed aquatic species in Texas).

101. United States v. Glenn-Colusa Irrigation District, 788 F. Supp. 1126, 1135 (E.D. Cal. 1995).

Although the Section 7 consultation requirement and jeopardy prohibition do not apply directly to private interests, if a federal permit or approval is required for private action, the prohibition or restriction of the desired action might give rise to a constitutional takings claim. For example, restrictions imposed under Section 7 consultations have limited the amount of water available to irrigators under federal reclamation contracts,[102] and required mining operators working claims on a mix of private and federal land to close roads and develop an anadromous fish habitat protection plan as a condition of project approval. Also, if a permit were required under Section 404 of the Clean Water Act to allow a landowner to fill wetlands on private property for the purpose of residential or other development, the denial of that permit as a result of a "jeopardy" determination following an ESA Section 7 consultation could prohibit the desired use of the property. As another example, if Section 7 precluded the BLM from authorizing groundwater dewatering activities on public lands necessary to allow mining of or access to patented or unpatented minerals and mining claims, because such dewatering potentially could affect the surface water habitat for a listed species, a taking of that property interest might ensue. Under these and similar conditions, the level of regulation imposed might on the specific facts and circumstances presented give rise to a prohibited taking of private property.

The requirements of the ESA permitting and consultation processes under Sections 7 and 10 help identify when specific regulatory activities might give rise to a compensable taking of private property. Under the Section 10(a) incidental take permit requirements, the issuance of the permit must be supported by a habitat conservation plan specifying, among other things, what impact will likely result from the proposed incidental taking, what steps the permit applicant will take to minimize and mitigate these impacts, the availability of funding for plan implementation, and the procedures to address unforeseen circumstances.[103] In approving an incidental take permit, the FWS or NMFS must find that the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the incidental taking.[104]

In the Section 7 federal agency consultation process, the consultation regulations contain built-in limitations on the scope of regulatory action available for reasonable and prudent measures to minimize the incidental take of a listed species, and also limitations on reasonable and prudent alternatives that the FWS or NMFS may suggest to avoid jeopardizing the

102. O'Neill v. United States, 50 F.3d 677, 680-82, 687 (9th Cir. 1995).
103. *See* 50 C.F.R. § 17.22(b)(1)(iii) (1995).
104. *Id.* § 17.22(b)(2).

continued existence of a listed species or to avoid the destruction or adverse modification of critical habitat. Reasonable and prudent alternatives must be consistent with the intended purpose of the original project, must be consistent with the scope of the federal agency's legal authority, and must be "economically and technologically feasible."[105] These restrictions indicate that requirements that, for instance, went so far as to deny a private project applicant all economically viable use of its property would not be an "economically feasible" reasonable and prudent alternative under the regulations. Similarly, reasonable and prudent measures intended to minimize incidental take "cannot alter the basic design, location, scope, duration, or timing of the [project] and may involve only minor changes."[106] While reasonable and prudent measures are intended to minimize the level of incidental take, "Congress also intended that the action go forward essentially as planned."[107] Thus, "[s]ubstantial design and routing changes . . . are inappropriate in the context of incidental take statements because the action already complies with Section 7(a)(2)" by avoiding jeopardy.[108]

Because of these inherent checks on the scope of ESA regulatory actions under Sections 7 and 10, the situation where ESA restrictions would totally deprive an owner of all economically viable use of private land, or result in the physical invasion of private property so as to result in a compensable Fifth Amendment taking should be unlikely. In the ESA permitting and approval context, the "rough proportionality" test applied in *Dolan* suggests an additional check on the scope of ESA regulatory measures to prevent them from rising to a level of an uncompensated taking of private property. For instance, if a habitat conservation plan to be approved by the FWS or NMFS as part of a Section 10 incidental take permit requires specific mitigation measures (such as the dedication of certain lands to wildlife habitat purposes to compensate for developments to other areas), the *Dolan* standard indicates that these measures must be based on an individualized determination that the scope of required mitigation is related both in nature and extent to the impact of the plan development. The *Dolan* standard thus suggests that the FWS or NMFS may be required to undertake a somewhat more specific inquiry than the agencies may have been doing previously to link specific mitigation measures and permit requirements to identified development or land-use impacts.

To the extent individual Section 10 permit and Section 7 consultation

105. 50 C.F.R. § 402.02.
106. 50 C.F.R. § 402.14(i)(2).
107. 51 Fed. Reg. 19,926, 19,937 (1986).
108. *Id.* at 19,937.

analyses already incorporate such determinations, the *Dolan* standard indicates no compensable taking of private property should occur, absent a total denial of all economically viable use of a private landowner's property. Overall, based on the inherent limitations on the scope of reasonable and prudent alternatives and measures available under the Section 7 consultation regulations, and considering the individualized permit decisions already made under the Section 10 incidental take permit regulations, the instances where ESA regulation of habitat modifying activities on private land may give rise to a compensable taking should be somewhat rare. However, as in the *Loveladies Harbor* example from the wetlands context, the case of an outright permit denial or jeopardy determination that precludes all economically viable use of private property may present those circumstances where a compensable taking is present.

CONCLUSION

The majority of concerns over the scope of ESA regulation of habitat altering activities on nonfederal lands will likely be decided in determinations about what actions constitute a prohibited taking of a listed species under Section 9, and what are the standards of proof required to demonstrate whether such a taking has occurred or will occur in the future. As forecast by Justice Stevens in *Sweet Home*,[109] it is in this case-by-case resolution of the Act's broad provisions that the scope of its habitat protection requirement will be spelled out in individual instances. While the possibility of some conflict with the desires of private property owners remains in this case-by-case approach, the limitations inherent in the Act, together with the outer limits of permissible government regulation as illustrated by the constitutional takings cases including *Dolan*, should help limit the potential for extreme adverse effects on private property use and development. For these existing limitations to function properly requires that the ESA's present regulations and consultation standards are conscientiously applied by federal agencies, species protection advocates, and private property owners. Doing so should help avoid the *Sweet Home* dissent's concerns, written by Justice Scalia, that the decision "imposes unfairness to the point of financial ruin . . . [for even] the simplest farmer who finds his land conscripted to national zoological use."[110]

109. 115 S. Ct. at 2418.
110. *Id.* at 2421.