Environmental Law - The Endangered Species Act - Private Property Rights

Lee Ann Kosakowski

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ENVIRONMENTAL LAW—THE ENDANGERED SPECIES ACT—PRIVATE PROPERTY RIGHTS—The Supreme Court held that the Endangered Species Act prohibits the modification of the habitats of endangered and threatened animals.

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

The purpose of the Endangered Species Act of 1973 (the “1973 Act”) is to provide protection for endangered animals.¹ Under the 1973 Act, a land acquisition program, conservation programs, and a series of prohibitions have been established to protect animals threatened with extinction.² According to Section 9 of the 1973 Act, it is unlawful for any person to “take”³ an endangered or threatened animal.⁴ In a federal regulation used to enforce the 1973 Act, the Secretary of the Interior (the “Secretary”) defined “harm,”⁵ as it appears in the definition of “take,” to include any changes made to the environment which kills or injures animals by damaging their means of “breeding, feeding, or sheltering.”⁶

The Sweet Home Chapter of Communities for a Great Oregon (the “Group”) consists of small landowners, workers in logging companies and families dependent on forest product industries.⁷

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5. Id. at 2410. "Harm" is defined as: "[A]n 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." 50 C.F.R. § 17.3 (1993).
7. Id.
The Group alleged that, by refraining from altering the environment so as not to “harm” the red-cockaded woodpecker, an endangered species, and the northern spotted owl, a threatened species, the Group has caused themselves economic hardship. The Group claimed that, in order to comply with the definition of “harm” as set forth by the Secretary, the Group was forced to lay off employees and limit income from trust lands.

The Group filed a declaratory judgment action against the Secretary in the United States District Court for the District of Columbia which challenged the Secretary’s definition of “harm” as set forth in the regulation. The Group argued that the Secretary’s definition of “harm” oversteps the intent and purpose of the 1973 Act. The Group also claimed that the regulation is void for vagueness.

The district court held that Congress intended the language of the 1973 Act to be interpreted broadly and the Secretary’s definition of “harm” is reasonable. The court held that the 1973 Act includes any and all actions against endangered animals. The district court cited previous cases which upheld the Secretary’s broad definition of “harm” and dismissed the Group’s complaint.

The Group appealed to the United States Court of Appeals for the District of Columbia. The Group claimed that the

8. Id.
9. Sweet Home Chapter of Communities for a Great Oregon v. Lujan, 806 F. Supp. 279, 282 (D.D.C. 1992) (holding that the Secretary’s definition of “harm” is consistent with the language and purpose of the Endangered Species Act), aff’d sub nom. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993), rev’d on rehearing, 17 F.3d 1463 (D.C. Cir. 1994), rev’d, 115 S. Ct. 2407 (1995). By adhering to the Secretary’s broad definition of “harm,” which forbids any change to the environment, the court noted that members of the Group were unable to cut down trees to collect the wood necessary for their lumber businesses. Sweet Home, 806 F. Supp. at 282. The Group argued that its inability to collect the lumber decreased the supply of wood to sell to its clients which then reduced members’ incomes. Brief for Respondents at 5, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 17 F.3d 1463 (D.C. Cir. 1994) (No. 94-859), cert. granted, 115 S. Ct. 2407 (1995).
11. Sweet Home, 115 S. Ct. at 2411.
12. Sweet Home, 806 F. Supp. at 285. The Group claimed that the regulation violates their property rights as protected by the Fifth Amendment. Id. The court promptly dismissed this argument, noting that the regulation specifically describes and limits the conduct it prohibits. Id. at 285-86.
13. Id. at 283.
14. Id.
15. Sweet Home, 115 S. Ct. at 2411. The district court discussed Palila v. Hawaii Dep’t of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988) (holding that the Secretary’s definition of harm, which includes alterations to an endangered animal’s habitat, is reasonable).
16. Sweet Home, 1 F.3d at 1.
Secretary's broad definition of harm is contrary to the 1973 Act and, in the alternative, the regulation is void for vagueness as to the definition of "harm." The court of appeals affirmed the judgment of the district court and held that the Secretary's definition of "harm" is reasonable. The Group then petitioned the court of appeals for a rehearing. The court of appeals granted the petition and reversed the decision of the district court, finding that the context of the word "harm" directly contradicts the broad interpretation given to it by the Secretary and the lower court. The court held that "harm" should be understood only in terms of the words used with it. The court noted that the other words used in the definition of "harm" describe an aggressor's direct application of force against an endangered animal. The court cited other cases in which the language of the federal regulation has been narrowly interpreted. The court found that the nine verbs used in the definition of "harm" all describe acts of direct force, a quality missing from acts of habitat modification. Based on this reasoning, the court of appeals held that the regulation, which defines "harm" to include acts of altering the environment, is invalid and that the judgment of the district court should be reversed.

The Secretary then appealed to the United States Supreme Court. The Supreme Court granted certiorari because the

17. Id. at 3-4. The Group argued that the Secretary's definition of "harm" violates the language of the 1973 Act which "clearly" demonstrates that Congress did not mean for the 1973 Act to regulate habitat modification. Id. at 3.

18. Id. at 8. The court of appeals concluded that the Secretary had an "almost infinite number of options available to him" when protecting an animal threatened with extinction. Id. at 6.


20. Id.

21. Id. The court based its holding on the canon of statutory construction known as noscitur a sociis. Id. Noscitur a sociis maintains that a word's meaning is realized by looking to the context of its usage. Id.


23. Sweet Home, 17 F.3d at 1465 (citing United States v. Hayashi, 5 F.3d 1278, 1292, superseded by 22 F.3d 860 (9th Cir. 1993)). In Hayashi, the court held that a person who fired his rifle into the water did not violate the 1973 Act because his actions did not invade the animals' ordinary activities. Hayashi, 5 F.3d at 1283.

24. Sweet Home, 17 F.3d at 1465.

25. Id. at 1472.


27. Id. A writ of certiorari is an order decreed by an appellate court which is used by that court when it has the discretion on whether or not to hear an appeal from a lower court. BLACK'S LAW DICTIONARY 1109 (6th ed. 1990). If the writ is granted, the lower court is ordered to certify the record and send the record to the higher court. Id.
court of appeals' finding that the Secretary's interpretation of the word "harm" was invalid conflicted with a decision of the Court of Appeals for the Ninth Circuit which upheld the same definition.\(^2\) The Supreme Court reversed the decision of the court of appeals based on the language and legislative history of the 1973 Act.\(^3\) The Supreme Court held that the 1973 Act seeks to protect endangered and threatened animals from the dangers included in the Secretary's definition of "harm."\(^4\) The Court noted that cases decided since the 1973 Act was passed demonstrate that the intent of Congress was to stop the extinction of animals at whatever cost necessary.\(^5\) The Supreme Court explained that the court of appeals' interpretation of the statute was erroneous in that it failed to give the word "harm" a meaning of its own.\(^6\) In reviewing the legislative history of the 1973 Act, the Supreme Court found that the drafters of the 1973 Act meant to protect animals from the harm caused when humans destroy their habitats.\(^7\) Accordingly, the Supreme Court reversed the court of appeals' decision that the Secretary's definition of "harm" is invalid.\(^8\)

A concurring opinion was filed by Justice O'Connor\(^9\) and a lengthy dissent by Justice Scalia.\(^10\) The concurring opinion upheld the Secretary's definition of "harm" because it is limited to specific acts of habitat modification that caused actual injury or death to animals.\(^11\) Justice O'Connor further noted that the definition of "harm" is valid under the principles of proximate causation.\(^12\)

\(^{28}\) *Sweet Home*, 115 S. Ct. at 2412. The Ninth Circuit upheld the Secretary's broad definition of harm in *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (holding that sheep which ate and depleted an endangered bird's habitat constituted "harm" under the 1973 Act).

\(^{29}\) *Id.*

\(^{30}\) *Id.* at 2418.

\(^{31}\) *Id.* at 2413 (citing *TVA v. Hill*, 437 U.S. 153 (1978) (holding that the 1973 Act authorizes a court to enjoin Congress from building a dam which would eradicate an endangered animal)). In *TVA*, the Court stated that the plain intent of Congress in passing the Endangered Species Act was "to halt and reverse the trend toward species extinction, whatever the cost." *TVA*, 437 U.S. at 184.

\(^{32}\) *Sweet Home*, 115 S. Ct. at 2415.

\(^{33}\) *Id.* at 2418. The Supreme Court quoted Senate Reports, House Reports, and hearings regarding the drafting and enactment of the 1973 Act. *Id.* at 2416-18.

\(^{34}\) *Id.* at 2418.

\(^{35}\) *Id.* (O'Connor, J., concurring).

\(^{36}\) *Id.* at 2421 (Scalia, J., dissenting). Justice Scalia was joined by Chief Justice Rehnquist and Justice Thomas. *Id.*

\(^{37}\) *Sweet Home*, 115 S. Ct. at 2418.

\(^{38}\) *Id.* at 2420. Justice O'Connor explained that, applying the principles of proximate causation, a private party will be liable under the Secretary's definition of harm "only if their habitat-modifying actions proximately cause death or injury to
The dissent stated that the Secretary's definition of "harm" overstepped the intent and purpose of the 1973 Act. Justice Scalia found that the definition of "harm" provided by the Secretary in the federal regulation goes beyond the very word it was meant to define. Justice Scalia emphasized the discrepancies between the language of the 1973 Act and the Secretary's definition of "harm." The dissent concluded that the Secretary's definition of "harm" places a heavy economic burden on the public, especially private landowners, to preserve the environment of endangered and threatened animals.

The tension between private property owners and environmentalists has been present since legislation protecting endangered animals was first enacted. The first comprehensive species legislation was enacted on October 15, 1966. The purpose of the Endangered Species Preservation Act of 1966 (the "1966 Act") was "to conserve and protect the species of fish and wildlife "threatened with extinction." Enactment of the 1966 Act was prompted by the loss of some species of animals native to North America. The 1966 Act directed the Secretary to designate, after consultation with state representatives and scientists, those animals whose survival was

protected animals." Id.

39. Id. at 2421-22.
40. Id. at 2423-24. Justice Scalia explained that "take" describes a class of acts done directly and intentionally to particular animals while "harm," when used to define "take," should have been defined as a specific process of taking. Id.
41. Id. at 2425-26. Justice Scalia noted that the Secretary's use of "harm" contradicts the use of "take" in the 1973 Act. Id. Justice Scalia pointed out another section of the 1973 Act concerning habitat modification which specifically limits the destruction of the environment by federal agencies. Id. at 2425.
42. Sweet Home, 115 S. Ct. at 2431. Justice Scalia noted that the 1973 Act places the burden of paying for the preservation of the environment on private landowners. Id. The Justice could not find support in the language of the 1973 Act for placing this burden on the public. Id.
43. See Moerman v. State, 21 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993) (holding that a private property owner is not entitled to compensation from a state for damage caused by endangered animals relocated by the state), cert. denied, 114 S. Ct. 1539 (1994); Louisiana ex rel. Guste v. Verity, 853 F.2d 322 (5th Cir. 1988) (holding that regulations requiring shrimpers to use special equipment to insure the safety of endangered turtles are valid); Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988) (holding that sheep herders who shoot endangered grizzly bears to protect their private property violate the Endangered Species Act).
45. See Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, § 1(a), 80 Stat. 926. The purpose of the 1966 Act was "to provide a program for the conservation, protection, restoration, and propagation of selected species of native fish and wildlife, including migratory birds that are threatened with extinction." Id.
46. Id.
in jeopardy and whose environments were "threatened with destruction, drastic modification, or severe curtailment." The 1966 Act authorized the Secretary to create and direct programs that conserved and restored the populations of those animals designated as endangered species. Additionally, the 1966 Act directed the Secretary to acquire lands in order to carry out the programs that conserved, protected, restored, or propagated endangered animals. The 1966 Act strictly prohibited individuals from disturbing those lands that the Secretary had designated as wildlife refuges for the protection of animals threatened with extinction. The 1966 Act prohibited the taking of endangered animals on federal lands only.

The 1966 Act was amended in 1969 in order to strengthen the federal government's ability to preserve and protect animals threatened with extinction. The Endangered Species Conservation Act of 1969 (the "1969 Act") increased the federal government's involvement in the protection of endangered animals. According to the 1969 Act, the Secretary was directed to compose a list of animals in danger of worldwide extinction. The Secretary was directed to create a list of animals threatened with extinction after consulting with the Secretary of State, representatives of foreign countries, and members of interested organizations. The 1969 Act provided four possible causes for an animal's extinction: the destruction of its environment; the effects of sport or commercial enterprises; disease or predators; and "other natural or man-made factors." Importing endangered animals from foreign countries was strictly prohibited by the 1969 Act. However, the
Secretary did have the power to issue permits to import endangered animals for scientific, educational, or zoological purposes. According to the 1969 Act, any person who delivered, carried, transported, or shipped an endangered animal for commercial or non-commercial purposes or caused that animal to be sold, taken, or transported was subject to a maximum fine of $5000 for each violation. The 1969 Act also provided for an increase in funds available to the Secretary for purchasing lands used for the conservation, protection, and restoration of endangered animals.

In A.E. Nettleton Co. v. Diamond, the Court of Appeals of New York addressed the issue of whether the 1969 Act preempted state environmental laws, thus invalidating New York state laws prohibiting the sale and transportation of endangered animals. The court cited the language of the 1969 Act and held that it specifically allowed for the enforcement of state laws protecting endangered animals. The court found that there was no conflict between the 1969 Act and the New York state laws and, therefore, the 1969 Act did not preempt state laws. The court concluded that, under the 1969 Act states had the responsibility of regulating the transportation, possession and sale of endangered animals within their jurisdictions.

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61. Nettleton, 264 N.E.2d at 120-21. The A.E. Nettleton Company challenged New York state laws known as the Harris Law and the Mason Law. Id. at 119-20. The Harris Law prohibited the "importation, transportation, possession or sale of any endangered species." Id. The Mason Law provided that "no part of the skin or body" of animals listed in the statute could be sold. Id. at 120. The A.E. Nettleton Company was involved in the manufacture and sale of alligator and crocodile skin footwear. Id. The crocodile had been listed as an animal protected by New York state law. Id.

62. Id. at 122. The court cited the following language of the 1969 Act: "Any person who sells or causes to be sold in interstate or foreign commerce any products manufactured, made, or processed from any wildlife taken ... in violation of any law or regulation of a State" shall be subject to the penalties. Id. (citing § 43(b)(2), 83 Stat. at 279).

63. Id. at 122-23. The court specifically found that compliance with the 1969 Act and the New York state laws was not an impossibility, notwithstanding the fact that the New York laws listed animals not included on the federal list. Id. at 124.

64. Id. at 123-24. The court concluded that the 1969 Act provided a means for protecting animals threatened with worldwide extinction. Id. The court held that states have to assume the responsibility of protecting the endangered animals within
In 1973, Congress amended the 1969 Act in order to better protect and preserve endangered animals. The Senate reported that the Department of the Interior had encountered some difficulties in protecting endangered animals under the 1969 Act. During hearings in 1973, Congress was informed that despite the 1969 Act, species were becoming extinct at a rate of one per year.

The 1973 Act, in its final form, was the most comprehensive legislation aimed at protecting animals enacted by any nation at the time. The 1973 Act has three purposes: conservation of the “ecosystems” of endangered and threatened species; creation of a program for the conservation of threatened and endangered animals; and achievement of the goals of treaties entered into with other countries concerning animals threatened with extinction. According to the 1973 Act, the Secretary is to denote the animals listed as either “threatened” or “endangered.”

The 1973 Act prohibits all importations, takings, possessions, exportations, deliveries, and sales of endangered animals. Pursuant to the 1973 Act, the Secretary is granted the broad authority to develop federal regulations and programs to preserve and protect threatened and endangered animals.

In United States v. Kepler, the United States Court of Appeals for the Ninth Circuit was faced with the issue of whether the 1973 Act is unconstitutional because it effected the taking of endangered animals from individuals without just compensation. The court cited provisions of the 1973 Act and

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their jurisdiction in order to “assure the continued survival” of those animals. Id.

66. S. REP. No. 93-307, supra note 44, reprinted in 1973 U.S.C.C.A.N. at 2991. The Senate reported that the President had stated that the 1969 Act “simply [did] not provide the kind of management tools needed to act early enough to save a vanishing species.” Id.

67. Id.


69. TVA, 437 U.S. at 180.

70. 16 U.S.C. § 1531(b).

71. A threatened animal is one likely to become extinct in its natural habitat in the “foreseeable future.” 16 U.S.C. § 1532(20).

72. An endangered animal is defined as one in danger of becoming extinct throughout its natural habitat. 16 U.S.C § 1532(6).


74. TVA, 437 U.S. at 180. According to section 1553(d) of the 1973 Act, the Secretary “shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.” 16 U.S.C. § 1533(d).

75. 531 F.2d 796 (9th Cir. 1976).

76. Kepler, 531 F.2d at 796-97. In Kepler, authorities confiscated the hides of endangered animals transported by Kepler. Id. at 796. The authorities apprehended Kepler while transporting a cougar and leopard from Florida to Kentucky. Id.
found that Kepler's constitutional rights had not been violated. The court explained that the 1973 Act is constitutional because it prohibits only interstate and foreign sales of all endangered animals. The court further noted that Kepler could have obtained a permit from the Secretary for the transport of the endangered animals for scientific purposes or to better the animals' chances of survival. The court concluded that Congress has the authority under the 1973 Act to regulate the transportation and sale of endangered animals in interstate and foreign commerce.

In *TVA v. Hill,* the Supreme Court was faced with the issue of whether the construction of a dam, funded by the federal government and near completion, should be halted when the project is found to harm an endangered animal and destroy that animal's environment. The Court held that the purpose of the 1973 Act is to protect and preserve endangered animals, and, in *TVA,* this outweighed the monetary value of the dam project funded by the federal government. To support this finding, the Court cited the extensive power given to the Secretary by the 1973 Act and the broad language of the 1973 Act itself. In its analysis, the Court pointed to the language of the 1973 Act which requires federal agencies to preserve and protect

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77. Id. at 797. The court held that Kepler's Fifth Amendment rights had not been violated because the 1973 Act does not prevent all sales of endangered animals. *Id.* The Fifth Amendment right raised by Kepler was that "No person shall be deprived of life, liberty, or property without due process of law." See U.S. CONST. amend. V.

78. *Kepler,* 531 F.2d at 797. The court found that Kepler could have sold the animals in Florida without fear of prosecution under the 1973 Act. *Id.*

79. *Id.* The court discussed section 1539(1)(A) of the 1973 Act which allows the Secretary to permit the transportation of endangered animals for "scientific purposes or to enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(1)(A) (1988).

80. *Kepler,* 531 F.2d at 797. The court further held that the authorities' taking of the animals from Kepler was not a taking of property in violation of the Fifth Amendment. *Id.* (citing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (holding that an ordinance will not be found unconstitutional solely on the basis that it deprives property of its most beneficial use)).


82. *TVA,* 437 U.S. at 156. The construction of the Tellico Dam was found to endanger the existence of a small fish known as the snail darter. *Id.* at 161. The snail darter had been added to the list of endangered species shortly after the passage of the 1973 Act. *Id.*

83. *Id.* at 184-85. The Court found that "the plain intent of Congress in enacting [the 1973 Act] was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184.

84. *Id.* at 180.
endangered and threatened animals when carrying out their programs and projects. The Court held that the 1973 Act prohibits all individuals, including federal agencies, from “taking” endangered and threatened species as defined by the 1973 Act. The Supreme Court concluded that Congress intended the 1973 Act to prevent the extinction of all endangered animals at “whatever the cost.”

In 1982, the 1973 Act was again amended to provide more effective protection for endangered animals. The 1973 Act was amended in order to quicken the process by which the Secretary lists an animal as endangered or threatened. During the hearings held prior to the enactment of the 1982 Amendments to the Endangered Species Act of 1973 (the “1982 Amendments”), Congress learned that only two animals had completed the proposal and listing process since 1981. In order to reduce confusion, the 1982 Amendments eliminated all references to economic considerations from the listing process. Economic growth and development was to be considered by the Secretary only when determining the “critical habitat” of an endangered animal. The Secretary was to define the “critical habitat” for each animal when that species was determined to be endangered. Under the 1982 Amendments, “critical habitat” is defined as the areas occupied by an endangered or threatened animal that are essential to preserving that animal and thus require special protection. If an endangered animal loses its “critical habitat,” that animal’s chances for long-term survival

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85. Id. at 183-84. According to section 1536 of the 1973 Act, all federal agencies “in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species.” 16 U.S.C. § 1536(a)(1).

86. TVA, 437 U.S. at 184-85.

87. Id.


91. Id. at 2811-12.

92. Id.

93. § 2(a)(3)(A), 96 Stat. at 1411. According to the 1982 Amendments: “The Secretary, by regulation . . . shall, concurrently with making a determination under paragraph (1) that an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat.” Id.

The Secretary must consider possible economic consequences before defining the critical habitat of an endangered animal.96

In Palila v. Hawaii Department of Land & Resources,97 the United States District Court for the District of Hawaii had to decide whether animals which destroyed the critical habitat of an endangered animal, the Palila bird, was a harmful taking of the bird under the 1973 Act, as amended in 1982.98 The court held that habitat modification, as defined by the 1973 Act, which prevents an endangered animal from improving its chances for survival is a harmful taking.99 To support this holding, the court cited the definition of “harm” set forth by the Secretary in 1981.100 The Secretary’s definition of “harm” includes any act, such as habitat modification, that harms or kills wildlife.101 Evaluating the facts of the case, the court found that the sheep’s feeding habits decreased the Palila’s food supply, thus harming the endangered bird.102 The court concluded that the broad purpose of the 1973 Act—to protect endangered animals and to preserve their “ecosystems”—mandates that the destruction of an endangered animal’s habitat is considered a violation of the 1973 Act.103

In Sierra Club v. Lyng,104 the United States District Court for the Eastern District of Texas had to decide if the management activities of the United States Forest Service constituted a “taking” of an endangered species.105 The court held that federal agencies, while carrying out their programs, are bound to protect and conserve endangered animals.106 The

96. § 2(b)(2), 96 Stat. at 1412.
98. Palila, 649 F. Supp. at 1072. In Palila, environmentalists sought an injunction requiring authorities to remove sheep from the Palila bird’s critical habitat. Id. at 1071-72. The environmentalists claimed that the sheep’s destruction of the bird’s environment was a “taking” as defined by the 1973 Act. Id.
99. Id. at 1077.
100. Id.
101. 50 C.F.R. § 17.3 (1993).
103. Id. at 1077.
105. Lyng, 694 F. Supp. at 1269. The Sierra Club and the Wilderness Society claimed that actions taken by the Forest Service to reduce forest areas decreased the food supply and available shelter for the red-cockaded woodpecker, an endangered animal. Id. at 1262, 1266. The environmentalists argued that this constituted a “taking” under the 1973 Act. Id.
106. Id. at 1270 (citing TVA v. Hill, 437 U.S. 153, 174 (1978)). See supra notes 81-87 and accompanying text for a discussion of TVA.
court found that federal agencies are bound by the 1973 Act to refrain from any activity that harms an endangered animal.\textsuperscript{107} The court further found that the practices of the Forest Service had harmed the endangered animal because the agency's actions led to the destruction of an animal's habitat, the decrease of the animal's food supply and the disturbance of the animal's behavioral patterns.\textsuperscript{108} The court concluded that federal agencies, like all individuals, are bound by the 1973 Act to refrain from all actions, including habitat modification, that harm endangered animals.\textsuperscript{109}

In \textit{Louisiana ex. rel. Guste v. Verity},\textsuperscript{110} the United States Court of Appeals for the Fifth Circuit was faced with the issue of whether regulations that require shrimpers to use special equipment in order to preserve endangered and threatened turtles are burdensome to their businesses.\textsuperscript{111} The court held that the regulations protecting the turtles are valid, despite the shrimpers' arguments concerning the cost to them of adhering to the regulations.\textsuperscript{112} The court reasoned that loss of endangered animals is far more important than any economic loss suffered by the shrimping industry.\textsuperscript{113} The court concluded that the Secretary has the discretion to issue regulations necessary to protect an endangered or threatened animal.\textsuperscript{114}

In \textit{Christy v. Hodel},\textsuperscript{115} the United States Court of Appeals for the Ninth Circuit was faced with the issue of whether the destruction of an endangered animal in order to protect private property is a violation of the 1973 Act.\textsuperscript{116} The court held that

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  \item \textsuperscript{107} \textit{Lyng}, 694 F. Supp. at 1270 (citing 50 C.F.R. § 17.3 (1993)). The court cited federal regulations in which the Secretary of the Interior defines harm as "an act [that] may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns." \textit{Id.}
  \item \textsuperscript{108} \textit{Id.} at 1271-72.
  \item \textsuperscript{109} \textit{Id.} at 1270-71.
  \item \textsuperscript{110} \textit{Guste}, 853 F.2d at 327. Shrimpers claimed that regulations requiring them to use "turtle excluder devices" or to limit their trawling time in order to protect endangered or threatened turtles are "arbitrary and capricious." \textit{Id.} The shrimpers also argued that the evidence presented by the Environmental Defense Fund and the Center for Environmental Education was insufficient to support the regulations. \textit{Id.}
  \item \textsuperscript{111} \textit{Id.} at 331.
  \item \textsuperscript{112} \textit{Id.} (citing TVA v. Hill, 437 U.S. 153, 179 (1978)).
  \item \textsuperscript{113} \textit{Id.} at 333. The court cited the language of section 1533(d) of the 1973 Act, which states: "The Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1553(d).
  \item \textsuperscript{114} \textit{Id.} at 1326. \textit{Christy} was instituted by Richard P. Christy, Thomas B. Guthrie and Ira Pertrins, three sheep herders who each claimed that their sheep had been destroyed by grizzly bears. \textit{Id.} at 1327-28. The grizzly bear
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sheep herders who had destroyed endangered grizzly bears to protect livestock had violated the 1973 Act by causing harm to an endangered species, despite the possible harm or loss of private property. The court reasoned that, because the 1973 Act does not list defense of private property as an exception to its prohibitions, the sheep herders' shooting of the bears to protect their livestock was a violation of the 1973 Act. The court opined that the federal regulation forbidding the killing of grizzly bears is reasonable because it provides for other methods of protecting sheep from grizzly bears. The court promptly dismissed the sheep herders' claim that the destruction of their animals by the grizzly bears, an animal protected by the 1973 Act, was an unlawful taking by the federal government. The court concluded that any loss of private property that occurs due to the actions of an endangered species is the "incidental result of reasonable regulation."

In Moerman v. State, the Court of Appeals of California was faced with the issue of whether the State of California was responsible for damage to private property caused by endangered animals relocated by the State. The court of appeals held that the State was not responsible for damage caused by relocated endangered tule elk to Moerman's property. The court reasoned that the State was not responsible for the damage to Moerman's property because the elk were wild animals and not, therefore, within the control of the State. The court concluded that states are not liable for...

was listed as a threatened animal in 1987. Id. Christy shot two grizzly bears in order to protect his livestock. Id. Christy claimed that the grizzly bears had destroyed approximately $1200 worth of his livestock. Id. 117. Id. at 1330-31. 118. Id. at 1329. 119. Id. at 1331. The federal regulation requires that private property owners, when threatened by an endangered animal, may request the help of "experienced government officials." Id. 120. Id. at 1334. The court held that the regulations are valid because they do not take or regulate individuals' private property. Id. The court noted other cases holding that the destruction of private property by animals protected by federal or state laws do not constitute an illegal "taking" by the government. Id. See Jordan v. State, 681 P.2d 346 (Alaska Ct. App. 1984). 121. Christy, 857 F.2d at 1335. 122. 21 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993), cert. denied, 114 S. Ct. 1539 (1994). 123. Moerman, 21 Cal. Rptr. at 331. Moerman brought suit against the State of California after the State relocated endangered tule elk. Id. The relocated tule elk ate crops meant for Moerman's livestock and damaged Moerman's private property. Id. Moerman sued the State for the damage to his property. Id. 124. Id. at 332-34. 125. Id. The court dismissed Moerman's argument that the State exerted con-
any damage to private property caused by animals protected by the 1973 Act. 126

The tension between supporters of private property rights and individuals wanting to protect wildlife has recently culminated in Congress. Cases such as Palila, Lyng, Guste, Christy, Moerman and Sweet Home, which favor the rights of endangered animals over those of property owners, have angered many private landowners, farmers, and businesses. 127 Critics of such cases claim that enforcement of the 1973 Act is extreme and prevents private individuals from using property as they wish. 128 One critic of the 1973 Act noted: "We now have a situation where the needs of blue-eyed salamanders and blind spiders take precedence over the need of American families." 129

On September 7, 1995, a bill was proposed that would amend the Endangered Species Act of 1973 to better accommodate the property rights of private landowners. 130 The bill proposes that the Secretary enter into "cooperative agreements" with private landowners who own property on which an endangered or threatened animal is found. 131 The amendment limits the definition of "harm" to direct actions against an endangered animal that cause physical injury. 132 This definition of "harm" would overrule the holding of Sweet Home, which interpreted the definition of "harm" as including acts against an endangered animal's habitat. 133 Supporters of the Endangered Species Act have expressed displeasure with the proposed bill. 134 According to Bruce Babbitt, Secretary of the Interior, if Noah would have had to operate under the proposed amendments to the 1973 Act, "he wouldn't have needed an ark, he could have fit all the animals he was allowed to save in a canoe." 135

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126. Id. at 332 (citing Christy v. Hodel, 857 F.2d 1324, 1334 (9th Cir. 1988)).
130. Margaret Kriz, The Showdown Over Endangered Species, 27 NAT'L J., Sept. 16, 1995, at 2315. One of the findings made by Congress is that: "As more species have been threatened by natural and human factors, conservation of those species has increasingly relied on habitat protection efforts on both public and private land." H.R. 2374, 104th Cong., 1st Sess. § 2(5) (1995).
133. Bill Would Reform, supra note 129.
134. Id.
135. Id.
The proposed amendments to the 1973 Act are expected to be fiercely debated in Congress during 1996. The decision in *Sweet Home* and the cases leading up to it have sparked a violent debate between private property owners and environmentalists. The debates in Congress concerning the amendments to the 1973 Act will pit business and industry against environmentalists. Members of the timber, mining and ranching industries have joined together to form interest groups and coalitions in preparation for the upcoming debates. Environmentalists have united to defend the 1973 Act against businesses and industries. Sadly, the future of the Endangered Species Act, and the animals it strives to preserve, may depend upon money and the political strength of interest groups and industry.

*Lee Ann Kosakowski*

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137. *Id.* Groups such as the National Endangered Species Act Reform Coalition, the Endangered Species Coordinating Council, the Grassroots ESA Coalition, and the American Land Rights Association are lobbying for the reforms to the Endangered Species Act. *Id.*

138. *Id.* The Endangered Species Coalition, President Clinton, and Vice President Gore support the present Endangered Species Act. *Id.*