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“Takings” and the Endangered Species Act

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**"TAKINGS" AND THE
ENDANGERED SPECIES ACT**

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**REGULATORY TAKINGS & RESOURCES:
WHAT ARE THE CONSTITUTIONAL LIMITS?**

**Natural Resources Law Center
University of Colorado
School of Law
Boulder, Colorado**

June 13-15, 1994

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The following thoughts and materials may be useful in considering "takings" law in the context of the Endangered Species Act.

1. How the Act works. The ESA proceeds from the listing of threatened and endangered species (Sec 4), to the designation of their critical habitats (Sec 4), to recovery planning designed to eliminate the threat of extinction, (Sec 4). Federal agencies are, further, required to ensure that they avoid jeopardy to these species or modifications of their critical habitats, (Sec 7), and to minimize "taking" these species, (Sec 7). Private parties are similarly required to avoid "taking" listed species, (Sec 9); this requirement may be met by "habitat conservation planing, (Sec 10). See generally, Houck, "The Endangered Species Act and its Implementation by the U. S. Departments of Interior and Commerce", 64 Colo. L. Rev 277 (1993).

Question: in this process, where does the question of "takings" arise?

2. Sections 9 and 10. Section 9 prohibits private parties from "taking" listed species, a definition which includes "harm" to a species, (Sec 9). The Departments of Interior and Commerce have defined "harm" to include acts that "significantly disrupt essential behavioral patterns" such as "breeding, feeding or sheltering". The Ninth and Fifth Circuits have interpreted this prohibition as including habitat modification. Palila v. Hawaii Department of Land and Natural Resources, 451 F. Supp. 985 (D. Haw. 1979), affirmed 639 F. 2d 495 (9th Cir. 1981); Sierra Club v. Yeutter, 926 F. 2d 429 (5th Cir 1991). The D. C. Circuit has

recently ruled to the contrary. Sweet Home v. Babbitt, 1994 U.S. App. Lexis 4341 (DC Cir 1994). Excerpts from Palila and Sweet Home are attached.

Question: If Sweet Home is correct, what is left of the "takings" question under the ESA?

3. Habitat conservation planning

Section 10 provides an outlet for private activity that would otherwise "take" an endangered species or its habitat, "habitat conservation planning". HCPs have slowly evolved from simple set-asides to more extensive and innovative planning efforts to facilitate development in less critical habitats and to provide financial incentives for species preservation. See Olson, Murphy and Thornton, "The Habitat Transaction Method: A Proposal for Creating Tradable Credits In Endangered Species Habitat", Oct. 1993, attached.

Question: If Sweet Home is correct, what is left of habitat conservation planning?

4. "Takings" law and endangered species.

Question: Do restrictions under the ESA rise to the level of "takings" under current Constitutional law?

Question: Conversely, does property law embrace the right to "take" endangered species and habitat critical to their survival?

Question: Are the answers to these questions any different from, say, ones posed by local zoning ordinances by virtue of the fact that endangered species are involved?

Attachments: Palila

Sweet Home

"Habitat Transaction" article