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SPECIES ACT OF 1973: THE EXISTENCE OF
EXCEPTIONS SUPPORTS FULL ENFORCEMENT

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The federal Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543, is our primary national bulwark against the destruction of the biological diversity on which ecosystems depend. The most far-reaching of the Act's protections is the prohibition against taking in section 9 of the Endangered Species Act, 16 U.S.C. § 1538. The prohibition against taking flatly forbids any entity, public or private, from "taking" any designated species of endangered wildlife. "Taking" includes any act that causes death or injury to any member of an endangered species, even death or injury that results indirectly from habitat modification. The section 9 taking prohibition is a powerful law, but has never been fully enforced.

In 1982, Congress amended the Endangered Species Act and added two exceptions to the taking prohibition, one for "incidental" takings resulting from federal actions, in sections 7(b)(4) and 7(o)(2) of the Act, 16 U.S.C. §§ 1536(b)(4) & (o)(2), and one for "incidental" takings resulting from all other actions, in section 10(a) of the Act, 16 U.S.C. § 1539(a). These exceptions are intended to allow limited takings of endangered species while preventing injury to the species as a whole. The capacity of these exceptions to achieve this goal is still unproved. However, the existence of the exceptions offers new reasons to enforce the section 9 taking prohibition.

A. The Section 9 Taking Prohibition

The taking prohibition embodied in section 9 of the Endangered Species Act of

1973 is simple, unambiguous and breathtaking in its scope. Endangered Species Act sections 9(a)(1)(B)&(C), 16 U.S.C. §1538(a)(1)(B)&(C), forbid anyone to "take" any member of any endangered species of fish or wildlife "within the United States or the territorial seas of the United States" or "upon the high seas." Section 2(19), 16 U.S.C. §1531(19), defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The term take was defined "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973).

The United States Fish and Wildlife Service ("USFWS"), which is responsible for enforcing the Endangered Species Act for almost all endangered species, has defined "harass" and "harm" in the definition of "take" to include indirect injury through habitat destruction or modification. USFWS defines "harm" to include an "act" that results in "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns." 50 C.F.R. § 17.3(c). USFWS defines "harass" to include an "intentional or negligent act or omission" that creates "the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns." *Id.* The broad USFWS definitions accurately reflect Congressional intent. The House committee report on the 1973 law contemplated that the prohibition against harassment would allow federal

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agencies "to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973).

The provisions of the section 9 taking prohibition can be enforced either by federal government action or by citizen suit. See 16 U.S.C. § 1540(e) & (g). The statute encourages citizen suits with a generous fee shifting provision. 16 U.S.C. § 1540(g)(4). The federal government may bring criminal prosecutions for "knowing" violations of the prohibition. 16 U.S.C. § 1540(b)(1). The section 9 taking prohibition makes it a violation of federal law for anyone to harm or injure or attempt to harm or injure any member of any endangered animal species anywhere in the United States, on public land or private land, or on the high seas. For these reasons, section 9 is, perhaps, the most powerful piece of wildlife legislation in the world.

Recent cases demonstrate the power and versatility of the section 9 taking prohibition. See, e.g. Palila v. Hawaii Department of Land and Natural Resources, 471 F. Supp. 985 (D. Hawaii 1979) aff'd 639 F.2d 495 (9th Cir. 1981)(holding that defendants had "taken" the endangered Palila bird in violation of section 9 by maintaining feral sheep and goats that degraded the mamane-niao forest on which the Palila depends and ordering the removal of the feral sheep and goats from Palila habitat); Palila v. Hawaii Department of Land and Natural Resources, (Palila II), 649 F. Supp. 1070 (D. Hawaii 1986) aff'd 852 F.2d 1106 (9th Cir. 1988)(holding that defendants had "taken" the Palila by maintaining a population of mouflon sheep in the mamane-niao forest); Defenders of Wildlife v. Administrator, Environmental Protection Agency, 688 F. Supp. 1334 (D. Minn. 1988) aff'd 882 F.2d

1294 (8th Cir. 1989)(holding that EPA's continuing approval of above-ground use of pesticides containing strychnine or strychnine sulfate was a "taking" because it indirectly resulted in the poisoning of "non-target" endangered species); Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988) on appeal 88-6041 (5th Cir.)(holding that U.S. Forest Service timber management on national forests in Texas was a "taking" of the endangered Red-Cockaded Woodpecker because it degraded and fragmented Red-Cockaded Woodpecker habitat). See also National Wildlife Federation v. Hodel, 23 E.R.C. 1089 (E.D. Cal. 1985).

B. Enforcement of the Section 9 Taking Prohibition

Section 9 of the Endangered Species Act is a statutory provision with teeth, a law intended to be a powerful tool in a national effort to preserve the biological diversity on which ecosystems, and therefore all of us, depend. Unfortunately, section 9 has never been fully enforced. Despite the handful of cases demonstrating its power, an apparently general reluctance to invoke the far-reaching language of section 9 taking prohibition has relegated it to a subsidiary role in Endangered Species Act litigation, a satellite to the more limited substantive provisions of Endangered Species Act section 7.

A striking example of a failure to enforce section 9 appears in the Fifth Circuit's recent consideration of the adequacy of regulations to limit takings of sea turtles caused by shrimping. In State of Louisiana ex rel Guste v. Verity, 853 F.2d 322 (5th Cir. 1988), the court upheld the challenged regulations while ignoring the legal ramifications of the fact that sea turtles are being taken. The court considered the evidence of how many turtles are being killed in shrimp nets. The court observed that "the relationship of shrimping to sea turtle

mortality is strongly demonstrated" and estimated that 2,381 threatened or endangered turtles are killed by shrimpers each year off Louisiana alone. But the court failed to consider whether this mass killing violated the section 9 taking prohibition.

The unwillingness to enforce the section 9 taking prohibition fully has distorted the law of endangered species, creating a system of unequal justice in which some groups and individuals are taken to court for acts that would go unquestioned if committed by others. The State of Hawaii is ordered to remove feral sheep and goats from the habitat of the endangered Palila, while the U.S. Fish and Wildlife Service has difficulty enforcing any habitat protections for the endangered 'Alala, or Hawaiian crow, on private land. The United States Forest Service is forced to preserve adequate habitat for the endangered Red-Cockaded Woodpecker, while private timber companies have been free to log in woodpecker habitat. This distortion of the law limits the protection available to endangered species and creates the impression that the law is unfair. If left uncorrected, it could erode our national commitment to preserving biological diversity and biological diversity itself.

C. Exceptions to the Taking Prohibition

The general reluctance to enforce the section 9 taking prohibition has grown, in large part, out of a perception that the prohibition was draconian, that it lacked the flexibility necessary to avoid injustice in specific cases. However, the 1982 amendments to sections 7(b)(4), 7(o)(2) and 10(a) of the Endangered Species Act have given USFWS and the National Marine Fisheries Service ("NMFS"), the agencies that administer the Act, discretion to fashion exceptions to the taking prohibition to prevent injustice that might be caused by full

enforcement.

First, sections 7(b)(4) and 7(o)(2) together authorize USFWS and NMFS to include "incidental take statements" as part of biological opinions rendered for federal agencies through the Endangered Species Act section 7 consultation process. Section 7 consultation is intended to insure that actions authorized, funded or carried out by federal agencies will not jeopardize the continued existence of any threatened or endangered species. These "statements" allow a federal agency or an applicant for federal authorization or funding, planning to engage in an action that is not likely to jeopardize the continued existence of a species, to take members of that species if the taking is not the purpose of the action.

Second, section 10(a) allows USFWS or NMFS to issue "incidental take permits" for non-federal actions that might otherwise violate the section 9 taking prohibition, if the incidental taking "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." These exceptions to the taking prohibition were provided under explicitly limited conditions designed to prevent harm to the species as a whole.

Without amending section 9 itself, the 1982 amendments transformed the taking prohibition from an inflexible rule against almost all takings into instrument which can be used to force entities, public or private, whose activities might harm endangered species, into the section 7 or section 10 administrative process, processes designed to resolve conflicts between species preservation and development or other potentially harmful activities. Eight years after their enactment, the effect of these exceptions is only beginning to be felt.

1. 7(b)(4)/7(o)(2) Incidental Take "Statements"

Section 7(b)(4) of the Endangered Species Act provides that if, after consultation on a federal action under section 7, USFWS or NMFS concludes: (A) that the action subject to consultation will not jeopardize the species or recommends a "reasonable and prudent alternative" that will prevent jeopardy, and (B) that the taking "incidental" to the action is not likely to jeopardize the species, then USFWS or NMFS "shall" provide the federal agency with a "written statement" that:

- (i) specifies the impact of the incidental taking on the species;
- (ii) specifies the "reasonable and prudent measures" that USFWS or NMFS considers "necessary and appropriate" to minimize that impact,
- (iii) in the case of marine mammals, specifies those measures that are necessary to comply with the Marine Mammal Protection Act, and
- (iv) sets forth "the terms and conditions . . . that must be complied with by the Federal agency or applicant (if any) or both, to implement the measures specified under clauses (ii) and (iii)."

Section 7(o)(2) provides, "[n]otwithstanding" section 9, that "any taking" that complies with the "terms and conditions" of an incidental take statement provided under "subsection [7](b)(4)(iv) . . . shall not be considered to be a prohibited taking of the species concerned."

Although sections 7(b)(4) and 7(o)(2) together allow actions authorized, funded or carried out by a federal agency to go forward even when they will kill or injure members of an endangered species, sections 7(b)(4) and 7(o)(2) are intended to ensure that the taking they authorize will not jeopardize the continued existence of the species and that everything that can be done

"reasonably" and "prudently" to protect the species is done. The explicit conditions required for a valid incidental take statement make it plain that Congress did not intend to simply exempt federal agencies from section 9's requirements.

The section 7(b)(4)/7(o)(2) exception offers federal agencies a mechanism through which they can shield themselves from the section 9 taking prohibition in most cases. Whenever either USFWS or NMFS issues a "no jeopardy" biological opinion under section 7 of the Endangered Species Act, and that agency anticipates incidental taking as a result of the contemplated action, the agency should also issue an incidental take statement. See Defenders of Wildlife v. EPA 882 F.2d 1294, 1301 (8th Cir. 1989)(holding that a "statement" cannot operate retroactively), National Wildlife Federation v. National Park Service, 669 F. Supp. 384 (D. Wyo. 1987)(holding that "statement" is not required when no taking is anticipated); National Wildlife Federation v. Hodel, 23 E.R.C. 1089 (E.D. Cal. 1985)(holding that a "statement" must contain reasonable and prudent mitigation measures and cannot operate retroactively); see also American Littoral Society v. Herndon, 720 F. Supp. 942, 948-49 (S.D. Fla. 1988).

2. Section 10(a) Incidental Take "Permits"

Section 10(a) provides that "the Secretary [NMFS or USFWS] may permit under such terms and conditions as he shall prescribe . . . any taking otherwise prohibited by section 1538(a)(1)(B) [the section 9 provision prohibiting takings within the United States and its territorial waters] . . . if the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." Section 10(a) allows non-federal entities, not subject to section 7 of the Endangered Species Act and therefore not eligible for a

7(b)(4)/7(o)(2) exception, to get permits for "incidental takings." While many of its requirements are very similar to those of the 7(b)(4)/7(o)(2) exception, its provisions are more detailed, more time consuming, and potentially more stringent.

To get a section 10(a) incidental take permit an "applicant" must submit a "conservation plan" to the agency charged with protecting the species, USFWS or NMFS. The required "conservation plan" must specify:

- (i) the impact that will likely result from such taking;
- (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
- (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

Once USFWS or NMFS receives a "conservation plan," an "opportunity for public comment, with respect to the permit application and the related conservation plan" must be provided.

After reviewing the plan and considering public comment, the agency "shall" issue a permit if it finds:

- (i) the taking will be incidental
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will assure that adequate funding for the plan will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild;
- (v) the measures, if any, required under

subparagraph (A)(iv) [measures the Secretary finds necessary or appropriate] will be met.

The permitting agency may also require "assurances" that the plan will be implemented and may impose "reporting requirements" in the permit. The agency "shall" revoke the permit if the permittee is not complying with its "terms or conditions."

The legislative history of section 10(a) shows that the broad statutory language authorizing USFWS or NMFS to impose permit conditions as it deems "necessary or appropriate" was part of an attempt to prompt both agencies and permit applicants to widen their horizons: to consider protecting unlisted species and ecosystems as a whole as well as listed endangered species. The explicitly contemplated quid pro quo for taking the broad view in conservation planning was "long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan." See H.R. Conf. Rep. No. 835, 97th Cong. 2d Sess. 30-31 (1982). The comments accompanying publication of the proposed Fish and Wildlife Service regulations implementing section 10(a) contemplate permits "of 30 or more years duration" but recognize that provision must be made for changing circumstances. 48 Fed. Reg. 31417, 31418 (July 8, 1983).

To illustrate how a long-term conservation plan should work, the House conference committee singled out the habitat conservation plan then being prepared to protect the habitat of three species, including the endangered Mission Blue Butterfly on San Bruno Mountain in San Mateo County, California. The committee report stated that "the San Bruno Mountain plan is the model for this long-term permit" and that "the adequacy of similar conservation plans should

be measured against the San Bruno plan."

Unlike 7(b)(4)/7(o)(2) "statement", section 10(a) taking "permits" have only been issued in a handful of cases: Delano, California Habitat Conservation Plan (permit issued January 1990); The Coachella Valley, California Habitat Conservation Plan for the Coachella Valley Fringe-Toed Lizard (permit issued 1986); The San Bruno Mountain, California Habitat Conservation Plan (permit issued 1983). However, as many as thirty more conservation plans are currently on the drawing board (e.g., The Balcones Canyonlands (Austin, Texas Regional) Habitat Conservation Plan; The Riverside County, California Stephens Kangaroo Rat Habitat Conservation Plan.

A 10(a) permit has been challenged only once in court and that court test may have little relevance for future challenges to conservation plans because it was a challenge to the same San Bruno plan that Congress had praised in drafting the section 10(a) legislation, the plan against which all other plans were to be measured. Friends of Endangered Species v. Jantzen 596 F. Supp. 518 (N.D. Cal. 1984) aff'd 760 F.2d 976 (9th Cir. 1985) (upholding the San Bruno Plan because: (1) Congress had considered the San Bruno plan as a "paradigm" for section 10(a) conservation plans; (2) USFWS had determined that the plan would enhance the habitat of the Mission Blue Butterfly; (3) USFWS had considered expert opinion and public comment before issuing the incidental take permit; and (4) the taking permit was subject to revocation or reconsideration if significant new information emerged).

The San Bruno Plan permanently protected 86% of the Mission Blue Butterfly habitat and provided for habitat enhancement. Unfortunately, it is exceptional. The conservation plan designed to protect the

Coachella Valley Fringe-Toed Lizard protects only 11% to 25% of its remaining habitat. The proposed Stephens Kangaroo Rat conservation plan, in Riverside County, California, would permit the destruction of 20% of the remaining occupied habitat of the species (about 4,000 acres) while protecting about the same amount. The recently approved Delano, California conservation plan allows the permanent destruction of 287 acres of habitat for three endangered species in return for the acquisition and fencing of 514 acres of habitat elsewhere. No other plan currently in place will achieve nearly the level of comprehensive protection required by the San Bruno plan.

Individuals involved with endangered species issues have reservations about the ability of the section 10(a) process to protect endangered species. Dr. Craig Pease, involved in the biological assessment for the Balcones Canyonlands (Austin Regional) Habitat Conservation Plan, notes that the compromise process required for the development of 10(a) conservation plans quickly precludes bold solutions to habitat conservation problems. Telephone interview, Craig Pease (February 2, 1990). John W. Thompson, a member of the Society of American Foresters, concerned with Red-Cockaded Woodpecker habitat conservation on private lands, observes that the 10(a) process creates "too big a temptation for bureaucrats who think their job is to issue permits." Telephone interview, John W. Thompson (February 2, 1990). William Bunch, an attorney representing Texas Earth First! in the Balcones Canyonlands (Austin Regional) Habitat Conservation Plan process believes that the value of the 10(a) process remains to be seen. Telephone interview, William Bunch (March 1, 1990).

USFWS officials charged with implementing the process are also concerned,

but more often about the lack of any provision for interim taking permits while long range conservation plans are being prepared. Telephone interview, James Bartell, USFWS Sacramento, (March 14, 1990); Telephone interview, Joseph Johnston, USFWS, Fort Worth, (March 12, 1990); Telephone interview Peter Stine, USFWS, Ventura, (February 15, 1990).

As the 1988 Endangered Species Act Report of the United States General Accounting Office noted concerning the San Bruno Plan:

While FWS officials we spoke to generally view the 1982 amendments as a valuable tool to allow development while receiving concessions and funding from developers to protect the species, a local [San Francisco] conservation group views the amendments as 'a dangerous loophole to the original intent of the Endangered Species Act . . .

United States General Accounting Office, Endangered Species: Management Improvements Could Enhance Recovery Program, 43 (December 1988).

On the bright side, the 10(a) process has prompted some of the creativity and "ecosystem thinking" it was intended to encourage. The currently proposed Balcones Canyonlands (Austin Regional) Habitat Conservation Plan is being designed to protect the habitat of the officially endangered Black-Capped Verio, the as yet unlisted Golden-cheeked Warbler, two rare but unlisted plants and an entire biota of cave invertebrates, some of which are listed as endangered but many of which have not yet even been formally identified. The Balcones Canyonlands Plan demonstrates the possible promise of using the 10(a) permit process to fashion ecosystem-based endangered species protection.

D. Conclusion: Exceptions and Enforcement of the Taking Prohibition

Recent developments demonstrate that it is too early to draw any general conclusions about the effect of either the 7(b)(4)/7(o)(2) or 10(a) exceptions to the section 9 taking prohibition. However, regardless of their intrinsic value, their existence radically alters the policy considerations for enforcing the section 9 taking prohibition. Before 1982, the taking prohibition was, for the most part, unconditional. If an action were going to kill or injure a member of an endangered species, that action was illegal. In contrast, after 1982, any entity, public or private, federal or non-federal, can seek to shield almost any contemplated action from the taking prohibition, so long as the action will not threaten the existence of an endangered species as a whole.

The existence of the 1982 exceptions to the taking prohibition supports three arguments in favor of full enforcement of the section 9 taking prohibition. First, the exceptions make enforcement more palatable because they give potential violators an opportunity to shield themselves from liability. If a public or private entity ignores the exception process, created for its benefit by the 1982 amendments, and goes ahead with an action that may kill or injure members of an endangered species, then it has brought section 9 liability upon itself and is in no position to complain if it is enjoined, fined or jailed. In other words, full enforcement of the taking prohibition is fair.

Second, enforcement of the taking prohibition works to force those whose actions may harm endangered species to engage in the administrative process created by the exceptions -- a process in which federal agency expertise potentially can limit the danger to endangered species and resolve conflicts between endangered species and

contemplated actions. This is far preferable, for everyone, to the high stakes game of "chicken" that results when an entity undertakes an action that is potentially harmful to an endangered species because it gambles that no one else has the information, resources, or desire to sue to stop that action. In other words, full enforcement will force potential violators to use the exception processes.

to protect endangered species and their ecosystems. The prohibition functions best in that role if fully enforced.

Third, the key to preserving endangered species is preserving the ecosystems on which they depend. Congress intended that the exceptions to the taking prohibition should encourage creative solutions to endangered species preservation problems, solutions that, among other things, consider the welfare of the ecosystem as a whole. Obviously, these creative solutions cannot be formulated, much less implemented, unless the section 9 taking prohibition provides a credible threat to potential violators: A threat that failure to put up the time, energy and money involved in formulating and implementing creative solutions, will result in much greater expenditures of time, energy and money fighting a section 9 taking suit. The encouraging Balcones Canyonlands (Austin Regional) Habitat Conservation plan is, in part, the result of letters of intent to sue under section 9 filed by Texas Earth First! In other words, enforcement will make the exception processes work for the benefit of species and their ecosystems.

Much of the past reluctance to enforce the section 9 prohibition appears to have grown out of perceptions that the prohibition was inflexible, perceptions formed before the 1982 amendments created the two exception processes. Those amendments changed the section 9 prohibition from an unconditional prohibition into a tool for forcing reluctant public and private entities to engage in the administrative process designed