

United States v. Wang Lin Company: The Kangaroo Rat and Criminal Prosecution Under the Endangered Species Act

INTRODUCTION

The case involving Taung Ming-Lin, a Taiwanese immigrant charged with criminal penalties for violating the Endangered Species Act (ESA),¹ provides a useful framework within which to examine the issues that arise under prosecution of the Act. California has 161 federally defined threatened and endangered species, which necessarily creates a conflict as farmers try to reap the bounty of the state's vast agricultural lands.

The case of immigrant Ming-Lin and his corporation, Wang Lin Co., Inc., received a great deal of media attention. Farmers around the country joined in one thought: "Could that have been me?"² With questions about ESA regulations and permit applications, and with concerns about their Fifth Amendment rights to just compensation for a taking of property, farmers across America identified with Ming-Lin and championed his cause.

The *Wang Lin* case has contributed more questions than answers to the scope of criminal liability under the ESA. Because it was resolved through a plea bargain,³ the case did not add to existing case law, and did not settle questions about how the ESA can and should apply to private property. It did not become a signpost for landowners who sought to avoid government intervention while maintaining economically viable use of their land.

Even the facts of the case do not provide for clear legal analogy to be used by a landowner seeking to avoid pitfalls in an endangered species statute that contains many unknowns. While the defense painted a picture of a poor immigrant farmer blind-sided

¹ 16 U.S.C. §§ 1531-1544 (1995).

² Russell Clemings, *Valley Farmers Angry Over Endangered Species Prosecution*, FRESNO BEE, Aug. 1, 1994, at A1.

³ Stipulation and Order, *United States v. Wang Lin Co.*, No. 94-5041 (E.D. Cal. May 1, 1995).

by government prosecutors for merely trying to earn a living, the government characterized Ming-Lin as a savvy businessman who never indicated an intent to farm on land the seller knew to host endangered species, and who exhibited a clear disregard for a permit process he knew was necessary.

This comment will examine the state of the law regarding criminal prosecutions under the Endangered Species Act.⁴ In the context of case law interpreting the 1973 statute, it will examine the criminal prosecution of Taiwanese immigrant Taung Ming-Lin, who was charged under the Act in 1994. Various issues that arose in the *Wang Lin* case will be examined, including constitutional issues such as the right to a jury trial, just compensation for takings under the Fifth Amendment, and double jeopardy issues, as well as defendants' rights to collaterally attack a listing under the Act.

I. THE WANG LIN CASE

The Tipton kangaroo rat was listed and published in the *Federal Register* as endangered on July 8, 1988;⁵ the San Joaquin kit fox and the blunt-nosed leopard lizard were so listed and published on March 11, 1967.⁶ In listing these species, the Secretary of the Interior determined that these specific population groups were "species" within the meaning of the ESA and that they were "in danger of extinction throughout all or a significant portion of their range."⁷ The listing determinations were not challenged.⁸

Taung Ming-Lin, a Taiwanese businessman who had never farmed before, signed a contract in 1991 to purchase more than a square mile of land in Central California north of Bakersfield

⁴ 16 U.S.C. §§ 1531-1544.

⁵ Exhibit A to Government's Request Pursuant to FED. R. EVID. 201(d) to Take Judicial Notice of Fact that Tipton Kangaroo Rat, Blunt-nosed Leopard Lizard and San Joaquin Kit Fox are listed as Endangered Species Under 50 C.F.R. § 17.11, *United States v. Wang Lin Co.*, No. 94-5041 (E.D. Cal. Aug. 29, 1994).

⁶ *Id.*

⁷ 16 U.S.C. § 1532(b).

⁸ An individual can seek a declaratory judgment against the USFWS asserting that the decision to list a specie as endangered is not supported by the evidence. Under 5 U.S.C. § 706, a reviewing court can set aside an agency action, finding or conclusion found to be arbitrary and capricious, contrary to a constitutional right, in excess of statutory jurisdiction, without observance of procedures required by law, unsupported by substantial evidence, or unwarranted by the facts.

for \$1.5 million. Three years after Ming-Lin purchased the land, an investigation into use of the land was started in mid-February of 1994 when a California Department of Fish and Game warden observed Ming-Lin discing the undeveloped land. Ming-Lin was ordered to stop discing because of the presence of the Tipton kangaroo rat, the blunt-nosed leopard lizard and the San Joaquin kit fox on the parcel.⁹ Only a small portion of the 770 acres that constituted the undeveloped parcel had been disced. After the order, Ming-Lin directed his foreman to continue the job without a permit.¹⁰ Approximately 440 acres were disced before the disc broke down.¹¹

On March 23, 1994, the U.S. Attorney's Office filed a criminal information charging Ming-Lin and the Wang Lin Co. with violating the Endangered Species Act.¹² The government later amended these charges to name the Wang Lin Co. as the only defendant.¹³ The government suggested that it dismissed Ming-Lin as an individual to allow "streamlining" of trial issues.¹⁴ The defense argued that the decision was attributable to adverse public sentiment caused by the government charging a farmer under the ESA, and "the hope[] of denying the defendant its constitutional right to a jury trial."¹⁵

This case brought to center stage the importance of finding a way to balance property rights—here a landowner's right to farm his own land—with the ESA, which has been interpreted to give

⁹ Louis Galvan, *Agreement Reached in Plowing Case*, FRESNO BEE, April 21, 1994, at B1.

¹⁰ Interview with Karen A. Kalmanir, Assistant U.S. Attorney, in Fresno, Cal. (Oct. 24, 1995).

¹¹ *Id.*

¹² Initial charges were a violation of 16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) for the unlawful taking of Tipton kangaroo rats. Counts for unlawful takings of the blunt-nosed leopard lizard and San Joaquin kit fox were added later. 16 U.S.C. §§ 1538(a)(1)(B), 1540(b)(1) (1995) and 18 U.S.C. § 2 (1995). See also 50 C.F.R. §17.21(c) (1994). *United States v. Wang Lin Co.*, No. 94-5041 (E.D. Cal. Jan. 12, 1995).

¹³ The Second Superseding Information charged the corporation with three counts of knowingly taking, and aiding and abetting the taking of, endangered species. See 16 U.S.C. §§ 1538(a)(1)(B), 1540(b)(1) and 18 U.S.C. § 2.

¹⁴ Government's Opposition to Motion to Dismiss on Grounds of Outrageous Government Conduct, *United States v. Wang Lin Co.*, No. 94-5041 (E.D. Cal. Feb. 21, 1995).

¹⁵ Memorandum of Points and Authorities in Support of Motion to Dismiss the Information, *United States v. Wang Lin Co.*, No. 94-5041 (E.D. Cal. Jan. 30, 1995).

broad, essential protections to this country's natural resources.¹⁶

II. FEDERAL LEGISLATION

A. *The Endangered Species Act of 1973*

The ESA¹⁷ was designed to preserve and protect species identified within the meaning of the Act as "endangered"¹⁸ or "threatened."¹⁹ Species are protected through three mechanisms: (1) land acquisition by the federal government,²⁰ (2) compelling federal agencies to act in a manner so as not to jeopardize the continued existence of a specie or modify its critical habitat,²¹ and (3) prohibiting any person from "taking" an individual member of a listed specie.²²

These protections further the goal of the ESA, which is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."²³ To accomplish this, the Act provides a variety of mechanisms for the protection of endangered and threatened species and their habitats.²⁴ Among these mechanisms is the protection of endangered species through criminal enforcement of provisions regarding the unlawful taking of endangered species "within the United States."²⁵

The ESA provides for identification of plant and animal species in danger of extinction, for protection of individual members of the species from direct harm or interference, and, critically, for

¹⁶ See *Babbitt v. Sweet Home Chapter*, 115 S. Ct. 2407 (1995); see also *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), in which the Supreme Court found that the ESA required the permanent halting of a virtually completed \$100 million dam to protect an endangered species of snail darter.

¹⁷ 16 U.S.C. §§ 1531-1544 (1995).

¹⁸ *Id.* § 1532(6). "Endangered species" means any specie in danger of extinction throughout all or a significant portion of its range.

¹⁹ *Id.* § 1532(20). "Threatened specie" means any specie likely to become an endangered specie within the foreseeable future throughout all or a significant portion of its range.

²⁰ *Id.* § 1534(a)(1).

²¹ *Id.* § 1536(a)(2).

²² *Id.* § 1538(a)(B).

²³ *Id.* § 1531(b).

²⁴ In addition to criminal penalties under 16 U.S.C. §§ 1538 and 1540, the ESA provides for civil penalties under 16 U.S.C. § 1540(a) and governmental land acquisition under 16 U.S.C. § 1534.

²⁵ 16 U.S.C. §§ 1538(a)(1)(B), 1540(b)(1).

protection from indirect harm caused by damage to the species' habitats.²⁶ In *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*,²⁷ the United States Supreme Court found that the ESA includes protection of habitat not just the endangered animal. The Court found that an ordinary understanding of "harm" supported Secretary Babbitt's interpretation that the Act places upon landowners a duty to avoid habitat alteration that would cause the effects Congress enacted the statute to avoid. Therefore, Secretary Babbitt "reasonably construed" the intent of Congress by expanding the definition of harm to include habitat degradation.

The Court also found that the permit process included in the Act, which requires mitigation, showed that Congress intended foreseeable rather than only accidental effects on listed species. This finding supported the Secretary's conclusion that activities not intended to harm an endangered specie, such as habitat modification, may constitute an illegal taking under the Act unless a permit is granted by the Secretary.²⁸

In *Palila v. Hawaii Dept. of Land and Natural Resources*²⁹ the Ninth Circuit upheld the validity of the "harm" regulation and recognized that a "take" of endangered species may result from modification of critical habitats. Critical habitat under the ESA is defined as:

- (i) the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection;
- (ii) specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.³⁰

The ESA provides for criminal penalties for any person who knowingly imports, exports, takes, transports, sells, purchases or receives in interstate or foreign commerce any species listed as endangered or threatened.³¹ Penalties include criminal misdemeanor penalties of up to one-year imprisonment,³² fines, or

²⁶ *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995).

²⁷ *Id.*

²⁸ *Id.* at 2410.

²⁹ *Id.* 852 F.2d 1106 (9th Cir. 1988).

³⁰ 16 U.S.C. § 1532(5)(A)(ii) (1995).

³¹ *Id.* § 1540(b).

³² *Id.*

both, for knowing violations of prohibitions relating to endangered species.³³

Much debate has arisen during prosecution under the Act about the intent needed to constitute a violation. In 1978, Congress amended the Act, replacing "knowingly" with "willfully" to make criminal violations of the Act a general intent rather than a specific intent crime.³⁴ A "knowing" violation³⁵ requires only proof of general intent to commit a prohibited act.³⁶ The general intent requirement exists because the ESA is a "regulatory statute, enacted to conserve and protect endangered species."³⁷ "General intent" means the violator must know that his property is a habitat for an endangered specie or know that he is taking an endangered specie within the meaning of the Act.³⁸

Defendants prosecuted under the ESA argue that Congress could not have meant that the penalty provisions under 16 U.S.C. § 1540 for "knowing" violations extend to unintentional "takes" defined under *Babbitt*. *Babbitt* encompasses habitat modification in addition to the killing of individual animals.

1. "Incidental Take" Permits

The ESA does not prohibit all development of endangered habitat, but instead permits destruction of habitat subject to conditions contained in "incidental take" permits. The Secretary of the Interior is authorized to grant a permit³⁹ for any taking otherwise prohibited under 16 U.S.C. § 1538(a)(1)(B) if such taking is incidental to, and not the purpose of, carrying out an otherwise lawful activity. The ESA authorizes a permit if the applicant submits a conservation plan specifying the impacts that likely will result from the taking and steps that will be taken to mitigate such impacts, in addition to alternative means considered and rejected by the applicant.⁴⁰

³³ *Id.*

³⁴ Pub. L. No. 95-632, 92 Stat. 5761 (1978).

³⁵ 16 U.S.C. § 1538.

³⁶ See *United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990); *United States v. Ivey*, 949 F.2d 759 (5th Cir. 1991); *United States v. St. Onge*, 676 F. Supp. 1041 (D. Mont. 1987); *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987).

³⁷ *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

³⁸ *Nguyen*, 916 F.2d 1016; *St. Onge*, 676 F. Supp. 1041; *Billie*, 667 F. Supp. 1485.

³⁹ The provisions to allow takings are contained in 16 U.S.C. § 1539(a)(1)(B).

⁴⁰ 16 U.S.C. § 1539 (a)(2)(A).

The legislative history of the ESA shows the congressional concern "to halt and reverse the trend toward species extinction, whatever the cost."⁴¹ Endangered species were judged to be the "highest of priorities."⁴²

When applying for a permit, a farmer seemingly has some suspicion of the presence of an endangered specie. But in disclosing information about the presence of endangered species to support an application for an incidental take permit, the applicant may expose himself to possible prosecution under the Act. The U.S. Attorney's office indicates⁴³ that using such information to charge an individual is permissible if the applicant does not act in good faith or misrepresents pertinent information; for example, how many individual members of a specie will be taken. The decision to use the information included in the permit application is one of prosecutorial discretion.⁴⁴

B. *The Migratory Bird Treaty Act*

Another important statute protecting wildlife and potentially interfering with property rights is the Migratory Bird Treaty Act (MBTA).⁴⁵ The ESA differs from the MBTA in several aspects, including the agency investigative process prior to granting a permit, the scienter element, and the definition of "take" under the statute.

The MBTA provides that

it shall be unlawful . . . to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter,

⁴¹ *TVA*, 437 U.S. at 184.

⁴² *Id.* at 174. The 1966 version of the Act protecting endangered species did not include anything near a sweeping prohibition of the taking of endangered species except on federal land, and even there the Secretary was authorized to allow hunting and fishing of endangered species. In the 1969 version, the Secretary was empowered to list species "threatened with worldwide extinction." *Id.* at 175. In the 1973 version, a Senate report stressed "'take' is 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. 93-307, 93d Cong., 1st Sess. 7 (1973), as quoted in *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2416 (1995).

⁴³ Interview with Karen A. Kalmanir, Assistant U.S. Attorney, in Fresno, Cal. (Sept. 15, 1995).

⁴⁴ Courts have recognized broad latitude for prosecutors to make charging decisions. *See, e.g., United States v. Goodwin*, 457 U.S. 368 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

⁴⁵ 16 U.S.C. §§ 703-712 (1995).

barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export birds protected under the treaty.⁴⁶

The treaty was developed between the United States and Great Britain (on behalf of Canada) at the 1916 Convention for the Protection of Migratory Birds. The Supreme Court upheld the constitutionality of the Act and the convention as valid exercises of treaty powers.⁴⁷

The MBTA relies on a landowner's representations of transient populations of birds during the permit process to establish the extent of the needed incidental take. Under the ESA, federal agencies go on site to conduct tests and search for signs of endangered species in the area.

A recent case suggests that one danger inherent in permit application resides in underestimating the number of individual members of a specie that will be taken. In *United States v. Carpenter*,⁴⁸ defendants Marvin Carpenter and Carpenter's Goldfish Farm, Inc. were jointly charged with 36 counts of making false statements to the U.S. Fish and Wildlife Service (USFWS),⁴⁹ illegally killing protected migratory waterfowl in violation of the MBTA,⁵⁰ and knowingly receiving and acquiring migratory birds protected under the MBTA in violation of the Lacey Act.⁵¹ Carpenter employed people whose sole function was to shoot birds that were preying on the fish at his 450-acre goldfish farm in Central California. Employees also poisoned birds with sodium cyanide and trapped them in leg traps in which the birds died.⁵² After being advised by a state game warden that the shooting must stop, Carpenter applied for a federal permit in early 1984. The permit allowed the company to take, by shooting only, a total of 50 birds of any combination of great or snowy egrets and great

⁴⁶ *Id.*

⁴⁷ *Missouri v. Holland*, 252 U.S. 416 (1920).

⁴⁸ 933 F.2d 748 (9th Cir. 1991).

⁴⁹ 18 U.S.C. § 1001 (1995).

⁵⁰ 16 U.S.C. §§ 703 and 707(a).

⁵¹ 16 U.S.C. §§ 3371-3378. The Lacey Act prohibits the import or export of any fish, wildlife or plant taken, possessed, transported or sold in violation of the laws of a state, Indian tribe or foreign country, or in violation of a treaty. Carpenter was charged under 16 U.S.C. §§ 3372 and 3373(d)(2).

⁵² *Carpenter*, 933 F.2d at 750.

blue and black crowned night herons during 1984.⁵³ In December 1984, the company reported that it had killed exactly 50 birds. Carpenter obtained a second permit in November 1986 and issued a similar report.⁵⁴ Both the 1984 and 1986 reports were false.⁵⁵ In each of those years, the defendant knew that approximately 3,000 migratory birds of different species had been shot, trapped or poisoned.

Carpenter was charged under the MBTA.⁵⁶ Definition of a misdemeanor offense is as follows: “[A]ny person, association, partnership, or corporation who shall violate any provisions of [the MBTA], or who shall violate or fail to comply with any [MBTA] regulation [50 C.F.R. parts 20 and 21] made pursuant to [the MBTA] shall be deemed guilty of a misdemeanor”⁵⁷ Penalties include six months imprisonment and/or a \$5,000 fine for an individual and a \$10,000 fine for an organization.⁵⁸

Most courts have held that 16 U.S.C. § 707(a) is a strict liability criminal statute, thereby excusing the government from the need to prove that the defendant knew the birds were protected by the Act. The rationale for imposing strict liability was articulated in *United States v. Reese*⁵⁹ in 1939:

There appears no sound basis . . . [that] Congress intended to place upon the Government the extreme difficulty of proving guilty knowledge . . . on the part of persons violating the express language of the [MBTA or] applicable regulations. . . . It is more reasonable to presume that Congress intended to require that hunters shall investigate at their peril conditions surrounding the fields in which they seek their quarry.⁶⁰

The one exception is the Fifth Circuit, which has required “a minimum level of scienter as a necessary element for [certain hunting offenses] under the MBTA.”⁶¹

The felony offense provision of 16 U.S.C. § 707(b) reads: “Whoever, in violation of [the MBTA] shall knowingly (1) take . . . any migratory bird with intent to sell, offer to sell, barter or

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 16 U.S.C. §§ 703-712 (1995).

⁵⁷ 16 U.S.C. § 707(a).

⁵⁸ *Id.*; 18 U.S.C. § 3571 (1995).

⁵⁹ 27 U.S.C.

⁶⁰ *Id.* at 835.

⁶¹ *United States v. Sylvester*, 848 F.2d 520, 522 (5th Cir. 1988).

offer to barter . . . or (2) sell, offer for sale, barter or offer for barter, any migratory bird shall be guilty of a felony. . . ."⁶² Congress added "knowingly" in 1986,⁶³ requiring the government to show that the subject of the violation must have acted intentionally. Maximum penalties are two years imprisonment and/or a \$250,000 fine for an individual and a \$500,000 fine for an organization.⁶⁴

In *Seattle Audubon Society v. Evans*,⁶⁵ the Ninth Circuit found the term "take" differed under the MBTA and the ESA. Regulations promulgated pursuant to the MBTA define "take" to mean "pursue, hunt, shoot, wound, kill, trap, capture, or collect," or attempt any such act.⁶⁶ The court interpreted the definition as describing the physical conduct of hunters and poachers, "which was undoubtedly a concern at the time of the statute's enactment in 1918."⁶⁷ However, neither the statute nor the subsequent regulations mention habitat modification or destruction.⁶⁸ The court in *Seattle Audubon* held the distinction to be intentional, pointing out that Congress amended the MBTA in 1974, the year after the ESA was enacted, but did not modify it to include "harm."⁶⁹

Courts have held that the prohibition on taking wildlife under the MBTA does not constitute a taking of property under the Fifth Amendment, even when private lands are closed to hunting.⁷⁰ As long as the government regulation does not deny the landowner all economically beneficial use of the property, the Supreme Court has held there is not a taking.⁷¹

C. *Defendants' Rights to Collaterally Attack Endangered Species Act Listings*

Listings may be attacked in one of two ways. An individual can seek a declaratory judgment against the USFWS asserting that the

⁶² 16 U.S.C. § 707(b).

⁶³ Title V, Section 501 of Pub. L. No. 99-645, 100 Stat. 3590 (1986).

⁶⁴ 16 U.S.C. § 707(b), 18 U.S.C. § 3571 (1995).

⁶⁵ 952 F.2d 297, 302 (9th Cir. 1991).

⁶⁶ 16 U.S.C. § 703; 50 C.F.R. § 10.12.

⁶⁷ *Seattle Audubon*, 952 F.2d at 302.

⁶⁸ *Id.*

⁶⁹ *Id.* at 303.

⁷⁰ See *Bailey v. Holland*, 126 F.2d 317 (4th Cir. 1942); *Koop v. United States*, 296 F.2d 53 (8th Cir. 1961); *United States v. Greenhead*, 256 F. Supp. 890 (N.D. Cal. 1966).

⁷¹ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

decision to list a specie as endangered is not supported by the evidence.⁷²

Under the terms of 16 U.S.C. § 704, the Secretary of the Interior is authorized to consider a number of factors when determining how to administer the ESA and what regulations should be issued. Among them are distribution, abundance, economic value, breeding habits, and migration routes of the various species.⁷³ There is a presumption that "the Secretary has done his duty" that precludes collateral attack on "facially valid regulations."⁷⁴

A defendant charged with a criminal violation under the ESA may collaterally attack a specie listing as a defense. The law is not consistent on whether this defense is available. Although one line of cases indicates that a determination by the Secretary may not be collaterally attacked,⁷⁵ other cases have allowed the attack.⁷⁶ In *Yakus v. United States*,⁷⁷ the Supreme Court refused to allow a collateral challenge to the Emergency Price Control Act of 1942⁷⁸ as a defense during a criminal case. The court said:

No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.⁷⁹

In *United States v. Guthrie*,⁸⁰ the Eleventh Circuit acknowledged that other circuits had suggested that "collateral review of an agency regulation in a criminal proceeding should be narrow or nonexistent,"⁸¹ but undertook a de novo review nonetheless. The

⁷² See *supra* note 8.

⁷³ 16 U.S.C. § 704 (1995).

⁷⁴ See generally *United States v. Gigstead*, 528 F.2d 314, 317 (8th Cir. 1976).

⁷⁵ *Gigstead*, 528 F.2d 314. The defendant in *Gigstead* was charged with unlawful possession of birds, unlawful offerings of birds for sale and unlawful sales after he sold to undercover federal agents the stuffed skins of birds protected under the MBTA. The defendant claimed the Secretary failed to properly consider whether the species were really scarce in number and at peril for extinction.

⁷⁶ See generally *United States v. Guthrie*, 50 F.3d 936 (11th Cir. 1995), which held that defendant could challenge the Secretary's 1987 regulation listing the Alabama red-bellied turtle as an endangered species.

⁷⁷ 321 U.S. 414 (1944).

⁷⁸ 56 Stat. 23 (1942) as amended by Inflation Control Act, 56 Stat. 765 (1942).

⁷⁹ *Yakus*, 321 U.S. at 444-45. See also *Adamo Wrecking v. United States*, 434 U.S. 275 (1978).

⁸⁰ 50 F.3d 936 (11th Cir. 1995).

⁸¹ *Id.* at 943 (citing *Gigstead*, 528 F.2d 314).

court declined to rule on whether the scope of review applicable to listing regulations when those regulations are collaterally attacked would be narrower than a direct review of the same regulations. It found that no matter what the scope, the regulation in the instant case would have been upheld.⁸²

Although the court allowed the collateral attack in *Guthrie*, it chided the defendant for failing to challenge the listing under either of two ESA sections. 16 U.S.C. § 1533(b)(3)(a) provides for a petition process for agency review, and 16 U.S.C. § 1540(g) authorizes citizen suits to challenge whether the Secretary has met his duties under the ESA.⁸³

The *Guthrie* court determined that its scope of review of an agency record was whether a criminal defendant could be foreclosed from challenging a listing determination if he failed to do so before charges were brought. Comments by the *Guthrie* court were not conclusive but merely suggestive on this point. The ESA does not explicitly require all persons to immediately challenge species listings or be foreclosed from litigating the issue in defense of a criminal charge. If the statute so provided, however, the preclusion would be binding.

III. CONSTITUTIONAL CONCERNS

B. Double Jeopardy

The ESA forfeiture provision, like other civil forfeiture statutes, may raise double jeopardy concerns if exercised in conjunction with a criminal prosecution. Under 16 U.S.C. § 1540(e)(4)(A): "All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this Act, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the

⁸² The court in *Guthrie* limited its review to the evidence in the record before the agency at the time it made the decision to list the species as endangered. Thus, defendant's proffered DNA evidence that a red-bellied turtle is not a species, but a hybrid, was rejected because of his failure to use that evidence prior to his prosecution to challenge the listing. *Id.* at 944. The *Guthrie* court then determined that on direct review, the Secretary's decision to list the Alabama red-bellied turtle as an endangered species met the "arbitrary and capricious" standard under the Administrative Procedure Act. 5 U.S.C. § 706 2(A).

⁸³ *Guthrie*, 50 F.3d at 943.

United States.”⁸⁴ 16 U.S.C. § 1540(e)(4)(B)⁸⁵ provides for forfeiture of “other equipment, vessels, vehicles, aircraft and other means of transportation used to aid the taking. . . .” upon conviction of a criminal violation under the ESA. The government bears the burden of establishing that probable cause exists to initiate a forfeiture action.⁸⁶

The Ninth Circuit in *United States v. \$405,089.23 U.S. Currency*⁸⁷ analyzed the constitutional limits on the government’s ability to seek both criminal penalties and civil forfeiture in a drug prosecution based on the same violations of the law. To determine whether the civil forfeiture action amounted to double jeopardy under the Fifth Amendment, the court looked at whether the criminal and civil actions were separate proceedings, and whether civil forfeiture under the applicable statutes constituted punishment.

The Supreme Court ruled in *Jeffers v. United States*⁸⁸ that parallel actions instituted at about the same time and involving the same criminal conduct are separate proceedings for double jeopardy purposes. The Ninth Circuit examined in *U.S. Currency*⁸⁹ whether the civil sanction of forfeiture of narcotics proceeds was remedial or a deterrent to establish whether it constituted punishment.⁹⁰ The Supreme Court found that a sanction designed in part to punish, even if it also has a remedial effect, constitutes punishment. That means forfeiture would constitute an additional penalty for a defendant’s actions. This rationale is applied even if instrumentalities of a crime are declared forfeited to the government.⁹¹

The law appears to be unsettled in the area of forfeiture of farm equipment. Although the ESA provides for forfeiture of equipment used in the violation upon a showing of probable

⁸⁴ 16 U.S.C. § 1540(e)(4)(A) (1995).

⁸⁵ *Id.* § 1540 (e)(4)(B).

⁸⁶ *United States v. One 1971 Chevrolet Corvette Automobile*, 496 F.2d 210, 212 (5th Cir. 1974).

⁸⁷ 33 F.3d 1210 (9th Cir. 1994), *cert. granted*, 116 S. Ct. 762 (1996). That burden is set forth under 16 U.S.C. § 1540(e)(5).

⁸⁸ 432 U.S. 137 (1977), *reh’g denied*, 434 U.S. 880 (1977).

⁸⁹ *U.S. Currency*, 33 F.3d 1210.

⁹⁰ Forfeiture may be considered punishment when “lawfully derived” property is forfeited. *United States v. Halper*, 490 U.S. 435 (1989).

⁹¹ *Austin v. United States*, 113 S. Ct. 2801 (1993), *see also Halper*, 490 U.S. 435.

cause, other cases seek to distinguish such forfeitures from the line of cases involving proceeds from the sale of illegal drugs. The Fifth Circuit in *United States v. Tilley*⁹² drew a distinction between forfeiture of an instrumentality and forfeiture of drug proceeds. Forfeiture of an instrumentality may lack the proportionality found between drug proceeds and the amount of narcotics. The court held that the "proceeds are roughly proportional to the harm inflicted upon government and society by the drug sale."⁹³ It may be more difficult to argue that a piece of farm equipment represents the exact harm of a criminal violation of the ESA. Similarly, it may be difficult to determine whether confiscation of equipment, such as a tractor, for criminal violation of the ESA constitutes punishment, compensatory damage, or deterrence. Therefore, the government's seizure of Ming-Lin's tractor may be difficult to justify as compensatory and may be considered an additional punishment of the defendant.

B. *The Takings Clause*

The potential of criminal prosecution is closely intertwined with Fifth Amendment concerns about private property rights. Effective criminal prosecution or the threat of prosecution may prompt a farmer to file a Fifth Amendment takings claim. The Fifth Amendment requirement that "private property [not] be taken for public use, without just compensation"⁹⁴ could significantly limit the government's ability to enforce the ESA.

In *Pennsylvania Coal Co. v. Mahon*,⁹⁵ the Supreme Court stated that to meaningfully enforce protection against physical appropriations of private property, the government's power to redefine the range of interests included in ownership was necessarily constrained under the Constitution.⁹⁶ To guard against subjecting uses of private property to unlimited qualification under the state's police power, the court said that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁹⁷

⁹² 18 F.3d 295 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 573 (1994).

⁹³ *Id.* at 300.

⁹⁴ U.S. CONST. amend. V.

⁹⁵ 260 U.S. 393 (1922).

⁹⁶ *Id.* at 414-15.

⁹⁷ *Id.* at 415.

The Supreme Court in *Lucas v. South Carolina Coastal Council*⁹⁸ examined the Takings Clause, “which has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that [landowners] acquire when they obtain title to property.”⁹⁹ The Court found that it is not consistent with the Takings Clause that title is held subject to the state’s subsequent decision to eliminate all economically beneficial use. Therefore, regulations having that effect cannot be newly decreed and sustained without compensating the owner. No compensation need be paid if there is a showing that the proscribed use interests were never part of the owner’s title.¹⁰⁰

Courts have had difficulty identifying when regulatory actions go “too far.”¹⁰¹ However, two categories of regulatory action have been found to be compensable without case-specific inquiry into the public interest advanced in support of the restraint: (1) regulations that compel a property owner to suffer a physical invasion of his property, and (2) regulations that deny all economically beneficial or productive use of the land.¹⁰²

In *Lucas* the Court found that

[a]ffirmatively supporting a compensation requirement is the fact that regulations that leave the owner of land without economic benefit 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.¹⁰³

The Court held that where a private property owner has been called upon “to leave his property economically idle, he has suffered a taking.”¹⁰⁴ This would also appear to be the case if a

⁹⁸ 505 U.S. 1003 (1992).

⁹⁹ *Id.* at 1027.

¹⁰⁰ *Lucas*, 505 U.S. at 1027. *See also* *Dolan v. City of Tigard* 114 S. Ct. 2309 (1994), in which a city was required to pay compensation for mandatory dedication of open land for a floodplain greenway, including a bike path and storm drainage system, as a taking of private land under the Fifth Amendment.

¹⁰¹ *Lucas*, 505 U.S. 1015.

¹⁰² *Id.* at 1022. The Supreme Court has recognized governmental power to prohibit “noxious” uses of property akin to public nuisances without having to pay compensation. *Mugler v. Kansas*, 123 U.S. 623 (1887). However, it is difficult to imagine a court finding farming to be a public nuisance.

¹⁰³ *Lucas*, 505 U.S. at 1017.

¹⁰⁴ *Id.* at 1019.

farmer is required—because of the possibility of criminal prosecution—to leave land in its natural habitat because endangered species are found on the land.

Courts have found that the Fifth Amendment prohibition against taking private property for public use without just compensation is designed to avoid “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁰⁵ The Ninth Circuit held in *Christy v. Hodel*¹⁰⁶ that the ESA and its regulations do not effect an unconstitutional taking of private property. In *Christy*, the court found that the loss of sheep to an ESA-protected grizzly bear did not constitute a taking of plaintiff’s property without just compensation.¹⁰⁷ The Supreme Court also determined that prosecution under the MBTA does not violate a defendant’s Fifth Amendment property rights.¹⁰⁸

Another case that dealt with the historic “bundle of rights” was *Andrus v. Allard*, where the Court held:

The denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety
When we review regulation, a reduction in the value of property is not necessarily equated with a taking.¹⁰⁹

Therefore, when applied to a landowner’s rights to farm his land, the Court’s analysis indicates that a regulation to protect the habitat of endangered species is not a substantial deprivation such that it triggers Fifth Amendment concerns, but may merely be one “strand” in the “bundle.”

In *Babbitt*, the Supreme Court addressed the issue of whether Congress intended the ESA’s express authorization for the federal government to buy private land to prevent habitat degradation to

¹⁰⁵ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹⁰⁶ 857 F.2d 1324 (9th Cir. 1988).

¹⁰⁷ The defendant in *Wang Lin* sought to distinguish the facts of its case from *Christy v. Hodel*, characterizing its attempt to seek the right to economically develop one’s property from the right to kill federally protected wildlife in defense of property. Defendant’s Reply to the Government’s Opposition to Motion to Dismiss Based on Procedural and Due Process Grounds, *United States v. Wang Lin Co.*, No. 94-5041 (E.D. Cal. Feb. 24, 1995).

¹⁰⁸ 444 U.S. 51 (1979), in which the Supreme Court found that the Fifth Amendment did not guarantee an opportunity to earn a profit from avian artifacts.

¹⁰⁹ *Id.* at 65-66.

be the exclusive check against habitat modification on private property. The Court limited its holding to an interpretation of "harm" under the statute, avoiding the volatile issue of personal property rights. The Court found that the broad purpose of the ESA supported the Secretary's decision to extend protections from activities that cause the harms Congress enacted the statute to avoid.¹¹⁰

In *Tennessee Valley Authority v. Hill*, the Supreme Court described the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted in any nation."¹¹¹ Endangered species statutes in 1966 and 1969 contained sweeping prohibitions on the taking of endangered species only on federal land. The 1973 version applied to all land in the United States and the nation's territorial seas. Therefore, the broad protections on all lands necessarily include private property under the Supreme Court's analysis in *Babbitt*.

C. *The Right to a Jury Trial*

The *Wang Lin* case raised the question of whether the Sixth Amendment requires a jury trial where the government chooses to prosecute a corporation for ESA violations while dismissing charges against an individual defendant. The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."¹¹² A corporate defendant qualifies as an "accused" within the meaning of the Sixth Amendment.¹¹³ Petty offenses are not subject to the Sixth Amendment jury trial provision, but the right exists for serious crimes.¹¹⁴ An offense authorizing a prison term of more than six months is presumed to be a "serious" crime under the Sixth Amendment.¹¹⁵

A maximum one-year prison sentence is authorized under 16 U.S.C. § 1540(b)(1), for "persons" who violate 16 U.S.C. § 1538(a)(1)(B). The ESA defines a "person" as "an individual, corporation, partnership, trust, association, or any other private

¹¹⁰ *Babbitt*, 115 S. Ct. 2407.

¹¹¹ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

¹¹² U.S. CONST. amend. VI.

¹¹³ *Armour Packing Co. v. United States*, 209 U.S. 56 (1908).

¹¹⁴ *Callan v. Wilson*, 127 U.S. 540 (1888).

¹¹⁵ *Baldwin v. New York*, 399 U.S. 66 (1970).

entity”¹¹⁶ Therefore, in *Wang Lin* the court noted that because an individual is entitled to a jury trial when a one-year prison sentence was possible, “the fact that the government chose to prosecute the corporation instead of an individual does not change how serious the legislature deems the offense.”¹¹⁷

In *United States v. Nachtigal*,¹¹⁸ the U.S. Supreme Court rejected the argument that mere collateral consequences of a conviction can render an offense “serious” for Sixth Amendment purposes. The Court also rejected the collateral consequences analysis in *Blanton v. North Las Vegas*,¹¹⁹ holding that the “[p]rimary emphasis . . . must be placed on the maximum authorized period of incarceration,” not on the collateral consequences of conviction.¹²⁰

Similarly, in *United States v. Rodriguez-Rodriguez*,¹²¹ the Ninth Circuit said that the mere fact that a conviction may result in deportation under an immigration-inspection exclusion statute¹²² did not make the offense a “serious” one under the Sixth Amendment.

1. Jury Nullification

The concept of jury nullification has emerged recently as a mechanism by which jurors can refuse to apply a certain law to the particular facts before them.¹²³ In recent years, some states have considered legislation to explicitly authorize jury nullification. In 1991, seven states proposed legislation or constitutional amendments requiring judges to inform jurors that jurors are finders of both law and fact, and they can ignore the law and vote their consciences.¹²⁴

Landowners’ concerns about private property rights can have an indirect effect on ESA prosecutions through the doctrine of jury nullification. Under this doctrine, jurors have an inherent

¹¹⁶ 16 U.S.C. § 1532(13) (1995).

¹¹⁷ Order Re: Defendant’s Motion for Jury Trial and Plaintiff’s Motion for Bench Trial, *United States v. Wang Lin Co.*, No. 94-5041 (E.D. Cal. Feb. 17, 1995).

¹¹⁸ 507 U.S. 1

¹¹⁹ 489 U.S. 538 (1989).

¹²⁰ *Id.* at 542.

¹²¹ 742 F.2d 1194 (9th Cir. 1984).

¹²² 8 U.S.C. § 1325 (1995).

¹²³ M. Kristine Creagan, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. L. REV. 1101 (1993).

¹²⁴ *Id.* at 1101-02.

right to set aside the judge's instructions and to reach a verdict of acquittal based on their consciences. The defendant has the right to have the jury so instructed.¹²⁵

In many prosecutions of farmers for ESA violations, the government should be concerned about the potential for jury nullification. Many jurors, particularly those in a district with a substantial farming population, might be hesitant to convict a defendant for the destruction of native habitat that he cannot avoid in farming his own land.

The U.S. Supreme Court has determined that in the federal system, there is no right to jury nullification,¹²⁶ although federal courts have recognized the jury's power to nullify a law that falls short of a right.¹²⁷ Jury nullification is seen as a form of separation of powers in administration of the law under which the jury gives to the judicial system a legitimacy it would otherwise not possess.¹²⁸ "A juror who is forced by the judge's instructions to convict a defendant whose conduct he applauds, or at least feels is justifiable, will lose respect for the legal system which forces him to reach such a result against the dictates of his conscience."¹²⁹

Federal courts have uniformly rejected the jury nullification argument. In *United States v. Moylan*,¹³⁰ the appellate court affirmed the lower court's denial of a motion for a jury nullification instruction in a Selective Service protest case. Although the Fourth Circuit acknowledged that juries have the right to acquit and a judge may not tamper with such a verdict, the court refused to instruct the jurors that they had the power to disobey the court's description of the law because that would "be negating the rule of law in favor of the rule of lawlessness."¹³¹

In *United States v. Sisson*,¹³² the court stated that in cases where

¹²⁵ Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 182 (1971).

¹²⁶ *Sparf v. United States*, 156 U.S. 51 (1895).

¹²⁷ *United States v. Burkhart*, 501 F.2d 993 (6th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975), in which defense counsel was given leeway to persuade the jury to acquit out of obedience to higher law despite the defendant having no right to a jury nullification instruction.

¹²⁸ Schefflin, *supra* note 125, at 182.

¹²⁹ *Id.* at 183.

¹³⁰ 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

¹³¹ *Id.* at 1006.

¹³² 399 U.S. 267 (1970).

political issues are at the forefront, juries can vote their political convictions and disregard the judge's instructions. However, the court felt that a move toward the broad nullification powers exercised by juries in seditious libel cases in the 18th century should first be sanctioned by the U.S. Supreme Court.

In *United States v. Boardman*,¹³³ the court emphasized that the jury has the power to ignore the law, but a duty to apply it as interpreted by the court. Therefore, the instruction given by the judge should inform the jury of its duty to adhere to the judge's rulings.

IV. THE PROSECUTION OF MING-LIN

When the government filed its motions in *Wang Lin* regarding the interpretation of "harm," *Babbitt*¹³⁴ had been decided by the Circuit Court for the District of Columbia but had not yet reached the U.S. Supreme Court. *Palila* was the law of the Ninth Circuit and therefore controlling. In *Babbitt*, the D.C. Circuit held that the regulatory definition of "harm" was not authorized by the ESA because it believed Congress showed no intent to include habitat modification within the meaning of "take."¹³⁵ The conflict between the circuit courts was pending resolution on certiorari.

The defendant in *Wang Lin* argued that prosecution for a take under the ESA could only be brought where defendant's action results in complete extinction of a specie instead of death or injury to an individual member of the specie.¹³⁶

The government argued that the ESA does not say that to be criminally prosecuted, an action must cause the extinction of the specie. In *Palila*,¹³⁷ the court held that a finding of habitat destruction resulting in extinction could constitute harm, but that habitat modification need not reach the level of complete extinc-

¹³³ 419 F.2d 110 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

¹³⁴ 17 F.3d 1463, 1465 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct 714 (1995).

¹³⁵ *Id.* at 1465-66.

¹³⁶ The *Palila* decision left unsettled whether it is necessary to show potential extinction of the species to classify an action as a "take." However, a finding that a showing of complete obliteration of a species is necessary to prosecute under the ESA would render the statute toothless in any instance other than the killing of the final member of the species. Certainly the statute wasn't written to provide for the prosecution of that one individual.

¹³⁷ 852 F.2d 1106 (9th Cir. 1988).

tion to constitute harm. Therefore, prosecution does not require proof that a taking will cause a specie to become extinct.

Had the *Babbitt* ruling been handed down earlier, it would have eased the government's evidentiary burden by ensuring the more expansive habitat-degradation definition of "harm" within the meaning of "take." In *Wang Lin*, the government had a two-pronged attack, showing actual dead animals of the endangered species in addition to presenting evidence of habitat modification. Under *Babbitt*, a showing of discing in the area known to host the endangered species would be sufficient for prosecution.¹³⁸

Many of the issues raised in *Wang Lin* remain unresolved because the case was settled before trial. The only judicial determination made was the unpublished ruling of the magistrate-judge that the corporation was entitled to a jury trial. A request for a jury trial was filed with the court on January 17, 1995. The government filed a request for a bench trial the same day.

The prosecution contended that Wang Lin Co. was not entitled to a jury trial because the charges did not meet the definition of "serious." As a corporation, Wang Lin Co. was not subject to imprisonment and the defendant faced no direct collateral consequences if convicted.¹³⁹ If the company chose to apply for an incidental take permit, it might be required to pay mitigation costs. Though a landowner may mitigate through monetary compensation or land transfer, the government alleged that the corporate defendant was not subject to transfer of property or mitigation unless it had applied for the permit.¹⁴⁰ However, the transfer of property could not be a consequence of a criminal conviction under the ESA.

A corporation may face punishment in an administrative or civil context for conduct that also is criminal. However, in such civil assessments, constitutional and procedural requirements for criminal punishments do not apply.¹⁴¹ In *Wang Lin*, the government argued that corporations are routinely assessed punitive fines in the civil context, and such context bypasses the need for

¹³⁸ *Babbitt*, 115 S. Ct. 2407 (1995).

¹³⁹ Government's Reply to Defendant's Request for Jury Trial, *United States v. Wang Lin Co.*, No. 94-5041 (E.D. Cal. Feb. 6, 1994).

¹⁴⁰ *Id.*

¹⁴¹ *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977).

a jury trial. Because a fine does not trigger a Sixth Amendment right to a jury trial in administrative and civil contexts, the government argued, no constitutional principle supports the right to a jury trial in the criminal context when the only penalty faced is monetary.¹⁴² In criminal contempt prosecutions of corporations, courts have held that there is no right to a jury trial notwithstanding potential fines.

In light of the fact that the corporation faced up to \$600,000 in fines,¹⁴³ the court held that the charges against the company were "serious" within the meaning of Article III, section 2, clause 3, and the Sixth Amendment. The court based its determination of seriousness on the potential penalty,¹⁴⁴ granting the defendant a jury trial.

A. The Defendant's Position

The defense argument focused on outrageous government conduct as well as procedural and substantive due process violations. In support of its position, the defense sought to introduce conversations in which Ming-Lin asked local agencies whether a permit was needed to farm the land. The defendant also argued that it was denied due process because the government failed to provide notice that the defendant's property was a habitat for an endangered specie, and that the government's proposed taking of the property violated the defendant's substantive due process rights. Additionally, the defense argued that the application of the ESA constituted a taking of the defendant's land under the Fifth Amendment, requiring just compensation because the statute deprived the owner of economically viable use of its property by not allowing it to farm the land.

The option of challenging the listings was foreclosed to Wang Lin Co.¹⁴⁵ by the time the government brought its charges. Challenges to agency regulations are barred after six years following the promulgation of the regulation.¹⁴⁶

The defense filed a motion to dismiss for outrageous govern-

¹⁴² Government's Reply to Defendant's Request for Jury Trial, *United States v. Wang Lin Co.*, No. 94-5041 (E.D. Cal. Feb. 6, 1994).

¹⁴³ \$200,000 per count under 18 U.S.C. § 3571 (c)(5).

¹⁴⁴ *Frank v. United States*, 395 U.S. 147 (1969).

¹⁴⁵ 16 U.S.C. § 1540(g) (1995).

¹⁴⁶ *Wind River Min. Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991); *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988).

ment conduct,¹⁴⁷ citing the taking of the defendant's tractor, which was used during the alleged violations. The defendant also argued that the government's failure to designate the property at issue as critical habitat was a violation of statutory requirements¹⁴⁸ and thus deprived it of procedural due process. However, the language of the statute lends itself to varying interpretations.¹⁴⁹

B. *The Prosecution's Position*

The government argued that the ESA does not contain a provision requiring the designation of critical habitat for endangered species.¹⁵⁰ Nor does enforcement of provisions on the unlawful taking of endangered species require a showing of a critical habitat designation.¹⁵¹

Additionally, the government disputed procedural or due process violations for the proposed taking of the land or confiscation of the tractor. The land had not been taken; the government had no means to enforce, without defendant's consent, a mitigation agreement for the incidental taking of endangered species. Nor, the government argued, is there a statutory basis for the nonconsensual taking of private property as habitat to conserve endangered species. The ESA and its subsequent regulations "do not purport to take, or even to regulate the use of . . . [private] property."¹⁵²

¹⁴⁷ Due process under the Fifth Amendment calls for dismissal of an indictment where "the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Citro*, 842 F.2d 1149, 1152 (9th Cir. 1988), *cert. denied*, 488 U.S. 866 (1988), quoting *United States v. Ramirez*, 710 F.2d 535, 539 (9th Cir. 1983), quoting *United States v. Ryan*, 548 F.2d 782, 789 (9th Cir. 1986) *cert. denied*, 430 U.S. 965 (1977). The government's involvement must be *malum in se* or amount to the engineering and direction of the criminal enterprise from beginning to end. *United States v. Williams*, 791 F.2d 1383, 1386 (9th Cir., 1986) *cert. denied*, 479 U.S. 869 (1986).

¹⁴⁸ 16 U.S.C. § 1533(b)(2).

¹⁴⁹ *Id.* § 1533 (a)(3). The Secretary: "(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and (B) may, from time-to-time thereafter as appropriate, revise such designation."

¹⁵⁰ *Id.* § 1532(5)(B). "Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established"

¹⁵¹ *Id.* §§ 1538(a)(1)(B), 1540(a), 1540(b).

¹⁵² *Christy v. Hodel*, 857 F.2d 1324, 1334 (9th Cir. 1988) *cert. denied*, 490 U.S.

Instead, the ESA authorizes the imposition of criminal fines for a criminal conviction.¹⁵³ The statute does not authorize the taking of private property upon conviction for an unlawful take, nor does the Act authorize additional penalties upon conviction of a criminal offense.¹⁵⁴

During the course of plea negotiations, the government and defense counsel discussed proposed mitigation measures for the future incidental taking of endangered species on the defendant's property. Therefore, the defendant could not rely on the substance of plea negotiations to claim that prosecutors were attempting to take its property.¹⁵⁵

C. The Forfeiture Issue

The ESA also authorizes forfeiture of equipment used in an unlawful take.¹⁵⁶ The government argued that the seizure of the tractor was authorized by a search warrant issued upon a showing of probable cause that a violation of the unlawful take provision had occurred. Subsequent to the warrant, one Ford tractor, one offset disc and five carcasses or parts of suspected Tipton kangaroo rats were taken from the property. The tractor was subsequently returned.

The government argued that whether the defendant knew it needed a permit or whether it was aware that the property was the habitat of an endangered specie was irrelevant because the offense was a general intent crime. Prosecutors also urged pre-trial exclusion of irrelevant evidence regarding the defendant's knowledge, alleging that the Ninth Circuit had excluded such evidence in other cases that involved general intent crimes.¹⁵⁷

The government contended that Ming-Lin had been given official notice of the threat he posed to endangered species on his land through a certified letter mailed more than a year before his arrest. He also had been advised by his foreman and son that a permit was required before discing. The defense argued that Ming-Lin had no prior knowledge, that he did not know of en-

1114 (1989).

¹⁵³ 16 U.S.C. § 1538(a)(1)(b).

¹⁵⁴ *Id.* §§ 1538, 1540(b)(1).

¹⁵⁵ FED. R. EVID. 410.

¹⁵⁶ 16 U.S.C. § 1540(e)(4)(B).

¹⁵⁷ *United States v. Cupa-Guillen*, 34 F.3d 860 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 921 (1995).

dangered species on his land, and that there were laws in the United States that would prevent him from farming his land until he compensated the government for any harm to the endangered species living there.

The government has said the charges against Ming-Lin and Wang Lin Co. could have been avoided had the corporation simply sought a permit for an incidental take.¹⁵⁸ It would have been the same activity, yet Wang Lin Co. would have been given the government's blessing to farm or develop the property had it applied for a permit. The Secretary may issue a permit to a private property owner for the incidental take of endangered species when an agreement is made to provide funding for mitigation.¹⁵⁹ Wang Lin Co. did not apply for a permit,¹⁶⁰ and thus the mitigation provisions that might have provided for land transfer did not apply.¹⁶¹

D. Resolution of the Wang Lin Case

On May 1, 1995, the government and Wang Lin Co. filed a Stipulation and Order resolving the action. Criminal prosecution was deferred until October 30, 1995, under the following conditions:

1. The defendant agreed to refrain from committing any unauthorized takings in connection with the property.

2. Should defendant apply for a section 10(a) permit, the USFWS and Wang Lin Co. would work in good faith toward development of all elements of the permit application.

3. The defendant agreed to donate \$5,000 to the Center for Natural Lands Management, to be earmarked for habitat conservation in Kern County.

4. The government agreed to dismiss the action on October 30, 1995, provided all conditions had been met.

¹⁵⁸ 16 U.S.C. § 1539(a)(1)(B) provides that the Secretary may issue a permit for "any taking otherwise prohibited by section 9(a)(1)(B) [16 U.S.C.S. § 1368 (a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."

¹⁵⁹ *Id.*

¹⁶⁰ Interview with Karen A. Kalmanir, Assistant U.S. Attorney, in Fresno, Cal. (Oct. 24, 1995).

¹⁶¹ Government's Opposition to Motion to Dismiss Based on Alleged Procedural and Substantive Due Process Violations, *United States v. Wang Lin Co.*, No. 94-5061 (E.D. Cal. Feb. 21, 1995).

5. The government agreed not to subject the defendant to civil or administrative action for any alleged, unauthorized past takings upon dismissal of the criminal case.¹⁶²

All of the conditions were met and the government dismissed the action.¹⁶³

V. CONSIDERATIONS OF PROPOSED LEGISLATION AND THE EFFECTS OF CASE LAW

A. *Proposed Amendments to the Endangered Species Act*

In an effort to balance the methods by which endangered or threatened species are protected while safeguarding the rights of private property owners, legislators in both houses of Congress submitted proposals for an Endangered Species Conservation and Management Act of 1995.

By April 1996, however, it appeared that the proposals would not receive congressional approval. Lawmakers were skeptical that there would be a dramatic rewriting of the ESA by the 104th Congress.¹⁶⁴

Both the House and the Senate versions of the proposed legislation clarified that habitat modification is not a "take" of a specie unless there is direct impact on a member of the specie for purposes of criminal prosecution under the ESA, bypassing the U.S. Supreme Court's decision in *Babbitt*.

Additionally, the Senate version,¹⁶⁵ authored by Sen. Slade Gorton (R-Wash.), Sen. Bennett Johnston (D-La.), and Sen. Richard Shelby (R-Ala.), exempted residential property from provisions of the ESA altogether, eliminating the government's ability to prosecute for criminal violations that occur on privately owned lands and that eradicate endangered species. The bill gave the Secretary discretion to exempt five acres or less of contiguous property from provisions of the Act if the proposed activity does not present imminent threat to the existence of endangered or threatened species.

The Senate bill purported to return to "the original intent of

¹⁶² Stipulation and Order, *United States v. Wang Lin Co.*, No. 94-5041 (E.D. Cal. May 1, 1995).

¹⁶³ Interview with Karen A. Kalmanir, Assistant U.S. Attorney, in Fresno, Cal. (Nov. 27, 1995).

¹⁶⁴ Michael Doyle, *Endangered Species Reforms Caged*, FRESNO BEE, April 1, 1996 at A1.

¹⁶⁵ S. 768, 104th Cong., 1st Sess. (1995).

Congress¹⁶⁶ when it enacted the 1973 Act by codifying the D.C. Circuit's opinion in *Babbitt*. Both the House and Senate versions required that criminal activity would be limited to a person's direct actions that actually injure or kill a member of the specie.

Additionally, both versions provided for general permits that would exempt specific categories of activities from liability for a taking for a period of five years. To qualify for exemption, an activity must have minimal individual and cumulative adverse effects on the species.

The House proposal,¹⁶⁷ introduced by Sen. Richard Pombo (R-Cal.) and House Resources Committee chairman Don Young (R-Alaska), included a provision to compensate a private property owner, through short- or long-term agreements or purchase, when restrictions imposed by the ESA diminish a property's value by 20% or more. The provision required the government to buy the property, with the consent of the owner, if the value is diminished by 50% or more. Critical habitat could not be designated on private property without the consent of the landowner or payment of compensation.

B. *Post-Babbitt Analysis*

Concurring and dissenting opinions in *Babbitt* suggest that the issue may not have been put to rest by the ruling, providing fodder for future arguments that the majority's holding may give habitat protections that are far too broad.

In *Babbitt*, Justice O'Connor, in her concurring opinion, urged that the ESA and related regulations be interpreted to limit their application to significant habitat modification¹⁶⁸ causing actual—not hypothetical or speculative—death or injury to identifiable protected animals. She also noted that application of the law should be limited by ordinary principles of proximate causation.¹⁶⁹

¹⁶⁶ Sen. Slade Gorton news release, *People Will Be "Equal Partners" on ESA*, May 9, 1995.

¹⁶⁷ H.R. 2275, 104th Cong., 1st Sess. (1995).

¹⁶⁸ Justice O'Connor gave the example of "significant habitat modification that kills or physically injures animals which, because they are in a vulnerable breeding state, do not or cannot flee or defend themselves, or to environmental pollutants that cause an animal to suffer physical complications during gestation." *Babbitt*, 115 S. Ct. 2407 (O'Connor, J., concurring).

¹⁶⁹ *Id.* at 2420.

Justice Scalia's dissent, joined by the Chief Justice Rehnquist and Justice Thomas, pointed out that the ESA forbids killing of endangered species and permits federal funds to be used for the acquisition of private lands to preserve the habitat of endangered animals. However, the Court's ruling that the killing prohibition was a necessity to preserve habitat on private lands "imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."¹⁷⁰

CONCLUSION

The government's reliance upon an environmental statute to criminally prosecute individuals is considered by many to be of questionable value. Regarding cases involving habitat modification, prosecutors are left with little guidance on the level of proof necessary to establish a knowing violation in light of the general intent standard. The inclusion of habitat degradation within the "harm" definition further complicates prosecution by broadening the net and triggering private citizen concern.

Both Republican and Democratic legislators, particularly on the East Coast, say you can't protect a species without protecting its habitat. However, some in Congress propose to eliminate the habitat modification interpretation of *Babbitt*, narrowing the scope of prosecution under the ESA to actual killing of an individual animal.

Perhaps an application that makes violation a specific-intent crime would still be broad enough to protect species in danger of extinction while clarifying the scienter needed for prosecution. On the other hand, a specific-intent requirement would likely ensure *no* criminal prosecutions, thus leading endangered species to actual extinction.

Perhaps *Tule Vista Farms* is demonstrative of things to come. Tule Vista Farms pled guilty to knowingly discing 160 acres of native grasslands inhabited by the blunt-nosed leopard lizard on the edge of the Pixley National Wildlife Refuge.¹⁷¹ Tule Vista Farms admitted in the settlement that it knew there might be endangered species on the family-owned land. A few years before, in fact, it had sold an adjacent 320 acres to the government for

¹⁷⁰ *Id.* at 2421 (Scalia, J., dissenting).

¹⁷¹ *United States v. Tule Vista Farms*, No. 94-5061 (E.D. Cal. April 20, 1994).

wildlife habitat.¹⁷²

Under the plea agreement, Tule Vista Farms deeded the entire 160-acre parcel to the USFWS to become part of the wildlife refuge. About 60 acres represented land of equivalent value for compensation, mitigation and fines in excess of \$93,000. The remaining approximately 100 acres were purchased from Tule Vista Farms.¹⁷³

Perhaps in the future land will be purchased at its full value by the government after endangered species are discovered but before criminal violations occur. This would fully compensate private property owners for land made economically nonviable by the presence of a species society seeks to protect.

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¹⁷² Clemings, *supra* note 2.

¹⁷³ U.S. Dep't of Justice, *Tule Vista Farms Convicted of Violating the Endangered Species Act by Destroying Habitat* (April 20, 1994).

