

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET
AL., Petitioners v. SWEET HOME CHAPTER OF
COMMUNITIES FOR A GREAT OREGON, ET AL.

CASE NO: No. 94-859

PLACE: Washington, D.C.

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 BRUCE BABBITT, SECRETARY OF :
4 THE INTERIOR, ET AL., :
5 Petitioners :
6 v. : No. 94-859
7 SWEET HOME CHAPTER OF :
8 COMMUNITIES FOR A GREAT :
9 OREGON, ET AL. :
10 - - - - -X
11 Washington, D.C.
12 Monday, April 17, 1995
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:02 a.m.
16 APPEARANCES:
17 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the Petitioners.
20 JOHN A. MACLEOD, ESQ., Washington, D.C.; on behalf of the
21 Respondents.
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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 94-859, Bruce Babbitt v.
5 Sweet Home Chapter of Communities for a Great Oregon.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF THE PETITIONERS

9 MR. KNEEDLER: Mr. Chief Justice and may it
10 please the Court:

11 The court of appeals in this case invalidated a
12 longstanding regulation of the Secretary of the Interior
13 that interprets the term "harm" as that term is used in
14 the Endangered Species Act's prohibition against the
15 taking of listed species. The regulation defines the
16 statutory term "harm" to mean an act which actually kills
17 or injures wildlife.

18 The second sentence elaborates upon that basic
19 definition in one particular circumstance. It provides
20 that harm includes significant habitat modification or
21 degradation that actually kills or injures wildlife by
22 significantly impairing its essential behavioral patterns,
23 including breeding, feeding, or sheltering.

24 The court of appeals invalidated this regulation
25 on its face. The court concluded that the take

1 prohibition in section 9 of the act applies only to the
2 direct applications of force against wildlife.
3 Respondents argue for a comparably narrow interpretation
4 saying that the take prohibition, including harm, applies
5 only to conduct that is purposeful and directed at
6 wildlife. In our view, both of these narrow constructions
7 are wrong.

8 A party challenging a regulation on its face
9 bears a very heavy burden of showing that no circumstances
10 exist under which the regulation may be valid. In this
11 case, we submit that respondents have failed to show that
12 Congress categorically excluded those deaths or injuries
13 to protected wildlife that result from habitat
14 modification.

15 QUESTION: Would you tell us preliminarily,
16 Mr. Kneedler, what the mens rea requirement is under this
17 statute?

18 MR. KNEEDLER: For a criminal violation --

19 QUESTION: Yes.

20 MR. KNEEDLER: -- knowing. The statute
21 specifically requires in section 11(b) that the person
22 must act knowingly. That's also true for --

23 QUESTION: Well, does that go to everything in
24 the statute? Must a person know that an endangered -- an
25 animal that's in an endangered species category --

1 MR. KNEEDLER: No --

2 QUESTION: -- is at risk?

3 MR. KNEEDLER: No. The person must -- need not
4 know that. In fact, Congress specifically amended the act
5 in 1978 to change the scienter from wilfully to knowingly,
6 to change it from a specific intent crime to a general
7 intent crime.

8 QUESTION: But why wouldn't a defendant in a
9 criminal case have to know that a particular animal was
10 endangered?

11 MR. KNEEDLER: That is a question of knowledge
12 of the law which is nor ordinarily required. What is
13 required, though, under our interpretation of knowingly,
14 is that the person must know that the conduct in which he
15 is engaging will have the prescribed effect on the
16 protected wildlife. In other words, he must know that
17 there is significant habitat modification for wildlife,
18 and must know that it will impair the behavioral patterns,
19 such as depriving it of food, depriving it of essential
20 shelter.

21 QUESTION: Well, do you think that our holding
22 in X-Citement Video bears on the interpretation of the
23 mens rea requirement?

24 MR. KNEEDLER: Well, in X-Citement Video, the
25 Court made clear, I believe, that it was not necessary

1 that the person know that the material was obscene in the
2 legal sense, but what the person did have to know was the
3 general character of the material in terms of its
4 displaying explicit sexual acts involving minors.

5 So here we believe what the person has to know
6 is that his conduct will have the effect on the wildlife,
7 but what -- the only thing he doesn't have to know is that
8 the species is listed, and that was what Congress was
9 driving at by changing the mens rea requirement from
10 wilful to knowingly.

11 QUESTION: But would have to know, for
12 example -- if you drained a pond on your property, you'd
13 have to know that there is a particular frog or
14 whatever --

15 MR. KNEEDLER: Right.

16 QUESTION: -- it is in the water --

17 MR. KNEEDLER: That's correct.

18 QUESTION: -- before you could be --

19 MR. KNEEDLER: That's correct.

20 QUESTION: Do you think that that Palila case
21 from Hawaii is consistent with your view?

22 MR. KNEEDLER: We do. What -- the position --
23 there may be some question on the facts whether the
24 anticipated harm to the protected bird there was
25 sufficiently immediately likely to happen, but the

1 analysis that the Court applied as a legal matter we
2 believe is correct, because there --

3 QUESTION: What actual injury or death was found
4 there, do you know?

5 MR. KNEEDLER: Yes. The goats and sheep that
6 were permitted to graze there were eating the shoots of
7 the trees on which the protected bird depended for its
8 entire habitat, in fact, for feeding, for shelter, and
9 ultimately for breeding, and we think that this fits very
10 readily into the normal understanding of what the word
11 "harm" means.

12 QUESTION: What about the word "take"? Let's
13 start with the word "harm" -- "take." We have here a
14 statute. The operative provision of the statute is the
15 provision that says it is unlawful for any purpose -- for
16 any person subject to jurisdiction of the United States to
17 take any protected species within the United States.

18 MR. KNEEDLER: Right. Well, "take" --

19 QUESTION: That word goes all the way back, and
20 to take an animal, it's clear what to take an animal
21 means, absent a definition. To take an animal refers to
22 hunters.

23 MR. KNEEDLER: Right. Well, Justice Scalia --

24 QUESTION: Is that not correct?

25 MR. KNEEDLER: Historically --

1 QUESTION: Historically, I've never heard it
2 used in any other way, to take an animal, to take a
3 species of animal. Okay. Step 1.

4 Then, step 2, you're going to say, but there is
5 a definition of "take" in this case. The definition
6 happens to contain the word "harm."

7 The word "harm," and every other word within
8 that definition, can be interpreted in a way consistent
9 with that old-fashioned meaning of "take," but the agency
10 here has chosen to take that one word, "harm," and instead
11 of giving it a meaning consistent with "take," has given
12 it a meaning that makes the word "take" an absolutely
13 inappropriate word to use in that operative provision of
14 the statute.

15 MR. KNEEDLER: Well --

16 QUESTION: You're saying you take an animal when
17 you plow your land and accidentally destroy the habitat of
18 the animal. You have taken the animal. I mean, nobody --
19 nobody would use the word in that sense.

20 MR. KNEEDLER: Well, the concept of "take" may
21 have its -- I think does have its roots in ancient
22 wildlife law as you're describing, but what Congress has
23 done is built upon that an extrapolated from that, and in
24 this --

25 QUESTION: Only if you choose to interpret the

1 word "harm" the way you want to interpret it. It can be
2 interpreted another way that fits perfectly well within
3 the concept of "take."

4 MR. KNEEDLER: But Congress -- there were prior
5 Federal wildlife statutes that did not contain the word
6 "harm," in fact did not contain the word "harass." The
7 Migratory Bird Treaty Act did not contain either of those
8 words, and yet, for example, in the FMC case we cite in
9 our brief, a corporation was convicted of a crime for
10 discharging chemicals into a pond.

11 The birds landed on it, and died as a result of
12 landing there. Now, they died -- it was not in the
13 classic sense hunting. It was in that respect changing
14 the habitat where the bird would land, and even under a
15 statute that didn't contain "harm" --

16 QUESTION: Was that a case from this Court?

17 MR. KNEEDLER: No, it wasn't, it was -- but it
18 is --

19 QUESTION: Was that issue specifically raised
20 within the case?

21 MR. KNEEDLER: Yes. It was argued in that case
22 that that wasn't "kill," and the court of appeals in that
23 case found that it was "kill."

24 What Congress did in the Marine Mammal
25 Protection Act was add the word "harass," and then in this

1 statute specifically added the word "harm," and we think
2 that Congress --

3 QUESTION: But we don't regard a court of
4 appeals case as any sort of a binding precedent.

5 MR. KNEEDLER: No, I understand that. I'm just
6 describing it in terms of how the predecessor statutes,
7 other statutes on which Congress was presumably building
8 when it added the words "harass" and "harm."

9 If I could, there are --

10 QUESTION: What was the operative word in that
11 other statute? It was also "take"?

12 MR. KNEEDLER: It was -- the statute included
13 "take." It also included "kill," and what the court was
14 interpreting there was "kill," but --

15 QUESTION: Mr. Kneedler, this regulation
16 interpreting --

17 MR. KNEEDLER: Yes.

18 QUESTION: -- "harm" has been on the books since
19 1975?

20 MR. KNEEDLER: Yes. It was promulgated almost
21 contemporaneously with the passage of the act, soon after
22 that, and significantly, then, this Court in its
23 celebrated case in TVA v. Hill concluded in that case,
24 pointed out not only that the construction of the Tellico
25 Dam would have violated section 7 of the act, but that it

1 would have also violated the take prohibition, because it
2 would have destroyed the habitat of the snail darter that
3 was necessary both for breeding, or for spawning, and for
4 feeding.

5 The Court pointed out that the act is pervasive
6 in its protection for species, and pointed out with
7 specific reference to the habitat aspect of the harm
8 regulation, saying we don't see how completion of the dam
9 could other than harm the snail darter, so --

10 QUESTION: How has the enforcement of the --
11 that was a case involving the Government, but against --
12 enforcement against private actors, how has that come
13 about over the years? Before you were engaged in an
14 explanation of the criminal prosecution prospect, but in
15 fact, what has the enforcement experience been?

16 MR. KNEEDLER: There have only been seven
17 criminal prosecutions.

18 What Fish & Wildlife Service typically does is
19 when a problem, or potential problem, has come to its
20 attention, it notifies the landowner and invites the
21 landowner to contact Fish & Wildlife Service, because this
22 is not an absolute prohibition.

23 The harm regulation does not establish an
24 absolute prohibition. What it does is trigger a
25 requirement that a person, if he wants to develop his land

1 or do something that would destroy critical or essential
2 habitat, to apply for a permit and enable the Fish &
3 Wildlife Service to suggest ways in which that activity
4 could be done in a way that would minimize the harm.

5 QUESTION: It's only absolute if Fish & Wildlife
6 wants it to be absolute.

7 MR. KNEEDLER: Well, the Fish & Wildlife
8 regulations in 50 C.F.R. 1732(b) say that Fish & Wildlife
9 shall issue a permit if the statutory criteria --

10 QUESTION: Whose regulations?

11 MR. KNEEDLER: The Fish & Wildlife regulations.

12 QUESTION: Which they can change.

13 MR. KNEEDLER: But they have -- since the
14 statute was passed these regulations have provided that a
15 permit shall be issued. It's designed consistent with the
16 overall thrust of the act to protect the species to ensure
17 that before someone goes ahead and destroys habitat in a
18 way that may be completely unnecessary, that he obtain the
19 advice and assistance of the expert agency in a way that
20 it might be tailored.

21 For example, in the Spotted Owl, if a person
22 applies for an incidental take permit, what the Fish &
23 Wildlife Service may say is fine, go ahead, but preserve
24 some habitat along the stream for the owls to fly from one
25 habitat to another, or don't clearcut, just take some

1 trees in ways that would minimize the taking of
2 protected species.

3 QUESTION: Because when you take trees, you're
4 taking the owl. That's the theory of this? I mean, I
5 note the way you use "take trees."

6 MR. KNEEDLER: Well, if I may --

7 QUESTION: The whole spotted owl thing is based
8 on the notion that people who are harvesting trees are
9 taking owls?

10 MR. KNEEDLER: If I may, on the word "take,"
11 there are other uses of the word "take" that I think are
12 instructive here. For example, the other use of the word
13 "take" that has been brought into this very case is that
14 the Takings Clause of the Fifth Amendment, and there the
15 Court has held that "take" does not, in the way
16 respondents are arguing, mean only the physical
17 appropriation of property. It also applies to regulations
18 that restrict the use of property.

19 QUESTION: Is that a realistic assessment of the
20 meaning that was intended in this particular statute by
21 the word "take"?

22 MR. KNEEDLER: Well, but there's -- it's a word
23 with many, many meanings.

24 QUESTION: I mean, you could say "take" means to
25 commit theft, too. You take something from someone else.

1 But obviously, that's not the meaning used here.

2 MR. KNEEDLER: Well, but there is -- the
3 word "take" also has a meaning of taking lives. For
4 example, one might say that a flood that inundated a
5 valley took 50 lives, and that's not hunting, it is action
6 which has the consequence of eliminating --

7 QUESTION: It can mean, too, you know -- he did
8 a double take. It can mean a lot of things.

9 (Laughter.)

10 QUESTION: But when you say you "take" an
11 animal, it means you hunt the animal and reduce it to your
12 control by wounding it, by killing it, by harming it. It
13 means harming the animal, not harming the forest, which
14 causes the animal to starve to death. To say that that's
15 taking an animal seems to me just weird.

16 MR. KNEEDLER: But if you're harming the animal
17 in a way that affects its essential behavioral
18 characteristics -- for example, take the salmon that would
19 be swimming up the river to spawn. If you put a barrier
20 in the river so it can't reach its spawning grounds, the
21 salmon may die in the same period of time, but will not be
22 able to reproduce.

23 I think that's "harm" within any meaning of that
24 term, and again, the word "harm" is a statutory term.
25 It's not just "take." Congress supplied a definition

1 which includes "harm," a definition that this Court
2 referred to the way the Secretary had given content to
3 that in TVA v. Hill.

4 And then, if I may, in 1982, significantly, and
5 this is very important, what Congress did was enact a
6 permit program recognizing, specifically recognizing in
7 the Senate report that "harm" means habitat modification
8 that harms a species.

9 What Congress did was enact a permit program
10 that permits such takings, incidental takings to go
11 forward, but only in specific circumstances, not that
12 they're entirely outside the act, but resting on the
13 premise that they are covered by the harm regulation.

14 Congress said they may go forward if they are
15 incidental and not the purpose of the conduct, and we
16 think those statutory phrases are inconsistent with
17 respondent's position that "harm" or "take" applies only
18 to purposeful conduct that is aimed at a species such as
19 hunting.

20 QUESTION: Mr. Kneedler --

21 QUESTION: Because --

22 QUESTION: I'm sorry.

23 QUESTION: No, I'm sorry.

24 QUESTION: Go on. I've asked a lot.

25 QUESTION: Your point -- I take it your point is

1 it's inconsistent because the statutory modification in
2 effect recognized the regulation as being reasonable, I
3 suppose.

4 MR. KNEEDLER: That's right, and also on the
5 face of the act we think refutes respondent's suggestion
6 that it refers only to such things as hunting that are
7 aimed at or directed at a specific animal --

8 QUESTION: No, but you don't --

9 MR. KNEEDLER: -- because the statute --

10 QUESTION: May I just interrupt you? I take it
11 you're not arguing that in the absence of a regulation the
12 word "harm" would cover what you claim it covers in this
13 case?

14 MR. KNEEDLER: Well, there still might be a
15 question, if the Secretary had given it that
16 interpretation, but here, under Chevron, the Secretary has
17 given it this interpretation for 17 years this Court
18 recognized that Congress responded to it and built upon
19 that, and we think at least under Chevron the word "harm"
20 carries that meaning, and Congress recognized that by
21 saying that you can get a permit to engage in activity
22 that harms a species incidentally, and not for the
23 purpose --

24 QUESTION: Mr. Kneedler, the later statutory
25 modification which acknowledges, let's assume that it

1 does, that it includes habitat modification, I would find
2 that persuasive if what that modification did was add some
3 new restriction or talk about the nature of the
4 restriction that had previously been imposed, but all this
5 amendment does is enable you to get out of the
6 restriction.

7 Let's assume I'm a Congressman who voted for the
8 original Endangered Species Act, and when I said, in that
9 statute, it's unlawful to take any protected species, I
10 thought I meant it's unlawful to take any protected
11 species, and I find that this agency has interpreted
12 "take" to mean no citizen in the country can do anything
13 to his land if it harms a species.

14 And I say, my God, that's terrible, and I try to
15 get enough votes to get that repealed, to get that
16 interpretation repealed in the statute. I cannot get
17 enough votes. There have never been enough votes to enact
18 it, but there are also not enough votes to repeal it.

19 So I say, well, at least let's give Fish &
20 Wildlife the authority to grant an exemption from it. It
21 won't be as bad. In fact, require them to consider
22 exemptions from it. That's a perfect explanation of that
23 modification, and it at no time gives you a majority in
24 the Congress who thought that every citizen in the country
25 can be prevented from using his own land if that

1 modification is going to modify -- is going to harm
2 wildlife.

3 MR. KNEEDLER: Well, Justice Scalia, in the
4 background of both the 1978 and 1982 amendments there is
5 no suggestion that this was a crazy interpretation of the
6 word "harm." Congress proceeded on the assumption that
7 this was a valid interpretation of the word "harm." There
8 was a proposal by Senator Garn to amend "harm" -- to amend
9 "take" to exclude forestry practice --

10 QUESTION: But is that assumption binding upon
11 us? If Congress enacts a mitigating statute based on what
12 is an incorrect interpretation of the statute, does that
13 make the statute suddenly change its interpretation?

14 MR. KNEEDLER: It may not change -- it
15 doesn't -- it's not binding in that respect. At the very
16 least, though, we would think it reinforces the
17 reasonableness of the Secretary's prior interpretation
18 under Chevron by adding a permit program when Congress
19 could very well have altogether exempted such a proposal,
20 which Senator Garn offered and withdrew.

21 QUESTION: They didn't have the votes for it.
22 They didn't have the votes for it. Having the votes for
23 it. Having the votes to overturn it is quite different
24 from having the votes to enact it in the first place. If
25 they never had the votes to enact it in the first place,

1 we shouldn't be enforcing it upon all the citizens of the
2 country.

3 QUESTION: Which do you think is more
4 persuasive, Mr. Kneedler, speculation about what Congress
5 might have done, or the actual record of what they did in
6 the legislative history?

7 MR. KNEEDLER: Well, we think the 1982
8 amendments are immensely significant, because of the
9 exemptions that Congress did enact, and enacted under
10 carefully limited circumstances, to enable the Fish &
11 Wildlife Service to ensure that the incidental takes that
12 may occur as a result of land development and other
13 activities do not jeopardize the species, and
14 significantly, the conference report is unusually explicit
15 in the type of situation that Congress was driving at in
16 this situation, and that is a conservation, a habitat
17 conservation plan, and the conference report uses this
18 language: a habitat conservation plan to preserve the
19 feeding and breeding habitat of a butterfly, endangered
20 butterfly on San Bruno Mountain, south of San Francisco,
21 which could not have gone forward under the harm
22 legislation.

23 Congress then, explaining the way the 1982
24 permit process was supposed to work, endorsed what was
25 done there, which was a cooperative effort among the Fish

1 & Wildlife Service, the county, municipalities, and the
2 private developer --

3 QUESTION: You say Congress endorsed it. How
4 did Congress go about --

5 MR. KNEEDLER: By each House passing the
6 conference report which contained this explanation of --

7 QUESTION: Well, a conference report isn't the
8 same thing as legislation.

9 MR. KNEEDLER: I -- that is certainly true,
10 but --

11 QUESTION: And each House doesn't pass it. What
12 do you mean, each House passing -- did the whole House
13 vote on the conference report? Is there a vote on a
14 conference report? I thought they vote on the bill.

15 MR. KNEEDLER: They vote on the bill, but it is
16 often expressed in terms of approving the report of the
17 conference committee.

18 In any event, what was clearly before Congress
19 was an explanation of how this was expected to work, which
20 was a situation such as that, or for a small landowner who
21 wanted to develop land or timber harvest, to come in with
22 a proposal to say, this is how I plan to do it. I plan to
23 take the following precautions to minimize the harm to
24 this protected species, and you can get a permit, and
25 that, in our view, is a very sound way for Congress to

1 have enacted a statute and for it to be administered.

2 It's much like Riverside Bayview Homes, where
3 the Court emphasized that the fact that there was a
4 regulatory regime affecting adjacent wetlands did not mean
5 that no one was going to ever be able to fill adjacent
6 wetlands. It just meant that there was a permit program so
7 that that particularly sensitive environmental area would
8 be scrutinized by the expert agency. The same thing is
9 true here.

10 QUESTION: Mr. Kneedler, do I understand that
11 these respondents, none of them have -- there's been no
12 enforcement against any of them. There's been no
13 application for a permit.

14 MR. KNEEDLER: That's correct. This has come up
15 as a facial challenge, and so there's nothing before the
16 Court in terms of how the permit application would be
17 reviewed, and whether respondents could then argue that if
18 a permit was denied, that it was improperly denied, but
19 here we have a challenge to a regulation on its face,
20 arguing essentially that Congress categorically excluded
21 harm resulting from habitat modification.

22 QUESTION: It didn't categorically include,
23 would be a better -- it didn't include, would be a better
24 way of putting it.

25 MR. KNEEDLER: But the common theme, we think,

1 that runs throughout the definition of "take" to which
2 Congress added the word "harm," an expansive word, as
3 respondents and the court of appeals recognized, is to
4 take all steps necessary to prevent injury to species that
5 Congress declared and this Court recognized in TVA v. Hill
6 were of national importance, both --

7 QUESTION: But Mr. Kneedler, I'm not sure that I
8 understand the other side's argument as categorically
9 excluding the habitat modification as a step which might
10 lead to liability.

11 If -- I don't understand the other side to be
12 arguing that if I had a spotted owl nesting in the tree
13 outside, and I went outside and cut the tree down for the
14 express purpose of killing the owl, who would go down with
15 the tree and be crushed, that that would be excluded from
16 liability.

17 It's habitat modification -- I think what
18 they're arguing is simply that habitat modification which
19 does not have a purpose to kill or eliminate the species
20 by these various means is excluded.

21 MR. KNEEDLER: That --

22 QUESTION: Some habitat modification can be an
23 interim step, but it's not a separate generic category.

24 MR. KNEEDLER: Right --

25 QUESTION: I think that's what they're arguing.

1 MR. KNEEDLER: That may be, but we think that's
2 a question of proximate causation and degree and a factual
3 question of whether the --

4 QUESTION: And their answer to that argument is
5 that once you get beyond the sort of specific intent to
6 kill through habitat modification, you're getting beyond
7 the purposeful activity which is the common thread of all
8 the more specific verbs in the definition.

9 MR. KNEEDLER: But purposeful -- purposeful --
10 two responses to that. First of all, within the
11 definition of "take" itself, "purposeful" is not a common
12 thread. One could kill --

13 QUESTION: Why isn't it a common thread, except
14 for the generic word "harm"?

15 MR. KNEEDLER: Well, "kill," for example, in the
16 hypothetical I was -- or the case I was describing before
17 of chemicals spilled into a pond that would kill a bird
18 that landed there, the chemicals were not put in the pond
19 for the purpose of killing the wildlife, and yet it had
20 that effect.

21 QUESTION: "Kill" is a species of "take." It
22 carries a purposeful connotation, doesn't it?

23 MR. KNEEDLER: Well, we think it does not, and
24 the other reason we think it does not is because the
25 criminal and civil penalty statutes contain a scienter

1 requirement of knowledge, but in the separate sections
2 that deal with civil penalties and criminal penalties, so
3 for an injunctive action you don't need to prove
4 knowledge, and there's no reason why Congress would have
5 wanted to show knowledge.

6 What Congress was focusing on was the impact on
7 these species which Congress determined to be of national
8 importance, not the blameworthiness of individuals when it
9 comes to civil injunctive actions.

10 QUESTION: Mr. Kneedler, do you know of any
11 other Federal criminal statute that provides for an
12 attempt crime that is attached to something other than a
13 purposeful crime, because this definition, which includes
14 "harm" -- the definition of "take" it says means to
15 harass, harm, pursue, hunt, wound, kill, trap, capture, or
16 collect, or to attempt to engage in such conduct.

17 Now, what do you mean? This means to attempt to
18 cut down a forest?

19 MR. KNEEDLER: I think it would encompass a
20 situation if you -- for example, if you attempted to block
21 passage of salmon to a spawning ground but were
22 unsuccessful, that would be an attempt to harm the salmon
23 species.

24 QUESTION: Attempt does suggest a very
25 purposeful intent.

1 MR. KNEEDLER: Yes, but that's the second half
2 of the definition, or attempt to do any of those things.
3 The first half of the definition does not contain the word
4 "attempt."

5 QUESTION: But you're saying you don't have to
6 attempt to stop the salmon from reaching their breeding
7 ground. That's your whole point. You don't have to be
8 attempting to doing that. All you want to do is build a
9 dam or something, and so the attempt would be the attempt
10 to build a dam.

11 MR. KNEEDLER: But for criminal liability you
12 would have to have knowledge of the consequence.

13 QUESTION: Knowledge --

14 MR. KNEEDLER: But for the action itself, no,
15 you would not have to have knowledge, and again, there's
16 no reason why Congress would have wanted that for an
17 injunctive action, because what Congress was focusing on
18 was the impact on the species.

19 Congress did not want the species to be
20 incidentally, accidentally killed, or have its essential
21 feeding or sheltering grounds eliminated, and so --

22 QUESTION: Your argument is that the act may be
23 satisfied by a completed act which isn't purposeful, but a
24 purposeful attempt --

25 MR. KNEEDLER: Will satisfy it as well. That's

1 correct.

2 If I may, I'd like to reserve the balance of my
3 time.

4 QUESTION: Very well, Mr. Kneedler.

5 Mr. MacLeod, we'll hear from you.

6 ORAL ARGUMENT OF JOHN A. MACLEOD

7 ON BEHALF OF THE RESPONDENTS

8 MR. MACLEOD: Mr. Chief Justice, and may it
9 please the Court:

10 I'd like to address three points this morning in
11 response to the Government's argument. First, I'd like to
12 talk about the text and structure of the act, and show
13 what "take" means in its statutory context, how it is
14 clear that in section 9 Congress was focused on certain
15 types of conduct, and wasn't attempting to establish a
16 broad, regulatory authority over any form of human
17 activity based solely on what its injurious effect might
18 be to wildlife.

19 Secondly, I'd like to talk about some of the
20 hard cases that come up under the statute, and in doing
21 so, I want to emphasize that the regulation, because it
22 focuses on effect and not on the types of conduct with
23 which Congress was concerned, will assure that the wrong
24 questions are asked about whether a take occurred in every
25 instance.

1 Finally, I'd like to say something about the
2 1982 amendments and the meaning of incidental take.

3 The 1973 Congress focused on two threats to rare
4 species. It wanted to stop the destruction of their
5 necessary habitat, and it wanted to stop people from
6 hunting and killing them and trading in them. It
7 addressed the habitat destruction issue in sections 5 and
8 7. Those provisions say that that's what they're about.

9 Section 5 in particular provides a very
10 effective means for addressing the very problems that the
11 Secretary claims authority to regulate under section 9.
12 It is a land acquisition authority in which Congress said
13 to the Government, if you need to protect habitat, you
14 have the authority and the funding to do so.

15 Section 9 has a very different purpose. It
16 zeroed in on the issue of hunting and killing rare
17 animals, and of putting an end to what was becoming a
18 thriving business of trafficking in them, and what it says
19 is very clear. It establishes a series of prohibited
20 acts. That's in fact the very title of section 9,
21 "Prohibited Acts," and what it says is that it is unlawful
22 to import --

23 QUESTION: Well, now, are you reading from
24 somewhere, Mr. MacLeod?

25 MR. MACLEOD: Your Honor, Mr. Chief Justice,

1 this is in section 9(a)(1).

2 QUESTION: Where may we find it? Is it in the
3 appendix to the petition?

4 MR. MACLEOD: In the petitioner's brief, Your
5 Honor, at page 14a.

6 QUESTION: Thank you.

7 MR. MACLEOD: What Congress focuses on in
8 section 9(a)(1) and its series of prohibited acts is the
9 importation, or the exportation, or the possession, or the
10 selling, or offering for sale, or transportation, or
11 delivery, or shipment, or taking of protected species.

12 The focus that you have there is on --

13 QUESTION: May I ask -- may I give you a
14 hypothetical that troubles me and get your explanation for
15 it?

16 Say I'm a real estate developer. I want to
17 build a new development in the Everglades, a new golf
18 course, say, and I have no desire to harm any endangered
19 species, but I do know that if I build this golf course a
20 certain rare bird will become extinct. Is that a taking?

21 MR. MACLEOD: No, Your Honor, not under the
22 statute as we read it. It is, of course, under the
23 regulation, because --

24 QUESTION: Yes, of course, under -- but is it
25 your view that in order to prevent that from happening the

1 Government has to acquire that land?

2 MR. MACLEOD: That is the sure way to avoid it.

3 Now, there's another protection before you get
4 to the land acquisition authority, and that's the
5 protection of section 7(a)(1) of the statute, which does
6 impose on the Federal Government a duty to avoid jeopardy,
7 as you all --

8 QUESTION: But that's on Government projects.

9 MR. MACLEOD: Well, it's not -- it's on
10 Government lands, but it is also private lands --

11 QUESTION: I'm assuming an entirely private
12 project.

13 MR. MACLEOD: Yes. If --

14 QUESTION: And is there any way to stop it,
15 other than acquiring the land?

16 MR. MACLEOD: Justice Stevens, in -- if --

17 QUESTION: What is 7(a)? Give us a real section
18 number, would you? I --

19 MR. MACLEOD: I'm sorry, Your Honor --

20 QUESTION: For those of us who are not --

21 MR. MACLEOD: Under the statute that's section
22 1536(a)(1), and that is at petitioner's brief at page 6a.

23 QUESTION: Be sure you answer my question before
24 you move on.

25 MR. MACLEOD: Thank you, Justice Stevens.

1 (Laughter.)

2 MR. MACLEOD: The answer to the question,
3 Justice Stevens, is when you're dealing with purely
4 private lands and there's no Federal permitting or
5 anything of that sort involved, yes, the answer to that is
6 to use the land acquisition authority under section 5.

7 Now, it's possible, given a particular situation
8 that if it went to a court, a court might find, in a given
9 case, that if there was enough knowledge and the end
10 result was clear, they might be willing to stretch the
11 statute or the language a little bit to reach it, but
12 certainly --

13 QUESTION: What statutory language would they
14 stretch, the word "take" and the word "harm"?

15 MR. MACLEOD: Well --

16 QUESTION: That's the only language -- or
17 "harass," I suppose.

18 MR. MACLEOD: Yes. They may try --

19 QUESTION: Those would be the words they'd have
20 to stretch.

21 MR. MACLEOD: -- to do that under the statutory
22 purpose, but the --

23 QUESTION: But under your view, they should not
24 do that.

25 MR. MACLEOD: That's --

1 QUESTION: In fact, they're categorically
2 prohibited from doing that.

3 MR. MACLEOD: That's correct as a matter of
4 statutory language, Justice Stevens. That is our view.

5 Now, the focus of section 9(a)(1) is on these
6 various kinds of specified conduct and on attempts to
7 engage in those kinds of conduct. Through this section 9
8 prohibition Congress wanted to stop, for example, such
9 things as the importation of ivory.

10 QUESTION: This is 1539, number 1539?

11 MR. MACLEOD: It's 1538 --

12 QUESTION: 38?

13 MR. MACLEOD: -- Mr. Chief Justice.

14 QUESTION: Oh, thank you.

15 MR. MACLEOD: Yes, that is --

16 QUESTION: Page 14.

17 MR. MACLEOD: 14a. Thank you. It wanted to
18 stop such things as the importation of ivory, which was
19 causing elephants to be killed. It wanted to --

20 QUESTION: Well, what do you say the mens rea
21 requirement is for the criminal statute? What do you have
22 to know?

23 MR. MACLEOD: Well -

24 QUESTION: If it's knowingly.

25 MR. MACLEOD: It is knowing, but it's also

1 knowingly violates, so you have to know what the violation
2 is, Justice O'Connor, and what that means, we think, is
3 that you not only need to know -- you need to know what a
4 take is. You need to know whether it is a violation or
5 the form of conduct which we say it is under the statute,
6 or simply is any kind of an act that may have an injurious
7 effect, which is what the Government says it is under the
8 regulations.

9 QUESTION: Does the defendant have to know that
10 a particular animal is on the Endangered Species List and
11 that the conduct will injure or kill it?

12 MR. MACLEOD: We would certainly say so,
13 although the Government's position appears to be that that
14 is not the case.

15 QUESTION: Right. I'm just asking what your
16 position is.

17 MR. MACLEOD: Yes. We would say that that
18 knowledge is necessary, Justice O'Connor.

19 QUESTION: I would think that your position, if
20 you really are serious about the word "take" and the word
21 "harm" as a definition of "take," I would think your
22 position is that it is not enough to know that the animals
23 will die. Your intent must be to reduce those animals to
24 your control.

25 MR. MACLEOD: That is very much our position,

1 Justice Scalia. I didn't mean to convey otherwise.
2 That's very clear from the way Congress has used the term
3 "take." It's a term that's used many times throughout the
4 act. You focus -- forgive me, Justice Breyer.

5 QUESTION: I mean, that's one of the problems I
6 was having, that the act doesn't say take an animal, does
7 it? It says, take a specie.

8 MR. MACLEOD: Correct, Justice Breyer.

9 QUESTION: And I don't think Daniel Boone used
10 to take species.

11 MR. MACLEOD: No.

12 QUESTION: Not even Robin Hood.

13 MR. MACLEOD: No.

14 QUESTION: So that to me signaled that this
15 might be a technical phrase, and then when I got to the
16 technical part, which is in the definition, I did read
17 this word harm, and so you're talking about harming the
18 specie.

19 Now, if a person goes out and puts guns around
20 his property that shoot up into the air in order to stop
21 sparrows, and knows that they'll also stop protected
22 birds, I take it that would violate the act, wouldn't it?

23 MR. MACLEOD: If you were intending to do that,
24 yes.

25 QUESTION: What you're intending to do is

1 protect your corn, so you put guns out, and the guns you
2 know will not only kill the sparrows, they'll also kill a
3 few rare birds.

4 MR. MACLEOD: Yes --

5 QUESTION: You know it.

6 MR. MACLEOD: -- Justice Breyer, that would be a
7 taking.

8 QUESTION: And on my understanding of the law,
9 intent includes both an action that you wish to have
10 happen, and also an action that you know will happen as a
11 result of what you do, whether or not you wish it.

12 MR. MACLEOD: In your hypothesis it is an action
13 directed at wildlife.

14 QUESTION: All right. So it's not directed at
15 wildlife. What it's done, it's done for entertainment,
16 but the person knows it's going, as a consequence, to kill
17 a few rare birds. I take it that that person would have
18 killed these birds, maybe all of them. There are none
19 left, and I would imagine a person who did that, even if
20 he did it for fun or for education, or for whatever
21 reason, knowing that would come about, would have violated
22 the act. Isn't that so, or is it so, in your opinion?

23 MR. MACLEOD: It would not have violated the
24 act --

25 QUESTION: It would not?

1 MR. MACLEOD: -- in our opinion.

2 QUESTION: It would not?

3 MR. MACLEOD: It would have violated the
4 regulation, to be sure, because the effect of killing the
5 birds is present, and it may well be --

6 QUESTION: So in other words, if a person goes
7 out, and for any reason he wants -- and he likes rare
8 birds, but doesn't care that much, and sets traps for
9 other things which he knows will have the effect of
10 killing the koala bears, the butterflies and everything
11 else, even though he says personally, you know, I couldn't
12 care less, I'm doing this for fun, that person does not
13 violate the act, in your opinion?

14 MR. MACLEOD: In our opinion, no, although,
15 Justice Breyer --

16 QUESTION: Well, if I did not hold that
17 position, and held the position that the person who was
18 doing this for fun, or whatever reason, knowing that the
19 koala bears would be destroyed, if I started out thinking
20 that that would violate the act, then would there be any
21 way to distinguish between the person who did that by
22 shooting guns and the person who did that by chopping down
23 trees, or the person who did that by modifying the habitat
24 in other ways?

25 MR. MACLEOD: Well, I think that the

1 hypothetical that you pose, Justice Breyer, is certainly a
2 situation where a court might well say, let's look at the
3 character of the underlying conduct. There was some
4 recklessness about it. There was some indifference to
5 whether you were going to kill endangered birds. In these
6 circumstances, we will interpret the take prohibition to
7 reach that. The problem is --

8 QUESTION: You know, I want to know what's
9 right, not what the court -- you see, I felt, as I read
10 through it, to be totally honest, that there was no way to
11 reach your position, which is certainly a reasonable
12 position, but I didn't understand how I could reach it
13 without thinking that the person who goes out and kills
14 the koala bears for fun is also outside the act.

15 I mean, he kills them wanting to do some other
16 thing, and since I don't see how Congress could have put
17 that outside the act, then I don't see how to reach your
18 position. That's my whole point which I'm driving towards
19 that I wanted to get a response from you.

20 MR. MACLEOD: Well, I do believe that if he's
21 killing them for fun --

22 QUESTION: No, no, no, I don't mean that. I
23 misspoke. I mean, he intends to do some other thing which
24 he knows as a result of shooting these guns in the air, or
25 whatever, will have the undoubted consequence of

1 destroying the koala bears, but doesn't want that to
2 happen, but just knows it will.

3 MR. MACLEOD: Again, Your Honor, I believe
4 that's a circumstance which would not be covered under the
5 act --

6 QUESTION: Yes, that's right. Now, my problem
7 is, is that plausible? I agree with you that the way to
8 get to your position is to deny my hypothetical case, but
9 then, to me it isn't plausible that Congress wanted to
10 pass this act and not prohibit the person who for other
11 reasons is shooting the guns off and happens to wipe out
12 the specie, knowing it.

13 MR. MACLEOD: If I may, Justice Breyer, I think
14 it is important to look at the various ways that Congress
15 has used this term "take" throughout the act. There is no
16 circumstance in which its use of "take" in the various
17 statutory provisions in which it comes up can be
18 reconciled with the Secretary's position.

19 QUESTION: Mr. MacLeod, why not look at the word
20 "harm" -- as I understand your position, it's as though
21 the word "harm" were not there. It has no independent
22 significance. It's going out there to trap the animal, to
23 kill the animal, to collect the animal, but what function,
24 independent of those other words, does the word "harm" --
25 does it add anything?

1 MR. MACLEOD: "Harm" is a broad word in and of
2 itself, in a vacuum, stripped of the context.

3 QUESTION: Can you give me an example, on your
4 reading of this statute, where something would not kill,
5 would not trap, but would harm, and therefore be covered?

6 MR. MACLEOD: Yes, Justice Ginsburg. For
7 example, the Government has said that "harm" means injury.
8 We believe it is possible to injure an animal without
9 doing any of the other words.

10 QUESTION: But you have the word "wound" to take
11 care of that.

12 MR. MACLEOD: Well, not necessarily. If you --
13 when we go to the zoo, we see, for example, signs that
14 say, don't feed the animals. If you feed an animal
15 something that is not good for the animal, you may injure
16 it in some way without actually wounding it, so we do
17 think that it really does have a different meaning.

18 QUESTION: May I ask you --

19 QUESTION: And that would not be --

20 QUESTION: Can you think of another example?

21 That's ingenious, but can you think of another one?

22 (Laughter.)

23 QUESTION: I think that's a pretty good example.

24 QUESTION: It's an excellent example. Can you
25 think of another one?

1 (Laughter.)

2 QUESTION: I suppose a hunter who wanted to get
3 this game by poisoning instead of by shooting it, you
4 could get a lot of game that way.

5 QUESTION: And he would be hunting -- and he
6 would be hunting, and he would be trapping and capturing.

7 QUESTION: And wouldn't be wounding.

8 MR. MACLEOD: And wouldn't be wounding.

9 QUESTION: No, but the point is, he'd be within
10 the statute without the word "harm," in his example.

11 You have responded to Justice Ginsburg by
12 finding one example of a harm that is not otherwise
13 covered by the statute. It's a very unlikely example,
14 that you're trying to feed some endangered species in the
15 zoo.

16 (Laughter.)

17 QUESTION: Can you think of any other example
18 that the word "harm" covers and would not otherwise be
19 covered by the statute?

20 MR. MACLEOD: I was actually building up,
21 Justice Stevens, to feeding them in the wild. I didn't
22 mean to confine them to the zoo.

23 But another example might be, we've heard from
24 Mr. Kneidler a couple of times about the Second Circuit's
25 decision in the FMC case. That's another example. If you

1 put poison down somewhere as an herbicide, for example, it
2 may well be that a listed animal will come and ingest the
3 poison, and that would be a harm, but it wouldn't be one
4 of the other listed words in that category.

5 QUESTION: Mr. MacLeod, the mens rea for the
6 criminal violation is knowingly, is that correct?

7 MR. MACLEOD: That's correct.

8 QUESTION: Knowing violation.

9 MR. MACLEOD: For both the criminal and the
10 civil violation.

11 QUESTION: Well, if --

12 QUESTION: Could I just finish this one point?

13 But it's also an example that under your view
14 should not be covered. What I'm asking you to do is
15 define a harm that you agree Congress intended to cover
16 but is not otherwise covered by the statute. Your
17 herbicide example was just like a subdivision.

18 MR. MACLEOD: As long as you have the purposeful
19 conduct, Justice Stevens, I think you can find a harm
20 which is covered.

21 For example, as Judge Silberman postulated in
22 the decision below, he said, if you want to drain a pond
23 in order to kill fish, you have in that case an action
24 directed at wildlife. You have purposeful conduct, and
25 there's no question that you are harming the fish in that

1 situation, so that would be a covered --

2 QUESTION: But as Justice Breyer's question
3 points out, it seems to me that what you're saying is not
4 even consistent with the common law of crimes. If two
5 people in two different instances shoot at little
6 children, one because he hates children, the other because
7 he just wants target practice, they're both equally
8 culpable, and your position wants us to distinguish
9 between those two instances. That's not even standard
10 criminal liability law.

11 MR. MACLEOD: Justice Kennedy, I think there is
12 a distinction between shooting at children intending to
13 kill them and being negligent in the way you conduct your
14 target practice, and again, it may well be that if you are
15 negligent in that circumstance, that may be enough to find
16 it to be a take.

17 QUESTION: Well --

18 QUESTION: Mr. MacLeod --

19 QUESTION: A child and a duck is the analogue,
20 right?

21 MR. MACLEOD: Forgive me, Justice Scalia?

22 QUESTION: I think the analogue is a child and a
23 duck. Shooting at a duck and hitting a child would be the
24 situation.

25 MR. MACLEOD: If you didn't have a child but you

1 had another animal, yes, that would be, we believe, an
2 incidental take under this statute.

3 QUESTION: Mr. MacLeod, isn't the fact that the
4 mens rea, in fact the mental element, both civil and
5 criminal, is knowing, the answer to what I take is your
6 argument -- strike the word "take." What I assume to be
7 your argument --

8 (Laughter.)

9 QUESTION: -- that in fact purposeful activity
10 is the norm in this string of verbs, and therefore
11 "injure" must be read as implying some purposeful
12 activity? If the mens rea is knowing, in the statute,
13 then in effect Congress is saying purposeful activity is
14 not the requirement, and that makes the answer to Justice
15 Breyer's objection even more difficult, doesn't it?

16 MR. MACLEOD: Purposeful activity is the
17 requirement, we believe, Justice --

18 QUESTION: Then why is the state of mind
19 expressly provided to be knowing?

20 MR. MACLEOD: Because you may well have a
21 situation where you are -- where you are fishing for
22 shrimp, for example, and you cast down a net intending to
23 catch shrimp, and you pull up an endangered turtle, your
24 act is purposeful in the sense of fishing, it was an
25 action directed at wildlife, but you have pulled up

1 something --

2 QUESTION: Well --

3 MR. MACLEOD: -- that you didn't have in mind.

4 QUESTION: -- true, but there's another example,
5 and that is the case in which you put down the net and you
6 don't want to catch the endangered species. That's not
7 what you want to do, but you know that that is, in fact,
8 what you are going to accomplish, and the statute says, by
9 using the word "knowing," that in fact your knowledge is
10 sufficient to make you liable under the statute.

11 I mean, you can't -- it makes no sense, it seems
12 to me, to say that -- for Congress to provide that you
13 must knowingly commit a purposeful act. The state of mind
14 has got to be knowing, and if the state of mind is
15 knowing, then there isn't a purposeful element in the
16 verbs, and if you know that your net is going to pull up
17 the endangered species, that's enough, and that, I
18 suppose, is consistent with the Secretary's regulation,
19 that if you know the destruction of the habitat is going
20 to result in the killing and the injury, that's enough.

21 MR. MACLEOD: It's not enough in the context of
22 the destruction of the habitat, because what Congress
23 focused on was conduct and not on effects. It is -- if
24 Congress wanted to --

25 QUESTION: But if you know -- but the

1 regulation -- it seems to me the most you can get out of
2 that argument is that by going to effect, the regulation
3 adds an element which is not covered by knowing in this
4 sense, that the regulation may cover the case in which you
5 don't know that you're going to get the species in the
6 net, or when the tree goes down, but on the other hand, it
7 seems to me you're wrong when you say it's got to be
8 purposeful activity.

9 So that that can't be the argument that wins the
10 case. The argument that wins the case for you, I suppose,
11 has got to be that this goes beyond merely knowing
12 activity to an activity which has an effect which is not
13 known at the time it's committed, but that's not a
14 purposeful argument.

15 MR. MACLEOD: Well, we don't believe -- Justice
16 Souter, for example, under the Secretary's regulation,
17 which is what we really are challenging, which is what's
18 at issue here, once you get to injurious effects, the
19 inquiry goes no further.

20 If you're driving down the highway, for example,
21 and you hit a listed insect on your windshield, under the
22 Secretary's regulation, you have committed a take. We say
23 that's not a take, but in that circumstance you weren't
24 asking all of the relevant questions about the nature of
25 the underlying conduct that Congress put in.

1 QUESTION: But you're making a facial challenge,
2 and I suppose if there are instances, and a substantial
3 number of instances, in which knowing conduct would in
4 fact be consistent with the statute, that I suppose is the
5 end of your facial challenge, and the most that you could
6 argue would be in a separate case, that the regulation
7 should not be construed to cover, could not be construed
8 to cover the case in which you had no reason to know that
9 the representative of the species was going to be hurt,
10 but you don't get that by a facial challenge, do you?

11 MR. MACLEOD: We believe that the facial
12 challenge falls in this circumstance, because every single
13 time you apply the regulation you apply it with a
14 different inquiry than the inquiry which is appropriate
15 under the statute. It is simply not --

16 QUESTION: No, but that -- I mean, if I
17 understand what you're saying, you're simply saying the
18 inquiry under the statute is whether there was a
19 purposeful act the conscious object of which was to
20 destroy the species through destruction of this individual
21 member of it, and if that is not true, then there are
22 going to be loads and loads of instances in which the
23 Secretary's reg is in fact going to cover the kind of
24 knowing conduct which I suppose the mens rea indicates
25 was -- requirement indicates was the object of the

1 statute.

2 MR. MACLEOD: Well, we have in this case,
3 Justice Souter -- we have made a challenge to the statute
4 as being ultra vires. We really aren't dealing with the
5 knowing aspect of it.

6 QUESTION: You mean to the regulation.

7 MR. MACLEOD: I'm sorry, Mr. Chief Justice, yes,
8 I mean the regulation.

9 QUESTION: Where is the knowing requirement?
10 What text of a knowing requirement are we talking about?

11 MR. MACLEOD: The knowing requirement is in the
12 penalty provisions, Justice Scalia, and those are at --

13 QUESTION: Section 1540 --

14 MR. MACLEOD: Yes, that's correct --

15 QUESTION: (b)?

16 MR. MACLEOD: -- Justice O'Connor. (a) -- (b)
17 is the criminal penalty, and that's in the respondent's
18 brief at page 5a.

19 QUESTION: Is there anything unfair -- the other
20 big sort of question that I'd had is, you see, once I get
21 out of this mens rea thing, to get onto a different
22 matter, I mean, you can find a mens rea that -- then you
23 win, but if we reject that, then I can't think of a way of
24 trying to take "habitat" out of the word "harm."

25 It seems that some instances you'd have it

1 there, some instances you wouldn't, and that your clients
2 and the others who are worried about extreme applications
3 of this thing ought to go and, case by case, say this is
4 an extreme application, if they're accused of a crime, say
5 the criminal element is not there, if their land is taken,
6 say maybe they have to have compensation, but what I can't
7 see is the facial challenge, where you'd say they're all
8 out the window.

9 Now, I'd like a response to that. I'm putting
10 that in order to get a response from you.

11 MR. MACLEOD: Yes. The facial challenge is not
12 out the window because the very nature of the conduct
13 which is specified by the regulation, namely the effects
14 of any activity, whatever it may happen to be, on listed
15 wildlife, prevents any inquiry by the agency or by the
16 court about the standards that the Congress established in
17 defining "take."

18 The nature of the conduct, it prohibited certain
19 types of conduct not only through the words, the ten
20 definitional words used to define "take," but through the
21 very statutory provision in which that prohibition found
22 itself, section 1538(a)(1). These are all words of
23 conduct. They say, do not do these things.

24 When we think in terms of thou shalt not kill,
25 for example, we're thinking, thou shalt not murder. We're

1 not thinking of an accidental death. When we say, do not
2 harm someone, we understand that as an active prohibitory
3 word to mean, do not use some forceful conduct, some
4 direct action against a species.

5 QUESTION: But in judging whether or not the
6 actor is culpable under that standard, we often look to
7 find what are the logical, likely, and natural
8 consequences of the acts, and that's the equation that you
9 want to excise from this analysis, it seems to me, which
10 brings us almost full circle to where we began, asking you
11 how to distinguish this purposeful interpretation you're
12 putting forward from what we often and always do in
13 criminal law and in mens rea analysis.

14 MR. MACLEOD: Justice Kennedy, we don't say that
15 it's inappropriate or irrelevant to look at effects. We
16 just say that you shouldn't look to the effects alone, but
17 under the regulation, that's what you're left with.

18 QUESTION: So that you can look to the effects.

19 MR. MACLEOD: You can look at the effects as
20 long as they're one of a number of relevant inquiries
21 under the statute.

22 QUESTION: Mr. MacLeod, I thought you have to
23 start with the take. I thought your position was that
24 what there has to be is a taking-type activity. If you
25 are engaged in taking animals, and you know that the

1 taking of some animals may take one of the protected
2 species, you are knowingly taking the protected species.

3 MR. MACLEOD: Correct, Justice Scalia.

4 QUESTION: But if you engage in an activity
5 which is not a taking activity, you are not knowingly
6 taking.

7 MR. MACLEOD: Correct, Justice Scalia.

8 QUESTION: So if you're cutting down trees,
9 you're not knowingly taking, even though you may kill an
10 owl, but if you're shooting some other species, knowing
11 that there are owls in the vicinity, and you shoot an owl,
12 you are knowingly taking an owl.

13 MR. MACLEOD: That is absolutely correct. That
14 would be an incidental take, but it would be a take
15 nonetheless.

16 QUESTION: But that -- but going back to Justice
17 Kennedy's example, you chop down a tree and you know it's
18 going to fall on someone's house and kill the occupant,
19 but you don't care about killing him, you just want to cut
20 down the tree, is that insulated from criminal liability,
21 and what's the difference?

22 MR. MACLEOD: It's certainly not insulated under
23 the regulation, Justice Stevens, that much is clear.

24 QUESTION: No, but under the common law of
25 murder, isn't that -- even though you didn't intend it,

1 but you just know it's going to happen, that somebody's
2 going to get killed as a result of your cutting down the
3 tree --

4 MR. MACLEOD: There is a foreseeability, a
5 knowledge element, an opportunity to avoid --

6 QUESTION: And we have precisely the same thing
7 in this area. Cut down the tree, it's going to kill the
8 last particular bird, or something.

9 MR. MACLEOD: Well, you don't know that it is,
10 Justice Stevens.

11 QUESTION: Oh, you do know it. Under your
12 assumption, you know it's going to kill, but you don't
13 care, because that's not what you're interested in.

14 MR. MACLEOD: Well, let's assume you don't know
15 that it's going to kill.

16 QUESTION: Yes, but the hypothetical you've got
17 to confront is one where you do have that knowledge. My
18 golf course example, you know you're going to extinguish
19 the habitat, and you said the only way you can avoid that
20 is to buy the land, and I don't understand how you get
21 around Justice Kennedy's question.

22 MR. MACLEOD: When you get to the point of
23 knowing that you're going to do something, if you didn't
24 have the regulation, and if that case were brought, if
25 there were an enforcement action brought against you based

1 on that set of facts, you may well have a result that
2 would have found that to be a take, but that's not --

3 QUESTION: I thought you --

4 QUESTION: I don't see how you could --

5 QUESTION: -- concede that you'd be guilty of
6 the common law crime of murder if you did that but not of
7 the common law crime of taking.

8 MR. MACLEOD: Not of the common --

9 QUESTION: The thing is, you knew you were going
10 to kill him, but you would not know you were going to take
11 him because you were not engaged in a taking activity.
12 You were cutting down a tree. It depends on what word
13 you're using in defining the crime.

14 MR. MACLEOD: It does, and the fact is, Congress
15 could well have written this prohibition in terms of
16 effects instead of in terms of conduct. If Congress did
17 do that --

18 QUESTION: One thing, though, and you said -- I
19 know we haven't made it easy for you, but you said you
20 were going to get to this.

21 (Laughter.)

22 QUESTION: I mean, in the 1982 amendment, didn't
23 Congress act consistently with what I'm going to call
24 generally the knowing interpretation here as distinct from
25 the purposeful interpretation?

1 MR. MACLEOD: In adopting the incidental take
2 provisions?

3 QUESTION: Yes.

4 MR. MACLEOD: I --

5 QUESTION: That's the Government's position.
6 What is your answer to that?

7 MR. MACLEOD: Congress acted in a way in
8 adopting that provision which is consistent with either
9 interpretation. It is every bit as valid to say that an
10 incidental take occurs in the course of a commercial
11 fishing operation. In fact, that language has been in the
12 Marine Mammal Protection Act since 1972, 10 years before
13 Congress adopted this provision here.

14 QUESTION: Why would Congress have needed an
15 incidental exception if the activity -- if it was required
16 to prove purposeful activity in every case?

17 MR. MACLEOD: I'm sorry, Justice Souter, I've
18 lost your question.

19 QUESTION: Well, if it's a requirement for
20 liability, civil or criminal, that the destruction of the
21 species or the particular example which would lead to the
22 destruction of the species be purposeful, i.e., it is my
23 conscious object to destroy the species, or to destroy
24 this individual member, why was there a need for an
25 incidental taking exception?

1 MR. MACLEOD: Because the taking action doesn't
2 have to be purposeful as against the protected species.
3 It can be purposeful against any species, and if it
4 happens to sweep in the protected species, then that is a
5 take. That is an incidental take, but it's a take
6 nonetheless. You took the wrong animal, but it's still a
7 take.

8 QUESTION: Thank you, Mr. MacLeod.

9 Mr. Kneedler, you have 5 minutes remaining.

10 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

11 ON BEHALF OF THE PETITIONER

12 MR. KNEEDLER: Thank you, Mr. Chief Justice.

13 I'd like to stress that this is not a new
14 question in the administration of the Endangered Species
15 Act. The regulatory interpretation adopted here has been
16 in effect since 1975, and this Court relied -- pointed to
17 that regulation in terms of the -- in TVA v. Hill in
18 pointing out the pervasive protection for protected
19 species under the act.

20 And in TVA v. Hill, the construction of the
21 Tellico Dam was not done for the purpose of harming the
22 snail darter. It was not directed at the snail darter.
23 It was a classic incidental take by destroying the habitat
24 of the snail darter that it depended upon for both
25 spawning and feeding purposes.

1 That's exactly the sort of application that
2 respondents are now challenging many years after TVA v.
3 Hill was --

4 QUESTION: That was an action for an injunction
5 in TVA v. Hill?

6 MR. KNEEDLER: Yes, it was, and that's we think
7 significant. The discussion of knowledge, knowledge is
8 not in section 13 -- excuse me, in 1538, the basic
9 prohibition against take. Knowledge comes in only in the
10 penalties, for civil penalties and criminal penalties,
11 retrospective penalties for prior conduct.

12 For an injunctive action, you sue for a
13 violation of section 1538, which has know knowledge
14 requirement in it, and that's consistent with the way
15 Congress would have wanted the scheme to work.

16 QUESTION: You mean, you can stop somebody from
17 cutting down trees on his land even if he doesn't --

18 MR. KNEEDLER: If you can --

19 QUESTION: -- he's violated the act, although
20 he's not subject to criminal penalties, even if he doesn't
21 know that there's --

22 MR. KNEEDLER: If you can show that the habitat
23 modification is going to actually kill or injure the
24 species by significantly impairing its behavior, and --

25 QUESTION: There's no state of mind requirement,

1 then.

2 MR. KNEEDLER: Not for an injunctive action, but
3 that's typical in civil injunctive actions.

4 QUESTION: But how could that possibly happen?
5 I mean, wouldn't you be in court getting the injunction,
6 and you'd tell the person --

7 MR. KNEEDLER: Right.

8 QUESTION: -- that if he cuts down the tree,
9 it's going to kill the koala bear --

10 MR. KNEEDLER: But again, that's --

11 QUESTION: -- and by that time he'd know it.

12 MR. KNEEDLER: Right.

13 QUESTION: And if it didn't happen to be true
14 you wouldn't get the injunction.

15 MR. KNEEDLER: Right. My only point is that --

16

17 QUESTION: So I don't see how there'd be no
18 state of mind requirement.

19 MR. KNEEDLER: Right. My only point is that
20 knowledge is not part of the basic prohibition. That's
21 the only point that I was making.

22 QUESTION: Can't we pick an uglier example than
23 the koala bear? We don't have any koala bears in this
24 country, do we?

25 (Laughter.)

1 QUESTION: We pick the cutest, handsomest little
2 critter.

3 (Laughter.)

4 QUESTION: This Hill case, Mr. Kneedler, is that
5 the case in which we described this statute, or Congress
6 in this statute as having determined that endangered
7 species must be protected no matter what the cost? Is
8 that where --

9 MR. KNEEDLER: Yes, and --

10 QUESTION: It really said that?

11 MR. KNEEDLER: But what -- but --

12 QUESTION: And you think that's an adequate
13 description of the statute and of what Congress did and of
14 what Congress -- no matter what the cost?

15 MR. KNEEDLER: But that is the way this Court
16 interpreted the statute, and the way Congress responded to
17 that --

18 QUESTION: In dictum, and you want us to stand
19 by that dictum.

20 MR. KNEEDLER: But significant dictum because it
21 greatly informed the way Congress amended the act in both
22 1978 and 1982. The construction of the Tellico Dam would
23 have violated both section 7 and section 9, as this Court
24 pointed out.

25 In 1978, Congress enacted the special exemption

1 provision, exempting projects from section 7 if they were
2 of regional or national importance, and then said any such
3 project granted an exemption will also be exempt from the
4 prohibition against taking in section 9 or any
5 implementing regulations.

6 Given the fact that this Court specifically
7 referred to the harm regulation, that reference to
8 regulations can only have been to the harm regulation, and
9 the legislative history to the '78 act shows that that was
10 true.

11 And then again in 1982, Congress saying not at
12 all costs, it created the special permit exemption to
13 allow takes to go forward in particular circumstances.

14 But it wasn't just in 1982. In 1973, the
15 legislative history of the report shows that with respect
16 to the word "harass" it would allow the Secretary to
17 regulate, the House report said, whether intentional or
18 not, regulate or prohibit activities of bird watchers
19 where the effect of those activities might disturb the
20 birds and make it difficult for them to hatch or raise
21 their young, in other words, interfere with their breeding
22 activities.

23 QUESTION: This was on private land? You
24 couldn't go out on your back yard and watch a bird nesting
25 if it might bother the bird?

1 MR. KNEEDLER: If it would significantly impair.
2 Not just momentarily disturb, but if you had lights on day
3 and night --

4 QUESTION: You watched day after day.

5 MR. KNEEDLER: But interfered in a way so --

6 (Laughter.)

7 MR. KNEEDLER: Interfered in a way so that it
8 would not breed.

9 QUESTION: All right. This doesn't apply to all
10 wildlife, though, as I understand it.

11 MR. KNEEDLER: It's only endangered --

12 QUESTION: We are talking about endangered
13 species, are we not?

14 MR. KNEEDLER: Right, and that's why we think
15 Congress would have added the word "harm" and species. As
16 Justice Breyer pointed out, the prior statutes referred to
17 individual animals. This one refers to harm to species,
18 which includes depriving it of food or shelter or breeding
19 grounds.

20 QUESTION: Thank you, Mr. Kneedler.

21 MR. KNEEDLER: Thank you, Mr. Chief Justice.

22 CHIEF JUSTICE REHNQUIST: The case is submitted.

23 (Whereupon, at 11:03 a.m., the case in the
24 above-entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., Petitioners v. SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.

CASE NO.: No. 94-859

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)