Worth a Double Take: The Removal of "Harm" from the Endangered Species Act

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INTRODUCTION

On April 16, 2025, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS, collectively, the Services) proposed to rescind the regulatory definition of "harm" in their respective Endangered Species Act (ESA or Act) regulations.[1] However, this proposal contravenes decades of case law, Congressional intent, and the natural reading of the ESA, all to the detriment of endangered species and vulnerable communities.

The ESA, passed in 1973, was intended to be a bulwark against extinction by establishing sweeping protections for ecosystems endangered by human activity. A key feature of the Act is its prohibition on the "taking" of endangered species. This protection emerges from the interplay of several sections of the ESA. At the outset, the Act (via Section 3) defines "take" as "to harass, *harm*,

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1. Notice of Proposed Rulemaking, *Rescinding the Definition of Harm under the Endangered Species Act*, Fed. Reg. 2025–06746 [hereinafter Notice of Proposed Rulemaking].

pursue, hunt, shoot, wound, kill, trap, capture or collect" or any attempt to engage in this conduct.[2] Reinforced by consistent practice throughout the last fifty years, the Services have statutorily defined "harm" to include habitat modification or degradation that results in death or injury to endangered or threatened species.[3] For example, if a new oil pipeline were proposed near a nesting site for an endangered migratory bird, interrupting its breeding pattern would constitute "harm" to the species.

The definitions of "harm" and "take" are nesting, such that the statutory definition of "harm" is included within any enumerated prohibitions on a taking. Section 9 prohibits the taking of listed endangered and threatened species, which currently includes habitat destruction without federal authorization.[4] This authorization is either controlled by Section 10, which governs "incidental take" permits,[5] or by incidental take statements (including an environmental assessment) issued under Section 7.[6] Indeed, "'harm' via incidental habitat modification or degradation is the most prevalent form of 'take' regulated by the Services."[7] Therefore, in practice, the Act's definition of harm is the primary protection for the habitats, and thus the enduring survival, of endangered species.

The definition of "harm" is the target of the Services' proposed changes. In attempting to justify the change, the Services argue that the current definition of "harm," which includes habitat modification, "runs contrary to the best meaning of the statutory term 'take.'"[8] They argue that "'the question that matters' is whether 'the statute authorizes the challenged agency action.' In other words, does the agency's regulation match the single, best meaning of the statute?"[9]

Upon its inception, the ESA was envisioned to protect the habitats of threatened and endangered species, stating, in no uncertain terms, that "[t]he purposes of this Act are to provide a means *whereby the ecosystems upon which endangered species and threatened species depend may be conserved*, to provide a program for the conservation of such endangered species and threatened species," and to implement various wildlife and ecological protection treatises and conventions.[10]

The Services' proposal does not provide an alternative definition for "harm." Rather, the new regulatory scheme would remove the word's nesting definition, relying solely on the statutory definition of "take." In practice, this would likely narrow the scope of regulation to the intentional harm of a specific animal(s) in the species, rather than the broader harms of incidental habitat

2. 16 U.S.C. § 1532 (emphasis added).
3. *Id*.
4. 16 U.S.C. § 1538.
5. 16 U.S.C. § 1539.
6. 16 U.S.C. § 1536.
7. *Federal Wildlife Agencies Propose Rescinding Definition of "Harm" Under Endangered Species Act*, Best, Best & Krieger (May 1, 2025) https://bbklaw.com/resources/la-0501325-federal-wildlife-agencies-propose-rescinding-definition-harm-under-endangered-species-act.
8. Notice of Proposed Rulemaking, *supra* note 8.
9. *Id*. [8].
10. § 2(b), 16 U.S.C. § 1531(b) (emphasis added).

destruction to the holistic ecosystems and connected communities. Thus, parties seeking to engage in projects or developments that would "only" harm a species' habitat, rather than the animal itself, need not apply for permits under the ESA. For example, imagine a condominium developer buying land that houses a grey wolf den. Because the developer would likely not intentionally trap or kill the grey wolves, even though they may bulldoze the wolves' den, the developer would likely escape regulatory oversight under this newly proposed ESA.

By removing the definition of "harm," the Services' would thus render the Act effectively toothless and fail the Act's intended purpose, its champions, and the species it protects.[11]

I. *LOPER BRIGHT* DOES NOT JUSTIFY, LET ALONE NECESSITATE, THIS CHANGE

At the outset of their proposed rulemaking, the Services claim that the Court's decision in *Loper Bright* necessitates removing the regulatory definition of harm. To address this argument, a quick background of the three major cases here (*Sweet Home*, *Chevron*, and *Loper Bright*) is needed. After the ESA was passed in 1975, the Supreme Court heard a challenge to the regulatory definition of "harm" in *Babbitt v. Sweet Home*.[12] The Court upheld the regulatory definition of "harm," in part relying on the *Chevron* doctrine,[13] which instructed courts to exercise deference to a federal agency's interpretation of a statute in cases where the statutory language is ambiguous and the agency's interpretation is reasonable. In *Sweet Home*, the Court applied *Chevron*, reasoning that it need not determine whether the definition of "take" *compelled* the agency definition of "harm" that included incidental habitat modification or degradation.[14] Rather, the Court reasoned that *Chevron* deference compelled the Court to uphold the definition as reasonable.[15] The Court, however, also engaged in its own analysis of the definition of harm, discussed further below.

Last year, the Supreme Court heard and ruled on *Loper Bright*,[16] deciding to overturn the longstanding *Chevron doctrine*. In its holding, the Court reasoned that the Administrative Procedure Act requires courts to exercise independent judgment in deciding whether an agency has acted within its statutory authority—an about-face from *Chevron* deference. The Services argue this holding compels the change in the ESA.

Specifically, the Services argue that *Loper Bright* requires regulatory rulemaking to be aligned with the single best reading of the statute, and that the definition of harm does not comport with this standard, as discussed further above.[17] The Services then address *Loper Bright*'s instruction to preserve *stare*

11. *See* 16 U.S.C. § 1532.
12. 515 U.S. 687 (1995).
13. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).
14. 515 U.S. at 687–88.
15. *Id*.
16. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 469 (2024).
17. *See* Notice of Proposed Rulemaking, *supra* note 8.

decisis[18] and assert that their proposed rescission of the definition is still correct, as "under the then-prevailing *Chevron* framework, *Sweet Home* held only that the existing regulation is a permissible reading of the ESA, not the only possible such reading."[19] Thus, the Services argue, "[o]ur rescission of the regulation definition on the ground that it does not reflect the best reading of the statutory text thus would not only effectuate the executive branch's obligation to 'take Care that the Laws be faithfully executed,' but would also be fully consistent with *Sweet Home."*[20]

This is an incorrect reading of several Supreme Court holdings.

At the outset, the Court made abundantly clear that *Loper Bright* does not "call into question prior cases that relied on the *Chevron* framework."[21] Indeed, the Court eliminated the possibility of this type of legal distortion, clarifying explicitly that "[m]ere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding."[22] This is a stronger instruction than the Services recognize when they present *Loper Bright* as holding that "prior cases that relied on the *Chevron* framework . . . are still subject to statutory *stare decisis.*"[23] Rather, the Court actually articulated that mere invocation of *Chevron* does not call into question the Court's ruling at all. The Services do not address this higher burden.

Indeed, the Services cannot reasonably conclude that, despite the Court's explicit caution against changing law based on prior invocations of *Chevron*, the definition of harm must still be rescinded. In making such an argument, the Services must logically show that the currently regulatory framework is not supported beyond *Chevron* deference. Despite the Services' sweeping statements alluding to such a conclusion, the Court, in evaluating the definition of harm thirty years ago, went well beyond *Chevron* deference in upholding the definition. In doing so, the Court conducted a comprehensive examination of the purpose of the ESA, its legislative history, and the ordinary meaning of the word.

To be sure, the Court begins its decision in *Sweet Home* not by saying that the Secretary's regulatory definition of "harm" is merely acceptable under *Chevron*. Rather, the Court begins by concluding "[t]he Act provides *three reasons for preferring* the Secretary's interpretation."[24] Preferring—not accepting, not permitting. This first sentence alone knocks the wind out of the Services' sails.

The Court then continues to articulate these reasons, succinctly and clearly, in the remainder of the syllabus:

First, the ordinary meaning of 'harm' naturally encompasses habitat modification that results in actual injury or death to members of an endangered

18. 603 U.S. at 412.
19. Notice of Proposed Rulemaking, *supra* note 8.
20. *Id*.
21. 603 U.S. at 376.
22. *Id*.
23. Notice of Proposed Rulemaking, *supra* note 8; 603 U.S. at 412.
24. 515 U.S. at 687 (emphasis added).

or threatened species. … Second, the ESA's broad purpose of providing comprehensive protection for endangered and threatened species supports the reasonableness of the Secretary's definition. … Third, the fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit, 'if such taking is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity,' § 10(a)(1)(B), strongly suggests that Congress understood § 9 to prohibit indirect as well as deliberate takings.[25]

Each of these conclusions is discussed further, but even reading the syllabus alone renders the Services' characterization that "*Sweet Home* held only that the existing regulation is a permissible reading of the ESA, not the only possible such reading" plainly false.[26] Under *Loper Bright*, which expressly prohibits this type of legal distortion, the Act's current regulatory definition must stand.

II. THE STRUCTURE OF THE ESA DEMONSTRATES CONGRESS INTENDED TO PROTECT SPECIES BROADLY

Even if the Services' reading of the Court's legal posture was accurate, reading the Act in its entirety makes clear that Congress intended to preserve habitats as well as their inhabitants. In the ESA, Congress repeatedly emphasized the importance of endangered species' habitats—demonstrating clear congressional understanding of the ecological need to preserve habitats for the success of the species.

For example, Section 4 instructs the Secretary to, concurrently with making a determination that a species is endangered or threatened, "designate any habitat of such species which is then considered to be critical habitat."[27] Requiring the designation of a species' habitat directly alongside the designation of the species itself provides strong evidence that Congress considered the habitat to be as important as the species—which makes sense, as habitat protection is the single most important factor in the recovery of endangered species.[28]

The Act goes on, in Section 5, to authorize the Secretary to, in cooperation with the States, acquire land to aid in preserving such species.[29] To avoid any doubt of Congress's intentional weight on habitat protection, Section 7 requires federal agencies to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of endangered

25. *Id.*

26. Notice of Proposed Rulemaking, *supra* note 8.

27. 16 U.S.C. § 1533(3)(A)(i).

28. *See, e.g.*, David S. Wilcove, David Rothstein, Jason Dubow, Ali Phillips, Elizabeth Losos, *Quantifying Threats to Imperiled Species in the United States: Assessing the relative importance of habitat destruction, alien species, pollution, overexploitation, and disease*, 48 BioScience 8, 607–615 (Aug. 1998) https://doi.org/10.2307/1313420; Matthias Leu, et al., *Temporal analysis of threats causing species endangerment in the United States*, 1 Conservation Science and Practice 8 (2019) https://conbio.onlinelibrary.wiley.com/doi/10.1111/csp2.78.

29. 16 U.S.C. § 1534.

species "or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical."[30]

These provisions, though broad, cannot alone protect the habitats endangered and threatened species rely on; they are only effective against harmful actions that have yet to occur. Section 9 (Prohibited Acts) contains the teeth for regulating harmful acts already occurring—and relies on the nesting definitions of "take" and "harm."[31] Specifically, Section 9 reads:

(1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to—

…

(B) take any such species within the United States or the territorial sea of the United States.[32]

With nesting definitions, Section 9 broadly prohibits harming any species or its habitat.

Indeed, "take," according to those drafting the Act, "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."[33] There can be no doubt as to congressional intent: the ESA was drafted in intentionally broad terms to account for all possible harms and methods of protecting the Nation's most vulnerable species.

Thus, as the system of checks and balances requires, Congress entrusted the executive branch with carrying out its intent. In carrying the torch forward, the FWS has previously stated that "harm" is not limited to "direct physical injury to an individual member of the wildlife species."[34]

The notion carried across to the judicial branch as well. By 1978, the Supreme Court stated: "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*. This is reflected not only in the stated policies of the Act, but in literally every section of the statute."[35] It categorized the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[36]

Congress did not make changes to tighten the legislation after these signals, thereby implicitly signaling that all three branches of government were aligned on the single best reading of the ESA: species conservation at any cost.[37] Thus, applying *Loper Bright*, the single best reading of the statute actually necessitates

30. 16 U.S.C. § 1536(a)(2).
31. 16 U.S.C. § 1538.
32. *Id*.
33. S. Rep. No. 93–307, 93rd Cong., 1st Sess. 7 (1973), 1973 U.S.C.C.A.N. p. 2995.
34. 46 Fed. Reg. 54748 (1981).
35. *TVA v. Hill*, 437 U.S. 153, 184 (1978).
36. *Id*. [35] at 180.
37. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024).

a regulatory structure that preserves broad regulatory oversight—the direct opposite of what the Services propose to do.

III. THE LEGISLATIVE HISTORY FURTHER DEMONSTRATES CONGRESS'S INTENT TO CONSTRUE "TAKE" BROADLY

Beyond the structure and interpretations of the ESA itself, the legislative history of the Act's definition of "take" further emphasizes Congress's intent to broadly protect the habitats of endangered and threatened species—not to narrowly protect animals at a more individualized level, as the Services now suggest. The Act was born of two endangered species bills, S. 1592 and S. 1983, which were introduced in the Senate and referred to the Commerce Committee.[38] Neither bill included "harm" in its definitions. However, by the time the ESA reached the Senate floor, Senator Tunney, the floor manager of the bill in the Senate, subsequently introduced "harm" to the definition via a "technical and clarifying amendment[]."[39]

Indeed, the definition of "take" that originally appeared in S. 1983 included "the destruction, modification, or curtailment of [the] habitat or range" of fish and wildlife.[40] This definition was not chosen for the ESA, as the drafters chose to use the definition drafted in S. 1592. However, the definition in S. 1983 was far broader in its application than what currently operates in the ESA, as it would have operated unbound by the current legislation's qualifier of "actually kills or injures wildlife." The S. 1983 language also declined to qualify "modification" with the regulation's limiting adjective "significant." In introducing the clarifying amendment, Senator Tunney suggested that its purpose was to alleviate a drafting error, which could be interpreted as referring to the bill's failure to incorporate these broader elements of the S. 1983 definition.[41]

The clarifying amendment received no objections nor debate.[42] Unanimity can only rightfully be interpreted as what it is: unanimous support for the change.

Similarly, "harass" is defined nearly as broadly as the term "harm": "Harass in the definition of 'take' in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering."[43] Because changes to a species' habitat can disrupt its breeding, feeding, and sheltering, "harm"

38. *See* Hearings on S. 1592 and S. 1983 before the Subcomm. on Env't of the Senate Comm. on Com., 93d Cong., 1st Sess., pp. 7, 27 (1973).

39. 119 Cong. Rec. 25, 682–83 (July 24, 1973); 119 Cong. Rec. 25683 (1973).

40. Hearings on S. 1592 and S. 1983 before the Subcommittee on Environment of the Senate Committee on Commerce, *supra* note 38.

41. *See* 119 Cong. Rec. 25, 683 (July 24, 1973) (Statement of Sen. Tunney) ("The amendments will help to achieve the purposes of the bill and will *clarify some confusion caused by language* remaining in the bill from earlier drafts or *omitted from earlier drafts which went unnoticed* during the final committee markup.") (emphasis added).

42. 119 Cong. Rec. 25683 (1973).

43. 50 C.F.R. § 17.3. (2025).

logically should include habitat modification. Indeed, the House Report specifically highlights the breadth of the ESA's prohibition of "harassment," stating: "['Take'] includes harassment, whether intentional or not. This would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young."[44] It is difficult to imagine that Congress would have explicitly preferred "harass" to be interpreted in such broad terms, but not its operating definition, "take."

After its initial years in operation, Congress amended the ESA in 1982. Crucially, these amendments included granting the Secretary authority to grant permits for "incidental" takings, which provides further support for a broad reading of the Act. The House Report expressly states that "[b]y use of the word 'incidental' the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity."[45] The permit process created requires the applicant to prepare a "conservation plan" that specifies how they intend to "minimize and mitigate" the "impact" of his activity on endangered and threatened species.[46]

If the Services' proposed change to the definition of "take" were applied in this instance, this Amendment would imagine someone requesting an "incidental" take permit to avert Section 9 liability for direct, deliberate action against a member of an endangered or threatened species. It is again difficult to imagine such an unintuitive intention.

Further, the Senate and House drafted the 1982 amendment to be modeled after the statute underlying a California litigation in which a development project threatened incidental harm to a species of endangered butterfly *by modification of its habitat*.[47] Thus, congressional focus in drafting the 1982 amendment was squarely on the "harm" of habitat destruction.

Moreover, by 1982, Congress was aware of the Ninth Circuit's application of "harm," and still it amended the Act without changing the definition of "take."[48] Congress chose to allow the definition of "take" to stand while amending other sections of the statute—making clear in the process that it knew habitat modification could be, and was being interpreted as, regulated under the ESA.

Thus, both the structure of the ESA and its legislative history demonstrate that including habitat destruction in the definition of "harm," and by extension "take," is the single best reading of the statute.[49]

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44. H.R. Rep. No. 93–412, at 11 (1973).

45. H.R. Rep. No. 97–567, at 31 (1982).

46. 16 U.S.C. § 1539(a)(2)(A).

47. *See* S. Rep. No. 97–418, at 10 (1982); H.R. Rep. No. 97–835, at 30–32 (1982).

48. *See Palila v. Hawai'i Dep't. of Land and Nat. Ress.*, 639 F.2d 495, 497 (9th Cir. 1981) (holding that "harm" is defined to include activity that results in significant environmental modification or degradation of the endangered animal's habitat).

49. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024).

IV. CANONS OF INTERPRETATION DO NOT SUPPORT THE REMOVAL OF THE DEFINITION OF "HARM"

In a final attempt to justify the proposed narrowing of the Act, the Services adopt the canon of interpretation *noscitur a sociis*, which translates to "known by its associates."[50] Roughly, the canon suggests that, in interpreting a word, the reader should define the ambiguous term in the way that would most align with the other terms in the list. Applying *noscitur a sociis* in this instance may suggest, as the Services claim, that the current definition of "harm" is too broad in comparison to its company in the remainder of the definition of "take."[51] This conclusion is not supported by the literal meaning of the words, nor by the canon itself.

At the outset, reliance on *noscitur a sociis* is improper when the list of words does not have a clear set of criteria, such as here. Contrary to Justice Scalia's framing of the list in his *Sweet Home* dissent, the definition of take does not include only narrow, direct words.[52] Rather, "the term 'harm' is accompanied by an assortment of words ranging from the precise and narrow 'shoot' to the vague and expansive 'harass.' 'Harm' is not a single elastic word among many ironclad ones but an ambiguous term surrounded by other ambiguous terms."[53]

Additionally, there is no ground for the argument that the definition of "take" would otherwise require intent or purpose. Should a reader so find, they would be ignoring Section 11's express provisions that a "knowing[]" action is enough to violate the Act.[54] Several of the words that accompany "harm" in the Section 3 definition of "take," especially "harass," "pursue," "wound," and "kill," refer to actions or effects that do not require direct applications of force.[55] Thus, there is no reason to find that "harm" in this setting would necessitate intentional or direct action. Indeed, the dictionary definition of "harm" does not include the words "directly" nor "intentionally," nor does it suggest that only direct or intentional action that leads to injury constitutes "harm."[56] The FWS already agrees with this categorization, though, having articulated in 1981 that "harm" is not limited to "direct physical injury to an individual member of the wildlife species"—a categorization that stood for 44 years.[57]

Indeed, as the majority emphasized in *Babbitt v. Sweet Home*, "unless the statutory term 'harm' encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that [Section]

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50. Notice of Proposed Rulemaking, *supra* note 8.

51. Notice of Proposed Rulemaking, *supra* note 8.

52. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 720–21 (1995).

53. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), rev'd, 515 U.S. 687 (1995) (Mikva, J., dissenting).

54. 16 U.S.C. § 1540 (a)(1), (b)(1).

55. *See* 16 U.S.C. § 1532(19).

56. Harm, Merriam-Webster Dictionary, 11th Ed, https://www.merriam-webster.com/dictionary/harm (last visited Aug. 20, 2025).

57. 46 Fed. Reg. 54748 (1981).

3 uses to define 'take.'"[58] Because a reader should be reluctant to treat statutory terms as duplicative, interpreting habitat modification as an indirect harm is the best reading of the interplay between "take" and "harm."

Finally, the other terms in the list do not clearly warn against habitat modification as constituting a taking. Rather, because the definition of "harm" is qualified as an act that "*actually kills or injures wildlife*," any habitat modification meeting this standard could easily have constituted a violation under the words "kill," "wound," and "harass."[59] Indeed, should the FWS have so chosen, they could have proscribed the same prohibition—habitat modification—under any of these other definitions.

Thus, utilizing the canons of interpretation, the inclusion of habitat modification as one of many instances of indirect "harm" under the ESA is the best reading of the statute.[60]

V. THE INTERSECTIONAL IMPLICATIONS ARE DEVASTATING FOR LOCAL AND TRIBAL COMMUNITIES

In addition to ecological consequences, the proposed change also poses significant economic risk to state, local, and tribal economies. Moreover, habitat degradation enabled by the proposed change impacts tribal cultural resources, including lifestyle practices, sacred values, and social dynamics centered around certain species and the environment they sustain. Countless tribes submitted comments to the Services' notice of proposed rulemaking, urging the federal government to uphold its treaty rights and consider the implications of their regulations on long-standing indigenous traditions.

As the Stillaguamish Tribe of Washington articulated in its comment on the proposed change, their tribe's economy "depend[s] on long term, sustainable, productive fisheries for their economic security. Without habitat and the species that use and depend on those critical habitats, commercial fisheries are at further risk of being reduced or closed all together."[61] Indeed, "[w]ithout habitat, fisheries are neither productive nor sustainable, thereby reducing harvest opportunities and subsequently America's market competitiveness"—which, as the Stillaguamish Tribe articulates, is antithetical the Trump Administration's promise to "Restore American Seafood Competitiveness."[62]

In addition to economic and cultural harms, the proposed changes undermine tribal rights and treaty requirements. One such tribe, the Nez Perce Tribe of Idaho, is entitled to specific habitat and species protections. In their comment to the proposed change, the Nez Perce Tribe writes:

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58. *Babbitt*, 515 U.S. at 697–98.

59. 16 U.S.C. § 1532.

60. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024).

61. Stillaguamish Tribe of Indians, Comment Letter on Proposed Rule Rescinding the Definition of Harm under the Endangered Species Act, at 2 (May 13, 2025), https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-127624.

62. *Id*.

In its 1855 Treaty with the United States, the Nez Perce Tribe . . . reserved rights to hunt, fish, gather and pasture across a vast territory. These rights depend on the underlying resources—the plants, fish, wildlife, and their ecosystems—that the [Nez Perce] Tribe more accurately terms 'life sources.' Today, as then and since time immemorial, these life sources are essential to maintaining the culture and way of life of the Nimiipuu, the Nez Perce people. They remain inextricably tied to our language, traditions, practices, and beliefs.[63]

The tribe demonstrates how meaningful species protection is indispensable to preserving their culture and way of life by emphasizing the numerous roles that Chinook salmon hold in Nez Perce society.[64] The salmon, they articulate, is critical to the Tribe's way of life.[65] The Tribe measures the year by the Chinook salmon's return to the Columbia River and its tributaries, because in the Tribe's creation story, the salmon was the first species to respond to the Creator's call for aid to humans.[66] The salmon, the story goes, gave the tribe its flesh to nourish and sustain the people.[67]

This same salmon population has declined to less than one percent of its historic level.[68] The main cause? Habitat degradation from a myriad of human activity, including mining, logging, and hydrosystem development.[69]

Further illustrating the diverse tribal communities that depend on habitat protection owed to them by the United States' treaty duties, the Puyallup Tribe in Washington state signed the Treaty of Medicine Creek with the U.S. in 1854. The treaty provides for and defines the tribe's interest in its fishery.[70] The importance of these terms cannot be understated, as the Puyallup people regard the salmon of the Puyallup River basin as culturally, spiritually, and economically important.[71] Tribal biologists work with state and federal agencies to preserve the salmon habitat, as the species is protected under the ESA.[72] This comment suggests concern that their ability to do so would be limited by this scaling-back of the ESA.

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63. Nez Perce Tribe, Comment Letter on Proposed Rule Rescinding the Definition of Harm under the Endangered Species Act, at 1–2 (May 19, 2025), https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-212992.

64. *Id*.

65. *Id*.

66. See *id.*

67. *Id*.

68. *Id*. at 1–2. The specific percentage of decline depends on the tributary.

69. *Id*. at 2. *See also* National Marine Fisheries Service. 2017. ESA recovery plan for Snake River spring/summer Chinook salmon (Oncorhynchus tshawytscha) & Snake River basin steelhead (Oncorhynchus mykiss). National Marine Fisheries Service, West Coast Region, Nov. l , 2017. Available at https://www.fisheries.noaa.gov/s3//dam-migration/final-snake-river-spring-summer-chinook-salmon-and-snake-river-steelhead-recovery-plan-2017.pdf.

70. Puyallup Indian Tribe, Comment Letter on Proposed Rule Rescinding the Definition of Harm under the Endangered Species Act, at 1 (May 19, 2025), https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-213042.

71. *See id*.

72. *Id.* at 1–2.

Finally, the Snoqualmie Tribe of Washington raises the duty of the United States to uphold such treaty agreements. Under the Treaty of Port Elliott in 1855, the tribe "reserved to itself, among other things the right to fish at usual and accustomed areas and the 'privilege of hunting and gathering roots and berries on open and unclaimed lands' off-reservation throughout the modern day state of Washington."[73] This, they argue, necessitates the conclusion that "the government of the United States…has a trust responsibility to ensure that we continue to have access to clean water, land, and air across our traditional lands in perpetuity."[74]

Beyond its statutory duty to maintain protections for wildlife populations, the United States' treaty obligations with tribes may impose upon the federal government broader responsibilities to protect the environment for tribal resources. Habitat protection is and always has been crucial to these treaties, which have been in place since the mid-1800s. Consider the 1854 speech by Chief Seattle of the Suquamish Tribe, preparing his people for their signing of one of these many treaties:

Every part of this soil is sacred in the estimation of my people. Every hillside, every valley, every plain and grove, has been hallowed by some sad or happy event in days long vanished. Even the rocks, which seem to be dumb and dead as the [sic] swelter in the sun along the silent shore, thrill with memories of stirring events connected with the lives of my people, and the very dust upon which you now stand responds more lovingly to their footsteps than yours, because it is rich with the blood of our ancestors, and our bare feet are conscious of the sympathetic touch.[75]

Removing the definition of "harm" from the ESA would further exacerbate the damage and injustice left by the United States' history of native oppression. Indeed, "treaty rights and resources are integral to maintaining the continued practice of [indigenous] tradition and culture and supporting the economic and spiritual well-being of the community."[76] Thus, though it may seem that the ESA can only affect animals, the Act's impact ripples outward to local and indigenous communities, whom the Services cannot ignore.

CONCLUSION

Irrespective of the method of interpretation, the ESA is clearly designed to protect endangered and threatened species, as well as their habitats, to the

73. Snoqualmie Indian Tribe, Comment Letter on Proposed Rule Rescinding the Definition of Harm under the Endangered Species Act, at 1 (May 19, 2025), https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-146347 (quoting Treaty of Point Elliott, 12 Stat. 927 (1855)).

74. *Id.*

75. Chief Seattle, 1854 Oration, ver. 1, (https://suquamish.nsn.us/home/about-us/chief-seattle-speech/). (Translation by the Suquamish People, but the translation is approximate, as the true speech has been lost to time).

76. Skokomish Indian Tribe, Comment Letter on Proposed Rule Rescinding the Definition of Harm under the Endangered Species Act, at 2 (May 20, 2025), https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-213067.

greatest extent possible. Removing the definition of "harm" will prevent enforcement of the ESA against ongoing actions and render incidental taking permits nearly useless. Without effective enforcement, the government would consequently permit catastrophic ecological damage, as well as economic and cultural harm to tribal communities across the nation. This reading cannot meet the standard under *Loper Bright*, and the proposed rulemaking must be rescinded or rejected to comply with the Act.