

# CRS Report for Congress

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## **The Endangered Species Act and Claims of Property Rights “Takings”**

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## Summary

The federal Endangered Species Act (ESA) has long been one of the major flash points in the “property rights” debate. This report first outlines the ESA provisions most relevant to the act’s impacts on private property, and then surveys the major ESA-relevant principles of Fifth Amendment takings law. The report then proceeds to its core topic: the court decisions adjudicating whether government measures based on the ESA effect a taking of property under the Fifth Amendment. The cases address four kinds of ESA measures: (1) restrictions on land uses that might adversely affect species listed as endangered or threatened; (2) reductions in water delivery to preserve lake levels or instream flows needed by listed fish; (3) restrictions on the defensive measures a property owner may take to protect his/her property from listed animals; and (4) restrictions on commercial dealings in members of listed species. To date, only one of the 14 ESA-based takings decisions revealed by research has found a taking.

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# The Endangered Species Act and Claims of Property Rights “Takings”

The federal Endangered Species Act (ESA),<sup>1</sup> along with its state counterparts, has long been a major flash point in the “property rights” debate. In the ESA context, the debate has had at least two parts. First, to what extent should, and to what extent does, the ESA restrict the use of privately owned land? Second, given that restrictions on land uses and other property-related activities *are* imposed under the ESA, to what extent does the Takings Clause of the Fifth Amendment<sup>2</sup> demand compensation of the property owner? This second question — the “takings” implications of the ESA — is our subject here.

Much has been written about which, if any, impacts on property owners by wildlife protection laws such as the ESA must be compensated as Fifth Amendment takings.<sup>3</sup> In 1993, CRS provided a comprehensive analytic review of how the takings issue had played out under the ESA and other federal and state wildlife laws.<sup>4</sup> This new report, reviewing the takings court decisions involving the ESA, was done for two reasons. First, there has been a burst of judicial activity in recent years adjudicating takings challenges to the ESA. One case in particular, *Tulare Lake Basin Water Storage District v. United States* (discussed in Section IV), garnered national headlines amid controversy over the United States’ decision to settle following the trial court’s widely questioned ruling that a taking occurred — particularly given the important issues in the case. Second, recent political shifts in the Congress enhance the likelihood that the 109<sup>th</sup> Congress may see enactment of

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<sup>1</sup> 16 U.S.C. §§ 1531-1544.

<sup>2</sup> “[N]or shall private property be taken for public use, without just compensation.”

<sup>3</sup> See, e.g., John D. Echeverria and Julie Lurman, “*Perfectly Astounding*” *Public Rights: Wildlife Protection and the Takings Clause*, 16 TULANE ENVTL. L. J. 331 (2003); Rebecca E. Harrison, Comment, *When Animals Invade and Occupy: Physical Takings and the Endangered Species Act*, 78 WASH. L. REV. 867 (2003); Glenn P. Sugameli, *The ESA and Takings of Private Property*, in Donald C. Baur and Wm. Robert Irvin (eds.), THE ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVES (American Bar Ass’n, 2002); Monica L. Mason, Comment, *Denial of Permission to “Take” an Endangered Species Will Amount to a “Taking” Under the Fifth Amendment in Limited Situations*, 21 U. ARK. LITTLE ROCK L. REV. 519 (1999); Blaine I. Green, *The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, 15 YALE J. ON REG. 329 (1998); Robin L. Rivett, *Why There Are So Few Takings Cases Under the Endangered Species Act, or Some Major Obstacles to Takings Liabilities*, course materials prepared for 1998 ALI-ABA conference on Inverse Condemnation and Related Government Liability.

<sup>4</sup> CRS Report 93-346, *The Endangered Species Act and Private Property: A Legal Primer*, by Robert Meltz.

ESA amendments addressing, among other things, the act's private property impacts.<sup>5</sup>

The cases reviewed in this report illustrate the types of private property impacts that occur under the ESA and how takings law regards them. This review is *not* a reliable indicator of the cumulative private property impacts of the ESA program. Almost certainly, many landowners who are restricted in some way under the act do not bother to sue. Of the filed suits, CRS has no systematic way of discovering those that were resolved without published decision (as by settlement or voluntary dismissal). And finally, court decisions under the Takings Clause do not exhaust the universe of decisions stemming from the ESA's private property impacts — other legal theories may be invoked. Indeed, one such non-takings case, making a breach of contract argument, was decided recently by the Supreme Court.<sup>6</sup>

Section I and II of the report give basic background: the ESA features pertinent to its impact on private property and ESA-relevant principles of takings law, respectively. Sections III through VI are the heart of the report: reviews of ESA takings decisions grouped by type of property impact involved. The decisions herein comprise all those of which CRS is aware, reported and unreported, from the highest court to rule on the taking issue in the case.<sup>7</sup> Of the 14 decisions reviewed in this report, only one, the aforementioned *Tulare Lake*, found a taking.

## I. ESA Features Pertinent to Private Property Use

### Listing and Critical Habitat Designation

Under the ESA, the possibility of private property impacts begins when the Secretary of the Interior, through the Fish and Wildlife Service (FWS), lists a species

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<sup>5</sup> Rep. Richard W. Pombo, chairman of the House Committee on Resources (with jurisdiction over the ESA), reportedly has said that revising the ESA will be his “top priority” in the 109<sup>th</sup> Congress. CQ Weekly, Jan. 3, 2005, page 16. On September 29, 2005, the House passed the Pombo-sponsored H.R. 3824, the *Threatened and Endangered Species Recovery Act of 2005*. Section 13 of the bill requires the Secretary of the Interior to pay “financial conservation aid” to landowners forced to forego certain uses of their property owing to the act, in the amount of the fair market value of that use.

<sup>6</sup> *Orff v. United States*, 125 S. Ct. 2606 (2005) (farmers could not maintain breach of contract suit against Bureau of Reclamation based on ESA-required cutbacks in water delivered by Bureau, since pertinent statute did not waive sovereign immunity for such suits).

<sup>7</sup> An exception is *Concerned Shrimpers of America, Inc. v. Mosbacher*, No. CA C-90-39 (S.D. Tex. Mar. 8, 1990), omitted because CRS has been unable to obtain a copy of the unpublished decision. This case reportedly was a taking challenge to an agency requirement under the ESA that shrimp trawlers use “turtle excluder devices” in their nets to minimize unintended catch of endangered and threatened sea turtles. The case, again reportedly, was dismissed on the ground that it was filed in the wrong court.

as endangered or threatened.<sup>8</sup> The Secretary of Commerce, through the National Marine Fisheries Service (NMFS, popularly called NOAA Fisheries), administers the ESA for marine species.

Important here, listing is to be done “solely on the basis of the best scientific and commercial data available” to the pertinent Secretary,<sup>9</sup> without reference to economic costs or private property impacts. In sharp contrast, such costs and impacts may be considered in devising agency responses to the determination of endangered or threatened status. For example, at the time of a listing, the Secretary is required, when “prudent and determinable,” to designate the “critical habitat” of the species — areas essential to its conservation.<sup>10</sup> A critical habitat designation is to be based both on scientific data *and* “economic impact and any other relevant impact,”<sup>11</sup> presumably allowing impacts on private property to be weighed. This distinction between listing and subsequent agency responses such as critical habitat designation was made by Congress quite deliberately.<sup>12</sup>

## **Section 9 Prohibitions; Section 10 Permits**

Listing and critical habitat designation trigger the ESA provisions that may interfere with private property use. Chief among these is Section 9, prohibiting certain acts in connection with endangered animals and plants.<sup>13</sup> Section 9’s prohibitions apply to both private and public land, and apply regardless of whether critical habitat has been designated. For endangered animals, prohibited acts include (a) the “taking” of an animal, (b) possessing, selling or transporting an animal obtained by an unlawful “take,” (c) transporting an animal interstate in the course of commercial activity, and (d) selling an animal interstate, or importing/exporting same. For endangered plants, the list is narrower — we do not describe it here since there appear to be no Fifth Amendment takings decisions involving listed plants.

The term “take” is a key ESA concept, not to be confused with Fifth Amendment takings. It is expansively defined by the statute to include almost any act adversely affecting a species member — including “to harass, harm, pursue, hunt, ... capture, or collect” a listed animal.<sup>14</sup> Central to the ESA’s impact on private land owners, the FWS defines “harm” to include indirect harm to listed species

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<sup>8</sup> ESA § 4; 16 U.S.C. § 1533.

<sup>9</sup> ESA § 4(b)(1)(A); 16 U.S.C. § 1533(b)(1)(A).

<sup>10</sup> ESA § 4(a)(3); 16 U.S.C. § 1533(a)(3).

<sup>11</sup> ESA § 4(b)(2); 16 U.S.C. § 1533(b)(2).

<sup>12</sup> See H.Rept. 97- 567, 97<sup>th</sup> Cong., 2d Sess. 12 (1982); H.Rept. 97- 835, 97<sup>th</sup> Cong., 2d Sess. 19 (1982).

<sup>13</sup> 16 U.S.C. § 1538.

<sup>14</sup> ESA § 3(19); 16 U.S.C. § 1532(19).

members through certain significant *habitat modifications*.<sup>15</sup> This agency definition has been upheld by the Supreme Court as a reasonable interpretation of the statute.<sup>16</sup>

By general rule, the FWS has extended almost all of the endangered species prohibitions just discussed to *threatened* animals and plants.<sup>17</sup> “Special rules,” withdrawing particular threatened species from aspects of the general regime, have been promulgated for those species with atypical management needs.<sup>18</sup> The NMFS, on the other hand, adopts Section 9’s endangered species prohibitions for threatened species only on a case-by-case basis. “Experimental populations” of listed species generally are treated as threatened species.<sup>19</sup>

To minimize its constraints on economic growth, the ESA in **Section 10** allows a much-used exemption from section 9’s taking prohibitions. The exemption authorizes the appropriate Secretary to permit any taking incidental to, and not the purpose of, otherwise lawful activity<sup>20</sup> — allowing some projects to proceed even if they harm individuals of a listed species. Such “incidental taking permits” (ITPs) may be issued to non-federal entities after the landowner submits a habitat conservation plan (HCP) including proposed mitigation measures and the considered but rejected alternatives to the proposed action. The purpose of the HCP is to ensure that the proposed action does not appreciably reduce the survival and recovery prospects of the species.

In an enforcement action for violating the ESA, the statute allows an affirmative defense for offenses committed in the good faith belief that the defendant was acting to protect persons from bodily harm.<sup>21</sup> The ESA makes no mention, however, of a similar defense for acts to protect property. The absence of a property-protection defense in the ESA itself has been largely offset — as to threatened species and experimental populations, but not endangered species — by administrative regulation.<sup>22</sup>

## Section 7 and Federal Agencies

Another ESA provision with obvious property rights implications is Section 7.<sup>23</sup> This section comes into play only when a project has a federal nexus — as when a

<sup>15</sup> 50 C.F.R. § 17.3.

<sup>16</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

<sup>17</sup> 50 C.F.R. § 17.31 (wildlife), § 17.71 (plants).

<sup>18</sup> 50 C.F.R. §§ 17.40-17.48 (wildlife); 50 C.F.R. §§ 17.73-17.78 (plants).

<sup>19</sup> ESA § 10(j)(2)(C); 16 U.S.C. § 1539(j)(2)(C). See special rules for experimental populations at 50 C.F.R. §§ 17.84-17.86.

<sup>20</sup> ESA § 10(a)(1)(B); 16 U.S.C. § 1539(a)(1)(B).

<sup>21</sup> ESA § 11(a)(3), 16 U.S.C. § 1540(a)(3) (civil enforcement actions); ESA § 11(b)(3), 16 U.S.C. § 1540(b)(3) (criminal enforcement actions).

<sup>22</sup> See notes 31-33 *infra* and accompanying text.

<sup>23</sup> 16 U.S.C. § 1536.

non-federal project requires a federal permit or is being federally funded, or the federal agency itself is carrying out the project. Section 7's mandate is that each federal agency consult with the FWS or NMFS, depending on the listed species involved, to ensure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of" designated critical habitat.<sup>24</sup> (Note the focus on the *species*, in contrast with section 9's focus on individual members of the species.)

Once consulted, FWS or NMFS must, if listed species might be affected, prepare a biological opinion to determine the actual impact of the proposed action.<sup>25</sup> If "jeopardy" of species or "destruction or adverse modification" of critical habitat (see preceding quote) is found, the FWS or NMFS must suggest "reasonable and prudent alternatives" to the proposed activity that would not violate the section 7 mandate. If the agency agrees to these or other reasonable and prudent alternatives consistent with the section 7 mandate and approved by FWS or NMFS — and if, further, any incidental takes satisfy that mandate, and other conditions are met — then the FWS or NMFS issues an incidental take statement and the activity may go forward consistent with its terms.<sup>26</sup> The incidental take analysis under section 7 is the same as for section 10 ITPs, and compliance with the mitigating measures in the biological opinion confers the same exemption from section 9 prohibitions as an ITP does on non-federal entities.

A federal action may be exempted from the section 7 mandate, despite the possibility of extinction, by an Endangered Species Committee of high-ranking federal officials (popularly called the God Squad).<sup>27</sup> The Committee must find, among other things, that there are no reasonable and prudent alternatives to the agency action, and that the action's benefits clearly outweigh the benefits of alternatives that would conserve the species or its critical habitat. The Endangered Species Committee exemption process is generally considered burdensome and is rarely used.

## **Administrative Reforms, Etc.**

Several administrative reforms were adopted in the Clinton Administration, under claimed authority in the ESA, to enhance the program's flexibility in dealing with property owners. Joint FWS and NMFS policies streamlined permit procedures for small landowners, and other initiatives encouraged landowners to increase protection for listed species on their land. Under "safe harbor agreements," landowners who increase species habitat can return to baseline conditions without penalty.<sup>28</sup> And "no surprises agreements" assure a landowner that if he/she

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<sup>24</sup> ESA § 7(a)(2); 16 U.S.C. § 1536(a)(2).

<sup>25</sup> ESA § 7(b)(3)(A); 16 U.S.C. § 1536(b)(3)(A).

<sup>26</sup> ESA § 7(b)(4); 16 U.S.C. § 1536(b)(4).

<sup>27</sup> ESA § 7(e); 16 U.S.C. § 1536(e).

<sup>28</sup> FWS and NMFS published a joint Final Safe Harbor Policy at 64 Fed. Reg. 32,717 (June (continued...))



implements an HCP, there will be no further costs or land use restrictions to benefit species covered by the HCP (with minor exceptions).<sup>29</sup>

Federal managers also attempted, where consistent with the facts, to tilt toward threatened rather than endangered designations, to allow use of the more flexible ESA provisions governing threatened species.<sup>30</sup> Use of threatened status has allowed the FWS, through “special rules,” to authorize takes of members of specified species causing depredations of private property (livestock, domestic animals, crops).<sup>31</sup> Usually, such takes of problem animals must be carried out by government officials, rather than the aggrieved property owner. FWS regulations governing private property depredations by members of *experimental populations* more often allow takes by both government agents and private landowners.<sup>32</sup>

Despite these impact-softening mechanisms in the ESA and in administrative reforms, the act at times may frustrate the economic desires of owners of land or other property. This fact has long been a rallying cry for the ESA’s detractors, who argue that restrictions under the act routinely “take” property in the constitutional sense. This brings us to Section II.

## II. ESA-Relevant Principles of Takings Law

The Fifth Amendment of the U.S. Constitution ends with 12 deceptively simple words: “[N]or shall private property be taken for public use, without just compensation.” Long a constitutional sleeper, this Takings Clause has been thrust into the limelight in recent decades by increased government land use controls (such as under the ESA) combined with a more conservative judiciary interested in greater protections for property owners. The Clause seeks to strike a balance between these two interests — more broadly, between society’s needs, as effected by government,

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<sup>28</sup> (...continued)

17, 1999). Implementing regulations are at 50 C.F.R. §§ 17.22(c), 17.32(c).

<sup>29</sup> 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5) (FWS); 50 C.F.R. § 222.307(g) (NMFS).

<sup>30</sup> ESA section 4(d), governing threatened species, contains no detailed list of prohibited acts, as does section 9 for endangered species. Rather, it requires only that regulations on threatened species “provide for the conservation of such species.” 16 U.S.C. § 1533(d).

<sup>31</sup> See, e.g., 50 C.F.R. § 17.40(b)(1)(i)(C) (government agents may remove grizzly bears causing depredations to lawfully present livestock, crops, or beehives); 50 C.F.R. § 17.40(d)(2)(i)(B)(4) (government agents may take Minnesota gray wolves causing depredations of lawfully present domestic animals). FWS regulations contain a very broad authority for takes of the Utah prairie dog in that state, through state permits apparently issuable to private parties. 50 C.F.R. § 17.40(g)(2).

<sup>32</sup> For example, regarding the experimental population of red wolves in North Carolina and Tennessee, see 50 C.F.R. §§ 17.84(c)(4)(iii) (private landowner may take red wolves in the act of killing livestock or pets), 17.84(c)(4)(iv) (private landowner may harass red wolves found on owner’s land), and 17.84(c)(5) (government agents may take red wolves causing depredations of lawfully present domestic animals or other personal property).

and the burdens that satisfying those needs may impose on individual property owners.

Here we scan the law developed by the courts for deciding which government actions work a Fifth Amendment taking of private property, requiring the owner to be compensated. We include only the principles most relevant to the ESA.

## Preliminary Thresholds

Before a court can even get to a plaintiff's taking claim, some initial hurdles, both procedural and substantive, must be surmounted. Procedurally, a taking claim against the United States (the likely defendant if suing because of the ESA) must be filed in the U.S. Court of Federal Claims, if plaintiff seeks more than \$10,000.<sup>33</sup> It must also, under that court's statute of limitations, be filed within six years of the date of the alleged taking.<sup>34</sup>

Most daunting of all the procedural hurdles, the taking claim must be ripe — that is, the dispute must have reached a sufficient maturity to be suitable for judicial resolution. In cases against the United States, this means chiefly that the property owner must have obtained a “final decision” from the government agency in question as to the nature and extent of the restrictions on the property.<sup>35</sup> “Final decision” is a much-litigated term of art. To get a final decision, it may be necessary for the property owner, after his/her initial development proposal is rejected, to reapply with scaled-down or reconfigured proposals. In the ESA context, the final decision requirement has been held to mean that the taking claim is not ripe until an ITP has been applied for and, usually, denied. Denial of the ITP is not necessary for ripeness where further negotiations with the federal agency are not needed to indicate what degree of development the government will allow on the parcel, where further negotiations would otherwise be pointless (“futility exception”), or where plaintiff is claiming that an agency's delay in granting or denying the ITP is “extraordinary.” But as yet, no court has been willing to excuse a plaintiff's failure to even *apply* for an ITP.

An agency's determination simply that the property owner's proposal requires an ITP application cannot itself be a taking. The reason is clear: that determination leaves open the possibility that the permit, if applied for, will be granted.<sup>36</sup>

Most important of the substantive threshold hurdles is the Takings Clause demand that the thing alleged to have been taken is “property” as used in the Clause. Almost all common interests in land — fee simple absolutes, leases, easements, etc. — are indisputably property, as are water rights, making this threshold an easily surmounted one in ESA takings cases. However, takings law is cognizant of only

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<sup>33</sup> 28 U.S.C. §§ 1346(a), 1491. On the rare occasion that an ESA taking claim seeks \$10,000 or less, the claim may be filed either in the Court of Federal Claims or in district court.

<sup>34</sup> 28 U.S.C. § 2501.

<sup>35</sup> *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

<sup>36</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

*direct* impacts on the property. For example, the denial of an ITP for a residential subdivision may, in proper circumstances, take the tract for which the permit is sought. However, a taking claim will not be entertained as to the nearby commercially zoned parcel whose value is greatly reduced because no residential subdivision, hence no potential customers, will come to the ITP-denied lot.

## Takings Principles

There are three fairly distinct types of takings claims, each evaluated under a different Supreme Court-created test. Each, potentially, might arise in an ESA-based taking claim.

A *regulatory taking* claim asserts that a government action has taken property merely by restricting its use. The idea of the regulatory taking concept is that even in the absence of an obvious government taking of property — as by appropriation of title or physical occupation — use restrictions may be sufficiently severe to amount to the same thing. Regulatory takings claims break down into two subcategories, depending on whether the regulation is alleged to have caused a total elimination of the land’s use or value, called a *total taking* claim, or a less-than-total elimination, called a *partial regulatory taking* claim.

The first category, total elimination of use or value, is held to be a *per se* taking, with at least one big exception. If the government restriction was implicit in “background principles” of property or nuisance law existing when the property was acquired, there is no taking.<sup>37</sup> The rationale for this exception is that the government has not taken away any right the property owner ever had. There is limited case-law support for the argument that the states’ historic ownership of wildlife and responsibility for wildlife protection as a trust obligation to the public constitute a background principle that forecloses takings claim based on such protections. However, this defense has yet to be addressed in an ESA-based takings decision.

Claims in the second category, less-than-total losses, are far more common, and are evaluated quite differently. Instead of a *per se* test, courts use a fact-intensive, case-by-case approach applying the “*Penn Central* balancing test.” Under this approach, the government action is assessed for its economic impact, the degree of interference with investment-backed expectations, and its “character.”<sup>38</sup> These vague factors have been explicated only minimally by the Supreme Court, leading many commentators to complain that the test is muddled and easily manipulated. Still, it is at least clear that the impact on the property owner must be severe, with the result that the large majority of regulatory takings claims tested under *Penn Central* are rejected. This government-friendly pattern has been replicated in the ESA-takings cases raising *Penn Central* claims, even though takings courts have not accorded the

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<sup>37</sup> Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

<sup>38</sup> Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

species-preservation goal of the ESA any special status (at least explicitly) in the takings calculus.<sup>39</sup>

With either total or partial regulatory takings claims, the court must define the “parcel as a whole” (aka “relevant parcel”) as to which the impact of the government action will be measured. The relevant parcel notion is needed because takings law looks at the economic impact and interference with expectations factors in a relative, rather than absolute, sense. As to economic impact, for example, what counts in the takings analysis is not that the plaintiff’s land lost X dollars in value due to a government restriction, but rather that the loss constituted a high percentage of the pre-restriction value of the parcel as a whole.

The relevant parcel generally is defined to include the entire contiguous lot in the same ownership, with noncontiguous lots held by the same owner thrown in if part of an integrated development. Importantly, the relevant parcel cannot be limited to the portion of the property subject to the challenged use restriction, at least not solely on that basis. Thus, a regulation that severely reduces use or value on only a portion of a tract is unlikely to be a taking. For this reason, it is almost certain that the relevant parcel factor has held down the number of ESA-based takings claims; many property owners restricted on a portion of their land still have economic use of the remainder. Beyond the regulated/nonregulated rule, however, the Supreme Court has left unresolved many issues that arise in defining the relevant parcel.

Also for both total and partial takings claims, the Supreme Court recently rejected the absolute version of the “notice rule,” under which lower courts once held that restrictions imposed under laws existing when the property was acquired cannot be a taking.<sup>40</sup> The pre-acquisition existence of the law in question carries *some* weight in the takings analysis, but does not bar the taking claim outright.<sup>41</sup> This easing of the notice rule is highly significant for the ESA, which was enacted so long ago (1973) that most landowners today, by virtue of having bought since enactment, might be barred from claiming takings under the former, absolute rule.

Finally, regulatory takings claims are treated differently depending on whether the restriction giving rise to the alleged taking was initially deemed to be *permanent (of indefinite duration)* or *temporary*. If an initially permanent government restriction is ultimately withdrawn or judicially invalidated, the analysis of whether it worked a taking while on the books is unaffected. The termination of the restriction nominally changes the permanent taking claim to a temporary one, but its only real effect is to limit the amount of compensation. A few ESA cases present this scenario: land use restrictions were lifted once listed birds were found no longer

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<sup>39</sup> According to the Supreme Court, Congress in the ESA elevated the government’s interest in species preservation to the “highest of priorities.” *TVA v. Hill*, 437 U.S. 153, 174 (1978). Were this vaunted status to enter the takings analysis as something to be balanced against the burden imposed on the property owner, it would presumably do so through the “character of the government action” factor in the *Penn Central* test.

<sup>40</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

<sup>41</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

present in an area. By contrast, the very same land use restriction may not cause a taking if initially designated as temporary (such as a development moratorium), because of the likelihood that the restriction will be lifted after a defined period.<sup>42</sup>

A *physical taking* claim asserts that the government has taken property by causing, or authorizing, a physical invasion. Such claims come in two types: *permanent physical occupations* and *temporary physical invasions*. Permanent physical occupations are almost invariably held to be takings,<sup>43</sup> because they infringe upon one of the most essential attributes of property ownership: the right to exclude others. Thus in assessing physical occupation claims the courts will not inquire into the extent of the occupation, the magnitude of the economic impact, or the importance of the underlying public purpose — key ingredients of a regulatory takings analysis. Indeed, even the parcel as a whole rule does not apply, so that an occupation of only a minuscule portion of a tract is a taking. Not surprisingly, takings plaintiffs always try to bring a physical occupation claim, among others, if the facts permit.

Temporary physical invasions, the lesser degree of interference, are regarded quite differently. They are tested under the *Penn Central* balancing test and generally are held nontakings.

Physical takings claims are common in ESA cases — the property owner pointing to the listed animals whose physical presence on his/her land must be tolerated, or the consumption of livestock by listed predators because the livestock owner was barred by the ESA from taking stronger measures (e.g., shooting) against the marauding animals, or the temporary presence on the owner's property of federal investigators. As the decisions described herein show, no physical taking claim based on these physical acts has been successful. Ironically, in the one ESA/takings case where the plaintiff prevailed, *Tulare Lake* (Section IV), a physical taking was found in the *absence* of any physical invasion, based on the appropriation perceived by the court of a water right.

The *exaction taking* claim asserts a taking on the basis of an exaction demanded by a land regulatory agency as a condition of approving a development proposal. In order not to be a taking, the exaction condition must meet two criteria. First, there must be an “essential nexus” between the condition and an underlying purpose of the permit or other approval to which the condition is attached.<sup>44</sup> Second, the burden imposed on the property owner by the exaction must be no greater than “roughly proportional” to the impact of the proposed development on the community.<sup>45</sup> Moreover, the burden of proving rough proportionality is on the government. This two-prong test places greater burden on the government defendant than the test for regulatory takings and is referred to as “heightened scrutiny.”

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<sup>42</sup> *Id.*

<sup>43</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>44</sup> *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>45</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The Supreme Court has clarified that not any condition attached to a development permit can ground an exaction taking claim. Rather, the Court particularly has in mind conditions requiring that the permit applicant dedicate land to a specific purpose — as by recorded easement. Lower courts have split on whether an exaction taking claim can be based, in addition, on a monetary exaction — when government requires a payment as a condition for development approval.

At least potentially, the conditions that landowners opt for in their submitted HCPs could be subject to exaction taking challenge. Such conditions have at times included dedications of acreage on the ITP applicant's land, or commitment by the applicant to purchase mitigation credits. If the ITP applicant realistically had no choice but to adopt one of these options to meet the statutory criteria for ITP issuance, and the condition lacks an essential nexus or rough proportionality, an exaction taking claim becomes possible. We have no information on how often this happens in practice, but can note that even after three decades of ESA implementation, there appear to be no court decisions adjudicating exaction takings challenges to HCP conditions.

### **III. Restrictions on Private Uses of Land That Might Adversely Affect Listed Species**

#### **Restrictions on timber harvesting for personal use: *Morris v. United States*, 392 F.3d 1372 (Fed. Cir. 2004)**

The plaintiffs own a half-acre lot, on which they seek to cut down old-growth redwood trees for lumber to build on another lot they own. They allege that owing to state and county land-use restrictions, harvesting timber is the lot's only economic use. In 2001, the NMFS told plaintiffs the harvest would violate the ESA by harming listed salmon in the river bordering the lot. The NMFS later said they could apply for an ITP, requiring them to prepare a HCP. However, plaintiffs' research led them to believe that the cost of applying for an ITP and preparing a HCP would be greater than the modest value of their trees and property. Hence, they did neither and instead filed a taking claim.

***Held, claim is not ripe.*** Plaintiffs challenge the cost of the administrative process, rather than any use restrictions that may result from it. But there has been no final agency decision that has sufficiently fixed the cost of the application, and the agency has discretion to assist plaintiffs with their application (indeed, a NMFS handbook instructs field offices to assist ITP applicants). Because the court has no way to predict what influence the wielding of that discretion will have on plaintiffs' costs, this case cannot be ripe. Therefore, the court will not reach plaintiffs' "novel theory" that a taking can result from the cost of complying with a valid regulatory process, where the government has never actually restricted the use of the property.

*Comment:* This decision is but the latest manifestation of the longstanding judicial insistence that to ripen a taking claim based on a federal permit requirement, the landowner must at least begin the permit application and negotiation process. Various takings-law ripeness doctrines may indeed excuse

the plaintiff's failure to pursue the process all the way to a formal permit denial — the general minimum prerequisite for a ripe taking claim — but to demonstrate their applicability the process must at least be engaged.

**Restrictions on commercial timber harvesting: *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir.), cert. denied, 125 S. Ct. 113 (2004).**

Plaintiffs owned a 200-acre tract, almost all timberlands. In 1994, Oregon designated 40 acres of the tract as spotted owl nesting habitat. By state law, this designation barred timber harvesting on the 40 acres, unless plaintiffs obtained an ITP under the federal ESA (the United States had designated the spotted owl a threatened species). The FWS found plaintiffs' ITP application inadequate, but said it was willing to work with them. The plaintiffs rejected this offer, and in 2000 the application was denied. The denial letter indicated, however, that several approvable alternatives (including selective harvesting) were available to plaintiffs. Plaintiffs simply applied for reconsideration of the denial, which was denied. In 2001, Oregon informed the plaintiffs that it no longer opposed timbering because the owls had moved away, and in 2002, the FWS found that an ITP was no longer needed for the same reason. The plaintiffs seek compensation for a temporary taking, from 2000 to 2002.

***Held, claim is ripe, but no taking.*** For purposes of this decision, the court assumes that the federal ESA barred logging during the period of the alleged taking, without which there can be no federal taking. The taking claim was ripe, even though the FWS identified approvable alternatives that the plaintiffs declined to pursue. The FWS did not say it lacked enough information to grant or deny the permit; rather, it formally denied the permit and did not allow further reconsideration. On the merits, there was no physical taking by the presence of the owls. Nor was there a regulatory taking: the government action did not deprive the relevant parcel (whether defined as the 200-acre parcel, or solely the *trees* on the 200-acre parcel) of all economic value, and indeed, plaintiffs made no showing of *any* economic injury caused by the temporary taking. Further, there was no regulatory taking by the alternative test: failure to substantially advance a legitimate government interest.

*Comment:* This case puts in high relief the ubiquitous takings-law issue of how to define the "relevant parcel" — that is, the precise property interest that the court will look at in assessing the impact of the government's action on the plaintiff. It does so in two ways. First, it requires that the 40 acres be evaluated together with the remaining 160 acres on the parcel. This was noncontroversial — squarely in line with precedent. Second, the court raised, but did not resolve, the issue whether the timber on the 200 acres could be regarded separately, prior to harvesting, from the land on which it grew.

The Seibers also sued Oregon in state court, under the state and federal constitutions, for a taking based on the 40-acre designation. On December 27, 2004, the trial court entered judgment for plaintiffs for a temporary taking of the timber on the 40 acres. Judgment was in the amount of \$75,000<sup>46</sup> plus interest,

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<sup>46</sup> This amount was the difference between the value of the 40 acres at the beginning of the (continued...)

attorney's fees and court costs. Appeals have since been filed. The prospects for a no-taking ruling on appeal were recently enhanced by the decision of the state supreme court in *Coast Range Conifers, LLC v. Oregon State Bd. of Forestry*, 117 P.3d 990 (Or. 2005), holding that the state constitution recognizes a relevant parcel doctrine. This decision will allow the state to argue that the trial court's regulatory takings analysis should have been based (as it was in the federal case) on the entire 200-acre tract, not merely the 40 restricted acres.

**Restrictions on commercial timber harvesting: *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), *cert. denied*, 538 U.S. 906 (2003)**

The FWS determined that allowing Boise Cascade to log its 65-acre old-growth tract in Oregon might harm spotted owls that would otherwise nest there. Subsequently, in October, 1998, a district court permanently enjoined the logging until Boise obtained an ITP. While Boise's ITP application was pending, however, an owl living on the tract was found dead and surveys found no other owls in the area, so the FWS said an ITP was no longer required. Accordingly, the district court, in August, 1999, lifted the injunction. Boise seeks compensation for the temporary taking of its merchantable timber, which it was prevented from logging during the court injunction.

***Held, no taking.*** The FWS never denied Boise's ITP; the company was enjoined only from logging *without a permit*. The mere imposition of a permit requirement by a regulatory agency does not, by itself, effect a regulatory taking. Nor is there a *per se* physical taking by the owls; the government is only regulating the use of the tract due to the incidental location of the owls there. The state has no control over where the owls choose to nest. Finally, no physical taking was caused by the requirement that Boise allow government officials to enter its land to conduct owl surveys. The visits were brief, nonexclusive, and approved by the district court.

*Comment:* The court's refusal to regard the presence of the spotted owls on the plaintiff's land as a physical taking is in accord with almost every prior decision addressing such challenges to wildlife protections. Rather, the logging restriction was deemed to be at most a regulatory taking. As noted, takings plaintiffs prefer to cast their claims as physical, rather than regulatory, takings, since the former are tested under a more plaintiff-friendly standard.

Boise Cascade also sued Oregon in state court for a temporary taking under the state constitution, based on the logging ban imposed by the state while a mating pair of owls occupied the tract (prior to the FWS' involvement). On November 17, 2004, the trial court entered judgment for plaintiffs for a temporary taking of the timber, in the amount of \$25,<sup>47</sup> plus costs. Both parties have filed appeals. The prospects for a no-taking ruling on appeal may have been enhanced recently by the decision of the state supreme court in *Coast*

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<sup>46</sup> (...continued)

temporary taking in 1994, and the end of the temporary taking in 2001.

<sup>47</sup> This amount was the difference between the value of the property at the beginning of the temporary taking in 1993, and the end of the temporary taking in 1997.



*Range Conifers, LLC v. Oregon State Bd. of Forestry*, 117 P.3d 990 (Or. 2005), holding that the state constitution recognizes a relevant parcel doctrine. This will allow the state to argue that the trial court’s regulatory takings analysis should have been based on the entire 65 acres, not merely the 56 acres to which the logging prohibition applied. Plainly, however, these numbers are not as favorable to the state as in *Seiber* (only 40 out of 200).

**Restrictions on land clearing and construction of home for personal use: *Taylor v. United States*, No. 99-131 L (Fed. Cl. June 20, 2001) (unpublished)**

The plaintiff planned to build a house on his residential-zoned lot. After he bought the lot, a pair of nesting bald eagles moved onto the adjacent parcel, within 90 feet of the planned house. The FWS informed the plaintiff that land clearing and construction on his property likely would render the area unusable by the eagles, and that a resulting abandonment of the nest would be a “take” pursuant to the ESA. The agency further told him that he could apply for an ITP, which would allow the house construction to proceed. However, when the plaintiff applied, the FWS insisted he agree to all the required mitigation *before* it would process the application. Plaintiff declined, believing the demanded mitigation to be overly restrictive.

***Held, claim is ripe, but no “total taking.”*** In an unpublished prior decision, the court held that despite the absence of a formal denial of the permit application, the FWS’ insistent position ripened the taking claim. In the decision here, the court holds that there is no total taking because the ESA development restrictions do not deprive plaintiff’s property of all economic value. The parties must present additional evidence, however, before the court can determine whether a partial regulatory taking occurred based on the takings test for less-than-complete loss of property value. Therefore, the parties’ motions for summary judgment are denied.

*Comment:* Ultimately, an ITP was issued to Mr. Taylor, meaning that at most he had a temporary taking claim. The case settled in April, 2002.

**Restrictions on filling in wetlands for commercial home construction: *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000)**

In 1973, plaintiff bought a 40-acre, mostly wetlands tract in the Florida Keys, and in 1980 began efforts to secure the federal, state, and local permits needed to construct a residential subdivision there. Though the Corps of Engineers issued wetlands permits twice, construction did not begin because of state and local permitting and ESA problems. Both of the Corps permits expired. Plaintiff’s final application to the Corps, at issue here, was denied in 1994 on the ground that the proposed project would endanger the continued existence of the Lower Keys marsh rabbit and the silver rice rat, listed as endangered in 1990 and 1991 respectively.

***Held, no taking.*** The plaintiff claims that the effect of the Corps’ action was to completely bar economic use of his property — effecting a *per se* total taking. Even with a total taking claim, however, a property owner must show that his reasonable investment-backed expectations were frustrated. The plaintiff could not

have had reasonable expectations when he bought the property in 1973 that he would obtain approval to fill the wetland. By that year, the Corps had begun to deny dredge-and-fill permits solely on environmental grounds. And plaintiff acknowledged in the sales contract the difficulty of obtaining the necessary permits. Finally, plaintiff waited seven years after purchasing the property before applying for permits, during which wetlands protection and endangered species laws became increasingly stringent. While these developments do not bar the taking claim, they reduce plaintiff's ability to claim surprise when the permit application was denied.

*Comment:* The *Good* decision takes a broad view of the “notice rule” — the case law doctrine that no regulatory taking occurs when the government restricts a property use under a law existing when the property was acquired, or even, as in *Good's* case, under a law whose adoption *after* the property was acquired could have been foreseen. Mr. *Good* bought his wetlands before the ESA was enacted in its modern form, and 17-18 years before the species that triggered the permit denial were listed. However, as mentioned in Section II, the notice rule is no longer viewed as an absolute bar to a taking claim.

The *Good* holding that a property buyer's investment-backed expectations are relevant even to total-taking claims was contravened later by an opposite holding of another Federal Circuit panel. *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1379 n.3 (Fed. Cir.), *and on petition for rehearing*, 231 F.3d 1354 (Fed. Cir. 2000). Since the decisions in *Palm Beach Isles*, the Court of Federal Claims and Federal Circuit generally have followed its approach.

**Deletion of area from timber sale contract: *Janicki Logging Co. v. United States*, 36 Fed. Cl. 338 (1996), affirmed without published opinion, 124 F.3d 226 (Fed. Cir. 1997)**

Plaintiff entered into a contract with the U.S. Forest Service allowing plaintiff to remove timber from areas within a national forest. Subsequently, the Forest Service deleted an area from the contract, citing the discovery of a northern spotted owl nest there. Plaintiffs claim a taking of its contract right.

**Held, no taking.** The Forest Service did not abrogate or repudiate any of its obligations under the contract, nor impair plaintiff's rights to enforce such obligations. Rather, the Service, acting in a proprietary rather than sovereign capacity, sought to exercise its rights under the contract and never suggested it was not bound by the contract. Thus, this case is “nothing more than a garden variety contract dispute.” (Elsewhere in the opinion, the contract claim was dismissed as untimely.)

**Restrictions on commercial construction: *Four Points Utility Joint Venture v. United States*, 40 Env't Rep. Cas. (BNA) 1509 (W.D. Tex. 1994)**

Plaintiffs-developers alleged that to protect endangered and threatened birds in the area, the United States “by coercion and by threatening criminal penalties” attempted to prevent the building of a multi-use development in Austin, Texas. (The FWS took no formal action to block the development.) Plaintiffs believed that no ESA take of a protected species would occur, and so did not apply for an ITP. They assert a Fifth Amendment taking.

***Held, claim is not ripe.*** The plaintiffs must apply for an ITP and receive a final determination before the court may consider their claims. What plaintiffs really seek is a court determination that their development will not involve an ESA take, and an injunction barring the United States from blocking it. This court will not preempt the FWS' responsibility to make the initial ruling regarding species protection under the ESA.

## **IV. Reductions in Water Delivery in Order to Preserve Instream Flows Needed by Listed Species**

### **Reduction in irrigation contract water delivered by United States: *Klamath Irrigation District v. United States*, 67 Fed. Cl. 504 (2005)**

During a drought in 2001, the U.S. Bureau of Reclamation terminated delivery of irrigation water from its Klamath Project in northern California and southern Oregon, to ensure lake levels and river flows sufficient to protect three fish species listed under the ESA. Plaintiffs, various agricultural landowners and water, drainage, or irrigation districts in the Klamath River Basin, all had been receiving water from the Project.

***Held, no taking.*** There was no taking of plaintiffs' water rights. Plaintiffs' interests in Klamath Project water fall into two broad categories. As to those based on water delivery contracts with the Bureau of Reclamation, the traditional reasons for favoring a breach of contract approach over a takings approach apply — the United States acted in its proprietary, not sovereign, capacity in entering into the contracts, and the plaintiffs retain the full panoply of remedies to vindicate their contract rights. Because the individual-irrigator plaintiffs are third-party beneficiaries of the contracts with the water districts, their claims, too, sound in contract, not takings. (While not resolving the contract claims in this decision, the court suggested reasons why they were unlikely to succeed.)

The remaining water rights asserted by plaintiffs are based on patent deeds from the United States for federal land in Oregon, and state water permits from Oregon. However, these rights, assuming they exist, were established well after the 1905 appropriation of the Klamath waters by the United States. The United States is thus the senior right holder under the prior appropriation doctrine used in Oregon, allowing it to insist that junior right holders, such as the plaintiffs, curtail their use as necessary for the United States to satisfy its senior rights.

### **Reduction in irrigation contract water delivered by state: *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001)**

During a drought in 1992-1994, the U.S. Bureau of Reclamation reduced the amount of water pumped from the Sacramento-San Joaquin Delta in California, in order to ensure flows sufficient to protect two fish species listed under the ESA. The result of the reduced pumping was to reduce the water available to the interconnected California State Water Project — which project, in turn, reduced the water delivered to two of the plaintiffs, who had water-delivery contracts with the state. Other

plaintiffs in the case received less water under their water-delivery contracts with these two plaintiffs.

***Held, a taking.*** There was a taking of the plaintiffs’ right to use the water, in the amount of the reduction. The plaintiffs’ contracts with the state conferred a right to the exclusive use of prescribed quantities of water. Thus, a mere restriction on use (as to the water not delivered) completely eviscerates the right to that amount of water, and constitutes a physical taking. The federal government has essentially substituted itself as the beneficiary of the contract right and totally displaced the contract holder. And plaintiffs’ state contracts hold harmless for reduced water delivery only the state, not the United States. Finally, background principles of state law (public trust doctrine, doctrine of reasonable use, and nuisance law) do not limit plaintiffs’ right to use the water, since that right was defined by their contracts and the state’s water allocation scheme. The state may change the contracts and its water allocation scheme to reflect these state-law background principles, but critically here, it chose not to do so in the 1992-1994 period.

*Comment:* In December, 2004, plaintiffs and the United States settled the case for \$16.7 million. The settlement agreement provides that it “shall not be construed as an admission by Defendant of any ... liability as to any or all of the Plaintiff’s claims for liability.”

*Tulare Lake* generated headlines for several reasons. First, it involves ESA-based cutbacks in delivery of irrigation water, a highly emotional issue in the West and one that has generated other takings suits.<sup>48</sup> Moreover, it is the only court decision involving *any* ESA circumstance to find a taking. Second, the court’s rationale included some controversial conclusions — e.g., that a regulatory restriction effected a *physical* taking, and that the plaintiffs acquired greater rights against the U.S. under their contracts with the state than they had against the state. Third (and related to the second), the Department of Justice had received at least four letters from other government agencies — two from the National Marine Fisheries Service, and one each from the California Attorney General’s Office and the California Water Resources Control Board — urging the Department not to settle, but to appeal. The California letters additionally asserted that *Tulare Lake* mischaracterized the state’s water law, and urged Justice on appeal to request certification of the state water law issues in the case to the California high court. Finally, several Members of California’s congressional delegation took public positions on the proper course of action for the Department of Justice — whether to settle or appeal.

Quite recently, another judge of the same court criticized the *Tulare Lake* decision as “wrong on some counts, incomplete in others ....” *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 538 (2005).

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<sup>48</sup> In addition to the other decisions reported in this section, there is pending litigation in *Casitas Municipal Water Dist. v. United States*, No. 05-168 L (Fed. Cl. filed Jan. 26, 2005). There, the water district alleges that the Bureau of Reclamation ordered the district to construct at its own expense a fish diversion facility at a dam operated by the district, and to maintain bypass flows — both for the protection of an endangered fish. The plaintiff asserts a taking of its contract right to use of the bypass flow, and a breach of contract in being required to pay for the diversion facility. No amount of damages is specified in the complaint.

**Reduction in irrigation contract water delivered by United States: *Barcellos and Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717 (E.D. Cal. 1993), *affirmed sub nom. O’Neill v. United States*, 50 F.3d 677 (9<sup>th</sup> Cir.), *cert. denied*, 516 U.S. 1028 (1995).**

During a drought in 1993-1994, the U.S. Bureau of Reclamation reduced the amount of water pumped to certain water users from the Sacramento-San Joaquin Delta in California, in part to ensure flows sufficient to protect two fish species listed under the ESA. The result of the reduced pumping was that plaintiffs, landowners and water users within the Westlands Water District, received up to 50% less water than the amount otherwise available under Westlands’ contract with the United States.

*Held, no taking.*<sup>49</sup> The fact that the Westlands contract was entered into before enactment of the ESA and another statute does not mean that application of those statutes to modify the contract was a taking of contract rights and violation of due process. (These issues were not reached in the decision on appeal.)

## **V. Restrictions on Defensive Measures That a Property Owner May Use to Protect Property from ESA-Listed Animals**

**Livestock killed by listed predators: *Gordon v. Norton*, 322 F.3d 1213 (10<sup>th</sup> Cir. 2003)**

In 1994, the Secretary of the Interior adopted an updated Northern Rocky Mountain Wolf Recovery Plan, under which gray wolves were introduced near plaintiff’s ranch. From 1997 to 1998, and despite the efforts of FWS and state officials, a number of cattle, and some dogs, were killed by wolves at plaintiff’s ranch.

*Held, no jurisdiction.* Because compensation for any taking by the United States is available in the U.S. Court of Federal Claims under the Tucker Act,<sup>50</sup> the district court below lacked jurisdiction to hear plaintiff’s taking claim. The Supreme Court decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), in which a plurality approved district court jurisdiction over a taking claim against the United States, is easily distinguished as involving an alleged taking based on monetary liability. Here, by contrast, we deal with an alleged taking of physical things; hence, there is no reason to reverse the presumption of Tucker Act availability.

**Livestock killed by listed predators: *Christy v. Hodel*, 857 F.2d 1324 (9<sup>th</sup> Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989)**

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<sup>49</sup> 849 F. Supp. at 730. It is not *entirely* clear from the court’s brief discussion that the plaintiffs were raising a taking claim in addition to their due process claim.

<sup>50</sup> 28 U.S.C. § 1491.

In 1982, grizzly bears began attacking Christy's herd of sheep, which he grazed on leased land in Montana. By July 9, the bears had killed about 20 sheep. That evening, Christy shot and killed a grizzly bear moving toward his herd. The FWS' efforts to catch the bears were unsuccessful, with the result that Christy lost a total of 84 sheep to the bears by the time he removed his sheep from the leased land. The Department of the Interior assessed a \$3,000 civil penalty against Christy for killing the bear, grizzlies being a threatened species under the ESA. A Department administrative law judge reduced the fine to \$2,500.

**Held, no taking.** Undoubtedly, the bears had physically taken the sheep, but such takings cannot be attributed to the federal government. Case law generally rejects the proposition that the government is answerable for the conduct of protected wildlife prior to their being reduced to possession by capture, which did not occur here. Neither is there a regulatory taking: the losses sustained by the plaintiffs are merely the incidental result of reasonable regulation.

*Comment:* *Christy* remains the leading decision for the proposition that government limits on the defensive measures available to protect one's property against marauding animals are not takings. Property rights advocates were heartened by Justice White's dissent from the denial of certiorari, in which he asked whether "a Government edict barring one from resisting the loss of one's property is the constitutional equivalent of an edict taking such property in the first place." 490 U.S. at 1115-1116. However, later court decisions have not picked up on Justice White's line of analysis.

## VI. Restrictions on Commercial Dealings in Species

### Interstate commercial transport of endangered species: *United States v. Kepler*, 531 F.2d 796, 797 (6th Cir. 1976)

As of the effective date of the ESA in 1973, Kepler allegedly held several animals for purposes lawful under the ESA. Thereafter, he transported two of them, a cougar and a leopard, from Florida to the "Dogpatch Zoo" in Kentucky — where he was arrested and the animals seized by Department of the Interior agents. He was later convicted of violating the ESA ban against interstate transport of endangered species in the course of a commercial activity.<sup>51</sup>

**Held, no taking.** There is no taking by virtue of plaintiff's animals being seized and his being subject to criminal prosecution for the attempted sale of them. The ESA does not prevent *all* sales of endangered wildlife, only those in interstate or foreign commerce. The act does not reach intrastate sales, and presumably Kepler could have sold the animals in Florida. In addition, ESA section 10 allows the interstate transport or sale of endangered animals if the Secretary of the Interior approves it for scientific purposes. These remaining uses of the animals deflect the taking claim.

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<sup>51</sup> ESA § 9(a)(1)(E).

**Sale of endangered species parts: *United States v. Hill*, 896 F. Supp. 1057 (D. Colo. 1995)**

A criminal indictment charged Hill with the sale of parts of various endangered species (black rhinoceros, tiger, clouded leopard, and snow leopard), in violation of the ESA and other wildlife protection statutes. He moved to dismiss all counts on the ground that the ESA and the other statutes are, as applied here, an unconstitutional taking under the Fifth Amendment.

***Held, no taking.*** There was no taking of Hill's property interest in these animal parts. He has not been denied all economic use of his property, since personal property may have value or generate income in ways other than by sale. Further, the ESA permits one to sell endangered and threatened species if one obtains a permit under section 10(a) of the act.<sup>52</sup> Finally, at the time Hill acquired the animal parts in the early 1980s, they were already subject to the ESA proscriptions at issue here. Therefore, he obtained no property right to sell the animals and so lost no right for which he can claim compensation.

*Comment:* This decision relies in part on *Andrus v. Allard*, 444 U.S. 51 (1979), the only U.S. Supreme Court Fifth Amendment takings decision that directly deals with wildlife protection. *Andrus* involved the Eagle Protection Act and Migratory Bird Treaty Act, which ban commercial transactions in bird parts even if they were lawfully acquired prior to the ban. The Court found no taking, explaining that while the ban foreclosed the most profitable use of the bird parts (sale), other uses, including possession, transport, donation, or exhibition for an admissions charge, remained to the plaintiffs.

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<sup>52</sup> 16 U.S.C. § 1539(a).