

The Endangered Species Act: Inadequate Species Protection in the Wake of the Destruction of Private Property Rights

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The Just Compensation Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹

I. INTRODUCTION

The plight of endangered species is conveyed to the American public daily through the news media. One reads of beleaguered owls as they lose their old-growth forest nesting areas or of a three-inch fish, the delta smelt, competing against thirsty Southern Californians for water rights. It is made apparent in these news reports that many species are facing serious threats to their survival.² Increasingly, however, private property owners feel as beleaguered and threatened as the rare species finding habitat on their land.

Examples abound, usually in the western United States, of property owners adversely affected by species protection. Native Americans were recently prevented from farming their fields because an endangered rodent, the Stephens' kangaroo rat, had been found on their reservation in southern California. Now, these American Indians, who have been planting the same acreage for over thirty years, wonder how they will make their living.³ A family of five was affected by the Stephens' kangaroo rat after they left Los Angeles to escape the pressures of the city. Now living in a more rural area of California, the family expected to expand their one-bedroom home to accommodate the size of their family. After the Stephens' kangaroo rat was listed as endangered, however, they found themselves trapped by the animal, neither able to build a larger house nor to sell their affected property.⁴

A battle is brewing between the economic interests of property owners and the environmental goals of those seeking to promote species

* The author would like to thank Hank Hankla and Dave Schroeder for their invaluable assistance, comments, and ideas.

¹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

² *BALANCING ON THE BRINK OF EXTINCTION* (Kathryn Kohm ed., 1991).

³ Gail Wesson, *Tribal Farmer Warned About K-rat*, *PRESS-ENTERPRISE* (Riverside, Cal.), Nov. 26, 1992, at B1.

⁴ Juan C. Arancibia, *Group Forming to Fight Restrictions*, *PRESS-ENTERPRISE* (Riverside, Cal.), July 24, 1992, at B2.

preservation. These extremely political and emotionally charged disputes⁵ will become worse before they are resolved. As the 103rd United States Congress draws to a close, it is extremely doubtful that any serious environmental solutions are forthcoming. Apparently it will be left to future Congresses to deal with these timely environmental issues.⁶ The next Congress should seize the opportunity to prevent future conflicts by reconciling the dual objectives of biological diversity and the protection of private property rights.

This Comment examines the legal issues surrounding the current state of takings law and discusses how recent court decisions affect the federal regulation of endangered and threatened species. Part Two outlines the characteristics of the Endangered Species Act as well as the principle arising out of the Fifth Amendment principle that compensation must accompany a "taking" of property. Part Three considers what circumstances must arise for the Endangered Species Act to effect a compensable taking of property. Part Four explains why the Endangered Species Act is more likely to result in a taking of property than other environmental laws. Past proposals to alleviate burdens on species and property owners will be examined. Part Five concludes that a balanced approach to species preservation is needed in the short term. In the long term, protection of entire ecosystems may alleviate the takings dilemma.

II. DIVERGENT PRINCIPLES: SPECIES PROTECTION VS. PROPERTY RIGHTS

A. *The Endangered Species Act*

Congress enacted the Endangered Species Act of 1973 (ESA)⁷ to provide a framework for identifying and protecting endangered and threatened animal and plant species.⁸ An important part of the Act's goal is

⁵ Lou Cannon, *Saw-Toothed Despair Leaves Mark on Northwestern Loggers*, WASH. POST, July 27, 1991, at A3 (telling the loggers' story of despair, particularly that of a young logger who committed suicide).

⁶ Growing dissension and dissatisfaction with the Clinton Administration within the ranks of environmental activists is evident in recent efforts to pull all environmental legislation out of circulation and consideration by the 103rd Congress. See Memorandum from Erik Olson, of the National Resource Defense Council to other environmental lobbyists March 4, 1994 (Memorandum on file with the *Ohio State Law Journal*).

⁷ 16 U.S.C. §§ 1531-1544 (1988).

⁸ 16 U.S.C. § 1531(b) (1988).

to protect entire ecosystems.⁹ This aim is met, in part, by efforts to conserve individual species. This ecosystem protection also includes the preservation of sensitive habitats. The objectives of the Act are implemented jointly by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) under the jurisdiction of the U.S. Department of the Interior and U.S. Department of Commerce, respectively. Despite this shared jurisdiction, the law assigns the major role of enforcement to the Secretary of the Interior.¹⁰ Once the Secretary from either department initiates the process of listing a species, an extensive series of procedural steps begins. This process of hearings and intensive biological research seeks to provide adequate public notice and a detailed collection of information. During this process the species under study is termed a "candidate species."¹¹ If the Secretary then decides to list a species as endangered or threatened, "critical habitat" must be designated and recovery plans must be developed.¹²

Due to the broad scope and strict enforcement of the ESA, some commentators believe endangered species to be this country's most highly protected natural resource.¹³ When enacting the ESA, Congress intended to protect endangered and threatened species at any cost.¹⁴ The original ESA translated into a rigid regulation that prohibited the consideration of any economic factors in the determination of when a species was endangered or threatened and what remedial actions were necessary to protect that species.¹⁵ The legislative history makes it abundantly clear that Congress was interested only in determining whether a species needed protection from extinction.¹⁶ As a result, the Secretary of Interior was directed to

⁹ *Id.*

¹⁰ 16 U.S.C. § 1533 (1988).

¹¹ *Id.*

¹² 16 U.S.C. § 1533(a)(3)(A) (1988). An "endangered species" is one which is in danger of extinction throughout all or a predominant portion of its range. 16 U.S.C. § 1532(6) (1988). A "threatened species" is a species *likely to become* an endangered species within the foreseeable future throughout all or a major portion of its range. 16 U.S.C. § 1532(20) (1988).

¹³ George C. Coggins & Irma S. Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO. L.J. 1433, 1496 (1982).

¹⁴ Chief Justice Burger, speaking for the Court, wrote, "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *TVA v. Hill*, 437 U.S. 153, 184 (1978).

¹⁵ See 16 U.S.C. § 1531(b)(1)(A) (1988).

¹⁶ See *TVA v. Hill*, 437 U.S. 153 (1978); H.R. REP. NO. 37, 93d Cong., 1st Sess. 4-5 (1973).

make his determinations in the listing process "solely" on the basis of the best scientific and commercial data available.¹⁷

Because the original ESA was considered too drastic,¹⁸ Congress amended the Act slightly to change the process of designating critical habitat.¹⁹ Pursuant to these amendments, the species listing process remains essentially the same, permitting only scientific data to be considered. Since 1978, however, the Secretary has also been required to consider the economic impact of critical habitat designation in addition to scientific data.²⁰ This attention to economic considerations allows the Secretary to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat" ²¹ Regardless of the economic impact, however, the ESA prohibits the exclusion of the critical habitat if the Secretary determines on the basis of biological factors that such exclusion would result in the extinction of the species.²²

Few can dispute the severe impact of land development upon the survival and existence of many plant and animal species.²³ Given the vast number of species, the impact of development is astounding. Some biologists estimate that the number of species reaches into the tens of

¹⁷ *TVA v. Hill*, 437 U.S. 153 (1978); see also James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look from a Litigator's Perspective*, 21 ENVTL. L. 499, 505 (1991) (explaining that Congress added the word "solely" in 1982 to preclude the consideration of any nonbiological factors during the listing process).

¹⁸ Upon finding that various species had "been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," the ESA was an extremely strict statute. 16 U.S.C. § 1531(a). Consequently, courts were willing to strictly enforce the statute. See, e.g., *TVA v. Hill*, 437 U.S. 153 (1978). Therefore, results under the Act were often harsh, and Congress subsequently amended the Act several times to take consideration of economic factors in specific situations. The primary situation in which the Secretary may consider economic factors occurs when designating critical habitat. 16 U.S.C. § 1532(b)(2).

¹⁹ Kilbourne, *supra* note 17, at 510.

²⁰ 16 U.S.C. § 1533(b)(2) (1988).

²¹ *Id.*

²² *Id.*

²³ Craig A. Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1 (1991) (acknowledging that protecting endangered species is important, but arguing for more balancing between land-use development and environmental policies).

millions.²⁴ Already 750 endangered and threatened species are listed, and the FWS intends to add nearly one hundred additional species.²⁵ The growing challenge for government agencies, municipalities, and private property owners is to find a way to comply with the ESA in the face of increasing development pressures.²⁶

B. Property Rights

The U.S. Constitution guarantees that private property will not be taken for public use without just compensation.²⁷ Despite this country's rich history of protection of property rights, the issue of determining when a taking occurs continues to be an area of confusion within the courts.²⁸ Several recent takings cases concern land use regulations aimed at protecting the environment.²⁹ Despite these recent cases, however, the application of the ESA to private real property rights has yet to be specifically addressed by the courts.³⁰

²⁴ Approximately 1.4 million species have been discovered and named. Estimates of total species on Earth range between 3 million and 30 million. Brian Mannix, *The Origin of Endangered Species and the Descent of Man*, AM. ENTERPRISE, Nov./Dec. 1992, at 57-59.

²⁵ The Audubon Society recently sued the U.S. Department of the Interior and successfully argued that the Secretary must list 400 species within the next 5 years.

²⁶ Coggins & Russell, *supra* note 13, at 1433 (accurately predicting that regulations aimed at protecting plant and animal species could act to limit land use planning in the United States).

²⁷ U.S. CONST. amend. V. Application of the takings provision to the individual states occurred after the provision was incorporated into the Fourteenth Amendment. *Chicago, B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 235-41 (1897).

²⁸ "The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978).

²⁹ *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (concerning preservation of beachfront property from erosion and development); *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991) (concerning the implementation of the Clean Water Act to preserve wetlands); *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161 (1990); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990).

³⁰ *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989), is the only case thus far to consider the issue of a taking of property as a result of the Endangered Species Act. After grizzly bears killed 20 of Christy's sheep, the rancher shot one of the bears to protect his remaining livestock. Because the grizzly bear is an endangered species, Christy was fined for violating the ESA. Christy claimed that he was rightfully defending his property and was entitled to federal compensation for loss of the sheep as a taking of property under the Fifth Amendment.

A government agency may "take" property under its power of eminent domain.³¹ It is this power with which the government has created "highway systems, built hospitals and dams, and preserved wilderness areas as national parks."³² Although takings may occur without an owner's consent,³³ compensation is required under the Fifth Amendment guarantee of just compensation to landowners whose property is taken for public purposes.³⁴ When a public benefit is gained from a taking, the public is expected to compensate the landowner for her loss.³⁵

The constitutional requirement that just compensation must accompany government takings is closely guarded in this country.³⁶ There is, however, a well established deviation from the compensation rule known as the "nuisance exception," first recognized by the Supreme Court in *Mugler v. Kansas*.³⁷ The *Mugler* opinion established that if a state could show that

The Ninth Circuit held that no taking of property had occurred and the U.S. Supreme Court denied certiorari. *Id.*

³¹ "The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good." BLACK'S LAW DICTIONARY 523 (6th ed. 1990).

³² ELLEN ALDERMAN & CAROLINE KENNEDY, IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION 192 (1991).

³³ ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 510 (1984). See also ALDERMAN & KENNEDY, *supra* note 32, at 189-205 (discussing Poletown Neighborhood Council v. City of Detroit, 304 N.W. 2d 455 (Mich. 1981), in which the city of Detroit successfully evicted homeowners unwilling to leave their neighborhood, compensated the previous landowners, and then contracted with General Motors to build an auto assembly factory on the property). See generally Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 36 (1964).

³⁴ "[T]his Court has recognized that the 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

³⁵ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

³⁶ In James Madison's words: "The rights of property are committed into the same hands with the personal rights" and "[g]overnment is instituted no less for the protection of the property than of the persons of individuals. . . ." THE FEDERALIST NO. 54, at 339 (James Madison) (Clinton Rossiter ed., 1961).

³⁷ 123 U.S. 623 (1887). In *Mugler*, the operations in a residential area of a Kansas distiller were found to be a public harm, and consequently:

[t]he power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the

it was prohibiting a use of land found to be “injurious to the health, morals, or safety of the community,”³⁸ a compensable taking had not occurred.³⁹ The Supreme Court continued to apply the nuisance exception until 1922 when it struck down an ordinance forbidding coal mining in certain areas.⁴⁰ Justice Holmes, writing for the majority, stated for the first time that “if regulation goes too far” it will be recognized as a compensable taking.⁴¹

In addition to a physical taking of property, it is now commonly recognized that regulatory takings of property are possible.⁴² Until recently, however, it was not clear how far a regulation had to go before a compensable taking occurred.⁴³ In *Lucas v. South Carolina Coastal*

public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

Id. at 669.

³⁸ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 (1987). The nuisance exception addresses an important concept of property law in our society: The principle that one may not use her property in a manner that will create a public nuisance to others. As the *Keystone* Court reiterated, “it is hard to imagine a different rule that would be consistent with the maxim ‘*sic utere tuo ut alienum non laedas*’ (use your own property in such manner as not to injure that of another).” *Id.* at n.22.

³⁹ *Mugler*, 123 U.S. 623.

⁴⁰ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

⁴¹ *Id.* at 415.

⁴² “Thus, government action that works a taking of property rights necessarily implicates the ‘constitutional obligation to pay just compensation.’” *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). In this case, state regulations prevented the landowner from rebuilding its church facilities in a floodplain. No physical occupation of the land occurred, yet the Court stated unequivocally that a regulatory taking had taken place and that monetary compensation was warranted. *See also Pennsylvania Coal*, 260 U.S. at 415 (“if regulation goes too far it will be recognized as a taking”).

⁴³ “[T]his Court has generally ‘been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government’” *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)); *see also*, Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627 (1989) (stating that determining when a regulation goes too far remains one of the most

Council,⁴⁴ the Supreme Court further defined the requirements necessary to establish such a regulatory taking.⁴⁵ In *Lucas*, the Court identified two discrete categories of regulatory takings that would result in a compensable taking.⁴⁶ If either of these two situations arises from a regulation, a per se taking has occurred and compensation is required, regardless of the regulation's intent or importance.⁴⁷

1. *Physical Invasion*

The first category of regulatory takings consists of those regulations that "compel the property owner to suffer a physical 'invasion' of his property."⁴⁸ According to the Court, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."⁴⁹ This class of regulatory takings applies to such situations as government-mandated beachfront easements⁵⁰ and cable line installations.⁵¹ In each of these cases, a regulation requiring a physical intrusion onto an owner's property resulted in a taking of property.

2. *Complete Economic Loss*

The second category of regulatory takings consists of those regulations that deny a property owner all economically beneficial or productive use of her land.⁵² Although the Supreme Court claimed it was not creating a

difficult issues in property law and advocating the use of the public trust doctrine in determining when a taking has occurred); Linda A. Malone, *The Coastal Zone Management Act and the Takings Clause in the 1990's: Making the Case for Federal Land Use to Preserve Coastal Areas*, 62 U. COLO. L. REV. 711 (1991) (stating that it is very unclear how far a deprivation must go to be a taking).

⁴⁴ 112 S. Ct. 2886 (1992).

⁴⁵ *Id.* The *Lucas* majority defends its position by stating that it is merely applying earlier takings law, not creating new exceptions, as Justice Blackmun argues in his dissenting opinion. *Id.* at 2893 n.6.

⁴⁶ *Id.* at 2893.

⁴⁷ *Id.* According to the Court, when it finds that one of these "two discrete categories of regulatory action" has affected private property, compensation is required "without case-specific inquiry into the public interest advanced in support of the restraint." *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

⁵¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁵² *Lucas*, 112 S. Ct. at 2893. "As we have said on numerous occasions, the Fifth

second classification of per se regulatory takings, *Lucas* marked the first time that the Court clearly articulated and applied this rule.⁵³ The *Lucas* Court avoided the difficulty of calculating complete economic loss of property by adopting the state court's finding that the entire economic value of the land had been destroyed.⁵⁴ In *Lucas*, the trial court found that the property owner had suffered a loss of all economic value of his beachfront property.⁵⁵ The loss resulted from a state regulation that sought to protect South Carolina's coastal areas from erosion and ecologically detrimental development.⁵⁶ Regardless of the purpose behind the statute, the Court found that the regulation completely destroyed the value of the property and remanded to the state supreme court.⁵⁷ Thus, the *Lucas* Court categorically held that complete destruction of the land's economic value warranted compensation to the property owner.⁵⁸ According to the *Lucas* Court, once it was determined that the regulation resulted in a complete economic loss, it was no longer necessary to inquire into the public interest at issue.⁵⁹

The *Lucas* Court justified the harmful or noxious use analysis of government regulation on property as a means of explaining the permissible police power exercised in cases such as *Mugler*. The Court reasoned that such earlier exercises of police power had caused a mere reduction in the value of land rather than complete economic loss.⁶⁰ One exception to the categorical rule of *Lucas* was recognized by the Court "if

Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" *Id.* at 2893-94 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

⁵³ Previously, the Court advocated factual inquiries into several factors accompanied takings analyses. Loss of economic viability was one of these factors, along with reasonable investment-backed expectations and the character of the governmental action. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 349 (1986); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

⁵⁴ Justice Blackmun questioned this step by the Court. *Lucas*, 112 S. Ct. at 2908 (Blackmun, J., dissenting) ("This finding is almost certainly erroneous.").

⁵⁵ *Lucas*, 112 S. Ct. at 2890 (citing Application to Petition for Cert. 37).

⁵⁶ 1988 Beachfront Management Act, S.C. CODE ANN. §§ 48-39-10 to -360 (Supp. 1991).

⁵⁷ *Lucas*, 112 S. Ct. at 2901-02.

⁵⁸ See Paul F. Haffner, Case Note, *Regulatory Takings—A New Categorical Rule: Lucas v. South Carolina Coastal Council*, 61 U. CIN. L. REV. 1035 (1993) (condemning the categorical rule and advocating a return to the case-by-case approach to takings cases).

⁵⁹ *Lucas*, 112 S. Ct. at 2893.

⁶⁰ *Id.* at 2898-99; see also Haffner, *supra* note 58, at 1044.

the regulation simply affirmed what inhered in the background principles of the state's property and nuisance law."⁶¹ This exception prevents a finding of a taking if a legitimate state interest (based on state property and common law principles) exists.

III. APPLICATION OF TAKINGS JURISPRUDENCE AND *LUCAS* TO THE ESA

In light of the *Lucas* opinion, it is helpful to examine the application of takings law to difficult cases arising under the ESA. The question that courts will likely struggle with is whether the ESA may result in a compensable regulatory taking of property when a landowner's property is designated as critical habitat therefore precluding any planned development on that land. Pursuant to *Lucas*, one must ask whether the federal regulation evokes either a physical invasion of the property or a complete loss of all economic viability. As examined earlier, either of these categories results in a per se regulatory taking.⁶² The only time such a regulatory taking will not require compensation to the private property owner is when the state actor is pursuing a legitimate state interest. The requisite legitimate state interest arises only when a traditional public nuisance is being prevented. The question then becomes whether the ESA acts to prevent a traditional public nuisance as interpreted by the Supreme Court.

A. *Does the ESA Result in a Physical Invasion?*

If a regulation results in a physical invasion upon private property, the owner is entitled to compensation from the government.⁶³ The primary issue in determining whether an ESA designation of critical habitat results in a physical invasion is not necessarily whether the species in question occupies the property, but whether the occupation by the species, and the resulting regulatory treatment of species habitated land, qualifies as an "invasion" of that property. Some would argue that a protected species is actually a third party that is given the unrestricted right to occupy private property as a result of government regulation.⁶⁴ Such an opinion is

⁶¹ Haffner, *supra* note 58, at 1045; *see also Lucas*, 112 S. Ct. at 2901.

⁶² *See supra* notes 46-52 and accompanying text.

⁶³ *See supra* notes 48-51 and accompanying text; *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁶⁴ *See* Geoffrey L. Harrison, Comment, *The Endangered Species Act and Ursine*

defeated, however, by the Supreme Court's decision in *Toomer v. Witsell*,⁶⁵ holding that the government acts as a trustee of fish and game that are the common property of all citizens of the governmental unit.⁶⁶ Under this view, the government exercises ownership for the benefit of its citizens.⁶⁷ It follows from such an interpretation that the government is responsible for the actions of the animal, and it is as if the government itself physically invaded the property. Other courts have disagreed, however, holding that the United States doesn't "own" the wild animals it protects through statutes such as the ESA.⁶⁸ In *Christy v. Hodel*,⁶⁹ the leading case in this area, a rancher was severely fined for defending his livestock against hungry grizzly bears.⁷⁰ Because grizzlies are listed as an endangered species, the rancher was found in violation of the ESA. In *Christy*, the Ninth Circuit held that because the United States does not own and cannot control the conduct of protected species, it is not responsible for their actions.⁷¹ Despite a vigorous dissent by Justice White, the Supreme Court denied certiorari.⁷² Consequently, it is unlikely that the Court would support a theory of physical invasion on the part of the protected species.

B. Does the ESA Result in Complete Economic Loss?

A much stronger argument can be made that ESA designations of critical habitat impact a property owner so severely that all economic value in the property is destroyed and compensation is required. To determine

Usurpations: A Grizzly Tale of Two Takings, 58 U. CHI. L. REV. 1101 (1991).

⁶⁵ 334 U.S. 385 (1948).

⁶⁶ *Id.* at 399-403.

⁶⁷ *Id.*

⁶⁸ *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989).

⁶⁹ *Id.*

⁷⁰ After losing 20 sheep worth at least \$1,200 to the grizzly bears, the rancher shot one of the bears and was fined \$2,500 by the FWS. *Id.* at 1326-27; *see also* Lauri Alsup, Comment, *The Right to Protect Property*, 21 ENVTL. L. 209 (1991); Harrison, *supra* note 64.

⁷¹ In his dissent, Justice White pointed out that if the federal government had authorized park rangers to feed protected grizzlies with the plaintiff's livestock, the result would be a taking that warranted compensation. Therefore, he argued, a regulation that protects the bears, allows them to prey on livestock, and prohibits the rancher from any action to protect his property is essentially the same situation. *Christy*, 490 U.S. at 1115 (White, J., dissenting).

⁷² *Christy*, 490 U.S. 1114.

when all economic value has been taken, the court must first know the limit of the property interest.⁷³

1. *Cumbersome Permitting Procedures Attempt to Accommodate Development Pressures*

Property owners in parts of the country such as the southwestern United States owned their land long before species regulation began. These states have come under increasing pressure to develop their open spaces due to population increases and the favorable climate in these areas. As development increases, more and more plant and animal species are being adversely impacted and listed as endangered or threatened. As a result it is not uncommon for certain Fish and Wildlife Service offices to threaten city and county officials with citations for violating the ESA if they approve development in sensitive habitat areas.⁷⁴ Local officials usually heed these warnings to prevent being hit with civil and criminal penalties.⁷⁵

The 1982 amendments to the ESA sought to institute a permitting process whereby limited development could take place and the ESA could be applied to private property interests. The amendments authorized the FWS to grant incidental taking permits under stringent restrictions.⁷⁶ A successful "section 10(a)" permit now allows minimal harm, known as a "taking" of the species, to come to a protected species when a conservation plan satisfying the ESA is submitted. For example, one of the findings that the FWS must make in granting such a permit is that the applicant will minimize and mitigate the impact of the taking to the maximum extent practicable.⁷⁷ Needless to say, defining what is meant by "maximum extent

⁷³ Sax, *supra* note 33, at 152 n.8.

⁷⁴ Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605, 613 (1991).

⁷⁵ 16 U.S.C. § 1540 (1988); *see also* Maura Dolan, *Nature at Risk in a Quiet War*, LOS ANGELES TIMES, Dec. 21, 1992, at A1.

⁷⁶ *See* 16 U.S.C. § 1539(a) (1988). Requirements under the act include finding that "the taking will be incidental, the applicant will to the maximum extent practicable, minimize and mitigate the impacts of such [a] taking;" adequate funding will be provided by the applicant; and "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." 16 U.S.C. § 1539(a)(2)(B). This last requirement is especially difficult in light of the fact that, once listed, an endangered species has never been removed from the list.

⁷⁷ 16 U.S.C. § 1539(a)(2)(B)(ii) (1988). Although one commentator has interpreted this language to mean that the FWS should balance the nature and benefits of a proposed development project against the overwhelming cost of mitigation

practicable” has been an uncertain task. The permitting process is a long and protracted one, yet the property owner must pursue these administrative avenues prior to making a constitutional claim for a taking of property.⁷⁸ Until a property owner has exhausted all administrative remedies, a court will not consider a takings case:⁷⁹

A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself “take” the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired Only when a permit is denied and the effect of the denial is to prevent “economically viable” use of the land in question can it be said that a taking has occurred.⁸⁰

Even if such a permit is obtained, development may be conditioned on the requirement that large tracts of land must be left pristine for protection of the species.⁸¹ If a permit is denied or if large tracts of property cannot

procedures, the Service has not used this interpretation. Arnold, *supra* note 23.

⁷⁸ The Stephens’ Kangaroo Rat Interim Habitat Conservation Plan (HCP) in Western Riverside County, California, has already taken over five years for processing and approval. An interim HCP is the equivalent of a temporary HCP. It is hard to determine how much longer property owners must wait before a full HCP will be completed. Thornton, *supra* note 74, at 634–35.

For a discussion of whether a temporary taking occurs when regulation adversely affects property for a period of time, see *Armour & Co., Inc. v. Inver Grove Heights*, 2 F.3d 276 (8th Cir. 1993).

⁷⁹ See *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (“[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.”); see also *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351–53 (1986). *Lucas* presents an unusual situation in which the statute was amended to provide a permitting process after the trial court had ruled on the case. Therefore, although Lucas’s claim was technically not a ripe one, the Supreme Court ruled on the case because the South Carolina Supreme Court had decided the case on its merits. The actions of the South Carolina Supreme Court essentially precluded Lucas from pursuing a permit process. *Lucas*, 112 S. Ct. at 2891–92.

⁸⁰ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985).

⁸¹ Takings issues continue to occupy the Court’s docket. The Court recently heard arguments in *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993), *cert. granted*, 62 U.S.L.W. 3375 (U.S. Nov. 30, 1993) (No. 93-518), in which the city conditioned a property owner’s building permit upon a grant of land from that property owner. Unless the landowner agreed to give the city a strip of land comprising 10% of her

be developed, the essential question for the court then becomes whether the regulatory restrictions have completely destroyed the property's economic value.⁸² Two factors have traditionally been considered in determining whether the loss of property value is complete. One inquiry is whether the property owner has lost all economic viability on the affected tracts of land, or whether the individual has merely experienced a diminution of value on the entire parcel of land as a whole.⁸³ The second inquiry affecting the court's determination of property loss centers on whether the landowner's distinct investment-backed expectations have been destroyed.

2. The "Parcel as a Whole" Debate

The Supreme Court has "uniformly reject[ed] the proposition that diminution in property value, standing alone, can establish a 'taking.'"⁸⁴ Thus, "[o]ne must look to the character and extent of any interference with

property, she would not be permitted to enlarge her small business. George F. Will, *Extortionist City Government*, WASH. POST, March 20, 1994, at C7. The city would then use the "donated" land for a drainage greenspace and pedestrian/bicycle path along a creek. 62 U.S.L.W. 15 (Oct. 26, 1993); Will, *supra*. The Court's opinion is expected to determine what degree of relationship the city must demonstrate between its approval of the requested building permit and the expected impacts of that land use. The Court's opinion in *Dolan* could be extremely influential in the context of the ESA as local and federal governments seek justification for species protection measures.

⁸² This is not to say that there must be loss of all economic value for a compensable taking to occur. In *Tabb Lakes, Inc. v. United States*, the court reads *Lucas* as allowing the proposition that a landowner "need not suffer total deprivation of economic value in order to have suffered a taking." If a complete economic loss has not occurred, the court must "consider the other factors enunciated in *Penn Central*." *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334, 1351 (1992), *aff'd*, 10 F.3d 796 (Fed. Cir. 1993).

⁸³ As the Court in *Lucas* said:

When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Lucas v. South Carolina Coastal Council, 112 S. Ct 2886, 2894 n.7 (1992).

⁸⁴ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value as a result of zoning law) and *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution in value)).

property rights whenever a taking claim is asserted.”⁸⁵ Even if a party has sustained some economic loss, the “proof of damage alone will not necessarily prove a taking”⁸⁶ In *Penn Central Transportation Co. v. New York City*, the Court articulated the concept of “parcel as a whole” in order to measure the extent to which a property right allegedly has been taken.⁸⁷ The *Penn Central* Court rejected the argument that a servitude exerted upon a particular parcel of land could constitute a taking of the entire property of the claimant.⁸⁸ Once the Court established a system of particularized parcels of land, it could then justify a denial of compensable taking in various other situations.

For example, a compensable taking did not occur when regulations restricted subsurface coal mining in order to prevent subsidence damage on the surface.⁸⁹ Although the regulation prohibited the claimant from mining twenty-seven million tons of coal, the Court reasoned that the affected coal made up only 2% of the entire property and thus did not constitute a separate parcel of property.⁹⁰ Nor were claimants entitled to compensation when either the subjacent or lateral development of particular parcels was prohibited by law.⁹¹ Because courts have not yet considered the question of economic loss of property resulting from an application of the ESA,⁹² it is

⁸⁵ *Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 769 (1978).

⁸⁶ *Yazel v. United States*, 118 Ct. Cl. 59, 72 (1950).

⁸⁷ In articulating the “parcel as a whole” concept, the Court stated:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

Penn Central, 438 U.S. at 130–31.

⁸⁸ *Id.* at 130 n.27.

⁸⁹ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 498 (1987).

⁹⁰ *Id.* “[W]here an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.” *Id.* at 497 (quoting *Andrus v. Allard*, 444 U.S. 51 (1979)).

⁹¹ In *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 591 (1962), the Court did not accept the property owner’s argument that, because the most beneficial use of the property was prohibited by statute, a compensable taking had occurred. Because the property owner could find other uses for the property, the regulation was a valid exercise of the town’s police power. *Id.*; see also *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (upholding city ordinance restricting the construction and location of buildings relative to the street).

⁹² In an effort to preserve critical Northern Spotted Owl habitat in the Pacific

useful to examine cases dealing with related environmental statutes.

In comparable federal cases concerning the filling of wetlands, *Loveladies Harbor, Inc. v. United States*⁹³ and *Florida Rock Industries v. United States*,⁹⁴ the U.S. Court of Claims found that a compensable taking occurred when fill permits were denied under the Clean Water Act. In both cases, the court employed the parcel as a whole concept to hold that the denial of fill permits for partial acreage of a larger tract of land constituted a compensable taking.⁹⁵ In reaching this conclusion, the court limited its examination of economic loss only to that portion of property negatively affected by the permit denial. Because the court determined that the economic value of the affected portions of property was completely destroyed, it found a complete economic loss.⁹⁶ Had the Court instead assessed the entire tract of property, some of which was not affected by the regulation, a different result would likely have occurred. This interpretation of parcel as a whole has led some to predict that developers will simply subdivide their land into smaller, more specialized parcels in order to insure that complete loss of value occurs each time a permit is denied.⁹⁷

Northwest, the U.S. Department of Interior (DOI) halted all logging on approximately 6.5 million acres of forested land in Washington, Oregon, and northern California. DOI's original plan would have prohibited logging on 12 million acres of private and federal lands. DOI eventually excluded the private property from the logging-prohibited area to avoid Fifth Amendment takings claims. The effect of the prohibition on the private land surely would have been to completely destroy its economic value. Thus, DOI sidestepped thousands of takings claims that could have resulted in billions of dollars in damages. Mannix, *supra* note 24, at 62.

⁹³ 21 Cl. Ct. 153 (1990).

⁹⁴ 21 Cl. Ct. 161 (1990), *vacated*, No. 91-5156, 1994 WL 73987 (Fed. Cir. Mar. 10, 1994). The lower court's holding in *Florida Rock* may be short lived, however, as the Federal Circuit, for the second time has vacated the Claims Court judgment. In its opinion, the Federal Circuit "reject[s] the trial court's analysis that led to its conclusion that all economically beneficial use of the land was taken by the Government." *Florida Rock*, No. 91-5156, 1994 WL 73987, at *3.

⁹⁵ *Loveladies*, 21 Cl. Ct. at 155; *Florida Rock*, 21 Cl. Ct. at 168.

⁹⁶ In *Florida Rock*, the U.S. Court of Claims awarded plaintiff \$1,029,000 for a taking of 98 acres on a larger tract of 1,560 acres. *Florida Rock*, 21 Cl. Ct. at 176. The *Loveladies* court awarded plaintiff \$2,658,000 for a taking of 12.5 acres on a 51-acre tract. *Loveladies*, 21 Cl. Ct. at 161. *But see* Ciampitti v. United States, 22 Cl. Ct. 310, 320 (1991) (interpreting parcel as a whole to include the entire tract of land, rather than only the property negatively affected, consequently, only a diminution in value had occurred— not a valid compensable taking).

⁹⁷ *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2919 (1992) (Stevens, J., dissenting). The Sierra Club and Audubon Society recently protested the

In three related wetlands cases decided by the U.S. Court of Claims, however, government regulation did not result in compensable takings. In *Tabb Lakes, Inc. v. United States*,⁹⁸ *Jentgen v. United States*⁹⁹ and *Dufau v. United States*,¹⁰⁰ the Claims Court disallowed plaintiffs' claims for compensation because *some* economic benefit was derived from the property. In *Tabb Lakes*, the landowner contended that three of the lots in a larger development constituted an entire parcel and that denial of a fill permit for the three parcels resulted in complete economic loss.¹⁰¹ The court held, however, that even had it accepted the landowner's parcel as a whole argument, substantial economic activity continued on the three lots throughout the permitting process.¹⁰² Thus, any losses suffered by the landowner amounted to no more than a mere diminution in value.¹⁰³

Similarly, in *Jentgen* and *Dufau* the court found that a mere degree of loss in the value of property is an "incident of ownership" and "cannot be considered as a 'taking' in the constitutional sense."¹⁰⁴ Of the eighty acres classified as wetlands in *Jentgen*, the Corps offered a permit to develop twenty acres.¹⁰⁵ Because the claimant's entire property holding of approximately 100 acres retained some of its development value, the parcel as a whole retained development potential.¹⁰⁶ Likewise in *Dufau*, 70 acres of the claimant's 112 acre parcel of land were designated as wetlands.¹⁰⁷ Although the landowner could not undertake any form of development over half of his property, the parcel as a whole retained development

division of a large lumber company in which the original company would retain 11,000 acres of *old-growth* forest while a new subsidiary would own 200,000 acres of *second-growth* forest. Environmental groups are worried that the new arrangement is an attempt to insure maximum economic loss to the holder of the 11,000 acre old-growth forest, thereby ensuring successful takings claim and a potentially costly legal settlement in favor of the lumber company. Michael Parrish, *Legal Strategy May Boost Cost of Saving Timberlands*, LOS ANGELES TIMES, Feb. 1, 1993, at B5.

⁹⁸ 26 Cl. Ct. 1334 (1992), *aff'd*, 10 F.3d 796 (Fed. Cir. 1993).

⁹⁹ 228 Ct. Cl. 527 (1981), *cert. denied*, 455 U.S. 1017 (1982).

¹⁰⁰ 22 Cl. Ct. 156 (1990).

¹⁰¹ *Tabb Lakes*, 26 Cl. Ct. at 1348.

¹⁰² *Id.* at 1352.

¹⁰³ *Id.*

¹⁰⁴ *Jentgen*, 228 Ct. Cl. at 534; *Dufau*, 22 Ct. Cl. at 163 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980) (citing *Danworth v. United States*, 308 U.S. 271, 285 (1939))).

¹⁰⁵ *Jentgen*, 228 Ct. Cl. at 533.

¹⁰⁶ *Id.*

¹⁰⁷ *Dufau*, 22 Cl. Ct. at 162.

potential.¹⁰⁸ Thus, the court in both *Jentgen* and *Dufau* concluded that no compensable taking had occurred.

3. *Investment-Backed Expectations*

The second inquiry used by the Court when determining whether the impacted property has undergone a complete economic loss is the effect of the regulation on the property owner's investment-backed expectations.¹⁰⁹ The *Lucas* Court indicated that it considered the result in *Penn Central Transportation Co. v. New York City*¹¹⁰ unsupportable on several grounds.¹¹¹ First, *Penn Central* was found distinguishable because the loss of value of one parcel of land was measured against the value of the landowner's other holdings in the area.¹¹² Second, the *Lucas* Court found inconsistencies in previous Court rulings.¹¹³ Finally, the *Lucas* Court did not have to decide the value of the economic loss because it summarily accepted the trial court's finding of complete loss of economic value.¹¹⁴

Further inquiry into a landowner's expectations of the property is necessary to determine the degree of loss resulting from a restrictive regulation.¹¹⁵ When a landowner seeks to assert a use of his property that

¹⁰⁸ *Id.*

¹⁰⁹ The *Lucas* Court admitted that the determination of economic loss could be a difficult one and insinuated that a property owner's "reasonable expectations" might be important in such a determination. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992).

¹¹⁰ *Penn Central*, 438 U.S. 104.

¹¹¹ *Lucas*, 112 S. Ct. at 2894 n.7.

¹¹² *Penn Central*, 438 U.S. 104.

¹¹³ The Court compared *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in which a regulation adversely affecting coal extraction was held to effect a taking, with *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), in which a nearly identical regulation was held not to effect a taking. *Lucas*, 112 S. Ct. at 2894 n.7.

¹¹⁴ *Lucas*, 112 S. Ct. at 2894 n.7. "In any event, we avoid th[e] difficulty [of deciding economic loss] in the present case, since the 'interest in land' that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value." See *supra* notes 54-55 and accompanying text.

¹¹⁵ A landowner must show that the regulation interfered with "distinct investment-backed expectations." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). According to the *Ciampitti* court, "the Supreme Court has made it clear that the degree to which the claimant has advance notice of the government action is relevant." *Ciampitti v. United States*, 22 Cl. Ct. 310, 320 (1991).

initially was not part of his original title, that landowner cannot complain of a taking.¹¹⁶ Thus, a property owner who acquires property already burdened by ESA restrictions on development may have to forego a claim for compensation. The FWS purposefully lists species as “candidates” prior to listing them officially as threatened, or endangered.¹¹⁷ By providing for such a “prelisting” process, Congress sought to avoid future conflict.¹¹⁸ It is conceivable, therefore, that one who owns undeveloped land or plans to buy such land may have an affirmative duty to research the most recent FWS listing of candidate, threatened and endangered species prior to the purchase of land or the formulation of development plans.¹¹⁹ A landowner may even have a duty to anticipate the listing of a species if there is some evidence or special knowledge to warn the landowner of future restrictions.¹²⁰

C. Is the ESA a “Traditional Public Nuisance”?

When the ESA does affect the development rights of a property owner but does not result in a complete loss of economic viability, the FWS has an opportunity to prove that the ESA is in the public interest and that any taking does not warrant compensation. The crucial question then is whether enforcement of the ESA prevents a traditional public nuisance. In *Lucas*, the Court laid down a very strict standard for a statute to qualify under the nuisance exception of *Mugler v. Kansas*. Essentially, the Court requires a showing that the regulation does no more than reproduce the result that could have occurred through court actions instituted by adjacent landowners or others with standing to bring an action under the state’s

¹¹⁶ *Lucas*, 112 S. Ct. at 2899.

¹¹⁷ 16 U.S.C. § 1533 (1988).

¹¹⁸ Kilbourne, *supra* note 17, at 512 n.52.

¹¹⁹ “[E]veryone is charged with the knowledge of the United States Statutes at large” *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947); *see also* *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334, 1354 (1992), *aff’d*, 10 F.3d 796 (Fed. Cir. 1993) (stating that because procedures were available for obtaining formal jurisdiction, the party “could have mitigated its own damage” and “should have ascertained for . . . [itself]” whether its development activities were in line with federal environmental regulations).

¹²⁰ *Lucas*, 112 S. Ct. at 2894 n.7 (1992) (stating that the determination of economic loss from an alleged taking may depend on “how the owner’s reasonable expectations have been shaped by . . . whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land” in question).

private nuisance laws.¹²¹ This narrow interpretation of the nuisance exception was criticized by several Justices in *Lucas* who believed it would prevent nuisance law from changing and adapting to evolving public demands on municipalities and localities.¹²²

It is unlikely, in light of the *Lucas* opinion, that ESA protection of endangered species will be sufficient to qualify under the traditional public nuisance exception. Preservation goals under the ESA¹²³ are similar to the goals articulated in the Beachfront Management Act,¹²⁴ which was the statute at issue in *Lucas*. In *Lucas*, the Court did not view the protection goals of the Beachfront Management Act to qualify as a nuisance exception.¹²⁵ Although the goal of species preservation is logically connected to the global environment and traditional issues of health and welfare, it is unlikely that one neighbor could successfully sue another for "taking" an endangered species under traditional public nuisance law.¹²⁶

IV. REVISIONS TO THE ESA ARE NECESSARY

It is apparent that Congress and the American public place a high value upon the protection of endangered and threatened species of plants and

¹²¹ The regulation negatively affecting the land must arise out of "background principles of the state's law of property and nuisance already place[d] upon land ownership." *Id.* at 2900.

¹²² Justice Kennedy believes that the state should be permitted to go beyond the traditional common law of nuisance in regulating land. He believes that property law is not static, that changing circumstances must be considered, and therefore protection of coastal areas might be important enough for the state to regulate without compensation. *Id.* at 2903 (Kennedy, J., concurring). Justice Stevens views the majority as unwisely "arresting the development of the common law." *Id.* at 2921 (Stevens, J., dissenting).

¹²³ See 16 U.S.C. § 1531(b) for the codified purpose of the ESA.

¹²⁴ S.C. CODE ANN. §§ 48-39-10 to -360 (Supp. 1991).

¹²⁵ *Lucas*, 112 S. Ct. at 2901. ("[I]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land.") (quoting *Curtin v. Benson*, 222 U.S. 78 (1911)).

¹²⁶ Some authors have argued that individuals have a moral obligation to protect endangered and threatened species. Holmes Rolston III, *Property Rights and Endangered Species*, 61 U. COLO. L. REV. 283, 300 (1990) (stating that the landowner, not the species, is the newcomer). Few would find any basis for an argument, however, that species preservation efforts that preclude the most basic forms of land development are part of this country's traditional public nuisance doctrine.

animals. As these heavily protected species continue to come into serious conflict with adversely impacted property owners, however, these property owners will resent bearing the heavy burden of regulations aimed at protecting these species which then grant a benefit upon the public at large. As the Secretary of Interior continues to exercise his power to designate critical habitat in the face of increasing development pressures, Congress and the FWS must confront the prospect of relaxing restrictions against taking endangered species or finding a way to compensate for the regulatory takings that are occurring.¹²⁷

A. *Why the ESA Is Unique Among Environmental Statutes*

The *Lucas* Court stated that it expected a complete economic loss to occur “relatively rarely” or only in “extraordinary circumstances.”¹²⁸ Because of the unique nature of the ESA among environmental regulation, however, the Court may be confronted with more takings cases than it anticipated. Three characteristics of the ESA differentiate the statute from other regulations. First, species protection does not fall under the traditional rubric of public nuisance. At common law, an individual owned not only the real property constituting a parcel of land, but also the resources contained on that land, including the plant and animal species.

The second distinction presented by the ESA is its nature of rigid enforcement. Although the use of an ESA section 10(a) permit allows for incidental takings in occasional cases,¹²⁹ a broad definition of harm disallows virtually any use of property designated as critical habitat.¹³⁰ Unlike wetlands cases in which the property owner may be able to work around the affected areas, endangered species usually rely on the entire habitat. Often, none of the property can be disturbed. Under such harsh restrictions, land must be “left substantially in its natural state.”¹³¹ Thus, the restrictions “carry with them a heightened risk that private property is being pressed into some form of public service under the guise of

¹²⁷ *The Law That Seemingly Pits Owls Against People and Jobs*, LOS ANGELES TIMES, Jan. 3, 1993, at M4 (stating that changes in environmental laws and ecological planning are necessary in harsh economic times).

¹²⁸ *Lucas*, 112 S. Ct. at 2904 (Blackmun, J., dissenting).

¹²⁹ See *supra* note 76 and accompanying text.

¹³⁰ See *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, 806 F. Supp. 279, 282–85, *dismissed without opin.*, in part, 976 F.2d 47 (D.C. Cir. 1992), *aff'd.*, 1 F.3d 1 (D.C. Cir. 1993).

¹³¹ *Lucas*, 112 S. Ct. at 2895.

mitigating serious public harm."¹³²

Finally, it is likely that a finding of a compensable taking will occur more often under the ESA because species often are listed *after* an individual has bought the impacted property and developed investment-backed expectations. This last indicia of the ESA creates a vicious cycle. As development pressures increase, more rural and agricultural land is being snatched up to satisfy the suburban sprawl. As land is purchased and modified, species that previously relied on the natural resources are threatened. Once a decline in any species or subspecies is detected, the ESA seeks to protect the survival of the plant or animal by halting development. Thus, once a property owner's legitimate investment-backed expectations are frustrated and the property experiences a total or almost total loss of economic value, a valid claim for a compensable taking is likely to exist. Therefore, these three characteristics of the ESA appear to make a compensable taking increasingly likely under the ESA.

B. *Potential Solutions to the Hard Reality*

As courts are faced with the task of discerning the degree of economic loss suffered by landowners affected by the ESA and the validity of takings claims, the federal government must find ways to compensate for regulatory takings. One mechanism in place to satisfy claims against the U.S. Government is the Tucker Act.¹³³ Cases involving wetlands takings have compensated plaintiffs through the Tucker Act. Another system of compensation used in Wyoming may serve as a model for the federal government.¹³⁴ Unfortunately, any federal compensation system will require a large amount of federal funds which are difficult to find in these days of budgetary restraints. Consequently, reforms within the ESA itself may be crucial to finding a truly realistic solution.

One way to raise funds to set aside critical habitat and compensate adversely affected property owners is the use of mitigation fees. By

¹³² *Id.*

¹³³ 28 U.S.C. § 1491 (1988 & Supp. IV 1992). "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . ." *Id.*

¹³⁴ WYO. STAT. § 23-1-901 (1991). The statute provides compensation to landowners whose property is being damaged by "big or trophy game animals or game birds" of the state. Strict time deadlines are set for reporting the damage, filing claims, and obtaining judgment. Landowners who are unhappy with the result of their claim may appeal and pursue the matter in arbitration. *Id.*

assessing a fee on each acre planned for development in the affected area, the cost of preserving species may be spread more evenly.¹³⁵

Several bills introduced in the House of Representatives and Senate during the last Congress demonstrate the direction that reforms to the ESA might take. One bill introduced by Senator Symms of Idaho, entitled the "Progressive Endangered Species Act of 1992," sought to protect endangered species while recognizing the economic impact of this protection.¹³⁶ This bill would have encouraged market forces to take part in species preservation and would have required compensation for takings. Representative Hansen of Utah introduced a bill, entitled the "Human Protection Act of 1991," that would have required the benefits of any action under the ESA, including the listing of species, to outweigh the costs of that action.¹³⁷ Finally, Representative Tauzin of Louisiana introduced a bill, entitled the "Endangered Species Act Reform Amendments of 1992," that would have left the listing process largely untouched but would have lightened the restrictions on government actions imposed by the ESA.¹³⁸

Another solution which has been suggested advocates large scale planning and coordination between all interested parties—from environmental groups to property developers. One year ago, U.S. Department of Interior Secretary, Bruce Babbitt, proposed such an ecosystem approach to the protection of the California Gnatcatcher, a small bird residing in southern California.¹³⁹ Secretary Babbitt simultaneously announced that the Gnatcatcher would be listed as a threatened species under the ESA and that limited takings of the species would be permitted under the guidelines of local conservation plans.¹⁴⁰ This unique program demonstrates an effort to promote "ecosystem-wide" management rather

¹³⁵ Presently, entities who develop acreage in Riverside County pay \$1,950 per acre. Position Paper, *Wildlife Conservation*, Property Owners Association of Riverside County p.3 (Position Paper on file with the *Ohio State Law Journal*). As of March 1992, the total amount of money raised thus far for the study and protection of the Stephens' kangaroo rat alone was approximately \$26.5 million. *Id.*

¹³⁶ H.R. 3159, 102d Cong., 2d Sess. (1992); see also Nancie G. Marzulla, *A Two-Front Battle for Property Rights*, CHRISTIAN SCIENCE MONITOR, Sept. 18, 1992, at 19.

¹³⁷ H.R. 3092, 102d Cong., 2d Sess. (1992).

¹³⁸ H.R. 6134, 102d Cong., 2d Sess. (1992).

¹³⁹ Tom Kenworthy, *Babbitt Clears Compromise to Protect California Bird*, WASH. POST, March 26, 1993, at A2; see also U.S. Department of the Interior News Release (March 25, 1993) (News Release on file with the *Ohio State Law Journal*) [hereinafter Interior News Release].

¹⁴⁰ Interior News Release at 2.

than "species-by-species" protection.¹⁴¹

V. CONCLUSION

The time has come for Congress to recognize the looming problem of species preservation and devise a way to alleviate the burden on private property owners. In many cases, mitigation can be a solution;¹⁴² however, when a property owner is affected drastically, that individual should not be expected to carry the burden of species protection for the general welfare of the public. Consequently, compensation offers an equitable solution by balancing the burden levied upon an affected landowner with funds raised from public sources. Nor does instituting a more balanced approach to species protection in relation to land uses aid only private landowners—many economic development and housing projects will also be benefited.¹⁴³ As Congress begins the task of reauthorizing the Endangered Species Act, it should anticipate the legal battles of the future by balancing the rights of species and property owners. Foresight of this kind will provide the best management of our country's ecosystems.

The Clinton Administration's Secretary of Interior, Bruce Babbitt, has proposed a system of species preservation that focuses on the entire ecosystem. Such a system of protection for entire ecosystems instead of specific species, could protect numerous animal and plant species in the short term, well before they are in danger of extinction. Such an approach could also provide advance notice to property owners before irreparable harm occurs. This fresh approach to the ESA likely will alleviate future battles between animal species and species of the human kind.

¹⁴¹ *Id.*

¹⁴² See *supra* note 76 and accompanying text.

¹⁴³ Arnold, *supra* note 23.