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The Endangered Species Act and Private Property: A Legal Primer

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THE ENDANGERED SPECIES ACT AND PRIVATE PROPERTY: A LEGAL PRIMER

SUMMARY

If the 103rd Congress embarks upon an effort to reauthorize the Endangered Species Act (ESA), it will run into an old acquaintance: the property rights issue. As now written, the ESA has at least the *potential* to curtail property rights (whatever its actual impact as implemented may be). This report explores the legal repercussions of those impacts, especially whether they constitute takings of property under the fifth amendment of the U.S. Constitution.

The first type of possible impact occurs when the ESA directly bars an activity on private land because it might adversely affect an endangered or threatened species. ESA section 9 bans the "taking" of a listed species, a term that includes significant habitat modification -- even on private land. On the other hand, the act seeks to accommodate economic pressure by allowing "takes" of listed species that are merely incidental to a proposed activity. ESA section 7 orders federal agencies to insure that their actions, including permitting, are unlikely to jeopardize the continued existence of a listed species. Like section 9, section 7 allows incidental "takes," and can be bypassed entirely by action of an Endangered Species Committee.

While the possibility of direct land-use prohibitions under the ESA sparks most of the congressional debate, there appears to be not a single constitutional taking decision from the courts based on such restrictions.

The second type of theoretical impact occurs when the ESA limits one's ability to protect property from the depredations of listed species. ESA section 9 contains no defense for protection of private property, though importantly, "special rules" allow government agents to deal with nuisance animals. One ESA case has been decided in this category, finding no constitutional taking, and most non-ESA depredation cases have yielded the same result. Instances where the protected species exists on private land through government relocation, however, may offer better prospects for the taking plaintiff.

The third type of possible impact occurs when the ESA limits commercial dealings in members of species that were acquired before the species was listed. ESA section 9 contains the pertinent language. Supreme Court taking decisions suggest that constitutional relief in these circumstances is particularly unlikely.

A key reason why courts are not finding constitutional takings is because until now they have deemed the restrictions in wildlife statutes to be land-use controls, rather than to effect permanent physical occupations by the protected animals. The former type of government interference with property is more rarely held to be a taking than the latter. For this and other reasons (but stressing the difficulty of prediction in this area), it seems that few ESA impacts on private property are likely to be constitutionally compensable.

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If the 103rd Congress embarks upon an effort to reauthorize the Endangered Species Act[1] (ESA), it will run into an old acquaintance: the property rights issue.

As now written, the ESA has at least the *potential* to curtail private property rights in various ways -- whatever its actual impact as implemented may be. The act's detractors brand it "absolutist" in commanding the protection of every endangered species regardless of private property impacts or the species' ecological role,[2] while its partisans find in it ample accommodation of landowners' concerns.[3] At times, the emotions generated by the debate have been extreme.

One can see why. To no one's surprise, the hundreds of species protected by the ESA are sometimes found on private property. Where they are, the ESA may pit private economic activity against national concern for aesthetic, ecological, scientific, and recreational values. The landowner, in theory, may suffer economic loss -- immediate, concrete, and quantifiable -- while the benefits he reaps from the act as a member of the public are delayed, uncertain, and noneconomic. Moreover, if the land is not formally purchased by government, the public shares in the claimed benefits without cost.

Of course, the ESA is but one face of the tension between government regulation and private property rights. In recent decades, federal programs, like state and local ones, have increasingly sought to curtail uses of private property deemed inconsistent with environmental and other public goals. Along with wildlife protection, wetlands and surface mining regulation are the salient federal examples. The reaction has been a burgeoning grassroots property-rights movement, and more Supreme Court attention to clarifying, and occasionally strengthening, the safeguards of private property in the fifth-amendment taking clause.[4] Both the Reagan and Bush Administrations made protection of property rights an explicit agenda item, the former issuing an executive order instructing federal agencies to set up procedures for considering, and minimizing, the property impacts of their proposed actions.[5]

Even looking solely at government protection of wildlife, the government- versus-property-rights issue has taken many forms. Analyzing the property impacts of such protections in terms of

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[1] 16 U.S.C. §§ 1531-1544.

[2] *See, e.g.,* Greve, *The Endangered Species Act* (1991), *printed in* Takings and the Environment: The Constitutional Implications of Environmental Regulation (Federalist Society, 1992); Somach, *The Endangered Species Act: How Great is the Threat?*, 2 CAL. WATER LAW & POLICY RPTR. 153 (May 1992).

[3] *See, e.g.,* Hunt and Irvin, *The Endangered Species Act: A Tough Law to Solve Tough Problems*, 90 J. of Forestry 17 (Aug. 1992).

[4] U.S. Const. amend. V: "Nor shall private property be taken for public use without just compensation."

[5] Exec. Order No. 12630, 3 C.F.R. 554 (1988), *reprinted at* 5 U.S.C. § 601 note.

whether there exists a constitutional taking is merely today's fashion; such conflicts have also been challenged as due process violations, government torts, or exceedances of the police power. And the ESA is not the only source of government wildlife protection affecting property. Other federal wildlife statutes that have spawned property-related challenges are the Migratory Bird Treaty Act, Eagle Protection Act, and Wild Free-Roaming Horses and Burros Act.

This report sketches the ESA provisions most likely to fix the act's impact on private property rights. It then reviews three ways in which the act may -- in theory at least -- constrain the use of private property, noting under each (a) pertinent ESA provisions, and (b) the case law, particularly on the constitutional taking issue. A fourth category, federal purchase of private property, is briefly noted. Finally, the report surveys past congressional legislation and future options. Because property-related case law under the ESA is so sparce, we cast our net broadly to include cases under other wildlife statutes as well.

I. A PROPERTY-RIGHTS WALK THROUGH THE ESA

Though Congress first adopted endangered-species legislation in 1966, the property-rights issue did not emerge until 1973 when it enacted the ESA. The ESA considerably broadened federal management authority over endangered and threatened species, including those on private land.

Under the modern act, the possibility of property-rights conflicts begins when the Secretary of the Interior, through the Fish and Wildlife Service (FWS), formally lists a species as endangered or threatened. (The Secretary of Commerce, through the National Marine Fisheries Service (NMFS), administers the act for marine species.) Any species or subspecies of fish, wildlife, or plants may be listed, and separate populations of vertebrate species as well. Significant here, listing is to be done "solely on the basis of the best scientific and commercial data"[6] -- *i.e.*, without reference to property rights impacts.

Along with the listing determination, the appropriate Secretary is required when possible to designate the "critical habitat" of the species -- areas essential to the conservation of the species that may require special management or protection. In sharp contrast with listings, a critical habitat designation is to be based *both* on scientific data and "economic impact and any other relevant impact"[7] -- presumably allowing impacts on property rights to be weighed. Indeed, the Secretary may even exclude an area from critical habitat if the benefits of exclusion outweigh those of inclusion (unless exclusion for this reason will cause species extinction). This ESA distinction between listing and habitat designation, allowing property-impacts analysis only with the latter, was made by Congress quite deliberately.[8]

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[6] ESA § 4(b)(1)(A); 16 U.S.C. § 1533(b)(1)(A).

[7] ESA § 4(b)(2); 16 U.S.C. § 1533(b)(2). *See* 50 C.F.R. § 424.19.

[8] Explains the pertinent committee report:

> Whether a species has declined sufficiently to justify listing is a biological, not an economic, question. For this reason, the [House Committee on Merchant Marine and Fisheries] eliminated all economic considerations from the species listing process. Desirous to restrict the Secretary's decision on species listing to biology alone, the Committee nonetheless recognized that the critical habitat designation, with its attendant economic analysis, offers some counterpoint to the listing of species without due consideration for the effects on land use and other development interests. For this reason,

Of course, species listing and habitat designation by themselves occasion no direct interference with private property. Rather, it is the ESA provisions triggered by these events that may do so.

One such provision, section 9, lays out *prohibited acts* in connection with endangered animals and plants.[9] Section 9's prohibitions apply to private as well as public property, and apply regardless of whether critical habitat is involved. For endangered animals, prohibited acts include (a) the "taking" of any such species, (b) possessing, selling, or transporting any such animal obtained by 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, deleting the general "taking" prohibition. The term "take," a key ESA concept not to be confused with fifth-amendment takings, is generously defined to include almost any act adversely affecting a species -- including "to harass, harm, pursue, hunt, ... capture, or collect" a listed animal. Exceptions from section-9 prohibitions, aimed at accommodation of economic pressures, may be authorized chiefly for "takings" incidental to otherwise lawful activities, and undue economic hardship due to contracts made prior to federal consideration of a species as possibly endangered.

By general rule, the FWS has extended almost all the above prohibitions to *threatened* animals and plants as well.[10] "Special rules" have been promulgated for those threatened species having atypical management needs, and for "experimental populations."

The other ESA provision with property-rights implications, section 7, sets out *federal agency obligations*.[11] Its sweeping mandate is that each federal agency "insure" that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species," or harm designated critical habitat. The only exemption to accommodate development is by action of the Endangered Species Committee (popularly dubbed the "God Squad"), a time-consuming and easily politicized process used to completion only three times since it was established in 1977.[12]

Stepping back, one can readily see that the ESA is neither absolutist in the protections afforded covered species, nor at the other extreme sensitive to every property impact of those protections. For example, the "incidental take" exception was added to the ESA in 1982 precisely to soften the private-property impacts of the act -- yet, on the other hand, its availability is far from universal. By definition, the "taking" can be excused only if it is incidental to, and not the purpose of, the landowner's proposed activity, and an incidental-"take" permit may be issued only when the landowner has submitted a "habitat conservation plan," an expensive proposition for some small

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> the Committee elected to leave critical habitat as an integral part of the listing process, but to prevent its designation from influencing the decision on the listing of a species.

House Rep. No. 567, 97th Cong., 2d Sess. 12 (1982). *See also* House Conf. Rep. No. 835, 97th Cong., 2d Sess. 19 (1982).

[9] 16 U.S.C. § 1538. Violation of section-9 prohibitions is subject under the ESA to civil and criminal penalties.

[10] 50 C.F.R. § 17.31 (wildlife), § 17.71 (plants). The NMFS, on the other hand, adopts section 9 prohibitions for threatened species only on a case-by-case basis. *See, e.g.,* 50 C.F.R. § 227.21(a) (chinook salmon). The authority for extending section 9 prohibitions to threatened species is in ESA section 4(d).

[11] 16 U.S.C. § 1536.

[12] *See generally* Corn and Baldwin, *Endangered Species Act: The Listing and Exemption Processes* (CRS Report 90-242 ENR). Appendix C of the report also details three instances where the exemption process was begun but not completed.

landowners. This and other private-property escape valves in the ESA are discussed in more detail below.

Note: to avoid confusion, the "taking" of listed species under the ESA is indicated by quotation marks; the taking of private property under the fifth amendment of the Constitution is shown by absence of quotation marks.

II. POSSIBLE TYPES OF ESA PROPERTY-RIGHTS IMPACTS

Following are the principal ways in which the ESA might conflict with private property rights. The focus, again, is on the act's legal potential; the extent of its impacts as actually implemented is only touched upon.

1. DIRECT LIMITS ON PROPERTY USES THAT MIGHT ADVERSELY AFFECT LISTED SPECIES

When the ESA's relation to property rights arises in Congress, and when property-rights advocates level their criticisms, the debate typically centers on this type of impact.[13]

ESA Provisions

ESA section 9, together with implementing rules, bars any person (or federal agency) from "taking" endangered or threatened wildlife. The term "take" is defined by the act to include "harming" a listed species. "Harm," in turn, is defined by FWS to include indirect harm by means of certain habitat alterations:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. *Such act may include significant habitat modification* or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.[14]

In bringing habitat modification within the definition of "harm," the FWS hardly lacked a mandate. Loss of habitat is recognized in the ESA as a principal threat to endangered species, and counteracting this trend is a key purpose of the act.[15] Nonetheless, the interpretation of section 9 as including habitat alterations is also a key reason why the ESA intersects with property rights.

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[13] *See, e.g.*, Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters -- Is It Against Nature to Pay for a Taking?*, 27 LAND AND WATER L. REV. 309, 321-22 (1992); Williams, *Landowners turn the Fifth into sharp-pointed sword*, High Country News, Feb. 8, 1993, at 1.

[14] 50 C.F.R. § 17.3 (second emphasis added). The NMFS has not yet promulgated a "harm" definition of its own.

[15] Among the ESA's stated purposes is the conserving of "the ecosystems upon which endangered species and threatened species depend ... ," ESA § 2(b), a goal embodied in the aforementioned device of designating "critical habitat," ESA § 3(5). While considering the bill that became the ESA, Congress was informed that the greatest threat to endangered species was destruction of natural habitats. TVA v. Hill, 437 U.S. 153, 179 (1978).

Plainly, the habitat of listed species may overlap with private land (and, in the case of listed aquatic species, with private water rights). With 749 domestic species listed as endangered or threatened under the act and thousands more awaiting consideration, the spectre has been raised by some that the ESA presents a ubiquitous threat to the institution of private property. Note also that habitat modification may constitute a prohibited "take" under section 9 regardless of whether the land is designated critical habitat.[16]

The key section-9 safety valve for development pressures is the "incidental take" provision,[17] added in 1982. Permits for "incidental takes" -- *i.e.*, "takes" of listed species that are incidental to, and not the purpose of, a proposed activity -- may be issued by the Secretary after the landowner submits a "habitat conservation plan" (HCP) on the impacts from the "taking," along with proposed mitigation measures, why alternatives were rejected, and so on. If the Secretary finds that the "taking" will in fact be incidental, satisfactorily mitigated, and will not appreciably reduce the species' chances for survival and recovery, he must issue the permit. However, HCPs, without which a permit cannot be issued, have been controversial. Their cost may be prohibitive for small landowners not covered by regional or project HCPs funded by big developers or state and local governments, and they allegedly impose delays on development.[18] FWS reports that as of December, 1992, it has approved only 14 HCPs in the program's decade-long history.

ESA section 7, by contrast with section 9, operates directly on federal agencies only, instructing them to avoid harm to listed species or critical habitat:

> Each federal agency shall, in consultation with ... the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical ....

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[16] *See, e.g.*, Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988) (logging practices of Forest Service harmed habitat of endangered red-cockaded woodpecker, and thus effected "taking," even though habitat had not been designated as critical).

[17] ESA § 10(a)(1)(B); 16 U.S.C. § 1539(a)(1)(B).

[18] States one commentator:

> Only a handful of HCPs have been approved since 1982. Several others have failed outright or have floundered in a seemingly endless attempt to reach consensus among disparate interest groupos. There is growing environmental opposition to HCPs which sanction the loss of habitat, and calls for instituting a "no net loss" policy for endangered species planning efforts. .... The development community is growing increasingly frustrated with the length of time required to resolve endangered species conflicts through the HCP process and the inability of HCPs to remove legal risks associated with the subsequent listing of species not addressed in the HCP.

Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENV'L LAW 605 (1991). Recommendations for changing HCPs are contained in Bean et al., *Reconciling Conflicts Under the Endangered Species Act: The Habitat Conservation Planning Experience* (World Wildlife Fund 1991).

A prime factor contributing to the time taken by the FWS to approve HCPs is doubtless the preparation of an environmental impact statement (EIS), which reportedly has accompanied every HCP approval to date except one. EIS preparation is required by the National Environmental Policy Act, of course, not by the ESA.

Once consulted under this provision, the Secretary must, if listed species might be affected by the proposed action, do a "biological assessment" to determine the actual impact. If he finds the proposed action "not likely to jeopardize ... " per the above language, he must specify the impact of any "incidental taking" on the species, necessary mitigating measures, conditions that should be imposed on the action, etc. The incidental-taking analysis under section 7 is the same as for incidental-taking permits under section 9.[19]

Section 7's impact on the private landowner comes about most tangibly when an agency finds that it cannot, consistently with section 7, issue a permit needed for land development.[20] Probably the most common example is denial of a wetlands fill permit under the Clean Water Act, which may substantially curtail a landowner's development plans. As a practical matter, pursuit of an Endangered Species Committee exemption from section 7 is an option only for the largest projects.

Section 7 approvals trump section 9's prohibitions. That is, when the Secretary has issued a section-7 incidental "take" statement, "takings" that occur in compliance with that statement are not actionable under section 9.[21]

Case Law

While the possibility of direct land-use prohibitions under the ESA sparks most of the congressional debate, there has been curiously little activity in the courts. We find no ESA taking decisions in this category.[22] Environmentalists infer from the lack of cases that the ESA/property rights conflict has been vastly overstated -- that the act and its enforcing agencies are flexible enough. Property-rights advocates argue that the high costs of taking litigation for the small landowner may be what is discouraging resort to the courts, not any lack of impacts.

The environmentalist argument has some force, given that other federal environmental programs caught up in the property rights debate, especially the wetlands protection effort of the Corps of Engineers, have spawned a hefty number of taking claims. But one cannot infer, from the absence of ESA taking suits alone, that the act is having universally *insignificant* impact on property, since the daunting demands of taking law discourage suit in all but extreme instances of property value loss. Moreover, property value loss is gauged by reference to the property *as a whole*; total deprivation of economic use on only a portion of a private tract is not a taking if

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[19] Provision for incidental taking permits exempting landowners from section 9 was added to the ESA in order to give landowners not requiring federal permits the same opportunity to develop their property as those proceeding under section 7. House Conf. Rep. No. 304, 97th Cong., 2d Sess., *reprinted in* [1982] U.S. Code Cong. & Ad. News 2860, 2870.

[20] Issuance of a federal permit notwithstanding failure of the proposed development to satisfy section 7 could also be viewed as a violation by the agency of ESA section 9. Federal agencies fall within the definition of "person" under section 9, and the issuance of the permit could be viewed as bringing about adverse habitat modification, thus "taking" the species. *See* Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988) (Forest Service's management practices resulted in precipitous decline of red-cockaded woodpecker on Forest Service lands, and hence violated both ESA sections 7 and 9).

[21] ESA § 7(o)(2); 16 U.S.C. § 1536(o)(2).

[22] Indeed, at this writing there are no taking cases under the ESA pending in the U.S. Court of Federal Claims, the forum where ESA/taking claims against the United States must be filed when the amount in controversy exceeds $10,000. 28 U.S.C. §§ 1346, 1491.

economic use of the unaffected portion remains feasible.[23] Thus, as with property impacts from other government programs, the large majority of any ESA impacts on private property that may be occurring are likely to fall short of the constitutional taking threshhold.

For another thing, even meritorious suits must meet the Supreme Court's exacting ripeness requirements. Generally, a taking claim is not ripe until a regulation has resulted in land-use prohibitions applied directly to plaintiff's specific parcel.[24] Beyond that, any potential exceptions from a land-use prohibition must have been applied for and denied,[25] and, unless it would be futile, the landowner must make further attempts to gain approval of scaled-down (but still profitable) proposals.[26]

For purposes of the ESA, these ripeness precepts mean that the mere listing of a species cannot support a taking claim. Nor can the FWS' giving a landowner notice that his proposed activity would be regarded by the agency as a "taking" under section 9, and prosecuted. Rather, it would seem that to clear the ripeness hurdle the landowner must apply for and be denied an "incidental take" permit for the proposed activity, and then perhaps do similarly for scaled-down versions thereof. Under section 7, there is an issue whether denials of federal permits can give rise to a ripe taking claim before the Endangered Species Committee exemption process has been exhausted.

Right now, the only federal-law case in the direct-limits category appears to be an old one not involving the ESA.[27] Still, there are intimations of ESA/taking litigation to come. Taking suits based on ESA-required timbering restrictions aimed at protecting the northern spotted owl, listed as threatened, are rumored to be near filing, even though all of the owl's critical habitat is on federal land.[28] And a taking action may be filed soon based on ESA property restrictions aimed at protecting the kanab ambersnail in southern Utah.

ESA/taking litigation may also arise at some point in connection with government efforts to maintain instream flows to avoid "taking" listed species of salmon, found in the Columbia and Sacramento rivers. Such efforts have been argued to conflict with state-law water rights. And a similar conflict with water rights might potentially arise from recent court injunctions against the

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[23] This doctrine, known as the rule against segmentation, was firmly endorsed by the Supreme Court in 1978. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127. Since then, however, a four-justice dissent in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), appeared to be accepting of segmentation, and the Court has recently gone out of its way to indicate interest in revisiting the issue. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992).

[24] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

[25] Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[26] MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

[27] In Bailey v. Holland, 126 F.2d 317, 324 (4th Cir. 1942), the court discerned no taking in application of a Migratory Bird Treaty Act hunting ban to private land near a wildlife refuge, allegedly rendering the land "practically worthless." The court explained, rather simplistically, that "[a]ny injury thus caused results from an exercise by the Government of its police power and not of its power of eminent domain."

[28] A private citizen suit recently filed in Oregon seeks to force a lumber company to obtain an "incidental take" permit under the ESA before cutting timber on its own land -- based on potential disruption of spotted owls on nearby federal land. Forest Conservation Council v. Rosboro Lumber Co., No. 92-1114-HO (D. Ore. filed Sept. 9, 1992). If such a permit is judicially required, and then applied for and denied, a ripe constitutional taking claim would seem to exist.

operation of irrigation-district diversion facilities that suck listed salmon into their pumps.[29] State-created water rights, by way of background, constitute property for taking-clause purposes,[30] and the ESA has been held to provide no exception from compliance to persons possessing such rights.[31]

At least one court decision in the direct-limits category has arisen under *state* law. In *Southview Associates, Ltd. v. Bongartz*,[32] the Second Circuit dealt with Vermont's denial of a permit for a vacation home development that would overlap a "deeryard area" protected by state law.[33] The court saw no physical taking, explaining that the developer had not met U.S. Supreme Court criteria for a compensable permanent physical occupation.[34] First, the developer had not lost the right to possess the deeryard area, nor to exclude the deer. Second, it had not lost the right to control the deeryard's use. For example, the developer, to the exclusion of others, could still walk, camp, ski, or even hunt deer on the land -- irrespective of whether these activities cause the deer to abandon the deeryard. Third, the availability of these uses to the deeryard owner meant that the right to sell the deeryard area was far from worthless. Of course, it may have helped the court hold against the developer that the physical invasion here was only seasonal, involving no more than 20 deer.[35]

Finally, *Southview* held that any *regulatory* taking claim was unripe due to the landowner's failure to seek state approval of scaled-down development plans for the site that did not intrude upon deeryard, and its failure to seek compensation in the state courts.[36]

Though *Southview* does not involve the ESA, it is important as the only modern federal-court ruling on the taking implications of direct private land-use control in the name of wildlife protection.

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[29] United States v. Glen-Colusa Irrigation Dist., 788 F. Supp. 1126 (E.D. Cal. 1992) (ESA compels issuance of injunction against the district's pumping from the Sacramento River during the winter-run chinook salmon's downstream migration); Dep't of Fish & Game v. Anderson-Cottonwood Irrigation Dist., 8 Cal. App. 4th 1554, 11 Cal. Rptr. 2d 222 (1992) (similar injunction issued under California Endangered Species Act to protect winter-run salmon). *See generally* Trager and Staples, *Water, Water Everywhere But ... : Species Protection Regulations as Water Rights Takings after* Nollan *and* Lucas, CALIF. WATER LAW & POLICY RPTR. 23 (Nov. 1992).

[30] United States v. Gerlach Live Stock Co., 339 U.S. 725 (1975); Ball v. United States, 1 Cl. Ct. 180 (1982).

[31] United States v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126, 1134 (E.D. Cal. 1992). ESA § 2(c) makes it congressional policy that federal agencies "cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." This exhortation, of course, does not qualify the act's mandate.

[32] 980 F.2d 84 (2d Cir. 1992).

[33] "Deeryard area" is defined in the opinion as "winter habitat for white-tailed deer," as identified on a state-prepared deeryard map. The deeryard in question, consisting of 280 acres, was found by the state to be the sole remaining, active deeryard within a 10.7 square mile area.

[34] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982).

[35] On the other hand, the *Southview* court seems to have erred in holding that the developer did not satisfy the government-compulsion prerequisite for compensability articulated in Supreme Court physical-taking cases. This prerequisite states, rather unremarkably, that only those physical invasions to which the property owner does not assent can be takings. The Second Circuit saw no government compulsion here in that the developer had voluntarily proposed the vacation home development. But of course, it is the voluntariness of the landowner's accepting the deer on his property, not that of his development proposal, that is the crux.

[36] Writing only for himself, the chief judge opined that if the merits had been reached, he would find no regulatory taking. For one thing, it appeared that the developer's proposal could be fit into the non-deeryard portion of the tract.

Moreover, if the three-factor analysis adopted in *Southview* becomes standard, physical takings would seem almost impossible for landowners to demonstrate.

As background on when habitat alteration amounts to a prohibited "take" under ESA section 9, one can do no better than read *Palila v. Hawaii Dep't of Land and Natural Resources*, the leading case. *Palila I* announced the simple proposition that habitat modification, without more, may constitute a "take."[37] After the FWS promulgated new regulations clarifying that "harm" means "actual" harm,[38] *Palila II* blessed the agency view that not all modification of listed-species habitat is a "taking." Rather, section 9 bans only those activities that modify habitat to an extent that essential behavioral patterns are disrupted, or which cause a significant decline in species population.[39] Thus, as is true under section 7, protection of habitat under section 9 is limited. The district court in *Palila II*, however, held expansively that habitat modification merely *preventing the recovery* of a species also constitutes "harm."[40]

The concept of habitat modification as a prohibited "take" in and of itself has been a favorite topic of commentators. According to one:

> The *Palila* decisions have stimulated vigorous and, indeed, creative administration of section 9 by certain FWS offices. In California, the FWS has convinced a number of city and county officials that they will violate the ESA, and be subject to civil and criminal penalties, if the city or county approves development within the listed species' habitat.[41]

Another commentator argues that since Congress left the relevant ESA sections unchanged through several amendments to the act since *Palila*, it must not disapprove of the definition of "harm" set out in that litigation.[42]

2. LIMITS ON DEFENSIVE MEASURES AIMED AT PROTECTING PROPERTY FROM HARM CAUSED BY LISTED SPECIES

Of older vintage than type-one impacts are instances when a person is legally barred from using certain measures to protect his property from the depredations of protected wild animals. A typical scenario, arising under the Migratory Bird Treaty Act and state hunting bans, involves

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[37] 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981). The issue recently has been resurrected in Sweet Home Chapter of Communities for a Great Oregon v. Lujan, 35 Env't Rptr. (Cases) 1264 (D.D.C. 1992) (habitat modification may constitute "harm"), *appeal docketed*, No. 92-5255 (D.C. Cir. July 9, 1992).

[38] 46 Fed. Reg. 54748 (1981), quoted on page 5.

[39] 649 F. Supp. 1070 (D. Haw. 1986), *affirmed*, 852 F.2d 1106 (9th Cir. 1988).

[40] 649 F. Supp. 1070, 1075-77 (D. Haw. 1986), *affirmed on other grounds*, 852 F.2d 1106 (9th Cir. 1988).

[41] Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENV'L LAW 605, 613 (1991).

[42] Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENV'L LAW 811, 847 (1990).

protected birds that feed on private crops or forage. Another situation, arising under the ESA, involves protected predators (wolves, grizzly bears) that on occasion kill private livestock.

ESA provisions

ESA section 9 and associated regulations against "taking" a listed species appear to admit of no defense based on protection of private property. The Act creates a defense based on good-faith belief that one was protecting *persons* from bodily harm, but no mention is made of protecting *property*.[43]

On the other hand, two FWS "special rules" allow government agents, but not private individuals, to "take" members of threatened species and experimental populations that have actually done harm to property.[44] One special rule speaks to grizzly bears, a threatened species: grizzlies "committing significant depredations to lawfully present livestock, crops, or beehives" may be humanely "taken" by such agents when it has not been possible to end the depredation by relocating the animals to a remote area.[45] The other special rule, quite similar, deals with experimental populations of red wolves.[46] If other threatened species and experimental populations come to harm property, there will presumably be more special rules. However, the ESA cannot easily be read to allow the FWS a similar freedom to abate property injuries in connection with species designated as *endangered*.

Direct action by the property owner against a nuisance animal could not qualify for an "incidental take" permit, since the resultant "taking" plainly would be the very aim of the property owner's response, and not merely "incidental" thereto.

Case law

To date, most taking litigation over federal wildlife laws falls into the defense-limitation category, and almost all of it has been resolved against the property owner.[47] Prominent in the federal-court decisions is endorsement of the common-law doctrine of *ferae naturae* -- the rule that no one is liable for injuries wrought by animals existing in a state of nature, until they have been reduced to possession by skillful capture. The doctrine has been consistently endorsed despite government's contributory role in such injuries by thwarting the landowner's defenses or failing to properly manage the species.

In the only ESA case, the statute's ban on "taking" grizzly bears, a threatened species, was found to cause no taking as applied to bar a rancher from killing grizzlies that ultimately ate 84 of

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[43] ESA § 11(a)(3) (protection of persons as civil defense); ESA § 11(b)(3) (protection of persons as criminal defense).

[44] In limiting removal authority to government agents, rather than individuals, these special rules track the Wild Free-Roaming Horses and Burros Act, which requires the United States to remove wild horses and burros from private land when requested. 16 U.S.C. § 1334.

[45] 50 C.F.R. § 17.40(b).

[46] 50 C.F.R. § 17.84(c)(5).

[47] *See generally* Note, *The Watchtower Casts No Shadow: Nonliability of Federal and State Governments for Property Damage Inflicted by Wildlife*, 61 UNIV. COLO. L. REV. 427 (1990).

his sheep. The United States, said the court in *Christy v. Hodel*,[48] neither owns nor controls the wildlife it protects; the rancher's loss is merely the "incidental" byproduct of the challenged ban. In lone dissent from the denial of certiorari, however, Justice White posed a question much repeated by property rights advocates: "whether a government edict barring one from resisting the loss of his property is the constitutional equivalent of an edict taking such property in the first place."[49]

Of course, the ESA does not literally bar one from "resisting the loss of his property"; by its terms, it prohibits only "takes." Any means of protecting property that causes no "take" is lawful under the ESA. Still, it is certainly possible that in specific instances such ESA-consistent modes of defense (fencing, watchdogs, etc.) may not be effective, affordable, or legal under other laws.

Most non-ESA depredation cases in the federal courts have reached the same no-taking conclusion as *Christy*, again despite government constraints on private defensive efforts. No taking was found based on private livestock forage consumed by feral horses protected under the Wild Free-Roaming Horses and Burros Act (WFHBA),[50] or based on crops damaged by geese that were protected from hunting under the Migratory Bird Treaty Act.[51] Not surprisingly, a federal case where *no* limits were placed on private defense, involving prairie dogs migrating from public land to private farms and ranches, also found no taking.[52] Most state-court decisions, typically involving hunting bans on game animals, have denied relief to the property owner as well,[53] though owing to

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[48] 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989).

[49] See Comment, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings*, 58 UNIV. CHI. L. REV. 1101 (1991). More broadly, *see* Note, *The Right to Protect Property*, 21 ENV'L LAW 209 (1991).

[50] Mountain States Legal Fdn. v. Hodel, 799 F.2d 1423, 1430-31 (10th Cir. 1986) (4-3), *cert. denied*, 480 U.S. 851 (1987). The United States did not appeal the trial court's grant of mandamus, ordering the Secretary of the Interior under the WFHBA to remove all wild horses from the plaintiffs' land, and to reduce the wild horse population on adjacent public lands.

[51] Bishop v. United States, 126 F. Supp. 449, 452 (Ct. Cl. 1954), *cert. denied*, 349 U.S. 955 (1955).

[52] American Farm Bureau Federation v. Block, 14 Env'l Law Rptr. 20763 (D.S.D. 1984). The failure of the federal-agency defendants to control the size of the prairie dog population on federal lands was seen by the court to be merely tortious, rather than a taking. Alternatively, the court cited *ferae naturae*.

[53] The seminal state case finding no taking appears to be Barrett v. State, 220 N.Y. 423, 116 N.E. 99 (1917) (government-reintroduced beavers destroyed hundreds of trees on valuable private woodland). Later no-taking rulings include Maitland v. People, 93 Colo. 59, 23 P.2d 116 (Colo. 1933) (protected deer alleged to have increased in number, causing crop damage); Platt v. Philbrick, 8 Cal. App. 2d 27, 47 P.2d 338 (1935) (wild animals in game refuge might proliferate as result of year-round hunting ban, causing damage to private garden in refuge); Cook v. State, 192 Wash. 602, 74 P.2d 199 (1937) (beaver trapping ban resulted in damage to private lake used as commercial skating rink); and Collopy v. Wildlife Comm'n, 625 P.2d 994 (Colo. 1981) (goose hunting ban inflated goose population, causing crop losses). *See also* Leger v. Louisiana, 306 So.2d 391, 393 (La. Ct. App.) (deer hunting ban resulted in crop damage; compensation claim denied on nonconstitutional grounds), *review denied*, 310 So.2d 640 (La. 1975).

On the opposite side of the ledger, state decisions finding a taking include State v. Herwig, 17 Wis.2d 442, 117 N.W.2d 335 (1962) (waterfowl hunting ban led to "unnaturally concentrated foraging" on plaintiff's crops), and Shellnut v. Arkansas, 222 Ark. 25, 258 S.W.2d 570 (1953) (deer hunting ban resulted in damage to orchards and crops). In both cases, a factor pointing toward a taking was the state's departure from its general practice of *purchasing easements* over tracts, such as those of plaintiffs, situated so as to be valuable as a game refuge.

federal/state court doctrinal differences their precedent value for the ESA/taking issue seems limited.[54]

The one federal case that *did* find a taking involved unusual facts. In *Fallini v. Hodel*,[55] plaintiffs had a state-granted stockwatering right at a federal site, and a federal Range Improvement Permit to build a well there. After the "costly" well was completed, however, the United States forbade plaintiffs from building guardrails around it, out of concern for the safety of wild horses protected under the WFHBA. As a result, wild horses consumed "practically all" of the well water. The district court found a taking because the burden on plaintiff was seen to be greater than in the foregoing cases, and because of the frustration of investment-backed expectations resulting from the well construction pursuant to government permit.

At first blush, *Fallini* has limited relevance to ESA-protected species, since by historical practice Range Improvement Permits for federal water sources include a requirement that wildlife access be assured.[56] Moreover, the taking ruling in the case was *dictum* and not reached on appeal.[57] Still, *Fallini* does show that under certain circumstances, as here where valuable improvements were rendered worthless, federal curtailment of private defenses against wildlife may be deemed a taking.

Another scenario with potential for takings, one likely to be heard from increasingly, is when protected animals are introduced into an area *by the government*. Recall above some real-life instances: the introduction of red wolves into North Carolina and the proposal to introduce gray wolves into the Yellowstone ecosystem. Whether introduced animals thereby become "instrumentalities of the government" for taking purposes was an issue expressly left open in *Christy*.[58] In this regard, might it matter also whether the animal is being reintroduced into its historic range, as opposed to a completely new area? And even in the absence of government introduction, could it be argued that government intervention merely increasing the population of

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[54] Many state cases (including those in note 53) have recognized a state constitutional right to defend one's property from wild animals even when contrary to state conservation laws, or, in *Maitland*, involved a statute providing for compensation to persons whose property is damaged by protected wild animals. *See, e.g.*, Cross v. State, 370 P.2d 371, 376, 377 (Wyo. 1962) (due process clause in state constitution read to guarantee "the inherent and inalienable right to protect property"). *See generally* Mountain States Legal Fdn. v. Hodel, 759 F.2d 1423, 1428 n.8 (10th Cir. 1986) (collecting cases), *cert. denied*, 480 U.S. 851 (1987); Annot., *Right to Kill Game in Defense of Person or Property*, 93 A.L.R.2d 1366 (1964) (noting that property protection right has been found both in states having constitutional provisions guaranteeing the right of acquiring, possessing, and protecting property, and those that do not).

As noted in text, no such rights have been judicially acknowledged under the federal constitution or ESA, arguably altering the taking analysis for the ESA.

[55] 725 F. Supp. 1113 (D. Nev. 1989), *aff'd on other grounds*, 963 F.2d 275 (9th Cir. 1992). The taking issue was raised *sua sponte* by the district court.

[56] The government did not consider the feral horses congregating at the Fallinis' water source to be "wildlife" within the meaning of their Range Improvement Permit.

[57] The Fallinis have since refiled their taking claim in the U.S. Court of Federal Claims, where it is now pending. No. 92-809 (filed Nov. 24, 1992).

[58] 857 F.2d at 1335 n.9. One might argue that the relocated animals, having been "reduced to possession" during capture and transit to their new home, are no longer in *ferae naturae* status, but rather have become the property or agents of the relocating government.

a listed species undercuts the *Christy* rationale?[59] Or that an animal that is heavily managed within its critical habitat (immunized, fed, tagged, etc.) is "controlled" by the federal government, and hence not under *Christy*?

The "government introduced" issue left dangling in *Christy* has received scant judicial attention in the past.[60] Quite recently, however, it has been raised in a suit contending that a state took plaintiff's ranch through its relocation nearby of a band of Tule Elk, which now allegedly occupy the ranch almost continuously, eat crops raised for the rancher's livestock, cause stream bank erosion, and damage fences -- while the rancher is prevented from taking adequate protective measures. Plaintiff asserts both a regulatory and physical taking.[61]

Undeniably, taking actions have become the landowner's weapon of choice in the depredations category. Still, other legal swords have been drawn. The *Christy* court also found no due process violation, discerning no "fundamental right" in the U.S. Constitution to protect livestock from protected predators that would subject the ESA "taking" ban to strict scrutiny. Though relying chiefly on the Supreme Court's reluctance to enlarge the list of fundamental rights under due process, the court also noted that nothing in the ESA prevents the rancher from fencing out grizzlies or driving them away by nonharmful means, and that as a last resort, the FWS special rule allows government agents to "take" nuisance bears.[62]

A suit based on another alternative, the Federal Tort Claims Act (FTCA), met the same fate. Plaintiff's theory was that by assuming the protection of migratory waterfowl under the Migratory Bird Treaty Act, the United States became responsible for their feeding on privately owned crops. The court disagreed, relying on *ferae naturae*. And, the court held, since a private person cannot

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[59] Under ESA section 7, it has been held that at least the Secretary of the Interior has "an affirmative duty to increase the population of protected species." Defenders of Wildlife v. Andrus, 428 F. Supp. 167 (D.D.C. 1977). In Mountain States Legal Fdn. v. Hodel, 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 851 (1987), the Bureau of Land Management acknowledged that there had been an "overpopulation" of wild horses since it assumed control of them, but the majority's taking analysis does not address the point.

[60] An old state case is Barrett v. State, *supra* note 53. There, the state reintroduced beavers to a region of the Adirondack Mountains, where they destroyed hundreds of trees on plaintiff's valuable woodland. The court found no violation of the police power, explaining that the state justifiably believed that its actions would promote the public good. Nor was reintroduction seen to be different in legal contemplation from increasing the beaver population by banning their destruction -- as the state, the court believed, could surely do. However, by virtue of its age, police-power focus, and strong deference to government, *Barrett* probably has little precedent value for a latter-day taking challenge to the ESA.

[61] *Moerman v. California*, No. 57221 (Mendocino Cty. Super. Ct. Feb. 25, 1992) (summary judgment for state), *appeal docketed*, Civ. A057389 (Cal. Ct. App. 1st Dist.). *See also* Hage v. United States, Civ. No. 91-1470 (Fed. Cl. filed Sept. 26, 1991) (claiming that non-indigenous elk introduced by state onto federal land with Forest Service permission are impairing stockwatering rights).

[62] As with the circuit court's no-taking holding, Justice White's dissent from the denial of certiorari takes exception. Justice White argues that a person's right to protect his property -- "long recognized at common law ... and deeply rooted in the legal traditions of this country" -- may indeed be a fundamental one under substantive due process. 490 U.S. at 1115.

As noted, certain state courts have construed state constitutions to confer a right to protect property from protected wildlife. *Supra* note 54.

be held liable under that doctrine for the trespasses of animals in a state of nature, neither, under the FTCA, can the United States.[63]

3. LIMITS ON COMMERCIAL DEALINGS IN SPECIES ACQUIRED PRIOR TO LISTING

If an animal or plant, or item made therefrom, is acquired prior to listing under the ESA, the fact of listing may well frustrate commercial expectations based on projected sale of those species or items. Exotic animals imported pre-listing for commercial resale are an obvious example.

ESA provisions

ESA section 9 includes among its prohibitions many that bar commercial dealings in endangered species. For example, it is made unlawful to import or export, or transport interstate in the course of commercial activity, any listed animal or plant.

The rub, from the property owner's point of view, is that the ESA contains no explicit authority for a *general* grandfathering from its section-9 prohibitions on species or items acquired before listing. Moreover, the insertion of several narrowly defined grandfather provisions in the act supports the view that Congress intended no broader authority be granted. The absence of general grandfathering authority creates the potential for property impacts when species acquired pre-listing lose most of their commercial value.

Of the limited grandfathers in the ESA, the one most likely to prove useful to the commercial dealer is the "hardship exemption."[64] A person may apply for this exemption following government publication of notice that a species is being considered for listing as endangered, if he has previously entered into a contract regarding such species and listing will cause him "undue economic hardship." Granting of the exemption by the Secretary is discretionary, however, and limited to one year from the aforementioned publication. Other grandfathering authorities are provided for animals held on the date of listing *not* in the course of commercial activity,[65] and for sperm whale oil and scrimshaw lawfully held as of the 1973 enactment of the ESA.[66]

Case law

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[63] Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939 (1951). In another case involving the spread of prairie dogs from federal to private lands, the FTCA claim was defeated by a procedural oversight: plaintiffs' failure to first present their claim to a federal agency, as required by the FTCA. American Farm Bureau Federation v. Block, 14 Env'l Law Rptr. 20763 (D.S.D. 1984).

[64] ESA § 10(b); 16 U.S.C. § 1539(b).

[65] ESA § 9(b); 16 U.S.C. § 1538(b).

[66] ESA § 10(f); 42 U.S.C. § 1539(f).

Only two federal-court decisions have dealt with limits on commercial dealings in previously acquired animals, each finding no taking.[67] As noted below, it is likely that future taking challenges under this rubric will fare no better.

In the only ESA case, *United States v. Kepler*,[68] no taking was found in the ESA's ban on interstate transport of a listed species, as applied to animals allegedly held lawfully as of the ESA's enactment. The court reasoned that the ESA barred sales of the animals in question only in interstate and foreign commerce, allowing sales in *intra*state commerce and (when approved by the Secretary) for scientific and species-propagation purposes. Thus, listing did not completely destroy the value of the animals and no taking was effected.

More important, this category includes the only Supreme Court taking decision in the wildlife-protection area. *Andrus v. Allard*[69] hinged on a federal ban on commercial transactions in bird parts covered under the Eagle Protection Act and Migratory Bird Treaty Act, as applied to bird parts lawfully acquired by the plaintiffs before the ban's effective date. The Court found the ban to work no taking, explaining that while it foreclosed the most profitable use of the bird parts, other uses of them -- possession, transport, donation, or exhibition for an admissions charge -- remained to plaintiffs.

Andrus is one of the Supreme Court's most government-friendly taking decisions, so its precedent value in a conservative Court has been questioned. Indeed, the justices themselves once debated its vitality.[70] Nonetheless, the Court gave *Andrus* a ringing endorsement in its most recent foray into the regulatory taking area in *Lucas v. South Carolina Coastal Council*.[71] *Lucas* asserted in dictum that by virtue of government's traditionally high degree of control over commercial dealings, the owner of *personal* property, in contrast with land, must be aware of the possibility that new regulation might even render such property worthless. The clear suggestion is that regulation of commercial dealings in personal property is rarely a taking. Most important, the case cited as illustrative was *Andrus*. In light of *Andrus* and *Lucas*, it is arguable that ESA restraints on commercial trading in animals acquired before listing can never effect a taking.

4. FEDERAL ACQUISITION OF PROPERTY TO CONSERVE HABITAT

So far, we have dealt only with preserving protected species from private activities through command and control: enjoining actions of land owners, livestock/forage owners, or commercial

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[67] By contrast, state cases appear to deal solely with state efforts to limit *before the fact* the property rights acquired when wildlife is reduced to capture. Cases upholding such efforts against taking challenge are of no relevance here, however, since in such circumstances there is no interference with investment-backed expectations. *See, e.g.*, Smith v. State, 155 Ind. 611, 613 (1900).

[68] 531 F.2d 796 (6th Cir. 1976).

[69] 444 U.S. 51 (1979).

[70] Hodel v. Irving, 481 U.S. 704, 718-19 (1987).

[71] 112 S. Ct. 2886, 2899-00 (1992). What is particularly interesting about the endorsement of Andrus v. Allard by the majority opinion in *Lucas* is that the latter was written by Justice Scalia. Just five years earlier, the very same justice asserted that by branding as a taking a federal law abolishing descent and devise of certain Indian property, the Court had "effectively limit[ed] *Allard* to its facts." Hodel v. Irving, *supra* note 70.

traders. We now turn to the very different, and far less contentious, approach of preserving species on private property through land acquisition.

ESA provisions

ESA section 5 directs the Secretary of Interior and Secretary of Agriculture (as to the national forests) to set up a program for conserving wildlife and plants, including those listed as endangered or threatened. To carry out the program, each secretary is directed to use land acquisition authorities in existing statutes, and beyond that is given broad land-acquisition authority "to acquire by purchase, donation, or otherwise, lands, waters, or interest therein ...." While this phrase explicitly embraces only *non*-coercive modes of property acquisition, sound argument points to its inclusion of condemnation authority as well.[72]

Case law

Section 5 has received judicial attention only as regards whether states and their political subdivisions may condition federal acquisition of land under that provision. In *Sierra Club v. Marsh*, the court said no, at least where the conditions would prevent the federal acquisition or, if allowing it to occur, would render it meaningless.[73] Similar holdings have been rendered by the U.S. Supreme Court as to federal land acquisition authorities under the Migratory Bird Conservation Act[74] and Migratory Bird Hunting Stamp Act.[75]

III. FURTHER ANALYSIS

A few issues reach beyond the bounds of any one category above, and are discussed here. Like the case law already discussed, these issues have been resolved in ways that by and large cut against the ESA being found to effect takings.

Physical taking or land-use regulation? Taking plaintiffs often argue that the ESA should be viewed as causing a permanent physical occupation of land by members of the listed species, or as causing an appropriation of consumed livestock and forage. Were courts to agree, it would plainly be a gain to property owners. Constitutional taking law has long been intolerant of government occupations and appropriations of property, allowing little room for factors such as the

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[72] First, there is the term "otherwise." Should this term be viewed as limited to other *non*-coercive measures, there remains the argument that under the General Condemnation Act, 40 U.S.C. § 257, a federal agency's power to condemn has been held as broad as its power to purchase. *See, e.g.*, Swan Lake Hunting Club v. United States, 381 F.2d 238, 240 (6th Cir. 1967).

[73] 692 F. Supp. 1210, 1214-15 (S.D. Cal. 1988) (voluntary transfer to U.S. of 178 acres to be used as mitigation land in connection with Corps of Engineers flood control/highway project).

[74] United States v. Little Lake Misere Land Co., 412 U.S. 580, 594-97 (1973) (state law inapplicable where it would negate terms of prior land acquisition).

[75] North Dakota v. United States, 460 U.S. 300, 318-19 (1983) (state law authorizing landowners to drain wetlands contrary to terms of easement acquired by U.S. may not be applied).

minor extent of interference or the importance of the government interest to deflect the taking claim.[76]

By contrast, if the ESA is viewed as merely a kind of land-use regulation, taking law raises the daunting hurdle for the landowner of proving near-total reduction in the value of his tract viewed as a whole.[77] Moreover, a dictum in a recent Supreme Court taking decision asserts that even with total value loss, government measures "perhaps" cannot be a taking where they "destroy[] the value of land *without being aimed at land*" -- as contrasted with regulation "specifically directed to land use."[78] If so, ESA limitations on private defensive measures, not being "aimed at land," may be constitutionally noncompensable as a matter of law.

So far, courts wrestling with taking challenges to the ESA and other federal wildlife statutes have spurned the physical taking approach, opting to use the more government-friendly test for land-use regulation.

Courts have differed, however, on precisely *why* physical taking theory is inappropriate. The defense-limitation cases, one involving the ESA, target the extent of government management or protection over the injury-causing animals -- finding it insufficient on the facts presented to impute the animals' conduct to the United States.[79] In sharp contrast, the direct-control case bypassed entirely the extent of species management, analyzing whether a physical taking existed solely on the basis of the spectrum of property rights left to the plaintiff in the face of the invading animals.[80] Query whether the divergent approaches of these cases can be explained entirely by the different nature of the challenged government actions.

Requirements for affirmative action. For purposes of taking analysis, it should make little difference whether the ESA impact is prohibitory or mandatory -- that is, whether it takes the form of a prohibition against harmful activity by the property owner, or a mandate that the property owner take action aimed at lessening the harm caused by his otherwise lawful activity. Each scenario asks the property owner only to avoid a harm that his own activity would create, arguably satisfying the fairness element of taking jurisprudence.

A common example of affirmative requirement is the mitigation conditions in habitat conservation plans. Another affirmative requirement, demanding that shrimp trawlers use "turtle

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[76] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (permanent physical occupation of land is *per se* taking).

[77] *See, e.g.*, Mountain States Legal Fdn. v. Hodel, 759 F.2d 1423, 1430-31 (10th Cir. 1986), *cert. denied*, 480 U.S. 851 (1987).

[78] Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 n.14 (1992) (emphasis added).

[79] Mountain States Legal Fdn. v. Hodel, 799 F.2d 1423 (10th Cir. 1986) (control of wild horses under the WFHBA was no greater than under many other federal and state wildlife protection laws), *cert. denied*, 480 U.S. 851 (1987); Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988) (ESA protections for threatened grizzly bears do not make them agents of the United States), *cert. denied*, 490 U.S. 1114 (1989).

[80] Southview Associates, Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992).

excluder devices" in their nets to protect endangered and threatened sea turtles, provoked a taking lawsuit dismissed on jurisdictional grounds.[81]

Whether government "owns" wildlife. Courts, as noted, have declared that the United States does not "own" the wildlife on federal lands,[82] and more generally that wildlife is never the private property of those whose lands it occupies.[83] Rather, the ownership language employed by the Supreme Court until recently has been called a legal fiction "expressive of the importance to its people" that a state have broad power to regulate wildlife in the public interest.[84] These two facets, nonownership and special relationship, are discussed in turn.

As to nonownership, we have seen in the federal wildlife/taking cases that the absence of traditional government ownership has facilitated the judicial embrace of *ferae naturae* -- nonresponsibility for acts of wildlife. Nonownership, however, may not excuse all governmental sins, as we have noted in connection with government relocation of protected species. Supreme Court taking decisions dealing with physical invasions have never insisted that the invading agent be government property.[85] It is only the existence of a sufficient causational nexus between government act and property impact that the taking clause requires.

The rule that land ownership does not extend to the wildlife thereon has a further consequence: the marauding grizzly bear does not become the property of the rancher when it runs onto his land. Thus, the rancher cannot argue that the ESA brings about a taking by denying the rancher free use of his property interest in the bear.[86]

The second facet of the government/wildlife relation, government's special duty to manage wildlife for the public good, has ancient roots in English common law. Notwithstanding, this factor has played only a diffuse role in the federal taking cases. (The special relationship with wildlife has been given express treatment, however, in federal cases in which governments have sought to recover monetary damages for the loss of wildlife from pollution.[87]) Some have argued for recognition of

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[81] Concerned Shrimpers of America v. Mosbacher, No. CA C-90-39 (S.D. Tex. Mar. 8, 1990) (unpublished). The current turtle excluder device regulations were promulgated at 57 Fed. Reg. 57348 (Dec. 4, 1992).

[82] [I]t is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government ... has title to these creatures until they are reduced to possession by skillful capture.

Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977). Shortly after *Douglas*, the Supreme Court sounded the death knell for the state ownership doctrine, under which the wildlife within a state used to be regarded as owned by that state. Hughes v. Oklahoma, 441 U.S. 322 (1979), *overruling* Geer v. Connecticut, 161 U.S. 519 (1896).

[83] *See, e.g.*, Mountain States Legal Fdn. v. Hodel, 799 F.2d 1423, 1426 (10th Cir. 1986) (en banc).

[84] Hughes v. Oklahoma, 441 U.S. 322, 334 (1979).

[85] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979) (taking caused by federal order that owners of exclusive private lagoon grant access to boating public).

[86] Along the same lines, the right to hunt wild game on one's own land has been judicially denied property status. Rather, the right to hunt has been deemed a privilege against the state. *See, e.g.*, Collopy v. Wildlife Comm'n, 625 P.2d 994, 999-1000 (Colo. 1981).

[87] *See, e.g.*, In re Stewart Transportation Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) ("Under the public trust doctrine, ... the United States [has] the right and the duty to protect and preserve the public's interest in natural wildlife resources ...."). Importantly, this decision came after the demise of the state ownership doctrine in *Hughes*.

a wildlife servitude in the federal government, comparable to its navigation servitude, under which federal wildlife protection would lie mostly beyond fifth-amendment reach.[88] Though a few state-court decisions support something akin to a state wildlife servitude, there seems to be no federal case even broaching the idea of a federal counterpart.

Supreme Court endorsement of wildlife protection generally. In construing federal wildlife-protection statutes, the high court in recent decades has consistently embraced the more wildlife-protective of the arguments advanced before it. In addition to *Andrus v. Allard*, noted earlier, the Court held that creation of a national monument reserved sufficient water to preserve a unique desert fish,[89] found the "jeopardy" ban of ESA section 7 (as then worded) so absolute as to halt an almost complete dam that might endanger a listed species,[90] and upheld the WFHBA protecting feral horses and burros on both public and private lands.[91] At a minimum, these cases indicate that the Court accepts wildlife protection as a legitimate governmental objective that can support reasonable interference with private rights.

IV. LEGISLATIVE OPTIONS

Though this report deals with law rather than policy, we note in broadest of broad outline what seem to be major congressional options for addressing the property rights issue. Of course, this threshhold is reached only if Congress finds during ESA reauthorization that the real-world collision between the ESA and landowner aspirations is significant. If so, the major options are fairly plain.

Option one is to do nothing, impliedly embracing the fifth-amendment standard of compensation as adequate. Under this option, the landowner remains in the same position under the ESA as under other federal statutes that have figured prominently in the property-rights debate -- none of which now provides for extraconstitutional compensation of landowners.

Option two is to leave the ESA's substantive species protections unchanged, but lower the compensation threshold -- that is, provide monetary relief to offset property-value losses occasioned by the act even where not constitutionally compelled. Option three is to tinker with how existing ESA mechanisms are administered, as by mandating formal evaluations of the private-property implications of agency actions[92] or encouraging more aggressive use of the developmental safety valves already in the ESA. And option four, the most substantively major, is to adjust the act's listing or protection standards so as to strike a balance more favorable to private property interests.

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[88] *See* Hoobler, *No Taking: The Endangered Species Act and the Fifth Amendment* 48 (student paper, 1991) (available from R. Meltz).

[89] Cappaert v. United States, 426 U.S. 128 (1976).

[90] TVA v. Hill, 437 U.S. 153 (1978).

[91] Kleppe v. New Mexico, 426 U.S. 529 (1976).

[92] Executive Order No. 12630, *supra* note 5, already requires preparation of "taking impact assessments" of proposed agency actions, but the Order's future under the Clinton Administration is reportedly in doubt.

Several of these options were embodied in ESA-amending bills of the 102nd Congress, which may presage the debates of the 103rd. Two of the 102nd-Congress bills would have amended the ESA comprehensively, and three were narrowly focussed, as follows.

S. 3159, a comprehensive bill, was introduced by now-retired Senator Symms. Mentions of property rights pervade its opening provisions -- stating, for example, the policy of Congress that federal species-protection efforts "minimize adverse effects on ... private property." More concretely, the bill proposed that ESA regulations not become effective until the issuing agency is certified by the Attorney General to be in compliance with the "federal taking" executive order.[93] This provision was a pared-down version of Senator Symms' S. 50, which imposed the same prerequisite on *all* new federal regulations.

Of potentially seismic impact is the bill's declaration that once the Judgment Fund pays a taking judgment against the United States based on agency action under the ESA, that agency must reimburse the fund out of agency appropriations. Partisans of Judgment Fund reimbursement, an idea first floated in 1991 by the Bush Administration,[94] typically speak in terms of promoting the fiscal accountability of agencies, and greater sensitivity to property rights. Opponents, not surprisingly, point to the potential for chilling agency program efforts.

The other comprehensive ESA bill, H.R. 6134 (Tauzin), offered an array of provisions to ensure that ESA "procedures and standards for private landowners ... are not more burdensome ... than those applicable to federal agencies." Most notably, the bill sought to aid property owners denied permits under the ESA for "economically viable use" of their property, affording them the right to either have the property bought by the United States at market value, or to receive compensation in the amount of the value loss. Plainly, this approach would often mandate compensation even when it was not compelled under the fifth amendment.

Other bills of the 102nd Congress were much narrower, targetting solely the ratio of costs and benefits resulting from ESA actions. H.R. 3092 (Hansen) would have barred any ESA action the economic benefits of which did not outweigh the economic costs. H.R. 4058 (Dannemeyer) and H.R. 6123 (Thomas, Cal.) similarly blocked ESA actions whose benefits did not outweigh costs, but went further to make explicit that determination of real-property value losses was to be part of that analysis. These bills also demanded federal compensation for economic loss resulting from a species being listed as endangered or threatened, including "any diminishment in the value of tangible or intangible property."

None of these bills was acted on, beyond committee referrals.

V. SUMMARY AND CONCLUSION

It has been said that while property rights are well analyzed in our legal and moral tradition, our duties to endangered species, both legal and ethical, are novel and not universally accepted.[95]

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[93] *Supra* note 5.

[94] Letter to Speaker of the House Foley from Attorney General Thornburgh and OMB Director Darman, July 10, 1991.

[95] Rolston, *Property Rights and Endangered Species*, 61 U. COLO. L. REV. 283 (1990).

Foregoing development of private land that might harm a public drinking-water source is a sacrifice most landowners might accept; having one's livelihood disrupted in order to preserve an endangered bird is a tougher call. The Endangered Species Act "is visionary, and implementing it is forcing seminal rethinking in both law and ethics."[96]

Given this ongoing debate, and the paltry number of ESA/taking cases, prediction of how the act may fare in any future taking litigation might seem premature. Adding to the difficulty, one might well argue, is the case-by-case nature of taking adjudication and, quite pivotal, the flexibility with which the FWS and NMFS execute their charge. Despite these question marks, one can expect that as with government impacts on property generally, the large majority of ESA-caused impacts are likely to be constitutionally noncompensable.

To recap why: For direct limits on land use under the ESA, the property owner has the daunting hurdles of proving ripeness and almost total elimination of economic use on the entire parcel. Near-total loss of economic use, when considering a tract of land as a whole, may rarely occur under ESA restrictions -- again assuming agency flexibility. For ESA limitations on defending property against animal depredations, *Christy v. Hodel* finds no taking and most cases under other federal wildlife statutes hold similarly. Persuading a court to see a *per se* taking owing to a permanent physical occupation by the harmful animals seems unpromising. The only solid prospects for property-owner compensation may be in narrow, special circumstances -- as when property damage would not have occurred but for government introduction of the species into the area. And finally, for transactional restraints on species members obtained prior to listing, the decisions in *Andrus* and *Lucas* suggest an almost absolute rule against compensation.

To be sure, imponderables could alter this government-friendly picture. For one thing, the Supreme Court's recent hint that it might qualify its current rule that parcels be viewed as a whole could significantly enhance a property owner's prospects. (A taking might then result from regulatory elimination of use on only a *portion* of one's land.) But so far, recent Supreme Court decisions favorable to the property owner notwithstanding, the Court of Federal Claims has continued to resolve the large majority of taking claims for the United States.

Whether to supplement this constitutional balance between ESA-protected wildlife and the property owner, through legislation giving added protection to the latter, is the question to which the 103rd Congress may have to turn.

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[96] *Id.* at 283.