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The Endangered Species Act and Claims of Property Rights "Takings": A Summary of the Court Decisions

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Summary

The federal Endangered Species Act (ESA) has long been one of the major flash points in the "property rights" debate. This report compiles the court decisions in cases challenging ESA-based measures as a "taking" of property under the Fifth Amendment. The cases address four kinds of ESA measures: (1) prohibitions on land uses that might adversely affect species listed as endangered or threatened; (2) reductions in water delivery to preserve instream flows needed by listed fish; (3) limits on the defensive measures a property owner may take to protect his/her property from listed animals; and (4) limits on commercial dealings in members of species acquired prior to listing as endangered or threatened. To date, only one of these decisions has found a taking, and that decision is still subject to appeal.

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The federal Endangered Species Act (ESA),[1] along with its state counterparts, has long been among the major flash points in the "property rights" debate. In the ESA context, the debate has at least two components. First, to what extent must or should implementation of the ESA include restrictions on the use of privately owned property? And second, given that such restrictions are imposed, to what extent does the Constitution, specifically the Takings Clause of the Fifth Amendment,[2] demand that compensation be paid to the property owner? This second question is our focus here.

Much has been written about what impacts on property owners by wildlife protection laws such as the ESA must, constitutionally, be compensated as "takings."[3] CRS provided a comprehensive analytic review in 1993 on how the takings issue has played out under the ESA and other federal and state wildlife protections.[4] This new report simply compiles the ESA takings court decisions to date, with brief comment. Renewed congressional interest has been prompted by the recent, highly significant decision of the U.S. Court of Federal Claims in *Tulare Lake Basin Water Storage District v. United States*,[5] holding that federal water use restrictions imposed under the ESA constituted a taking. This is the only time that any ESA-mandated measure has been held by a court to be a taking, and the decision may yet be appealed. Legislative activity may also be prompted by the ascension to

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[1]16 U.S.C. §§ 1531-1544.

[2]The Takings Clause of the Fifth Amendment states: [N]or shall private property be taken for public use, without just compensation."

[3]*See, e.g.*, Glenn P. Sugameli, *The ESA and Takings of Private Property*, in Donald C. Baur and Wm. Robert Irvin (eds.), THE ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVES (American Bar Ass'n, 2002); Comment, *Denial of Permission to "Take" an Endangered Species Will Amount to a "Taking" Under the Fifth Amendment in Limited Situations*, 21 U. ARK. LITTLE ROCK L. REV. 519 (1999); Blaine I. Green, *The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, 15 YALE J. ON REG. 329 (1998).

[4]Robert Meltz, *The Endangered Species Act and Private Property: A Legal Primer*, CRS Report 93-346 A (March 7, 1993).

[5]*See* discussion of this decision on page 6.

committee leadership posts of Members of Congress with longtime interest in the private property impacts of the ESA.[6]

This report does not delve significantly into the nuances of Fifth Amendment takings law, a complex and rapidly evolving field. Nonetheless, the reader may find his/her understanding of the cases here enriched by some background reading, such as CRS Report RS20741 (The Constitutional Law of Property Rights "Takings": A Primer).

The ESA takings decisions address four types of impacts that the Act has had on private property owners, as follows.

I. Prohibitions on uses of privately owned land that might adversely affect listed species

***Seiber v. United States*, 53 Fed. Cl. 570 (2002)**

Plaintiffs owned a 200-acre tract, almost all timberlands (the rest, plaintiffs' homestead). In 1994, Oregon designated 40 acres of the tract as spotted owl nesting habitat. This designation barred timber harvesting on the 40 acres, unless plaintiffs obtained an "incidental take permit" (ITP)[7] under the ESA (the United States had designated the spotted owl a threatened species). The U.S. Fish and Wildlife Service (FWS) found plaintiffs' ITP application inadequate, but said it was willing to work with the plaintiffs. The plaintiffs rejected this offer, and the application was denied. The denial letter indicated, however, that several approvable alternatives were available to plaintiffs. Again, plaintiffs chose not to work with the FWS, but simply applied for reconsideration of the denial, which was denied. In 2002, the FWS found that the owls had moved away, so an ITP was no longer needed to log the 40 acres. The plaintiffs seeks compensation for a temporary taking, for the period 1994-2002.

Held, because FWS had the discretion and indicated willingness to consider a modified timber harvest plan, but plaintiffs did not ask the government to exercise that discretion, the permit denial was not a final decision. Thus, plaintiffs' taking claim is not ripe. Even if the claim had been ripe, plaintiffs would have failed. There

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[6]For example, Rep. Richard W. Pombo was designated chairman of the House Committee on Resources in January, 2003. The new chairman "is well-known as an outspoken champion of private property rights .... He "has frequently complained that ... the ESA ... drastically interferes with landowners' rights to use their property." According to an aide, "improving the Endangered Species Act" will be one of his key priorities. Congressional Green Sheets, Green Sheets Express, Jan. 13, 2003 (e-mail version only).

[7]The word "take" is used by the ESA in a manner entirely different from its use in the Fifth Amendment's Takings Clause. In the ESA, "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an animal. ESA § 3(19). The Act makes it unlawful for any person to "take" a listed endangered animal, ESA § 9(a)(1)(B)-(C), but provides for certain exceptions, as when the person first obtains an "incidental take permit" under ESA § 10(a)(1)(B). By contrast, "take" in the Fifth Amendment refers to government actions that so severely impinge on private property rights as to "take" the property.

is no taking by permanent physical occupation of the owls, since coexistence with the owls did not deprive the plaintiffs of their right to possess, or control the use of, their property. Nor is there a regulatory taking, since the 40 acres of timber must be regarded together with the remainder of the merchantable timber on the tract.

> *Comment*: This case puts in high relief the ubiquitous takings-law issue of how to define the "relevant parcel" – that is, the precise property interest that the court will look at in assessing the impact of the government's action on the plaintiff. It does so in two ways. First, it requires that the 40 acres be evaluated together with the remaining 160 acres on the parcel. This was noncontroversial – squarely in line with precedent. Second, the court was willing to sever the timber on the near-200 acres from the land on which it grew. This was more debatable, since the Supreme Court has held that fractionated interests in land should generally be consolidated for purposes of takings analysis.
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> The Seibers also sued the state of Oregon in state court for a taking based on the 40-acre designation. The trial court dismissed the physical taking claim with prejudice and the regulatory taking claim without prejudice (unpublished opinion). The Seibers appealed the dismissal of the physical taking claim, but the appellate court affirmed, 47 P.3d 486 (table entry), and the state and federal supreme courts denied review. The Seibers have since filed a new regulatory taking claim in state trial court, asserting that they now have a ripe claim.

***Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), *cert. denied*, 71 U.S.L.W. ____ (March 10, 2003) (No. 02-862)**

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

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

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

Boise Cascade also sued the state of Oregon in state court for a taking based on the logging ban imposed by a state agency while a mating pair of owls occupied the tract (prior to the FWS' involvement). This case has been up and down several times in the Oregon courts, the latest round being decided just a month ago. *Boise Cascade Corp. v. Oregon State Bd. of Forestry*, 2003 Westlaw 292305 (Or. App. Feb. 12, 2003) (reversing trial court and remanding).

***Taylor v. United States*, No. 99-131 L (Fed. Cl. June 20, 2001) (unpublished)**

The plaintiff planned to build a house on his residential-zoned lot. After he bought the lot, a pair of nesting bald eagles moved onto the adjacent lot, within 90 feet of the planned house. The FWS informed the plaintiff that land clearing and construction on his property likely would render the area unusable by the eagles, and that abandonment of the nest would be considered a "take" pursuant to the ESA. The agency further informed him that he could apply for an ITP, which would allow the house construction to proceed. However, when he applied, the FWS insisted that plaintiff agree to all the required mitigation *before* it would process the application. Plaintiff declined, believing the demanded mitigation to be overly restrictive. In an unpublished decision filed August 18, 1999, the court held that notwithstanding the absence of a formal denial of the permit application, the FWS' insistent position ripened the taking claim.

Held, there is no "total taking" because the development restrictions imposed under the ESA here do not deprive plaintiff's property of all economic value. The parties must present additional evidence, however, before this court can determine whether a regulatory taking occurred based on the takings test for less-than-complete deprivations of property value. Therefore, the parties' motions for summary judgment must be denied.

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

***Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000)**

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

Held, there was no taking of plaintiff's tract. Plaintiff claims that the effect of the Corps' action was to *completely* eliminate any economic use of his property – known in takings law as a *Lucas* "total taking."[8] Even with a total taking claim, however, a property owner must show that his reasonable investment-backed expectations were frustrated. Plaintiff here could not have had a reasonable investment-backed expectation when he bought the property in 1973 that he would obtain approval to fill the wetland. By that year, the Corps had begun to deny dredge-and-fill permits solely on environmental grounds. And at the time he bought the property, plaintiff acknowledged in the sales contract the difficulty of obtaining the necessary permits. Finally, plaintiff waited seven years after purchasing the property before applying for permits, as wetlands protection and endangered species laws became increasingly stringent. While these developments do not bar the taking claim, they reduce plaintiff's ability to claim surprise when the permit application was denied.

> *Comment*: The *Good* decision takes a broad view of the "notice rule" – the case law doctrine that no regulatory taking occurs when the government restricts a property use under a law existing when the property was acquired, or even, as in Good's case, under a law whose adoption *after* the property was acquired could have been foreseen. Mr. Good bought his wetlands before the ESA was enacted in its modern form, and 17-18 years before the species that triggered the permit denial were listed.
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> The *Good* holding that a property buyer's investment-backed expectations are relevant even to total-taking claims was contravened later by an opposite holding of another Federal Circuit panel. *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1379 n.3 (Fed. Cir.), *and on petition for rehearing*, 231 F.3d 1354 (Fed. Cir. 2000). In addition, the notice rule is no longer viewed as an absolute bar to a taking claim. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Supreme Court held that the mere fact that a restriction was in place prior to the acquisition of a parcel does not prohibit its owner from

[8] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

maintaining a taking claim. A year later, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), the Court clarified that pre-acquisition law remains relevant to the regulatory taking analysis, even if not determinative.

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

Plaintiffs-developers allege that to protect endangered and threatened species in the area, the United States "by coercion and by threatening criminal penalties" attempted to prevent the building of a multi-use development in Austin, Texas. Plaintiffs believe that no "take" of a protected species under the ESA will occur,[9] and therefore did not apply for an "incidental take permit."

Held, plaintiffs must apply for an incidental take permit before the court may properly consider the merits of plaintiffs' claims. Until the Fish and Wildlife Service (FWS) rules on such an application, the Fifth Amendment taking claim is not ripe. Parenthetically, the Service has not taken any definitive action to block the development.

Comment: Observers have noted that the number of takings claims based on ESA restrictions is rather small given the decibel level of the property rights debate that the statute has long inspired. Some have suggested that one reason for the case law scarcity might be the difficulty in ripening a takings claim under the ESA.[10]

II. Reductions in water delivery in order to preserve instream flows needed by listed species

***Tulare Lake Basin Water Storage District v. United States*, No. 98-101 L (Fed. Cl. April 30, 2001)**

In 1992-1994, the federal government reduced the amount of water pumped from the Sacramento-San Joaquin Delta in California, in order to ensure river flow sufficient to protect two species of fish protected under the ESA. The result of the reduced pumping was to cut the amount of water made available to the California State Water Project, which, in turn, reduced the amount of water delivered to two of the plaintiffs, the Tulare Lake Basin WSD and the Kern County Water Agency. Other plaintiffs in the case received less water by virtue of being subcontractors to Tulare and Kern.

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[9] *See* note 7 *supra*.

[10] James Rosen, *Private Property and the Endangered Species Act: Has the Doctrine of Ripeness Stymied Legitimate Takings Claims?*, 6 HASTINGS W.-N.W. J. ENV'L L. & POL'Y (1999).

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

> *Comment*: This decision may be appealed by the United States, thus its permanence is unclear. If not appealed, or if affirmed on appeal, the question will be to what extent it generalizes to users of water from other federal projects.

III. Limits on the defensive measures a property owner may take to protect his/her property from harm by animals of a listed species

***Gordon v. Norton*, No. 01-8102 (10th Cir. Feb. 25, 2003)**

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

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

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

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

the bear, grizzlies being a listed threatened species under the ESA. A Department administrative law judge reduced the fine to $2,500.

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

> *Comment. Christy* remains the leading case for the proposition that government limits on the defensive measures available to property owners against marauding animals do not constitute takings. In lone dissent from the denial of certiorari, Justice White asked whether "a Government edict barring one from resisting the loss of one's property is the constitutional equivalent of an edict taking such property in the first place." 490 U.S. at 1115-1116.

IV. Limits on commercial dealings in species acquired prior to listing

***United States v. Kepler*, 531 F.2d 796, 797 (6th Cir. 1976)**

As of the effective date of the ESA in 1973, Kepler allegedly held several animals for lawful purposes under the ESA. Thereafter, he transported two of them, a cougar and a leopard, from Florida to the "Dogpatch Zoo" in Kentucky – where he was arrested and the animals seized by Department of the Interior agents. He was later convicted of violating the ESA ban against interstate transport of endangered species in the course of a commercial activity.[11]

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

***United States v. Hill*, 896 F. Supp. 1057 (D. Colo. 1995)**

A criminal indictment charged Hill with the sale of parts of various endangered species (black rhinoceros, tiger, clouded leopard, and snow leopard), in violation of the ESA.

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[11]ESA § 9(a)(1)(E).

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

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