
# The Endangered Species Act (ESA) and Claims of Property Rights "Takings"

**Robert Meltz**
Legislative Attorney

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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 outlines the ESA provisions most relevant to the act's impacts on private property and surveys the major ESA-relevant principles of Fifth Amendment takings law. The report then proceeds to summarize the court decisions on whether particular government actions (or inaction) based on the ESA "take" private property under the Fifth Amendment. The cases to date address several kinds of ESA impacts on private property: (1) restrictions on land uses that might adversely affect species listed as endangered or threatened, and mitigation conditions to offset the impacts of development; (2) administrative delays; (3) reductions in water delivery or allowable water diversion to preserve lake levels or instream flows needed by listed fish (currently the most active area of ESA takings litigation); (4) restrictions on the defensive measures a property owner may take to protect his/her property from listed animals; and (5) restrictions on commercial dealings in listed species.

To date, only one of the 18 ESA-based takings cases disclosed by research, *Tulare Lake Basin Water Storage District v. United States*, has found a taking. However, two cases, *Casitas Municipal Water District v. United States* and *Klamath Irrigation District v. United States*, have yet to be finally resolved and may or may not result in holdings that takings occurred.

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# Introduction

The federal Endangered Species Act (ESA),[1] along with its state counterparts, has long been a major flash point in the "property rights" debate. In the ESA context, the debate has had at least two parts. First, to what extent should, and to what extent does, the ESA restrict the use of privately owned land? Second, given that restrictions on land uses and other property-related activities *are* imposed under the ESA, to what extent does the Takings Clause of the Fifth Amendment[2] demand compensation of the property owner? This second question—the "takings" implications of the ESA—is our subject here. Much has been written about it elsewhere as well.[3]

The court decisions described in this report illustrate the wide variety of private property impacts that may occur under the ESA—going well beyond the land-use restrictions noted above. On the other hand, the report is *not* a reliable indicator of the aggregate private property impacts of the ESA program. Almost certainly, many landowners who are restricted in some way under the act do not bother to sue. Of the filed suits, CRS has no systematic way of discovering those that were resolved without published decision (as by settlement or voluntary dismissal). And finally, court decisions under the Takings Clause do not exhaust the universe of decisions stemming from the ESA's private property impacts—other legal theories may be invoked also.[4]

Sections I and II of the report give background: respectively, the ESA features pertinent to the act's impacts on private property and ESA-relevant principles of Fifth Amendment takings law. Sections III through VII then offer summaries of ESA takings decisions grouped by type of property impact involved. The decisions herein comprise all those of which CRS is aware, reported and unreported (though early decisions in a case are omitted if no longer important).[5] Of

[1] 16 U.S.C. §§ 1531-1544.

[2] "[N]or shall private property be taken for public use, without just compensation."

[3] *See, e.g.*, Brian Scaccia, *"Taking" A Different Tack on Just Compensation Claims Arising Out of the Endangered Species Act*, 37 Ecol. L. Quart. 655 (2010); John D. Echeverria and Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause*, 16 TULANE ENVTL. L. J. 331 (2003); Rebecca E. Harrison, Comment, *When Animals Invade and Occupy: Physical Takings and the Endangered Species Act*, 78 WASH. L. REV. 867 (2003); Glenn P. Sugameli, *The ESA and Takings of Private Property*, in Donald C. Baur and Wm. Robert Irvin (eds.), THE ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES (American Bar Ass'n, 2002); Monica L. Mason, Comment, *Denial of Permission to "Take" an Endangered Species Will Amount to a "Taking" Under the Fifth Amendment in Limited Situations*, 21 U. ARK. LITTLE ROCK L. REV. 519 (1999); Blaine I. Green, *The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, 15 YALE J. ON REG. 329 (1998); Robin L. Rivett, *Why There Are So Few Takings Cases Under the Endangered Species Act, or Some Major Obstacles to Takings Liabilities*, course materials prepared for 1998 ALI-ABA conference on Inverse Condemnation and Related Government Liability.

[4] *See, e.g.*, Orff v. United States, 545 U.S. 596 (2005) (farmers could not maintain breach of contract suit against Bureau of Reclamation based on ESA-required cutbacks in water delivered by Bureau, since pertinent statute did not waive sovereign immunity for such suits); Casitas Municipal Water District v. United States, 543 F.3d 1276 (Fed. Cir. 2008) (United States did not breach its contract with water district when it required district to build fish passage facility to aid ESA-listed fish; while United States' requirement that water be diverted to fish passage facility did breach contract provision giving district all water available through project, U.S. is not liable owing to sovereign acts doctrine).

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

the 18 decisions reviewed, only one, *Tulare Lake Basin Water Storage District v. United States*,[6] found a taking, and as discussed that decision has been undermined by a later decision of the same judge that appears to have survived appeal. However, two other cases have yet to be finally resolved and thus may or may not ultimately find a taking.[7]

# I. ESA Features Pertinent to Private Property Use

## Listing and Critical Habitat Designation

Under the ESA, the possibility of private property impacts begins with "listing"—that is, when the Secretary of the Interior, through the Fish and Wildlife Service (FWS), lists a species as endangered or threatened.[8] The Secretary of Commerce, through the National Marine Fisheries Service (NMFS, popularly called NOAA Fisheries), administers the ESA for marine species.

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

## Section 9 Prohibitions; Section 10 Permits

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

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[6] *See infra* at page 17.

[7] The two cases in this report that are not yet finally resolved with respect to the taking issue in the case are *Casitas Municipal Water District v. United States, infra* at 15, and *Klamath Irrigation District v. United States, infra* at 16.

[8] ESA § 4; 16 U.S.C. § 1533.

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

[10] ESA§ 4(a)(3); 16 U.S.C. § 1533(a)(3).

[11] ESA § 4(b)(2); 16 U.S.C.§ 1533(b)(2).

[12] *See* H.Rept. 97-567, 97th Cong., 2d Sess. 12 (1982); H.Rept. 97-835, 97th Cong., 2d Sess. 19 (1982).

[13] 16 U.S.C. § 1538.

The term "take" is a key ESA concept, not to be confused with Fifth Amendment takings. It is expansively defined by the statute to include almost any act adversely affecting a species member—including "to harass, harm, pursue, hunt, ... capture, or collect" a listed animal.[14] Central to the ESA's impact on private land owners, the FWS defines "harm" to include indirect harm to listed species members through certain significant *habitat modifications*.[15] This agency definition has been upheld by the Supreme Court as a reasonable interpretation of the statute.[16]

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

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

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

## Section 7 and Federal Agencies

Another ESA provision with obvious property rights implications is Section 7.[23] This section comes into play only when a project has a federal nexus—as when a non-federal project requires

[14] ESA § 3(19); 16 U.S.C. § 1532(19).

[15] 50 C.F.R. § 17.3.

[16] Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).

[17] 50 C.F.R. § 17.31 (wildlife), § 17.71 (plants).

[18] 50 C.F.R. §§ 17.40-17.48 (wildlife); 50 C.F.R. §§ 17.73-17.78 (plants).

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

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

[21] ESA § 11(a)(3), 16 U.S.C. § 1540(a)(3) (civil enforcement actions); ESA § 11(b)(3), 16 U.S.C. § 1540(b)(3) (criminal enforcement actions).

[22] *See infra* notes 31-32 and accompanying text.

[23] 16 U.S.C. § 1536.

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

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

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

## Administrative Reforms, Etc.

Several administrative reforms were adopted in the Clinton Administration, under claimed authority in the ESA, to enhance the program's flexibility in dealing with property owners. Joint FWS and NMFS policies streamlined permit procedures for small landowners, and other initiatives encouraged landowners to increase protection for listed species on their land. Under "safe harbor agreements," landowners who increase species habitat can return to baseline conditions without penalty.[28] And "no surprises agreements" assure a landowner that if he/she implements an HCP, there will be no further costs or land use restrictions to benefit species covered by the HCP (with minor exceptions).[29]

Federal managers also attempted, where consistent with the facts, to tilt toward threatened rather than endangered designations, to allow use of the more flexible ESA provisions governing

[24] ESA § 7(a)(2); 16 U.S.C. § 1536(a)(2).

[25] ESA § 7(b)(3)(A); 16 U.S.C. § 1536(b)(3)(A).

[26] ESA § 7(b)(4); 16 U.S.C. § 1536(b)(4).

[27] ESA § 7(e); 16 U.S.C. § 1536(e).

[28] FWS and NMFS published a joint Final Safe Harbor Policy at 64 Fed. Reg. 32,717 (June 17, 1999). Implementing regulations are at 50 C.F.R. §§ 17.22(c), 17.32(c).

[29] 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5) (FWS); 50 C.F.R. § 222.307(g) (NMFS).

threatened species.[30] Use of threatened status has allowed the FWS, through "special rules," to authorize takes of members of specified species causing depredations of private property (livestock, domestic animals, crops).[31] Usually, such takes of problem animals must be carried out by government officials, rather than the aggrieved property owner. FWS regulations governing private property depredations by members of *experimental populations* more often allow takes by both government agents and private landowners.[32]

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

# II. ESA-Relevant Principles of Takings Law

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

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

## Preliminary Thresholds

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

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

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

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

[33] 28 U.S.C. §§ 1346(a), 1491. On the rare occasion that an ESA taking claim seeks $10,000 or less, the claim may be (continued...)

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

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

Most important of the substantive threshold hurdles is the Takings Clause demand that the thing alleged to have been taken is "property" as used in the Clause. Almost all common interests in land—fee simple absolutes, leases, easements, etc.—are indisputably property, as are water rights, making this threshold an easily surmounted one in ESA takings cases. However, takings law is cognizant of only *direct* impacts on the property. For example, the denial of an ITP for a residential subdivision may, in proper circumstances, take the tract for which the permit is sought. However, a taking claim will not be entertained as to the nearby commercially zoned parcel whose value is greatly reduced because no residential subdivision, hence no potential customers, will come to the ITP-denied lot.

## Takings Principles

As recently reviewed by the Supreme Court, there are three types of takings claims, each evaluated under a different Supreme Court-created test.[37] Each type might arise in the ESA context.

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

(...continued)

filed either in the Court of Federal Claims or in district court.

[34] 28 U.S.C. § 2501.

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

[36] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985).

[37] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

caused a total elimination of the land's use or value, called a *total taking* claim, or a less-than-total elimination, called a *partial regulatory taking* claim.

The first category, total elimination of use or value, is held to be a *per se* taking, with at least one big exception. If the government restriction was implicit in "background principles" of property or nuisance law existing when the property was acquired, there is no taking.[38] The rationale for this exception is that the government has not taken away any right the property owner ever had. There is limited case-law support for the argument that the states' historic ownership of wildlife and responsibility for wildlife protection as a trust obligation to the public constitute a background principle that forecloses takings claim based on such protections. However, this defense has yet to be addressed in an ESA-based takings decision.

Claims in the second category, less-than-total losses, are far more common, and are evaluated quite differently. Instead of a *per se* test, courts use a fact-intensive, case-by-case approach applying the "*Penn Central* balancing test." Under this approach, the government action is assessed for its economic impact, the degree of interference with investment-backed expectations, and its "character."[39] These vague factors have been explicated only minimally by the Supreme Court, leading many commentators to complain that the test is muddled and easily manipulated. Still, it is at least clear that the impact on the property owner generally must be severe, as long as the other *Penn Central* factors are not so compelling on the facts of the case as to be dispositive. The result is that the large majority of regulatory takings claims tested under *Penn Central* are rejected. This government-friendly pattern has been replicated in the ESA-takings cases raising *Penn Central* claims, even though takings courts have not accorded the species-preservation goal of the ESA any special status (at least explicitly) in the takings calculus.[40]

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

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

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

[39] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

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

Also for both total and partial takings claims, the Supreme Court recently rejected the absolute version of the "notice rule," under which lower courts once held that restrictions imposed under laws existing when the property was acquired cannot be a taking.[41] The pre-acquisition existence of the law in question carries *some* weight in the takings analysis, but does not bar the taking claim outright.[42] This easing of the notice rule is highly significant for the ESA, which was enacted so long ago (1973) that most landowners today, by virtue of having bought since enactment, might be barred from claiming takings under the former, absolute rule.

Finally, regulatory takings claims are treated differently depending on whether the restriction giving rise to the alleged taking was initially deemed to be *permanent (of indefinite duration)* or *temporary*. If an initially permanent government restriction is ultimately withdrawn or judicially invalidated, the analysis of whether it worked a taking while on the books is unaffected. The termination of the restriction nominally changes the permanent taking claim to a temporary one, but its only real effect is to limit the amount of compensation. A few ESA cases present this scenario: land use restrictions were lifted once listed birds were found no longer present in an area. By contrast, the very same land use restriction may not cause a taking if initially designated as temporary (such as a development moratorium), because of the likelihood that the restriction will be lifted after a defined period.[43]

A *physical taking* claim asserts that the government has taken property by causing, or authorizing, a physical invasion. Such claims come in two types: *permanent physical occupations* and *temporary physical invasions.* Permanent physical occupations are almost invariably held to be takings,[44] because they infringe upon one of the most essential attributes of property ownership: the right to exclude others. Thus in assessing physical occupation claims the courts will not inquire into the extent of the occupation, the magnitude of the economic impact, or the importance of the underlying public purpose—key ingredients of a regulatory takings analysis. Indeed, even the parcel as a whole rule does not apply, so that an occupation of only a minuscule portion of a tract is a taking. Not surprisingly, takings plaintiffs always try to bring a physical occupation claim, among others, if the facts permit.

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

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

[41] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[42] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

[43] *Id.*

[44] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

The *exaction taking* claim asserts a taking on the basis of an exaction demanded by a land regulatory agency as a condition of approving a development proposal. In order not to be a taking, the exaction condition must meet two criteria. First, there must be an "essential nexus" between the condition and an underlying purpose of the permit or other approval to which the condition is attached.[45] Second, the burden imposed on the property owner by the exaction must be no greater than "roughly proportional" to the impact of the proposed development on the community.[46] Moreover, the burden of proving rough proportionality is on the government. This two-prong test places greater burden on the government defendant than the test for regulatory takings and is referred to as "heightened scrutiny."

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

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

# III. Restrictions on Uses of Land / Mitigation Conditions

**Mitigation condition on development approval: *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009); on remand, 92 Fed. Cl. 373 (2010)**

In 2000, plaintiff developer bought 82 acres adjacent to the Mississippi Sandhill Crane National Wildlife Refuge for $964,000. Long before, in 1977, the land had been designated as critical habitat for the crane, a listed endangered species. Soon after its purchase, plaintiff sold 8 of those 82 acres for $430,000. When the Navy expressed interest in buying the remainder, for construction of Navy housing, the FWS issued an ESA Biological Opinion concluding that the project could go forward only if the loss of Sandhill Crane critical habitat in the remainder parcel was mitigated by the preservation off-site of 77 acres of equivalent habitat value. Thus when, in 2002, plaintiff contracted with the Navy for sale of the remainder, for $1.9 million, the Navy imposed a condition: that plaintiff purchase and transfer 77 acres to the FWS, for inclusion in the Refuge. This the plaintiff did, at a cost of $312,000. Plaintiff claims this mitigation condition was a taking.

[45] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[46] Dolan v. City of Tigard, 512 U.S. 374 (1994).

***Held (Federal Circuit), the trial court mischaracterized the property interest.*** The trial court (Court of Federal Claims) viewed the property interest asserted by the plaintiff as taken to be its interest in selling the land to the Navy without conditions. Holding that this was not a property interest under the Takings Clause, the trial court granted summary judgment for the United States. But a closer reading of the pleadings shows that the actual property interest alleged to have been taken was plaintiff's right to develop the remainder parcel. The right to develop land *is* clearly cognizable under the Takings Clause, and the plaintiff has properly pled a taking thereof. Therefore, the trial court on remand must do a *Penn Central* analysis of the taking claim with regard to the right to develop. In doing so, the trial court must bear in mind that plaintiff's actual or constructive knowledge of the pre-purchase designation of critical habitat (in 1977) is relevant, though not dispositive, on the taking question. Finally, there is a threshold ripeness issue as to whether the FWS's evaluation of the remainder parcel resulted in a sufficiently final conclusion that plaintiff could not develop the land.

***Held (on remand to trial court), claim not ripe.*** The trial court found the taking claim to lack final-decision ripeness, since plaintiff had not applied for an ESA incidental take permit. Nor, it held, did the futility exception to proving ripeness apply. Because the plaintiff no longer owned the property, the absence of ripeness could not be cured, so the case was dismissed with prejudice.

> *Comment:* Even had plaintiff's claim been ripe, it is difficult to see how the trial court, on remand, could have found a *Penn Central* regulatory taking. First, plaintiff netted roughly $1.6 million on its sale to the Navy ($1.9 million minus $312,000 for mitigation), a profit of about 80% in two years. That the plaintiff would have profitted even more in the absence of the ESA mitigation requirement is not a ground for a taking. Second, the eight acres plaintiff sold prior to its sale to the Navy is likely to be considered by a court as part of the parcel as a whole for purposes of the takings analysis. Adding together the $430,000 received for the eight acres and the roughly $1.6 million net on the sale to the Navy, plaintiff more than doubled its investment in two years. And third, the Court of Federal Claims and Federal Circuit have on several recent occasions found no taking based on restrictions imposed under environmental regimes predating plaintiff's acquisition of the land, as was the case here. *See, e.g., Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004).
>
> The third reason above—courts frinding no taking under pre-acquisition regimes—is also of interest in light of the Supreme Court's ruling in 2001 that the pre-acquisition existence of the regulatory regime at issue does not *categorically* bar a court from finding a taking. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). That holding left open whether the pre-existing regime still plays some *less-than-dispositive* role in the takings analysis. Thus far, as noted above, lower courts have continued after *Palazzolo* to give the pre-acquisition law considerable weight against the taking claim, to the point where some observers ask whether *Palazzolo* is being ignored.

**Mitigation condition on development approval: *Mead v. City of Cotati*, 389 Fed. Appx. 637 (9th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3403 (December 21, 2010) (No. 10-828)**

Plaintiff, owner of 1.6 acres of vacant land in the city, applied for approval to build four duplexes on 0.9 acres. The city approved, subject to compliance with the city's affordable housing plan and, pertinent here, mitigation of the proposed development's impact on the California Tiger Salamander, an endangered species. Plaintiff's consultant concluded that under interim mitigation guidelines developed by the FWS and the state under the ESA, plaintiff would be required to devote one acre of land to habitat conservation for each acre of a nearby salamander breeding site that was adversely affected by the development. Plaintiff claims the imposition of the two

conditions effects a taking. (Facts taken from district court decision: 2008 WL 4963048 (N.D. Cal.).)

***Held, mitigation claim not ripe.*** The landowner's taking claim based on the required mitigation of his development's impact on the salamander is unripe. The claim fails to satisfy the ripeness requirement that a final decision be obtained from the government body as to the permitted uses of the property, since the landowner did not avail himself of the opportunity to submit to FWS a survey showing the presence or absence of salamanders on his land. Nor has he argued that the cost of performing a proper survey would constitute a taking. For this reason, he has not received a final FWS determination as to whether the salamander mitigation requirements apply to his land.

(As to the affordable housing requirement, the court assumes without deciding that the claim is ripe and proceeds to the taking question. Because the landowner insists this is an exaction taking claim and not a *Penn Central* claim, he has not alleged facts sufficient to win a *Penn Central* claim. Therefore, his claim must be dismissed.)

The petition for certiorari abandons the challenge to the salamander mitigation condition and pursues only the challenge to the affordable housing condition.

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

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

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

> *Comment:* This decision is but one manifestation of the longstanding judicial insistence that to ripen a taking claim based on a federal permit requirement, the landowner must at least begin the permit application and negotiation process. Various takings-law ripeness doctrines may indeed excuse the plaintiff's failure to pursue the process all the way to a formal permit denial—the general minimum prerequisite for a ripe taking claim—but to demonstrate their applicability the process must at least be engaged.

**Restrictions on commercial timber harvesting: *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004)**

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

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

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

**Restrictions on commercial timber harvesting: *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002)**

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

***Held, no taking.*** The FWS never denied Boise's ITP; the company was enjoined only from logging *without a permit*. The mere imposition of a permit requirement by a regulatory agency does not, by itself, effect a regulatory taking. Nor is there a *per se* physical taking by the owls; the government is only regulating the use of the tract due to the incidental location of the owls there.

The state has no control over where the owls choose to nest. Finally, no physical taking was caused by the requirement that Boise allow government officials to enter its land to conduct owl surveys. The visits were brief, nonexclusive, and approved by the district court.

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

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

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

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

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

**Restrictions on filling in wetlands for commercial home construction: *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999)**

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

***Held, no taking.*** The plaintiff claims that the effect of the Corps' action was to completely bar economic use of his property—effecting a *per se* total taking. Even with a total taking claim, however, a property owner must show that his reasonable investment-backed expectations were frustrated. The plaintiff could not have had reasonable expectations when he bought the property in 1973 that he would obtain approval to fill the wetland. By that year, the Corps had begun to deny dredge-and-fill permits solely on environmental grounds. And plaintiff acknowledged in the sales contract the difficulty of obtaining the necessary permits. Finally, plaintiff waited seven

years after purchasing the property before applying for permits, during which wetlands protection and endangered species laws became increasingly stringent. While these developments do not bar the taking claim, they reduce plaintiff's ability to claim surprise when the permit application was denied.

> *Comment:* The *Good* decision takes a broad view of the "notice rule"—the case law doctrine that no regulatory taking occurs when the government restricts a property use under a law existing when the property was acquired, or even, as in Good's case, under a law whose adoption *after* the property was acquired could have been foreseen. Mr. Good bought his wetlands before the ESA was enacted in its modern form, and 17-18 years before the species that triggered the permit denial were listed. However, as mentioned in Section II, the notice rule is no longer viewed as an absolute bar to a taking claim.
>
> The *Good* holding that a property buyer's investment-backed expectations are relevant even to total-taking claims was contravened later by an opposite holding of another Federal Circuit panel, holding that expectations are irrelevant to a total-taking claim. *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1379 n.3 (Fed. Cir.), *and on petition for rehearing*, 231 F.3d 1354 (Fed. Cir. 2000). Since the decisions in *Palm Beach Isles*, the Court of Federal Claims and Federal Circuit generally have followed the *Palm Beach Isles* approach. *See Cane Tennessee, Inc. v. United States*, 62 Fed. Cl. 703, 711-716 (2004).

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

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

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

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

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

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

# IV. Administrative Delays

**Consultation process delays: *Aloisi v. United States*, 85 Fed. Cl. 84 (2008)**

Plaintiff seeks to mine on federal lands in the Klamath National Forest (California). On July 23, 1990, the FWS issued a biological opinion to the Forest Service, as part of the ESA's section 7 consultation process, concluding that plaintiff's proposed mining plan was not likely to jeopardize the continued existence of the northern spotted owl, a threatened species. Plaintiff, however, claims that the Forest Service did not notify his company of this opinion until March, 1992. In addition, plaintiff was told that because his company's April 1, 1992, plan of operation was different than prior proposals, the Forest Service would have to initiate a second section 7 consultation with the FWS. This consultation was completed February 8, 1994, and came to the same no-jeopardy conclusion as the first one. Plaintiff claims three temporary takings based on the administrative delays from 1990 to 1992, from 1992 to 1994, and, adding the two periods, from 1990 to 1994.

***Held, no taking.*** A claim of taking based on administrative delay must show that the delay was "extraordinary." As to 1990-1992, the complex, multi-step regulatory process to approve mining in an environmentally sensitive area indicates that a 20-month delay is not extraordinary. Moreover, administrative delays of greater length have been held not to be extraordinary, and some time was consumed by the Forest Service's having to request information from the plaintiff several times. As to 1992-1994, the first eight months were taken up by discussions between the Forest Service and FWS as to whether a second consultation was needed and plaintiff's appeal, and an additional four months went by while the Forest Service waited for requested information from the plaintiff. Finally, even if the two separately alleged taking periods are considered together, totalling 43 months, the delay was not extraordinary. Nor has plaintiff shown government bad faith.

> *Comment:* Takings claims based on administrative delays often involve the time taken by an agency to process a permit application. Whatever the context, such claims are very difficult for a plaintiff to win—particularly, as here, in the absence of government bad faith. *See, e.g., Wyatt v. United States,* 271 F.3d 1090, 1098 (Fed. Cir. 2001) (it is "the rare circumstance that we will find a taking based on extraordinary delay without a showing of bad faith"). Indeed, of the dozen or so delay-taking decisions revealed by research (only *Aloisi* was based on the ESA), none found a taking.

# V. Reductions in Irrigation Water to Preserve Instream Flows

**Reduction by United States in irrigation water that water district was allowed to divert from river: *Casitas Municipal Water District v. United States*, 543 F.3d 1276 (Fed. Cir. 2008)**

In 1997, the National Marine Fisheries Service (NMFS) listed the West Coast steelhead trout as endangered. In response, the water district, operator of the Bureau of Reclamation's Ventura River Project, requested the Bureau to initiate a section 7 consultation with the NMFS. The result was revised operating criteria for the Project to augment river flow for the endangered fish. Under these new criteria, the water district had to forego exercising its appropriative water right to up to 3,200 acre-feet of water per year from the river for irrigation purposes. In the compliance option

chosen by the district or by NMFS (the facts are unclear on this), water already diverted from the river by a Project dam and canal was rediverted to a fish passage facility that returned the water back to the river.

***Held, to be analyzed as a physical, not regulatory, taking.*** Three Supreme Court opinions (1931 to 1963) hold that when the U.S. physically diverts water away from plaintiff's property, or causes the water to be so diverted, a physical taking occurs. The government says these cases are distinguishable since all that is involved with Casitas is a restriction on the use of water—appropriately analyzed as a regulatory taking. This position must be rejected—the government did not merely require some water to remain in the stream, but instead caused the physical diversion of water away from the canal to the fish ladder, reducing Casitas's water supply. The government's position that in contrast to the Supreme Court trilogy, the U.S. did not divert the water for its own use or for use by a third party must also be rejected: preservation of endangered species habitat *is* for government and third party (the public) use. Finally, the sharp distinction made in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), between regulatory and physical takings is not relevant here; that case did not involve a physical taking claim.

> *Comment:* The decision does not actually find a physical taking, but rather remands to the trial court for further proceedings on a physical taking theory. Nonetheless, under a physical taking theory the plaintiff is almost sure to win, unless the U.S. can convince the trial court that water rights in California are so conditional (e.g., due to the state's public trust or reasonable use doctrines) that the water diversion took no right the plaintiff ever had. The U.S. sought reconsideration of the Federal Circuit decision, which was denied in 2009. 556 F.3d 1329. At this writing, the case is back in the trial court, which has yet to rule.
>
> The rules governing which government actions are to be analyzed as physical takings, and which as regulatory takings, are a recurring issue. The issue is pivotal, since a taking plaintiff is much more likely to win under a physical theory. In *Casitas*, the trial court judge had to decide whether his earlier characterization of an ESA-mandated reduction in water delivery as a physical taking, in *Tulare Lake* (see below), governed here as well. He held that it did not, owing to the Supreme Court's intervening decision in *Tahoe-Sierra* noted above. Thus, he concluded that *Casitas* was to be analyzed on a regulatory taking theory. This change of heart led the Federal Circuit, in the *Casitas* appeal, to address *Tahoe-Sierra* at length—concluding, as noted above, that *Tahoe-Sierra* in no way undercut the Supreme Court's physical-diversion trilogy and its labelling of such diversions as physical takings. But because *Tulare Lake* involved different facts—because it was a prevention of water use case rather than a physical diversion case—the Federal Circuit in *Casitas* expressly disclaimed any comment on whether *Tulare* was correctly decided.

**Reduction in irrigation contract water delivered by United States: *Klamath Irrigation District v. United States*, 635 F.3d 505 (Fed. Cir. 2011)**

During a drought in 2001, the U.S. Bureau of Reclamation terminated delivery of irrigation water from its Klamath Project in northern California and southern Oregon, to ensure lake levels and river flows sufficient to protect three fish species listed under the ESA. Plaintiffs, 13 agricultural landowners and 14 water, drainage, or irrigation districts in the Klamath River Basin, all had been receiving water from the Project.

***Note: certification.*** In 2005, the Court of Federal Claims determined that the United States had perfected its water rights pursuant to governing state law and ruled in favor of the United States on the taking claim. 67 Fed. Cl. 504. (Later, it ruled in favor of the United States on the breach of

contract claim also. 75 Fed. Cl. 677.) In 2008, the Federal Circuit determined that the answer to the taking issue in the case depends on complex issues of Oregon property law. So the court "certified" (officially transmited) three questions of Oregon property law to that state's high court. 532 F.3d 1376. In 2010, the Oregon Supreme Court responded. 227 P.3d 1145.

***Held, further proceedings necessary.*** Further proceedings are compelled by the Oregon Supreme Court's answers to the certified questions. Its first answer makes clear that the districts are not precluded by Oregon's 1905 reclamation act from acquiring a beneficial or equitable interest in Klamath Project water that was appropriated by the United States under the 1905 act. Its second answer asserts that beneficial use alone is insufficient to acquire a beneficial or equitable property interest in a water right to which another person holds title. Its third answer says that plaintiffs may assert, under Oregon law, beneficial or equitable interests in Klamath Project water to which the United States holds legal title; they need not pursue those claims in the Klamath Basin water rights adjudication. In sum, such beneficial and equitable interests should be considered in this case, which the trial court did not do.

Therefore, the takings claims (and interstate compact claim) are remanded to the Court of Federal Claims for determination, based on the Oregon Supreme Court's answers, on a case-by-case basis, of any outstanding property interest questions and any surviving takings claims. In addition, the case is remanded for further proceedings on the breach of contract claims. The Court of Federal Claims' earlier decisions on the takings and breach of contract claims are vacated.

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

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

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

> *Comment:* In December, 2004, plaintiffs and the United States settled the case for $16.7 million. The settlement agreement provides that it "shall not be construed as an admission by Defendant of any ... liability as to any or all of the Plaintiff's claims for liability."
>
> *Tulare Lake* generated headlines for several reasons. First, it involved ESA-based cutbacks in delivery of irrigation water, a highly emotional issue in the West and one that has

generated other takings suits noted in this report. Moreover, at the time it was decided it was the *only* court decision involving *any* ESA circumstance that found a taking. Second, the court's rationale included some controversial conclusions—e.g., that a regulatory restriction effected a *physical* taking, and that the plaintiffs acquired greater rights against the U.S. under their contracts with the state than they had against the state. Third (and related to the second), the Department of Justice had received at least four letters from other government agencies—two from the National Marine Fisheries Service, and one each from the California Attorney General's Office and the California Water Resources Control Board—urging the Department not to settle, but to appeal. The California letters additionally asserted that *Tulare Lake* mischaracterized the state's water law, and urged Justice on appeal to request certification of the state water law issues in the case to the California high court. Finally, several Members of California's congressional delegation took public positions on the proper course of action for the Department of Justice—whether to settle or appeal.

The *Tulare Lake* decision was pointedly criticized by three later decisions, *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 537-538 (2005), *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122, 129-132 (Cal. App. 2006), and *Meeker v. Belridge Water Storage Dist*., 2006 U.S. Dist. LEXIS 91774, at *36 (E.D. Cal. January 17, 2006).[47] Its characterization of the reduced water delivery as a physical, rather than regulatory, taking was also subsequently repudiated by the judge who wrote the decision—see Comment under *Casitas Municipal Water District v.United States, supra* at 16, for further discussion.

**Reduction in irrigation contract water delivered by United States: *Barcellos and Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717 (E.D. Cal. 1993), *affirmed sub nom. O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995)**

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

***Held, no taking.***[48] The fact that the Westlands contract was entered into before enactment of the ESA and another statute does not mean that application of those statutes to modify the contract was a taking of contract rights and violation of due process. (These issues were not reached in the decision on appeal.)

[47] *See also* Melinda H. Benson, *The Tulare Case: Water Rights, The Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551 (2002).

[48] 849 F. Supp. at 730. It is not *entirely* clear from the court's brief discussion that the plaintiffs were raising a taking claim in addition to their due process claim.

# VI. Restrictions on Measures a Property Owner May Use to Protect Property from ESA-Listed Animals

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

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

***Held, no jurisdiction.*** Because compensation for any taking by the United States is available in the U.S. Court of Federal Claims under the Tucker Act,[49] the district court below lacked jurisdiction to hear plaintiff's taking claim. The Supreme Court decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), in which a plurality approved district court jurisdiction over a taking claim against the United States, is easily distinguished as involving an alleged taking based on monetary liability. Here, by contrast, we deal with an alleged taking of physical things; hence, there is no reason to reverse the presumption of Tucker Act availability.

**Livestock killed by listed predators: *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988)**

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

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

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

[49] 28 U.S.C. § 1491.

# VII. Restrictions on Commercial Dealings

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

As of the ESA's effective date in 1973, Kepler allegedly held several animals for purposes lawful under the ESA. Thereafter, he transported two of them, a cougar and a leopard, from Florida to the "Dogpatch Zoo" in Kentucky—where he was arrested and the animals seized by Department of the Interior agents. He was convicted of violating the ESA ban against interstate transport of endangered species in the course of a commercial activity.[50]

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

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

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

***Held, no taking.*** There was no taking of Hill's property interest in these animal parts. He has not been denied all economic use of his property, since personal property may have value or generate income in ways other than by sale. Further, the ESA permits one to sell endangered and threatened species if one obtains a permit under section 10(a) of the act.[51] Finally, at the time Hill acquired the animal parts in the early 1980s, they were already subject to the ESA proscriptions at issue here. Therefore, he obtained no property right to sell the animals and so lost no right for which he can claim compensation.

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

[50] ESA § 9(a)(1)(E).

[51] 16 U.S.C. § 1539(a).

## Author Contact Information

Robert Meltz
Legislative Attorney
rmeltz@crs.loc.gov, 7-7891