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Cover Page Footnote

This article won first prize in the 1992 R. Marlin Smith Student Writing Competition sponsored by the Planning and Law Division of the American Planning Association. This competition honors the late R. Marlin Smith, a prominent land use lawyer and teacher who contributed greatly to the theory and practice of land use law. The author is serving a two-year staff attorney appointment with the United States Court of Appeals for the Eighth Circuit. The views expressed in this article are the author's own and do not necessarily reflect those of the court or any of its judges.

FIFTH AMENDMENT TAKINGS ISSUES RAISED BY SECTION 9 OF THE ENDANGERED SPECIES ACT*

PATRICIA A. HAGEMAN**

I. INTRODUCTION

Congress promulgated the Endangered Species Act of 1973¹ (ESA), currently scheduled for reauthorization,² to conserve ecosystems "upon which endangered species and threatened species [of fish, animals and plants] depend."³ The Supreme Court has acknowledged this purpose to be absolute and inviolable.⁴ The Court has noted that both the language of the ESA and its legislative history manifest a congressional intent "to halt and reverse the trend toward species extinction, whatever the cost,"⁵ and that the ESA leaves no room for exceptions.⁶ Lower courts in turn have willingly enforced the ESA as a powerful and comprehensive measure of species protection.⁷

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** J.D., Washington University Law School, 1992; B.S., Bradley University, 1989. The author is serving a two-year staff attorney appointment with the United States Court of Appeals for the Eighth Circuit. The views expressed in this article are the author's own and do not necessarily reflect those of the court or any of its judges.

1. 16 U.S.C. §§ 1531-1544 (1988).

2. Initially authorized for twenty years, the ESA was scheduled for reauthorization in 1993. Congress extended the reauthorization date to 1994, and it now appears that reauthorization may not take place until 1995. See *Natural Resources: Mining Law Reform, Endangered Species*, DAILY REP. FOR EXECUTIVES, (BNA) No. 15, (Jan. 25, 1994) (stating House Speaker Thomas Foley (D-Wash) advised constituents in December 1993 that ESA may receive another one-year extension without substantial changes). For an analysis of the four bills introduced during the 102d Congress to either replace or amend the ESA, see generally Davina K. Kaile, Note, *Evolution of Wildlife Legislation in the United States: An Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 GEO. INT'L ENVTL. L. REV. 441 (1993). As of May 1994, all four bills, reintroduced during the 103d Congress, remained in subcommittee hearings.

3. 16 U.S.C. § 1531(b) (1988).

4. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). In *TVA*, the Court enjoined the virtually completed, federally funded construction of the Tellico Dam because the finished dam would lead to the extinction of the snail darter, a small endangered fish. *Id.* at 172-73.

5. *Id.* at 184.

6. *Id.* at 185.

7. See, e.g., *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in part, vacated in part, and remanded sub nom.*, *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (enjoining timber management practices); *Palila v. Hawaii Dep't. of Land & Natural Resources (Palila II)*,

The ESA contains three main provisions that further its purpose. Section 4 of the ESA provides for the identification and listing of threatened and endangered species, and for designation of the species' critical habitat.⁸ Section 7 imposes obligations and restrictions upon federal agencies to further the preservation of listed species.⁹ Section 7's restrictions also reach far beyond federal agencies in that section 7 precludes federal agencies from granting permits to parties whose proposed actions would jeopardize the existence of listed species.¹⁰ Finally, section 9 restricts activities of individuals and other entities that affect listed species.¹¹ Specifically, section 9 prohibits the capturing of an endangered species.¹² These sections operate in concert to restrict and regulate both public and private land uses that contravene the ESA's conservation purpose.

As a land use regulation, the ESA raises Fifth Amendment taking issues.¹³ Both sections 7 and 9 of the ESA may prohibit private landowners from using their land in a manner that is detrimental to endangered species. Section 9, for example, could prohibit private landowners from developing their land if it was designated as an endangered species' critical habitat. This may lead to claims that the development prohibition constitutes a compensable taking of property rights.¹⁴ Because of such potential takings claims, the

649 F. Supp. 1070 (D. Haw. 1986), *aff'd* 852 F.2d 1106 (9th Cir. 1988) (requiring the removal of mouflon sheep from the critical habitat of the endangered palila); *Palila v. Hawaii Dep't of Land & Natural Resources (Palila I)*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (enjoining grazing of feral sheep and goats in the critical habitat of the endangered palila); see also James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look from a Litigator's Perspective*, 21 ENVTL. L. 499 (1991) (analyzing the ESA as a powerful litigation tool).

8. 16 U.S.C. § 1533 (1988). Under this section, the Secretary of the Interior and the Secretary of Commerce identify endangered and threatened land and marine species, and then promulgate regulations listing the species. The Secretary of the Interior delegates its ESA functions to the Fish and Wildlife Service (FWS). The FWS, after listing a species, also is responsible for designating the species' critical habitat.

9. 16 U.S.C. § 1536 (1988).

10. 16 U.S.C. § 1536(a)(2) (1988).

11. 16 U.S.C. § 1538 (1988).

12. *Id.*; see *infra* notes 17-25 and accompanying text.

13. U.S. CONST. amend. V, ("[N]or shall private property be taken for public use, without just compensation.").

14. It was due to concern for such claims that former President Reagan issued Executive Order No. 12,630, which directs the executive branch to consider the private property takings issue when undertaking regulatory actions. Exec. Order No. 12,630, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 (1988). One impact of this Executive Order on the ESA is that the FWS must consider Fifth Amendment takings implications when it designates privately owned land as endangered species' critical habitat. For a discussion of the validity and accuracy of Exec. Order No. 12,630, see Roger J. Marzulla, *The New "Takings" Executive Order and Environmental Regulation - Collision or Cooperation?*, 18 ENVTL. L. REP. (Envtl. L. Inst.) 10,254 (1988) (arguing that Exec. Order No. 12,630 directs agencies to follow an overly restrictive view of what constitutes a private property taking); see also Jerry Jackson & Lyle D. Albaugh, A

agencies that designate the endangered species' critical habitats also must attempt to avoid infringing on private property rights.¹⁵ This article addresses Fifth Amendment takings issues raised by the ESA's section 9, and specifically section 9's potential prohibition against private land development.¹⁶

Part I of this article discusses the background, text, and judicial interpretation of section 9. Part II discusses per se physical takings issues raised by section 9 and argues against application of a physical takings rule to section 9 takings claims. Part III identifies the regulatory takings issues raised by section 9. Finally, part IV concludes that section 9 takings claims will turn on the economic impact that section 9 has on specific landowners, and that landowners should be able to state a takings claim only if section 9 operates to deprive them of nearly all economically viable use of their land.

II. THE ESA'S SECTION 9

Section 9 of the ESA prohibits "any person" from "taking" (capturing) an endangered species.¹⁷ The term "person" includes private individuals, private entities, and all forms of government entities.¹⁸ "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct."¹⁹ The Fish and Wildlife Service (FWS) has further detailed the "take" definition through its regulations. The FWS originally defined harm as

an act or omission that actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental

Critique of the Takings Executive Order in the Context of Environmental Regulation, 18 ENVTL. L. REP. (Envtl. L. Inst.) 10,463 (1988).

15. See *supra* note 14.

16. Section 7 also restricts private landowners' land uses, thus raising Fifth Amendment takings issues. Section 7 prohibits federal agencies from undertaking actions likely to jeopardize endangered or threatened species. 16 U.S.C. § 1536 (1988). Federal agencies, then, may not grant permits or licenses to private landowners whose proposed actions would jeopardize listed species. This article focuses on section 9 because its prohibitions are broader than those in section 7. Section 9 reaches all persons, whether acting under federal permission or not. Further, section 9's prohibition against capturing an endangered species applies not only to actions that would jeopardize an entire species population, but also to actions that capture a discrete member or members of the population.

17. 16 U.S.C. § 1538 (1988).

18. 16 U.S.C. § 1532(13) (1988).

19. 16 U.S.C. § 1532(19) (1988).

modification or degradation which has such effects is included within the meaning of "harm."²⁰

Courts have broadly interpreted section 9's "harm" definition. In the first significant interpretation of "harm" under section 9, the Ninth Circuit held that the destruction of critical habitat upon which an endangered species depended for food, shelter, and nesting "harmed" the species.²¹ This decision was an important indicator of courts' willingness to prevent land uses which indirectly harmed endangered species by damaging those species' habitats.

Subsequent to its original definition of section 9 harm, the FWS amended the definition to "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."²² In an interpretation of the amended definition, the Ninth Circuit held that "habitat destruction which could lead to extinction of [an endangered species]" falls within the definition of "harm."²³ These Ninth Circuit interpretations, along with other lower court decisions, prohibit under section 9 a wide range of land uses that could harm endangered species.²⁴ This broad application of section 9 harm enhances the comprehensiveness of the ESA and its potential to reach numerous private landowners.²⁵

Because of the absolute nature of the ESA, Congress amended the ESA to provide limited exemptions. One of those amendments, now

20. 50 C.F.R. § 17.3 (1976). The Supreme Court in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184-85 n.30 (1978) cited this definition of harm, which applies to sections 7 and 9.

21. *Palila v. Hawaii Dep't. of Land & Natural Resources*, 639 F.2d 495 (9th Cir. 1981), *aff'd* 471 F. Supp. 985 (D. Haw. 1979). The palila is a small endangered bird found only in the mamane forests of Hawaii. The district court found the maintenance of feral sheep and goats in the palila's critical habitat harmed the bird in violation of ESA's section 9 because the livestock's grazing destroyed the mamane woodlands on which the palila depended for food, shelter and nesting. 471 F. Supp. at 999. The Ninth Circuit affirmed the district court's conclusion that natural habitat destruction harmed the bird. 639 F.2d at 498.

22. 50 C.F.R. § 17.3 (1987).

23. *Palila v. Hawaii Dep't. of Land & Natural Resources (Palila II)*, 852 F.2d 1106, 1108 (9th Cir. 1988), *aff'd* 649 F. Supp. 1070 (D. Haw. 1986), (accepting this definition as consistent with the purposes of the Endangered Species Act).

24. See *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988) (finding certain timber management practices harmed red-cockaded woodpecker because these practices had caused a decline in the species' population and ultimately would lead to the species' extinction), *aff'd in part, vacated in part, remanded*, *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991); cf. *National Wildlife Fed'n v. Hodel*, 23 Env't Rep. Cas. (BNA) 1089 (E.D. Cal. 1985) (finding waterfowl hunters harmed bald eagles under section 9 where the hunters used lead shot that poisoned eagles feeding upon contaminated waterfowl).

25. See generally Frederico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109 (1991).

section 10(a),²⁶ allows a person to request a permit of exception to section 9 for an "incidental taking" of an endangered species.²⁷ The FWS may issue such a permit if the requested taking "is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."²⁸ A permit applicant also must comply with several requirements, including developing, funding, and undertaking a habitat conservation plan.²⁹ Under such a scenario, a private landowner works with public conservation authorities to arrive at a land development plan that balances the landowner's incidental taking with long-term species preservation.³⁰ The FWS then guarantees the landowner that implementation of the agreed upon plan will require no future mitigation under the ESA.³¹

In summary, section 9, in its most restrictive light, prevents landowners whose land is a critical habitat for an endangered species from modifying their land if it will harm the endangered species. Section 10(a) provides a limited exception. Section 9 restrictions do not impose affirmative obligations on landowners, but they may prohibit or regulate particular land uses, such as development.

III. SECTION 9 AND THE PER SE TAKINGS RULE

The Fifth Amendment of the United States Constitution states that private property shall not "be taken for public use, without just compensation."³² Judicial interpretation of the Takings Clause has produced a myriad of definitions of what constitutes a Fifth Amendment private property taking. The various definitions fit loosely into two categories: regulations that go "too far"³³ and physical invasions.³⁴

Historically, physical invasions in the nature of expropriations and trespasses were thought to be the only types of invasions that

26. 16 U.S.C. § 1539 (1988).

27. *Id.*

28. *Id.* § 1539(a)(1)(B).

29. 16 U.S.C. § 1539(a)(2)(A) (1988); see Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1991) (discussing section 10(a) permits and habitat conservation plans).

30. See Thornton, *supra* note 29, at 620-25.

31. *Id.* at 625.

32. U.S. CONST. amend. V.

33. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (noting that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

34. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992) (discussing the two discrete categories of compensable takings).

could constitute a compensable taking.³⁵ Indeed, the earliest takings cases concerned such trespassory invasions.³⁶ The Supreme Court, however, has long recognized that both physical occupations and regulations that restrict land use may spawn takings claims,³⁷ and has maintained a dichotomy between physical and regulatory takings. Physical takings are established through a modern per se takings rule stemming from a "historically rooted expectation of compensation"³⁸ for physical invasions.³⁹

The modern per se takings rule pronounced in *Loretto v. Teleprompter Manhattan CATV Corp.*, is that a taking occurs where there is a "permanent physical occupation authorized by government."⁴⁰ In *Loretto*, the Supreme Court held that a government-authorized placement of a television cable and a small connection box on a building rooftop constituted a per se taking. Government agents did not actually place the cable and box on the rooftop; a state statute, however, authorized the cable company's placement of the items.⁴¹ The *Loretto* Court found the statute was sufficient government authorization of the cable company's physical invasion.⁴² Subsequent courts have interpreted *Loretto* to mean that such an occupation is a per se taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the [land]owner."⁴³ Thus, under *Loretto*, a permanent and physical occupation of private property authorized by the government, no matter how small the occupation, is a compensable taking of private property.

The *Loretto* Court did not define the precise parameters of its per se rule. Lower courts have interpreted *Loretto's* permanence factor to require something less than forever. For instance, one court found the time period necessary to establish a taking must be more than temporary or "transient and relatively inconsequential."⁴⁴ The

35. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967).

36. See, e.g., *Transportation Co. v. City of Chicago*, 99 U.S. 635, 642 (1878).

37. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-27 (1982).

38. *Id.* at 441.

39. *Id.*

40. *Id.* at 426.

41. *Id.* at 423.

42. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

43. *Hendler v. United States*, 952 F.2d 1364, 1375 (Fed. Cir. 1991) (citing *Loretto*, 458 U.S. 419).

44. *Id.* at 1377. In *Hendler*, the court found a taking by permanent physical occupation where Environmental Protection Agency officials, their contractors, and state officials entered upon the plaintiff's land and installed at least eighteen wells for monitoring and extracting hazardous substances. The court found the installation of the wells was sufficiently permanent under *Loretto*. *Id.*

Supreme Court further shaped the *Loretto* rule in *Nollan v. California Coastal Commission*.⁴⁵ In *Nollan*, the Court determined that a physical occupation need not be exclusive, continuous or uninterrupted constitute a per se taking.⁴⁶ The *Nollan* Court stated that a permanent physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed even though no particular individual is permitted to station himself permanently upon the premises."⁴⁷

Some advocates have argued unsuccessfully that the ESA operates as a per se taking of their property under *Loretto* and *Nollan*.⁴⁸ Their argument is that the endangered species occupying a person's property is, as a government-authorized actor, engaged in a per se physical taking by physical occupation.⁴⁹ This theory may seem tenable if one substitutes the statute at issue in *Loretto* with the ESA and the pedestrians in *Nollan* with endangered animals. However, this analogy is misplaced for two reasons. First, regulation of wildlife is not tantamount to government authorization of the wildlife's presence or actions. Second, the physical presence of regulated wildlife is not the type of physical invasion to which *Loretto* applies.

Government regulation of wildlife does not rise to authorization of the wildlife's presence or actions. In *Loretto*, a state statute authorized the presence of a third party that, absent the statute or landowner acquiescence, would be engaged in a trespass. The *Nollan* permit requirement similarly authorized the presence of third parties who, absent a public easement, would be trespassing on private land. In contrast, wild animals and their habitats exist naturally on private land, and their presence does not constitute an actionable trespassory invasion. The Seventh Circuit has correctly recognized that neither the government nor any person could "be held liable for trespasses of animals which . . . have not been reduced to possession,

45. 483 U.S. 825 (1987) (holding that conditioning a permit to rebuild a home on providing a public beach access was a taking).

46. *Id.* at 831-32; see also *United States v. Causby*, 328 U.S. 256 (1946) (analogizing permanent government easement of low air space for flights over the plaintiff's property to a taking by physical invasion).

47. *Nollan*, 483 U.S. at 832.

48. See *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988) (rejecting a claim that governmental protection of grizzly bears on the plaintiff's property constituted a taking of the plaintiff's sheep by a government agent), *cert. denied*, 490 U.S. 1114 (1989).

49. *Id.*; see also Geoffrey L. Harrison, Comment, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings*, 58 U. CHI. L. REV. 1101 (1991).

but which exist in a state of nature."⁵⁰ The natural presence of wildlife is distinguishable from the trespassory invasion of the third parties in *Loretto* and *Nollan*.

In numerous contexts, courts have rejected arguments that wildlife acts under government authorization. The Ninth Circuit has addressed the precise issue of whether the ESA constitutes government authorization for purposes of a physical takings claim. In *Christy v. Hodel*,⁵¹ the Ninth Circuit faced a different aspect of section 9's prohibition against taking an endangered species. In *Christy*, an endangered grizzly bear entered the plaintiff's land and destroyed a number of the plaintiff's sheep.⁵² Christy argued that the grizzly bear's actions were attributable to the government, and thus effected a taking of his sheep.⁵³ The *Christy* court rejected the plaintiff's focus on the physical occupation of the bear or its destruction of the sheep, and instead noted that if there was to be any takings claim at all, it must stem from the ESA's regulation of the plaintiff's property.⁵⁴ The *Christy* court observed that the federal government neither owns nor controls the wildlife it regulates.⁵⁵ While the scenario in *Christy* differs from section 9's prohibition on the modification or degradation of critical habitat, *Christy* is nonetheless important. The court in *Christy* characterized section 9 as a potential regulatory taking, but denied the viability of a per se physical takings claim. The *Christy* court refused to focus on the physical occupation of the bear.⁵⁶ If a physical takings claim was untenable in the *Christy* scenario, then a physical takings claim certainly cannot exist where there is no similar destruction of property.

The Tenth Circuit Court of Appeals similarly denied a physical takings claim under the Wild Free-Roaming Horses and Burros Act of 1971 (Burros Act).⁵⁷ In *Mountain States Legal Foundation v. Hodel*,⁵⁸ the plaintiff attempted to prevent wild horse herds from roaming

50. *Sickman v. United States*, 184 F.2d 616, 619 (7th Cir. 1950) (refusing to impose liability on federal government under Federal Tort Claims Act for damage wild waterfowl caused to plaintiff's land), *cert. denied*, 341 U.S. 939 (1951).

51. 857 F.2d 1324 (9th Cir. 1988).

52. *Id.* at 1326.

53. *Id.* at 1334.

54. *Id.* But see *Harrison*, *supra* note 49, at 1113-14 (arguing that the bear in *Christy* acted as government-authorized actor and effected a per se taking of the plaintiff's property).

55. 857 F.2d at 1334; see also *Douglas v. Seacoast Products Inc.*, 431 U.S. 265, 285 (1977) (noting that "it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the states nor the Federal Government . . . has title to these creatures until they are reduced to possession by skillful capture.") (citing *Missouri v. Holland*, 252 U.S. 416 (1920)); *Geer v. Connecticut*, 161 U.S. 519, 539-40 (Field, J., dissenting) (1896).

56. But see *Christy*, 490 U.S. at 1115-16 (White, J., dissenting from denial of certiorari).

57. 16 U.S.C. §§ 1331-1340 (1988).

58. 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

across its private land.⁵⁹ The Burros Act mandated the plaintiff to allow the herds to cross its land. The plaintiff unsuccessfully argued that the government authorized the horses' presence on its land, similar to the government-authorized presence in *Loretto*. The court, however, found it a "fallacy . . . that the wild horses are, in effect, instrumentalities of the federal government whose presence constitutes a permanent governmental occupation of the [plaintiff's] property."⁶⁰ The court concluded that the Burros Act "is nothing more than a land-use regulation . . . to ensure the survival of a particular species of wildlife."⁶¹

Similarly, the Second Circuit recently denied that seasonal deer habitation amounted to a physical taking.⁶² In *Southview Associates v. Bongartz*, plaintiff Southview was denied a land development permit because its proposed development would have imperiled deer that used the land as a winter deeryard.⁶³ In denying Southview's physical takings claim, the court noted that the deer displaced "only a few sticks in the bundle"⁶⁴ of the plaintiff's property rights, and that the deer were not "strangers" to the property, but naturally existed there.⁶⁵ Other lower courts have similarly denied takings claims for wildlife's presence on or injury to private property.⁶⁶

The presence of wildlife is not the type of physical invasion to which *Loretto* applies. The *Loretto* Court itself, in preserving the distinction between physical and regulatory takings, admonished that the *Loretto* rule is inapplicable to typical land use regulations.⁶⁷ The Court noted it did not "question the equally substantial authority upholding a State's broad power to impose appropriate restrictions

59. The horses roamed throughout a vast area of land, some parcels of which were owned by the plaintiff, and other parcels owned by the federal government. Because of the fractionalized pattern of land ownership, it was necessary for the wild horses to cross the plaintiff's land to roam the public land. *Id.*

60. *Id.* at 1428.

61. *Id.*

62. *Southview Assocs. v. Bongartz*, 980 F.2d 84, 95 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993).

63. *Id.* at 90.

64. *Id.* at 95.

65. *Id.* at 95 n.5. The court did not decide the merits of Southview's regulatory takings claim because the claim was not ripe for review. *Id.* at 100.

66. See, e.g., *Jordan v. State*, 681 P.2d 346, 350 n.3 (Alaska Ct. App. 1984) (denying takings claim for the plaintiff's loss of moose carcass where state regulation prohibited the plaintiff from thwarting a bear from consuming the carcass); *Collopy v. Wildlife Comm'n, Dep't of Natural Resources*, 625 P.2d 994 (Colo. 1981); *Barrett v. State*, 116 N.E. 99 (N.Y. Ct. App. 1917) (denying a takings claim where regulation prohibited landowner from stopping beavers from eating his timber; the court ruled the plaintiff's injury was merely incidental compared with state's interest in protecting beaver). *But see State v. Herwig*, 117 N.W.2d 335 (Wis. 1962) (finding a taking where landowner was prohibited from hunting waterfowl on his land).

67. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

upon an owner's *use* of his property."⁶⁸ Section 9's prohibition on land development does not focus on forcing a landowner's acquiescence to the occupation of an endangered species; rather, section 9 regulates a landowner's affirmative land uses that would harm an already present species. By the *Loretto* Court's own description, the analysis of the ESA's regulation of land development is precisely the type of issue *Loretto* did not reach.

Neither precedent nor logic permits application of a *Loretto* per se physical takings analysis to endangered species or other wildlife regulation. Rather, the ESA is a typical land use regulation that merits consideration only as a potential regulatory taking.

IV. REGULATORY TAKINGS ISSUES

The proper analysis of a takings claim arising from land use restrictions inquires whether a government regulation "goes too far [so that] it will be recognized as a taking."⁶⁹ The argument for an ESA regulatory taking is that although the ESA is a facially valid regulation, it can regulate land uses to an unacceptable extent and thus effect a taking of private property.

The Supreme Court most recently addressed the issue of regulatory takings in *Lucas v. South Carolina Coastal Council*.⁷⁰ In *Lucas*, subsequent to the plaintiff's purchase of two coastal lots for residential development⁷¹ the South Carolina State Legislature enacted the Beachfront Management Act.⁷² This Act effectively prevented Lucas from erecting permanent habitable structures on his land,⁷³ and he claimed the Act effected a compensable taking of his land.⁷⁴

Before *Lucas*, the Supreme Court had developed two common measures for assessing regulatory takings claims. In *Penn Central Transportation Co. v. City of New York*,⁷⁵ the Court announced a measure that later developed into a three-factor balancing test. Under this test, courts undertook an ad hoc balancing of three factors to determine whether a regulation effected a taking: (1) the purpose of the regulation; (2) the extent to which the regulation interferes with the property owner's investment-backed expectations; and (3) the

68. *Id.*

69. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

70. 112 S. Ct. 2886 (1992).

71. *Id.* at 2889.

72. S.C. Code Ann. §§ 48-39-250 to -360 (Supp. 1990) (amended 1993).

73. *Lucas*, 112 S. Ct. at 2889.

74. *Id.* at 2890.

75. 438 U.S. 104, 124 (1978).

economic impact of the regulation on the property owner.⁷⁶ The other measure provided by the Court was that a regulation constitutes a taking if it does not substantially advance legitimate government interests or "denies an owner economically viable use of his land."⁷⁷

Along with these ad hoc assessments, two concepts emerged. The nuisance prevention exception recognized that a regulation enacted to prevent a public harm cannot result in a taking.⁷⁸ Related to the nuisance exception, the average reciprocity of advantage principle balanced the benefits a landowner receives from a regulation against the burdens imposed by the regulation.⁷⁹ A court could be less willing to find a taking when a landowner, although personally burdened by a land use regulation, benefited from the similar regulation of others.⁸⁰ Under this principle, landowners could not expect to engage in land uses that harmed the community at large.⁸¹

In *Lucas*, the Court held that a loss of "all economically beneficial use" of property is a per se taking.⁸² The Court diverted its focus from the governmental interests advanced by a regulation and abandoned balancing such interests against a regulation's economic impact on landowners.⁸³

The *Lucas* Court also narrowed the nuisance exception to apply only to nuisances identified in a state's "background principles of nuisance and property law."⁸⁴ This analysis retreats from previous nuisance or reciprocity of advantage approaches that addressed a regulation's purpose in preventing public harms.⁸⁵

76. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986).

77. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); see also *Keystone*, 480 U.S. at 485 (summarizing the test in *Agins*, 447 U.S. 255).

78. See *Miller v. Schoene*, 276 U.S. 272 (1928); *Mugler v. Kansas*, 123 U.S. 623 (1887).

79. See Daniel R. Mandelker, *Waiving the Taking Clause: Conflicting Signals from the Supreme Court*, LAND USE L. & ZONING DIG., Nov. 1988, at 3; see, e.g., *Keystone*, 480 U.S. at 491 (discussing average reciprocity of advantage principle).

80. For a thorough discussion of the average reciprocity of advantage principle, see generally Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Jurisprudence*, 40 AM. U. L. REV. 297 (1990).

81. See Mandelker, *supra* note 79, at 4.

82. 112 S. Ct. at 2895.

83. See *id.* at 2893 ("We have . . . described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint.").

84. *Id.* at 2901-02.

85. See, e.g., *Just v. Marinette County*, 201 N.W.2d 761, 767 (Wis. 1972) (discussing the "concepts of public benefit in contrast to public harm").

Because the *Lucas* Court accepted the trial court's factual finding that Lucas had lost *all* economically viable use of his land,⁸⁶ the Court did not address what constitutes such a total deprivation of property value. Nor did the Court squarely address whether a taking would occur when a landowner's economic deprivation is significant, yet less than complete.⁸⁷ In these two regards, the Court referred back to two of its *Penn Central* inquiries: the extent to which a regulation interferes with distinct investment-backed expectations and the economic impact of the regulation on the landowner.⁸⁸

In short, the *Lucas* Court, while narrowing the nuisance exception, essentially meshed its two former tests and eliminated the aspects of those tests that balanced the purpose of a regulation with its economic impact.⁸⁹ Thus, assuming a land use regulation has a legitimate purpose, its potential for constituting a regulatory taking will turn, with a narrow exception, on its economic impact on a landowner.

ESA's section 9 provides a classic example of a land use regulation subject to the above analysis. Like other environmental statutes, such as those regulating wetlands, and like zoning laws, section 9 may severely restrict land development.⁹⁰ The remainder of Part III of this article will explain the above analysis and apply it to ESA's section 9.

A. *The Nuisance Exception*

In abandoning any focus on either a regulation's prevention of public harm or a balance of a regulation's benefits and burdens, the *Lucas* Court left nuisance prevention, narrowly defined, as the only exception to a regulatory takings analysis. This exception could thwart an ESA takings claim only to the extent that harming an endangered species previously was prohibited by common law property and nuisance principles.⁹¹ Because the ESA prevents losses that Congress has declared harmful to the public,⁹² and not actions prohibited at common law, the nuisance prevention exception likely cannot save the ESA from a takings claim.

86. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2896 n.9 (1992).

87. *See id.* at 2895 n.8 (1992) ("It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full.")

88. *Id.* at 2895 n.8 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

89. *See James W. Sanderson and Ann Mesmer, A Review of Regulatory Takings After Lucas*, 70 DENV. U. L. REV. 497 (1993).

90. *See supra* part II.

91. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900-02 (1992).

92. *See* 16 U.S.C. § 1531(a)(3)-(b) (1988).

A possible argument for application of the exception to the ESA is that the government holds endangered wildlife as a public trust resource, and that harm to such public trust property is a tortious invasion of public rights.⁹³ If this common law prohibition against harming endangered species is valid, and if government links the ESA's purpose to such common law roots, then this argument may be tenable. One obvious problem is that newly endangered species become subject to ESA's coverage as part of a continuing process, and therefore a species would have to "become" public trust property as it became endangered.

B. Frustration of Investment Backed Expectations

The *Lucas* Court preserved the concept that a takings claimant must have a distinct investment-backed expectation in the regulated use of his land.⁹⁴ When the *Penn Central* Court proffered the requirement of a distinct investment-backed expectation, it failed to define the concept.⁹⁵ In *Penn Central*, the Court denied the plaintiff's taking claim where New York City's Landmark Preservation Law prohibited the plaintiff from constructing a multistory office building over its Grand Central Terminal.⁹⁶ The *Penn Central* Court found that the plaintiff had no distinct investment-backed expectation in its ability to exploit its developmental property interest.⁹⁷

Since *Penn Central*, courts and commentators have provided additional insight into the meaning of an investment-backed expectation.⁹⁸ Such an expectation must be both distinct and reasonable.⁹⁹ "[D]istinct' implies the expectation must have some

93. See Gregg L. Spyridon & Sam A. LeBlanc, III, *The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action*, 6 TUL. ENVTL. L.J. 287 (1993) (suggesting tortious invasion of public rights as common law cause of action against violation of public's legally protected interest in damaged natural resources); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989) (suggesting public trust doctrine extends to the protection and preservation of wildlife).

94. *Lucas*, 112 S. Ct. at 2895 n.8 (noting that investment-backed expectations are "keenly relevant to takings analysis generally").

95. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

96. *Id.* at 136.

97. *Id.* ("[T]he law does not interfere with what must be regarded as *Penn Central's* primary expectation concerning the parcel.").

98. See, e.g., Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3 (1987).

99. See *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring) ("[R]easonable expectations must be understood in light of the whole of our legal tradition."); see also *Presbytery of Seattle v. King County*, 787 P.2d 907, 915 n.29 (Wash. 1990) (citing *Penn Central*, 438 U.S. at 124; also citing *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980)), *cert. denied*, 498 U.S. 911 (1990).

concrete manifestation and . . . 'reasonable' implies the expectation must be appropriate under the circumstances."¹⁰⁰

The reasonableness requirement for investment-backed expectations has often been equated with the notice rule, which states generally that "a landowner who knew about a restrictive land use regulation when he purchased his property cannot make a taking claim against [that regulation]."¹⁰¹ Although the validity of the notice rule has been questioned,¹⁰² lower courts, particularly the Court of Claims, continue to refer to the notice rule in assessing investment-backed expectations.¹⁰³

Courts have extended this notice concept to include constructive, as well as actual, notice. In *Empire Kosher Poultry, Inc. v. Hallowell*,¹⁰⁴ the Third Circuit held that a plaintiff could have no reasonable investment-backed expectation of kosher processing its chickens in an area it should have known was a quarantined zone.¹⁰⁵ The *Empire* court used a constructive notice standard in its assessment of the plaintiff's knowledge of the challenged regulation.¹⁰⁶

In *Yancey v. United States*,¹⁰⁷ the Federal Circuit, contrary to the court in *Empire*, refused to let a turkey breeder's notice of a quarantine zone render unreasonable the breeder's investment-backed expectation of selling the turkey's eggs. The *Yancey* court noted that the plaintiffs learned of "the quarantine from the newspaper only the day before it took effect."¹⁰⁸ The court did not clarify whether it found the notice rule inapplicable or whether it applied the rule but found insufficient notice.¹⁰⁹

The Supreme Court originally adopted the notice rule in *Ruckelshaus v. Monsanto Co.*¹¹⁰ The Court in *Monsanto* found no investment-backed expectation in the protection of certain trade secrets because a statute had put Monsanto on notice that it would have to disclose the secrets.¹¹¹ The *Monsanto* Court also noted that an

100. 787 P.2d at 915 n.29 (citing Mandelker, *supra* note 98).

101. Mandelker, *supra* note 79, at 5.

102. *See id.*

103. *See, e.g., Ciampitti v. United States*, 22 Cl. Ct. 310, 320 (1991) (stating that in determining interference with investment-backed expectations the "degree to which the claimant has advance notice of the government action is relevant").

104. 816 F.2d 907 (3d Cir. 1987).

105. *Id.* at 916.

106. *Id.*; *see also Rowe v. Town of North Hampton*, 553 A.2d 1331, 1336 (N.H. 1989) (extending concept of constructive notice to assume wetland owner knows his land may be regulated in future because of strong public policy in protecting wetlands).

107. 915 F.2d 1534, 1541-42 (Fed. Cir. 1990).

108. *Id.* at 1540 (citing *Yancey v. United States*, 10 Cl. Ct. 311 (1988)).

109. *Id.*

110. 467 U.S. 986 (1984).

111. *See id.* at 1007.

investment-backed expectation may not merely be a unilateral one.¹¹²

In *Nollan*, Justice Scalia rejected application of the *Monsanto* notice rule to land use cases.¹¹³ Scalia distinguished *Monsanto* as a case in which the property right removed was one conferred by regulation in the first instance.¹¹⁴ According to Scalia, a restriction on land development, in contrast, involves the removal of a more deeply rooted property right than a conferred government benefit. Scalia also rejected the notion that an expectation to develop land is unilateral.¹¹⁵ Thus, according to Scalia in *Nollan*, a landowner may not be deprived of a land development right simply because he was on notice of the deprivation.

Certainly after *Lucas* the notice theory of investment-backed expectations could bolster a landowner's takings claim, when, as in *Lucas*, a plaintiff had no notice at the time of purchase that the land could not be developed as planned. Conversely, if a landowner had notice when first planning a land development that the land was to become designated under the ESA as critical habitat, the landowner should not be allowed to proceed with development and later, upon actual critical habitat designation, claim an investment-backed expectation.

An additional theory defining investment-backed expectation is the doctrine of estoppel and vested rights.¹¹⁶ This doctrine "protect[s] a landowner from a change in land use regulations if he makes substantial expenditures on a development project in good faith reliance on a government act."¹¹⁷ This theory protects, almost exclusively, an expectation "created by the issuance of a building permit."¹¹⁸ This doctrine protects the investment-backed expectations of a narrow class of landowners. Under this theory, landowners restricted from development by ESA's section 9 would have a valid development expectation if they already had obtained permission to develop their land before its designation as critical habitat.

112. *Id.* at 1005-06.

113. *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 833-34 n.2 (1987); see Mandelker, *supra* note 79 at 5-6.

114. 483 U.S. at 833-34 n.2.

115. *Id.*; see Mandelker, *supra* note 79 at 5-6.

116. See Mandelker, *supra* note 98, at 5.

117. *Id.*

118. *Id.*; see, e.g., *Hamilton Bank v. Williamson County Regional Planning Comm'n.*, 729 F.2d 402, 407 (6th Cir. 1984) (applying doctrine where planning commission approved, then later disapproved development plans), *rev'd on other grounds*, 473 U.S. 172 (1985).

Investment-backed expectations also may protect landowners subject to a "sudden and unexpected change in the regulation of [their] property."¹¹⁹ This may be particularly applicable to the ESA because endangered species identification may be sudden or unpredictable.¹²⁰

A final argument, currently foreclosed by *Lucas*, is that a landowner simply has no reasonable expectation to interfere with or destroy nature. This theory is similar to a broad interpretation of the nuisance prevention exception, and may be called the "exploitation exception."¹²¹ The Wisconsin Supreme Court employed this theory in *Just v. Marinette County*¹²² to deny that the plaintiff had a justifiable expectation of developing his wetlands. The court held that the natural character of the wetlands defied any reasonable investment-backed expectation of the land's development.¹²³ The South Carolina Supreme Court adopted a similar view in *Carter v. South Carolina Coastal Council*.¹²⁴ Under the ESA, one could argue that the essential character of the land at issue is an endangered species critical habitat. Such an argument must be based on the idea that nature defines land as a critical habitat, not that the ESA so defines it.

C. Economic Impact and Complete Loss of Economically Viable Use

The *Lucas* Court stated that a complete economic deprivation, or perhaps a deprivation a step short of complete, will result in a compensable taking.¹²⁵ Courts have used different methods for assessing the remaining economic use of land after regulation. One approach is to examine only the viability of using the land for the landowner's restricted primary purpose.¹²⁶ Alternatively, one could give credence to more than one primary purpose, including primary purposes not contemplated by the landowner.¹²⁷ Finally, one could find that land remains economically viable for nominal uses.¹²⁸

119. Mandelker, *supra* note 98, at 39 n.154.

120. See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (endangered snail darter was newly discovered species).

121. Mandelker, *supra* note 98, at 29-30.

122. 201 N.W.2d 761 (Wis. 1972).

123. *Id.* at 768.

124. 314 S.E.2d 327, 329 (S.C. 1984) (citing *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972), in upholding the denial of a landowner's application to fill wetlands).

125. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2895 n.8 (1992).

126. See, e.g., *Loveladies Harbor Inc. v. United States*, 21 Cl. Ct. 153 (1990).

127. See, e.g., *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

128. See, e.g., *Macleod v. County of Santa Clara*, 749 F.2d 541 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985).

In *Loveladies Harbor, Inc. v. United States*,¹²⁹ the Claims Court measured the severity of a regulation's economic impact by comparing the fair market value of the plaintiff's land both before and after the effects of the regulation.¹³⁰ In its "before" test, the court used the fair market value of the land based on its highest and best use absent the regulation.¹³¹ The court then found the land had no economic value at all after the regulation, and thus found a complete loss of economically viable use.¹³² In *Loveladies*, the plaintiff had purchased the land specifically for the purpose of building a housing development, and the court looked only to that use, refusing to consider the economic viability of alternative uses.¹³³

In *Whitney Benefits, Inc. v. United States*,¹³⁴ the government prohibited the plaintiff from surface mining coal on land that it leased. As in *Loveladies*, the Claims Court rejected the argument that the plaintiff retained alternative uses of its land, such as the right to mine underground or to ranch or farm.¹³⁵ The Claims Court found a complete deprivation of the plaintiff's economically viable use of its land.¹³⁶

In a slightly different approach toward the test for economic viability, the Federal Circuit in *Florida Rock Industries, Inc. v. United States*¹³⁷ noted that a taking would not necessarily result from a prohibition of a landowner's highest and most profitable use.¹³⁸ The court further stated that a sufficiently severe restriction on a productive use of land would constitute a taking.¹³⁹ This type of analysis finds support in *Olson v. United States*.¹⁴⁰ In *Olson*, the Supreme Court recognized that a landowner need not consider alternative uses for his land unless the land is adaptable to such a use and there is a demand for the use.¹⁴¹ This test suggests a court should consider

129. 21 Cl. Ct. 153 (1990).

130. *Id.* at 155.

131. *Id.* at 156 ("Intrinsically linked to the determination of fair market value is a determination of the highest and best use.").

132. *Id.* at 159.

133. *Id.*

134. 18 Cl. Ct. 394 (1989), corrected, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991).

135. *Id.* at 405 ("Because plaintiffs are claiming only that defendant took their coal rights, and not their surface rights, consideration of surface rights . . . as part of plaintiffs' bundle of property rights is not warranted.").

136. *Id.*

137. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

138. *Id.* at 901.

139. *Id.*

140. 292 U.S. 246 (1934).

141. *Id.* at 256-57.

alternative uses, but only within these limits. This approach is a more accurate application of the test for economic viability, as it inquires whether remaining economic uses are truly economically plausible.

In *Macleod v. County of Santa Clara*,¹⁴² the Ninth Circuit examined alternative uses of the plaintiff's land in assessing the land's economic viability. In *Macleod*, the plaintiff had engaged in numerous varied uses of his land, but then attempted large scale timber harvesting, a use he determined was the best and most profitable use of his land.¹⁴³ The Ninth Circuit looked to remaining primary uses of Macleod's land and found they were economically viable. The court noted the plaintiff could continue to hold his land for investment purposes and continue to use it for grazing cattle.¹⁴⁴

The *Macleod* approach represents a sensible compromise to the extremes of considering the viability of only the most profitable land use, or, at the other extreme, of considering all potential uses, no matter how nominal. Courts should recognize the reality that certain remaining nominal uses, or a mere resale value of land, may leave landowners with economically viable use of their land after regulation.

Section 9 of the ESA could conceivably restrict large scale land development while leaving intact less intensive land uses. For example, the commercial development of a small tract of land may harm a critical habitat, whereas using the tract for a single residence or similar purpose may leave sufficient habitat intact to prevent harm to an endangered species. ESA's section 9 is more likely to withstand economically viable use scrutiny than many other regulations that have failed the test. Regulations such as those in *Lucas* and *Loveladies*, which effectively disallow construction of any permanent structures, may be more restrictive than section 9. Low intensity land uses and wildlife habitats could co-exist in many instances. Further, the section 10(a) exemption clause could allow low intensity land uses in some instances where section 9 would not.

V. CONCLUSION

ESA's section 9 is a comprehensive measure that prevents persons from engaging in land uses that detrimentally affect endangered species. At its broadest, section 9 may prevent any substantial modification of land designated as endangered species' critical

142. 749 F.2d 541 (9th Cir. 1984), cert. denied, 472 U.S. 1009 (1985).

143. *Id.* at 547.

144. *Id.*

habitat. Thus, section 9 raises similar Fifth Amendment taking issues as other environmental regulations that restrict land development. These issues do not arise because section 9 authorizes the presence of endangered species on private land. Rather, the endangered species exist naturally on private land, and section 9 merely regulates the uses a private landowner may make of the land to the extent those uses harm the natural course of a species' existence.

Specific takings claims under section 9 must turn on a court's interpretation of the economic impact on the affected landowner. The ESA may effect a taking only when its economic impact on a landowner is so harsh that it deprives the owner of all, or almost all, economically viable use of the land. Because the question of how to measure such an economic impact remains unresolved today, the question of precisely when the ESA will effect a private property taking also remains unresolved. Perhaps the strongest implications of takings issues for ESA's section 9 are not found in actual litigation arising from section 9. When designating private land as critical habitat for endangered species, the Fish and Wildlife Service must consider the potential threat of takings claims subsequent to the habitat designation. This type of planning can only result in under-designation of what otherwise would be designated critical habitat. Clarifying methods for measuring a landowner's economic loss would enhance the designation of critical habitats and the operation of section 9.

