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WHEN ANIMALS INVADE AND OCCUPY: PHYSICAL TAKINGS AND THE ENDANGERED SPECIES ACT

Rebecca E. Harrison

Abstract: Government actions implementing the Endangered Species Act (ESA) on private lands have sparked extensive debate and litigation over whether such actions result in Fifth Amendment takings. To date, courts have uniformly rejected regulatory takings claims under the ESA, leading several landowners to advance a different theory—physical takings claims. Successful physical takings claims require landowners to show that government actions resulted in either *per se* physical takings or compensable physical invasions of their land. In two recent decisions, *Boise Cascade Corp. v. United States* and *Seiber v. United States*, courts rejected *per se* physical takings claims under the ESA, finding that listed species are not controlled by the government, and the presence of such species on private land does not destroy all of a landowner's fundamental property rights. The second type of physical takings, compensable physical invasions, arises when a government action limits a landowner's right to exclude but leaves other property rights intact. To determine if such an invasion is a taking, a court would likely employ the three-factor test the United States Supreme Court presented in *Penn Central Transportation Co. v. New York City* and weigh the character of the government action, the effect of the action on the landowner's reasonable investment-backed expectations, and the economic effect of the action on the landowner. This Comment argues that government actions taken under the ESA to protect listed species on private lands do not give rise to compensable physical invasions.

Property rights organizations and private landowners have advanced two arguments for the proposition that the federal government should compensate landowners for restrictions it imposes on land pursuant to the Endangered Species Act (ESA or "the Act").¹ The first argument is that these restrictions result in regulatory takings under the Fifth Amendment of the United States Constitution.² Regulatory takings occur when government regulations go "too far" in placing restrictions on private property.³ Courts have steadfastly rejected this argument⁴

1. 16 U.S.C. §§ 1531–1544 (2000); *see also, e.g.*, Harold Johnson, Pacific Legal Foundation, *The Endangered Species Act Threatens Our Environment and Property Rights*, at http://www.pacificlegal.org/view_Commentaries.asp?iID=49&sTitle=The+Endangered+Species+Act+Threatens+Our+Environment+and+Property+Rights (last visited June 15, 2003) (arguing that the ESA improperly impinges on private property rights).

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

3. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (stating the guiding principle behind regulatory takings as follows: "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"). The United States Supreme Court has established two tests courts use to determine whether a specific regulation passes this threshold; *see infra* notes

because the claims either (1) lack ripeness,⁵ (2) challenge actions affecting only a portion of the property,⁶ or (3) stem from a landowner's improper investment-backed expectations for the land.⁷

The second argument private landowners have advanced is that government actions under the ESA give rise to physical takings.⁸ These claims avoid several of the roadblocks that prevent landowners with regulatory takings claims from receiving relief. Specifically, the claims have a lower threshold for ripeness⁹ and can be brought regardless of whether the government action affects the landowner's entire parcel.¹⁰ Such claims have met with some success in the courts.¹¹

To bring a successful physical takings claim a landowner must show that a government action resulted in either a permanent physical occupation—a *per se* physical taking¹²—or a compensable physical invasion.¹³ A *per se* physical taking occurs when the government, or an entity authorized by the government, occupies private land¹⁴ and destroys all of the landowner's fundamental property rights.¹⁵ These rights include the rights to possess the land, exclude others from possessing and using it, control its use, and dispose of it.¹⁶ A

118–24 and accompanying text.

4. See Melinda Harm Benson, *The Tulare Case: Water Rights, The Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 552–53 (2002).

5. See, e.g., *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1347 (Fed. Cir. 2002), cert. denied, 123 S. Ct. 1484 (2003); *Seiber v. United States*, 53 Fed. Cl. 570, 574–75 (2002).

6. See Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369, 385 (1994).

7. See Glenn P. Sugameli, *The ESA and Takings of Private Property*, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 441, 446–47 (Donald C. Baur & William Robert Irvin eds., 2002); *Good v. United States*, 189 F.3d 1355, 1361–63 (Fed. Cir. 1999).

8. See, e.g., *Boise*, 296 F.3d at 1342–43; *Seiber*, 53 Fed. Cl. at 575–76; *Boise Cascade Corp. v. Or. State Bd. of Forestry*, 991 P.2d 563, 569–70 (Or. Ct. App. 1999); see also Eric Grant, *Endangered Species, Habitat Preservation, and Just Compensation: Why Habitat-Preserving Regulations are Permanent Physical Occupations of Private Property*, SF64 A.L.I.-A.B.A. 729, 733 (May 2001).

9. See Grant, *supra* note 8, at 733.

10. See *id.* at 734.

11. See, e.g., *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318–19 (2001) (finding ESA-based restrictions on the use of a water right caused a *per se* physical taking).

12. See *infra* Part II.

13. See *infra* Part II.

14. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432–33 n.9 (1982).

15. See *id.* at 435.

16. See *id.* at 435–36.

compensable physical invasion, on the other hand, stems from a government action that causes a temporary or intermittent invasion of private land.¹⁷ During the invasion, the landowner's right to exclude is limited, but his or her other fundamental property rights are left unimpaired.¹⁸

To date, courts have only considered whether government implementation of the ESA amounts to a *per se* physical taking.¹⁹ In two recent decisions, the United States Court of Appeals for the Federal Circuit and the United States Court of Federal Claims rejected such claims.²⁰ Both courts reasoned that government actions under the ESA resulting in the presence of protected species on private land neither provide for a government presence on private land nor divest a landowner of all of his or her fundamental property rights.²¹ These actions, therefore, are not *per se* physical takings.

Courts have not addressed whether a government action under the ESA may give rise to a compensable physical invasion. Given the systematic tenacity of some landowners and property rights organizations,²² there can be little doubt that courts soon will face such a claim. When landowners bring this claim, it is likely that a court will apply the United States Supreme Court's three-factor balancing test introduced in *Penn Central Transportation Co. v. New York City*.²³ The Court has stated, in dicta, that courts should apply the *Penn Central* test to claims of compensable physical invasions.²⁴ This test requires courts to consider the character of the action, the effect of the action on the landowner's reasonable investment-backed expectations, and the action's economic impact on the landowner.²⁵

17. *See id.* at 435 n.12.

18. *Id.*

19. *See, e.g.,* *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1352 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1484 (2003); *Seiber v. United States*, 53 Fed. Cl. 570, 575–76 (2002); *Boise Cascade Corp. v. Or. State Bd. of Forestry*, 991 P.2d 563, 569–70 (Or. Ct. App. 1999).

20. *Boise*, 296 F.3d at 1352; *Seiber*, 53 Fed. Cl. at 576.

21. *See Boise*, 296 F.3d at 1354–55; *Seiber*, 53 Fed. Cl. at 575–76.

22. *See, e.g.,* *Boise*, 296 F.3d 1339; *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001); *State v. Sour Mt. Realty, Inc.*, 17 N.Y.S.2d 78 (N.Y. App. Div. 2000); *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999); *Moerman v. California*, 21 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993).

23. 438 U.S. 104, 124 (1978).

24. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432, 435 n.12 (1982) (discussing *Penn Central*, 438 U.S. at 124).

25. *Penn Central*, 438 U.S. at 124.

This Comment argues that government actions implementing the ESA on private land do not amount to compensable physical invasions for two reasons. First, background principles of property law require private landowners to allow for government efforts to protect wildlife on their land.²⁶ The enforcement of preexisting restrictions on title to property is never a taking.²⁷ Second, application of the *Penn Central* balancing test strongly suggests that courts should reject claims arguing that ESA restrictions amount to compensable physical invasions.²⁸ Legal precedent and statutory safeguards in the ESA are likely to require that affected landowners not receive compensation for these claims.²⁹

Part I of this Comment presents relevant sections of the ESA controlling its application to private land. Part II explains regulatory takings, *per se* physical takings, and compensable physical invasions. Part III discusses the obstacles facing ESA-based regulatory takings claims. Part IV presents *per se* physical takings claims under the Act, explains how these claims avoid several of the roadblocks faced by regulatory takings claims, and discusses courts' rationale for rejecting such claims. Part V discusses compensable physical invasion takings claims and outlines the three-factor test courts may use to determine if a compensable taking is present. Finally, Part VI argues that preexisting limitations on property use, precedent, and statutory safeguards in the ESA strongly suggest that courts should reject compensable physical invasion claims under the Act.

I. THE ENDANGERED SPECIES ACT AND PRIVATE PROPERTY RIGHTS

The purpose of the ESA is to recover populations of imperiled species and conserve the ecosystems upon which such species depend.³⁰ Many imperiled species occupy and depend on private land.³¹ To meet its goal, the Act provides the U.S. Fish and Wildlife Service (FWS) and the

26. See *infra* Part VI.B.

27. See *infra* Part II.

28. See *infra* Part VI.C.

29. See *infra* Part VI.C.

30. 16 U.S.C. § 1531(b) (2000).

31. See David S. Wilcove et al., *Rebuilding the Ark: Toward a More Effective Endangered Species Act for Private Land*, at http://www.environmentaldefense.org/documents/483_Rebuilding%20the%20Ark%2Ehtm (Dec. 5, 1996).

National Oceanic and Atmospheric Administration Fisheries Service (NOAA Fisheries) with the authority to regulate actions on private lands that may harm imperiled species or their habitat.³² In order to exercise this authority, the FWS and NOAA Fisheries (collectively, “the Services”) must list a species as “endangered” or “threatened.”³³ An endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range.”³⁴ A threatened species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”³⁵ The Act provides listed species with two protections on private land.³⁶ First, it is illegal for a private landowner to harm a listed species or its habitat.³⁷ Second, the federal government may not authorize, fund, or carry out actions on private land that may jeopardize the continued existence of the listed species or its habitat.³⁸ To lessen the burden of these restrictions, the Act provides two means by which landowners can mitigate the effects of a listing on their land—commenting on proposed rules³⁹ and applying for Incidental Take Permits (ITPs).⁴⁰

A. Private Land and the ESA

To meet the goals of the ESA, it is critical for the Services to provide protection for species on private land.⁴¹ Habitat loss is the primary cause of wildlife endangerment,⁴² and more than half of all species listed as endangered inhabit private lands.⁴³ Furthermore, as of 1994, at least

32. See *infra* Part I.B.

33. See 16 U.S.C. §§ 1533, 1536(a)(2), 1538(a)(1).

34. *Id.* § 1532(6).

35. *Id.* § 1532(20).

36. See Meltz, *supra* note 6, at 373–76.

37. 16 U.S.C. § 1538(a).

38. *Id.* § 1536(a)(2).

39. See *id.* § 1533(b)(3)(B)(ii), (b)(5)(A)–(E); see also U.S. FISH & WILDLIFE SERVICE, LISTING A SPECIES AS THREATENED OR ENDANGERED: SECTION 4 OF THE ENDANGERED SPECIES ACT 2, at <http://endangered.fws.gov/listing/listing.pdf> (Feb. 2001) [hereinafter LISTING A SPECIES].

40. 16 U.S.C. § 1539(a)(1)(B).

41. See U.S. FISH & WILDLIFE SERVICE, OUR ENDANGERED SPECIES PROGRAM AND HOW IT WORKS WITH LANDOWNERS 1, at <http://endangered.fws.gov/landowner/landown.pdf> (June 2002) [hereinafter ENDANGERED SPECIES PROGRAM].

42. Wilcove et al., *supra* note 31.

43. Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute “Takings”?*, 80 IOWA L. REV. 297, 319 (1995).

eighty percent of the habitat for over half of all listed species was located on non-federal land, which includes private, tribal, and state-owned land.⁴⁴ Private lands therefore play an important role in providing for successful species recovery efforts under the ESA.⁴⁵

Before the FWS or NOAA Fisheries can provide protection for imperiled species on private land, they must list the species as endangered⁴⁶ or threatened.⁴⁷ Section 4⁴⁸ of the Act requires the Services to decide whether to list a species as threatened or endangered “solely on the basis of the best scientific and commercial data available.”⁴⁹ When a species is listed, the Services must designate its “critical habitat” when doing so is “prudent and determinable.”⁵⁰ “Critical habitat” includes areas within the region the species occupied at the time it was listed that contain “physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.”⁵¹ It also encompasses certain areas outside the region the species occupied at the time it was listed that “are essential for the conservation of the species.”⁵² The establishment of critical habitat is to be based on both scientific data and potential economic impact.⁵³ Critical habitat may include private as well as public land.⁵⁴ It is intended to encompass areas “within the geographical area occupied by the species,”⁵⁵ as well as lands “essential for the conservation of the species” that are not currently occupied.⁵⁶

44. Wilcove et al., *supra* note 31.

45. See ENDANGERED SPECIES PROGRAM, *supra* note 41, at 1.

46. 16 U.S.C. § 1532(6) (2000); see also *supra* note 34 and accompanying text.

47. 16 U.S.C. § 1532(20); see also *supra* note 35 and accompanying text.

48. 16 U.S.C. § 1533(a)–(i).

49. *Id.* § 1533(b)(1)(A). Pursuant to § 1533(a)(1), factors the Services must consider in making listing determinations include:

(A) the present or threatened destruction, modification, or curtailment of [the species’] habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

50. *Id.* § 1533(a)(3).

51. *Id.* § 1532(5)(A)(i).

52. *Id.* § 1532(5)(A)(ii).

53. *Id.* § 1533(b)(2).

54. See *id.* § 1532(5)(A).

55. *Id.* § 1532(5)(A)(i).

56. *Id.* § 1532(5)(A)(ii).

The first protection the ESA provides for a listed species is to prohibit people or agencies from effecting a “take” of the species on public and private land.⁵⁷ “Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁵⁸ This restriction, provided for in Section 9 of the Act,⁵⁹ reaches beyond injury inflicted directly on an individual animal; it also includes “significant habitat modification or degradation.”⁶⁰

The ESA also provides protection for listed species and habitat on private land through the Section 7⁶¹ consultation requirement.⁶² This provision requires that every federal agency consult with either the FWS or NOAA Fisheries to ensure actions they authorize, fund, or carry out will be unlikely to either “jeopardize the continued existence of any [listed] species”⁶³ or “result in the destruction or adverse modification of [critical] habitat.”⁶⁴ Private landowners who undertake projects that require a federal agency’s funds, authorization, or participation, and are likely to affect listed species or critical habitat, are subject to the consultation requirement.⁶⁵

B. Private Landowners Can Use Two Means to Influence the ESA’s Application to Their Land

While the ESA places restrictions on the use of private land, it also provides two means by which private landowners can influence the Act’s application to their land. First, Section 4 grants the public notice of and an opportunity to comment on proposed rules to list species and designate critical habitat.⁶⁶ Second, Section 10⁶⁷ gives landowners the

57. *Id.* § 1538(a)(1)(B).

58. *Id.* § 1532(19).

59. *Id.* § 1538(a)–(g).

60. 50 C.F.R. § 17.3 (2000).

61. 16 U.S.C. § 1536(a)–(p).

62. *Id.* § 1536(a)(2).

63. *Id.*

64. *Id.*

65. *See id.* § 1536(a)(2)–(3).

66. *See id.* § 1533(b)(3)(B)(ii).

67. *See id.* § 1539(a)–(j).

opportunity to receive ITPs.⁶⁸ These permits allow landowners to take listed species or species habitat under certain conditions.⁶⁹

Section 4 of the ESA provides landowners with an opportunity to learn about, comment on, and provide additional information regarding proposed listings and critical habitat designations.⁷⁰ The Section requires the Services to notify the public of proposed rules listing species and designating critical habitat,⁷¹ and provides an opportunity for the public to comment.⁷² This process ensures that a landowner who may be affected by the listing of a species will know in advance that the species is proposed for listing.⁷³ Landowners therefore have an opportunity to voice their concerns about the listing and provide additional information that may inform the Services' final decision.⁷⁴

Once a species is listed, a landowner may avoid the Act's prohibitions on the take of the species by applying for and receiving an ITP.⁷⁵ These permits grant landowners permission to take listed species or species habitat.⁷⁶ In order to receive an ITP, a landowner must submit an acceptable habitat conservation plan (HCP).⁷⁷ The FWS or NOAA Fisheries must then find that the landowner's proposed taking is incidental to, and not the purpose of, his or her proposed action.⁷⁸ ITPs may be granted for a variety of activities on non-federal lands such as logging, clearing land, and development.⁷⁹

68. *See id.* § 1539(a)(1)(B).

69. *See id.*

70. *See id.* § 1533(b)(3)(B)(ii), (b)(5)(A)–(E); *see also* LISTING A SPECIES, *supra* note 39, at 2.

71. 16 U.S.C. § 1533(b)(3)(B)(ii), (b)(5)(A)–(E); *see also* LISTING A SPECIES, *supra* note 39, at 2.

72. *See* 16 U.S.C. § 1533(b)(3)(B)(ii); *see also* LISTING A SPECIES, *supra* note 39, at 2.

73. *See* LISTING A SPECIES, *supra* note 39, at 2.

74. *Id.*

75. *See* 16 U.S.C. § 1539(a)(1)(B).

76. *See id.*

77. *Id.* § 1539(a)(2)(A). Pursuant to § 1539(a)(2)(A), HCPs must specify:

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

78. *Id.* § 1539(a)(1)(B).

79. *See* Marj Nelson, *Habitat Conservation Planning*, ENDANGERED SPECIES BULLETIN 12, at <http://endangered.fws.gov/esb/99/11-12/12-13.pdf> (Nov.–Dec. 1999).

II. REGULATORY TAKINGS, *PER SE* PHYSICAL TAKINGS,
AND COMPENSABLE PHYSICAL INVASIONS

The Fifth Amendment of the U.S. Constitution provides that private property may not be taken for public use without just compensation.⁸⁰ The Takings Clause was designed to prevent the government from instituting an action or regulation that forces a few individuals “to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁸¹ A landowner affected by such an action may seek compensation through a regulatory takings claim, a physical takings claim, or both.⁸² There are two types of physical takings claims: *per se* physical takings and compensable physical invasions.⁸³ The requirements for bringing a successful takings claim vary depending on the type of claim asserted.⁸⁴ There is one principle, however, that applies to all claims: laws that simply repeat or enforce preexisting limitations on a landowner’s title do not cause a taking.⁸⁵

There are two categories of takings for which landowners may seek compensation: regulatory and physical.⁸⁶ In general, regulatory takings arise out of government regulations that, when applied to private land, unfairly reduce or eliminate the land’s economic value or use.⁸⁷ Physical takings, on the other hand, occur when the government, or something the government sets in motion or authorizes, physically enters and occupies private property.⁸⁸

The U.S. Supreme Court has recognized two types of physical takings: *per se* physical takings and compensable physical invasions.⁸⁹ *Per se* physical takings claims stem from the permanent physical occupation of private land by either the government or an entity

80. U.S. CONST. amend. V.

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

82. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425–40 (1982).

83. *See id.* at 434–35; ROBERT MELTZ ET AL., *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION* 571 (1999).

84. *See infra* Parts III.B, IV.B, V.B.

85. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992).

86. *See, e.g., Loretto*, 458 U.S. at 425–40.

87. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (stating the guiding principle behind regulatory takings as follows: “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”).

88. *See MELTZ ET AL., supra* note 83, at 117.

89. *See Loretto*, 458 U.S. at 434–35; MELTZ ET AL., *supra* note 83, at 571.

authorized by the government.⁹⁰ An occupation of this kind requires compensation because it destroys all of a landowner's basic property rights.⁹¹ These include the rights to possess the land or exclude others from possessing and using it, control its use, and dispose of it.⁹²

Compensable physical invasions result from a temporary or intermittent invasion of private property caused by a government action.⁹³ These invasions limit a landowner's right to exclude, but the landowner retains some or all of the other basic property rights.⁹⁴ Namely, the landowner may still possess the land, exclude others from possessing and using it, and control its use and disposal.⁹⁵

The U.S. Supreme Court has developed different tests to determine whether a landowner has suffered a regulatory taking,⁹⁶ a *per se* physical taking,⁹⁷ or a compensable physical invasion.⁹⁸ In spite of these differences, there is one principle courts apply to all takings claims: laws that merely repeat or enforce preexisting limitations on a landowner's title do not cause a taking.⁹⁹ These limitations stem from state property and nuisance law.¹⁰⁰ This rule, announced in *Lucas v. South Carolina Coastal Council*,¹⁰¹ recognizes that government actions do not deprive landowners of any rights simply by articulating or implementing limitations on the use of private land that applied to the land prior to private ownership.¹⁰² Such actions therefore do not require compensation.¹⁰³

90. See *Loretto*, 458 U.S. at 426, 432–33 n.9.

91. See *id.* at 435–36.

92. *Id.*

93. See *id.* at 435 n.12.

94. See *id.*

95. See *id.*

96. See *infra* Part III.B.

97. See *infra* Part IV.B.

98. See *infra* Part V.B.

99. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992).

100. *Id.* at 1029.

101. 505 U.S. 1003 (1992).

102. See *id.* at 1028–29; see also Benson, *supra* note 4, at 582.

103. See Benson, *supra* note 4, at 582.

III. REGULATORY TAKINGS CLAIMS UNDER THE ESA

Landowners affected by the ESA have argued that restrictions the Services impose on their property to protect listed species result in regulatory takings.¹⁰⁴ To date, such claims have failed.¹⁰⁵ There are two main reasons for this record. First, regulatory takings claims must meet an exacting ripeness standard.¹⁰⁶ Claims stemming from the ESA often do not meet this standard and therefore are dismissed without adjudication on the merits.¹⁰⁷ Second, these claims generally fail the two U.S. Supreme Court tests to determine whether a given regulation requires compensation.¹⁰⁸

A. *Regulatory Takings Claims Under the ESA Often Fail the U.S. Supreme Court's Exacting Ripeness Standard*

Before a court determines whether a regulatory takings claim has merit, it must conclude that the claim is ripe for review.¹⁰⁹ For a court to draw this conclusion, it must find that the government agency implementing the regulation has rendered a final action.¹¹⁰ One factor courts consider in determining the finality of a challenged agency action is whether the landowner has exhausted all available administrative remedies and exceptions to the regulation.¹¹¹ Courts have established one exception to the finality requirement: the futility doctrine.¹¹² Under this doctrine, a court will find a regulatory takings claim to be ripe for review if it would be futile for the landowner to pursue further agency action or relief.¹¹³

104. See, e.g., *Moerman v. California*, 21 Cal. Rptr. 2d 329, 334 (Cal. Ct. App. 1993).

105. See *Benson*, *supra* note 4, at 552–53.

106. See *MELTZ ET AL.*, *supra* note 83, at 45–46.

107. See, e.g., *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1347 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1484 (2003) (finding regulatory takings claim was not ripe because the FWS had not denied the ITP); *Seiber v. United States*, 53 Fed. Cl. 570, 574–75 (2002) (concluding that the FWS' denial of an incidental take permit, when accompanied by communications indicating a willingness to consider a modified permit application, was not a final agency action and therefore the claim was not ripe).

108. See *Meltz*, *supra* note 6, at 385–86.

109. See, e.g., *Boise*, 296 F.3d at 1347; *Seiber*, 53 Fed. Cl. at 574–75.

110. *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985).

111. See *id.* at 190.

112. See *MELTZ ET AL.*, *supra* note 83, at 46.

113. *Id.*

Regulatory takings claims under the ESA are often based on intermediate agency actions, rather than final actions,¹¹⁴ and therefore do not fulfill the ripeness requirement. In the case of a claim under the ESA, the finality requirement usually means that the landowner must have applied for and been denied an ITP.¹¹⁵ To satisfy the exhaustion of remedies factor, the landowner must then submit a revised ITP application, if doing so would not be futile, and have that application denied.¹¹⁶ Courts have repeatedly rejected regulatory takings claims under the ESA brought by landowners who have not completed this process.¹¹⁷

B. Regulatory Takings Claims Fail the U.S. Supreme Court's Two Tests to Determine Whether a Government Regulation Requires Compensation

If a regulatory takings claim satisfies the ripeness requirement, a court must then decide it on the merits. To determine whether a government regulation has gone “too far,”¹¹⁸ thereby requiring compensation, a court undertakes an *ad hoc* factual inquiry.¹¹⁹ There are two different tests a court uses to inform this inquiry.¹²⁰ Under the first test, announced in *Lucas v. South Carolina Coastal Council*, a court determines whether the regulation has deprived the landowner’s property of its entire value or use.¹²¹ If it has, a *per se* regulatory taking has occurred, and the government must compensate the landowner.¹²² But, if the property retains some usefulness or value, then a court must undertake the second test and weigh three factors to determine whether the regulation requires compensation.¹²³ These factors, announced in *Penn Central Transportation Co. v. New York City*, include the character of the government’s action, its effect on the landowner’s reasonable

114. See, e.g., *Boise*, 296 F.3d at 1347; *Seiber*, 53 Fed. Cl. at 575–76.

115. See *Boise*, 296 F.3d at 1349 (noting that extraordinary delay or bad faith on the part of an agency in considering an ITP application can make a claim ripe without a final agency action).

116. See *id.* at 1347; *Seiber*, 53 Fed. Cl. at 574–75; see also Meltz, *supra* note 6, at 386–87.

117. See, e.g., *Boise*, 296 F.3d at 1347; *Seiber*, 53 Fed. Cl. at 574–75.

118. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

119. See *id.* at 415–16.

120. See *Benson*, *supra* note 4, at 581–82.

121. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

122. *Id.*

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

investment-backed expectations, and its economic impact on the landowner.¹²⁴ In its most recent decision on the merits of a regulatory takings claim under the ESA, the Court of Appeals for the Federal Circuit based its decision on only one of these factors—the landowner’s reasonable investment-backed expectations.¹²⁵

Landowners’ claims asserting that ESA restrictions agencies place on their property give rise to regulatory takings generally fail both tests of the regulatory takings analysis. These claims fail the first test because ESA regulations usually affect some, but not all, of the value or use of a parcel of private land.¹²⁶ For example, if the Services designate a landowner’s entire acreage as critical habitat, he or she is not automatically prohibited from using the land to hunt and fish for animals other than the listed species.¹²⁷ If the regulations do not eliminate the *entire* value or use, the landowner has not suffered a *per se* regulatory taking.¹²⁸

Regulatory takings claims under the ESA generally fail the second test of the regulatory takings analysis because they are not based on reasonable investment-backed expectations.¹²⁹ The term “investment-backed expectations” is derived from a law review article¹³⁰ defining it as the crystallized expectations a landowner holds for the continued use of his or her land in a certain manner.¹³¹ Because the U.S. Supreme Court itself has not defined the term, however, it is unclear how lower courts should apply this factor.¹³² In *Good v. United States*,¹³³ the Court of Appeals for the Federal Circuit applied the factor to a regulatory takings claim under the ESA.¹³⁴ The court determined that a landowner who, at the time of purchase, had actual and constructive knowledge of

124. *See id.* All three factors are discussed in detail in Part V.B.

125. *See Good v. United States*, 189 F.3d 1355, 1360–63 (Fed. Cir. 1999).

126. Meltz, *supra* note 6, at 385.

127. *See Sugameli, supra* note 7, at 450.

128. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

129. *See Sugameli, supra* note 7, at 447.

130. MELTZ ET AL., *supra* note 83, at 134.

131. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation Law,”* 80 HARV. L. REV. 1165, 1233 (1967).

132. *See, e.g., MELTZ ET AL., supra* note 83, at 133–34; Blaine I. Green, *The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, 15 YALE J. ON REG. 329, 358 (1998).

133. 189 F.3d 1355 (Fed. Cir. 1999).

134. *Id.* at 1360–63.

the Act's potential application to his land, did not have the investment-backed expectations necessary to satisfy regulatory takings claims.¹³⁵ Thus, to satisfy the second step in the regulatory takings test, landowners must have had no knowledge at the time of purchase that the ESA may apply to their land.¹³⁶

IV. *PER SE* PHYSICAL TAKINGS UNDER THE ESA

Faced with courts' consistent rejection of regulatory takings claims under the ESA, landowners have tried a different approach: asserting that government actions to protect listed species result in *per se* physical takings.¹³⁷ *Per se* physical takings occur when the government, or an entity authorized by the government, permanently occupies private land.¹³⁸ Claims asserting *per se* physical takings avoid the major roadblocks faced by regulatory taking claims: ripeness,¹³⁹ the extensiveness of the injury to the landowner,¹⁴⁰ and the landowner's reasonable investment-backed expectations.¹⁴¹ In spite of these distinctions, *per se* physical takings claims have not met with much success in the courts.¹⁴²

In fact, courts have rejected such claims in two recent decisions: *Boise Cascade Corp. v. United States*¹⁴³ and *Seiber v. United States*.¹⁴⁴ In *Boise*, the Court of Appeals for the Federal Circuit determined that the government does not control the location of wild animals and

135. *Id.* at 1362.

136. *Id.* The court did not articulate a general principle for what constitutes "knowledge." It did conclude, however, that the claimant's acknowledgement of the necessity and difficulty of obtaining regulatory approval for the development, and the language in the sales contract recognizing potential problems with obtaining federal permission to develop the land, amounted to adequate "knowledge" that the ESA could be applied to the land. *Id.*

137. *See, e.g., Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1342-43 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1484 (2003); *Seiber v. United States*, 53 Fed. Cl. 570, 575-76 (2002); *Boise Cascade Corp. v. Or. State Bd. of Forestry*, 991 P.2d 563, 569-70 (Or. Ct. App. 1999).

138. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 n.9, 435-36 (1982).

139. *See Grant, supra* note 8, at 733.

140. *Id.*

141. *See Sugameli, supra* note 7, at 447.

142. *See infra* Part IV.C. *But cf. Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318-19 (2001) (finding ESA-based restrictions on the use of a water right caused a *per se* physical taking).

143. 296 F.3d 1339 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1484 (2003).

144. 53 Fed. Cl. 570 (2002).

therefore did not cause the listed species to inhabit private land.¹⁴⁵ This rationale is supported by the findings of two older Circuit Court of Appeals decisions: *Mountain States Legal Foundation v. Hodel*¹⁴⁶ and *Christy v. Hodel*.¹⁴⁷ The court in *Seiber*, on the other hand, based its conclusion largely on its finding that the government's actions did not deprive the landowners of all of their fundamental property rights.¹⁴⁸

A. *Per Se Physical Takings Claims Under the ESA Avoid the Major Roadblocks Posed by Regulatory Takings Claims*

Landowners who bring *per se* physical takings claims for government actions implementing the ESA avoid the major roadblocks faced by those who bring regulatory takings claims. First, unlike regulatory takings claims, which are not ripe until the completion of a final agency action,¹⁴⁹ *per se* physical takings claims are ripe as soon as the government, or an entity authorized by the government, enters or occupies private property.¹⁵⁰ Proceeding with a *per se* physical takings claim therefore allows a landowner to avoid the often costly and laborious process of applying for an HCP and ITP prior to seeking compensation from the federal government.¹⁵¹

Second, landowners asserting *per se* physical takings claims can receive compensation for any portion of property the government has occupied, even if this portion is merely a small fraction of the total property.¹⁵² On the other hand, a court can order compensation in a regulatory takings case only if the government action has affected the entire value or use of the property.¹⁵³ Thus, the fact that government actions under the ESA generally affect only a portion of a parcel of private land¹⁵⁴ does not present a significant barrier to successful *per se* physical takings claims under the Act. Finally, courts do not apply the

145. See *Boise*, 296 F.3d at 1354–55.

146. 799 F.2d 1423 (10th Cir. 1986).

147. 857 F.2d 1324 (9th Cir. 1988).

148. See *Seiber*, 53 Fed. Cl. at 576.

149. See *supra* Part III.A.

150. See *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997) (“[P]hysical taking is by definition a final decision.”); see also *Grant*, *supra* note 8, at 733.

151. *Grant*, *supra* note 8, at 733.

152. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 n.16 (1982).

153. See *supra* note 121 and accompanying text.

154. See *Meltz*, *supra* note 6, at 385–86.

Penn Central three-factor balancing test to *per se* physical takings claims,¹⁵⁵ so the landowner's reasonable investment-backed expectations are irrelevant to the success of such claims.¹⁵⁶

B. Requirements for Per Se Physical Takings

In *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁵⁷ the U.S. Supreme Court established two requirements for a successful *per se* physical takings claim.¹⁵⁸ First, the occupant must be either the government or an entity authorized by the government.¹⁵⁹ Second, the occupation must destroy all of the landowner's property rights.¹⁶⁰ These rights include the rights to possess the land, exclude others from it, control the use of the land, and dispose of it.¹⁶¹ The occupation does not have to destroy the landowner's property rights for his or her entire parcel of property.¹⁶² Instead, the government must compensate the landowner for any portion of the property it occupies, regardless of the size.¹⁶³ If the claim fulfills both of these criteria, the landowner has suffered a *per se* physical taking, and the government must provide just compensation.¹⁶⁴

In *Loretto*, a landlord challenged a New York state law that required landlords to allow the installation of cable boxes on rental properties so tenants could access cable television.¹⁶⁵ The landlord brought a class action against Teleprompter, a cable television company, claiming that the installation constituted a taking without just compensation.¹⁶⁶ The Court agreed, reasoning that the government authorized the boxes'

155. See *infra* Part IV.B.

156. See *supra* Part III.B.

157. 458 U.S. 419 (1982).

158. See *id.* at 432–33 n.9, 435–36 & n.12.

159. *Id.* at 432–33 n.9.

160. See *id.* at 435–36 & n.12.

161. *Id.* at 435–36.

162. *Id.* at 436–37.

163. See *id.* at 438 n.16 (“[W]hether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox.”). *But cf. id.* at 437 (noting that a court should consider the extent of the occupation as one factor in determining the amount of compensation due).

164. *Id.* at 426.

165. *Id.* at 421–24.

166. *Id.* at 424. The landlord also alleged a trespass against Teleprompter for the installation. *Id.*

occupation of the landlord's property,¹⁶⁷ and that this occupation destroyed all of the landlord's property rights for the portion of land on which the boxes were installed.¹⁶⁸ The landlord could not possess the space occupied by the boxes, exclude the boxes, control the use of the occupied space, or dispose of it.¹⁶⁹ The Court reasoned that because permanent physical occupations destroy all of these rights, the government must provide compensation for such occupations, regardless of the size of the area affected¹⁷⁰ or the public purpose served.¹⁷¹

C. *In Two Recent Cases, Courts Held that Government Actions Under the ESA Did Not Support Claims of Per Se Physical Takings*

In two recent decisions, courts rejected claims that government actions under the ESA to protect imperiled species give rise to *per se* physical takings.¹⁷² Courts in *Boise Cascade Corp. v. United States* and *Seiber v. United States* applied the *Loretto* test and rejected claims by private landowners that government actions protecting listed species resulted in *per se* physical takings.¹⁷³ In *Boise*, the Court of Appeals for the Federal Circuit held that the landowner had not suffered a *per se* physical taking because the government does not control the location of wild animals and therefore did not cause the species to inhabit private land.¹⁷⁴ Furthermore, in *Seiber*, the U.S. Court of Federal Claims held that government actions under the ESA did not amount to a *per se* physical taking because the government did not deprive the landowners of all of their property rights.¹⁷⁵ The U.S. Court of Federal Claims hears all takings claims against the federal government for more than \$10,000.¹⁷⁶ Parties can appeal its decisions to the Court of Appeals for the Federal Circuit.¹⁷⁷

167. *Id.* at 425–26.

168. *Id.* at 438.

169. *Id.* at 435–36, 438.

170. *Id.* at 438 n.16. *But cf. id.* at 437 (noting that a court should consider the extent of the occupation as one factor in determining the amount of compensation due).

171. *Id.* at 426, 434–35.

172. *See Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1354–55 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1484 (2003); *Seiber v. United States*, 53 Fed. Cl. 570, 574–76 (2002).

173. *See Boise*, 296 F.3d at 1354–55; *Seiber*, 53 Fed. Cl. at 576.

174. *See Boise*, 296 F.3d at 1354–55.

175. *See Seiber*, 53 Fed. Cl. at 576.

176. Tucker Act, 28 U.S.C. § 1346 (1994).

177. *Id.* § 1291; *see also* MELTZ ET AL., *supra* note 83, at 43 (“Because few takings cases are

1. *The Government Does Not Control the Location of Wild Animals That Are Protected Under Federal Statutes*

In *Boise*, the Court of Appeals for the Federal Circuit held that the presence of wildlife protected by the ESA on private land does not constitute a government occupation of private land.¹⁷⁸ This is true because the government does not control the location of wildlife protected by the ESA.¹⁷⁹ The *Boise* case arose from a dispute between the Boise Cascade Corporation (Boise) and the FWS over the management of a 65-acre parcel of Boise's land known as the Walker Creek Unit.¹⁸⁰ This parcel hosted, and contained habitat for, the federally-listed northern spotted owl.¹⁸¹ When Boise attempted to log the parcel, the FWS conducted an inspection and determined that logging could harm owls that might otherwise use the site as nesting habitat.¹⁸² It then notified Boise that the corporation must secure an ITP prior to logging the parcel.¹⁸³ Boise filed suit in federal district court seeking an injunction preventing the FWS from enforcing the ESA against it and a declaratory judgment that its logging operation would not take spotted owls.¹⁸⁴ The district court dismissed Boise's claim for lack of ripeness¹⁸⁵ and instead granted the United States' request for an injunction preventing the corporation from logging on the site without an ITP.¹⁸⁶ Boise then applied for an ITP.¹⁸⁷ After conducting additional surveys of the Walker Creek Unit, the FWS determined that spotted owls would not be taken by the corporation's planned logging activities and informed

appealed from the Federal Circuit to the U.S. Supreme Court, the Federal Circuit has a leading role in articulating takings law in the many areas where the High Court has not yet spoken.”).

178. *See Boise*, 296 F.3d at 1353–55.

179. *Id.*

180. *Id.* at 1341.

181. *Id.* at 1341–42. In 1990, the FWS listed the northern spotted owl as a threatened species under the ESA. 50 C.F.R. § 17.11 (current through June 16, 2003). *See also* Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114, 26,194 (June 26, 1990).

182. *Boise*, 296 F.3d at 1341–42.

183. *Id.* at 1342.

184. *Id.*

185. *Id.* at 1342 n.3.

186. *Id.* at 1342.

187. *Id.*

the corporation that an ITP was no longer required.¹⁸⁸ The district court subsequently lifted the injunction.¹⁸⁹

Boise returned to court, seeking compensation for the temporary taking of merchantable timber it was prevented from logging because of the district court's injunction.¹⁹⁰ One theory Boise presented¹⁹¹ was that the injunction was a *per se* physical taking under *Loretto*¹⁹² because the corporation was not allowed to exclude spotted owls from its property by harvesting the timber.¹⁹³ The court dismissed Boise's complaints, and Boise appealed.¹⁹⁴

In its decision upholding the dismissal, the Court of Appeals for the Federal Circuit relied on *Loretto* and concluded that, because government actions under the ESA merely restrict what landowners can do with their land once a species has been listed, rather than actually cause the species to inhabit the land, such actions do not give rise to *per se* physical takings.¹⁹⁵ Boise had argued that *Loretto* should be applied to its situation because the "occupation [of its land] by wild spotted owls [is] indistinguishable from a forced government intrusion upon its land."¹⁹⁶ In rejecting this argument, the court identified a critical difference between the two situations. Unlike *Loretto*, in which the government regulation in question required the cable boxes to be installed on private lands,¹⁹⁷ the government actions in *Boise* were not responsible for the owls' presence on the corporation's land.¹⁹⁸

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* The other claims included a categorical taking, an exaction-type taking, and a temporary regulatory taking. *Id.* at 1342–43.

192. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425–40 (1982).

193. *Boise*, 296 F.3d at 1352. Boise also argued that the requirement that it allow government agents onto its land to conduct owl surveys constituted a compensable physical taking. The court rejected this claim, finding that under *Loretto*, "[t]ransient, nonexclusive entries by the [FWS] to conduct owl surveys do not permanently usurp Boise's exclusive right to possess, use, and dispose of its property." *Id.* at 1355.

194. *Id.* at 1343.

195. *See id.* at 1354–55.

196. *Id.* at 1354.

197. *See Loretto*, 458 U.S. at 421.

198. *See Boise*, 296 F.3d at 1354–55 ("The government has no control over where the spotted owls nest, and it did not force the owls to occupy Boise's land. The government simply imposed a temporary restriction on Boise's exploitation of certain natural resources located on its land unless Boise obtained a permit.").

Two older cases support the *Boise* court's conclusion that the government does not control wildlife protected by federal statute. First, in *Mountain States Legal Foundation v. Hodel*, the U.S. Court of Appeals for the Tenth Circuit considered whether damage to private land caused by wild horses and burros should be compensated as a *per se* physical taking.¹⁹⁹ The federal government granted protection to the animals under the Wild Free-Roaming Horses and Burros Act,²⁰⁰ which prohibited landowners from removing the animals from private land.²⁰¹ The landowners claimed that because the government did not respond to their requests for removal of the animals,²⁰² the damage the animals caused through grazing and erosion should be compensated as a taking of private property.²⁰³ In rejecting this claim, the court determined that the Wild Free-Roaming Horses and Burros Act did not give the government ownership of the animals.²⁰⁴ The offending horses therefore were not "instrumentalities of the federal government"²⁰⁵ whose presence gives rise to a physical taking.²⁰⁶

The U.S. Court of Appeals for the Ninth Circuit applied the *Mountain States* court's reasoning to a physical takings claim arising under the ESA in *Christy v. Hodel*.²⁰⁷ The plaintiff in *Christy* claimed that by listing grizzly bears as threatened under the Act, the government made the bears government agents that physically took his property.²⁰⁸ The court rejected this claim, reasoning that the government neither owns nor controls the conduct of the species it protects.²⁰⁹ Thus, both the Court of Appeals for the Federal Circuit and the Ninth Circuit have based their rejection of *per se* physical takings claims under the ESA on the reasoning that the government does not control the location of wild animals.

199. See *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1424–28 (10th Cir. 1986).

200. 16 U.S.C. §§ 1331–1340 (2000).

201. See *Mountain States*, 799 F.2d at 1425.

202. *Id.*

203. *Id.* at 1425–26.

204. *Id.* at 1426–27 (“[I]t is pure fantasy to talk of ‘owning’ wild fish, birds, or animals. Neither the States nor the Federal Government . . . has title to these creatures until they are reduced to possession by skillful capture.”) (quoting *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977)) (internal quotations omitted) (internal citation omitted).

205. *Id.* at 1428.

206. *Id.*

207. 857 F.2d 1324, 1334–35 (9th Cir. 1988).

208. *Id.* at 1334.

209. *Id.* at 1335.

2. *The Presence of a Protected Species on Private Land Does Not Destroy All of a Landowner's Property Rights in the Inhabited Parcel*

In *Seiber v. United States*, the U.S. Court of Federal Claims found that the presence of the northern spotted owl on private land did not destroy all of the landowner's property rights to the inhabited parcel.²¹⁰ At the heart of the *Seiber* case were restrictions the Oregon Department of Forestry placed on the Seibers' property to protect northern spotted owls.²¹¹ The department's regulations required seventy acres of land around every nesting tree to be designated as nesting habitat and prevented logging within these areas.²¹² In 1994, the State of Oregon designated forty acres of the Seibers' property as nesting habitat.²¹³ Five years later, the Seibers sought to log the area and submitted an HCP and an ITP application.²¹⁴ The Department of the Interior's Regional Solicitor informed the couple that their ITP application was not adequate, offering to discuss modifications.²¹⁵ The landowners rejected this offer, and the FWS denied the application.²¹⁶ The Seibers then brought a takings action in the U.S. Court of Federal Claims.²¹⁷ Under the court's order, the FWS visited the plaintiffs' property to evaluate the status of the habitat²¹⁸ and determined that an ITP was no longer required for the Seibers to log the property.²¹⁹ The plaintiffs pursued their claim, arguing that the Service's denial of an ITP resulted in regulatory and physical takings under various theories.²²⁰

One theory the Seibers asserted was that the government's action of prohibiting logging prevented them from excluding owls from the land and therefore resulted in a *per se* physical taking.²²¹ In rejecting this claim, the court determined that the government's actions did not strip

210. 53 Fed. Cl. 570, 576 (2002).

211. *Id.* at 572–74.

212. *Id.* at 572.

213. *Id.*

214. *Id.*

215. *Id.* at 573.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *See id.* at 573–74.

221. *Id.* at 575–76.

the landowners of their fundamental property rights.²²² First, the owls' presence did not prevent the Seibers from possessing the land or excluding others from it.²²³ Second, the government's actions did not take away the landowners' rights to control the property and put it to other uses, even though it prevented them from logging the property.²²⁴ Thus, under *Seiber*, a landowner who retains his or her fundamental property rights following a government action under the ESA has not suffered a *per se* physical taking.²²⁵

In sum, although *per se* physical takings claims avoid several of the procedural and substantive hurdles that regulatory takings claims face, courts have consistently rejected them for two reasons. First, the government does not control the location of wild animals protected by federal statutes. Second, the presence of a protected species on private land does not destroy all of a landowner's fundamental property rights.

V. COMPENSABLE PHYSICAL INVASIONS UNDER THE ESA

The final type of takings claim is the compensable physical invasion.²²⁶ Compensable physical invasion claims result from temporary or intermittent invasions of private property caused by a government action.²²⁷ These invasions limit a landowner's right to exclude but leave some or all of the other basic property rights intact.²²⁸ A landowner may suffer a compensable physical invasion and still possess the land, retain the ability to prevent others from possessing and using it, and control its use and disposal.²²⁹ Compensable physical invasions are physical takings.²³⁰ Thus, as with *per se* physical takings claims, compensable physical invasion claims under the ESA avoid several of the roadblocks faced by claims of regulatory takings. In determining whether a physical invasion claim will receive compensation, it is likely that a court will undertake the three-factor

222. *Id.* at 576.

223. *Id.*

224. *Id.*

225. *See id.* at 576. The court did not discuss whether the government's actions prevented the landowners from disposing of their land because the plaintiffs had not raised the claim. *Id.*

226. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982).

227. *See id.*

228. *See id.*

229. *See id.*

230. *See supra* notes 89–95 and accompanying text.

balancing test the U.S. Supreme Court developed in *Penn Central Transportation Co. v. New York City*.²³¹ This test requires a court to weigh the character of the government action, the effect of the action on the landowner's reasonable investment-backed expectations, and the action's economic impact on the landowner.²³²

A. *Compensable Physical Invasion Claims Under the ESA Avoid the Roadblocks Faced by Regulatory Takings Claims*

Compensable physical invasions are another type of physical taking.²³³ Consequently, landowners' claims of compensable physical invasions have several of the same advantages over regulatory takings claims as those enjoyed by *per se* physical takings claims.²³⁴ First, compensable physical invasion claims are ripe as soon as the invasion occurs.²³⁵ Thus, a landowner may seek compensation from the federal government without having completed the process of applying for an HCP and ITP.²³⁶ Second, landowners may receive compensation for any portion of property the government has occupied in the invasion, regardless of whether this area is merely a small fraction of the total property.²³⁷

While *per se* physical takings and compensable physical invasions share these two advantages over regulatory takings, there is one advantage *per se* physical takings claims enjoy that compensable physical invasion claims do not. Namely, courts do not consider the landowners' reasonable investment-backed expectations when evaluating *per se* takings claims.²³⁸ For compensable physical invasion claims, however, these expectations are one factor the courts consider in determining whether a physical invasion requires compensation.²³⁹

231. See *Loretto*, 458 U.S. at 432 (discussing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

232. See *Penn Central*, 438 U.S. at 124.

233. See *Loretto*, 458 U.S. at 435 n.12.

234. See *supra* Part IV.A.

235. See, e.g., *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989) (stating that the "final decision requirement is inapplicable in cases of physical invasion"); see also *Grant*, *supra* note 8, at 733.

236. See *Grant*, *supra* note 8, at 733.

237. See *Loretto*, 458 U.S. at 438 n.16.

238. See *supra* Part IV.A.

239. See *infra* Part V.B.

B. *Courts Consider Three Factors to Determine Whether a Physical Invasion Requires Compensation*

The *Loretto* Court explicitly excluded physical invasions from its rule that permanent physical occupations of private land due to government actions require compensation as *per se* physical takings.²⁴⁰ In dicta, however, the Court suggested that lower courts use the *Penn Central* balancing test to determine whether a compensable physical invasion has occurred.²⁴¹ Under this test, courts weigh three major factors—the character of the government action, the effect of the action on the landowner’s reasonable investment-backed expectations, and the economic impact of the action on the landowner.²⁴²

1. *In Assessing the Character of a Government Action, Courts Consider the Degree to Which the Action Allows Physical Government Interference With Private Property*

To determine whether a government action resulting in a physical invasion is compensable, courts first consider the character of the action itself.²⁴³ In *Penn Central*, the U.S. Supreme Court stated that the primary consideration courts are to make in evaluating the character of the government action is whether the action is physical in nature.²⁴⁴ If the action includes a physical invasion by the government, a court is more likely to find the landowner has suffered a taking.²⁴⁵ One example of the application of this factor is *United States v. Causby*.²⁴⁶ In *Causby*, the U.S. Supreme Court concluded that government flights over private property at low altitudes, which caused direct and immediate harm to the landowners, were physical invasions of private property by the

240. *Loretto*, 458 U.S. at 435 n.12 (“The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is taking [T]emporary limitations are subject to a more complex balancing process to determine whether they are a taking.”) (emphasis in original) (citations omitted).

241. *See id.* at 434–35.

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

243. *Id.*

244. *See id.* (“A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”) (citation omitted).

245. *Id.*

246. 328 U.S. 256 (1946); *see also Penn Central*, 438 U.S. at 124 (citing *Causby*).

government.²⁴⁷ Such actions therefore required compensation for a taking.²⁴⁸ Thus, the more the action results in the physical presence of the government on private land, the more likely a court is to find that the landowner has suffered a taking.

2. *A Government Action Resulting in a Physical Invasion That Destroys a Landowner's Reasonable Investment-Backed Expectations Requires Compensation If Those Expectations Were Based on Assurances Provided by the Government*

The second factor in the *Penn Central* balancing test is the effect of the government action on the landowner's reasonable investment-backed expectations.²⁴⁹ Although the U.S. Supreme Court has not explicitly defined the term "investment-backed expectations,"²⁵⁰ it has considered this factor in assessing a takings claim stemming from a physical invasion in *Kaiser Aetna v. United States*.²⁵¹ Thus, in *Kaiser*, the Court set the parameters for applying a takings claim stemming from a physical invasion.

In *Kaiser*, the Court determined that landowners' investment-backed expectations for property are reasonable when they are based on assurances provided by the government.²⁵² If the government causes a physical invasion that destroys these expectations, compensation is due.²⁵³ The dispute in *Kaiser* arose when the Army Corps of Engineers granted a developer permission to dredge a navigable channel between the Pacific Ocean and a formerly land-locked pond on Oahu, Hawaii as part of an effort to create a marina-style community around the pond.²⁵⁴ Eleven years later, after the marina was complete and Kaiser had spent millions of dollars on the effort, the government claimed the public had a right of access to the marina.²⁵⁵ The government reasoned that, because the marina was linked to navigable waters, it was subject to a

247. *Causby*, 328 U.S. at 264–67.

248. *Id.*

249. *Penn Central*, 438 U.S. at 124.

250. *See supra* notes 130–32 and accompanying text.

251. 444 U.S. 164, 180 (1979).

252. *Id.* at 179.

253. *Id.* at 179–80.

254. *Id.* at 167.

255. *Id.* at 170.

navigational servitude.²⁵⁶ The United States brought an action against Kaiser to resolve whether the corporation could deny the public access to the marina in spite of Kaiser's past improvements that turned the marina into navigable waters of the United States.²⁵⁷ The Court held that the government's approval of the original marina project made the corporation's expectation—that it would be able to exclude the public from the marina—reasonable.²⁵⁸ Subsequent government actions asserting the public's right of access to the marina destroyed the corporation's right to exclude the public from its property.²⁵⁹ This combination—creating a property-expectancy and then destroying it by requiring Kaiser to acquiesce to a physical invasion—required compensation.²⁶⁰

3. *A Government Action That Does Not Provide a Landowner With a Mechanism to Control a Physical Invasion and Mitigate the Invasion's Economic Impact May Require Compensation*

The final factor in the *Penn Central* balancing test is the economic impact of the government action.²⁶¹ In *PruneYard Shopping Center v. Robins*,²⁶² the U.S. Supreme Court determined that, when considering the economic impact of a physical invasion, courts should look to the landowner's degree of control over the invasion.²⁶³ If the landowner had an available mechanism with which to control the time, place, and manner of the invasion in such a way as to reduce its economic impact, courts are unlikely to award compensation.²⁶⁴

In *PruneYard*, the owners of a shopping center asserted that a California Supreme Court decision requiring the center to allow students onto their property to collect signatures effected a compensable physical invasion.²⁶⁵ After students set up a booth on the center's property to distribute literature and collect signatures in opposition to a United

256. *Id.*

257. *Id.* at 168–69.

258. *Id.* at 179.

259. *Id.* at 179–80.

260. *Id.*

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

262. 447 U.S. 74 (1980).

263. *See id.* at 83–84.

264. *See id.*

265. *Id.* at 82.

Nations resolution, they were ordered off the premises.²⁶⁶ The students brought an action in California state court, arguing that it was a violation of their First Amendment rights not to be able to solicit signatures on PruneYard's property.²⁶⁷ The California Supreme Court held that the state constitution protected "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."²⁶⁸ On review, the U.S. Supreme Court held that the California Supreme Court's requirement that the students be allowed to exercise protected free expression rights did not amount to a taking.²⁶⁹ The Court reasoned that the shopping center retained the ability, through the enactment and enforcement of regulations, to restrict the "time, place, and manner" in which the students could make public expressions within the center.²⁷⁰ This control provided PruneYard's owners with a mechanism through which to ensure that the students' presence would have minimal economic effects on the center.²⁷¹ Thus, the Court concluded that a compensable physical invasion had not occurred.²⁷²

VI. GOVERNMENT ACTIONS UNDER THE ESA DO NOT GIVE RISE TO COMPENSABLE PHYSICAL INVASIONS

Compensable physical invasion claims are the only remaining untested option for landowners seeking government compensation for a taking under the ESA. Such claims present several advantages over regulatory and *per se* physical takings claims.²⁷³ These advantages suggest that compensable physical invasion claims are likely to be the next type of claim advanced by landowners affected by the ESA.²⁷⁴ When faced with such a claim, courts should reject it for two reasons. First, courts should find that the protection of wildlife on private land is a background principle of property.²⁷⁵ As such, government actions implementing protections for wildlife on private land can never result in

266. *Id.* at 77.

267. *Id.*

268. *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979).

269. *See PruneYard*, 447 U.S. at 83.

270. *Id.*

271. *Id.*

272. *Id.* at 84.

273. *See infra* Part VI.A.

274. *See infra* Part VI.A.

275. *See infra* Part VI.B.

takings.²⁷⁶ Second, physical invasion claims under the ESA will most likely fail each prong of the *Penn Central* balancing test.²⁷⁷

A. *Compensable Physical Invasion Claims Under the ESA Are Likely To Be the Next Type of Claim Advanced By Landowners Affected By the ESA*

Courts' rejections of regulatory and *per se* physical takings claims under the ESA suggest that landowners seeking compensation for takings under the Act may be left with only one option—claims of compensable physical invasions.²⁷⁸ Although no court has decided such a claim, there are three reasons why landowners are likely to raise them. First, because compensable physical invasions are physical takings,²⁷⁹ landowners do not have to complete HCPs and have the Services take final actions on the plans prior to bringing claims.²⁸⁰ Instead, compensable physical invasion claims are ripe as soon as the physical invasion occurs.²⁸¹ Second, as with *per se* physical takings, landowners advancing compensable physical invasion claims may seek compensation for any portion of their property affected by the invasion.²⁸² Successful regulatory takings claims, on the other hand, require that the government action affect the entire piece of land owned by the claimant.²⁸³

Finally, compensable physical invasion claims do not require as extensive an interference with private land as that required for successful *per se* physical takings claims. A *per se* physical takings claim requires a landowner to prove that a government action caused a permanent physical occupation of his or her land by a listed species.²⁸⁴ A landowner may assert a compensable physical invasion claim, on the other hand, merely by showing that a government action limited his or her right to exclude the species from the land.²⁸⁵ Thus, an injunction or other

276. See *infra* Part VI.B.

277. See *infra* Part VI.C.

278. See *supra* Part V.A.

279. See *supra* notes 93–95 and accompanying text.

280. See *supra* notes 235–36 and accompanying text.

281. See Grant, *supra* note 8, at 733.

282. See *Loretto Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 n.16 (1982).

283. See *supra* notes 126–28 and accompanying text.

284. See *supra* notes 158–64 and accompanying text.

285. See *Loretto*, 458 U.S. at 435 n.12.

government action that prevents a landowner from taking actions to exclude a listed species—such as fencing land or harvesting trees—technically may result in a physical invasion.²⁸⁶

B. The ESA Enforces Preexisting Limitations on Landowners' Titles, and Therefore Its Implementation Does Not Result in a Compensable Physical Invasion

In *Lucas v. South Carolina Coastal Council*, the U.S. Supreme Court held that laws that place limitations on a landowner's title never cause a taking when the limitations are grounded in background principles of property and nuisance.²⁸⁷ The common law, which defines these background principles, provides that the state holds wildlife in trust for the benefit of the public.²⁸⁸ Commentators have asserted that limits on the use of private land that are necessary to further the government's interest in managing wildlife therefore constitute a background principle of property.²⁸⁹ As such, these limits do not give rise to takings.²⁹⁰ Thus, federal wildlife conservation statutes such as the ESA simply recognize the government's ability to enforce preexisting limitations on a landowner's title to protect wildlife.²⁹¹ Claims of compensable physical invasions under the ESA therefore should fail because the Act merely enforces a limitation on a landowner's title that is rooted in background principles of property.

C. Claims of Compensable Physical Invasions Stemming from Government Actions Implementing the ESA Fail the Penn Central Balancing Test

If a court found that a government action under the ESA went beyond simply implementing a preexisting limitation on the landowner's title, it would consider the merits of the takings claim. No court has yet considered a claim of a compensable physical invasion arising from a government action under the Act. When such a claim arises, however, a

286. These situations are analogous to those in *Kaiser* and *PruneYard*, in which government actions provided for the intermittent presence of boats and people, respectively, on private property. See *supra* notes 254–55, 265–66 and accompanying text.

287. 505 U.S. 1003, 1028–29 (1992).

288. See Houck, *supra* note 43, at 308–09.

289. See, e.g., Sugameli, *supra* note 7, at 443; Houck, *supra* note 43, at 308–21.

290. See Sugameli, *supra* note 7, at 443.

291. See *id.*; Houck, *supra* note 43, at 320.

court should apply the *Penn Central* three-factor balancing test. This test is appropriate because in *Loretto*, the U.S. Supreme Court stated that physical invasion takings claims are subject to a “complex balancing process.”²⁹² The Court then referenced the *Kaiser* and *PruneYard* decisions, both of which used the *Penn Central* test, as examples of the Court’s application of this balancing process to such claims.²⁹³ A consideration of the *Penn Central* decision in light of legal precedents and the ESA’s statutory safeguards strongly suggests that courts should reject these claims.

1. *Government Actions Under the ESA Are Not of the Character Necessary to Support Claims of Compensable Physical Invasions Because They Do Not Provide for a Physical Government Presence on Private Land*

Actions the Services take to enforce the ESA do not provide for a physical government presence on private land and therefore are not of the character necessary to support claims of compensable physical invasions. Under the U.S. Supreme Court’s standard for determining whether the character of a government action bolsters such claims, a court must consider the extent to which the action results in the government’s physical presence on private land.²⁹⁴ In *Mountain States*, *Christy*, and *Boise*, three different circuit courts determined that federally-protected species are not agents of the government,²⁹⁵ and thus government actions to enforce the ESA do not result in a physical government presence on private land. Actions under the ESA requiring landowners to allow listed species onto private land therefore do not result in a physical governmental presence on the land.

292. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982).

293. *Id.*

294. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *see also supra* Part V.B.1.

295. *See Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1354–55 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1484 (2003); *Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1426–27 (10th Cir. 1986).

2. *Notification Requirements for Listing Decisions and Section 7 Consultation Requirements Preclude Claims That Government Actions Interfere with Landowners' Reasonable Investment-Backed Expectations*

Even if a court found that the government controlled a listed species, and that the species' inhabitation of private land comprised a government presence on the property, a claim that such a presence is compensable should still fail. Applying the other two factors in the *Penn Central* test should lead a court to find that such invasions do not require compensation. The second factor in this test is the landowner's reasonable investment-backed expectations. Reasonable investment-backed expectations are crystallized expectations a landowner holds for the continued use of his or her land in a certain manner.²⁹⁶ In *Kaiser Aetna v. United States*, the U.S. Supreme Court established that compensation for a taking is due to landowners who base their investment-backed expectations on government assurances and then have those expectations destroyed by government-authorized physical invasions.²⁹⁷ Sections 4 and 7 of the ESA protect against such an occurrence by requiring the Services to provide landowners with notice of listing events²⁹⁸ and consult with agencies that undertake or authorize activities on private land that may affect listed species.²⁹⁹

The notice requirement of Section 4 should ensure that, once a species is listed, the investment-backed expectations landowners hold for private property are "reasonable." Under Section 4, landowners who may be affected by a listing receive notice that either the FWS or NOAA Fisheries has listed a species or designated critical habitat.³⁰⁰ Once notified, landowners can no longer modify the species' habitat located on their property without an approved HCP and thus must incorporate these prohibitions into their investment-backed expectations.³⁰¹ Landowners' expectations that they will be able to take any actions on their land, regardless of the impact the actions have on the listed species, therefore is no longer reasonable after notice has been given. For

296. See Michelman, *supra* note 131, at 1233.

297. See *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979); see also *supra* Part V.B.2.

298. 16 U.S.C. § 1533(b)(3)(B)(ii), (b)(5) (2000); see also LISTING A SPECIES, *supra* note 39, at 2.

299. 16 U.S.C. § 1536(a)(2).

300. *Id.* § 1533(b)(3)(B)(ii), (b)(5); see also LISTING A SPECIES, *supra* note 39, at 2.

301. See 16 U.S.C. § 1538(a)(1)(B).

example, in *Boise*, the landowner knew that the northern spotted owl was listed as threatened and that habitat for the species was present on the property prior to the landowner's initiation of efforts to log the site.³⁰² A court therefore should find such a landowner's expectation that it would be able to log freely without obtaining an ITP to be unreasonable.

The Section 7 consultation requirement presents another roadblock to landowners' assertions that government actions, which result in physical invasions of private property, destroy their reasonable investment-backed expectations. This Section requires federal agencies to consult with the FWS or NOAA Fisheries to ensure that actions they authorize, fund, or carry out will be unlikely to either jeopardize the existence of any listed species or destroy or adversely modify critical habitat.³⁰³ Thus, any agency that provides a landowner with approval of a project on private land must first establish that the project will not harm a listed species or its habitat.³⁰⁴ This requirement should prevent situations such as that in *Kaiser*, in which an agency provided a landowner with assurances and then destroyed those assurances by requiring the landowner to submit to a physical invasion.³⁰⁵

3. *The Availability of ITPs Under the ESA Mitigates the Economic Impact of the Government's Actions on Landowners*

Landowners' claims of compensable physical invasions under the ESA also fail the third prong in the *Penn Central* balancing test. In *PruneYard*, the U.S. Supreme Court established that landowners who have a mechanism to mitigate the economic effects of a government invasion by controlling its time, place, and manner should not receive compensation for a physical invasion.³⁰⁶ The ESA's ITP provision grants landowners such a mechanism.³⁰⁷

Section 10's ITP provision provides private landowners affected by the Act with a mechanism through which they can mitigate the economic effects of the government's action.³⁰⁸ This provision allows landowners

302. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1341–42 (Fed. Cir. 2002).

303. 16 U.S.C. § 1536(a)(2).

304. *Id.*; see also *supra* notes 62–65 and accompanying text.

305. See *supra* notes 252–60 and accompanying text.

306. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

307. See 16 U.S.C. § 1539(a)(1)(B).

308. See *id.*; see also *supra* notes 75–79 and accompanying text.

to develop and submit an HCP for their land. If the FWS or NOAA Fisheries accepts the plan, landowners may receive an ITP to “take” individuals of a listed species or harvest segments of critical habitat.³⁰⁹ Under this process, landowners can determine the sections of property that are most economically valuable and seek an ITP to harvest them.³¹⁰ By allowing landowners to propose areas of habitat to protect and areas to eliminate, the habitat conservation planning process also gives landowners some control over where a listed species may reside on their property. If the FWS determines that the landowner has taken adequate measures to mitigate for the destruction of habitat, and for the possible take of individual owls, it will grant an ITP and allow him or her to proceed.³¹¹ While the HCP development process can have significant costs,³¹² receiving an ITP should provide landowners with the same ability to mitigate the economic effects of maintaining suitable habitat for listed species on their land as that enjoyed by the landowners in *PruneYard*.³¹³

The *Boise* case illustrates the difficulty landowners would face in presenting a convincing case that the government’s actions under the ESA had an economic impact severe enough to warrant compensation as a physical invasion. Boise did not file an application for an ITP until the federal district court enjoined the corporation from logging without one.³¹⁴ Thus, Boise had not used the available mechanisms to reduce the economic impact of the ESA on its land. This omission would make it difficult, if not impossible, for the corporation to claim that the government’s actions implementing the Act on its land resulted in a compensable economic impact. Had Boise applied for an ITP at the outset, it could have proposed a mitigation plan, such as undertaking limited logging in the area inhabited by the owl in return for preserving habitat elsewhere on its property.

309. See 16 U.S.C. § 1539(a); see also *supra* notes 75–79 and accompanying text.

310. See 16 U.S.C. § 1539(a); see also *supra* notes 75–79 and accompanying text.

311. See 16 U.S.C. § 1539(a); see also *supra* notes 75–79 and accompanying text.

312. See Robin L. Rivett, *Why There Are So Few Takings Cases Under the Endangered Species Act or Some Major Obstacles to Takings Liabilities*, SC43 A.L.I.-A.B.A. 383, 394 (1998).

313. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

314. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1342 (Fed. Cir. 2002).

VII. CONCLUSION

Given the failure of regulatory and *per se* physical takings claims in the courts, it is likely that landowners affected by the ESA will soon turn to compensable physical invasion claims. When such claims are presented, courts should reject them. Existing precedent and statutory safeguards in the ESA make it difficult, if not impossible, for private landowners to argue successfully that any of the three factors in the *Penn Central* balancing test rise to the level of requiring compensation for a physical invasion. The Act's protection of imperiled species does not come at the expense of private landowners' fundamental property rights. Thus, courts should reject landowners' claims that ESA restrictions result in compensable physical invasions.