The Endangered Species Act and the Constitutional Takings Issue

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Introduction

In the 35-year history of the Endangered Species Act (ESA), property owners have filed over a dozen lawsuits claiming that the Act resulted in a “taking” of private property under the Takings Clause of the Fifth Amendment to the U.S. Constitution. In only one instance, however, has such a claim succeeded, in the controversial case of Tulare Lake Basin Water Storage District v. United States. Applying an expansive “per se” takings theory, a U.S. Court of Federal Claims judge ruled that an ESA restriction on water deliveries from a California water project resulted in a taking. But six years later, in a similar case, Casitas Municipal Water District v. United States, the same court (indeed, the same judge) repudiated the ruling in Tulare Lake. Thus, there is no surviving, final legal authority supporting the argument that ESA restrictions result in constitutional takings.

This chapter surveys the numerous, overlapping rationales courts have offered for rejecting takings claims based on government actions protecting threatened and endangered species. While the primary focus is on claims arising from restrictions imposed pursuant to the ESA, the chapter also discusses takings cases arising from other federal laws that serve at least in part to protect imperiled wildlife. Thus, it discusses a case based on denial of a Clean Water Act permit for a development that threatened bald eagles, and a case based on a restriction on mining activity under the Surface Mining Control & Reclamation Act designed to avoid adverse impact on an endangered fish. In addition, it discusses various takings cases based on application of state or local land use laws to protect threatened or endangered species. With one arguable exception, these decisions, like decisions based directly on ESA restrictions, have consistently rejected takings claims.

In theory, condemnation of private lands for species conservation purposes might raise interesting questions about the scope and proper application of the eminent domain power. So far as we are aware, the United States has not exercised its condemnation power for ESA conservation purposes.

The chapter is organized as follows. First, it provides an overview of the relevant principles of regulatory takings doctrine, then describes the major provisions of the ESA that generate potential takings concerns. The primary reasons why takings challenges based on ESA restrictions have consistently failed are then summarized. The chapter then lays out in detail the various grounds on which courts have rejected takings claims based on restrictions on natural resource use designed to protect threatened and endangered species. We then discuss takings claims arising from private property damage caused by protected species, and the private property issues raised by government surveys for the presence of threatened and endangered species on private land. Finally, the chapter addresses takings claims arising from restrictions on the sale or transport of endangered animals or parts of endangered animals.

Overview of Relevant Takings Principles

In a regulatory taking case there are two basic questions: does the owner possess “property” and has the government “taken” the property? At the most simplistic
level, plaintiff may not be the public or some third party, but must be an owner of the property. In addition, the owner must have a legal entitlement to use the property for the purpose he or she intends that is prohibited by the challenged law or regulation. The scope of private property interests is defined in part by “background principles” of nuisance or property law that limit what can be privately owned and what owners can lawfully do with their property.11

Assuming the owner can point to a protected property interest, the next question is whether the government action results in a “taking.” As the Supreme Court explained in Lingle v. Chevron U.S.A. Inc., the “common touchstone” of regulatory takings doctrine is government action that imposes such a severe burden on private property that it is “functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”12 Under this general principle, the Court has recognized two “relatively narrow”13 categories of government action that will generally be regarded as per se takings. The first per se category, first recognized in Loretto v. Teleprompter Manhattan CATV Corp.,14 involves the situation where the government “requires an owner to suffer a permanent physical invasion of her property.”15 A regulation imposing a physical occupation generally effects a taking regardless of whether all or only a part of the property is subject to the invasion. The second per se category, first recognized in Lucas v. South Carolina Coastal Council,16 refers to regulation that renders an entire parcel of land valueless.

“Outside these two relatively narrow categories regulatory takings challenges are governed by the standards set forth in Penn Central Transp. Co. v. New York City.”17 In its landmark 1978 Penn Central decision,18 the Supreme Court set out a three-part framework that remains the “polestar” of the Court’s regulatory analysis today. The three factors include the “economic impact” of the government action, the extent to which the regulation has interfered with “investment-backed expectations,” and the “character” of the government action.19

The economic impact factor addresses the degree of economic loss (if any) caused by the government action. Investment expectations, which the Supreme Court has said must be “reasonable,”20 primarily turn on whether the regulatory program was in place at the time the claimant acquired the property, and whether the claimant knew or should have known that the property might be subjected to regulatory restrictions. The character factor has a somewhat more uncertain meaning, but largely turns on whether the regulation is designed to restrict harmful activity and whether the regulation singles out an owner to bear a particular burden or whether the burden is spread broadly across the community.21

In either a Lucas or a Penn Central regulatory taking case, the economic impact of the regulation must be assessed in relation to the property as a whole, not the portion of the property subject to the regulation. In general, in the case of land, “[t]he relevant parcel is defined to include the entire contiguous lot in the same ownership, with noncontiguous lots held by the same owner thrown in if part of an integrated development.”22 The resolution of the parcel question determines how difficult it will
be to demonstrate the kind of severe economic impact necessary to support a taking claim: focusing on the affected portion, virtually any regulation will appear to have a burdensome effect; but under the property-as-a-whole approach it will be far more difficult to show a burdensome effect. In \textit{Penn Central}, the Supreme Court seemingly resolved the issue in favor of the property-as-a-whole approach, but some dicta in two subsequent Supreme Court decisions appeared to cast doubt on this aspect of \textit{Penn Central}. However, in its 2002 decision in \textit{Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency}, the Court definitively settled on the property-as-a-whole approach.

A special set of rules apply to regulatory "exactions," conditions attached to permits requiring owners to accept physical invasions of their property. Viewed independently, physical invasions ordinarily trigger the Supreme Court's per se takings rule. On the other hand, exactions are imposed as conditions to permits that government officials could generally deny without takings liability. In this special context, the Supreme Court has said that an individualized exaction will not be deemed a taking unless there is no "essential nexus" between the exaction and the government's regulatory objective, or no "rough proportionality" between the burden imposed by the exaction and the projected impacts of development. In \textit{City of Monterey v. Del Monte Dunes at Monterey, Ltd.}, the Supreme Court refused to extend this test "beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."

The Supreme Court has drawn a distinction in its takings analysis between regulation of land and personal property. "In the case of personal property," the Court has stated, "by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)."

For many years, the Supreme Court maintained that a regulation constitutes a taking if it "fails to substantially advance a legitimate government interest," a verbal formula that appeared to call for relatively searching judicial review of government action under the Takings Clause. However, in \textit{Lingle v. Chevron U.S.A.}, the Supreme Court eliminated this test as a free-standing takings inquiry and ruled that this type of claim was "in the nature of a due process test," governed by the Court's traditional rational basis test. The \textit{Lingle} decision makes clear that this ruling amounts to more than a matter of constitutional labels. Indeed, the \textit{Lingle} decision is more important for reemphasizing the need for judicial deference to regulatory programs than for its rejection of the Takings Clause as the technical basis for judicial review.

\textbf{ESA Provisions Affecting Property Use}

The regulatory apparatus of the ESA is triggered by the listing of a species as threatened or endangered. Concurrent with the listing decision, the relevant agency (the U.S. Fish and Wildlife Service (FWS), or the National Marine Fisheries Service
(NMFS)) is required, when "prudent and determinable," to designate "critical habitat" for a listed species. While the initial listing decision is to be made "solely on the basis of the best scientific and commercial data available," a critical habitat decision must be based both on scientific data and "economic impact and any other relevant impact."

Listing decisions and critical habitat designations trigger substantive legal protections that may affect private property interests. Most significantly, section 9 of the ESA prohibits the "take" of an endangered species, which is defined to include any act endangering a species—including "to harass, harm, pursue, hunt, . . . capture or collect" a listed animal. The Fish and Wildlife Service by regulation has defined "harm" to include "an act which actually kills or injures wildlife, . . . includ[ing] significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."

Section 10 of the ESA contains an important exception to section 9's takings prohibition. This provision authorizes the issuance on an Incidental Take Permit (ITP) for any taking otherwise prohibited by section 9 "if such taking is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity." This provision allows permitted activities to proceed even if they harm individuals of a listed species. To obtain an ITP, an owner must prepare a habitat conservation plan (HCP) that includes proposed mitigation measures and discusses alternatives to the proposed action that were considered. "The purpose of the HCP is to ensure that the proposed action does not appreciably reduce the survival and recovery prospects of the species."

The other provision of the ESA with the potential to generate takings concerns is section 7, which directs federal agencies in carrying out their responsibilities, such as deciding whether to issue a permit to a private party, to consult with the FWS or NMFS to ensure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of" designated critical habitat. If the relevant service determines in a "biological opinion" that the proposed action will likely result in "jeopardy" or "adverse modification," it must prepare "reasonable and prudent alternatives" to the proposed action that would not violate the ESA. Once the agency ultimately adopts a reasonable and prudent alternative approved by the FWS or NMFS, then the service issues an incidental take permit and the activity can go forward.

Finally, over the last decade, the FWS and NMFS have adopted various administrative measures designed to soften the burden of the ESA on the regulated community and private landowners in particular. Under safe harbor agreements, landowners who take steps to improve the quality of wildlife habitat on their land can subsequently return the land to its baseline condition without violating the ESA. The so-called "No Surprises" policy provides property owners assurances that if they comply with the terms of an HCP, no additional restrictions or monetary obligations
will be imposed during the term of the plan.\textsuperscript{43} Finally, federal agencies have made increasingly aggressive use of "4(d) rules" for threatened species to establish relatively flexible wildlife protections.\textsuperscript{44}

**Overview of the ESA and Constitutional Takings Claims**

In the sections that follow we discuss the grounds on which takings claims involving threatened and endangered species have been resolved. Before delving into these details, however, it may useful to focus on the big picture—the striking fact that so far the ESA has not produced any authoritative precedent upholding a taking claim. What accounts for this remarkable record? Several explanations come to mind.

First, regulatory takings doctrine, as recently clarified and simplified by the U.S. Supreme Court, provides an avenue for relief for landowners only in rare and extreme circumstances. Despite the efforts of property rights advocates to persuade the Supreme Court to adopt a broader view, the vast majority of regulatory takings claims fail under current law. Viewed in this larger context, the complete dearth of authoritative ESA takings precedents, though remarkable, basically reflects the current state of takings jurisprudence.

Second, the general failure of takings claims based on the ESA is consistent with a longstanding legal tradition upholding broad government authority to regulate private property to protect wildlife. As stated in a leading text on wildlife law, wildlife has long been "regarded as occupying a nearly unique status" in the law.\textsuperscript{45} This special status is attributable to the deep-rooted idea that government (specifically state government) owns the wildlife within its borders in its sovereign capacity as representative of and for the benefit of the people. As a result of the doctrine of public ownership, wildlife is "not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or the traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good."\textsuperscript{46}

Historically, this doctrine has been invoked to support extensive fish and hunting regulations and substantial public immunity from liability for property damage caused by wildlife.\textsuperscript{47} But, as a matter of logic, what the Washington Supreme Court has described as the public's "perfectly astounding" power to protect wildlife provides equally strong support for modern endangered species protections against constitutional takings challenges.\textsuperscript{48}

Finally, despite frequent objections to the ESA by some development interests, the Act's regulatory mandates are actually quite flexible and carefully tailored to achieve conservation goals without unduly interfering with private property interests. As discussed, at various points the ESA requires consideration of economic effects on landowners, including in designating critical habitat and in defining reasonable and prudent alternatives. Before property owners can file a "ripe" taking claim, they must seek relief under the Act to determine what development will be allowed, ultimately
reducing the volume of takings litigation under the ESA. Also, some endangered species restrictions are by their nature limited in area (e.g., applying only to acreage around a nesting tree); in scope (e.g., restricting some uses of property while allowing others); or in duration (e.g., addressing stresses caused by periodic droughts or protecting a species during one particular part of its life cycle).

For this combination of reasons, the ESA has proven essentially impregnable to regulatory takings claims. We now turn to a more detailed examination of the reasoning employed by different courts in rejecting takings claims based on the ESA and other laws that protect imperiled wildlife.

Regulatory Restrictions on Natural Resource Use

The most common takings claims involving the ESA and other similar laws arise from regulatory restrictions on the use of land, water, and other natural resources. These types of takings claims have failed at a number of different points in the courts’ legal analyses, as we discuss below.

Ripeness Issues

In order to get out of the starting gate with a taking claim, the claimant must present a “ripe” claim, and a number of ESA claims have been dismissed because they failed to overcome this hurdle. The ripeness requirement is rooted in the notion that “[a] court cannot determine whether a regulation has gone too far unless it knows how far the regulations go.” Accordingly, a taking claim is not ripe for adjudication until the government decision maker has made a “final” decision. A corollary of the ripeness rule is that the mere imposition of a “requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself ‘take’ the property in any sense: after all, the very existence of a permit system implies that permission may be granted.”

Thus, for example, the U.S. Court of Appeals for the Federal Circuit rejected on ripeness grounds a taking claim based on logging restrictions designed to protect the endangered spotted owl when the owner had never filed an application for an incidental take permit. State courts have likewise rejected takings claims involving endangered species when the owners failed to pursue state administrative processes to their conclusion.

In Morris v. United States, the Federal Circuit rejected a test case mounted by the Pacific Legal Foundation that attempted to circumvent the ripeness barrier. The plaintiffs owned a half-acre lot on the Eel River in northern California with a half dozen old-growth redwoods that the owners wanted to harvest. Logging the trees represented a potential ESA “take” because it could adversely affect endangered fish in the river. The plaintiffs claimed their property had been taken without first seeking an incidental take permit, arguing that the claim was ripe on the theory that the $10,000 cost of preparing and processing a permit application exceeded the value of the timber. The government defended on the basis that the NMFS staff was willing
to provide free assistance to the owners in preparing the application. On that understanding, the court ruled that the plaintiffs were required to seek an incidental take permit in order to ripen their taking claim.\textsuperscript{58}

**Threshold Property Issue**

Assuming the claimant has overcome the procedural barriers to prosecuting a taking claim, the first substantive issue is whether the claimant has a protected property right to engage in the proposed activity. It can never be a taking to bar uses of property that are not part of the owner’s title, or to “occupy” property in a way the owner does not have a right to prevent. In other words, do “background principles” of property or nuisance law bar the owner from claiming a vested property right and therefore preclude the taking claim at the threshold? The *Lucas* decision recognized that background limits can originate in either federal or state law.\textsuperscript{59}

To date, only a handful of courts have carefully evaluated the background principles defense in the ESA context. Nonetheless, the available precedents indicate that relevant background principles of state law represent an important defense to takings claims based on protections for imperiled wildlife.

The doctrine of public ownership of wildlife, discussed above, readily fits into the background principles framework. In *Lucas*, the Court declared that a regulatory taking claim should fail if “the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”\textsuperscript{60} No regulation results in a taking, the Court continued, if the limitation “inhere[s] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”\textsuperscript{61} The public ownership doctrine is a rule of state property law that limits private rights impinging on wildlife and therefore qualifies as a background principle for the purpose of takings analysis. Both the courts and the commentators\textsuperscript{62} have recognized that the venerable common-law doctrine of public ownership should generally bar takings claims based on restrictions to protect imperiled wildlife.

In *State v. Sour Mountain Realty*,\textsuperscript{63} the Appellate Division of the New York Supreme Court invoked the public ownership doctrine to justify rejection of a taking claim arising from enforcement of the New York Endangered Species Act. The case involved a dispute between a property owner seeking to establish a mining operation and the New York Department of Environmental Conservation (DEC), which is responsible for enforcing the state act. A den of timber rattlesnakes, a threatened species in New York, was discovered on property a few hundred feet from the plaintiff’s property line. The snakes undoubtedly utilized portions of the plaintiff’s property as forage habitat. The landowner responded to the discovery of the den by constructing a “snake proof” fence to keep the snakes off its land. The DEC then sought an injunction requiring removal of the fence. The owner opposed the injunction, arguing that it would result in a regulatory taking.

The Appellate Division affirmed entry of an injunction against the landowner and rejected the taking claim. The court ruled that the plaintiff had failed to demonstrate
the kind of severe intrusion on private property necessary to support a claim. In addition, however, the court stated that "the State, through the exercise of its police power, is safeguarding the welfare of an indigenous species that has been found to be threatened with extinction. The State's interest in protecting its wild animals is a venerable principle that can properly serve as a legitimate basis for the exercise of its police power" without payment of compensation. To support this conclusion, the court cited a New York statute codifying the doctrine of public ownership of wildlife.64 The court also cited an early-twentieth-century New York decision rejecting an owner's objection to a requirement of a fishway at a private dam on the ground that the "petitioner cannot be deprived of a right [to obstruct wild fish] which it never possessed."65

Similarly, in Sierra Club v. Department of Forestry & Fire Protection,66 the California Court of Appeals invoked the public ownership doctrine to support rejection of a taking claim based on an endangered species regulation. The case involved applications by the Pacific Lumber Company to harvest old growth timber on two parcels on which several endangered species, including the marbled murrelet and the spotted owl, had been detected. The timber company appealed a ruling invalidating its timber harvest plans for lack of necessary wildlife mitigation measures, contending that rejection of its plans was an unconstitutional taking. The Court of Appeals rejected the taking claim on ripeness grounds and, in the alternative, based on the doctrine of public ownership of wildlife. Surveying the extensive precedents on public ownership of wildlife, the court said that federal and state courts "have rejected the claim that a state or federal statute enacted in the interest of protecting wildlife is unconstitutional because it curtails the uses to which real property may be put." The court continued:

A landowner whose valuable stands of old-growth forest are infested with protected species is subject to state regulation designed for the legitimate purpose of such protection. The ... [precedents] clearly indicate that the federal and state governments may regulate and protect rare species on private lands without, ipso facto, triggering an unconstitutional taking of private property on which such species are present.

The court recognized that the then recently decided Lucas decision generally mandated compensation for regulations that eliminate all economic use. However, it observed that the Supreme Court had made its "total taking" inquiry subject to an exception for limitations consistent with "preexisting state common law of nuisance and property use," and that "wildlife regulation of some sort has been historically a part of the preexisting law of property."

Laws protecting endangered wildlife also can be defended against takings claims on the alternative ground that they parallel background principles of "nuisance" law. The Restatement (Second) of Torts defines a public nuisance to include, among other things, "an unreasonable interference with a right common to the general public."67 Because the doctrine of public ownership of wildlife defines a common public right in wildlife, an activity that harms wildlife arguably represents not only an intrusion on public property rights but also a nuisance.
Reliance on the concept of public ownership in the context of endangered species regulation undoubtedly represents somewhat of a departure from the traditional applications of the doctrine. For the reasons discussed, however, application of the doctrine in the ESA context is entirely consistent with the logic underlying the doctrine. Moreover, the Supreme Court has recognized that the scope of background principles may evolve. As the Court stated in *Lucas*, “Changed circumstances or new knowledge may make what was previously permissible no longer so.” Even more to the point, Justice John Paul Stevens has observed, “New appreciation of the significance of endangered species . . . shapes our evolving understandings of property rights.”

The doctrine of public ownership of wildlife does not exhaust background principles that might be relevant in takings analyses. For example, the state courts have recognized that private interests in tidelands are subject to the public trust doctrine protecting the public’s right to use tideland areas. Wildlife protection is generally viewed as within the scope of the public trust doctrine. Therefore, a restriction on development of tidelands that served in whole or in part to protect imperiled wildlife would fall within the scope of the public trust doctrine, providing an independent basis for rejecting a taking claim. Native American treaty rights might also represent background principles supporting ESA restrictions against a takings challenge.

Finally, in *Palazzolo v. Rhode Island*, the Supreme Court explicitly recognized that at least some statutes can be background principles, but declined “to consider the precise circumstances when a legislative enactment can be deemed a background principle.” In *Tahoe-Sierra*, Chief Justice Rehnquist, in dissent, suggested that zoning restrictions might represent background principles, referencing the 1916 New York City zoning ordinance. Query whether, under this view, given sufficient passage of time, certain federal or state statutes protecting wildlife or the ESA itself may be or might become background principles of property law.

**Takings Analysis**

**Physical versus Regulatory Takings Analysis**

A recurring issue in takings cases arising from endangered species regulation has been whether a regulatory restriction can be characterized as a physical occupation of private property. This is an important issue because, absent some applicable background principle, a permanent physical occupation is generally regarded as a per se taking no matter how modest the intrusion. By contrast, takings claims based on regulatory restrictions are evaluated using the property-as-a-whole approach, and generally based on the multifactor *Penn Central* analysis, with the result that few government actions rise to the level of compensable takings. In recent years, the issue has been hotly litigated in two contexts: trees and water.

In Oregon, the Boise Cascade Corporation and other timber companies mounted a concerted litigation campaign over the last decade seeking to establish that logging restrictions for the protection of endangered species should be regarded as a type of physical occupation. All of the cases involve the same basic pattern, with state
forestry or federal wildlife officials drawing an imaginary circle around nest sites of spotted owls or bald eagles and prohibiting logging within the circles so long as the nests remain active. Some of the claims have been filed against the United States in federal court and other claims have been filed against the Oregon Board of Forestry in state court. The plaintiffs' theory has been that because the restrictions effectively required them to suffer the presence of wildlife that they would have driven from the area by logging, the restrictions constituted a physical taking of their property. Both the federal and state courts have roundly rejected the theory.

In Boise Cascade Corp. v. United States, involving ESA restrictions designed to protect a nesting spotted owl, the Federal Circuit rejected the claim that a federal district court's injunction against logging constituted a per se physical-occupation taking of the property. In the Federal Circuit's words, "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." The Federal Circuit followed the same reasoning in Seiber v. United States, rejecting the argument that denial of an incidental take permit for logging activity that would harm an eagle nest site constituted a physical taking, stating, "The Supreme Court has long held that regulatory restrictions on the use of property do not constitute physical takings."

The Oregon Supreme Court, in another case involving nesting eagles, also refused to accept the per se physical taking theory. Rejecting plaintiff's effort to analogize a restriction on tree harvesting to protect an endangered bird to a physical occupation, the court said that plaintiff's theory "fails to take into account the different character of regulatory action." As noted, the same issue also has been debated in the context of endangered species restrictions relating to water use. In the controversial Tulare Lake case, U.S. Court of Federal Claims Judge John Wiese ruled that restrictions on water pumping in the Sacramento-San Joaquin Delta to protect endangered fish constituted a taking under the per se rule for physical occupations. Although the resulting shortfalls in water deliveries affected only a small portion of plaintiffs' entire water rights, the court ruled that the restrictions constituted a compensable taking under this per se theory.

The Tulare Lake decision has been the object of substantial judicial and academic criticism. The question whether the United States would appeal this adverse ruling became a matter of significant public controversy, especially after the National Oceanic and Atmospheric Administration (which includes the National Marine Fisheries Service), the California Attorney General's Office, and the California Water Resource Control Board advocated an appeal. Despite these recommendations, the U.S. Department of Justice decided not to appeal. Not surprisingly, the Tulare Lake decision prompted the filing of several similar takings claims based on ESA restrictions in water use.

However, six years later, in Casitas Municipal Water District v. United States, Judge Wiese issued a decision repudiating his ruling in the Tulare Lake case. In response to the listing of the steelhead trout as an endangered species, the National
Marine Fisheries Service prescribed new operating criteria for the Ventura River Project in southern California that limited the quantity of water the district could divert. Judge Wiese concluded that the Supreme Court's 2002 decision in *Taboe-Sierra Preservation Council v. Tahoe Regional Planning Agency* required that he abandon the analysis in *Tulare Lake*. In *Taboe-Sierra* the Court rejected a claim that a development moratorium in the Lake Tahoe basin should be regarded as a per se taking, and in the process emphasized the narrowness of the physical occupation theory, stating that it was confined to "relatively rare, easily identified" cases. In *Casitas*, Judge Weise concluded that the Supreme Court's *Taboe-Sierra* decision "compels us to respect the distinction between a government takeover of property (either by physical invasion or by directing the property's use to its own needs) and government restraints on an owner's use of that property."  

The decisions discussed above addressing the physical occupation takings theory in the context of endangered species restrictions affecting logging activity and water diversions have attracted a good deal of public attention. But these relatively recent decisions are only the latest examples in a long line of legal authority consistently rejecting the physical-occupation takings theory in cases involving similar (as well as other types) of restrictions on property use designed to protect endangered species and other wildlife.

**Applying Regulatory Takings Analysis**

Setting aside the physical occupation theory, the next issue is how a taking claim based on ESA restrictions should be analyzed under the *Lucas* test or the *Penn Central* framework.

Because a *Lucas* claim must be evaluated using the property-as-a-whole approach, and ESA restrictions rarely if ever prohibit all economically productive use of an entire parcel, *Lucas* offers little promise to claimants challenging ESA restrictions. Accordingly, the courts that have addressed *Lucas* claims based on ESA restrictions have consistently dismissed them. The Oregon Supreme Court rejected a claim that restrictions on logging in the vicinity of a nesting bald eagle affected a taking under *Lucas*, stating that "in determining whether the regulation at issue ... deprived plaintiff of any economically viable use of its property, we focus on the plaintiff's ability to use the 40-acre parcel, not merely its ability to use the nine acres of timber" subject to the restrictions.  

Similarly, the Federal Circuit rejected a *Lucas* claim based on logging restrictions where "the forty acres of regulated land were part of a larger two-hundred acre parcel of land."  

Absent a viable *Lucas* claim, a plaintiff challenging an ESA restriction must proceed under the *Penn Central* framework, which focuses on the economic impact of the regulation, the reasonableness of the owner's investment expectations, and the character of the regulation. Each of these factors has figured prominently in decisions rejecting ESA takings claims.

As with a *Lucas* regulatory taking claim, a *Penn Central* claim must be evaluated using the property-as-a-whole approach. Accordingly, some takings claims under
Penn Central have failed because the claimants did not make the kind of showing of adverse economic impact necessary to support their claims. In Flotilla v. Florida Game & Fresh Water Fish Commission, the Florida Court of Appeals rejected a Penn Central claim where restrictions on development surrounding a bald eagle nest affected only 48 acres of the plaintiff's 173-acre holding. In East Cape May Associates v. State of New Jersey, the New Jersey Court of Appeals reversed and remanded a takings award that was based on denial of a state wetlands permit because the trial court had not adequately considered whether a restricted parcel should be regarded as a part of a larger property.

As noted, the narrow focus and limited duration of ESA restrictions tend to prevent the ESA from imposing the kinds of severe economic burdens that support a credible takings claim. For example, in Seiber v. United States, the Federal Circuit affirmed rejection of a Penn Central claim when the FWS initially denied an incidental take permit because of the presence of an endangered bird, but 19 months later concluded that a permit was not necessary because the bird was no longer present on the property. The taking claim failed, the court said, because plaintiffs presented no evidence of "any economic impact imposed by the alleged temporary taking." Similarly, in Flotilla, the court rejected a taking claim because it was based on a temporary restriction that remained in place only until nesting eagles left the property.

The expectations factor also may militate against takings claims based on regulations imposed to protect endangered species. In Palazzolo v. Rhode Island, the Supreme Court rejected the notion that an owner's knowledge of applicable regulations at the time he or she purchased the property should always bar a subsequent regulatory taking claim. However, in practice, a claimant's advance notice of a regulatory restriction is generally fatal to a taking claim. Although we are not aware of any ESA takings case following this pattern, there is no reason to suppose that a property investor's advance notice of ESA constraints would not weigh against a takings challenge. If and when such a case is presented, an interesting set of questions may arise about whether the courts should regard the owner's expectations as having been primarily shaped by enactment of the ESA itself, the discovery of species on the property, and/or the formal designation of a particular species as threatened or endangered.

Another approach to the expectations issue is to ask whether the plaintiff was operating in a "highly regulated environment" and whether the plaintiff could have anticipated the regulation based on that environment and any foreseeable problems associated with the planned property use. In Good v. United States, the Federal Circuit affirmed rejection of a takings claim on this basis, stating: "In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land." The developer purchased the land shortly before the ESA was enacted and started taking steps to obtain regulatory approval for development in 1980. The Army Corps of Engineers issued and reissued wetlands permits on several occasions. But, in the 1990s, after two endangered species were discovered on the property, the Corps denied a permit, prompting the tak-
ings claim. In rejecting the claim the court affirmed that it is not enough to sustain a claim that, when a property was acquired, a claimant "had every reason to believe that necessary permits would be forthcoming." Because Good "must have been aware that standards could change to his detriment . . . he lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking." The court also observed that during the lengthy application process, "rising environmental awareness translated into ever-tightening land use regulations," and that plaintiff "was not oblivious to this trend."

The character factor tends to be the most elusive part of regulatory takings analysis and this has certainly been the case with takings claims involving ESA restrictions. A review of takings jurisprudence reveals a plethora of alternative, sometimes conflicting definitions of the character factor. The limited space in this chapter requires a truncated examination of the issue, focusing specifically on how the character factor applies in the ESA context.

As initially introduced into takings law by the Penn Central decision itself, the character factor was defined as focusing on whether the government action could be characterized as a "physical occupation of private property." As discussed, the courts have consistently rejected efforts to categorize property restrictions based on the presence of endangered species as physical invasions. Accordingly, this original definition of the character factor has apparently provided no support for takings claims involving imperiled wildlife.

Another approach to the character factor focuses on the importance of the goal the government is trying to achieve. Several cases involving ESA restrictions embrace this definition of the character factor, referring to the "strong public policy interest," or the "benefit[s] to the welfare and quality of life of the people" served by species conservation. Given that regulatory takings doctrine is a subset of condemnation law, the importance of the government's goal cannot properly be weighed directly against the burden imposed on a landowner to evaluate the merits of a takings claim. After all, it could never be contended that the government is entitled to take land for a road or a park without payment because the taking will serve some important transportation or open space need.

Nonetheless, the importance or value of a government policy, and of species conservation in particular, is critically important in takings analysis. The Supreme Court has long recognized that "[u]nder our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." While certain landowners are burdened by ESA restrictions, they are also benefited by the application of the ESA (and many other laws) to other landowners in the community. The more important the public purpose served by the law, the greater the reciprocal benefits. Because the ESA serves what is generally acknowledged to be a vital public goal, it produces very significant reciprocal benefits for landowners. In addition, the increasing presence of threatened and endangered species on private lands across the
country\textsuperscript{112} means that both the burdens and reciprocal benefits of ESA restrictions are becoming widely shared.\textsuperscript{113}

The final alternative definition of character that appears relevant in the ESA context is the extent to which a restriction on activities to protect threatened or endangered species can be characterized as harm-preventing. In \textit{Lucas}, Justice Scalia famously observed that the distinction between harm-preventing and benefit-conferring regulation "is difficult, if not impossible, to discern on an objective, value-free basis."\textsuperscript{114} However, this statement runs counter to a long legal tradition of considering the harmfulness of a regulated activity in takings cases,\textsuperscript{115} and probably should be read as applying only in a \textit{Lucas}-type case, not a case under \textit{Penn Central}.\textsuperscript{116} In a variety of contexts the lower courts have addressed the degree to which regulations prevent harm in analyzing whether they result in takings.\textsuperscript{117}

Regulations that prevent the death or extinction of fish and other wildlife can fairly be characterized as harm-preventing. Indeed, the ESA itself explicitly defines the primary regulatory provision of the Act as aimed at harm prevention. Section 9 of the Act makes it unlawful for any person to "take" endangered or threatened species, and defines "take" to mean, among other things, to "harm," which the Secretary of the Interior subsequently defined by regulation to include "significant habitat modification or degradation where it actually kills or injures wildlife." Consistent with this understanding, some lower courts addressing takings claims involving threatened or endangered species have explicitly relied upon the harm-preventing character of the restrictions in rejecting the claims.\textsuperscript{118}

\section*{Restrictions on Defense of Property}

Another type of regulatory taking claim involving threatened or endangered species arises when animals have directly caused damage to private property, such as by breaking down fences or attacking livestock. These cases are part of a much larger body of law relating to government liability for property damage caused by wildlife generally. Summarizing the larger body of law, the en banc U.S. Court of Appeals for the Tenth Circuit stated, "Of the courts that have considered whether damage to private property by protected wildlife constitutes a 'taking,' a clear majority have held that it does not and that the government thus does not owe compensation."\textsuperscript{119} The handful of cases specifically involving threatened or endangered species have reached the same result.

The leading ESA decision is \textit{Christy v. Hodel},\textsuperscript{120} decided by the U.S. Court of Appeals for the Ninth Circuit. Christy maintained a flock of sheep that was repeatedly attacked by endangered grizzly bears on land adjacent to Glacier National Park. After unsuccessful attempts to capture the bears or frighten them away, Christy shot and killed a bear. In response to the Department of the Interior's assessment of a civil penalty under the ESA, Christy asserted that the prohibition against killing endangered species in this circumstance was a taking. The court rejected the claim that the ESA effected either a physical or a regulatory taking, observing that "Numerous
cases have considered, and rejected, the argument that destruction of private property by protected wildlife constitutes a governmental taking. 121

Although the matter is debatable, the soundest legal basis for this ruling appears to the longstanding doctrine of public ownership of wildlife. In the venerable case of Barrett v. State, 122 the New York Court of Appeals rejected a landowner’s claim for compensation for the value for timber destroyed by wild beavers based on the public ownership doctrine, stating:

Whatever protection is accorded [to wildlife], harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the Legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confined to its discretion. 123

Similarly, the Colorado Supreme Court stated in a comparable case that the principle of governmental immunity from takings claims “is based largely on the circumstance that the property right to the wild game within [a state’s] borders is vested in the people of the state in their sovereign capacity.” 124

Certain other decisions, including Christy, suggest that this rule is based on the different rationale that government officials have no ability to control the conduct of wild animals. 125 But, as noted, the concept of public rights in wild animals appears to represent the actual foundation for this rule. This conclusion is supported by decisions rejecting takings claims based on property damage even when government officials have physically transported and reintroduced the animals to an area where they were absent. Barrett v. State, the seminal public ownership precedent, involved beavers that state officials had trapped and transported to a new location where they destroyed the plaintiff’s valuable trees. Likewise, in Moerman v. California, 126 the California County of Appeals ruled that the state did not take private property by reintroducing endangered tule elk that subsequently damaged the plaintiff’s fences and ate his forage. If the rule that government is not liable for property damage caused by wild animals were based on a lack of government control over the animals, as opposed to sovereign public rights in wildlife, these cases probably would have come out the other way.

**Official Access for Survey Purposes**

As discussed, the Supreme Court has emphasized that government actions impinging on an owner’s right to exclude others from private property generally trigger serious concerns under the Takings Clause. One ESA-related question raised by this aspect of takings doctrine is whether surveys of private land by government wildlife officials to determine whether endangered species are present constitute takings. Again, the answer is no.

In Boise Cascade Corp v. United States, 127 the U.S. Court of Appeals for the Federal Circuit ruled that a preliminary injunction granting the U.S. Fish and Wildlife Service permission to enter private property to conduct surveys for spotted owls over a
five-month period did not constitute a compensable taking. In rejecting the owner’s takings theory, the court emphasized the transitory nature of the invasions:

Transient, nonexclusive entries by the Service to conduct owl surveys do not permanently usurp Boise’s exclusive right to possess, use, and dispose of its property. The government’s incursion into Boise’s property is more in the nature of a temporary trespass . . . rather than a permanent physical occupation or an easement of some kind.128

The court also observed that rejection of the claim was justified in this case by the purpose of these particular surveys, “which was to discover information necessary to the adjudication of a case that [the plaintiff] itself had initiated.”129

**Restrictions on Commercial Dealings**

Finally, takings claims have arisen from restrictions on commercial sales or transportation of endangered animals or parts of endangered animals. These cases arise against the backdrop of the Supreme Court decision in *Andrus v. Allard*,130 in which the Court found no taking based on a ban on the commercial sale of bird parts under the Eagle Protection Act and the Migratory Bird Treaty Act. The cases arising directly from enforcement of the ESA reach the same result.

In *United States v. Kepler*,131 the U.S. Court of Appeals for the Sixth Circuit rejected a takings challenge to a criminal conviction for the illegal transportation of endangered species. The defendant had lawfully acquired two animals, a cougar and a leopard, but later, following the enactment of the ESA, transported the animals from Florida to Kentucky in violation of the ESA’s ban on interstate transport. In *United States v. Hill*,132 the federal district court refused to dismiss, based on a takings objection, a criminal indictment charging plaintiff with the sale of parts of endangered species (rhinoceroses, tigers, and leopards) in violation of the ESA provision barring such sales.

These decisions (and *Andrus*) appear to rest on two rationales. First, the courts invoked the property-as-a-whole rule to support the conclusion that the ESA restrictions did not destroy all or a substantial portion of plaintiffs’ property interests. In *Kepler*, the court observed that the prohibition on interstate sales did not destroy the plaintiff’s property because it did not apply to intrastate sales and was subject to an exception “for scientific purposes or to enhance the propagation or survival of the affected species.”133 Similarly, in *Hill*, the court said, “Hill has not been denied all economic value from his property. There are other uses for the animal parts in question.”134

Second, the decisions are supported by the distinction between land and personal property. In *Lucas*, the Court, citing *Andrus v. Allard*, stated, “[I]n the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale).”135 In *Hill*, the court
explicitly invoked “the distinction between personal and real property” to justify rejection of the claim. While the court in *Kepler* did not rely on this distinction, the result in that case can be explained on the same basis.

**Conclusion**

The central message of this chapter is that experience with takings claims based on the ESA and other legal restrictions designed to protect imperiled wildlife shows that these claims will be extremely difficult to sustain. The consistent rejection of this type of claim partly reflects the determination by the Supreme Court to reserve regulatory takings doctrine for rare cases. But it also reflects the flexibility inherent in the ESA and the strong legal tradition, long predating adoption of the ESA, upholding expansive public authority to protect the public’s wildlife despite claimed impacts on private property interests.

**Notes**

1. “[N]o private property be taken for public use, without just compensation.”
3. 76 Fed. Cl. 100 (2007).
4. Technically, as a trial-level ruling, the decision in *Tulare Lake* never had binding precedential effect, even on the judge who issued the opinion. See Penzoil-Quaker State Co. & Subsidiaries v. United States, 62 Fed. Cl. 689, 696 (2004) (decisions by particular judges of the Court of Federal Claims not binding on other judges of the Court of Federal Claims); 18-134 Moore’s Federal Practice—Civil § 134.02[1][d] (2006) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.”).
5. As this chapter was being prepared for publication, the U.S. Court of Appeals for the Federal Circuit, in a 2 to 1 ruling, reversed the grant of summary judgment to the government in *Casitas* and remanded for the federal claims court to determine whether requiring the plaintiff to divert water through a fish ladder would be a compensable taking. See 543 F.3d 1276 (Fed. Cir. 2008). The panel majority did not rule on whether Judge Wiese correctly repudiated his prior ruling in *Tulare Lake*, stating: “We do not opine on whether *Tulare* was rightly decided, but note that the *Tulare* decision has been criticized.” *Id.* at 1295 n.16. On February 17, 2009, the Federal Circuit rejected an application for a rehearing en banc, with four members of the court dissenting. See 556 F.3d 1329 (Fed. Cir. 2009).
9. The arguable exception is the Supreme Court decision in City of Monterey v. Del Monte Dunes at Monterey Ltd., 526 U.S. 687 (1999), upholding a takings award based on a city’s rejection of a development application. The city’s action was motivated by various factors, including a concern about potential impacts on an endangered butterfly. However, for several reasons the case provides little useful guidance on whether or under what circumstances restrictions to protect endangered wildlife might support a takings claim. The record was ambiguous on whether the butterfly was even present on the property.
and therefore the endangered species issue did not loom large in the case. The jury was instructed that it could find a taking if it concluded that the regulatory action failed to substantially advance a legitimate state interest, a theory of takings liability subsequently repudiated by the U.S. Supreme Court in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005). Finally, the case before the Supreme Court did not focus on the substantive issues of takings law discussed in this chapter, but instead addressed (1) whether the case was properly submitted to a jury, (2) whether the municipality's decision was subjected to overly intrusive judicial review, and (3) the scope of the Court's doctrine dealing with regulatory "exactions."

13. Id. at 538.
15. Lingle, 544 U.S. at 538.
17. Lingle, 544 U.S. at 538.
19. Id. at 124.
29. Lucas, 505 U.S. at 1027.
41. 16 U.S.C. § 1536(b)(4). A rarely invoked provision authorizes the so-called Endangered Species Committee to exempt activities from section 7 despite the risk of species extinc-
tion based upon a finding that the action’s benefits clearly outweigh the benefits of alternatives that would conserve the species or the habitat. 16 U.S.C. § 1536(e).

42. See 50 C.F.R. §§ 17.22(c), 17.32(c).
43. 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5) (FWS); 50 C.F.R. § 222.307(g) (NMFS).
44. See 16 U.S.C. § 1532(d).
48. Cook v. State, 74 P.2d 199, 201 (Wash. 1973). Some decisions, including decisions directly addressing takings claims involving threatened or endangered species, appear to reject the concept of public ownership of wildlife. See Christy v. Hodel, 837 F.2d 1324, 1335 (9th Cir. 1988) (“The federal government does not ‘own’ the wild animals it protects”) (citing Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284, (1977) (“[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.”)). As one of us and a co-author have explained elsewhere, these statements are based on an overly broad reading of Supreme Court decisions invalidating state protectionist regulation of wildlife under the federal Constitution that do not (and could not) invalidate the common-law tradition of public ownership of wildlife. See John D. Echeverria & Julie Lurman, “Perfectly Astounding” Public Rights: Wildlife Protection and the Takings Clause, 16 Tul. Envtl. L.J. 331 (2003).
51. We are not aware of any cases focusing on the takings implications of legal protections for endangered plants and we therefore confine our attention to animals.
53. Id.
55. Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed. Cir. 2002) ( landowner failed to present ripe federal taking claim based on district court injunction barring logging because owner never sought an incidental take permit under the ESA).
56. See, e.g., Sierra Club v. Dep’t of Forestry & Fire Prot., 24 Cal. Rptr. 487 (Cal. App.) ( dismissing challenge to logging restrictions designed to protect endangered species on the ground that the state department of forestry had not made a final administrative decision on proposed logging plan), review denied, 26 Cal. Rptr. 338 (1993) (ordering that court of appeals decision not be published). Cf. Boise Cascade Corp. v. Bd. of Forestry, 63 P.3d 598 (Or. Ct. App. 2003) (vacating grant of summary judgment to state board in takings challenge to logging restriction designed to protect spotted owl in order to give plaintiff opportunity to attempt to establish “futility” of filing an application for an ITP).
57. 392 F.3d 1371 (Fed. Cir. 2004).
58. Ripeness doctrine does not exhaust the list of potential procedural hurdles to successful takings claims based on regulations protecting threatened wildlife. For a sampling of decisions involving other procedural hurdles, see Gordon v. Norton, 322 F.3d 1213 (10th Cir. 2003) ( affirming dismissal of taking claim based on Department of the Interior’s reintroduction of the endangered gray wolf to the Yellowstone ecosystem on the ground that exclusive jurisdiction over takings claims over $10,000 against the United States lies in the U.S. Court of Federal Claims); Meredith v. Talbot, 828 F.2d 228 (4th Cir. 1987) ( affirming dismissal of taking claim under both Pullman and Burford abstention doctrines where developers brought suit in federal court based on county’s limitation of proposed subdivision to avoid adversely affecting endangered species habitat).
59. 505 U.S. at 1029 (citing as an example of a background limitation Scranton v. Wheeler, 179 U.S. 141 (1900), in which the claimant's property interest was limited by the federal navigational servitude).
61. Id. at 1029.
67. Lucas, 505 U.S. at 1031.
68. Id.
75. 296 F.3d 1339 (Fed. Cir. 2002).
76. Id. at 1354–55.
77. 364 F.3d 1356 (Fed. Cir. 2004).
78. Id. at 1366.
overall reduction in water availability of approximately 0.11% and 2.92%" for the two lead plaintiff irrigation districts).

82. 49 Fed. Cl. at 319.

83. Klamath, 67 Fed. Cl. at 538 ("[W]ith all due respect, Tulare appears to be wrong on some counts, incomplete in others, and distinguishable at all events."); Allegretti & Co. v. County of Imperial, 42 Cal. Rptr. 3d 122 (2006) ("we disagree with Tulare Lake's conclusion that the government's imposition of pumping restrictions is no different than an actual physical diversion of water").


86. 76 Fed. Cl. 100 (2007).


88. 76 Fed. Cl. at 106. As noted supra note 5, on September 25, 2008, the U.S. Court of Appeals for the Federal Circuit, in a 2 to 1 ruling, reversed the federal claims court's grant of summary judgment to the government and remanded the case for further proceedings to determine whether a compensable taking occurred.

89. See, e.g., Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1576 (10th Cir. 1995) ("[p]laintiffs resist framing their argument as a 'regulatory' takings claim" but "do not complain of a physical occupation"); Fallini v. United States, 56 F.3d 1378, 1383 (Fed. Cir. 1995) (protected wild "horses are not agents of the Department of the Interior"); Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 106–07 (2d Cir. 1992) (no physical taking; developer retained decyrd and substantial power to control use or to sell it), cert. denied, U.S. 987 (1993); Christy v. Hodel, 837 F.2d 1324, 1335 (9th Cir. 1988) (management and protection of grizzly bears did not cause government occupation of land); Mountain States Legal Found., 799 F.2d at 1428 (Wild Free-Roaming Horses and Burros Act is "nothing more than a land-use regulation"); Moerman v. California, 21 Cal. Rptr. 2d 302, 304 (Cal. App. 1993) (state relocated tule elk were not state "instrumentalities"); Flotilla v. Fla. Game & Fresh Water Fish Comm'n, 636 So. 2d 761 (Fla. App. 1994) (no physical occupation from establishment of bald eagle nest buffer zone; developer "lost neither the right to possess nor convey the affected areas, and further retained the right to use the property in any way that would not disturb the eagles' habitat."); State v. Lake Lawrence Pub. Lands Prot. Ass'n, 601 P.2d 494 (Wash. 1979) (en banc) (no physical or regulatory taking from denial of plat to protect eagle perching and feeding area), appeal dismissed, cert. denied, 449 U.S. 830 (1980).

90. Coast Range Conifers, 117 P.3d at 998.

91. Seiber, 364 F.3d at 1369. See also Forest Props., Inc. v. United States, 39 Fed. Cl. 56 (1997) (rejecting Lucas claim based on denial of permit to fill 9.4 acres of wetlands in order to protect several species of endangered animals and plants where wetland area was a portion of a larger 62-acre property), aff'd, 177 F.3d 1360 (Fed. Cir. 1999).

92. 636 So. 2d 761 (Fla. App. 1994).


94. See also Appolo Fuels, Inc. v. United States, 54 Fed. Cl. 717 (2002) (rejecting, based on the property-as-a-whole rule, taking claim based on restriction imposed pursuant to Surface Mining Control and Reclamation Act designed in part to protect endangered species), aff'd, 381 F.3d 1338 (Fed. Cir. 2004); State v. Lake Lawrence Pub. Lands Prot.
Ass'n, 601 P.2d 494, 500 (Wash. 1979) (rejecting taking claim under federal and Washington state takings clauses, stating, “Of crucial importance in this case is the fact that the Commissioners’ decision to deny the plat leaves open the possibility of approving a less dense development of Woods Point.”).

95. 189 F.3d 1355 (Fed. Cir. 1999).
96. Id. at 1361.
97. 636 So. 2d 761 (Fla. App. 1994).
100. Appolo Fuels, Inc v. United States, 381 F.3d 1338, 1349 (Fed. Cir. 2004).
102. Id. at 1361–62.
103. Id. at 1363 (quoting Deltona Corp. v. United States, 657 F.2d 1184, 1193 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982)).
104. Id. at 1363.
105. Id. at 1362. The court ruled in Good that even a total taking under Lucas does not “eliminate[e] the requirement that the landowner have reasonable, investment-backed expectations of developing his land.” Id. at 1361. Subsequently, a different Federal Circuit panel claimed that this statement in Good was dictum and ruled that a lack of reasonable investment-backed expectations is a not a relevant factor in a Lucas case. Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir.), op. on reh’g, 231 F. 3d 1354 (Fed. Cir. 2000). This characterization of the ruling in Good as dictum is at the very least highly debatable. See Glenn F. Sugameli, The Supreme Court Confirms That Threshold Statutory and Common Law Background Principles of Property and Nuisance Law Define If There Is a Protected Property Interest, in TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF TAHOE-SIERRA § 7, at 51, 53 (Thomas E. Roberts ed., ABA 2003) (discussing this intra-circuit conflict in greater detail). If the Good language is indeed a holding, then it remains the binding circuit rule on this question. See Newell Cos., Inc. v. Kenney Mfg. Co., 864 F.2d 757, 765 (Fed. Cir. 1988) (“This court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned in banc.”), cert. denied, 493 U.S. 814 (1989).
107. 438 U.S. at 124.
110. In addition, the U.S. Supreme Court in TVA v. Hill, 437 U.S. 135 (1978), famously observed that the ESA elevated the government’s interest in species conservation to the “highest of priorities.”
111. Id. at 491.
113. The Supreme Court has also emphasized that the reciprocity of advantage concept includes the reciprocal advantages that citizens receive from the network of regulations that exist in modern society. In his famous dissent in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), Justice Louis Brandeis objected to the notion that regulations could only be defended based on the reciprocal benefits produced by the specific regulation at issue. Sometimes regulations can be defended, he said, based on “the advantages of living and doing business in a civilized society,” id. at 142, an idea subsequently embraced

114. 505 U.S. at 1026.


117. See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 904 (1989) (on remand from the Supreme Court, rejecting taking claim based on floodplain zoning ordinance that “involve[d] this highest of public interests—the prevention of death and injury”).

118. See, e.g., Appolo Fuels, Inc v. United States, 381 F.3d 1338 (Fed. Cir. 2004) (affirming rejection of a taking claim based on designation of area as unsuitable for mining under the Surface Mining Control and Reclamation Act in order to protect an endangered fish species, and observing that the designation would prevent “harmful runoff” into local streams and represented “the type of governmental action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations”); State v. Sour Mountain Realty, Inc., 276 A.D.2d 8, 16 (N.Y. App. Div. 2000) (rejecting taking claim on the ground that “the State, through its exercise of its police power, is safeguarding the welfare of an indigenous species that has been found to be threatened with extinction”).


120. 857 F.2d 1324, 1335 (9th Cir. 1988).

121. Id. at 1334.

122. 116 N.E. 99 (N.Y. 1917).

123. Id. at 100.


125. 857 F.2d at 1335 (“the government [does not] control the conduct of such animals... Plaintiffs assume that the conduct of the grizzly bear is attributable to the government but offer no explanation or authority to support their assumption”).


127. 296 F.3d 1339 (Fed. Cir. 2002).

128. Id. at 1355.

129. Id. at 1357.


131. 531 F.2d 796 (1976).


133. 531 F.2d at 797.

134. 896 F. Supp. at 1063.

135. Lucas, 505 U.S. at 1027.

136. 896 F. Supp. at 1063.