

DEATH BY A THOUSAND CUTS: REGULATORY TAKINGS UNDER THE ENDANGERED SPECIES ACT

I. INTRODUCTION

In the 1960s, Congress recognized the need to balance the preservation and needs of wildlife with the growth of industrialization and passed the first Endangered Species Act (“ESA”) legislation.¹ Since that time, the ESA’s exponential growth has led it to become one of the most powerful pieces of legislation ever written in the United States.² The ESA regulates both public and private land use in the United States as well as the international trade in animals and animal parts.³ It has also been the primary vehicle of environmental groups to initiate litigation through *citizen suits* to add additional listings of animals and plants.⁴ The most recent litigation, in 2011, resulted in the listing of an additional 1100 species.⁵ The greater the

¹ *Endangered Species Act: A History of the Endangered Species Act of 1973, Timeline*, UNITED STATES FISH AND WILDLIFE SERVICE, <https://www.fws.gov/endangered/laws-policies/timeline.html> (last updated Jul. 15, 2013).

² *Id.*

³ *Id.*

⁴ Citizen Suits are driven primarily by environmental groups against the federal government to force additional listings of species to the ESA. Candee Wilde, Comment, *Evaluating the Endangered Species Act; Trends in Mega-Petitions, Judicial Review, and Budget Constraints Reveal A Costly Dilemma for Species Conservation*, 25 VILL. ENVTL. L.J. 307, 336 (2014). (explaining that citizen’s suits are taking up enormous amounts of taxpayer’s money to pay the costs of litigation of and often results in closed door settlements between the government and the environmental groups behind them without the input of the general public). Wilde, at 330-337 (Litigating suits have become the primary drivers behind the legislative terms in the ESA); *See generally* 33 U.S.C. § 1365 (2016), [http://uscode.house.gov/view.xhtml?req=\(title:33%20section:1365%20edition:prelim](http://uscode.house.gov/view.xhtml?req=(title:33%20section:1365%20edition:prelim) (enumerating Citizen Suits general regulations).

⁵ *See* Terms of Agreement in *Stipulated Settlement Agreement for Center for Biological Diversity v. Salazar, No. 10-377 Doc. 42-1 (D.D.C. 2011)* (Jul. 12, 2011), [hereinafter *CBD Settlement*], http://www.biologicaldiversity.org/programs/biodiversity/species_agreement/pdfs/proposed_settlement_agreement.pdf; Exhibits A & B, *Stipulated Settlement Agreement for Wild Earth Guardians v. Salazar, No. 10-377 Doc. 31-1 (D.D.C. 2011)* (May 10, 2011) [hereinafter *WEG Settlement*].

number of species protected, the greater the chance those private landowners in ranching or farming activities that fall under the umbrella of the ESA regulations could be out of compliance with the 2016 changes.⁶ This can place the small landowner and agricultural enterprise in the cross fire between Environmental Groups litigating for increased listings and the Federal Government efforts to comply.⁷

The Endangered Species Act has three sections that can be triggered by the listing of a threatened or endangered species, specifically sections 7, 9 and 10.⁸ Section 7 applies to projects that have a connection to the federal government, a “federal nexus”, such as government contracts, a non-federal project using federal funding or one undertaken by a federal agency.⁹

Section 9 makes it unlawful for any individual to “take” any listed species within the United States or violate any regulation pertaining to such species listed or threatened.¹⁰ A “take” is defined in the 2016 Endangered Species Act as “to harass, harm pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to attempt engage in any such conduct may include significant habitat modification or degradation if it kills or injures wildlife by significantly impairing essential behavior patterns such including breeding, feeding or sheltering”.¹¹

Section 10 provides limited exemptions to the “take” provisions of the Endangered Species Act by allowing private landowners, whose activities may result in the take of listed or threatened species, to enter

https://www.fws.gov/endangered/improving_esa/exh_1_re_joint_motion_FILED.PDF.

⁶ See generally Diana Kirchheim, Comment, *The Endangered Species Act: Does Endangered Refer to Species, Private Property Rights, the Act Itself or All of the Above?* 22 SEATTLE U.L. REV. 819, 820 (Winter 1999).

⁷ Wilde, *supra* note 4, at 326.

⁸ Metz, Robert, *The Endangered Species Act (ESA) and Claims of Property Rights “Takings”*, CRS Report for Congress, 3 (January 7, 2013).

⁹ *Id.*

¹⁰ *ESA, Section 9*, UNITED STATES FISH AND WILDLIFE, <https://www.fws.gov/endangered/laws-policies/section-9.html> (last updated July 15, 2013).

¹¹ *Endangered Species Glossary*, UNITED STATES FISH AND WILDLIFE, <https://www.fws.gov/endangered/about/glossary.html> (last updated May 28, 2015); U.S. Constitution, Fifth Amendment, CORNELL UNIVERSITY LAW SCHOOL, https://www.law.cornell.edu/wex/fifth_amendment.

into a Habitat Conservation Program under the United States Fish and Wildlife Service (“USFW”).¹² The plans themselves, however, place regulatory restrictions on private property.¹³

Once an application is submitted and approved, the landowner will receive an Incidental Take Permit (“ITP”) from the USFW that allows them to engage in the activity in question.¹⁴ When a member of a particular listed or threatened species causes depredations to crops or livestock, the landowner can have the animal removed by a USFW officer, however, the landowner cannot remove the animal themselves or they will be in violation of the ESA and subject to fines and criminal penalties.¹⁵

As the ESA expands and increasingly impacts private property, factions are forming.¹⁶ One side is comprised of vocal supporters of the ESA, many of whom are environmental groups and individuals, some of whom reside in cities.¹⁷ Consequently, they may sometimes be environmentally disconnected from the necessary management of private lands to maintain its health and wildlife or realize the full impact on their rural counterparts, although they are taxed equally to fund the costs of the program and litigation.¹⁸ The other side includes private landowners whose activities and businesses can be greatly impacted or jeopardized by the extent of governmental oversight and

¹² Metz, *supra* note 8, at 3.

¹³ USFW *Habitat Conservation Plans Under the Endangered Species Act*, 1 (April 2011), <https://www.fws.gov/endangered/esa-library/pdf/hcp.pdf2>; Kirchheim, *supra* note 6, at 820.

¹⁴ Metz, *supra*, note 8, at 3 (including small scale projects such as commercial timber production, clearing a home and construction for personal use, stopping streams to build ponds, large scale grazing of livestock on federal lands, projects that involve areas specified as wetlands and predation of livestock by listed or threatened species).

¹⁵ *Id.* at 5.

¹⁶ Wilde, *supra* note 4, at 308-09.

¹⁷ Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization and Senselessness*, 37 SPG ENVIRONS ENVTL. L. & POL'Y J. 105, 132 (2014).

¹⁸ See generally Jennifer Sitton, *The Effects of Forestry Regulations on Rural Communities and the Urban Rural Divide in Oregon*, Thesis, p. 41, CLAREMONT MCKENNA COLLEGE (2015), http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=2015&context=cmc_theses; Kirchheim, *supra* note, 6 at 820.

regulatory restrictions due to ESA.¹⁹ Although diverging in opinions, parties on both sides of the controversy have an interest in the survival of wildlife and plants.²⁰

The full implications of some of the ESA regulations can be devastating.²¹ One example, in Riverside, California the potential fire danger around homes was extremely high due to dry vegetation.²² With fires approaching in the early hours of the morning, Michael Rowe used his tractor to disc the ground to make an emergency firebreak to save his house.²³ Residents had been previously warned by the Department of Fish and Wildlife against the fire prevention measures of clearing vegetation and discing.²⁴ Although clearing and discing are the most effective methods of preventing swiftly advancing fires, the listing of the Stephen's Kangaroo Rat prohibited such actions that would destroy its habitat.²⁵ Violations would lead to criminal and civil penalties, possible prison time or fines up to \$100,000.²⁶ Rowe's neighbors, who remained within ESA compliance, bore the brunt of the legislative restrictions when their homes, as well as their possession were destroyed in the fires.²⁷ After two more failed attempts at changing the legislation and another fire ten years later that destroyed 2,700 homes and killed seventeen people, a Memorandum

¹⁹ Jason Scott Johnston, Article, *The Tragedy of Centralization: The Political Economic of American Natural Resource Federalism*, 74 U. COLO. L. REV. 487, 568 (2003); Kirchheim, *supra* note 6, at 819-21.

²⁰ See generally HUNTINGTON & WILLIAMS, *Major Changes to Endangered Species Act Critical Habitat Rules Will Cause Substantial Impacts to Land Use*, Client Alert, 1 (2016), <https://www.hunton.com/files/News/5a27ed15-5f4d-4181-9b07-b361e860310c/Presentation/NewsAttachment/681a23e2-e205-4f71-899d-b3654e8ab515/major-changes-to-endangered-species-act-critical-habitat-rules-will-cause-substantial-impacts-to-.pdf>.

²¹ See generally Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, 2 PERC, PROPERTY AND ENVIRONMENTAL RESEARCH <http://www.perc.org/articles/endangered-species-act-1> (Discussing the elevation of the ESA aims over all other priorities); See generally HOUSE REPORT 94-224 (1994) (discussing the elevation of the Kangaroo Rat tunnels over fire prevention priority), <http://archive.gao.gov/t2pbat3/152125.pdf>.

²² See generally Stroup, *supra* note 21, at 4; H. R. 94-224 *supra* note 21.

²³ See generally Stroup, *supra* note 21, at 4; Kirchheim, *supra* note 6, at 804.

²⁴ See generally Stroup, *supra* note 21, at 4; Kirchheim, *supra* note 6, at 804.

²⁵ See generally Stroup, *supra* note 21, at 4. (explaining that discing is the process of turning over grass or soil by turning over the ground with discs behind a tractor.)

²⁶ See generally Stroup, *supra* note 21, at 4; Kirchheim, *supra* note 6, at 804.

²⁷ See generally Stroup, *supra* note 21, at 4.

of Understanding was reached that gave priority to fire prevention.²⁸ The Memorandum tentatively allowed clearances of brush from buildings for 100 feet.²⁹ In the State of California decisions in fire control that may affect a species must go through the Services first.³⁰

In 2016, elements of the ESA that expanded the “critical habitats” of species were redefined.³¹ This was accompanied by redefining elements of the Act, which in essence removed limits on the amount of species, habitats and lands subject to regulatory restrictions.³²

This Comment will discuss how “voluntary programs” instituted by the Department of the Fish and Wildlife, combined with the expansion of the 2016 ESA, constitute regulatory takings of private property for which compensation is due. Section II of this Comment will discuss the Endangered Species Act and its recent 2016 changes. Section III discusses the requirements of USFW Voluntary Program Incidental Take Permits. Section IV discusses the balance of people’s property rights against the government implemented regulations to determine if it is a taking of private property. Section V discusses policy recommendations and the Comment will conclude in Part VI acknowledging the need for balance in the enforcement of the Endangered Species Act and the compensation of small landowners under the 5th Amendment takings clause.

II. ENDANGERED SPECIES ACT

From its inception in the 1960s, the ESA set forth the framework for protecting endangered animals in the United States.³³ In 1973, it underwent a major overhaul that expanded its scope and power through further regulation of private, public and federal conduct regarding endangered species.³⁴ “Takes” of listed species, regardless of

²⁸ H. R. 94-224; *supra* note 21.

²⁹ *Id.*

³⁰ *Id.*

³¹ See generally HUNTINGTON, *supra* note 20, at 1; LAKE, BROWNLOW & LARKIN, *New ESA Regulations Expand Impact of Critical Habitat Designations* <https://www.hklaw.com/Publications/New-ESA-Regulations-Expand-Impact-of-Critical-Habitat-Designations-03-14-2016/>; ESA DEFINITIONS, 16 USCA §1532 (2016) (providing a listing of the 2016 ESA elements).

³² See generally HUNTINGTON, *supra* note 20, at 1; LAKE, *supra* note 31 at 2; 16 USCA §1532, (demonstrating the expansion of definition of Critical Habitat.)

³³ *A History of the Endangered Species Act of 1973, Timeline*, *supra* note 1 at 1.

³⁴ *Id.*

location were made illegal.³⁵ Federal projects were likewise limited in their actions by making it illegal to *adversely modify* critical habitat.³⁶ This was also the year the ESA was extended to include plants, invertebrates and to prohibit *takes* of listed species.³⁷ As the regulations that defined and streamlined takings provisions continued to evolve, *Incidental Takes* were allowed only under the protection of a Habitat Conservation Plan, which was first instituted in 1982.³⁸ The ESA continued to expand with the recommendation of an additional 3,000 plant species as candidates for listing as endangered plants in 1975.³⁹ Since that time continual legislative changes and the increase in citizen suits, the vehicle by which groups have sued the government under the ESA, have increased the scope, power and politicization of the Act.⁴⁰ In 2016, major changes were made to the Endangered Species Act that increased the ability of the USFW to place regulatory controls on private lands.⁴¹

A. 2016 Changes to the Endangered Species Act

The most recent changes to the Endangered Species Act became effective March 14, 2016.⁴² These are primarily expansions of the definitions that in effect extend the reach of the ESA exponentially.⁴³ Prior to these changes, and as early as 2005, there was concern within the government about the overreach of the ESA.⁴⁴ In a report to

³⁵ *Id.*; Schiff, *supra* note 17, at 107.

³⁶ Schiff, *supra* note 17, at 108.

³⁷ *A History of the Endangered Species Act of 1973, Timeline*, *supra* note 1.

³⁸ *Id.* (Incidental Takes were defined in 1996 as the “Take of a listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant.”); ESA DEFINITIONS, 50 CFR §402.02, 3 (2016).

³⁹ *A History of the Endangered Species Act of 1973, Timeline*, *supra* note 1.

⁴⁰ See generally Kirchheim, *supra* note 6 at 810; Wilde, *supra* note 4, at 308.

⁴¹ See generally HUNTINGTON, *supra* note 20, at 1; LAKE, *supra* note 31 at 1; 16 USCA §1532 (2016).

⁴² See generally HUNTINGTON, *supra* note 20, at 1; LAKE, *supra* note 31, at 1; 16 USCA §1532.

⁴³ See generally HUNTINGTON, *supra* note 20, at 1; LAKE, *supra* note 31; 16 USCA §1532.

⁴⁴ *The Endangered Species Act and Incentives for Private Landowners, Hearing before the Subcommittee on Fisheries, Wildlife and Water of the Committee on Environment and Public Works, United States Senate, 109th Cong., 15 (2005), (Opening Statement of Lisa Murkowski, Senator of Alaska),*

Congress, Senator Lisa Murkowski of Alaska addressed the Environmental Committee, and discussed the implications of the Act on property owners given its breadth and its punitive nature.⁴⁵

There are 2 aspects of the law that have very serious implications for property owners. First is the definition of taking as an activity that may occur on private land. It is extremely broad and the punishment for a taking is extremely serious.” . . . Second, there is the judicial issue. Any private party, including the most radical environmental rights advocacy groups, can force a landowner into a position of having to defend himself or herself in court against charges that the landowner's activities lead to a taking, potentially at great cost.⁴⁶

An increasing number of species are being listed and few are being removed from the list.⁴⁷ This is despite controversy over their recovery status.⁴⁸ Such a trend, combined with the broader definitions that define the ESA, will only increase the number of violators of the Act, and the polarization of opposing sides.⁴⁹

B. Changes in Definitions of Elements

The key to effecting change in the property rights of landowners is the language of the definitions in the Endangered Species Act.⁵⁰ These definitions set the limits of how far the government can extend its reach onto private property.⁵¹ Prior definitions that set limitations on the criteria for *determining protected habitat* were disregarded in the 2016 ESA.⁵² The potential reach of the Act has been extended by removal of the terminology limiting protected habitat to “only where

<https://www.gpo.gov/fdsys/pkg/CHRG-109shrg35459/html/CHRG-109shrg35459.htm>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See generally Schiff, *supra* note 17, at 117.

⁴⁸ *Id.*

⁴⁹ See generally, Andreas Olive, *It's Just Not Fair: The Endangered Species Act in the United States and Ontario*, ECOLOGY AND SOCIETY JOURNAL, 10 (2016).

⁵⁰ See LAKE, *supra* note 31, at 1, 2; 16 USCA §1532 (2106) (explaining that changes reflect the 2016 expansion of the government's role and powers under the 2016 ESA from protecting of critical species and habitat to focusing on conservation by “all activities including but not limited to scientific methods, census, law enforcement, habitat acquisitions and . . . regulated takings.” This expansion is accompanied by alterations in key definitions, particularly Critical Habitat).

⁵¹ See generally HUNTINGTON, *supra* note 20, at 1.

⁵² *Id.*

appropriate.”⁵³ The removal of this key wording now allows for an increase in the amount of habitat on private lands that can be designated as protected and as such placed under government regulatory control.⁵⁴

Another small but powerful change is the allowance of the Secretary of the Interior, “*at his discretion,*” to “identify specific area[s] within the geographical area occupied at the time of listing as well as any outside the geographic area occupied by the species to be considered for designation of critical habitat.”⁵⁵ The allowance of designation *outside of the geographical area the species in question lives on*, allows any property, for any reason found acceptable by the Secretary of the Interior, to be taken under regulatory control under the auspices of the protection of any species that does not currently reside there.⁵⁶

The USFW states that this designation would not affect private landowners but would only apply to any large or small enterprise that accepted federal funding, federal grant monies, subsidies, obtained a federal permit, or started an enterprise under a special federal program.⁵⁷ This is redundant because the landowner is already under similar restrictions.⁵⁸ Is it possible such enterprises could include federally funded startup programs, USDA programs, small farming grants as well as veteran agricultural training programs and others that are located on privately owned lands?⁵⁹

⁵³ LAKE, *supra* note 31, at 1, 2; 16 USCA §1532.

⁵⁴ LAKE, *supra* note 31, at 2.

⁵⁵ ESA Criteria for Designating Critical Habitat 50 CFR § 424.12, (2016), <https://www.law.cornell.edu/cfr/text/50/424.12>.

⁵⁶ LAKE, *supra* note 31, at 2; 16 USCA §1532.

⁵⁷ UNITED STATES FISH AND WILDLIFE, *Revision of the Definition of Destruction or Adverse Modification of Designated Critical Habitat Questions and Answers*, (2014).

https://www.fws.gov/endangered/improving_esa/pdf/AdMod_FAQs%20Final.pdf
https://www.fws.gov/endangered/improving_esa/pdf/AdMod_FAQs%20Final.pdf.

⁵⁸ EARTHJUSTICE, *Answer to Critical Habitat and the Endangered Species Act*, (2004). <http://earthjustice.org/sites/default/files/library/factsheets/RotaCHFAQ.pdf>. (Any existing terms that set limitations on what defined the criteria for determining “protected habitat” under previous versions of the ESA was disregarded in the 2016 version).

⁵⁹ United States Department of Agriculture, USDA Announces Grants to Help Veterans and Minority Farmers, Release No 0159.14.

<http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2014/07/0159.xml>.

The 2016 ESA also changes the definitions of “*Critical Habitat*” and “*Destruction or Adverse Modification*”.⁶⁰ Critical Habitat refers to areas needed by a species to feed, nest and breed.⁶¹ This would include areas within and outside of geographical areas the species resides in if the agency “*determines the area itself is essential for conservation.*”⁶² Simply stated, in accordance with the 2016 changes, “critical habitat” can now be set aside for endangered and threatened species where it was not allowable before.⁶³ Will new definitions impact small landowners whose animals graze plants utilized by threatened or endangered species even if that species does not currently reside there? There could be an impact to livestock owners who remove predators preying on their livestock as well.⁶⁴

The danger for landowners is that the activities they undertake on their lands may now result in the destruction or adverse modification of previously defined *crucial habitat*, which is now defined as “*designated critical*” habitat.⁶⁵ Damages include alterations to “physical or biological features essential to the conservation of a species or that preclude or significantly delay the development of such features.”⁶⁶

This seemingly small change in the definition refocuses the ESA and small landowners from the previous requirements to take measures to *conserve the species* to the current *conservation of the habitat*.⁶⁷ Conservation of a habitat can greatly affect the way a landowner uses his lands.⁶⁸ Seemingly innocuous activities, such as the removal of trees may now be found to alter “physical or biological features”, and require enrollment in a USFW program to protect the landowner from penalties under the ESA.⁶⁹ The habitat in question can also be within or outside of the geographical range of a listed species.⁷⁰

⁶⁰ See generally LAKE, *supra* note 31, at 2; 50 C.F.R. §402.02 Definitions (March 14, 2016). (West, Westlaw).

⁶¹ EARTHJUSTICE, *supra* note 58.

⁶² See 16 USCA §1532 (2016).

⁶³ See *id.*

⁶⁴ See LAKE, *supra* note 31, at 2; 16 USCA §1532.

⁶⁵ See 16 USCA §1532.

⁶⁶ ESA Definitions, 50 CFR §402.02, *supra* note 38, <https://www.law.cornell.edu/cfr/text/50/402.02>.

⁶⁷ See generally, 16 USCA §1532.

⁶⁸ USFW, *Habitat Conservation Plans Under ESA*, *supra* note 13 at 2.

⁶⁹ 50 CFR §402.02 *supra* note 38, at 2.

⁷⁰ See generally 16 USCA §1532 (5)(A)(i)(ii) (2016). Also see *Taylor v. United States* (unpublished) at Metz, *supra* note 8 at 13 (discussing an unpublished case

The 2016 changes in the ESA have also incorporated climate change.⁷¹ The potential reach of the ESA is greatly extended because it now includes conservation measures for the *possible* future habitats of various species based on altered migration patterns due to global warming, although these changes are not yet known or defined.⁷² No parameters or benchmarks have been established to preclude the possibility of increased uncompensated regulatory takings of private property in regulating lands for future possible, yet still unknown, changes in migratory patterns due to global warming.⁷³ This element combined with the conservation of the species habitat, and the restrictions on the uses of property on which the species does not reside, potentially removes all safety valves that protect the small landowner.⁷⁴ To sustain the new aims the ESA will increase taxes for both urban and rural populations, and place a larger burden on small landowners, farmers and ranchers whose lands can house large numbers of wildlife.⁷⁵

This is especially problematic for small landowning ranchers and farmers that fall under Section 7 or 9 who often cannot afford to incur fines for violations of the ESA and yet they are in a precarious position due to the high costs affiliated with enrollment in a program which would allow for incidental takes.⁷⁶

where plans to build home on lot expressly purchased for that purpose was prevented by the sudden appearance of nesting of eagles in a tree on the property. Their nesting would be disturbed by the homebuilding activities. The property owners were prevented from moving ahead with their plans regardless of expenses incurred to that point.)

⁷¹ NATIONAL OCEANIC AND ATMOSPHERIC ASSOCIATION, A CHANGING CLIMATE FOR ENDANGERED SPECIES, 1 (2013), http://www.nmfs.noaa.gov/stories/2013/12/12_4_2013climate_and_the_esa.html.

⁷² *Id.*

⁷³ See generally HUNTINGTON, *supra* note 20, at 1; LAKE, *supra* note 31.

⁷⁴ See generally HUNTINGTON, *supra* note 20, at 1; LAKE, *supra* note 31.

⁷⁵ See generally Ike C. Sugg, Article, *Caught in the Act: Evaluating the Endangered Species Act. Its Effects On Man and Prospects for Reform*, 5 CUMB. L. REV. 1, 2 (1993) (for a general overview of the issue at hand); Leslie Marshall Lewallen, Russel C. Brooks, Article, *Alsea Valley Alliance V. Evans and the Meaning of "Species" Under the Endangered Species Act: A Return to Congressional Intent*, 25 SEATTLE U.L. REV. 731, 735-37 (2002); Olive, *supra* note 49, at 735. (discussing the long terms effects of the *Alsea Valley Alliance* lawsuit as demonstrative of the effects of the Settlements with environmental organization litigation).

⁷⁶ For a comparison of process and costs see generally, USF, *Draft Habitat Conservation Planning Handbook*, Chapter 11-5.

https://www.fws.gov/endangered/esa-library/pdf/HCP_Handbook-Draft.pdf.

III. VOLUNTARY USFW PROGRAMS AND INCIDENTAL TAKE PERMITS

The United States Fish and Wildlife (USFW) offers voluntary programs landowners can enroll in to avoid penalties for infractions of the ESA provisions.⁷⁷ Enrollment in a program brings its own set of regulatory controls.⁷⁸ Enrollment can, however, protect a landowner from penalties for an infraction or “take” of select endangered species identified in the owner’s plan.⁷⁹ A *take* can result in a \$49,467 fine per incident, accompanied by possible criminal charges for a knowing violation of the ESA.⁸⁰ Being unaware a species was listed or on the property is not a defense to a taking.⁸¹ The penalty is up from a seemingly moderate amounts in comparison under the ESA a few years ago.⁸²

As additional private and public lands are regulated by the ESA, small agricultural enterprises could be seeing the deprivation of their sole means of primary or secondary income.⁸³ It could also spell the

⁷⁷ See generally USFW, *Habitat Conservation Plans under ESA* (2011), *supra* note 13, at 1.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ David Miller, *Endangered Species Law and Policy*, (June 30, 2016) (explaining that that fee relates to section 1538.)

<http://www.endangeredspecieslawandpolicy.com/2016/06/articles/fish-wildlife-service/u-s-fish-and-wildlife-service-increases-civil-penalties>.

⁸¹ *U.S. v. Nguyen*, 916 F.2d 1016, 1018 (5th Cir. 1990). (establishing that lack of knowledge the species was endangered is not a defense.)

⁸² See generally *Endangered Species Act Penalty Schedule*; 16 U.S.C. §1531 *et seq.* (January 2011) (to compare with previous fines).

<http://www.gc.noaa.gov/schedules/6ESA/EndangeredSpeciesAct.pdf>.

⁸³ USDA Small Farm Definitions, Animal Manure Management, August 19, 2013. <http://articles.extension.org/pages/13823/usda-small-farm-definitions> (explaining that USDA, in 2013 defined Small Farms as those with gross sales of less than \$250,000. They are made up of 4 classifications: Rural Residence farms as retirement farms whose operators are retired; Residential style/lifestyle farms whose operators derive their major income from another occupation; Immediate family farms of low income with gross sales of less than \$100,000 and High Sales farms with gross sales between \$100,000 = \$249,999); Kathleen Kassel, USDA Ag and Food Statistics; Charting the Essentials; Farming and Farm Income. (November 30, 2016). <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/farming-and-farm-income> (demonstrating that, in 2015, a USDA study found that 99 percent of U.S. farms were family farms with less than \$350,000 in gross income and accounted for 90% of all farmland and a quarter of the production).

end of hobby farms.⁸⁴ The ESA has many small landowners and agricultural operations worried about the discovery of a listed species, plant or invertebrate on their property.⁸⁵

Small landowners have every reason to be concerned about this discovery.⁸⁶ They are the primary stewards both of the land and the wildlife it supports.⁸⁷ Small ranchers cross graze livestock and rotationally graze to maintain low brush grass levels and reduce invasive weeds.⁸⁸ In the process they are also practicing fire suppression techniques.⁸⁹ Healthier grasslands, the removal of thistle and other invasive, non-native weeds that destroy grasslands, and the removal of excess brush balances, if not increases, the amounts and variety of wildlife a given property can support.⁹⁰ With the threat to

⁸⁴ Kirchheim, *supra* note 6, at 803, 820.

⁸⁵ Terry Anderson, *When the Endangered Species Act Threatens Wildlife*, 1 Property and Environmental Research Organization, (2014).
<http://www.perc.org/articles/when-endangered-species-act-threatens-wildlife>.

⁸⁶ *Id.*

⁸⁷ Kirchheim, *supra* note 6, at 819, 820 (according to studies done by the Nature Conservancy that almost-two thirds of endangered species are housed on private property); Scott Talbot, Director of the Wyoming Game and Fish Department, *Stewards of the Land, 1*, Wyoming Livestock Roundup, <http://www.wylr.net/guest-opinions/255-agencies/4961-stewards-of-the-land>.

⁸⁸ Heather Smith Thomas, *Multi-Species Grazing: Horses and Cows and Goats, Oh My*, *The Horse*, 1, 2 <http://www.thehorse.com/articles/26829/multi-species-grazing-horses-and-cows-and-goats-oh-my> (explaining that cross grazing is a pasture management method in which the type of species grazed on a given piece of land is changed, for example grazing horses on a pasture for a season, removing them, and replacing them with a ruminant species such as sheep, goats or cattle on the same pasture the following year. The ruminants will remove invasive weeds, and rank grass that has grown up, and in the process, ingest parasites that have passed through the digestive system and are present in the manure. The parasites (worms) from a select specie, both domestic and wildlife, cannot survive in the digestive system of another and vice versa. The result is the natural end to a parasitic cycle, and the balanced, natural removal of invasive weeds, brush, and rank grass. Rotational grazing is when livestock is rotated into different fields, allowing previously grazed pastures to rest. Although weeds and brush will not be removed, the parasitic cycle will be interrupted if they are not ingested, however the period of time they can remain dormant varies with the species).

⁸⁹ See generally HOUSE REPORT 94-224, *supra* note 21 (noting that the presence of vegetative matter was considered a major hazard in the Riverside fires).

⁹⁰ See generally *Managing Small Grasslands for Grassland Birds*, 1, 2 http://www.audubon.org/sites/default/files/documents/grassland_management_tips.pdf; Paul Krausman *et al.*, *Livestock Grazing, Wildlife Habitat and Rangeland Values*, Society for Range Management, (October 2009), https://www.fs.fed.us/rm/pubs_other/rmrs_2009_krausman_p

their recreational and agricultural use of their lands threatened, some have resorted to the practice of “Shoot, Shovel and Shut Up” where the landowner removes or discourages the species on their property rather than risk discovery.⁹¹ For those landowners often the least viable option is to enroll in a volunteer program offered through the USFW due to the labor, time and expense involved.⁹² This is counterproductive to the goals of the ESA and could permanently damage the chances of a species recovery.⁹³

There are a number of USFW programs the landowner can place his/her land under, one of which is the Habitat Conservation Plan.⁹⁴ Once enrolled, the owner can apply for an incidental take permit (“ITP”) that protects him/her from “incidental takes” or violations against a species or habitat that occurs during the governmental approved use of his/her property.⁹⁵ The protections last for the duration the property is enrolled in the program, and the incidental damage, injuries or death to specified species are identified as within the parameters of the USFW/Landowners program.⁹⁶ The owner is not protected if he/she removes his/her land from the program or violates any portion of the agreement.⁹⁷ Given the wide expansion the ESA has undergone in 2016, there are very few landowners or occupiers who could not potentially be in violation for the “taking” of a plant, animal, or invertebrate or for adversely impacting habitat that the species may use now or in the future due to climate change.⁹⁸

According to the 2011 ESA, the Habitat Conservation Plan (“HCP”) is required to protect landowners from the incidental take of a listed

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⁹¹ Anderson, *When the Endangered Species Act Threatens Wildlife*, *supra* note 85, at 1.

⁹² USFWS, *Draft Habitat Conservation Planning Handbook*, *supra* note 76, at 11-5.

⁹³ Anderson, *When the Endangered Species Act Threatens Wildlife*, *supra* note 85.

⁹⁴ USFW, *Habitat Conservation Plans Planning Handbook* *supra* note 76 at Glossary-8.

⁹⁵ Endangered Species Act Definitions 50 CFR §402.02, *supra* note 38; UNITED STATES FISH AND WILDLIFE SERVICE, *Permits*, (2016) (defining Incidental Takes in 1996 as the Take of a listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant).

⁹⁶ USFW SERVICE, *Habitat Conservation Plans Under ESA*, 1, *supra* note 13, at 2.

⁹⁷ USFW SERVICE, *Habitat Conservation Plans Under ESA*, 1, *supra* note 13, at 2; USFW *Permits*, *supra* note 95, at 1.

⁹⁸ *See generally* HUNTINGTON, *supra* note 20, at 1.

wildlife species.⁹⁹ Of the offered plans, the HCP is the only path to obtain the Incidental Take Permit.¹⁰⁰ The enrollment process for an HCP is time consuming.¹⁰¹ It requires a Habitat Conservation Plan developed by the landowner, an Implementation Agreement, application fees plus expenses for reports,¹⁰² and proof of the landowner's funding source(s) to pay for the implementation of the USFW plan presently and in the future.¹⁰³ A HCP also requires a National Environmental Policy Act ("NEPA") analysis and a biological assessment ("Biop") by Department of Fish and Wildlife.¹⁰⁴ Under the programs, the USFW reserves its right to restrict the regulated land use activity in the plan if it finds it is overly damaging in keeping with the definitions in the 2016 ESA.¹⁰⁵ The Services can also make any changes necessary to prevent additional damages that were not accounted for in the original plan, at its own expense.¹⁰⁶ A plan can take varying amounts of time to complete.¹⁰⁷

The conclusions of the DFW Biop will determine if mitigation measures are required as part of the enrollment process.¹⁰⁸ Mitigation measures "include but are not limited to payment into an established conservation fund or bank; preservation (via acquisition or conservation easement) of existing habitat; establishment of buffer areas around existing habitats; modifications of land use practices and restrictions on access".¹⁰⁹ At the completion of the Habitat Conservation Plan an Incidental Take Permit is issued that binds the landowner to the regulatory controls placed on the land.¹¹⁰ The Incidental Take Permit allows the landowner to "take" particular species and alter specific habitat in the course of his/her activities until

⁹⁹ USFW SERVICE, *Habitat Conservation Plans Under ESA*, 1, *supra* note 13, at 1.

¹⁰⁰ *Id.*

¹⁰¹ *See generally*, USFWS, *Draft Habitat Conservation Planning Handbook*, *supra* note 76 at 12-9.

¹⁰² *See generally*, USFWS, *Draft Habitat Conservation Planning Handbook*, *supra* note 76 at 11-5.

¹⁰³ *Id.*

¹⁰⁴ USFWS, *Draft Habitat Conservation Planning Handbook*, *supra* note 76, at Glossary 4, 11.

¹⁰⁵ USFW SERVICE, *Habitat Conservation Plans Under ESA*, 1, *supra* note 13, at 3.

¹⁰⁶ USFW SERVICE, *Habitat Conservation Plans Under ESA*, 1, *supra* note 13, at 2.

¹⁰⁷ *See generally* USFW, *Draft Habitat Conservation Planning Handbook*, *supra* note 76 at 12-9.

¹⁰⁸ *Id.*

¹⁰⁹ USFW SERVICE, *Habitat Conservation Plans Under ESA*, 1, *supra* note 13, at 2.

¹¹⁰ *Id.* at 1.

its expiration date.¹¹¹ After expiration or upon disenrollment, the landowner is subject to penalization for violation of the ESA in its entirety.¹¹² However, unlike the Incidental Take Permit which expires, the mitigation factors identified in the Habitat Conservation Plan do not expire and can, including the establishment of buffer zones, extend into perpetuity.¹¹³ The question remains whether or not the small landowner is bearing the majority of the burden of the Endangered Species Act and therefore is entitled to compensation under the Takings Clause in the 5th Amendment when enrolled in this program.

IV. LEGAL AUTHORITY AND ANALYSIS

A. The 5th Amendment Takings Clause

The 5th Amendment to the Constitution protects citizens from the governmental takings of private property without just compensation.¹¹⁴ Three types of “takings” have been established: per se, per se not, and Regulatory Takings.¹¹⁵

A per se taking involves a government regulation that results in a physical invasion of property or a total loss in its economic value.¹¹⁶ A per se not or nuisance per se taking involves common law nuisance claims, and provides an exception to state and local governments for regulatory total economic takings claims based on the existence of a private or public nuisance.¹¹⁷ Finally, Regulatory Takings, is defined as the appropriation by government of private land for which compensation must be paid.¹¹⁸

¹¹¹ USFW SERVICE, *Habitat Conservation Plans Under ESA*, 1, *supra* note 13 at 2.

¹¹² *Id.*

¹¹³ *Id.* at 2.

¹¹⁴ U.S. Const. amend. V.

¹¹⁵ *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1004, 1071 (1992).

¹¹⁶ *Lucas*, 505 U.S. at 1028-29.

¹¹⁷ David L. Callies and David A. Robyak, *The Categorical (Lucas) Rule: “Background Principles,” Per Se Regulatory Takings, and the State of Exceptions* 30 *TOURO L. REV.* 245 384-385 (2014).

¹¹⁸ *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

1. *Per Se Takings*

Per se takings can be physical or economic.¹¹⁹ A physical taking occurs when the government “has taken property by causing or authorizing a physical invasion”.¹²⁰ The Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), set the standard for permanent physical takings, when the government’s required installation of a cable box on a privately owned building constituted a physical taking.¹²¹ The Supreme Court stated that “the placement of a fixed structure on land or real property . . .” constitutes a physical taking.¹²²

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), served as the landmark case to establish per se economic takings. In *Lucas*, the State of South Carolina adopted a coastal protection plan that established a building moratorium after *Lucas* had purchased the property.¹²³ The Court held this a per se taking because the adoption of the regulation after the fact rendered the property valueless.¹²⁴ The Supreme Court established that a regulation is an economic taking when it deprives the property owner of all economic use/benefit of his land.¹²⁵

2. *Per Se Not/ Nuisance Per Se Takings*

Nuisance per se also grew out of the decision in *Lucas v. South Carolina Coastal Council*.¹²⁶ In *Lucas*, the Court stated that due to the regulation’s passing after *Lucas* purchased the property, South Carolina could only avoid a takings claim if there were elements of nuisance that applied to the proposed *Lucas* project that could be identified based on property law.¹²⁷ The Court further clarified that States have a defense to regulatory takings claims if the landowner’s title was under state or local restrictions at the time the property was

¹¹⁹ Callies and Robyak, *supra* note 117, at 371, 374.

¹²⁰ Metz, *supra* note 8, at 3.

¹²¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

¹²² *Loretto*, 458 U.S. at 437.

¹²³ *Lucas*, 505 U.S. at 1006 - 07.

¹²⁴ *Id.* at 1007.

¹²⁵ *Id.* at 1019.

¹²⁶ *Id.* at 1031.

¹²⁷ *Id.*

purchased.¹²⁸ In such situations the “restriction never affects a taking”.¹²⁹ No compensation is owed if the State simply makes explicit what is already in the title itself, i.e. the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.¹³⁰

3. Regulatory Takings and The Penn Central Balancing Test

The Court established in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), the balancing test that has been used since to evaluate cases that fall under Regulatory Takings.¹³¹ The test allows the Court to examine each case on an individual basis.¹³² In doing so, it traditionally balances the impact of three factors: the character of the government actions; the degree to which the regulation interferes with a private landowner's distinct investment backed expectations; and the economic impact of the regulation on the private landowner.¹³³ The Court's *ad hoc* evaluation of each of the elements can be visualized on a sliding scale.¹³⁴ At one end of the scale is one extreme that would indicate the element in question had a large impact on the landowner, and on the other end of the scale it would tend towards little to no impact.¹³⁵ A balance of regulatory versus individual interests would be found somewhere in the middle.¹³⁶ Finally, the Court looks at the findings on the scale of each of the three elements and weighs them as whole against each other to determine where the balance of interests falls, or more

¹²⁸ Michael C. Blumm, Lucan Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles As Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 327 (2005).

¹²⁹ Sugameli, Glenn P, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 VA ENVTL L. J. 439, 458 (1993).

¹³⁰ *Lucas*, 505 U.S. at 1031, 1032.

¹³¹ *Penn Central*, 438 U.S. at 124.

¹³² *Id.*

¹³³ *Loretto*, 458 U.S. at 426; *Maritrans Inc. v. United States*, 342 F.3d 1344, 1351 (2003).

¹³⁴ See generally *Penn Central*, 438 U.S. at 124-129 (providing a general introduction to takings).

¹³⁵ See generally *id.* at 123-124 (providing a general introduction to takings); *Loretto*, 458 U.S. at 426; *Maritrans Inc.*, 342 F.3d at 1351.

¹³⁶ See generally *Penn Central*, 438 U.S. at 123-124 (providing a general introduction to takings); *Loretto*, 458 U.S. at 437, 438; *Maritrans Inc.*, 342 F.3d at 1351.

specifically, whether there was a taking or not.¹³⁷ The scales will weigh differently in each and every case, which is the nature of the Court's *ad hoc* approach.¹³⁸

B. The Application of the Regulatory Takings Framework as Applied to Small Landowners

There have been very few ESA cases brought by small landowners since the 1980's.¹³⁹ Few of those brought prior to that time were successful.¹⁴⁰ Consequently, cases that successfully used the balancing test framework for ESA regulations are rare.¹⁴¹ For those reasons, I have chosen to use two diverse cases in examining the Court's use of the Penn Central Balancing Test - *Tulare Lakes Basin Water Storage District v. U.S.*, 49 Fed. Claims 313 (2001) and *Christy v. Hodel*, 857 F.2d 1324 (1988).¹⁴² In *Tulare Lakes Basin*, the Court determined a takings had occurred when water contracts were affected because of ESA regulations, but declined to use the Penn Central balancing test despite the State's request to do so.¹⁴³ In *Christy*, a rancher who shot and killed a protected grizzly bear that was preying on his flock of sheep, was fined for a taking, the Court analyzed it under a physical takings claim, however, these cases serve as a good models to examine the complexity of applying the balancing test to ESA cases.¹⁴⁴

1. Element 1: The Nature of the Governmental Interest

The first element to be weighed in any Regulatory Takings analysis is the nature of the governmental regulation.¹⁴⁵ In terms of the ESA, this element should be approached with the understanding that the government is charged with the protection of the country's natural

¹³⁷ See generally *Penn Central*, 438 U.S. at 123-124 (providing a general introduction to takings); *Loretto*, 458 U.S. at 432; *Maritrans Inc.*, 342 F.3d at 1351.

¹³⁸ See generally *Penn Central*, 438 U.S. at 124; *Loretto*, 458 U.S. at 426; *Maritrans Inc.*, 342 F.3d at 1351.

¹³⁹ Blaine Greene, *The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, 15 Yale J. on Reg. 329 332.

¹⁴⁰ *Id.*

¹⁴¹ See Metz, *supra* note 8, see Summary.

¹⁴² See generally *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988); *Tulare Lakes Water Basin Storage District v. United States*, 49 Fed. Cl. 313 (2001).

¹⁴³ *Tulare Lakes Water Basin Storage District*, 49 Fed. Cl. at 318.

¹⁴⁴ See generally *Christy*, 857 F.2d at 1324.

¹⁴⁵ *Penn Central*, 438 U.S. at 124.

resources for the benefit of citizens.¹⁴⁶ In passing regulations to protect those natural resources, the government is exercising its inherent police powers.¹⁴⁷ Due to these considerations alone, the nature of the government action would initially register closer to “no taking” having occurred.¹⁴⁸ However, if the regulation in question was to be found to be so overly restrictive from its inception that it negatively impacts the interests of a segment of the population, such as small landowners, or the population as a whole, the impact of the regulation would move to the opposite end of the scale indicating the possibility of a takings having occurred.¹⁴⁹ The same could be true if the regulation in question became increasingly restrictive.¹⁵⁰ The deprivation of contractual water rights in *Tulare Basin Water District v. U.S.*, 49 Fed Claims 313 (2001) is demonstrative of this principle.¹⁵¹

In *Tulare*, the results of the Biop conducted by the Department of Wildlife resulted in the restriction of the “time and manner” of pumping water from the Delta.¹⁵² The limitations that were initiated for salmon but were extended the following year to the delta smelt, became increasingly restrictive over the next few seasons.¹⁵³ The Tulare Lake Basin Water District water losses went from 9,770 acre-feet of water to 2,050 acre-feet between 1992 and 1994.¹⁵⁴ Here, the regulation passed by the State in the interests of protecting salmon and the delta smelt became increasingly restrictive, interfering, and ultimately prevent the Water Basin’s ability to fulfill its State contractual obligations until it was no longer able to meet its obligations.¹⁵⁵ This is an example of a regulation that was restrictive to the point where the business or interest in question could no longer operate.¹⁵⁶ Such a regulation would register on the extreme end of the scale as constituting a possible taking.¹⁵⁷ In this case, the regulations

¹⁴⁶ *Christy*, 857 F.2d at 1335.

¹⁴⁷ *Id.*

¹⁴⁸ *Christy*, 857 F.2d at 1335; *Tulare Lakes Water Basin Storage District*, 49 Fed. Cl. at 315.

¹⁴⁹ See generally *Christy*, 857 F.2d at 1335; *Penn Central*, 438 U.S. at 124.

¹⁵⁰ See generally *Christy*, 857 F.2d at 1335, 1336-37; *Penn Central*, 438 U.S. at 124.

¹⁵¹ *Tulare Lakes Water Basin Storage District*, 49 Fed. Cl. at 318.

¹⁵² *Id.* at 315, 316.

¹⁵³ *Id.* at 315, 322.

¹⁵⁴ *Id.* at 316.

¹⁵⁵ *Id.* at 319.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

were restrictive enough that the Court found a physical taking at the plaintiff's request despite the defendant's argument that the claim should be evaluated under the Penn Central balancing test.¹⁵⁸

In *Christy*, the Court reached a different conclusion than it reached in *Tulare*.¹⁵⁹ In *Christy*, a livestock rancher killed a federally protected grizzly bear while two were charging his herd of sheep on rented grazing lands.¹⁶⁰ Under the ESA regulations, it was illegal for *Christy* to kill the bears himself.¹⁶¹ To protect his private property, he was first required to obtain an Incidental Take Permit ("ITP").¹⁶² The ITP was applied, paid for, and subsequently approved by the USFW Service, and a UFSW trapper was hired to remove the bears.¹⁶³ The same two bears had killed eighty-four of *Christy's* sheep by the time of the final encounter, despite multiple attempts by the trapper to scare away or remove them.¹⁶⁴ *Christy* was standing with the trapper when the bears made yet another charge at the herd.¹⁶⁵ *Christy* fired killing one bear mid-charge, and was subsequently fined for killing an endangered species.¹⁶⁶

When considering the first element, the nature of the government's interests in *Christy*, the government's interest in protecting natural resources for the general public was found to be within its responsibility and power.¹⁶⁷ However, there is another aspect that further complicates the *Christy* case and many other interest/violations of the ESA by rural landowners that are not considered by the Court.¹⁶⁸ The recovery of governmentally protected species under the ESA can, in cases, recover to the point that balance is lost, and the species are subject to territorial disputes and/or begin to outstrip their food supplies.¹⁶⁹ This can lead to increased interactions with small

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1336, 1337 (While the *Christy* Court decided there was no physical taking and the Secretary Acted within his scope, the Court in *Tulare* ruled that there was).

¹⁶⁰ *Christy*, 857 F.2d at 1326.

¹⁶¹ *Id.* at 1327.

¹⁶² *Habitat Conservation Plans Under ESA*, *supra* note 76, at 3; *Christy*, 857 F.2d at 1326.

¹⁶³ *Christy*, 857 F.2d at 1326.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1336.

¹⁶⁸ *See generally id.* at 1332-33.

¹⁶⁹ *See generally id.* at 1333-36.

ranchers and farmers.¹⁷⁰ If the standards for the recovery of the species are not determined based on the existence of habitat and are removed from the ESA list once that goal is reached, the larger animal populations will quickly outstrip their natural food supplies and habitations in undeveloped land/property. Climactic conditions such as extended drought can exacerbate the situation.¹⁷¹ This directly affects the small landowner because in order to control the increased animal populations' predatory behavior it requires the affected parties to obtain an ITP and enrollment of their property in a USFW voluntary program.¹⁷² Factoring this in may move the balance closer to constituting a taking as decided in *Tulare*.¹⁷³

2. Element 2: The Extent of Interference with the Landowners Investment Backed Expectations

The second element of the balancing test is the extent of interference with a landowner's distinct investment backed expectations, as established in *Keystone Bituminous Coal Ass'n v De Benedictis*, 107 S.Ct. 1232 (1987).¹⁷⁴ In *Christy*, the question is if the regulation was in place at the time of purchase did a taking occur because the landowner could not have expectations for the property outside of what the regulations allowed?¹⁷⁵ If the regulation in question was not in place prior to the purchase of the property, and the regulation is then put into place, the measure of the scale can fall anywhere depending on what the landowners' expectations for the property was, and the extent, the regulation impacts those expectations.¹⁷⁶

¹⁷⁰ *Id.* at 1333 (noting that the total recovery of the grizzly bear was discussed by the Court in *Christy*. Increased predation on domestic farming animals and crops could increase with the full recovery and subsequent overpopulation of protected species that are not removed from the list to the point of causing the interests of the parties great harm).

¹⁷¹ See generally effect of climactic conditions on water contracts *Tulare Lakes Water Basin Storage District*, 49 Fed. Cl. at 315.

¹⁷² See generally *Habitat Conservation Plans Under the Endangered Species Act*, *supra* note 13, at 1.

¹⁷³ See generally *Christy*, 857 F.2d at 1333; *Seiber v. United States*, USCA, 364 F.3d 1356, 1361.

¹⁷⁴ *Keystone Bituminous Coal Ass'n v. De Benedictis*, 107 S.Ct. 1232, 1258 (1987).

¹⁷⁵ See generally *Penn Central*, 438 U.S. at 125.

¹⁷⁶ *Id.*

In *Tulare*, the water contracts were in effect prior to the ESA regulations.¹⁷⁷ The nature of the ESA regulations is fluid and the effects on an owner's expectations can be reevaluated to determine the status of the species(s) in question (and the requisite costs of obtaining an ITP).¹⁷⁸ If evidenced, as in *Tulare*, that the regulations become increasingly more restrictive, and the investment backed expectations increasingly reduced, the measure of its effect would move towards a taking.¹⁷⁹

Other factors that may be considered are the ripple effects of the restrictions – such as the owner's interests serving a public need or a needed commodity.¹⁸⁰ In *Tulare*, the supply and quality of water delivered to the public was in jeopardy, and was measured against the possible detrimental effects on the regular run of salmon in the same rivers, which could have been affected annually.¹⁸¹ The public was considered to have priority.¹⁸² This is in contrast to *Christy* in which the Court was dealing with a roaming predatory animal that moved with location of a food supply impacting a private owner's interest.¹⁸³

The government's responsibility for placing ESA restrictions on property, and its lack of control over the sudden presence of a protected species on the property limited *Christy's* intended uses *after* the property's purchase.¹⁸⁴ Viewed in this light the timing of the protected species is critical when examining the investment backed expectations.¹⁸⁵ *Christy* argued the ESA regulations interference with investment backed expectations required him to tolerate a predatory animal on his land because the limits on hunting the protected bears had increased the numbers dramatically.¹⁸⁶ The predation impacted the investment-backed expectations *Christy* had when he purchased the sheep, and rented the land to graze them as a business investment.¹⁸⁷ In

¹⁷⁷ See generally *Tulare Lakes Water Basin Storage District*, 49 Fed. Cl. at 315.

¹⁷⁸ See generally *Habitat Conservation Plans Under the Endangered Species Act*, *supra* note 13, at 1.

¹⁷⁹ See generally *Tulare Lakes Water Basin Storage District*, 49 Fed. Cl. at 319.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 317, 322.

¹⁸² *Id.* at 317.

¹⁸³ See generally *Christy*, 857 F.2d at 1332-33.

¹⁸⁴ See generally *Christy*, 857 F.2d at 1326; Seiber, USCA, 364 F.3d at 1359-60.

¹⁸⁵ See generally *Christy*, 857 F.2d at 1326; *Tulare Lakes Water Basin Storage District*, 49 Fed. Cl. at 319; *Penn Central*, 438 U.S. at 124, 125.

¹⁸⁶ *Christy*, 857 F.2d at 1333.

¹⁸⁷ *Id.* at 1326.

this case the Court would find the ESA regulation protecting the bears was in effect prior to *Christy's* livestock being preyed upon, therefore the ESA regulation protecting the bears would not constitute a regulatory taking.¹⁸⁸ However, when further examined in light of the growing populations of such prey species, the increased predations caused by them, coupled with the unpredictability of their movements, the balance of the interests may shift.¹⁸⁹ A growing population of prey animals protected by the regulations increasingly impacts an owner's investment backed interests.¹⁹⁰ Livestock owners' interests are impacted when it is no longer possible to run livestock at a profit.¹⁹¹ In *Christy's* case, his investment-backed expectation was almost completely wiped out by two bears in one season.¹⁹² Rather than shifting the balance in the interest of Christy, the Court made a clear distinction between its responsibility for placing restrictions on a property, that in this case allowed for the growth of the bear populations, and its lack of control over the sudden presence of a protected species on that property which then limits its intended uses after the property's purchase.¹⁹³ As in *Tulare*, this removes an element of certainty as to the extent a small landowner's investment backed expectations will be impacted from year to year.¹⁹⁴

C. The Economic Impact of the Regulation

In considering the Court's examination of the final element, the economic impact of the regulation, *Christy* argued that it was the government regulations protecting grizzly bears as an endangered species that forced him to suffer the presence of the bears and watch the predation of his sheep and loss of economic value.¹⁹⁵ The Court would evaluate *Christy's* entire property or stock in considering the

¹⁸⁸ Compare generally *Christy*, 857 F.2d at 1326-1327, with *Penn Central*, 438 U.S. at 126.

¹⁸⁹ See *Christy*, 857 F.2d at 1333 (demonstrating *Christy's* argument that species who had recovered and were still protected placed ecological pressures on landowners in their search for food).

¹⁹⁰ See generally *id.* at 1333.

¹⁹¹ *Id.* at 1327.

¹⁹² *Id.*

¹⁹³ *Id.* at 1328, 1334-1335.

¹⁹⁴ Compare *Christy*, 857 F.2d at 1334, with *Tulare Lakes Water Basin Storage District*, 49 Fed. Cl. at 318-19.

¹⁹⁵ *Christy*, 857 F.2d at 1328, 1334.

effect of the losses due to the regulation in question.¹⁹⁶ If the losses to *Christy's* flock were severe enough, it could tend towards a regulatory taking.¹⁹⁷ However, since the Court could not control the location of the predatory animals that it protected, the measure of impact would have fallen closer towards no taking having occurred.¹⁹⁸ This is exactly what occurred in *Christy v. Hodel*. The court conceded to the damage caused by the ESA regulation but removed the government from any responsibility stating that, "damage to private property by protected wildlife does not constitute a taking."¹⁹⁹ This is indicative of the hurdles small landowners face in Court when challenging the ESA regulations.²⁰⁰

In evaluating the economic impact on the Tulare Water Basin, the *Tulare* Court would have to measure the impact of the regulation on the ability of the Water Basin to deliver water that met a proscribed salinity standard.²⁰¹ The Court did consider the ability to deliver on those contracts against the costs of their inability to deliver contracted water due to the regulation.²⁰² The sliding scale of the economic impact could move in either direction depending upon the weight the Court placed on breach of contract of state standards resulting in failure to deliver water.²⁰³ The Court declined to apply Penn Central but if evaluated under the balancing test as the defendant contended should have been done, the economic loss would not support a taking.²⁰⁴ The Courts instead applied a physical taking analysis, as opposed to a regulatory takings analysis and found a per se taking.²⁰⁵

D. The Final Balancing

¹⁹⁶ As established in *Keystone*, 107 S.Ct. 1232, 1249.

¹⁹⁷ Using the analysis in *Keystone*, 107 S.Ct. at 1249.

¹⁹⁸ See generally *Christy*, 857 F.2d at 1334.

¹⁹⁹ *Id.* at 1328.

²⁰⁰ See generally Metz, *supra* note 8, at 3 (noting that additional hurdles include procedural hurdles such as meeting filing an ITP and the required HCP or working through the state courts in order for the claim to be ripe or meeting the threshold requirements to file in federal court. The financial costs alone often discourage the filing of claims).

²⁰¹ *Tulare Lakes Water Basin Storage District*, 49 Fed. Cl. at 316.

²⁰² *Id.* at 319.

²⁰³ *Id.* at 322.

²⁰⁴ *Id.* at 318-19.

²⁰⁵ *Id.*

In making the final determination the Court will evaluate whether the three elements considered together indicate if a taking has occurred or not.²⁰⁶ If the balance of the three tests demonstrates the regulation does not cause a small portion of the population to be unduly affected by the government regulation put in place for the public's interest, then a regulatory taking has not occurred.²⁰⁷ Conversely, if a small segment of the population is unduly affected then a regulatory taking has occurred, and compensation is due.²⁰⁸ In *Christy*, the government's interest in protecting endangered species outweighed the interest of the individual in removing an endangered species to protect his herd.²⁰⁹ The interference on *Christy's* investment backed expectation may not have been enough to be considered a taking regardless of the number of sheep he had lost because the regulation was in place prior to his grazing of the sheep.²¹⁰ If these two factors are weighed and then compared to a finding that the economic expectation of the regulation affected *Christy*, it would not be enough to tip the balance towards a taking having occurred, regardless of the amount of losses he suffered.²¹¹

In *Tulare*, the government regulation protecting water, a natural resource, would again be paramount.²¹² The impact on the water board's investment backed expectations, although based on pre-drought conditions, may be found to have been greatly impacted as a result of the increasingly restrictive regulations.²¹³ The final factor, the economic impact of the regulation, if viewed as the defendant's unsuccessfully requested the Court to do using the balancing test, would have been minimal when compared with their total contracts.²¹⁴ If *Tulare* had been evaluated using the balancing test rather than as per se taking, the outcome may have indicated the opposite and the final outcome may find that a taking did not take place.²¹⁵

As the 2016 ESA increases the number of species protected combined with the expansive changes in the definitions, the small

²⁰⁶ *Penn Central*, 438 U.S. at 124-129.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 125.

²⁰⁹ *Christy*, 857 F.2d at 1330-31.

²¹⁰ *Compare Penn Central*, 438 U.S. at 124, with *Christy*, 857 F.2d at 1326.

²¹¹ *Penn Central*, 438 U.S. at 124-26.

²¹² *See generally Tulare Lakes Water Basin Storage District*, 49 Fed. Cl. at 319.

²¹³ *Id.*

²¹⁴ *See generally id.* at 319.

²¹⁵ *Id.* at 319-20.

landowner's investment backed expectations and the economic interests will be greatly impacted and no compensation will be paid to affected landowners.²¹⁶

V. POLICY RECOMMENDATIONS

The changes to the 2016 Endangered Species Act have substantially increased the breadth and reach of the Act and its effects on the small landowner with small agricultural/ranching enterprises.²¹⁷ The consequence of the changes may eliminate hobby farms, and severely reduce the ability of small businesses to start up or survive.²¹⁸ Policy reform is needed. Citizen suits have generated large amounts of taxpayers money to environmental organizations.²¹⁹ Taxpayer's dollars are currently used to pay for US government's litigation costs against environmental groups using citizen suits to increase the numbers of species listed could be saved.²²⁰ A portion of those funds could be used to implement education programs for small rural landowners on methods to encourage protected wildlife and pursue their ranching/farming while protecting the habitat.²²¹ Rather than programs that hold the threat of exorbitant fines and regulatory controls, affected landowners could instead pay a fee that would go to pay for those educational programs, much in the same way that hunting and fishing programs operate an excellent model program is the Wolf Compensation Trust.²²² Such an approach would also better serve

²¹⁶ See generally Kirchheim, *supra* note 6, at 819-20 (For a discussion of economic and private property rights impacts).

²¹⁷ See generally HUNTINGTON, *supra* note 20, at 1; LAKE *supra* note 31, at 1.

²¹⁸ Kirchheim, *supra* note 6, at 820.

²¹⁹ See US ACCOUNTABILITY OFFICE GAO-11-650 *Cases against EPA and Associated Costs over Time* 24 (Aug 1, 2011), <http://www.gao.gov/products/GAO-11-650>
<http://www.gao.gov/products/GAO-11-650>.

²²⁰ Center for Biological Diversity, *The Endangered Species Act: A Wild Success*, http://www.biologicaldiversity.org/campaigns/esa_wild_success/ (stating that since 2008 - 2013 they have been successful in the designation of 233 million acres of critical habitat, 95% of all critical habitat set aside. As they describe it "an area larger than the entire national forest system [191 million acres], twice as large as California (105 million acres), and almost three times the size of the national park system [84 million acres]").

²²¹ UNITED STATES FISH AND WILDLIFE, CATTLE HELP BUILD UP ENDANGERED BUTTERCUP, (2016); <https://www.fws.gov/news/blog/index.cfm/2016/5/4/Cattle-Help-Build-Up-Endangered-Buttercup>.

²²² Wolf Compensation Trust pays ranchers for losses due to predation of their livestock by wolves. The ranchers work with the program and find it a fair exchange.

regional issues rather than the programs requirements being developed in a government or environmental agencies/groups think tank located in a different area. The programs would benefit both parties and ultimately preserve the natural wildlife under threat.

As previously discussed, there are consequences to the ESA that Courts have not considered.²²³ First and foremost is the problematic aspect of the roaming nature of the protected species.²²⁴ The Courts have clearly stated they are responsible for restricting the landowner's ability to protect its assets/property from the animal in question.²²⁵ However, it does not take responsibility for any damages done by the animals that are under their protection as a result of the ESA listing, and whose growing numbers make increased interactions between livestock/crops and the species inevitable.²²⁶ Historically, the landowner is uncertain of any success in Court.²²⁷ At the very least the case cannot be heard unless the landowner has pursued the incidental take permit.²²⁸ This places him/her in an untenable situation. The only legal recourse available is to enroll his/her lands in one of the voluntary programs in order to legally protect his investment.²²⁹ The costs and length of time it takes for landowners to work with the Department of Wildlife to relocate, remove or discourage a predator is costly in terms of the damage being done, and the mandatory enrollment of the land in a "voluntary program" in order to receive an Incidental Take Permit is not cost effective for many small landowners.²³⁰ Yet he/she has no recourse. If the landowner cannot afford the enrollment in a voluntary program, it is doubtful he/she can afford litigation. Educational programs and incentives or rewards for the protection of species would allow all landowners, regardless of their size, to be involved in the process of preserving wildlife, while

They tolerate the wolves because they are not causing them economic damage.

Defenders of Wildlife, WOLF COMPENSATION TRUST;

http://www.defenders.org/publications/statistics_on_payments_from_the_defenders_wildlife_foundation_wolf_compensation_trust.pdf.

²²³ See *Christy*, 857 F.2d at 1333.

²²⁴ See *id.* at 1335.

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ Metz, *supra* note 8, see Summary.

²²⁸ Metz, *supra* note 8, at 6.

²²⁹ USFW *Habitat Conservation Plans Under the Endangered Species Act*, *supra*, note 13 at 2; <https://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>.

²³⁰ See Murkowski, *supra* note 44.

residents of urban areas would benefit from reduced taxes needed to implement the program.²³¹ The government would be better using its resources to prosecute the most egregious offenders rather than applying increasing pressure to all landowners, many of whom are proponents of protecting wildlife.

VI. CONCLUSION

Preservation of wildlife and those habitats being destroyed by an increased human population, urban sprawl, industries and farming and ranching pursuits is imperative since left unprotected many will perish.²³² However, continual litigation that needs perpetual funding and increasing regulations that stifle the free exchange of ideas is capable of doing equal damage to those species populations whose residence on a property will be actively discouraged to avoid falling under regulations.²³³ The effects of the current regulations on small landowners and the voluntary programs offered by the Department of Fish and Wildlife amount to a taking of private property without compensation as defined in the 5th Amendment, and for which compensation is due.²³⁴ Without such compensation we may see the end of the small landowner/agricultural business and increased reliance on large scale commercial farming that can absorb the costs affiliated with the ESA. In that case neither the public or the wildlife wins.

ANNEMARIE TAYLOR²³⁵

²³¹ See Jeffrey A. Michael, *The Endangered Species Act and Private Landowners Incentives*, University of Nebraska, USDA National Research Center, 34 (2000).

²³² Wilde, *supra* note 4, at 348 (this includes animals and potentially medicinally valuable plants).

²³³ GAO-11-650, *supra* note 219, at 23.

²³⁴ Stroup, *supra* note 21, at 9.

²³⁵ J.D. Candidate, San Joaquin College of Law, 2019. I would like to thank my faculty advisor, Professor Jeffrey Purvis, whose knowledge guided me through the entire process of this comment. I would also like to thank Professor Andrew Kucera who kindly reviewed my comment and gave me valuable advice on presentation and analysis. My deepest gratitude goes to the entire SJCL Editorial Board, for their invaluable experience and guidance throughout this process, particularly BreAnne Ruelas for all her efforts in getting this comment organized. Finally, without the support of my family there would not have been the time to do the necessary researching, writing and revisions for this piece. Once again, they have provided incredible support and deserve my heartfelt thanks.