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


\(^2\) 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 (enumerating Citizen Suits general regulations).

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.  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.

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. 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.

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. 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.”

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

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


7 Wilde, supra note 4, at 326.


9 Id.


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

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. 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.

As the ESA expands and increasingly impacts private property, factions are forming. One side is comprised of vocal supporters of the ESA, many of whom are environmental groups and individuals, some of whom reside in cities. 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. 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.
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.
regulatory restrictions due to ESA.\textsuperscript{19} Although diverging in opinions, parties on both sides of the controversy have an interest in the survival of wildlife and plants.\textsuperscript{20}

The full implications of some of the ESA regulations can be devastating.\textsuperscript{21} One example, in Riverside, California the potential fire danger around homes was extremely high due to dry vegetation.\textsuperscript{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.\textsuperscript{23} Residents had been previously warned by the Department of Fish and Wildlife against the fire prevention measures of clearing vegetation and discing.\textsuperscript{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.\textsuperscript{25} Violations would lead to criminal and civil penalties, possible prison time or fines up to $100,000.\textsuperscript{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.\textsuperscript{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

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  \item \textsuperscript{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.
  \item \textsuperscript{22} See generally Stroup, supra note 21, at 4; H. R. 94-224 supra note 21.
  \item \textsuperscript{23} See generally Stroup, supra note 21, at 4; Kirchheim, supra note 6, at 804.
  \item \textsuperscript{24} See generally Stroup, supra note 21, at 4; Kirchheim, supra note 6, at 804.
  \item \textsuperscript{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.)
  \item \textsuperscript{26} See generally Stroup, supra note 21, at 4; Kirchheim, supra note 6, at 804.
  \item \textsuperscript{27} See generally Stroup, supra note 21, at 4.
\end{itemize}
of Understanding was reached that gave priority to fire prevention.\textsuperscript{28} The Memorandum tentatively allowed clearances of brush from buildings for 100 feet.\textsuperscript{29} In the State of California decisions in fire control that may affect a species must go through the Services first.\textsuperscript{30}

In 2016, elements of the ESA that expanded the “critical habitats” of species were redefined.\textsuperscript{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.\textsuperscript{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 5\textsuperscript{th} 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.\textsuperscript{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.\textsuperscript{34} “Takes” of listed species, regardless of

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\textsuperscript{28} H. R. 94-224; supra note 21.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{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.)
\textsuperscript{33} A History of the Endangered Species Act of 1973, Timeline, supra note 1 at 1.
\textsuperscript{34} Id.
location were made illegal.\textsuperscript{35} Federal projects were likewise limited in their actions by making it illegal to \textit{adversely modify} critical habitat.\textsuperscript{36} This was also the year the ESA was extended to include plants, invertebrates and to prohibit \textit{takes} of listed species.\textsuperscript{37} As the regulations that defined and streamlined takings provisions continued to evolve, \textit{Incidental Takes} were allowed only under the protection of a Habitat Conservation Plan, which was first instituted in 1982.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{41}

A. 2016 Changes to the Endangered Species Act

The most recent changes to the Endangered Species Act became effective March 14, 2016.\textsuperscript{42} These are primarily expansions of the definitions that in effect extend the reach of the ESA exponentially.\textsuperscript{43} Prior to these changes, and as early as 2005, there was concern within the government about the overreach of the ESA.\textsuperscript{44} In a report to

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  \item \textsuperscript{35} \textit{Id.}; Schiff, \textit{supra} note 17, at 107.
  \item \textsuperscript{36} Schiff, \textit{supra} note 17, at 108.
  \item \textsuperscript{37} \textit{A History of the Endangered Species Act of 1973, Timeline, supra} note 1.
  \item \textsuperscript{38} \textit{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.”); \textit{ESA DEFINITIONS}, 50 CFR §402.02, 3 (2016).
  \item \textsuperscript{39} \textit{A History of the Endangered Species Act of 1973, Timeline, supra} note 1.
  \item \textsuperscript{40} \textit{See generally} Kirchheim, \textit{supra} note 6 at 810; Wilde, \textit{supra} note 4, at 308.
  \item \textsuperscript{41} \textit{See generally} HUNTINGTON, \textit{supra} note 20, at 1; LAKE, \textit{supra} note 31 at 1; 16 USCA §1532 (2016).
  \item \textsuperscript{42} \textit{See generally} HUNTINGTON, \textit{supra} note 20, at 1; LAKE, \textit{supra} note 31, at 1; 16 USCA §1532.
  \item \textsuperscript{43} \textit{See generally} HUNTINGTON, \textit{supra} note 20, at 1; LAKE, \textit{supra} note 31; 16 USCA §1532.
  \item \textsuperscript{44} \textit{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),}
\end{itemize}
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.\textsuperscript{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.\textsuperscript{46}

An increasing number of species are being listed and few are being removed from the list.\textsuperscript{47} This is despite controversy over their recovery status.\textsuperscript{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.\textsuperscript{49}

\textit{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.\textsuperscript{50} These definitions set the limits of how far the government can extend its reach onto private property.\textsuperscript{51} Prior definitions that set limitations on the criteria for \textit{determining protected habitat} were disregarded in the 2016 ESA.\textsuperscript{52} The potential reach of the Act has been extended by removal of the terminology limiting protected habitat to “only where

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} See generally Schiff, supra note 17, at 117.
\textsuperscript{48} Id.
\textsuperscript{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).
\textsuperscript{51} See generally HUNTINGTON, supra note 20, at 1.
\textsuperscript{52} Id.
appropriate.” 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.

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.” 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.

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. This is redundant because the landowner is already under similar restrictions. 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?

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53 Lake, supra note 31, at 1, 2; 16 USCA §1532.
54 Lake, supra note 31, at 2.
56 Lake, supra note 31, at 2; 16 USCA §1532.
The 2016 ESA also changes the definitions of “Critical Habitat” and “Destruction or Adverse Modification”.

Critical Habitat refers to areas needed by a species to feed, nest and breed. 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.” 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. 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.

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. 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.”

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. Conservation of a habitat can greatly affect the way a landowner uses his lands. 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. The habitat in question can also be within or outside of the geographical range of a listed species.

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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.
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.\footnote{71} The potential reach of the ESA is greatly extended because it now includes conservation measures for the \textit{possible} future habitats of various species based on altered migration patterns due to global warming, although these changes are not yet known or defined.\footnote{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.\footnote{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.\footnote{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.\footnote{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.\footnote{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.)

\footnote{71} National Oceanic and Atmospheric Association, A Changing Climate for Endangered Species, 1 (2013), \url{http://www.nmfs.noaa.gov/stories/2013/12/12_4_2013climate_and_the_esa.html}.

\footnote{72} Id.

\footnote{73} See generally Huntington, supra note 20, at 1; Lake, supra note 31.

\footnote{74} See generally Huntington, supra note 20, at 1; Lake, supra note 31.


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

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.\(^\text{83}\) It could also spell the

\(^{77}\) See generally USFW, Habitat Conservation Plans under ESA (2011), supra note 13, at 1.

\(^{78}\) Id.

\(^{79}\) Id.


\(^{81}\) 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).


\(^{83}\) 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. The ESA has many small landowners and agricultural operations worried about the discovery of a listed species, plant or invertebrate on their property.

Small landowners have every reason to be concerned about this discovery. They are the primary stewards both of the land and the wildlife it supports. Small ranchers cross graze livestock and rotationally graze to maintain low brush grass levels and reduce invasive weeds. In the process they are also practicing fire suppression techniques. 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. With the threat to

84 Kirchheim, supra note 6, at 803, 820.
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 species, 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).
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. 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. This is counterproductive to the goals of the ESA and could permanently damage the chances of a species recovery.

There are a number of USFW programs the landowner can place his/her land under, one of which is the Habitat Conservation Plan. 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. 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. The owner is not protected if he/she removes his/her land from the program or violates any portion of the agreement.

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.

According to the 2011 ESA, the Habitat Conservation Plan (“HCP”) is required to protect landowners from the incidental take of a listed plant, animal, or invertebrate.
wildlife species. Of the offered plans, the HCP is the only path to obtain the Incidental Take Permit. The enrollment process for an HCP is time consuming. It requires a Habitat Conservation Plan developed by the landowner, an Implementation Agreement, application fees plus expenses for reports, and proof of the landowner’s funding source(s) to pay for the implementation of the USFW plan presently and in the future. A HCP also requires a National Environmental Policy Act (“NEPA”) analysis and a biological assessment (“Biop”) by Department of Fish and Wildlife. 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. 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. A plan can take varying amounts of time to complete.

The conclusions of the DFW Biop will determine if mitigation measures are required as part of the enrollment process. 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”. 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. 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.
102 See generally, USFWS, Draft Habitat Conservation Planning Handbook, supra note 76 at 11-5.
103 Id.
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.
108 Id.
109 USFW SERVICE, Habitat Conservation Plans Under ESA, 1, supra note 13, at 2.
110 Id. at 1.
its expiration date. After expiration or upon disenrollment, the landowner is subject to penalization for violation of the ESA in its entirety. 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. 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. Three types of “takings” have been established: per se, per se not, and Regulatory Takings.

A per se taking involves a government regulation that results in a physical invasion of property or a total loss in its economic value. 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. Finally, Regulatory Takings, is defined as the appropriation by government of private land for which compensation must be paid.

\[111\] 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.
\[116\] Lucas, 505 U.S. at 1028-29.
1. Per Se Takings

Per se takings can be physical or economic.\textsuperscript{119} A physical taking occurs when the government “has taken property by causing or authorizing a physical invasion”.\textsuperscript{120} The Court in \textit{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.\textsuperscript{121} The Supreme Court stated that “the placement of a fixed structure on land or real property . . .” constitutes a physical taking.\textsuperscript{122}

\textit{Lucas v. South Carolina Coastal Council}, 505 U.S. 1003 (1992), served as the landmark case to establish per se economic takings. In \textit{Lucas}, the State of South Carolina adopted a coastal protection plan that established a building moratorium after \textit{Lucas} had purchased the property.\textsuperscript{123} The Court held this a per se taking because the adoption of the regulation after the fact rendered the property valueless.\textsuperscript{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.\textsuperscript{125}

2. Per Se Not/ Nuisance Per Se Takings

Nuisance per se also grew out of the decision in \textit{Lucas v. South Carolina Coastal Council}.\textsuperscript{126} In \textit{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.\textsuperscript{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

\textsuperscript{119} Callies and Robyak, \textit{supra} note 117, at 371, 374.
\textsuperscript{120} Metz, \textit{supra} note 8, at 3.
\textsuperscript{121} \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 426 (1982).
\textsuperscript{122} \textit{Loretto}, 458 U.S. at 437.
\textsuperscript{123} \textit{Lucas}, 505 U.S. at 1006 - 07.
\textsuperscript{124} \textit{Id.} at 1007.
\textsuperscript{125} \textit{Id.} at 1019.
\textsuperscript{126} \textit{Id.} at 1031.
\textsuperscript{127} \textit{Id.}
purchased. 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.

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. The test allows the Court to examine each case on an individual basis. 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. The Court’s ad hoc evaluation of each of the elements can be visualized on a sliding scale. 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. A balance of regulatory versus individual interests would be found somewhere in the middle. 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

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.\textsuperscript{137} The scales will weigh differently in each and every case, which is the nature of the Court’s \textit{ad hoc} approach.\textsuperscript{138}

\textbf{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.\textsuperscript{139} Few of those brought prior to that time were successful.\textsuperscript{140} Consequently, cases that successfully used the balancing test framework for ESA regulations are rare.\textsuperscript{141} For those reasons, I have chosen to use two diverse cases in examining the Court’s use of the Penn Central Balancing Test - \textit{Tulare Lakes Basin Water Storage District v. U.S.}, 49 Fed. Claims 313 (2001) and \textit{Christy v. Hodel}, 857 F.2d 1324 (1988).\textsuperscript{142} In \textit{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.\textsuperscript{143} In \textit{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.\textsuperscript{144}

\textit{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.\textsuperscript{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

\textsuperscript{137} See generally \textit{Penn Central}, 438 U.S. at 123-124 (providing a general introduction to takings); \textit{Loretto}, 458 U.S. at 432; \textit{Maritrans Inc.}, 342 F.3d at 1351.
\textsuperscript{138} See generally \textit{Penn Central}, 438 U.S. at 124; \textit{Loretto}, 458 U.S. at 426; \textit{Maritrans Inc.}, 342 F.3d at 1351.
\textsuperscript{139} Blaine Greene, \textit{The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection}, 15 Yale J. on Reg. 329 332.
\textsuperscript{140} Id.
\textsuperscript{141} See Metz, supra note 8, see Summary.
\textsuperscript{143} \textit{Tulare Lakes Water Basin Storage District}, 49 Fed. Cl. at 318.
\textsuperscript{144} See generally \textit{Christy}, 857 F.2d at 1324.
\textsuperscript{145} \textit{Penn Central}, 438 U.S. at 124.
resources for the benefit of citizens. In passing regulations to protect those natural resources, the government is exercising its inherent police powers. Due to these considerations alone, the nature of the government action would initially register closer to “no taking” having occurred. 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. The same could be true if the regulation in question became increasingly restrictive. The deprivation of contractual water rights in Tulare Basin Water District v. U.S., 49 Fed Claims 313 (2001) is demonstrative of this principle.

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. 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. 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. 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. This is an example of a regulation that was restrictive to the point where the business or interest in question could no longer operate. Such a regulation would register on the extreme end of the scale as constituting a possible taking. In this case, the regulations

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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.\(^\text{158}\)

In *Christy*, the Court reached a different conclusion than it reached in *Tulare*.\(^\text{159}\) In *Christy*, a livestock rancher killed a federally protected grizzly bear while two were charging his herd of sheep on rented grazing lands.\(^\text{160}\) Under the ESA regulations, it was illegal for *Christy* to kill the bears himself.\(^\text{161}\) To protect his private property, he was first required to obtain an Incidental Take Permit (“ITP”).\(^\text{162}\) The ITP was applied, paid for, and subsequently approved by the USFW Service, and a USFW trapper was hired to remove the bears.\(^\text{163}\) 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.\(^\text{164}\) Christy was standing with the trapper when the bears made yet another charge at the herd.\(^\text{165}\) Christy fired killing one bear mid-charge, and was subsequently fined for killing an endangered species.\(^\text{166}\)

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.\(^\text{167}\) 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.\(^\text{168}\) 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.\(^\text{169}\) 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{172} Factoring this in may move the balance closer to constituting a taking as decided in Tulare.\textsuperscript{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).\textsuperscript{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?\textsuperscript{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.\textsuperscript{176}

\textsuperscript{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).

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

\textsuperscript{172} See generally Habitat Conservation Plans Under the Endangered Species Act, supra note 13, at 1.

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


\textsuperscript{175} See generally Penn Central, 438 U.S. at 125.

\textsuperscript{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.\(^{187}\)

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\(^{177}\) 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.\textsuperscript{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.\textsuperscript{189} A growing population of prey animals protected by the regulations increasingly impacts an owner’s investment backed interests.\textsuperscript{190} Livestock owners’ interests are impacted when it is no longer possible to run livestock at a profit.\textsuperscript{191} In Christy’s case, his investment-backed expectation was almost completely wiped out by two bears in one season.\textsuperscript{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.\textsuperscript{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.\textsuperscript{194}

\textit{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.\textsuperscript{195} The Court would evaluate Christy’s entire property or stock in considering the

\begin{footnotes}
\footnotetext[188]{\textit{Compare generally Christy}, 857 F.2d at 1326-1327, \textit{with Penn Central}, 438 U.S. at 126.}
\footnotetext[189]{\textit{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).}
\footnotetext[190]{\textit{See generally \textit{id.} at 1333.}}
\footnotetext[191]{\textit{Id.} at 1327.}
\footnotetext[192]{\textit{Id.} at 1328, 1334-1335.}
\footnotetext[193]{\textit{Compare Christy}, 857 F.2d at 1334, \textit{with Tulare Lakes Water Basin Storage District}, 49 Fed. Cl. at 318-19.}
\footnotetext[194]{\textit{Christy}, 857 F.2d at 1328, 1334.}
\end{footnotes}
effect of the losses due to the regulation in question.\textsuperscript{196} If the losses to Christy’s flock were severe enough, it could tend towards a regulatory taking.\textsuperscript{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.\textsuperscript{198} This is exactly what occurred in \textit{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.”\textsuperscript{199} This is indicative of the hurdles small landowners face in Court when challenging the ESA regulations.\textsuperscript{200}

In evaluating the economic impact on the Tulare Water Basin, the \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{204} The Courts instead applied a physical taking analysis, as opposed to a regulatory takings analysis and found a per se taking.\textsuperscript{205}

\textbf{D. The Final Balancing}

\textsuperscript{196} As established in \textit{Keystone}, 107 S.Ct. 1232, 1249.
\textsuperscript{197} Using the analysis in \textit{Keystone}, 107 S.Ct. at 1249.
\textsuperscript{198} \textit{See generally Christy}, 857 F.2d at 1334.
\textsuperscript{199} \textit{Id.} at 1328.
\textsuperscript{200} \textit{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).
\textsuperscript{201} \textit{Tulare Lakes Water Basin Storage District}, 49 Fed. Cl. at 316.
\textsuperscript{202} \textit{Id.} at 319.
\textsuperscript{203} \textit{Id.} at 322.
\textsuperscript{204} \textit{Id.} at 318-19.
\textsuperscript{205} \textit{Id.}
In making the final determination the Court will evaluate whether the three elements considered together indicate if a taking has occurred or not.\textsuperscript{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.\textsuperscript{207} Conversely, if a small segment of the population is unduly affected then a regulatory taking has occurred, and compensation is due.\textsuperscript{208} In \textit{Christy}, the government’s interest in protecting endangered species outweighed the interest of the individual in removing an endangered species to protect his herd.\textsuperscript{209} The interference on \textit{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.\textsuperscript{210} If these two factors are weighed and then compared to a finding that the economic expectation of the regulation affected \textit{Christy}, it would not be enough to tip the balance towards a taking having occurred, regardless of the amount of losses he suffered.\textsuperscript{211}

In \textit{Tulare}, the government regulation protecting water, a natural resource, would again be paramount.\textsuperscript{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.\textsuperscript{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.\textsuperscript{214} If \textit{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.\textsuperscript{215}

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

\textsuperscript{206} \textit{Penn Central}, 438 U.S. at 124-129.
\textsuperscript{207} \textit{Id}.
\textsuperscript{208} \textit{Id} at 125.
\textsuperscript{209} \textit{Christy}, 857 F.2d at 1330-31.
\textsuperscript{210} \textit{Compare Penn Central}, 438 U.S. at 124, with \textit{Christy}, 857 F.2d at 1326.
\textsuperscript{211} \textit{Penn Central}, 438 U.S. at 124-26.
\textsuperscript{212} \textit{See generally Tulare Lakes Water Basin Storage District}, 49 Fed. Cl. at 319.
\textsuperscript{213} \textit{Id}.
\textsuperscript{214} \textit{See generally id.} at 319.
\textsuperscript{215} \textit{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. Citizens 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.
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”]).
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. First and foremost is the problematic aspect of the roaming nature of the protected species. The Courts have clearly stated they are responsible for restricting the landowner’s ability to protect its assets/property from the animal in question. 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. Historically, the landowner is uncertain of any success in Court. At the very least the case cannot be heard unless the landowner has pursued the incidental take permit. 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. 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. 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.
230 See Murkowski, supra note 44.
residents of urban areas would benefit from reduced taxes needed to implement the program. 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. 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. 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. 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 TAYLOR

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