Does Preventing "Take" Constitute an Unconstitutional "Taking"?: An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act

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I.
INTRODUCTION

The conflict over Humboldt County's Headwaters Forest ("Headwaters") represents a classic battle between environmental protection and private property rights. The five hundred to one thousand year-old redwoods of the Headwaters support an incredibly diverse, delicate, and beautiful ecosystem, and serve as a defining symbol of California.[1] However, the enormous redwood trees also garner a high price in the patio, paneling, hot tub, and furniture markets.[2] The three thousand acre Headwaters was appraised at $500 million in 1993.[3] Moreover, the fate of the Headwaters, in particular, evokes strong feelings because the landowner, the Pacific Lumber Company ("PLCO"), is a major

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1. H.R. 2866, 103d Cong., 1st Sess. § 2(a) (1993) (The Headwaters Forest Act). In its findings, the House of Representatives called the Headwaters a "defining symbol of the State of California" and a "unique and irreplaceable . . . resource."

2. Michael Satchell, *Trading tall trees for debt*, U.S. NEWS & WORLD REPORT, August 29, 1994, at 52 (analyzing the conflict between protecting the Headwaters environmental value and the high economic value of redwood lumber). The old growth redwood lumber of the Headwaters is at least two times more valuable than second or third growth lumber. *See Hearings on H.R. 2866 Before the Subcomm. on National Parks, Forests & Public Lands of the House Comm. on Natural Resources*, 103d Cong., 1st Sess. 136 (1993) (testimony of Gary C. Rynearson, Pres. of Natural Resources Management Corporation).

3. *Hearings on H.R. 2866 Before the Subcomm. on Specialty Crops and Natural Resources of the House Comm. on Agriculture*, 103d Cong., 1st Sess. 19 (1993) (testimony of George Leonard, Associate Chief, Forest Service).

employer of Humboldt County's residents. Also, PLCO is a subsidiary of the much-maligned finance company, MAXXAM, Inc. (MAXXAM).[4]

In this paper, I analyze a legal conflict involving the Headwaters that, although not yet ripe, looms on the horizon. Considering their economic value, PLCO is almost surely going to attempt to harvest the old growth redwoods of the Headwaters. However, harvesting will destroy the habitat, and possibly the existence, of species protected by the federal Endangered Species Act ("ESA").[5] Under the ESA, the Secretary of the Interior, through the U.S. Fish and Wildlife Service ("FWS"), has identified five inhabitants of the Headwaters worthy of protection: The marbled murrelet, the northern spotted owl, the chinock salmon, the peregrine falcon, and the bald eagle.[6] In all likelihood, additional threatened and endangered species of the Headwaters will continue to be identified. Because of the threat to so many species, any attempt to harvest the Headwaters will be met with an ESA-based lawsuit initiated by the FWS or an environmental group. If these challenges are successful and

4. In addition to criticisms over its forestry practices, MAXXAM's takeover of PLCO generated lawsuits and bad press. Following the takeover, MAXXAM terminated PLCO's pension fund and replaced it with annuities from Executive Life, an insurance company that subsequently went bankrupt. In 1991, the Department of Labor responded by filing an action against PLCO for violating its fiduciary duty to employees. To its credit, PLCO voluntarily replenished the retirees' pension fund. Also, in September 1994 MAXXAM settled a shareholders' action arising from claims that the 1986 takeover was achieved through fraud. For background on MAXXAM's troubles see: Satchell, *supra* note 2; Skow, *infra* note 6; John Markoff, *A Legal Thicket Amid the Redwoods*, N.Y. TIMES, June 4, 1993, at D1; *Hearings on H.R. 2866 Before the Subcomm. on National Parks, Forests & Public Lands of the House Comm. on Natural Resources*, 103d Cong., 2nd Sess. 21 (1993) (testimony of Rep. Pete Stark).

5. Endangered Species Act, 16 U.S.C.S. §§ 1531-1544 (1992).

6. The Endangered Species Act authorizes the Secretary of Interior to enforce the Act and pass necessary regulations. *Id.* In turn, the Secretary of Interior authorizes the U.S. Fish and Wildlife Service to list endangered and threatened species and to enforce the laws protecting species. U.S. Fish and Wildlife Service, General Provisions, 50 C.F.R. § 10.1 (1995). The marbled murrelet was deemed protected by the ESA in October, 1992. 57 Fed. Reg. 45328 (1992); the northern spotted owl was deemed protected by the ESA on June 26, 1990, 55 Fed. Reg. 26194 (1990); the chinock salmon on April 6, 1990, 55 Fed. Reg. 12832 (1990); the bald eagle on March 11, 1967, 32 Fed. Reg. 4001 (1967); the peregrine falcon on March 20, 1984, 49 Fed. Reg. 10526. *See also* John Skow, *Redwoods: The Last Stand*, TIME, June 6, 1994, at 58 (describing the protected species that inhabit the Headwaters). Old growth redwoods have certain growth forms and are susceptible to damage which provides unique nesting opportunities for birds such as the marbled murrelet. Proposed Designation of Critical Habitat For the Marbled Murrelet, 59 Fed. Reg. 3811 (1994) (to be codified at 50 C.F.R. pt. 17).

PLCO's right to harvest the Headwaters is prevented, PLCO will claim that the ESA regulation constitutes a Fifth Amendment taking.[7]

The PLCO case highlights the policy conflicts between the Fifth Amendment's guarantee against taking without compensation and society's need to protect biodiversity. These issues are bound to arise in future ESA taking claims.[8] This paper analyzes these conflicts and describes possible defenses to PLCO's claim and future ESA taking claims.

I conclude, based on the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, that a total restraint on timber harvesting imposed by the ESA would constitute an unconstitutional taking claim.[9] However, I analyze five possible defenses to a "total taking" claim: (1) wildlife protection inheres in the "bundle of rights" granted to landowners under the theory of public trust; (2) an expanded definition of public nuisance includes species destruction; (3) the *Christy-Flotilla*[10] defense which absolves the government of responsibility because it does not control where protected species live; (4) a defense based on the *Andrus v. Allard*[11] personal versus real property distinction; and (5) the legislative solution defense.

I conclude that the public trust and public nuisance defenses will probably fail.[12] The *Christy-Flotilla* defense, although approved by some courts, lacks merit.[13] The *Andrus* defense has potential to succeed, because of its logical consistency, but it is based on antedated property law.[14] Finally, legislative solutions, such as the Headwaters Forest Act, may preempt a *Lucas* "total

7. U.S. CONST. amend. V ("Nor shall property be taken for public use, without just compensation"), *see infra* notes 41-42 and accompanying text.

8. *C.f.*, Martin Dickson, *Competing Claims of Man and Nature*, FIN. TIMES, May 11, 1992, at 14 (demonstrating the economic burdens on landowners caused by the ESA); *Hearings on S. 605 Before the Senate Environment and Public Works Committee*, 104th Cong., 1st Sess. 166 (1995) (testimony of Dean Kleckner, American Farm Bureau Federation, stressing the need to compensate private landowners from losses suffered due to the ESA).

9. 505 U.S. 1003, 1028 (1992)(finding that a South Carolina law protecting coastal land constituted a Fifth Amendment taking). *See infra* notes 53-62 and accompanying text (analyzing the *Lucas* decision).

10. *See infra* notes 74-84 and accompanying text.

11. 444 U.S. 51 (1979),.*See infra* notes 68-73 and accompanying text.

12. *See infra* notes 85-121 and accompanying text.

13. *See infra* notes 122-123 and accompanying text.

14. *See infra* notes 124-128 and accompanying text.

taking" claim, because they demonstrate that, despite regulation, the land still possesses value.[15]

II.

THE PLCO CASE

PLCO, the largest producer of high grade redwood lumber in the world, owns 195,000 acres of redwoods and Douglas firs, including the Headwaters.[16] Prior to MAXXAM's 1986 acquisition of PLCO, the 124 year old lumber company harvested its redwoods moderately, under a sustained-yield policy which allowed new trees to grow faster than those cut. In addition, the company never engaged in clear-cutting.[17] However, low overhead and under-utilized assets attracted MAXXAM to buy out PLCO's stock through junk bond financing.[18] To cover interest payments on its high interest junk bonds, PLCO doubled its harvest rate and began clear-cutting.[19] MAXXAM has since refinanced PLCO's bond debt from a twelve percent to an eight percent interest rate, but it is unclear whether or how this has affected PLCO's harvesting rate.[20]

PLCO's forestry practices have already been the subject of one lawsuit based on the ESA. During the 1992 Thanksgiving holiday, PLCO secretly harvested part of Owl Creek, a 220-acre parcel of old growth redwoods separate from the Headwaters. This secret harvest prompted an investigation by the FWS, as it appeared that PLCO had failed to comply with ESA requirements.[21] After the FWS's failure to prosecute PLCO for ESA violations, the Environmental Protection Information Center ("EPIC"), a private, non-profit organization, obtained a temporary injunction which blocked any further harvesting of Owl

15. *See infra* notes 129-141 and accompanying text.

16. *Hearings on H.R. 2866 Before the Subcomm. on Specialty Crops and Natural Resources of the House Comm. on Agriculture*, 103d Cong., 1st Sess. 170 (1993) (testimony of John Campbell, CEO and Pres. of PLCO).

17. PLATER, ABRAMS, & GOLDFARB, ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY, 225 (1992). In their textbook, the authors use the MAXXAM takeover of PLCO as a case study on corporate law and the environment.

18. *Id.*

19. *Id.* at 226. *See also* Carolyn Lochhead, *House Panel OKs Novel Plan to Save Forest*, S.F. CHRON., May 12, 1994, at A2 (suggesting that the new harvesting practices of the MAXXAM-controlled PLCO have inflamed environmentalists and politicians).

20. Satchell, *supra* note 2.

21. Telephone Interview with Charles Steven Crandall, Attorney, Environmental Protection Information Center (Nov. 8, 1994).

Creek.[22] Then, on February 24, 1995, the court in *Marbled Murrelet v. Pacific Lumber Co.* granted a permanent injunction which blocked PLCO from harvesting Owl Creek.[23]

Because PLCO intends to harvest the Headwaters,[24] it is likely the FWS or an environmental group will attempt to obtain an injunction against PLCO.[25] Assuming the injunction is successful, PLCO will probably argue that it is entitled to just compensation under the Fifth Amendment.[26]

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22. *Id. See also, Closing Arguments Heard in Challenge to Logging Operation on Private Lands*, BNA CAL. ENVT. DAILY, Sept. 12, 1994.

23. Marbled Murrelet v. Pacific Lumber Co., No. C-93-1400-LCB, 1995 U.S. Dist. LEXIS 3100 (N.D. Cal. Feb. 24, 1995) *aff'd*, Marbled Murrelet v. Pacific Lumber Co., No. 95-16504, 1996 U.S. App. LEXIS 15304 (9th Cir. May 7, 1996) (finding that the murrelet, a protected species, occupies Owl Creek and that any harvesting would "harm" or "harass" the birds and would constitute a "take" under the ESA.) Importantly, the court found that experts hired by PLCO were instructed not to report sightings of the murrelet. According to EPIC's attorney, a permanent injunction need not be permanent. Under § 1539(a) of the ESA, PLCO could petition for an "incidental take" exemption. To obtain this exemption, PLCO and federal agencies would have to establish a Habitat Conservation Plan ("HCP") which would minimize harm to the murrelet. However, an HCP takes years to develop, it would be extremely costly for PLCO, and it would still severely limit PLCO's ability to harvest the redwoods. Interview with Charles Steven Crandall, *supra* note 21. For discussions of the burdens of HCP's on landowners see also Robert Thorton, *Searching For a Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1990). Considering the burdens of an HCP, a court might not even require PLCO to apply for the exemption prior to exerting its taking claim. But, even if PLCO establishes an HCP, its effect on PLCO's land value will be substantially similar to the effect of a permanent injunction.

24. *Hearings on H.R. 2866 Before the Subcomm. on Specialty Crops and Natural Resources of the House Comm. on Agriculture*, 103d Cong., 2d Sess. (1993) (testimony of John Campbell, CEO and Pres. of PLCO, clearly indicating PLCO's intent to harvest the Headwaters); *Headwaters: CA Forestry Board Rejects Cuts For Road*, Greenwire, March 7, 1996, *available in* LEXIS, Nexis Library, CURNWS file.

25. Interview with Charles Steven Crandall, *supra* note 21. It might be easier for an environmental group to obtain an injunction to protect the Headwaters than it was for Owl Creek since a link between the Headwaters and the marbled murrelet has already been established: the Headwaters is one of the last remaining habitats of the marbled murrelet. H.R. 2866, 103d Cong, 2d Sess. § 2(a)(3) (1994).

26. PLCO may already be planning to file a Fifth Amendment taking claim with respect to the Headwaters Forest. On March 5, 1996, the California Board of Forestry voted 5-0 to reject PLCO's plan to log the Headwaters Forest, because of the potential of damage to the protected marbled murrelet. *Headwaters: CA Forestry Board Rejects Cuts For Roads*, Greenwire, March 7, 1996, *available in* LEXIS, Nexis Library, CURNWS file.

III.

THE PROTECTION OF SPECIES: POLICY AND LAW

Recognizing the ecological and scientific importance of protecting biodiversity, Congress enacted the ESA to protect endangered and threatened species from the ill effects of land use.[27] In *Tennessee Valley Authority v. Hill*, the Supreme Court stated that Congress intended the ESA to protect species "whatever the cost."[28] The ESA prevents persons[29] from "taking" an endangered or threatened species.[30] To "take" means to kill or harm.[31]

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Supreme Court upheld the Secretary of Interior's definition of harm.[32] In that case, harm included significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.[33] In *Marbled Murrelet v. Pacific Lumber Co.*, the Ninth Circuit held that *Sweet Home* did not limit ESA-imposed injunctions to cases where a defendant has "actually killed" a protected species.[34] Rather than a showing of past harm, the court only required a showing of "a reasonably certain threat of imminent harm to a protected spe-

27. 16 U.S.C. § 1531 et seq. (1994).

28. 437 U.S. 153, 184 (1978)(preventing the Tennessee Valley Authority from completing the almost-finished Tellico Dam, because operation of the dam would destroy the endangered snail darter, a small fish).

29. 16 U.S.C. § 1532(13) (1994) (persons includes corporations).

30. 16 U.S.C. § 1538 (1994). Although not expressly stated in the ESA, subsequent regulations apply the ESA's taking provision to endangered and threatened species. 50 C.F.R. § 17.31(a) (1995).

31. 16 U.S.C. § 1532(19) (1994).

32. No. 94-859, 1995 U.S. LEXIS 4463, at *14 (June 29, 1995) (overruling the D.C. Circuit by upholding 50 C.F.R. 17.3, the defintion of harm. Respondents, composed of logging interests and other property holders, unsuccessfully argued that the Secretary of Interior's definition superceded his authority under the ESA).

33. 50 C.F.R. § 17.3 (1995)(Secretary of Interior's definition of harm). *Sweet Home* did not expressly overrule *Palila v. Hawaii Department of Land & Natural Resources*, wherein the Sierra Club and other environmental groups successfully prevented Hawaii's Dept. of Land & Natural Resources from allowing feral goats and sheep to share habitat with the protected bird, the Palila. 852 F.2d 1106 (9th Cir. 1988). The court found that the sheep and goats grazed on and destroyed the mamane trees which are critical to the Palila's survival. In *Palila*, the Ninth Circuit held that harm could include habitat destruction that *could* result in extinction. *Id.* at 1110. Arguably, *Palila*'s definition circumvents the "actually kills" requirement in 50 C.F.R. 17.3. See *Sweet Home*, 1995 U.S. LEXIS 4463, at *36 (J. O'Connor, concurring)(suggesting that the majority opinion questions *Palila*).

34. No. 95-16504, 1996 U.S. App. LEXIS 15304, at *22 (9th Cir. May 7, 1996)(upholding a permanent injunction barring PLCO from harvesting Owl Creek, a small forest of old-growth redwoods).

cies" before issuing a protective injunction.[35] Thus, to enjoin PLCO from harvesting the Headwaters, the FWS or environmentalists must show that a protected species, most likely the marbled murrelet, is in imminent danger of being actually killed by the modification of its habitat.[36]

Humans, plants and animals are all components of an interdependent ecosystem, and as a result of one species' extinction, numerous other species also disappear.[37] The ESA can protect an "indicator species" which reflects on the health of an entire forest, desert, or lake.[38] In other words, the protection of one species' habitat is vitally linked to the protection of biodiversity.[39]

Some critics argue that the interests of private property owners outweigh the benefits of protecting species such as the marbled murrelet.[40] However, supporters of the ESA note that species protection ensures the biodiversity necessary for the overall health of society.[41] For example, the timber industry almost harvested the Pacific Yew tree into extinction before researchers discovered that it may be helpful in treating breast cancer.[42] Also, penicillin, used to cure bacterial infections, was originally discov-

35. *Id.* at 15 (finding that the *Sweet Home* "actually kills" requirement does not require a showing a past harm to obtain prospective injunctive relief).

36. *See supra* notes 21-23 and accompanying text. In October 1992, the U.S. Fish and Wildlife Service listed the marbled murrelet as threatened. 57 Fed. Reg. 45328 (1992). Alternatively, environmentalists can rely on the California Endangered Species Act. CAL. FISH & GAME CODE §§ 2050-2080 (Deering 1989). The ESA permits states to impose stricter regulations. 16 U.S.C. § 1535(f) (1994). However, unlike the ESA, the CESA does not expressly establish that habitat destruction constitutes a take. *But cf.*, Department of Fish and Game v. Anderson-Cottonwood Irrigation Dist., 8 Cal. App. 4th 1554 (1992) (holding that habitat destruction could result in a take); Lynda G. Cook, *Lucas and Endangered Species Protection: When "Take" and "Takings" Collide*, 27 U.C. DAVIS L. REV. 185 (1993) (stating that the CESA is stricter than the ESA).

37. *See* Cook, *supra* note 36, at 191.

38. *Id.*

39. Katherine S. Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811, 814 (1990).

40. *Coalition For Property Rights*, PR Newswire, Oct. 20, 1994, *available in* LEXIS, Nexis Library, CRNWS file; *See also*, Martin Dickson, *Competing Claims of Man and Nature: The US is Striving to Find Sensible Balance Between Economic Progress and Environmentalism*, FIN. TIMES, May 11, 1992, at 14. *But cf.*, Dan Campbell, *Poll shows strong support for environmentalism in rural areas*, THE ARIZONA REPUBLIC, October 19, 1994, at B4.

41. Maura Dolan, *Extinction of Planet's Species*, L.A. TIMES, May 22, 1992, at A1(reporting on a scientific symposium on the dangers of species extinction).

42. Jim Marston, *'Takings' Bill Poses Risks to Health, Environment*, HOUSTON POST, May 3, 1996, at a-33; Pratap Chaterjee, *Environmental Auditing Still Awaits Its Green Signal*, FIN. TIMES, Feb. 4, 1993, at 10.

ered in a fungus growing on oranges.[43] The Supreme Court justified the ESA as follows:

> From the narrowest point of view, it is in the best interests of mankind to minimize the losses of genetic variation. The reason is simple: They are potential resources. They are keys to puzzles which we cannot solve and may provide answers to questions which we have not learned to ask.[44]

The government's ability to protect biodiversity, however, is limited by its budget. If Fifth Amendment taking claims such as PLCO's are successful, they will force an already debt-ridden federal government to pay landowners just compensation. Budget restraints are likely to force the government to relax its enforcement of the ESA and risk the loss of valuable biodiversity.[45] Alternatively, Congress may legislate to repeal the ESA altogether.[46]

IV.

PROPERTY RIGHTS AND UNCONSTITUTIONAL TAKING

Until relatively recently, Americans have failed to recognize the need to protect biodiversity, but the United States has long adhered to theories supporting the protection of property rights.[47] In recognizing these theories of property rights, the Fifth Amendment of the United States Constitution states: "[n]or shall property be taken for public use, without just compensation."[48] Thus, private property rights are not absolute. The government may take property, but if it does, it must pay for it.

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43. DORLAND'S POCKET MEDICAL DICTIONARY 526 (23d ed. 1982).

44. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 178 (1978) (quoting from H.R. REP. No. 412, 93d Cong., 1st Sess. at 4-5 (1973)).

45. *See* Cook, *supra* note 36 (suggesting that society would be unwilling to pay higher taxes to cover the just compensation requirement for 5th Amendment taking caused by the ESA).

46. *See, e.g.* H.R. 490, 104th Cong., 1st Sess. (The Farm, Ranch, and Homestead Protection Act of 1995)(to prevent the Secretary of Interior from declaring any additional species threatened or endangered).

47. One theory states that property rights protect landowners' reasonable expectations of deriving benefit from their possessions. JEREMY BENTHAM, THEORY OF LEGISLATION 111-113 (4th ed. 1882). Through this protection of expectations, the theory suggests that property owners will efficiently utilize society's resources. *Id.* Another theory is that, in democratic societies, property rights foster independence, dignity, and individual responsibility, since the power of the majority must yield to the rights of the private owner. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964). However, the idea of protecting private property is not without its critics. *See, e.g.*, KARL MARX, THE COMMUNIST MANIFESTO (1848).

48. U.S. CONST. amend. V.

The right to just compensation is subject to limits. Through its police powers, government restrains property use through, *inter alia*, residential[49] and environmental[50] zoning and regulations without compensation. Though beneficial, the efficient use of property achieved through private property protection sometimes conflicts with goals of coordinated urban development and environmental protection. With respect to property rights, the Supreme Court has stated:

> While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.[51]

Thus, changing conditions and new knowledge may motivate legislatures to create regulations that limit private land use without violating property rights.

In *Pennsylvania Coal v. Mahon*, Justice Holmes introduced the concept of a "regulatory taking" when a regulation or law "goes too far" in diminishing the economic value of a landowner's property so as to require compensation.[52] The Court recognized that Government could hardly operate if it was forced to pay for every change in the general law which impacted values incident to property.[53]

Nevertheless, the Court held that a Pennsylvania law which prevented a coal company from mining portions of its property violated the Fifth Amendment.[54] Unlike zoning regulations which evenly allocate the benefits and burdens to many different landowners, the Pennsylvania law unfairly burdened only the coal company. In contrast, city-wide zoning regulations are generally fair because they lead to an average reciprocity of advan-

49. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (upholding a zoning regulation that devalued a landowner's property by eighty percent).

50. Just v. Marinette County, 56 Wis. 2d 7, 26 (1972) (upholding the constitutionality of a county ordinance which prevented a landowner from filling wetlands).

51. *Village of Euclid*, 272 U.S. at 387.

52. 260 U.S. 393, 415 (1922). Unlike a regulatory taking where a court considers the police powers of government, a physical invasion of property is a taking "without regard to the public interests that it may serve." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (finding that a New York statute allowing cable companies to install wires on private property constituted a permanent physical occupation of property and, thus, a Fifth Amendment taking demanding just compensation).

53. *Mahon*, 260 U.S. at 413.

54. *Id.* at 414.

tage.[55] Property zoned for residential use retains its value because adjacent lots must also remain residential.

Since *Mahon*, the Court has enunciated two principles to guide lower courts in determining whether a regulation constitutes an unconstitutional taking.[56] First, the Fifth Amendment should prevent one landowner from bearing burdens that, in fairness, all of society should bear.[57] Second, a Fifth Amendment taking depends on the regulation's effect on a landowner's reasonable "investment-backed expectations."[58] Despite the Fifth Amendment's constitutional guarantees, until *Lucas* the Court had never used the *Mahon* diminution of value test to award just compensation.[59]

In *Lucas*, the Court held that a South Carolina regulation which prohibited a beachfront landowner from developing his vacant lots constituted an unconstitutional taking, unless the regulation inhered in the owner's title.[60] In 1986, Mr. Lucas paid $975,000 for two undeveloped residential lots on which he intended to build single family homes.[61] However, in 1988 the South Carolina legislature passed the Beachfront Management Act, which prohibited Lucas' plans for development.[62]

The Court held that a land-use regulation constitutes a taking when it "denies an owner economically viable use of his land."[63] A state can only avoid the "total taking" compensation requirement if it can show that the regulation inhered "in the title itself, in the restrictions that [are in the] background principles of the State's law of property and nuisance already [in] place upon land

55. *Id.* at 415.

56. In suggesting these principles, Justice Holmes recognized that "the natural tendency of human nature is to extend the [police power] qualification more and more until at last private property disappears." *Id.*

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

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

59. DUKEMINIER & KRIER, PROPERTY 1198 n.29 (3d ed. 1993) (Although frequently mentioned, the Court never used the *Mahon* test to find that a regulation constituted a regulatory taking from 1922 to 1991). Actually, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court interpreted a substantially similar Pennsylvania law and, unlike the *Mahon* ruling, did not find an unconstitutional taking. 480 U.S. 470, 471 (1987).

60. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992).

61. *Id.* at 1006.

62. *Id.* at 1007.

63. *Id.* at 1016. Using *Mahon*'s diminution of value test, the Court reasoned that a complete diminution of value, a "total taking," goes too far. *Lucas*, 505 U.S. at 1017.

ownership."[64] In other words, if the regulation simply codifies already existing common law, then no compensation is required.[65]

By requiring the regulation to inhere in the landowner's title under pre-existing property law, the court attempted to protect the landowner's reasonable expectations. If, under a common law nuisance or other property law claim, Mr. Lucas' development plans could have been limited, he should have known that the legislature might enact an equally limiting regulation. The Court also attempted, by finding a Fifth Amendment taking when the regulation *diminishes all value*, to prevent landowners from unfairly shouldering a burden that all South Carolinians should bear equally.[66]

Lucas suggests that enforcement of the ESA against private landowners may constitute a total taking worthy of compensation, even though the Act constitutes a valid exercise of federal authority. PLCO will certainly rely on *Lucas* if it is enjoined from harvesting the Headwaters.[67]

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64. *Id.* at 1029.

65. On remand, the South Carolina Supreme Court found that the Beachfront Management Act did not inhere in Mr. Lucas' title. Lucas v. South Carolina Coastal Council, 424 S.E. 2d 484 (S.C. 1992).

66. The Court admitted the difficulty in determining what constitutes a 'total' taking. However, since the lower courts determined that the law totally diminished Lucas' property value, and South Carolina did not contest this finding, the Court did not have to decide this issue. In dicta, the Court stated that to establish a total taking, the resulting deprivation could possibly be less than a 100% loss. Furthermore, the Court suggested analyzing the 'totality' of the taking by analyzing the owner's "reasonable expectations." *Lucas*, 505 U.S. at 1017 n.7. In his dissent, Justice Stevens noted that the land, without the development planned by Mr. Lucas, still had value as picnic land or as a buffer zone valuable to neighboring property owners. *Id.* at 1065 n.3 (Stevens, J., Dissenting). For a criticism of the *Lucas* decision see Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

67. For the purposes of this paper, I assume that an ESA-imposed ban on harvesting the Headwaters would constitute a total taking. What portion of an aggrieved owner's land to consider when determining whether a taking is "total" has yet to be resolved by the Supreme Court. Prior to *Lucas*, courts considered all of the property owner's holdings, not just those implicated by the regulation. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); San Francisco v. Golden Gate Heights Invs., 14 Cal. App. 4th 1203, 1209 (1993). But footnote seven of *Lucas* states that including all of a landowner's holdings in the "relevant calculus" is "insupportable." *Lucas*, 505 U.S. at 1017 n.7. The segment of property measured in the total takings analysis depends on how the law has shaped an owner's expectations through legal recognition of particular interests in land. *Id.*; *See also*, Florida Rock Indus. v. United States, 18 F.3d 1560, 1568 (Fed. Cir. 1994)(holding that the Fifth Amendment recognizes partial "taking" of an owner's land). During the process of reduc-

V.
TAKING CLAIMS AND THE ESA

Although no court has heard a claim completely analogous to PLCO's, a few courts have ruled that the ESA or a similar species protection act does not lead to a compensable taking. These cases offer insight into how a PLCO-type claim might be resolved in the future.

A. *The Supreme Court, Species Protection, and the Fifth Amendment*

In *Andrus v. Allard*, the Court held that even if the Eagle Protection Act prohibited the most profitable use of property, its operation did not necessarily give rise to a compensable taking.[68] The plaintiffs, engaged in the trade of Indian artifacts containing bald and golden eagle feathers, were convicted of violating the Eagle Protection Act.[69]

The Court noted that where "an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."[70] Moreover, even though the right to sell the feathers was the property's most profitable "strand," the Court refused to find a compensable taking, because the owners still

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ing its bond debt interest rate, PLCO transferred 180,000 acres of second and third growth redwoods to a subsidiary called Scotia Pacific Holding Company, but strategically PLCO retained 11,000 acres of old growth. *See* Michael Parrish, *Legal Strategy Could Boost Cost of Saving Timberlands*, L.A. TIMES, February 1, 1993, at D1 (citing complaints from environmental groups that PLCO's reorganization threatens the government's ability to protect the Headwaters). Thus, after the reorganization, PLCO's total property consists of the type of timberland most likely to be subject to ESA regulations—the old growth redwoods—and increases the likelihood of a "total" taking of PLCO's land. Moreover, PLCO must submit a "timber harvest plan" to be approved by the California Board of Forestry for each particular area to be cut. CAL. PUB. RES. CODE 4581. Arguably, when and if the Board approves of PLCO's plan to harvest the Headwaters, the law recognizes a particular interest in the Headwaters separate from PLCO's other holdings.

68. 444 U.S. 51, 65 (1979).

69. The Eagle Protection Act punishes those who "take, possess, sell, purchase, barter, offer to sell" a bald or golden eagle "alive or dead, or any part." But the Act allows those who possessed the feathers before the Act's initiation to continue to possess and transport, but not sell the feathers. *Andrus*, 444 U.S. at 53. Similarly, the ESA punishes those who take, possess, and sell protected species, including the bald and golden eagles. And, similarly, the ESA contains a grandfather clause to protect those dealings in exotic animal goods prior to the Secretary's listing the species endangered. 16 U.S.C. § 1539(b) (1994).

70. *Andrus*, 444 U.S. at 65-66.

retained the potential to derive economic benefit by exhibiting the artifacts for an "admissions charge."[71]

However, *Lucas* limited the applicability of *Andrus* to personal property.[72] *Lucas* affirmed *Andrus*, noting the state's traditionally high degree of control over commercial dealings in personal property, but refused to expand *Andrus* to real property.[73]

B. *Lower Courts, the ESA, and the Fifth Amendment*

Few lower courts have addressed whether ESA enforcement creates a Fifth Amendment taking when it interferes with property interests. However, two decisions demonstrate that courts are reluctant to find an ESA-created taking.

In *Christy v. Hodel*, the Ninth Circuit rejected a livestock owner's claim that the ESA's protection of the grizzly bear constituted a taking of his property.[74] Under the ESA, the owner was financially penalized for shooting an endangered bear while protecting his sheep.[75] The owner claimed that by preventing him from protecting his property, the ESA "takes" his property without just compensation.[76] The court stated:

> The regulations leave the plaintiffs in full possession of the complete 'bundle' of property rights to their sheep. . .Undoubtedly, the bears have physically taken plaintiffs' property, but plaintiffs err in attributing such takings to the government. [77]

The court reasoned that the Fifth Amendment was intended to bar the government from forcing the individual from bearing public burdens alone.[78] However, the property loss caused by a

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71. *Id.* at 66.

72. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992).

73. *Id.* Furthermore, the *Lucas* court suggested that, considering the high degree of control, commercial dealers should reasonably expect that a regulation may totally diminish their property's value. Thus, unlike *Andrus*, *Lucas* does not require the personal property to retain some economic value in order to defeat a taking claim; a regulation can render personal property valueless. *Id.*

74. 857 F.2d 1324 (9th Cir. 1988)(a landowner was fined for killing a protected grizzly bear after losing twenty sheep to bears), *cert. denied*, 490 U.S. 1114 (1989).

75. *Id.* at 1326.

76. *Id.* at 1334.

77. *Id.* at 1334. The court also noted that the owner could have defended his property by means other than killing the bears. *Id.* at 1331. However, the landowners unsuccessfully tried to scare the bears by building fires and shooting guns into the air. *Id.* at 1326. Also, the landowner hired a professional trapper to capture the bears, but this also failed. *Id.*

78. *Id.* at 1334.

protected species is not attributable to the government.[79] The loss depends, instead, on where a species resides. The court concluded that the owner's property losses were merely "incidental, and by no means inevitable."[80]

Relying on *Christy*, in *Florida Game & Fresh Water Fish Commission v. Flotilla*, the court refused to find a taking even though the ESA prevented a landowner from developing part of his property.[81] In *Flotilla*, state wildlife officials enforced the ESA in order to protect bald eagle nests by requiring a developer to set aside 48 out of 173 acres he planned to develop as a residential subdivision.[82] Applying the same reasoning as used in *Christy*, the court rejected a taking claim on the grounds that "[t]he government neither owns nor controls the migration of the wildlife species it protects."[83]

However, the owners in *Christy* and *Flotilla* did not suffer a total taking. In *Christy*, the owner only lost 84 out of 1700 sheep, and in *Flotilla*, the landowner could still develop 125 out of 173 acres.[84] Thus, it is unclear whether a court would hold that a "total" taking is "incidental."

VI.

DEFENSES TO A PLCO-TYPE TOTAL TAKING CLAIM

Considering that on one hand, species need habitat to survive, and on the other, property owners want to develop their land for profit, it is likely that taking claims, such as PLCO's, will repeatedly arise in the near future. With this conflict in mind, I analyze five potential defenses to PLCO's Fifth Amendment taking claim, some of which could defeat future total taking claims based on ESA restrictions.

A. *The ESA and the Public Trust*

The FWS may argue that the "public trust" encompasses wildlife.[85] If wildlife is viewed as part of the public trust, the ESA could be interpreted as codifying a pre-existing property law.

79. *Id.*
80. *Id.*
81. 636 So. 2d 761 (Fla. App. 1994).
82. *Id.* at 764.
83. *Id.* at 765.
84. *Christy*, 857 F.2d at 1326, *Flotilla*, 636 So. 2d at 764.
85. PLCO would sue the United States for an ESA-created taking. Thus, for this paper, I will refer to the defendant as the FWS, the enforcement arm of the ESA.

Hence, PLCO would receive no right to compensation under *Lucas*. In states such as California, landowners do not own the rights to public trust resources located on their private property. Rather, the state government controls the property for all of its residents.[86] Therefore, by the terms used in *Lucas*, the public trust "inheres in the title itself."[87] However, to date the Supreme Court and California courts have held that the public trust encompasses only resources connected to navigable waters and tributary streams.[88] Given that wildlife has not thus far been considered a public trust resource, it is unlikely that a court would see the ESA as codifying a pre-existing federal or California property law.[89] As a result, reliance on the public trust doctrine will probably not succeed in defeating an ESA total taking claim.

Although it existed in ancient Roman law, the concept of the public trust first gained major recognition in American law in *Illinois Central Railroad v. Illinois*.[90] There the Supreme Court held that the Illinois legislature could not convey lands covered by the navigable tidewaters of Lake Michigan to a private landowner.[91] Instead, the State was to act as trustee over navigable waters for the benefit of the public.[92] For instance, the state has a duty to ensure public access to navigable waters for fishing, navigation,

86. National Audubon Soc'y v. Superior Court, 658 P.2d 709, 723 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983)(involving the Los Angeles Department of Water and Power's efforts to divert water from streams feeding into Mono Lake. The court held that the state's agreement with DWP to sell the water rights violated the state's duty as trustee of public trust resources).

87. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992); *see supra* notes 64-65 and accompanying text.

88. *See infra* notes 90-99 and accompanying text.

89. *But see*, Richard M. Frank, *"Take" It to the Limit: Reconciling the Endangered Species Act and the Fifth Amendment*, ENVT'L LAW NEWS, Summer 1994. Frank argues that wildlife is owned by Californians, "in trust, in their collective, sovereign capacity." However, Frank's authority for this assertion is questionable. He relies on cases from 1884 to 1925 which are based on the old common law notion that states own their wildlife. These cases are not based on the idea that states act as the *trustee* of wildlife. Also, Frank relies on California Fish and Game Code, which refers to the public's ownership of wildlife. CAL. FISH & GAME CODE, § 1801(f) (Deering 1989). The principle of state ownership of wildlife was overruled in Hughes v. Oklahoma, 441 U.S. 322 (1979), *see infra* note 94. *See also* Douglas v. Seacoast Prods., 431 U.S. 265, 284 (1977) ("It is pure fantasy to talk of 'owning' wild fish, birds, or animals.").

90. 146 U.S. 387 (1892). For more detailed history of the public trust doctrine see Charles Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989).

91. *Illinois Central*, 146 U.S. at 452.

92. *Id.*

and commerce.[93] However, the Supreme Court has never expanded the public trust beyond navigable waters.[94]

Following the Supreme Court's lead, the California state courts have linked the public trust to navigable waters. In *Marks v. Whitney*, the California Supreme Court expanded the uses of navigable waters protected by the public trust.[95] Beyond fishing, navigation, and commerce, the state has a duty as trustee to preserve tidewaters in their "natural state so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life."[96] In 1983, the California Supreme Court expanded the scope of the public trust.[97] *National Audubon* held that the public trust extended beyond navigable waters to include tributary streams.[98] However, neither expansion suggested the inclusion of wildlife in the public trust.[99]

Although California has not yet included wildlife in its public trust, two other jurisdictions have. The Alaskan Constitution expressly identifies wildlife as a "common-use resource," which one court analogized to the public trust.[100] And in *In re Steuart*

93. *Id.*

94. In *Geer v. Connecticut*, the Court found that the states hold their wildlife in public ownership, as opposed to public trust. 161 U.S. 519, 522 (1896) (involving a criminal conviction for illegally transporting hunted game across state lines. The Court upheld the conviction on the grounds that states possess ownership rights of its animals and, thus, Connecticut had the authority to pass and enforce its non-transportation law). Moreover, *Hughes v. Oklahoma* overruled *Geer*. 441 U.S. 322, 326 (1979) (finding that an Oklahoma statute prohibiting the transportation of in-state bred minnows to another state violated the Commerce Clause). *Hughes* held that the states do not own their wildlife, but noted that they still maintain their general police powers to protect wildlife. *Id.* at 335. *See also*, Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 648 n.92 (1986) (suggesting that despite the opportunity to do so, the Court has never expanded the public trust doctrine beyond navigable waters).

95. 6 Cal. 3d 251 (1971) (in a quiet title action, the California Supreme Court found that the property transferred could not be developed since it contained tidelands, a part of California's public trust).

96. *Id.* at 259.

97. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419 (1983).

98. *Id.* at 425-6.

99. *Id.* at 425 ("The core of the public trust doctrine is the states' authority as sovereign to exercise . . . control over the navigable waters of the state and the lands underlying those waters.").

100. Owsichek v. State, 763 P.2d 488, 494 (Alaska 1988) (upholding an Alaska law requiring hunting party guides to obtain licenses).

Transportation Company, a Virginia federal court held that wildlife is part of the public trust.[101]

It is highly unlikely that a California court would expand the public trust doctrine to defeat a total taking claim such as PLCO's.[102] First, except for the Alaska and Virginia cases,[103] all courts link the public trust doctrine to navigable waters and, at least in California, the inclusion of wildlife in the public trust would require complete judicial innovation.[104] Clearly, the public trust of wildlife does not constitute a property law restriction "already in place upon land ownership" as envisioned by *Lucas*.[105]

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101. 495 F. Supp. 38 (E.D.Va. 1980) (allowing Virginia and the federal government to sue Steuart for damages to migrant water fowl caused by an oil spill). The court stated, "Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources." *Id.* at 39. For scholarly support of the expansion of the public trust *see also* Gary Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989); *see* Cook, *supra* note 36, at 210.

102. The public trust may be an effective weapon to protect water resources. *See* Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473 (1989); Jan S. Stevens, *The Public Trust and In-Stream Uses*, 19 ENVTL. L. 605 (1989).

103. See supra notes 100-101 and accompanying text.

104. Regardless of its probability of success, some scholars warn against promoting the public trust. Professor Lazarus argues that from a strategic perspective, public trust expansion is not an effective method to protect the environment. *See* Lazarus, *supra* note 94, at 712-713. He argues that the public trust doctrine arose (1) at a time when the *Illinois Central* Court feared that the legislature would sell off public lands, thus preventing the public from access, and (2) before the post-New Deal era in which the government has taken a central role in environmental protection. *Id.* at 665-689. Lazarus argues that the public trust is an outdated doctrine. First, there is no longer a fear that legislatures will sell off navigable waters. Second, the police powers, expanded during the New Deal and exerted through a maze of government agencies, have replaced the need for the public trust doctrine. Third, the public trust doctrine unduly relies on pro-environment judicial bias, subject to political change. If the courts acquire an anti-environment bias, they may not only halt expansion of the public trust doctrine, but they may use the public trust to further land degradation. For example, in *Illinois Central* the court ensured public "access" to public trust resources. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892). Too much public access can destroy the ecological value of land. And fourth, Lazarus argues that the judicial expertise in environmental matters is far inferior to the many administrative agencies created specifically to regulate environmental concerns. *See* Lazarus, *supra* note 94, at 712-713; *Cf.* Joel Yellin, *Science, Technology, and Administrative Government: Institutional Designs for Environmental Decision Making*, 92 YALE L.J. 1300, 1325 (1983) (listing cases where courts made "fundamental" scientific errors); *But cf.* Yagerman, *supra* note 39, at 851 (arguing that the inadequacies of administrative agencies require judicial oversight).

105. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992); *see supra* notes 64-65 and accompanying text.

A court would also rely on the principle that a retroactive expansion of the public trust to defeat a taking claim would disrupt PLCO's reasonable investment-backed expectations. Based on case law at the time of purchase, PLCO was entitled to assume that the ESA constituted a valid exercise of police power, not an outgrowth of California's duty as public trustee.[106] Thus, PLCO expected that the ESA was subject to Fifth Amendment limitations. Subject to normal land-use regulations, PLCO probably thought it could harvest some, if not most, of its old-growth redwoods. A court will be hesitant to expand the scope of the public trust doctrine so long as reasonable expectations are embodied in the *Lucas* compensation exception for pre-existing property laws.

Second, a court is not likely to use the public trust to defeat a total taking claim, since it contradicts the policy of preventing individuals from bearing unfair burdens. Considering the importance of protecting the Headwaters' biodiversity, courts might conclude that it would be unfair to require PLCO, its stockholders and its employees to bear the burden of such protection alone. Unlike zoning regulations that spread the burdens and benefits so as to create an average reciprocity of advantage, the ESA burdens only a few landowners who unfortunately provide a habitat for a protected species. As the last major private landowner of biodiverse, old growth redwoods, PLCO is especially burdened by the ESA. Thus, an expansion of the public trust to include wildlife would conflict with *Lucas*'s attempt to protect the individual landowner, such as PLCO, from facing burdens that, in fairness, the rest of society should also bear.

B. *The ESA and Public Nuisance*

Lucas suggests that the public nuisance doctrine may constitute a pre-existing property law which would defeat the just compensation requirement.[107] Thus, if the FWS shows that species destruction constitutes a nuisance, the government would not have to compensate PLCO to protect the Headwaters from harvesting.[108] Despite its attractiveness as compared to the public trust doctrine, the public nuisance doctrine is also unlikely to defeat PLCO's total taking claim.

106. People v. K. Sakai Co., 56 Cal. App. 3d 531 (1976) (holding that the ESA constitutes a valid exercise of police power).

107. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

108. As with all creators of nuisances, it is not unfair to prevent PLCO from utilizing its property to harm others.

Unlike the public trust doctrine, public nuisance is a flexible legal rule, not limited by its origins.[109] To expand the public nuisance doctrine to include species destruction, a court need only apply a broader definition of harm. When determining whether a regulation "inheres in the title itself," the *Lucas* Court suggested using the Restatement's flexible definition of nuisance.[110] Restatement section 821B(1) defines public nuisance as "an unreasonable interference with a right common to the general public."[111] The phrase "unreasonable interference" includes a "significant interference with the public health."[112] Moreover, in 821B, comment e, the editors state, "[s]ome courts have shown a tendency, for example, to treat significant interferences with . . . principles of conservation of natural resources as amounting to a public nuisance.[113] Also, *Lucas* admitted the possibility that "changed circumstances or new knowledge may make what was previously permissible no longer so."[114]

Based on the Restatement's flexible nuisance definition and on *Lucas*'s suggestion that new nuisances can be created by the courts, the FWS should argue that species destruction constitutes a public nuisance.[115] However, this result is unlikely.

As far as the PLCO case is concerned, no California court has found species destruction to constitute a public nuisance. The California Civil Code defines nuisance as "anything which is injurious to health so as to interfere with the comfortable enjoyment of life."[116] For instance, California courts have held that fire hazards and pollution constitute public nuisances.[117] The harm

109. *See supra* notes 85-106 and accompanying text (expansion of the public trust requires a court to break the doctrine's historical link to navigable waters).

110. RESTATEMENT (SECOND) OF TORTS § 821B (1979). Lucas at 1029, supra note .

111. *Id.* at § 821B(1).

112. *Id.* at § 821B(2)(a).

113. *Id.* at § 821B, comment e. However, the editors failed to cite a case which demonstrates this tendency; I was also unable to discover such a case.

114. *Lucas*, 505 U.S. at 1031.

115. As the defendant, the FWS will have no problem bringing the public nuisance defense. However, standing may pose a problem for environmental groups trying to initiate a lawsuit for species destruction nuisance. Although the Restatement relaxes strict standing requirements, the Supreme Court has refused to follow its lead. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). To succeed, an environmental group such as EPIC would have to allege specific injuries to its membership caused by species destruction.

116. CAL. CIV. CODE § 3479 (Deering 1989).

117. City of Bakersfield v. Miller, 64 Cal. 2d 93, 100 (1966) (fire hazard); Helix Land Co. v. City of San Diego, 82 Cal. App. 3d 932, 949-50 (1978) (water pollution).

caused by species destruction is likely to be considered too remote to constitute a public nuisance for the purposes of defeating a total taking claim.

Unlike certain types of pollution, which affect the health of distinct individuals, species destruction harms society in general. For example, harvesting the Headwaters may cause the loss of an important medical cure — a loss that may threaten the well-being of people all over the world. Even so, a court will be reluctant to declare species destruction a nuisance to prevent an unknown degree of harm that adversely affects society in unknown ways.[118] Thus, when balanced against the Fifth Amendment concerns of a landowner, at the present time a court would be unlikely to declare species destruction a public nuisance for the purpose of defeating a total taking claim.[119] As society learns more about how the destruction of biodiversity harms humans, courts may look to the public nuisance doctrine to include species protection in the future.[120] Thus, although it seems more likely to succeed than the public trust doctrine, a public nuisance argument will probably not defeat a total taking claim, such as PLCO's.[121]

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118. On the other hand, if the FWS could show that destruction of a particular species harms society in a known manner, then a court is likely to enjoin the activity as a public nuisance.

119. PLCO's Fifth Amendment concerns are analogous to those described in the public trust doctrine section above. There is a strong claim that the judicial innovation needed to equate species destruction with nuisance, although less drastic than in the case of the public trust doctrine, would conflict with PLCO's reasonable expectations. MAXXAM will argue that when it purchased PLCO in 1986, it could not have expected that harvesting timber could constitute a public nuisance. PLCO was well aware of the ESA and ought to have expected restraints on its harvesting. But these restraints were legislative and subject to the Fifth Amendment limits on the police powers. Second, considering the uncertain dangers caused by species destruction, most courts would probably refrain from using judicial innovation for the purpose of imposing the total burden on an individual landowner. Such uncertainty will prevent a court from both expanding the public nuisance doctrine and defeating a total taking claim in one decision. Without being certain of the extent of the injury caused by the landowner's activity, a court is likely to invoke the Fifth Amendment's fairness principle and impose the burden on all of society.

120. I do not deny the possibility that residents neighboring PLCO's property might be able to enjoin PLCO for nuisance based on aesthetic considerations. However, such a claim would not demonstrate that the ESA codifies pre-existing nuisance law (since the ESA is an environmental, not aesthetic regulation) and thus, it would not alter PLCO's taking claim.

121. Between the two, the FWS should rely on the public nuisance doctrine. Its flexibility makes it a more effective tool to ensure environmental protection, including the possibility of species protection in the future.

C. *The* Christy-Flotilla *Defense*

The FWS may use the "*Christy-Flotilla*" defense to argue that the ESA does not regulate PLCO's property rights at all.[122] By analogizing PLCO's case to *Christy*, a court could hold that the ESA merely protects species, and that economic losses caused by this protection are "incidental."[123]

Essentially, the *Christy-Flotilla* defense relies on two theories. First, the ESA does not regulate property rights. Rather, the ESA protects species, and this protection only indirectly controls property use. Second, for a Fifth Amendment taking, the government must "force" a landowner to bear an unfair burden. Because the ESA is enforced where species reside, the species, not the government, spread the burdens of the regulation. Thus, any taking claim related to a protected species cannot be attributed to the government and any property loss is merely incidental.

However, this argument elevates form over substance. All of the responsibility cannot be placed on the species. Indirectly, the government regulates landowners by protecting certain species. A species' choice of habitat does not, by itself, force landowners to bear burdens; rather, the government's protection of a species forces the landowner to bear burdens. Moreover, there is no precedent differentiating between direct and indirect restrictions that force a landowner to restrict property use.

Further, the owners in *Flotilla* and *Christy* did not suffer a total, or even a fifty percent, taking of their property. Faced with PLCO's *total* taking claim of $500 million, a court will be reluctant to find PLCO's loss "incidental" to the ESA regulation.

D. *The* Andrus *Defense*

Under *Andrus*, a restriction such as the ESA can eliminate the most profitable "strand" of a property owner's bundle of rights and, assuming that the property still has some economic value, a court will not find a compensable taking.[124] But, because *Lucas* limited *Andrus* to personal property, the FWS must show that

122. *See supra* notes 74-84 and accompanying text.

123. Christy v. Hodel, 857 F.2d 1324, 1335 (9th Cir. 1988).

124. Andrus v. Allard, 444 U.S. 51, 66 (1979). Note that *Andrus* held that the property must possess some remaining economic value. Subsequently, in its affirmation of *Andrus*, *Lucas* stated that personal property regulation could totally diminish value and not risk a total taking claim. *See supra* notes 68-73 and accompanying text.

the ESA regulates PLCO's property interest in harvested timber, not its real property.

When attached to the land, timber is considered part of the owner's real property.[125] However, when severed, the timber becomes personal property.[126] The FWS could argue that the ESA does not regulate PLCO's real property interest. With its trees uncut, the ESA does not affect PLCO. But, the ESA does affect PLCO when it attempts to harvest its redwoods. At this point, the FWS could argue, the ESA is regulating PLCO's interest in severed trees, which is personal property. To put it differently, PLCO's just compensation claim depends on the value of its redwoods harvested. Thus, for the ESA to give rise to a taking claim, it is arguably regulating PLCO's personal property interest.

A court may be reluctant to consider the ESA's prohibition on timber harvesting a personal, rather than real, property restriction. A court may favor the policies of fairness and protection of expectations over old, infrequently litigated property common law.

However, *Lucas* asserts that commercial dealers in personal property ought to expect that regulations could totally diminish their properties' value.[127] Presumably, such a regulation would be fair under *Lucas*. Thus, if the FWS could convince a court that the ESA only regulates a personal property interest, then under either *Lucas* or *Andrus*, PLCO's claim will fail. Furthermore, following the logic of *Andrus*, the FWS has a strong argument that although the ESA blocks PLCO's most profitable use of its property, it does not prevent PLCO from deriving some economic benefit by charging admission to walk among its beautiful redwoods.[128]

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125. AMERICAN LAW OF PROPERTY, Vol. 5, § 19.15 (1952).

126. *Id.* at § 19.1; *See also* TIFFANY ON PROPERTY § 595 (3rd ed. 1939); FLA. JURISPRUDENCE, 2d., *Property*, § 11 (1995); NEW YORK JURISPRUDENCE, 2d., *Logs and Timber*, § 29 (1994); OHIO JURISPRUDENCE, 3d., *Logs and Timber*, § 2 (1994); and *cf.* CAL. UNIF. COM. CODE § 2107(2). One court has gone so far as to consider unsevered timber personal property if the buyer of the real property intended to harvest the trees. Ascherman v. McKee, 143 Cal. 2d. 277, 282 (1956) ("The majority rule is that where it is apparent from the contract that the prime object is the severance of the trees within a reasonable time. . .the sale is one of goods not of an interest in real property").

127. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992).

128. This argument is stronger in the PLCO case than in *Andrus* assuming that people would pay more to camp at a redwood forest than to view eagle feathers. This argument failed in the real property context of *Lucas*. *See Lucas*, 505 U.S. at

E. *Legislative Solutions to Defeat Total Taking Claims*

Through legislative solutions, the FWS can defeat *Lucas* taking claims by arguing no *total* taking exists. The Headwaters Forest Act ("Act") exemplifies a potential legislative solution to the Fifth Amendment concerns created by the ESA.[129] If it had passed, the Act would have authorized the federal government to purchase the Headwaters and other timberland owned by PLCO.[130] The Act would have appropriated at least $200 million to purchase PLCO's land.[131] If passed, the FWS could have argued that Congress' willingness to spend $200 million to purchase the uncut redwoods demonstrates that satisfying the requirements of the ESA does not totally diminish the value of the land.[132]

1017 n.3 (J. Stevens, Dissenting)(arguing that Lucas's land still had value as picnic land or a buffer zone).

129. H.R. 2866, 103d Cong., 2d Sess. (1993). Dan Hamburg, a freshman Democrat representative from Ukiah, CA, authored the bill. PLCO and the Headwaters are located in Hamburg's district.

130. H.R. 2866 § 3(d). On October 22, 1994, the House of Representatives passed the Headwaters Forest Act by a margin of 288 to 133. However, the Senate never voted on its version of the bill and with the 1994 Republican victories in the House and Senate the bill was not reintroduced the next session. In fact, voters in Humboldt County expressed their displeasure with their representative, Dan Hamburg, and his efforts to pass the Act. They voted to oust the first term representative and voted in PLCO's lobbyist and strong opponent of the Act, Frank Riggs. *Final California Election Returns*, L.A. TIMES, Nov. 10, 1994, at A25. Riggs has introduced another bill to purchase the Headwaters. H.R. 2712, 104th Cong., 1st Sess. (1996). However, environmental groups strongly oppose the Riggs bill. Jane Kay, *Ideas for saving a forest*, S.F. CHRON., Dec. 21, 1995, at A-1. Specifically, the Act authorized the federal government to purchase 44,000 acres of land owned by PLCO, including the Headwaters. PLCO's land would be added to the Six Rivers National Forest. H.R. 2866 § 3(b)(1). The Act prohibits harvesting of the 3000-acre Headwaters, but it would allow PLCO to selectively harvest approximately 40,000 acres of second and third growth redwoods. *Id.* at § 5(a)(1). Opposition to the bill focused on the Headwaters' cost. The Headwaters alone was appraised at $500 million in 1993. *See supra* note 3. Thus, to appease opponents the bill only appropriates $200 million to pay for 44,000 acres. H.R. 2866 § 3(d). Besides its high cost, opponents argued that the bill unfairly authorized the purchase of 30% of PLCO's land, an amount that would require the company to cut jobs; *See also* Carolyn Lochhead, *House Spares Old Redwoods: Bill to Buy Headwaters Goes to Senate*, S.F. CHRON., Sept. 22, 1994, at A3 (stating that opponents of bill won important modifications, such as the $200 million appropriations limit).

131. H.R. 2866 § 3(d). The $200 million would be supplemented by swapping surplus federal assets. *Id.* at § 3(b)(3).

132. Because under the proposed Act PLCO would have still been able to harvest the second and third growth redwoods, the bulk of the federal money would have gone to purchasing the Headwaters. Thus, to simplify I assume that the Act signifies the government's willingness to pay approximately $200 million for the Headwaters. A payment of $200 million of land worth $500 million constitutes 40% of the total

From the FWS' perspective, by preventing PLCO from harvesting the Headwaters, the ESA actually creates new value. For all land with unique social value, whether historical, symbolic, ecological, or aesthetic, its preservation through regulation creates or preserves values otherwise lost if the development or use of the land is permitted. Left intact, the Headwaters' value can generate profits through tourism and scientific research.[133] The Act, if passed, would have demonstrated the existence of this new value.[134]

The Constitution requires the government to pay just compensation to property owners if a court finds a taking. The Court has equated just compensation with fair market value.[135] However, in *Lucas*'s "total taking" analysis—one separate from the just compensation question—the Court does not require that certain sources of value be excluded, such as offers from the government to purchase the land.

In response to this approach, one might argue that if the government could partially compensate landowners to defeat total taking claims, the Fifth Amendment's just compensation requirement would be rendered meaningless. In *Monongahela Navigation Co. v. United States*, the Court stated:

> It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid.[136]

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value. In Village of Euclid v. Ambler Realty Co., the Supreme Court upheld a zoning regulation that devalued landowner's property by eighty percent. 272 U.S. 365 (1926). A current bill to rewrite the ESA includes a compensation provision. H.R. 2275, 104th Cong., 1st Sess. (1995). The bill requires the federal government to fully compensate landowners whose property values declined by 20 percent due to the ESA. Essentially, this bill requires "just compensation" even when the Fifth Amendment would not require it. Favorable to property owners, this measure would either overwhelm an already debt-ridden federal government or lead to less protection of endangered species.

133. *See Hearings on H.R. 2866 Before the Subcomm. on National Parks, Forests & Public Lands of the House Comm. on Natural Resources*, 103d Cong., 1st Sess. 101 (1993) (testimony of William Stewart, Senior Research Associate, Pacific Institute for Studies in Development, Environment & Security, arguing that recent job growth in Humboldt County is positively associated with its "environmental amenities", rather than its timber industry).

134. H.R. 2866 § 3(d).

135. United States v. Miller, 317 U.S. 369, 374 (1943).

136. 148 U.S. 312, 326 (1893).

Unarguably, the government is not a typical market actor, and in eminent domain proceedings it cannot choose its own price for just compensation. Yet, prior to awarding just compensation, a court must first find that a taking actually occurred. In the regulatory taking context, the landowner must show a total diminution of his or her property value. If land has economic value despite the restraining effect of a regulation, then the regulation does not totally diminish the value of the land, and thus *no taking has occurred.* A legislative solution, such as the Act, does not manipulate the just compensation amount at all.

If the only reason a valid exercise of police power requires compensation is because it renders property valueless, then it seems reasonable to allow a separate government act to show that the land has value in its regulated state. By demonstrating that despite ESA regulation the Headwaters has value, the Headwaters Forest Act, or a similar legislative solution, could defeat PLCO's total taking claim.

In at least one case, the Supreme Court viewed a somewhat similar legislative solution favorably. In *Penn Central Transportation Co. v. City of New York*, a New York landmark preservation law prevented Penn Central's owners from constructing a skyscraper above their historic railroad station.[137] The Court refused to grant the owners just compensation.[138] Despite prohibiting development plans, the law did not totally diminish the property's value. The Court noted through New York's transferable development-rights ("TDR") program, the owners could sell their skyscraper development rights to another property owner for a profit.[139]

To alleviate fears that legislative actions, such as the Headwaters Forest Act, would eviscerate the just compensation requirement, courts should limit the applicability of the partial compensation defense. First, artificially inserting value through a legislative purchase offer should be limited to defeating regulatory taking claims, not physical takings.

Second, courts could limit the legislative solution defense to the rare cases where private parties own property with unique social value. Courts could assume that a purchaser of land with unique social value takes title with different expectations than a purchaser of ordinary land. For example, purchasers of redwood

137. 438 U.S. 104, 119 (1978)
138. *Id.* at 138.
139. *Id.* at 137.

forests should expect more severe restraints to preserve the property in its socially-valued state than an owner of ordinary property. Relying on one of these limitations, a court could hold that an action like the Headwaters Forest Act defeats PLCO's total taking claim.

From a policy perspective, such an outcome would not conflict with the Fifth Amendment. First, by receiving a portion of the Headwaters' value, PLCO no longer bears the burden of protecting the Headwaters alone. Society, through taxes, will share a portion of the burden. Second, as suggested above, PLCO's reasonable expectations are not unfairly disturbed. As the owner of property with as much symbolic, aesthetic, and ecological value as the Headwaters, PLCO should have also expected society to take measures to protect it from harvesting.

Besides offering to purchase land, Congress could establish a plan of transferable development rights for the ESA similar to the plan in *Penn Central*.[140] By leaving land undeveloped, the landowners of a protected species' habitat can bank development credits to use in future projects or transfer them to another property owner for value. Another possibility is that Congress could grant owners of land devalued by the ESA a modest tax break.[141]

However, there is one major limitation to the legislative-solution defense. It requires the legislature to act, to act responsibly, and to spend money—requirements that Congress and state legislatures do not always meet.

VII.
CONCLUSION

The ESA attempts to protect society's valuable biodiversity. Its enforcement, however, may severely restrict the ability of landowners to use their property to maximize profits. Under the *Lucas* doctrine, when the ESA totally deprives land of its economic value, the Fifth Amendment requires just compensation. If such taking claims are successful, this will force an already debt-ridden federal government to relax its ESA enforcement and important natural resources may be lost forever.

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140. For a more detailed analysis of legislative attempts to create value *see* Lazarus, *supra* note 94, at 698-702.

141. Larry Swisher, *Give 'em Tax Breaks for Compliance*, LEWISTON MORNING TRIB., Sept. 3, 1995, at 3C (suggesting that tax breaks would better encourage compliance than the current system of criminal and civil penalties).

There are at least five defenses to a PLCO-type taking claim. The public trust defense will probably fail, as will the public nuisance defense. However, the public nuisance defense may succeed in the future as society obtains a greater scientific understanding of the dangers of species destruction. The defense relying on the *Christy* and *Flotilla* cases is unlikely to succeed. The *Andrus* defense is more likely to defeat a total taking claim. The most promising defense that might defeat a PLCO-type claim relies on a legislative solution. Congress or state legislatures can defeat a total taking claim by artificially creating value in regulated land. The Headwaters Forest Act or New York's TDR program demonstrate such solutions.

The PLCO case is unique, but its resolution, based on the legislative solution defense, would demonstrate that a compromise can be made between property owners and environmentalists. Property owners should receive some compensation when an ESA restraint would otherwise result in a total loss of their property value. However, the subsidization need not cover the land's full, unregulated market value. Rather, the compensation need only give landowners enough value to defeat a total taking claim. Such a compromise will uphold the Constitutional guaranties of the Fifth Amendment and ensure continued enforcement of the ESA.