Washington Law Review

Volume 78 | Number 3

8-1-2003

When Animals Invade and Occupy: Physical Takings and the Endangered Species Act

Rebecca E. Harrison

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

Rebecca E. Harrison

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

Property rights organizations and private landowners have advanced two arguments for the proposition that the federal government should compensate landowners for restrictions it imposes on land pursuant to the Endangered Species Act (ESA or "the Act").[1] The first argument is that these restrictions result in regulatory takings under the Fifth Amendment of the United States Constitution.[2] Regulatory takings occur when government regulations go "too far" in placing restrictions on private property.[3] Courts have steadfastly rejected this argument[4]

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

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

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

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

The second argument private landowners have advanced is that government actions under the ESA give rise to physical takings.[8] These claims avoid several of the roadblocks that prevent landowners with regulatory takings claims from receiving relief. Specifically, the claims have a lower threshold for ripeness[9] and can be brought regardless of whether the government action affects the landowner's entire parcel.[10] Such claims have met with some success in the courts.[11]

To bring a successful physical takings claim a landowner must show that a government action resulted in either a permanent physical occupation—a *per se* physical taking[12]—or a compensable physical invasion.[13] A *per se* physical taking occurs when the government, or an entity authorized by the government, occupies private land[14] and destroys all of the landowner's fundamental property rights.[15] These rights include the rights to possess the land, exclude others from possessing and using it, control its use, and dispose of it.[16] A

118–24 and accompanying text.

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

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

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

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

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

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

10. *See id.* at 734.

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

12. *See infra* Part II.

13. *See infra* Part II.

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

15. *See id.* at 435.

16. *See id.* at 435–36.

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

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

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

---

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

18. *Id.*

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

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

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

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

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

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

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

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

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

I. THE ENDANGERED SPECIES ACT AND PRIVATE PROPERTY RIGHTS

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

26. *See infra* Part VI.B.

27. *See infra* Part II.

28. *See infra* Part VI.C.

29. *See infra* Part VI.C.

30. 16 U.S.C. § 1531(b) (2000).

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

National Oceanic and Atmospheric Administration Fisheries Service (NOAA Fisheries) with the authority to regulate actions on private lands that may harm imperiled species or their habitat.[32] In order to exercise this authority, the FWS and NOAA Fisheries (collectively, "the Services") must list a species as "endangered" or "threatened."[33] An endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range."[34] A threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[35] The Act provides listed species with two protections on private land.[36] First, it is illegal for a private landowner to harm a listed species or its habitat.[37] Second, the federal government may not authorize, fund, or carry out actions on private land that may jeopardize the continued existence of the listed species or its habitat.[38] To lessen the burden of these restrictions, the Act provides two means by which landowners can mitigate the effects of a listing on their land—commenting on proposed rules[39] and applying for Incidental Take Permits (ITPs).[40]

A. Private Land and the ESA

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

32. *See infra* Part I.B.

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

34. *Id.* § 1532(6).

35. *Id.* § 1532(20).

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

37. 16 U.S.C. § 1538(a).

38. *Id.* § 1536(a)(2).

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

40. 16 U.S.C. § 1539(a)(1)(B).

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

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

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

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

Before the FWS or NOAA Fisheries can provide protection for imperiled species on private land, they must list the species as endangered[46] or threatened.[47] Section 4[48] of the Act requires the Services to decide whether to list a species as threatened or endangered "solely on the basis of the best scientific and commercial data available."[49] When a species is listed, the Services must designate its "critical habitat" when doing so is "prudent and determinable."[50] "Critical habitat" includes areas within the region the species occupied at the time it was listed that contain "physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection."[51] It also encompasses certain areas outside the region the species occupied at the time it was listed that "are essential for the conservation of the species."[52] The establishment of critical habitat is to be based on both scientific data and potential economic impact.[53] Critical habitat may include private as well as public land.[54] It is intended to encompass areas "within the geographical area occupied by the species,"[55] as well as lands "essential for the conservation of the species" that are not currently occupied.[56]

---

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

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

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

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

48. 16 U.S.C. § 1533(a)–(i).

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

> (A) the present or threatened destruction, modification, or curtailment of [the species'] habitat or range;
>
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
>
> (C) disease or predation;
>
> (D) the inadequacy of existing regulatory mechanisms; or
>
> (E) other natural or manmade factors affecting its continued existence.

50. *Id.* § 1533(a)(3).

51. *Id.* § 1532(5)(A)(i).

52. *Id.* § 1532(5)(A)(ii).

53. *Id.* § 1533(b)(2).

54. *See id.* § 1532(5)(A).

55. *Id.* § 1532(5)(A)(i).

56. *Id.* § 1532(5)(A)(ii).

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

The ESA also provides protection for listed species and habitat on private land through the Section 7[61]consultation requirement.[62] This provision requires that every federal agency consult with either the FWS or NOAA Fisheries to ensure actions they authorize, fund, or carry out will be unlikely to either "jeopardize the continued existence of any [listed] species"[63] or "result in the destruction or adverse modification of [critical] habitat."[64] Private landowners who undertake projects that require a federal agency's funds, authorization, or participation, and are likely to affect listed species or critical habitat, are subject to the consultation requirement.[65]

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

While the ESA places restrictions on the use of private land, it also provides two means by which private landowners can influence the Act's application to their land. First, Section 4 grants the public notice of and an opportunity to comment on proposed rules to list species and designate critical habitat.[66] Second, Section 10[67] gives landowners the

57. *Id.* § 1538(a)(1)(B).
58. *Id.* § 1532(19).
59. *Id.* § 1538(a)–(g).
60. 50 C.F.R. § 17.3 (2000).
61. 16 U.S.C. § 1536(a)–(p).
62. *Id.* § 1536(a)(2).
63. *Id.*
64. *Id.*
65. *See id.* § 1536(a)(2)–(3).
66. *See id.* § 1533(b)(3)(B)(ii).
67. *See id.* § 1539(a)–(j).

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

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

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

---

68. *See id.* § 1539(a)(1)(B).

69. *See id.*

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

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

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

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

74. *Id.*

75. *See* 16 U.S.C. § 1539(a)(1)(B).

76. *See id.*

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

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

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

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

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

78. *Id.* § 1539(a)(1)(B).

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

91. *See id.* at 435–36.

92. *Id.*

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

94. *See id.*

95. *See id.*

96. *See infra* Part III.B.

97. *See infra* Part IV.B.

98. *See infra* Part V.B.

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

100. *Id.* at 1029.

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

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

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

III. REGULATORY TAKINGS CLAIMS UNDER THE ESA

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

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

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

---

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

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

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

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

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

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

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

111. *See id.* at 190.

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

113. *Id.*

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

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

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

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

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

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

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

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

119. *See id.* at 415–16.

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

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

122. *Id.*

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

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

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

Regulatory takings claims under the ESA generally fail the second test of the regulatory takings analysis because they are not based on reasonable investment-backed expectations.[129] The term "investment-backed expectations" is derived from a law review article[130] defining it as the crystallized expectations a landowner holds for the continued use of his or her land in a certain manner.[131] Because the U.S. Supreme Court itself has not defined the term, however, it is unclear how lower courts should apply this factor.[132] In *Good v. United States*,[133] the Court of Appeals for the Federal Circuit applied the factor to a regulatory takings claim under the ESA.[134] The court determined that a landowner who, at the time of purchase, had actual and constructive knowledge of

---

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

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

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

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

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

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

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

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

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

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

134. *Id.* at 1360–63.

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

IV. *PER SE* PHYSICAL TAKINGS UNDER THE ESA

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

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

135. *Id.* at 1362.

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

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

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

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

140. *Id.*

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

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

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

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

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

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

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

Second, landowners asserting *per se* physical takings claims can receive compensation for any portion of property the government has occupied, even if this portion is merely a small fraction of the total property.[152] On the other hand, a court can order compensation in a regulatory takings case only if the government action has affected the entire value or use of the property.[153] Thus, the fact that government actions under the ESA generally affect only a portion of a parcel of private land[154] does not present a significant barrier to successful *per se* physical takings claims under the Act. Finally, courts do not apply the

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

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

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

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

149. *See supra* Part III.A.

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

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

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

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

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

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

B. Requirements for Per Se *Physical Takings*

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

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

155. *See infra* Part IV.B.

156. *See supra* Part III.B.

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

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

159. *Id.* at 432–33 n.9.

160. *See id.* at 435–36 & n.12.

161. *Id.* at 435–36.

162. *Id.* at 436–37.

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

164. *Id.* at 426.

165. *Id.* at 421–24.

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

occupation of the landlord's property,[167] and that this occupation destroyed all of the landlord's property rights for the portion of land on which the boxes were installed.[168] The landlord could not possess the space occupied by the boxes, exclude the boxes, control the use of the occupied space, or dispose of it.[169] The Court reasoned that because permanent physical occupations destroy all of these rights, the government must provide compensation for such occupations, regardless of the size of the area affected[170] or the public purpose served.[171]

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

In two recent decisions, courts rejected claims that government actions under the ESA to protect imperiled species give rise to *per se* physical takings.[172] Courts in *Boise Cascade Corp. v. United States* and *Seiber v. United States* applied the *Loretto* test and rejected claims by private landowners that government actions protecting listed species resulted in *per se* physical takings.[173] In *Boise*, the Court of Appeals for the Federal Circuit held that the landowner had not suffered a *per se* physical taking because the government does not control the location of wild animals and therefore did not cause the species to inhabit private land.[174] Furthermore, in *Seiber*, the U.S. Court of Federal Claims held that government actions under the ESA did not amount to a *per se* physical taking because the government did not deprive the landowners of all of their property rights.[175] The U.S. Court of Federal Claims hears all takings claims against the federal government for more than $10,000.[176] Parties can appeal its decisions to the Court of Appeals for the Federal Circuit.[177]

---

167. *Id.* at 425–26.

168. *Id.* at 438.

169. *Id.* at 435–36, 438.

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

171. *Id.* at 426, 434–35.

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

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

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

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

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

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

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

In *Boise,* the Court of Appeals for the Federal Circuit held that the presence of wildlife protected by the ESA on private land does not constitute a government occupation of private land.[178] This is true because the government does not control the location of wildlife protected by the ESA.[179] The *Boise* case arose from a dispute between the Boise Cascade Corporation (Boise) and the FWS over the management of a 65-acre parcel of Boise's land known as the Walker Creek Unit.[180] This parcel hosted, and contained habitat for, the federally-listed northern spotted owl.[181] When Boise attempted to log the parcel, the FWS conducted an inspection and determined that logging could harm owls that might otherwise use the site as nesting habitat.[182] It then notified Boise that the corporation must secure an ITP prior to logging the parcel.[183] Boise filed suit in federal district court seeking an injunction preventing the FWS from enforcing the ESA against it and a declaratory judgment that its logging operation would not take spotted owls.[184] The district court dismissed Boise's claim for lack of ripeness[185] and instead granted the United States' request for an injunction preventing the corporation from logging on the site without an ITP.[186] Boise then applied for an ITP.[187] After conducting additional surveys of the Walker Creek Unit, the FWS determined that spotted owls would not be taken by the corporation's planned logging activities and informed

---

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

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

179. *Id.*

180. *Id.* at 1341.

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

182. *Boise*, 296 F.3d at 1341–42.

183. *Id.* at 1342.

184. *Id.*

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

186. *Id.* at 1342.

187. *Id.*

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

Boise returned to court, seeking compensation for the temporary taking of merchantable timber it was prevented from logging because of the district court's injunction.[190] One theory Boise presented[191] was that the injunction was a *per se* physical taking under *Loretto*[192] because the corporation was not allowed to exclude spotted owls from its property by harvesting the timber.[193] The court dismissed Boise's complaints, and Boise appealed.[194]

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

---

188. *Id.*

189. *Id.*

190. *Id.*

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

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

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

194. *Id.* at 1343.

195. *See id.* at 1354–55.

196. *Id.* at 1354.

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

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

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

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

---

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

200. 16 U.S.C. §§ 1331–1340 (2000).

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

202. *Id.*

203. *Id.* at 1425–26.

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

205. *Id.* at 1428.

206. *Id.*

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

208. *Id.* at 1334.

209. *Id.* at 1335.

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

In *Seiber v. United States*, the U.S. Court of Federal Claims found that the presence of the northern spotted owl on private land did not destroy all of the landowner's property rights to the inhabited parcel.[210] At the heart of the *Seiber* case were restrictions the Oregon Department of Forestry placed on the Seibers' property to protect northern spotted owls.[211] The department's regulations required seventy acres of land around every nesting tree to be designated as nesting habitat and prevented logging within these areas.[212] In 1994, the State of Oregon designated forty acres of the Seibers' property as nesting habitat.[213] Five years later, the Seibers sought to log the area and submitted an HCP and an ITP application.[214] The Department of the Interior's Regional Solicitor informed the couple that their ITP application was not adequate, offering to discuss modifications.[215] The landowners rejected this offer, and the FWS denied the application.[216] The Seibers then brought a takings action in the U.S. Court of Federal Claims.[217] Under the court's order, the FWS visited the plaintiffs' property to evaluate the status of the habitat[218] and determined that an ITP was no longer required for the Seibers to log the property.[219] The plaintiffs pursued their claim, arguing that the Service's denial of an ITP resulted in regulatory and physical takings under various theories.[220]

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

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

211. *Id.* at 572–74.

212. *Id.* at 572.

213. *Id.*

214. *Id.*

215. *Id.* at 573.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *See id.* at 573–74.

221. *Id.* at 575–76.

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

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

V. COMPENSABLE PHYSICAL INVASIONS UNDER THE ESA

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

222. *Id.* at 576.

223. *Id.*

224. *Id.*

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

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

227. *See id.*

228. *See id.*

229. *See id.*

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

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

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

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

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

---

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

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

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

234. *See supra* Part IV.A.

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

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

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

238. *See supra* Part IV.A.

239. *See infra* Part V.B.

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

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

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

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

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

241. *See id.* at 434–35.

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

243. *Id.*

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

245. *Id.*

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

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

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

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

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

247. *Causby*, 328 U.S. at 264–67.

248. *Id.*

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

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

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

252. *Id.* at 179.

253. *Id.* at 179–80.

254. *Id.* at 167.

255. *Id.* at 170.

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

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

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

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

256. *Id.*
257. *Id.* at 168–69.
258. *Id.* at 179.
259. *Id.* at 179–80.
260. *Id.*
261. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
262. 447 U.S. 74 (1980).
263. *See id.* at 83–84.
264. *See id.*
265. *Id.* at 82.

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

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

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

266. *Id.* at 77.

267. *Id.*

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

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

270. *Id.*

271. *Id.*

272. *Id.* at 84.

273. *See infra* Part VI.A.

274. *See infra* Part VI.A.

275. *See infra* Part VI.B.

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

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

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

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

276. *See infra* Part VI.B.

277. *See infra* Part VI.C.

278. *See supra* Part V.A.

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

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

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

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

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

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

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

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

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

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

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

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

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

287. 505 U.S. 1003, 1028–29 (1992).

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

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

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

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

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

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

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

---

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

293. *Id.*

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

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

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

Even if a court found that the government controlled a listed species, and that the species' inhabitance of private land comprised a government presence on the property, a claim that such a presence is compensable should still fail. Applying the other two factors in the *Penn Central* test should lead a court to find that such invasions do not require compensation. The second factor in this test is the landowner's reasonable investment-backed expectations. Reasonable investment-backed expectations are crystallized expectations a landowner holds for the continued use of his or her land in a certain manner.[296] In *Kaiser Aetna v. United States*, the U.S. Supreme Court established that compensation for a taking is due to landowners who base their investment-backed expectations on government assurances and then have those expectations destroyed by government-authorized physical invasions.[297] Sections 4 and 7 of the ESA protect against such an occurrence by requiring the Services to provide landowners with notice of listing events[298] and consult with agencies that undertake or authorize activities on private land that may affect listed species.[299]

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

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

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

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

299. 16 U.S.C. § 1536(a)(2).

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

301. *See* 16 U.S.C § 1538(a)(1)(B).

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

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

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

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

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

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

303. 16 U.S.C. § 1536(a)(2).

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

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

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

307. *See* 16 U.S.C. § 1539(a)(1)(B).

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

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

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

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

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

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

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

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

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

VII. CONCLUSION

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