

CHAPTER 5

Takings and Takings:

The Conflict Between the Endangered

Species Act and Property Rights

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Synopsis

§ 5.01. Introduction.

§ 5.02. Overview of the Endangered Species Act.

[1]--The "Jeopardy" Prohibition of Section 7(a)(2).

[2]--The "Taking" Prohibition of Section 9.

[3]--Impact of ESA Regulation on Private Property Rights.

§ 5.03. Constitutional Taking.

[1]--Overview of Taking Law.

[2]--The "New" *Lucas* Taking Standard.

[3]--Effect of *Lucas*.

§ 5.04. Conclusion.

§ 5.01. Introduction.

The Endangered Species Act⁽¹⁾ (ESA or Act) was enacted in 1973 to promote the conservation of protected domestic species of plants, fish, wildlife, and the ecosystems on which these species depend.⁽²⁾ At the time of its enactment, few appreciated, or even envisioned, the potential implications of the Act's provisions. The ESA had originally gained notoriety for its prohibition, under Section 7, of federal government activities that could jeopardize the continued existence of a species. As it enters its twentieth year, the ESA has matured into a substantially more comprehensive statute. As a result of a shift in focus from Section 7 to the Section 9 prohibition on the "taking" (including the modification of habitat) of any protected species, the

ESA has been applied more broadly. It is imposing stringent restrictions on the use of property. These property use restrictions may significantly reduce or eliminate the development potential and, consequently, the value of private property. Thus, this new direction in ESA regulation has generated a conflict with private property rights. Although the judiciary has not yet had occasion to address this conflict, the deprivation of all economically beneficial use of private property by regulations promulgated under other environmental laws has been recognized as a regulatory "taking" under the Fifth⁽³⁾ and Fourteenth⁽⁴⁾ Amendments to the United States Constitution, requiring just compensation. Consistent with this precedent, ESA requirements for the perpetuation of species that cause the "extinction" of property rights would be subject to constitutional limitations.

§ 5.02. Overview of the Endangered Species Act.

The ESA creates two categories of protected species⁽⁵⁾ -- "endangered" and "threatened" species. An "endangered" species is one that is "in danger of extinction throughout all or a significant portion of its range."⁽⁶⁾ A "threatened" species is one that is "likely to become an endangered species within the foreseeable future."⁽⁷⁾

Section 4 of the ESA⁽⁸⁾ directs the Secretary of the Interior (Secretary) to prepare a list of species in the appropriate category and concurrently to designate their critical habitats.⁽⁹⁾ To determine whether any species is endangered or threatened, the Secretary considers criteria such as the present or threatened destruction, modification, or curtailment of its habitat or range; over-utilization for commercial, recreational, scientific, or educational purposes; disease or predation; the adequacy of existing regulatory mechanisms; and other natural or man-made factors affecting its continued existence.⁽¹⁰⁾ While the responsibility for listing terrestrial species as endangered or threatened lies with the Secretary, the Secretary has delegated this authority to the U.S. Fish and Wildlife Service (FWS). The Secretary of Commerce is responsible for listing marine species and has delegated this authority to the National Marine Fisheries Services (NMFS).

Listing occurs through notice and comment rulemaking procedures initiated by the FWS or any interested person.⁽¹¹⁾ Decisions about species-listing must be based entirely on biological factors, using the "best scientific and commercial data available."⁽¹²⁾ They cannot consider the economic impact of listing.⁽¹³⁾

The ESA requires the designation of critical habitat at the time a species is proposed for listing.⁽¹⁴⁾ "Critical habitat" is defined as the specific geographic area occupied by the species at the time of listing, and those areas outside that geographic area that possess those biological and physical characteristics essential to conservation of the species.⁽¹⁵⁾ Unlike the process involving a species-listing decision, before designating critical habitat, the FWS must consider the economic and other relevant impacts of the decision.⁽¹⁶⁾ Unless the FWS determines that the failure to designate it as critical habitat will result in the extinction of the species concerned, an area may be excluded from critical habitat designation on the basis of economic impacts where the benefits of exclusion are greater than the benefits of designation.⁽¹⁷⁾ The FWS may refrain, however, from designating critical habitat during the listing process if it determines either that (1) designation is not prudent because identifying the critical habitat would be expected to increase the threat of takings or other impacts from human activities or (2) there is insufficient scientific information to make a decision.⁽¹⁸⁾

Once listing has been accomplished, the ESA establishes two important mechanisms for protection of the listed species: the Section 7 "jeopardy" prohibition and the Section 9 "taking" prohibition. Under Section 7,⁽¹⁹⁾ federal agencies are required to ensure that their actions will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of the species' critical habitat. Section