

PRIOR APPROPRIATIONS WATER RIGHTS: DOES LUCAS PROVIDE A TAKINGS ACTION AGAINST FEDERAL REGULATION UNDER THE ENDANGERED SPECIES ACT?

Twenty years ago, Congress passed the Endangered Species Act¹ as part of a series of ecologically-focused legislative acts.² The Endangered Species Act (ESA) codifies the federal policy of protecting endangered and threatened species by designating and maintaining critical habitats.³ While this policy may be the most effective way to manage the species conservation effort, it may potentially conflict with private property rights.⁴ Applying the ESA to state-derived private property rights, such as appropriations water rights, showcases a potential conflict between these state rights and federal regulation.⁵

In its history, the ESA has never been applied to include private property within a protected species' critical habitat. However, nothing in the statutory language suggests that the statute is limited to federal property. Moreover, it would be ironic if endangered and threatened species continue to be found only on federal property or in federally-regulated waterways. Therefore, the resulting analysis is premised on a hypothetical situation: the

1. 16 U.S.C. §§ 1531-1544 (1988).

2. Congress passed numerous environmental legislative acts during the 1970s. See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-4344 (1988); Clean Air Act, 42 U.S.C. §§ 7401 (1988); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6922i (1988).

3. A. Dan Tarlock, *The Endangered Species Act and Western State Water Rights*, 20 LAND & WATER L. REV. 1, 2 (1985). Professor Tarlock focuses on the way the ESA affects state water resource management programs.

4. *Id.* at 1. For a discussion of the relationship between property rights and the ESA, see David P. Berschauer, *Is the "Endangered Species Act" Endangered?*, 21 SW. U. L. REV. 991 (1992) (discussing whether the economic impact of listing rather "innocuous" species as endangered has rallied support against the ESA); Holmes Rolston, III, *Property Rights and Endangered Species*, 61 U. COLO. L. REV. 283 (1990) (analyzing the ESA's protection of endangered plants and its relationship to property rights); Rufus C. Young, Jr., *The Endangered Species Act: Impacts and Land Use*, 629 A.L.I.-A.B.A. 631 (1991) (noting the impact on land use of the newest endangered species to be listed in Western states).

5. See Tarlock, *supra* note 3; Melissa K. Estes, Comment, *The Effect of the Federal ESA on State Water Rights*, 22 ENVTL. L. 1027 (1992). This Note focuses on whether ESA regulation of a private water appropriator is subject to a takings action. For a discussion of the impact of the ESA on state water resource management and hydroelectric power, see Tarlock, *supra* note 3; Estes, *supra*.

federal regulation of a prior appropriator's right to use water, under the ESA.

Under the theory of prior appropriations, one who possesses a prior appropriations water right may appropriate a certain quantity of water from a designated source.⁶ If the federal government determines that a prior appropriator's water source lies within an endangered species' critical habitat, a decision to regulate the critical habitat could deprive the appropriator of the economic benefit of the appropriations right.⁷ Consequently, it could be argued that regulation under the ESA could constitute a taking under the framework articulated by the Supreme Court in *Lucas v. South Carolina Coastal Council*.⁸

Since its enactment, the ESA has had dramatic economic and political implications.⁹ The federal government's designation of critical habitats has cost taxpayers and private citizens millions of dollars.¹⁰ Politicians are forced to make difficult value judgments when faced with the choice of supporting economic development or protecting a bird or fish from extinction.¹¹ Congress will undoubtedly focus on these issues when it votes on reauthorization of the ESA.¹²

6. See *infra* notes 65-83 and accompanying text.

7. See, e.g., *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) (holding that a taking exists once a regulation "goes too far" by denying economic benefit).

8. 112 S. Ct. 2886 (1992).

9. See, e.g., *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (D. Wash. 1988). During the 1992 Presidential campaign, George Bush frequently referred to the spotted owl controversy in the Pacific Northwest. This controversy arose when the spotted owl was listed as an endangered species, thereby prohibiting any lumbering activity in the areas known to be the owl's habitat. See also Mark Bonnett & Kurt Zimmerman, Comment, *Politics and Preservation: The Endangered Species Act and the Northern Spotted Owl*, 18 *ECOLOGY L. Q.* 105 (1991).

The most recent controversy involves the listing of various salmon species in the Pacific Northwest. For a discussion of the effects of listing the salmon, see Scott W. Reed, *Fish Gotta Swim: Establishing Legal Rights to Instream Flows Through the Endangered Species Act and the Public Trust Doctrine*, 28 *IDAHO L. REV.* 645 (1992); Andrew S. Noonan, Note, *Just Water Over the Dam? A Look at the Endangered Species Act and the Impact of Hydroelectric Facilities on Anadromous Fish Runs of the Northwest*, 28 *IDAHO L. REV.* 781 (1992).

10. See, e.g., *T.V.A. v. Hill*, 437 U.S. 153 (1978) (upholding an injunction against the completion of a federal dam project, for which Congress had already spent \$78 million, in order to protect the endangered snail darter). See also Young, *supra* note 4 (discussing the economic impact of the ESA's protection of coastal sage scrub, chinook salmon, delta smelt, Colorado squawfish, and the spotted owl).

11. Young, *supra* note 4.

12. See *Economic Issues to Be 'Prevailing Factor' in Battle Over Reauthorization, Hatfield Says*, 23 *Env't Rep. (BNA)* 2080, 2080 (Dec. 18, 1992). The article discusses why the Oregon senator believes that the ESA can work as drafted and applied. However, while Senator Hatfield supports reauthorization of the ESA, he strongly believes that economics will be "a prevailing factor[.]" *Id.* Nonetheless, other senators believe that Congress should "amend the guts out of the . . . Act." *Id.*

This Note uses the *Lucas* decision as a framework for examining the legal relationship between the ESA and prior appropriations water rights. Previous discussions of federal regulation of state-derived property rights have failed to address the relationship between the Takings Clause of the Fifth Amendment and applications of the ESA.¹³ Part I discusses the regulatory protective and prohibitive mechanisms of the ESA. Part II analyzes prior appropriations water rights and the manner in which the federal government regulates water rights under the ESA. Part III examines the Supreme Court's Takings Clause jurisprudence and discusses the Court's recent decision in *Lucas*. Part IV uses a hypothetical fact pattern to demonstrate how application of the ESA to a prior appropriator could result in a taking under the *Lucas* framework.

I. THE ENDANGERED SPECIES ACT

The ESA regulates the protection of any species of fish, wildlife, or plant, that is threatened or in danger of becoming extinct.¹⁴ In 1973, Congress passed the ESA in order to preserve, maintain, and rehabilitate the tenuous ecosystems of endangered or threatened species.¹⁵ In passing the ESA, Congress determined that many plant and animal species were on the verge of extinction because of previously uninhibited commercial development.¹⁶ The Act explicitly states that the federal government shall

13. See Tarlock, *supra* note 3.

14. 16 U.S.C. § 1531(b) (1988). Under the ESA, "endangered species" means:

[A]ny species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

16 U.S.C. § 1532(6) (1988).

15. Under the ESA, a species threatened with possible extinction is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20) (1988). 16 U.S.C. § 1531(b) dictates:

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

Id.

16. 16 U.S.C. §§ 1531(a)(1)-(2) states:

The Congress finds and declares:

(1) Various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction.

preserve all threatened or endangered species, by conserving the habitats necessary for their survival.¹⁷ In particular, the ESA pledges cooperation with the states regarding any conflict between conservation efforts and state water rights.¹⁸

The ESA has three primary devices that act in concert to protect threatened or endangered species: (A) listing and determination of critical habitats; (B) agency consultation and protection requirements; and (C) the prohibition against "taking," in other words, hunting, trapping, or otherwise harming,¹⁹ any threatened or endangered species.²⁰ The ESA requires the appropriate government agency to promulgate property use regulations implementing each of these protective mechanisms.²¹ Congress has the authority to regulate endangered species under the Commerce Clause of the Constitution.²²

A. Listing a Species and Determining Its Critical Habitat

Section 1533 provides the mechanism for determining if a species is endangered or threatened.²³ Any interested person or group may petition the Secretary of the Interior (Secretary) to have a species "listed"²⁴ as endangered or threatened.²⁵ Once a petition is submitted, the Secretary must follow the ESA's guidelines in deciding whether or not to list the species.²⁶ The decision to list the species depends on one or more of the

16 U.S.C. §§ 1531(a)(1)-(2) (1988).

17. 16 U.S.C. § 1531(c)(1) (1988). Congress extended this policy to the federal government in its international programs and its numerous international treaty obligations. 16 U.S.C. §1531(a)(4)-(5) (1988). See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (declining to confer standing upon private citizen's group because it was removed from the international arena in which alleged ESA violations occurred).

18. 16 U.S.C. § 1531(c)(2) (1988) ("It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.").

19. 16 U.S.C. § 1532(19) (1988). See also *infra* text accompanying note 52.

20. 16 U.S.C. § 1533 (1988); Tarlock, *supra* note 3, at 6.

21. 16 U.S.C. § 1533 (1988). This section grants the Secretary of the Interior or Secretary of Commerce the power to promulgate regulations. In some instances, the Secretary of Agriculture may create regulations.

22. U.S. CONST. art. I, § 8, cl. 3 states, "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

23. 16 U.S.C. § 1533(a)(1) (1988).

24. "Listed" is an ESA term of art. Cf. Tarlock, *supra* note 3, at 6.

25. Endangered Species Committee Regulations, Listing Endangered and Threatened Species and Designating Critical Habitat, 50 C.F.R. §§ 424.14, 424.10 (1990).

26. 16 U.S.C. § 1533 (1988).

following factors: present or threatened destruction, modification, or curtailment of the species' habitat or range; over-utilization of the species' habitat for commercial, recreational, scientific, or educational purposes; disease or predation of the species; inadequacy of existing regulatory mechanisms to preserve the habitat; or other natural or man-made factors affecting the species' continued existence.²⁷ The existence of any of these factors is determined on the "basis of the best scientific and commercial data available."²⁸ This initial decision to list a species does not take economic considerations into account.²⁹

Once a species is listed, the Secretary must then designate the species' critical habitat.³⁰ The critical habitat of a species is the specific geographic area necessary for the species' survival.³¹ The Secretary must consider both scientific data and the economic impact of designating a habitat.³² After the Secretary has listed a species and designated the critical habitat, the Secretary may issue any regulations deemed "necessary and advisable to provide for the conservation of such species."³³ In addition to these protective regulations, the Secretary must also develop a recovery plan, detailing the procedures to be followed in conserving the species.³⁴ Moreover, the Secretary must monitor the species' status³⁵ and promulgate guidelines each federal agency must follow in order to fully comply with the Act's provisions.³⁶

B. The Agency Consultation and Protection Requirement

The agency consultation requirement, set out in 16 U.S.C. § 1536(7), addresses federal regulation of federal agencies under the ESA.³⁷ Under section 1536(7), every federal agency or license applicant must insure that any action that it funds, authorizes, or carries out will not jeopardize

27. 16 U.S.C. §§ 1533(a)(1)(A)-(E) (1988).

28. 16 U.S.C. § 1533(b)(1)(A) (1988).

29. H.R. REP. NO. 697, 96th Cong., 1st Sess. 159 (1978), reprinted in 1979 U.S.C.C.A.N. 2557, 2576.

30. 16 U.S.C. §§ 1533 (a)(3)(A)-(B) (1988).

31. 16 U.S.C. § 1532(5)(A) (1988).

32. 16 U.S.C. § 1533(b)(2) (1988).

33. 16 U.S.C. § 1533(d) (1988).

34. 16 U.S.C. § 1533(f)(1) (1988). The Secretary must create a recovery plan to promote the survival of the species, unless such a plan will not achieve that end. *Id.*

35. 16 U.S.C. § 1533(g) (1988).

36. 16 U.S.C. § 1533(h) (1988).

37. 16 U.S.C. § 1536 (1988).

protected species.³⁸ Prior to taking action, every federal agency or license applicant must consult with the Secretary³⁹ to determine if the proposed action will affect a protected species' designated critical habitat.⁴⁰ If the Secretary determines that the proposed agency action will affect a protected species, then the ESA requires the agency to prepare a "biological assessment."⁴¹ Based upon the assessment, if the Secretary ultimately determines that the agency action will harm the protected species, the Secretary will "suggest reasonable and prudent alternatives which he believes would not violate" the ESA's protection scheme.⁴²

The Supreme Court addressed the ESA's agency consultation requirement in *Tennessee Valley Authority v. Hill*.⁴³ In *Hill*, the Court concluded that Congress intended the ESA to prohibit "taking" any protected species, even if the prohibition harmed ongoing federal projects.⁴⁴ After Congress appropriated funds for the Tellico Dam, the respondents in *Hill* sought to enjoin the dam's construction under section 1536(7) of the ESA. The respondents argued that the dam would destroy the critical habitat of the endangered snail darter, a small fish.⁴⁵

Chief Justice Burger, writing for the majority, focused on the legislative history of the ESA and section 1536(7).⁴⁶ The Chief Justice reasoned that Congress placed greater priority in saving endangered species than in

38. 16 U.S.C. § 1536(a)(2) (1988).

39. See Endangered Species Committee Regulations, Interagency Cooperation, 50 C.F.R. § 402.01(b) (1992) (reassigning authority to administer the Act from the Secretary of Interior to the Fish and Wildlife Service).

40. 16 U.S.C. § 1536(a)(2) (1988); 16 U.S.C. § 1536(c) (1988).

41. 16 U.S.C. § 1536(c) (1988).

42. 16 U.S.C. § 1536 (b)(3)(A).

43. 437 U.S. 153 (1978).

44. *Id.* at 186. The district court had denied the respondents' request for an injunction. The court reasoned that despite the jeopardizing effects that the dam could have had on the snail darter, "[a]t some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result." 419 F. Supp. 753, 760 (E.D. Tenn. 1976).

The Sixth Circuit reversed the district court opinion. *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977). The court found that completion of the dam was a prima facie violation of 16 U.S.C. § 1536(7). *Id.* at 1072.

45. *Hill*, 437 U.S. at 161. The respondents, a group of biological scientists, a conservation group, and citizens who used the Little Tennessee Valley, which was to be affected by the dam, had petitioned the Secretary of the Interior to list the snail darter as an endangered species in 1975. *Id.* As a result, the Secretary listed the snail darter on October 8 of that year. *Id.* Furthermore, the Secretary determined that 100% of the critical habitat was within the geographic region affected by the Tellico Dam. *Id.*

46. *Id.* at 183-87.

continuing federal agency missions.⁴⁷ Although the ESA took priority over existing and future federal programs, the majority concluded that section 1536(7) could also require agencies to alter ongoing projects in order to satisfy the ESA's requirements.⁴⁸ Thus, the Court affirmed the powerful protective provisions of the ESA despite the incredible economic costs associated with compliance.⁴⁹ Furthermore, the Court relied heavily on Congress' conclusion that habitat modification is the greatest threat to protected species.⁵⁰

C. *The Prohibition Against "Taking"*

The ESA, in section 1536(9), stipulates that it is unlawful to "take" an endangered species.⁵¹ According to the ESA, to "take" a species is "to harass, harm, pursue, hunt, wound, kill, trap, capture, or collect, or attempt to engage in such conduct."⁵² This prohibition applies to any federal agency or private individual.⁵³ A "taking" also occurs when a state, agency, or individual adversely alters an endangered species' habitat.⁵⁴

47. *Id.* at 185-86. The Court opined that Congress was clearly concerned about "the potentially enormous danger presented by the eradication of any endangered species." *Id.* at 186.

48. *Id.* at 186. The Court stated, "[I]t is clear Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act." *Id.* The Court also held that the ESA still applied, despite the fact that Congress had appropriated funds for the dam after it knew of the section 1536(7) implications. *Id.* at 189. "There is nothing in the appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act." *Id.*

49. *Id.* at 187. The Court stated that despite the loss of millions of dollars the public would suffer, the ESA clearly showed that the value of an endangered species was "incalculable." *Id.* By the time the case reached the district court, Congress had already appropriated \$78 million to the dam project. *Id.* at 166.

50. *Id.* at 179-81.

51. 16 U.S.C. § 1538(a)(1)(B) (1988). For a comprehensive study of 16 U.S.C. § 1536(9) of the ESA, see Federico M. Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live With a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109 (1991).

52. 16 U.S.C. § 1532(19) (1988).

53. 16 U.S.C. § 1538(a)(1)(B) (1988).

54. Endangered and Threatened Wildlife and Plants Provision, 50 C.F.R. § 17.3 (1991). An act that "harms" a species is "an act which actually kills or injures wildlife." These acts include "significant habitat modification or degradation [that] actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Id.*

Professor Tarlock discussed the relationship between the "takings" provisions and 16 U.S.C. § 1536(7):

Theoretically, each time an endangered species is killed by a project, a section 9 violation occurs. The section 9 prohibition against "takings" has been characterized as double jeopardy because an activity, such as a water diversion project, could be in violation of the Act even

In *Palila v. Hawaii Department of Land and Resources*,⁵⁵ the district court concluded that a state cannot avoid application of the ESA by maintaining that it holds its wildlife in a public trust.⁵⁶ In *Palila*, the Hawaii Department of Land and Resources maintained a feral sheep and goat game reserve in an area that included the critical habitat of the endangered Palila bird.⁵⁷ The court dismissed a Tenth Amendment claim that the state had sovereignty over its species, holding that the Commerce Clause granted Congress the power to supersede state control of wildlife.⁵⁸ Focusing on section 1536(9) of the ESA, the court held that the game reserve had a negative impact on the Palila bird and its critical habitat.⁵⁹ The court concluded that the ESA's prohibition against "taking" included a taking through alteration of the species' critical habitat.⁶⁰

Recently, in *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*,⁶¹ the District Court for the District of Columbia upheld the Secretary's interpretation expanding the definition of "take" under section 1536(a) of the ESA.⁶² Pursuant to the ESA, the Secretary of the Interior broadened the definition of the term to include instances of "significant

though it received section 7 clearance.

Tarlock, *supra* note 3, at 9.

55. 471 F. Supp. 985 (D. Haw. 1979). The Sierra Club and other conservation groups brought this action in the name of the Palila bird. *Id.* at 987. For a thorough discussion of *Palila* and its effect on actions under 16 U.S.C. § 1536(9), see Cheever, *supra* note 51, at 143-50.

56. *Palila*, 471 F. Supp. at 995. The Department of Land and Resources alleged that applying the ESA to protect the Palila violated Hawaii's Tenth Amendment right to sovereignty over its own wildlife. *Id.* The court discounted this argument under the Commerce Clause. *Id.* at 995.

57. *Id.* at 989. The defendants had maintained the reserve since 1950. *Id.*

58. *Id.* at 995. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. art. I, § 8, cl. 3. In dictum, the district court referred to the Supreme Court's decision in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), which held that the states yielded control of their wildlife to the federal government's power to regulate wildlife in the name of commerce. 471 F. Supp. at 992. The district court also noted that through certain international treaties, the federal government has recognized that species preservation is of national interest. *Id.* at 993.

59. *Id.* at 990. The court concluded that "Congress has determined that protection of any endangered species anywhere is of the utmost importance to mankind, and that the major cause of extinction is the destruction of natural habitat." *Id.* at 994-95.

60. *Id.* at 991, 999.

61. 806 F. Supp. 279 (D.D.C. 1992), *aff'd sub nom.* Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993).

62. *Id.* at 283. The plaintiffs were citizens' groups, individuals, and businesses, all of whom depend upon the timber industry in the Northwest and Southeast United States. *Id.* at 281. The plaintiffs brought suit alleging that because the Secretary had listed the Northern Spotted Owl and other species as protected, the plaintiffs had to curtail the use of their property, resulting in economic losses. *Id.* at 282.

habitat modification or degradation" that injure or kill a protected species.⁶³ The court relied on the legislative history of the ESA and concluded that Congress intended to define "take" broadly.⁶⁴ By extending the regulation of property to include prevention of habitat modification, the Court strengthened the "takings" prohibition of the ESA.

II. WESTERN STATES' PRIOR APPROPRIATION WATER RIGHTS

Water rights, like most property rights, are derived from the states and not the federal government.⁶⁵ Most Eastern states follow the doctrine of "reasonable use,"⁶⁶ whereby a riparian owner, one who owns property adjacent to a water source,⁶⁷ may use the water in any reasonable manner, provided the owner does not unreasonably interfere with another riparian owner's reasonable use.⁶⁸ However, because of the divergent climatic conditions and the widely dispersed sources of water in the western United States, the common-law reasonable use doctrine did not equitably maximize the use of water.⁶⁹ Applying the "reasonable use" theory in these areas

63. *Id.* at 281-82. Pursuant to 16 U.S.C. § 1532(19), the Secretary of the Interior promulgated a regulation defining the word "harm" in the ESA's definition of "take." *Id.* The regulation defined "harm" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (1991).

64. 806 F. Supp. at 283. Both the House and Senate reports show an intent to interpret the term "take" broadly. "'Take' is defined in Section 3(12) in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. REP. NO. 307, 93d Cong., 1st Sess. 7 (1973). The House noted that the definition of takings "includes, in the broadest possible terms, restrictions on the taking, importation and exportation, and transportation of [endangered] species." H.R. REP. NO. 412, 93d Cong., 1st Sess. 11, 15 (1973). The case was affirmed on appeal. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993). The majority agreed with the district court's reasoning regarding the definition of "harm" under the "take" provision. 1 F.3d at 8. However, the dissent would have struck down the regulation under the statutory construction principle of *noscitur a sociis*. *Id.* at 11 (Sentelle, J., dissenting). The dissent argued that "a general word in a list should be interpreted narrowly" in order to avoid exceeding the intended scope of congressional acts. *Id.* Thus, because the definition of "take" under the statute included to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect," 16 U.S.C. § 1532(19) (1988), construing harm to mean "habitat modification" as the regulation defines it would be to give a broader meaning to the term than Congress intended. *Id.* at 11-12.

65. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 7.4, at 422 (1988) (stating that riparian rights are born out of the common law). For a comprehensive treatise on water rights theories, see A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* 10-23 (1991).

66. CUNNINGHAM, *supra* note 65, § 7.4, at 422.

67. BLACK'S LAW DICTIONARY 1327 (6th ed. 1990).

68. See CUNNINGHAM, *supra* note 65, § 7.4, at 423.

69. WELLS ALECK HUTCHINS, *SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST* 64-65 (1942).

would have resulted in granting a priority to riparian land owners over non-riparian land owners, regardless of who had greater need or capacity.⁷⁰ Therefore, the Western states developed the theory of prior appropriation water rights.

The goal of the prior appropriation theory is to distribute water supplies so that they can be most "beneficially and economically utilized."⁷¹ Because the prior appropriation theory seeks to maximize beneficial use of water, the theory is grounded on the notion of "first in time, first in right," establishing principal appropriation rights in the individual who first acquires the water right.⁷² The right to appropriate originates, administratively, with the state, because the state owns non-navigable waters in trust for the public and regulates all acquisitions of appropriations rights.⁷³ Thus, the state provides the procedure under which an individual can apply for, and perfect, a right to appropriate water from a non-navigable water source.⁷⁴

The prior appropriator's right to appropriate is secure and without

70. *Id.* Furthermore, diversions of water for use on non-riparian lands would encroach upon the riparian landowner's use of water, due to the lack of consistency of the water source. *Id.*

71. For a thorough discussion of Western states' water rights theory, see generally WILLIAM GOLDFARB, *WATER LAW* (2d ed. 1988); WELLS ALECK HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* (1972). Each of the 17 western states practices either a pure prior appropriations theory, known as the "Colorado doctrine," or a dual reasonable use and prior appropriations theory of state water rights, called the "California doctrine." CUNNINGHAM, *supra* note 65, § 7.4, at 423-25, 427. The arid states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming follow the "Colorado doctrine." CUNNINGHAM, *supra* note 65, § 7.4, at 427. The less arid states of California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington follow the "California doctrine." CUNNINGHAM, *supra* note 65, § 7.4, at 427. In the western states, water sources are more often snow and rain rather than lakes, rivers, or other ostensibly constant sources of water. HUTCHINS, *supra* note 69, at 65. "The sources of water are snow and rain on the mountain ranges and other higher lands, which in seeking lower levels flows over and under the surface in streams and in diffused flows." *Id.*

72. See ARIZ. REV. STAT. ANN. §§ 45-1512-167 (1988); CAL. CIV. CODE §§ 1414-1422 (West 1990); COLO. REV. STAT. § 37-90-102 (1987); IDAHO CODE §§ 42-101-252 (1990); KAN. STAT. ANN. §§ 821-701-732 (1989); MONT. CODE ANN. §§ 85-2-301-328 (1989); NEB. REV. STAT. §§ 46-202-206 (1990); NEV. REV. STAT. §§ 533.010-533.545 (1991); N.M. STAT. ANN. §§ 72-5-6-31 (Michie 1978); OKLA. STAT. ANN. tit. 82, §§ 105.23-105.31 (1990); ORE. REV. STAT. § 537 (1987); S.D. CODIFIED LAWS ANN. §§ 46-5-1-52 (1982); TEX. WATER CODE ANN. §§ 11.023-11.336 (West 1990); UTAH CODE ANN. §§ 73-3-1-23 (1953); WASH. REV. CODE ANN. § 90.16 (West 1988); WYO. STAT. § 41-3 (1972).

73. Tarlock, *supra* note 3, at 14; HUTCHINS, *supra* note 69, at 74. The states began to enact legislation codifying the law of prior appropriations during the mid-1800s. *Id.* at 74-75. Moreover, the states have, for the most part, dedicated all unappropriated waters for the public's use. *Id.* at 78-80.

74. HUTCHINS, *supra* note 69, at 74. The federal government holds the power to determine whether non-navigable waters in the public domain may be appropriated. *Id.*

limitation, so long as the appropriator uses the water for a beneficial use.⁷⁵ The prior appropriator may not appropriate water for speculative purposes or appropriate more water than the appropriator can use, as neither of these appropriations would be "beneficial" uses of the water.⁷⁶ However, the appropriator may seek to increase the amount that can be appropriated if the need for more water for a beneficial use also increases or is developed.⁷⁷

The amount of the appropriation is stipulated in the appropriator's title, and the state will permit the appropriator to take only that amount of water, save the above circumstance.⁷⁸ A secondary appropriator may also obtain the right to appropriate water from the same source as the prior appropriator, subject to the same prerequisites as the prior appropriator.⁷⁹ However, the secondary appropriator's right to appropriate is a right to take only the excess of the prior appropriator's appropriation for beneficial uses.⁸⁰ This applies to all subsequent appropriators.

The prior appropriations right is not a right in the water itself, but in the water's use. As a result, any restriction of the prior appropriator's right to withdraw water is an infringement of that property right.⁸¹ States that employ the appropriations theory recognize that a subsequent appropriator may modify the prior appropriator's right to use water.⁸² Therefore, in all

75. Tarlock, *supra* note 3, at 14. Beneficial uses include irrigation, domestic use, and other farming or mining needs. HUTCHINS, *supra* note 69, at 65-68.

76. HUTCHINS, *supra* note 69, at 65-66 (quoting *Union Mill & Mining Co. v. Daugberg*, 81 F. 73 (C.C.D. Nev. 1897)).

77. *Id.* at 65 ("[T]he appropriator is entitled, not only to his needs and necessities at that time, but to such other and further amount of water . . . as would be required for the future improvement and extended cultivation of his lands.").

78. HUTCHINS, *supra* note 69, at 65-66.

79. *Id.*

80. See CUNNINGHAM, *supra* note 65, § 7.4, at 424. The authors state:

The basic apportionment principle is that one, not necessarily a riparian owner, who makes a prior use of water for some 'beneficial' purpose may gain the right to continue doing so. Under most systems the prior appropriator's right is subject to being diminished by a later claimant who can establish a need for water for a preferred beneficial purpose. However, since water rights are viewed as property rights, the diminished prior appropriator must be compensated.

Id.

81. Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257-59 (1991) (stating that the nature of the prior appropriations right is such that restricting the amount of water that can be appropriated infringes on the very nature of the property right).

82. WILLIAM B. STOEBCUK, *NONTRESPASSORY TAKINGS IN EMINENT DOMAIN* 92 (1977). Appropriations states have compensated owners in this situation unless the subsequent appropriator's specific use is preferred to the prior appropriator's use. *Id.* For example, a domestic use of water is preferred to an agricultural or purely economic use. *Id.* Appropriations states accordingly require the

instances of appropriation, when the prior user is restricted from withdrawing the amount of water allotted in the appropriations permit, the secondary appropriator must compensate the prior user for infringing on the prior appropriations right.⁸³

A. Federal Regulatory Doctrines: Modifications of States' Prior Appropriations Schemes

The federal government's authority to regulate appropriations water rights is drawn from Congress' power to regulate commerce under the Commerce Clause.⁸⁴ Courts have recognized several different theories under which the federal government may regulate state appropriations water rights in the name of protecting commerce.

1. Federal-Reserved Water Rights

Courts have recognized a theory of federal-reserved water rights on federal lands.⁸⁵ These rights are a hybrid of appropriations and riparian rights because they allow federal appropriation of water, but require the water to be on federally-owned riparian land.⁸⁶ Unlike the holder of a

subsequent user to compensate the prior appropriator for the value of the lost water. *Id.*

83. *Id.*

84. The states' authority to regulate state water rights rests in the public trust doctrine. The public trust doctrine theorizes that the state holds in trust for the public all lands not owned privately. *Estes, supra* note 5, at 1029-30. The Supreme Court first articulated this doctrine in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892), in which the Court held that the state of Illinois could not sell land beneath the Chicago harbor to the Illinois Central Railroad Company. 146 U.S. at 453. The Court determined that the lands beneath navigable waters are for the public and that the state cannot relinquish its responsibility over these lands. 147 U.S. at 453.

In *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal.), *cert. denied*, 464 U.S. 977 (1983), the California Supreme Court firmly applied *Illinois Central* to a state's power to appropriate water through the public trust doctrine. The dispute arose because Mono Lake was being appropriated via a man-made aqueduct by users in Los Angeles. The California Supreme Court held that the state must consider the public trust interest when appropriating water rights. *Id.* at 728, 732.

85. *Tarlock, supra* note 3, at 14-15. The Supreme Court first recognized federally reserved water rights in *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the Court applied these rights in the context of federal Indian reservations. 207 U.S. at 567. The Court held that "[t]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." *Id.* at 577.

86. *Tarlock, supra* note 3, at 14-15.

Theoretically, federal-reserved proprietary water rights are mules. They have hybrid appropriative and riparian characteristics. They have a priority date and entitle the holder to a fixed quantity of water like appropriative rights. But they also have riparian characteristics; i.e., the right depends on federal land ownership rather than on the application of water to a beneficial use.

Id.

state prior appropriations right, the holder of a federal-reserved right may only appropriate the minimum amount of water necessary to support the federal appropriator's purpose.⁸⁷ Furthermore, Congress creates these water rights through legislation that specifically sets such land aside, rather than the "first in time" theory of prior appropriations.⁸⁸ Therefore, the federal-reserved water right permits federal appropriation of water without compensating any private property owners who might be affected by the action, only when the federal government has held title to the water right prior to the date of the private owner's title.⁸⁹ However, Congress and the courts disfavor setting aside federal-reserved water rights because the action treads on a traditionally state-derived right.⁹⁰ Therefore, the use of the federal-reserved right is limited. As a result, Congress often resorts to regulating land or navigable water to avoid having to actually claim land to ascertain the federal-reserved water rights.⁹¹

In *United States v. New Mexico*,⁹² the Supreme Court stated that it disapproved of finding congressional claims of implied federal-reserved water rights. In this case, the United States government claimed that when Congress set aside the Gila National Forest from other public lands, it reserved the right to use the water of the Rio Mimbres River for all purposes commensurate with the withdrawal of the land.⁹³ The Court held that unless Congress explicitly states its intention to reserve water rights for specified federal uses, a federal-reserved right does not exist.⁹⁴ Justice Rehnquist, writing for the majority, noted that the Government's claim was inconsistent with the relatively narrow purposes for which national forests

87. *Id.* at 15.

88. *Id.*

89. See *United States v. Cappaert*, 426 U.S. 128, 143-46 (1976).

90. Tarlock, *supra* note 3, at 15. The Supreme Court articulated its disfavor of finding congressional claims in *United States v. New Mexico*, 438 U.S. 696, 715 (1978), stating: "[T]he 'reserved rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas." *Id.*

91. Tarlock, *supra* note 3, at 15. In *Nevada v. United States*, 463 U.S. 110 (1983), the Supreme Court implied that it preferred federal regulation by refusing to find federal-reserved water rights.

92. 438 U.S. 696 (1978).

93. *Id.* at 704-05. The United States asserted that Congress had intended to reserve the water of the Rio Mimbres for "aesthetic, recreational and fish-preservation purposes." *Id.* at 705. The Supreme Court of New Mexico disagreed with the Government's contention, holding that in setting aside a national forest, the government only reserved the amount of water necessary "to insure favorable conditions of water flow and to furnish a continuous supply of timber." *Id.* at 704 (quoting *Mimbres Valley Irrigation Co. v. Salopek*, 564 P.2d 615, 617-19 (N.M. 1977)).

94. *Id.* at 709. The Court stated that when Congress intended to reserve water flows for specific purposes, it expressed those purposes in the language of the reservation. *Id.* at 710.

have been reserved.⁹⁵ The Court concluded that Congress intended to regulate the Rio Mimbres only to preserve the timber and maintain favorable water flows for public and private uses.⁹⁶

2. *Navigational Servitude and Federal Supremacy*

The federal government has also utilized the theory of navigational servitude to regulate state-allocated water rights.⁹⁷ The navigational servitude theory holds that the federal government, under the Commerce Clause, has the right to maintain and create navigable waters.⁹⁸ Under this theory, all navigable water rights, which are primarily state-created, are held subject to a federal "servitude" to regulate and improve navigation.⁹⁹ Therefore, imposing a navigational servitude on a state water rights user is not a compensable regulation because the user has always been subject to the federal servitude.

The Supreme Court upheld the federal government's power under the navigational servitude doctrine in *United States v. Willow River Power Co.*¹⁰⁰ The Court held that the federal government was not required to compensate a power company for interfering with the company's state-allocated water rights when the government acted to improve the navigability of an interstate waterway.¹⁰¹ Justice Jackson, writing for the majority,

95. *Id.* at 707-08. Justice Rehnquist noted that national forests were to be reserved for the two limited purposes of protecting forests from human destruction and preserving the water conditions and flow necessary to conserve the forest's conditions. *Id.* at 708. Justice Rehnquist further noted that the government's aesthetic and recreational uses would defeat the original intent of preserving the water's quantity and quality. *Id.* at 713.

96. *Id.* at 718. The Court concluded that Congress created the national forest system to preserve the forest through water regulation. *Id.* Furthermore, Congress continually deferred to state water law, rather than exercising its federal reservation power to achieve this end. *Id.*

97. See *Estes*, *supra* note 5, at 1038.

98. CUNNINGHAM, *supra* note 65, § 7.4, at 425. The authors describe the navigational servitude doctrine:

On navigable water a major limitation on the riparian owner's rights is imposed by what is commonly called the "navigation servitudes" held by the Federal Government and to a much lesser extent by state governments. Under an extension of the commerce clause of the United States Constitution, the Federal Government has the power to regulate and improve navigation.

Id.

99. *Id.*

100. 324 U.S. 499 (1945).

101. *Id.* at 511. The claimants owned a power producing dam on the Willow River, which empties into the St. Croix River. Under a federal project to improve navigability on the Upper Mississippi and St. Croix Rivers, the federal government constructed a dam on the Mississippi that caused the headwaters of the Willow River to flood the claimant's dam. *Id.* at 499-502. The claimants argued that their property right to use of the Willow River headwaters had been taken, requiring just compensation.

first declared that only the taking of legally protected property rights requires compensation.¹⁰² The Court then stipulated that legally protected property rights must be weighed against the federal government's right to improve navigability.¹⁰³ The Court concluded that federal operations designed to improve navigation do not require compensation unless property is actually taken.¹⁰⁴

3. *Eminent Domain*

Eminent domain is the power through which a sovereign may take private property for public use.¹⁰⁵ This power is an attribute of sovereignty, inherent in all independent states.¹⁰⁶ The federal government's eminent domain power is limited by the Fifth Amendment, which requires that when the government takes private property for public use, it must pay the property holder just compensation.¹⁰⁷ A governmental taking may be either trespassory or nontrespassory.¹⁰⁸ A trespassory taking occurs when

Id. at 501.

102. *Id.* at 502. Justice Jackson stated that "only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." *Id.* The majority further determined that the power company had no property interest in the headwater of the Willow River. *Id.* at 503.

103. *Id.* at 510. The Court stated:

Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation.

Id.

104. *Id.* The Court reasoned that interference with a riparian owner's economic advantage is not a compensable harm. *Id.* *But c.f. Willow River*, 324 U.S. at 515 (Roberts, J., dissenting) ("I think it is a right decision if the United States, under the Constitution, must pay for the destruction of a property right arising out of the lawful use of waters not regulable by the federal government because they are not navigable.").

105. JACQUES B. GELIN & DAVID W. MILLER, *THE FEDERAL LAW OF EMINENT DOMAIN* 1 (1982).

106. *Id.* at 2. Because the eminent domain power inheres in every independent state, it cannot be abridged. *Id.*

107. The Fifth Amendment states: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

State governments may also take property for public use, with payment of just compensation, under the Fourteenth Amendment. The Fourteenth Amendment states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

108. CUNNINGHAM, *supra* note 65, § 9.1, at 512.

Today it can be pretty generally said that eminent domain law accepts 'property' as an abstract legal construct. Thus, compensation may be had on account of nontrespassory

the government physically enters an individual's land and demands title or a lesser interest in the land.¹⁰⁹ Nontrespassory takings usually involve a taking of a property interest through regulation rather than physical invasion.¹¹⁰

In *Kaiser Aetna v. United States*,¹¹¹ the Supreme Court acknowledged the distinction between the navigational servitude and the eminent domain takings power of the federal government.¹¹² In *Kaiser Aetna*, a privately-owned, non-navigable marina was subsequently made navigable by the owners.¹¹³ The federal government wanted to open the marina to public access, under the theory that because the marina was now navigable, it was subject to the federal navigational servitude.¹¹⁴ The private owners argued that the marina was private property and that granting public access to it would amount to a taking.¹¹⁵

The Court noted that both the navigational servitude power and eminent domain power were derived from the federal government's commerce power.¹¹⁶ The Court then determined that federal action to maintain navigability under the navigational servitude doctrine does not include granting a public right of access over private property.¹¹⁷ The Court concluded that requiring public access in the case would amount to a taking

interferences by governmental entities that . . . cause loss of riparian rights; and that seriously interfere with many other interests normally regarded as property rights.

Id. See also William B. Stoebuck, *Condemnation of Riparian Rights, A Species of Taking Without Touching*, 30 LA. L. REV. 394 (1970).

109. STOEBUCK, *supra* note 82, at 1. In the case of trespassory takings, courts are primarily concerned with determining the amount of compensation and, at times, with determining whether land has been condemned for public use. *Id.*

110. *Id.* at 171. Nontrespassory takings litigation creates questions whether there has been a "taking" and if so, whether the government has taken "property." *Id.* at 1. Nontrespassory takings usually involve conceptualizing property rights that are distinct from real property. *Id.* at 2.

111. 444 U.S. 164 (1979).

112. *Id.* at 179-80.

113. *Id.* at 169. The petitioners conformed the previously non-navigable Kuapa Pond into a navigable waterway for their private use. *Id.* at 167. The federal government filed suit claiming that because the pond was now navigable, it was subject to federal navigational servitude regulation. *Id.* at 168-69. The government sought a right of public access to the pond. *Id.*

114. *Id.* at 168-69.

115. *Id.* at 169.

116. *Id.* at 177. The majority stated that a distinction existed between "taking" riparian lands while improving navigability, and condemning fast riparian lands—lands not connected to the navigation of water. *Id.*

117. *Id.* at 178. Because the pond was privately owned under Hawaiian law, the majority recognized that one could own this type of water. *Id.* at 179. The Court also relied on *United States v. Willow River Power Co.*, 324 U.S. 499 (1945), which held that the government could not invade upon a legally supported economic advantage without providing just compensation. 444 U.S. at 178.

under the Fifth Amendment, requiring just compensation.¹¹⁸

The Supreme Court's analysis in *Kaiser Aetna* illustrates the distinction between federal action under the navigational servitude doctrine and federal action under the eminent domain power. Although both powers are derived from the federal commerce power, their doctrines differ greatly. The navigational servitude power is premised on the notion that all navigable waters are "owned" by the federal government, and therefore, all riparian property-owners' and water rights-holders' of navigable waters property rights are, and always have been, subject to the higher federal right to regulate navigability.¹¹⁹ On the other hand, the eminent domain power is premised on the idea that the federal government may take private property or a private property right for public use.¹²⁰ Thus, where the federal government does not "own" the property or property right and does not have a right to regulate it that supersedes the private owner's right, the government must compensate the property owner for the federal regulation—a taking.

B. *The Endangered Species Act and State Water Rights*

The ESA allows the federal government to regulate the use of water to conserve protected species.¹²¹ This right is derived from the federal power to regulate commerce.¹²² Because appropriations water rights are derived from the state, the question arises whether the federal government may regulate these state rights through federal regulatory programs such as the ESA. Courts have determined that appropriations water rights are no different from any other property right and are thus subject to federal commerce regulation.¹²³

118. 444 U.S. at 180. Justice Rehnquist concluded that the government could not require public access "without invoking its eminent domain power and paying just compensation." *Id.*

119. See *supra* notes 97-104 and accompanying text.

120. See *supra* notes 105-10 and accompanying text.

121. 16 U.S.C. §§ 1533, 1538 (1988).

122. See *supra* note 22.

123. Professor Sax has summarized the constitutional issue:

1. Water rights have no greater protection against state regulation than any other property rights. They are in no sense "super-property."

2. In fact water rights have *less* protection than most other property rights for several reasons: . . . (a) because their exercise may intrude on a public common, they are subject to several original public prior claims, such as the navigation servitude and the public trust, and to laws protecting commons; . . . (b) their original definition, limited to beneficial and non-wasteful uses, imposes limits beyond those that constrain most property rights; (c) insofar as water rights . . . are granted by permit, they are subject to constraints articulated in the permits.

Sax, *supra* note 81, at 260.

In *Cappaert v. United States*,¹²⁴ the Supreme Court unanimously affirmed a Ninth Circuit decision subjecting a private appropriations water right to a federal-reserved water right.¹²⁵ The dispute called into question whether the federal government had reserved an underground pool beneath the Devil's Hole when it declared the site a national monument in 1952 in order to protect a threatened species of fish.¹²⁶ The dispute arose because the petitioners argued that the federal government's reservation of the water should not limit their right to appropriate water from the pool, which originated in 1968.¹²⁷

The Court held that because the federal government's purpose in withdrawing the Devil's Hole from public use was to protect the pool and its fish, the government had also intended to reserve any unappropriated water from the pool.¹²⁸ The Court further stipulated that the federal-reserved water right applied to groundwater as well as surface water.¹²⁹ Because the federal government had reserved water for federal use prior to the inception of the petitioners' appropriations right, the Court held that the government was not required to perfect its water right according to state appropriations law.¹³⁰

The extent of the ESA's reach over existing prior appropriations rights was addressed by the Ninth Circuit's decision in *Carson-Truckee Water Conservancy District v. Clark*.¹³¹ In *Carson-Truckee*, the court determined that the Secretary has an obligation to administer a federal reservoir in order to protect endangered species.¹³² The court concluded that until the species was no longer threatened or endangered, the Secretary's species conservation duties outweighed the conservancy district's state right to the

124. 426 U.S. 128 (1976).

125. *Id.* at 138.

126. *Id.* at 131. In 1952, President Truman withdrew Devil's Hole from public use and proclaimed it a national monument. *Id.* at 131-32. The President made this proclamation in order to maintain the underground pool and to protect a unique species of fish, the pupfish, from extinction. *Id.* at 132.

127. In 1968, the petitioners, owners of land near Devil's Hole, began pumping groundwater that consistently depleted Devil's Hole. *Id.* at 133. The petitioners argued that the federal reservation of Devil's Hole did not enjoin their appropriations right to pump the groundwater. *Id.* at 135-36.

128. *Id.* at 139. The Court also recognized that the President had the right to reserve the pool and protect the pupfish because of their scientific import. *Id.* at 142.

129. *Id.* at 142-43.

130. *Id.* at 143-46. The Court held that federal water rights are not dependent upon state law. *Id.* at 145. The Court further held that the determination of reserved water rights derives not from state law, but from the federal purpose behind the reservation. *Id.*

131. 741 F.2d 257 (9th Cir. 1984), *cert. denied sub nom.* Nevada v. Hodel, 470 U.S. 1083 (1985).

132. *Id.* at 262.

allocated water.¹³³

In both *Cappaert* and *Carson-Truckee*, the courts dealt, respectively, with the federal government's regulation of state water users on federally reserved land and federal regulation of a federal project.¹³⁴ Furthermore, *Kaiser Aetna* and *Willow River* stand for the proposition that the federal navigational servitude right is restricted to maintaining the navigability of navigable waters. Thus, federal ESA regulation of a *private* appropriator of *non-navigable* water, the issue that will be addressed in Part IV, must be considered an exercise of the federal eminent domain power. The issue inevitably arises whether such federal regulation of a private property right would constitute a taking.

Having laid out the relationship between federal regulation under the ESA and the principles of prior appropriations water rights, this Note turns to a discussion of the Supreme Court's takings jurisprudence, paying particular attention to the *Lucas* opinion.

III. TAKINGS JURISPRUDENCE AND *LUCAS*

An analysis of the relationship between the ESA and its regulation of prior appropriations water rights necessarily leads to the issue of takings. Under the Fifth and Fourteenth Amendments, the Constitution proscribes the taking of private property without just compensation.¹³⁵ However, courts have had difficulty determining what type of governmental action constitutes a taking.¹³⁶

A. *History of Takings Jurisprudence*

In three early cases the Supreme Court laid down the principles that have shaped the development of the modern takings doctrine.¹³⁷ Each case involved state, rather than federal, exercise of the power of eminent domain.

133. *Id.* at 262. "[T]he ESA supports the Secretary's decision to give priority to the fish until such time as they no longer need ESA's protection." *Id.*

134. See *supra* notes 124-33 and accompanying text.

135. See *supra* notes 105-20 and accompanying text.

136. This Note relies primarily on the discussion of takings in Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993). For a discussion of general takings jurisprudence, see Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393 (1991); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CAL. L. REV. 1299 (1989); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. (1964).

137. Rubenfeld, *supra* note 136, at 1083.

1. Physical Invasions

In *Pumpelly v. Green Bay Co.*,¹³⁸ the Supreme Court held that when a state physically invades private land, the state must compensate the private landowner.¹³⁹ In *Pumpelly*, the construction of a dam in conjunction with a state canal project resulted in the irreversible flooding of the plaintiff's land.¹⁴⁰ The Court, rejecting a prior line of cases, concluded that private lands need not be totally converted for a takings claim to exist.¹⁴¹ The Court focused not on the "public use" aspect of the Fifth Amendment, but rather on the deprivation of the private property's economic value.¹⁴² However, the Court limited its holding to cases involving some physical invasion of "water, earth, sand or other material."¹⁴³

In 1982, the Court further defined the physical invasion takings analysis in *Loretto v. Teleprompter Manhattan CATV Corp.*¹⁴⁴ In *Loretto*, the Supreme Court concluded that New York legislation requiring the placement of "thirty feet of one-half inch cable and two, four-square-inch cable boxes." in rental apartment buildings was a physical taking requiring just compensation.¹⁴⁵ In striking down the legislation, the Court asserted that any government action resulting in a permanent invasion¹⁴⁶ would constitute a taking, regardless of the economic implications.¹⁴⁷ Specifi-

138. 80 U.S. (13 Wall.) 166 (1871).

139. *Id.* at 180-81.

140. *Id.* at 167.

141. *Id.* at 177-78. The Court noted that:

It would be a very curious and unsatisfactory result, if in construing [the Takings Clause] . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it . . . can in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.

Id. at 177-78.

142. *Id.* at 181.

143. 80 U.S. (13 Wall.) at 181.

144. 458 U.S. 419 (1982).

145. *Id.* at 441.

146. The Court distinguished temporary or non-continuous physical invasions from permanent physical invasions. *Id.* at 435 n.12. The Court reasoned that temporary physical invasions "are subject to a more complex balancing process to determine whether they are a taking." *Id.* For a discussion of the economic analysis considered in balancing compensation with takings, see Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984).

147. *Loretto*, 458 U.S. at 432. The Court stated that "a permanent physical occupation is a government action of such unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.*

cally, the Court noted that a permanent physical invasion destroys one of the property owner's most important rights—the power to exclude others from the property.¹⁴⁸ Therefore, the Court established a per se takings rule, applicable when state action results in a physical invasion of private property.¹⁴⁹

2. Regulation of Harmful Use

In *Mugler v. Kansas*,¹⁵⁰ the Supreme Court recognized the right of the state to regulate against the harmful or noxious use of private property. In *Mugler*, a brewery owner challenged a Kansas statute that proscribed the manufacture or sale of alcohol. The plaintiff argued that this regulation had deprived him of the entire benefit of his property, resulting in a compensable taking.¹⁵¹ Despite the economic loss of the plaintiff's factory, the Court determined that the state's regulation prevented public harm and therefore required no compensation.¹⁵² The Court concluded that private property owners have an implied obligation to use their land in a manner that does not cause injury to the community.¹⁵³

The Supreme Court again faced the issue of state regulation against public nuisance in *Miller v. Schoene*.¹⁵⁴ In *Miller*, the petitioners were the owners of land that contained cedar trees.¹⁵⁵ Pursuant to a Virginia statute providing for the removal of cedar trees infected with cedar rust disease, the respondent, the state entomologist, ordered the Millers to cut

148. *Id.* at 435. "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. . . . [H]e not only cannot exclude others, but [he] can make no nonpossessory use of the property." *Id.* at 435-36.

149. Rubenfeld, *supra* note 136, at 1084-85. See also JOHN E. NOWACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.12, at 436 (4th ed. 1991) ("A permanent physical occupation of private property by the government or a government regulation which allows someone other than the property owner to have permanent physical occupation of a definable part of a piece of property should constitute a taking.")

150. 123 U.S. 623 (1887).

151. *Id.* at 648-49.

152. *Id.* at 669. The Court stated:

The power which the States have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

Id.

153. *Id.* at 665.

154. 276 U.S. 272 (1928).

155. *Id.* at 277.

down their cedar trees in order to protect Virginia's apple crop.¹⁵⁶ The Millers argued that the statute was an unconstitutional violation of their due process rights.¹⁵⁷

The Supreme Court rejected the Millers' claim that the statute resulted in an uncompensated taking of their property.¹⁵⁸ The Court held that because the public interest supported Virginia's decision to save its apple crop, despite destroying its cedar trees, this action was a valid exercise of Virginia's police power.¹⁵⁹ The Court concluded that because the infected cedars were akin to a public nuisance, it was not a denial of due process to enforce their removal without compensation.¹⁶⁰

Both *Mugler* and *Miller* stand for the proposition that a state may regulate private property, without compensating the property owner, if the property is causing a public nuisance. Furthermore, this regulation is valid even if the property is being used in a manner that is otherwise legal.

3. *Deprivation of Economic Benefit*

The Court enunciated a third takings theory in *Pennsylvania Coal v. Mahon*.¹⁶¹ Writing for the majority, Justice Holmes held invalid a Pennsylvania statute (the Kohler Act) prohibiting coal mining that resulted in subsidence damage to permanent structures.¹⁶² In *Pennsylvania Coal*, the Pennsylvania Coal Company had sold property to the Mahons on the condition that the company could continue to mine the land beneath the

156. *Id.*

157. *Id.* The circuit court found the statute constitutional but awarded the Millers \$100 for the expense of removing the trees. *Id.* The statute provided no compensation to the landowners for the value of the trees or the decreased value of the property. *Id.* The statute merely provided the landowners with the use of the wood from the felled trees. *Id.* On appeal, the Virginia Supreme Court affirmed the lower court's decision. *Id.*

158. *Id.* at 279-81. The Millers challenged the statute's constitutionality under the Due Process Clause of the Fourteenth Amendment. *Id.* at 277.

159. 276 U.S. at 279-80. The Court focused on the public support for the statute, determining that it elevated the interest in the apple crop to a public interest, rather than a mere private interest. *Id.* at 279.

160. *Id.* at 280. "For where, as here, the choice is unavoidable, we cannot say that . . . [the statute], controlled by considerations of social policy which are not unreasonable, involves any denial of due process." *Id.*

161. 260 U.S. 393 (1922).

162. *Id.* at 414. "The statute forbids the mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation. . . . As applied to this case, the statute is admitted to destroy previously existing rights of property and contract." *Id.* at 412-13.

Mahons' property.¹⁶³ The Mahons brought suit in Pennsylvania state court to prevent the coal company from exercising its property rights. The Mahons argued that the Kohler Act effectively prohibited the coal company from mining beneath their land.¹⁶⁴ The Pennsylvania Coal Company argued that the Kohler Act was an unconstitutional taking of its property rights without just compensation.¹⁶⁵

The Supreme Court concluded that the Kohler Act was invalid because it resulted in an uncompensated taking of private property.¹⁶⁶ Justice Holmes focused his opinion not on the regulation against harm, but rather on the mining rights owners' deprivation of economic benefit.¹⁶⁷ The Court laid down the principle that if a regulation "goes too far," it will be recognized as a taking.¹⁶⁸

*Keystone Bituminous Coal Ass'n v. DeBenedictis*¹⁶⁹ presented the Court with essentially the same facts as *Pennsylvania Coal*.¹⁷⁰ In 1966, Pennsylvania enacted a new Subsidence Act¹⁷¹ which, similar to the Kohler Act, prevented the mining of coal where such mining would cause the subsidence of any surface structure.¹⁷² However, the Subsidence Act, in the name of public safety, required coal miners to leave fifty percent of

163. *Id.* at 412. In 1878, the Pennsylvania Coal Company sold the Mahons' surface property. *Id.* However, in the deed, the company expressly reserved the right to remove all the coal from beneath the property sold to the Mahons. *Id.* Moreover, the deed expressly waived all claims for damages arising from any coal mining activities. *Id.*

164. *Id.* at 412.

165. *Id.*

166. 260 U.S. at 414. "It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved." *Id.*

167. *Id.* at 413. Justice Holmes wrote:

[S]ome values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

Id.

168. *Id.* at 415. *Pennsylvania Coal* has come to stand for the principle that "diminution of value would be a decisive factor in determining the existence of 'taking,' and where the economic impact on the regulated property was too severe, a taking would likely be found." Rubinfeld, *supra* note 136, at 1087.

169. 480 U.S. 470 (1987).

170. *Id.* at 473-76.

171. *Id.* at 474.

172. *Id.* at 474-75. The Subsidence Act prohibited mining that causes subsidence damage to public buildings, homes or other dwellings, and cemeteries. *Id.* at 476.

the coal in the ground beneath areas subject to possible subsidence.¹⁷³ The representatives of an association of coal mining operations sued to enjoin the enforcement of the Subsidence Act. The Association argued that the Subsidence Act's rule that half of the coal must remain beneath the surface constituted a taking of its private property without compensation.¹⁷⁴

Justice Stevens, writing for the majority, concluded that the Subsidence Act in *Keystone* could be enforced without compensation, unlike the Kohler Act in *Pennsylvania Coal*, because it was promulgated for the public purpose of promoting health and safety.¹⁷⁵ In addition, focusing on the diminution of value of the petitioner's property, the Court found that the petitioner had alleged no injury, but instead made only a facial takings claim based upon the promulgation of the Subsidence Act.¹⁷⁶ Finally, the Court noted that the Subsidence Act did not constitute a total economic loss because it applied only to the petitioner's mining rights to sell its coal.¹⁷⁷ The Court held that the Association still retained the remaining elements of property rights, such as ownership of the coal, and that this "bundle of property rights" is the relevant "property" by which to consider economic devaluation.¹⁷⁸

173. *Id.* at 476-77. "Since 1966 the [Department of Environmental Resources] has applied a formula that generally requires 50% of the coal beneath structures protected by § 4 to be kept in place as a means of providing surface support." *Id.*

174. *Id.* at 478-79. The district court and court of appeals both rejected the Association's claims. *Id.* at 479-81.

175. *Id.* at 485-92. The Court noted that Pennsylvania had specifically enacted the Kohler Act for the benefit of private economic interests. *Id.* at 487-88. Thus, the Court focused on the nature of the state action and the state's purpose in assessing whether the state passed the act for the public interest. *Id.* at 492.

176. *Id.* at 493. The Court noted that facial takings challenges are extremely tenuous because the Court cannot invoke its balancing test to compare the remaining value of the property with the value of the destroyed interest. *Id.* at 497.

177. *Id.* at 500-02. Under Pennsylvania law, the mineral estate, surface estate, and support estate are all considered distinct, conveyable estates. *Id.* at 500. The Court rejected the petitioner's argument that the Subsidence Act entirely destroyed its interest in the mineral estate, stating that the right to sell property is just one part of a property owner's property rights. *Id.* Moreover, the Court noted that "[b]ecause petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking." *Id.* at 501.

178. *Id.* at 496-502. The Court focused on the record, which showed that petitioners owned not only the mineral rights and support estates that could be affected by the Act, but also land that remained unaffected by the Act. *Id.* at 501-02. The Court adhered to the petitioner's argument that the mineral estate, support estate, and surface estate are separate types of property and therefore the Act destroyed its interest in the support estate. *Id.* at 500. The Court reasoned that because the mineral, support, and surface estates do not exist independently, and rely on each of the other estates to remain intact, the state's view that they are separate estates cannot control the reality of their coexistence. *Id.* at 500-01.

The dissent in *Keystone*, led by Chief Justice Rehnquist, agreed with the petitioner that the Subsidence Act constituted an uncompensated taking.¹⁷⁹ The dissent first determined that *Pennsylvania Coal's* holding that the Kohler Act resulted in a taking of property deserved great deference.¹⁸⁰ Justice Rehnquist then dismissed the majority's view that the Subsidence Act was similar to a nuisance regulation, noting that its primarily economic purposes could not exempt it from takings scrutiny.¹⁸¹ Finally, turning to the deprivation of the petitioner's economic benefit in its right to mine coal, the dissent reasoned that the Subsidence Act extinguished all of the Association's rights because its mining rights had become essentially valueless, and thus, non-transferrable.¹⁸²

As a result of these three lines of takings precedent, the Supreme Court's takings doctrine was mired in conceptual conflict.¹⁸³ The Court, acknowledging this conflict, began to take an "ad hoc" approach in analyzing takings cases.¹⁸⁴ Thus, takings cases lacked a uniformity in analysis and outcome.

179. 480 U.S. at 520-21 (Rehnquist, C.J., dissenting).

180. *Id.* at 508. Chief Justice Rehnquist believed that the relevant facts of this case were virtually indistinguishable from those in *Pennsylvania Coal*. *Id.* at 508-09.

181. *Id.* at 512-13.

The central purposes of the Act, though including public safety, reflect a concern for preservation of buildings, economic development, and maintenance of property values to sustain the Commonwealth's tax base. We should hesitate to allow a regulation based on essentially economic concerns to be insulated from the dictates of the Fifth Amendment by labeling it nuisance regulation.

Id. at 513.

182. *Id.* at 513-14. The Chief Justice noted first that the Court's precedents have never allowed a nuisance exception when property has been rendered valueless. *Id.* at 513. He furthermore stated that "the Subsidence Act has extinguished any interest one might want to acquire in this property, for 'the right to coal consists in the right to mine it.'" *Id.* at 514 (quoting *Pennsylvania Coal*, 260 U.S. at 414).

183. Rubenfeld, *supra* note 136, at 1088. Professor Rubenfeld writes:

To put it bluntly, a diminution-of-value test simply cannot be squared with the harm principle as espoused in the *Mugler* line of cases. *Mugler* rested on the idea that owners have no right—and never had any right—to do harm with their property; hence they are not deprived of anything when laws enforcing those implied limitations are passed. . . . But if this is so, then the fact that a harm-preventing measure diminished the value of the regulated property—no matter to what extent—ought not to convert the regulation into a taking.

Id. at 1087.

184. *See, e.g., Pennsylvania Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). The Court wrote that to resolve takings cases, a court must entertain "essentially ad hoc, factual inquiries." *Id.* at 124.

B. *The Lucas Case*

In *Lucas v. South Carolina Coastal Council*,¹⁸⁵ the Supreme Court faced its latest opportunity to articulate a definitive takings doctrine.¹⁸⁶ The issue before the Court was whether a South Carolina statute preventing the construction of permanent habitable structures on certain beachfront property constituted an “economic deprivation” taking of the petitioner’s land.¹⁸⁷ David Lucas had purchased his South Carolina beachfront property in 1986.¹⁸⁸ In 1988, the Beachfront Management Act (BMA) was enacted, prohibiting the construction of habitable structures on certain coastal areas, including Lucas’ property.¹⁸⁹ Lucas sued the Coastal Council, claiming that the BMA constituted an uncompensated taking of his property.¹⁹⁰

Justice Scalia, writing for the majority, first reiterated the Court’s regulatory takings jurisprudence, noting that the Court will, without any set standard, inquire into the facts of takings cases to determine compensability in all but two classes of regulatory takings.¹⁹¹ Justice Scalia stated that in cases of physical invasion of private property and in cases in which a property owner is deprived of all economic benefit of the property due to regulation, compensation is always required, without analyzing the public interest supporting the regulation.¹⁹² Government regulation of private property resulting in total deprivation of economic benefit is always compensable, the court reasoned, because it is the functional equivalent of

185. 112 S. Ct. 2886 (1992).

186. For a discussion of the impact of the *Lucas* decision, see generally Symposium, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993); Richard M. Frank, *Inverse Condemnation Litigation in the 1990s—The Uncertain Legacy of the Supreme Court’s Lucas and Yee Decisions*, 43 WASH. U. J. URB. & CONTEMP. L. 85 (1993); Rubinfeld, *supra* note 136; *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 269.

187. *Lucas*, 112 S. Ct. at 2889.

188. *Id.* Lucas paid \$975,000 for the property with the intention of building single-family homes on the two lots. *Id.*

189. *Id.* The South Carolina Legislature enacted the BMA in an effort to prevent beach erosion and maintain the condition of certain coastal areas. *Id.* at 2889-90.

190. The South Carolina Court of Common Pleas found a compensable taking and awarded Lucas \$1,232,387.50. *Id.* The South Carolina Supreme Court reversed, finding the BMA a proper regulation preventing public harm. *South Carolina Coastal Council v. Lucas*, 404 S.E.2d 895 (S.C. 1991).

191. *Lucas*, 112 S. Ct. at 2893 (“In 70-odd years of succeeding ‘regulatory takings’ jurisprudence, we have generally eschewed any [‘]set formula[‘] for determining how far is too far, preferring to ‘engage in essentially ad hoc, factual inquiries.’”) *Id.* (quoting *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

192. *Id.*

a physical taking.¹⁹³

Lucas had argued that his land had been rendered valueless by the regulation and that therefore, he was entitled to compensation without any inquiry into the public interest in the regulation.¹⁹⁴ However, because the South Carolina Supreme Court believed the BMA was a proper state regulation of a nuisance, the Court analyzed the nature of the BMA regulation.¹⁹⁵ In analyzing the Coastal Council's argument that the BMA was a valid police power exercise that protected the public interest in preventing harm to the coastal area, Justice Scalia reasoned that such "harmful or noxious use" analysis has evolved, through Court precedent, into the premise that land use regulation must advance a legitimate state interest in order to avoid effecting a taking.¹⁹⁶ As such, Justice Scalia argued that the BMA could easily be viewed as either a "harm-preventing" or "benefit-conferring" regulation.¹⁹⁷ Only the latter would require just compensation.¹⁹⁸ The Court consequently refused to use the *Mugler* harmful-use test to determine whether a regulatory taking requires compensation.¹⁹⁹

Instead, the *Lucas* Court articulated a framework for dealing with regulatory takings issues that encompassed both the nuisance and economic deprivation analyses of the Court's takings doctrine.²⁰⁰ Justice Scalia reasoned that a regulation depriving a property owner of all the property's economic benefit is the functional equivalent of a "permanent physical occupation" of property, a situation that always amounts to a taking requiring compensation.²⁰¹ Justice Scalia determined that no property

193. *Id.* at 2893 ("We think, in short, that these are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.").

194. *Id.* at 2896. The trial court had agreed with Lucas that the property was valueless under the Supreme Court's takings precedent.

195. *Id.* at 2896-99.

196. 112 S. Ct. at 2897.

197. *Id.* Justice Scalia stated that "[t]he transition from our early focus on control of 'noxious' uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." *Id.*

198. *Id.*

199. Justice Scalia stated that "it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation." *Id.* at 2899.

200. *Id.* at 2900-02.

201. *Id.* at 2900.

regulation that renders the property economically inviable can be newly enacted, without compensation, unless the limitation pre-exists in the property's title or in "background principles of property and nuisance."²⁰² This framework, the court opined, would only require just compensation for total regulatory takings that go beyond the limitations imposed upon the land by background common-law principles.²⁰³

Therefore, the *Lucas* decision characterizes the Court's regulatory takings jurisprudence as having two categories of analysis. A government regulation of private property is either a physical invasion or total economic deprivation taking and is per se compensable, or the regulation is neither and thus must be analyzed under an ad hoc factual inquiry.

IV. THE EFFECT OF *LUCAS* ON A PRIOR APPROPRIATOR'S TAKINGS CLAIM

This section will use a hypothetical fact pattern to demonstrate how the *Lucas* decision might be applied to a prior appropriator who claims just compensation based on water use regulations imposed under the ESA. The *Lucas* decision provides the proper framework for analyzing a possible takings action when the federal government regulates a private appropriations water right under the guise of the ESA.²⁰⁴ Consider the following hypothetical:²⁰⁵

A is the non-riparian prior appropriator of a non-navigable body of water. *A*

202. 112 S. Ct. at 2900. The Court stated that regulations prohibiting all economically beneficial use of property "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* Justice Scalia's test opens up the possibility that the same fact pattern could generate fifty different outcomes depending upon the fifty states' common laws of nuisance and property. See *infra* notes 227-34 and accompanying text.

In *DeSylva v. Ballentine*, 351 U.S. 570 (1956), the Supreme Court noted that when federal law is being determined, often state law can establish the aspects of the federal right. *Id.* at 580 ("The scope of federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law."). See *infra* notes 232-34 and accompanying text.

203. 112 S. Ct. at 2901. The Court noted that determining whether there was a total taking of a property's value would require an analysis of at least "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities." *Id.*

204. Professor Rubinfeld stated, "If government violates an owner's right to remove objects from his land, to bequeath it, or to make some money from it (absent a *Lucas* nuisance exception), it has impinged upon a fundamental incident of ownership for which compensation must be paid." Rubinfeld, *supra* note 136, at 1106.

205. This hypothetical is loosely based on a situation posed by Professor Sax. Sax, *supra* note 81, at 272. The basis of the hypothetical is that the water source is critical to endangered species' existence. See *supra* notes 30-33 and accompanying text.

has held this appropriations right since 1930. *A* uses the water for the beneficial purposes of irrigation and basic domestic use. Moreover, *A* needs to use all of the water allotted in the appropriations permit in order for *A*'s farm to make a profit. In 1994, the Secretary lists as endangered a species of fish living primarily in the body of water from which *A* appropriates. Upon listing the fish, the Secretary designates a certain level of instream water flow as critical to the fish's habitat. The level of water now required to remain instream includes fifty percent of *A*'s total appropriation allotment. As a result, the government now regulates *A*'s right to appropriate all of the water that *A* is allotted. *A* sues the government for taking the property right, seeking just compensation.

Is the diminution of the prior appropriator's property right, in favor of requiring a certain instream flow level, a taking under the *Lucas* framework?

A. Proper Analytical Framework

In analyzing whether federal regulation of appropriations water rights under the ESA is a taking, one must first ask whether appropriations rights are a transferable property interest.²⁰⁶ Based upon the Court's opinion in *United States v. Kaiser Aetna*, holding that one can privately own the rights to use a navigable pond,²⁰⁷ and the numerous state statutes creating property interests in water appropriations, there is little doubt that a prior appropriations right is a transferable property right.²⁰⁸

The next question in the takings analysis is whether the property has been "taken" for public use.²⁰⁹ The *Lucas* Court reasserted two principal conditions that would result in a taking: (1) a regulation that physically invaded the private property and (2) a regulation depriving the property owner of "all economically beneficial or productive use" of the owner's property.²¹⁰ When the federal government controls the acts of a prior appropriations water rights holder under the ESA, this action must first be analyzed as either a "physical" taking or an "economic deprivation"

206. STOEBCUK, *supra* note 82, at 19. Although there is no definition of "property," courts have recognized that interests such as riparian rights or easements are considered to be forms of "property." *Id.* at 17.

207. 444 U.S. 164, 180 (1979).

208. See *supra* note 72.

209. STOEBCUK, *supra* note 82, at 19 ("In most cases this means that a property interest has been transferred from an owner to an entity having the power of eminent domain.").

210. *Lucas*, 112 S. Ct. at 2893.

taking.²¹¹

However, when the taking does not fit either of the per se categories, the case must undergo an ad hoc factual analysis, balancing the social values and interests in the regulation versus the preservation of the property right. If the Court determines that the property interest supersedes the public's interest in the regulation, then and only then, will the government be required to compensate the property owner.²¹² Thus, *Lucas* dictates that a regulatory takings case must be analyzed to see if it fits either of the per se categories before the purposes and interests supporting the regulation are examined.

Is the ESA regulation of *A*'s activities a "physical invasion" regulatory taking? The Court's most recent cases demonstrate that physical invasions of property will be treated as per se violations of the Fifth Amendment, regardless of the size of the invasion.²¹³ In *Loretto*, the statutory requirement of placing cable and two four-square-inch cable boxes on the outside of a building was deemed a physical invasion requiring just compensation.²¹⁴ Requiring *A* to maintain a certain instream flow due to ESA regulation is a regulation of *A*'s narrowly defined property interest.²¹⁵ However, requiring *A* to maintain a certain amount of water in the source is not a "physical" invasion of *A*'s right to appropriate. Under the Court's "physical" invasion takings analysis, the regulation must actually require the government or the statutorily-authorized entity to enter upon the property as an aspect of the regulation.²¹⁶ In the case of *A*, the federal regulation lacks the necessary "physical" invasion upon *A*'s property. Therefore, the regulation must be analyzed under *Lucas*' total economic deprivation test.

B. Total Economic Deprivation

The essence of a property right to appropriate water is the right to divert a certain quantity of water from a source, without reservation.²¹⁷ Under

211. See *supra* parts III.A.1 & 3.

212. 438 U.S. at 123-28. The Court in *Penn Central* stated that there is no set formula for determining compensability, and the facts of the case will be the biggest factor. *Id.* at 124.

213. *Lucas*, 112 S. Ct. at 2893.

214. *Loretto*, 458 U.S. at 441.

215. STOEBUCK, *supra* note 82, at 90. When an appropriator's right is diminished by a higher subsequent user, the subsequent user clearly deprives the appropriator of a vested property right and must therefore compensate the appropriator. *Id.* at 92.

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

217. See *supra* notes 71-83 and accompanying text.

the *Lucas* framework, in order for the regulation of *A*'s appropriation right to be compensable, it must deprive *A* of the total value of the right to appropriate.²¹⁸ Therefore, the ESA's requirement that a certain amount of water remain in the source must be seen as rendering *A*'s property right worthless if *A* is to be compensated.

The right to the total water in one's appropriation permit is obviously the primary "strand" in the "bundle of property rights" comprising the right to appropriate water.²¹⁹ As noted earlier, the purpose behind the appropriations right was to ensure that water would be beneficially used.²²⁰ Moreover, prior appropriation states all believe that private use maximizes the beneficial use of their state's water.²²¹ *A* is a non-riparian prior appropriator, it could be argued that if the ESA were used to prevent *A* from withdrawing and using the *total* amount of water permitted in the appropriations right, that this alone could deprive *A* of the total *value* of the right. *A* does not enjoy any other use of the body of water such as the ability to swim or go boating in the water. *A*'s primary right is in the water's use for the beneficial purposes of irrigation and domestic use. However, the right to appropriate and use the water is not *A*'s only "strand."

Essential to the nature of *A*'s appropriation right is the "right to exclude" others from encroaching on *A*'s property rights.²²² The various appropriations statutes all treat a subsequent appropriator's encroachment on the prior appropriator's right to appropriate as if the subsequent appropriator had *taken* the prior appropriator's property, and thus require just compensation for the amount taken.²²³ Furthermore, the Supreme Court in *Loretto* and *Kaiser Aetna* required that compensation be paid for any encroachment that denies a property-holder the right to exclude.²²⁴ It is therefore clear

218. *Lucas*, 112 S. Ct. at 2893 ("The second situation in which we have found categorical [takings] treatment appropriate is where regulation denies all economically beneficial or productive use of [property].").

219. *Loretto*, 480 U.S. at 497 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)) (referring to property as a "bundle" of rights).

220. See *supra* notes 71-73 and accompanying text.

221. See *supra* notes 74-77 and accompanying text.

222. *Loretto*, 458 U.S. at 435.

223. See *supra* notes 78-83 and accompanying text.

224. *Loretto*, 458 U.S. at 435. The Court noted that the "right to exclude" others from even a small portion of one's property is so fundamental that a regulation that defies this demands compensation "without regard to the public interests that [the law] may serve." *Id.* at 426. See also *Kaiser Aetna*, 444 U.S. at 179-80 ("In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government

that the right to exclude would be completely abolished if the ESA operated to require *A* to maintain a certain level of water that was higher than the total amount that *A* is permitted to withdraw under *A*'s right.

The last major strand in *A*'s bundle is the right to transfer the appropriations right—to sell it to another person. It has long been held that the most important aspect to determining a property's value is the right to sell it.²²⁵ However, because *A*'s appropriation right has been diminished by fifty percent, the value of the right, in a market for unencumbered *total* appropriation rights, is drastically reduced. In order for *A*'s property right to be of any value, there must be someone who needs only fifty percent of *A*'s allotted amount of water. Yet, the value to *A* of the right, compared with the losses *A*'s farm will suffer, may be completely eliminated. Therefore, viewing the bundle of rights that comprise *A*'s appropriations right, *A* has a strong argument that there is complete deprivation of the economic benefit of *A*'s appropriation right. To facilitate the remainder of Justice Scalia's test, this Note assumes, for the time being, that *A*'s property has been rendered valueless.²²⁶

C. *Background Principles of Common-Law Nuisance Prohibiting Use*

The touchstone issue arising out of the *Lucas* decision was Justice Scalia's articulation of the rule that if a state regulation deprives a property owner of the total value of the property, the state must compensate the owner unless the regulation's proscriptions inhered in any background common-law principles of nuisance.²²⁷ Although Justice Scalia did not believe this rule to be "extraordinary,"²²⁸ the rule, as articulated, raises important questions. By resorting to the common-law principle of nuisance to legitimize regulation that renders a property valueless, Justice Scalia seemingly articulates a rule that could result in fifty different outcomes—based on the fifty states' different common-law nuisance principles. In essence, the second part of Justice Scalia's test is that the

cannot take without compensation.").

225. *Lucas*, 112 S. Ct. at 2894.

226. For a discussion of how property almost always has value, thus making this aspect of the *Lucas* test impractical, see *infra* notes 247-49.

227. *Lucas*, 112 S. Ct. at 2899-2900. "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 2901.

228. *Id.* ("In light of our traditional resort to [existing rules of state law] . . . this recognition that the Takings Clause does not require compensation . . . is surely unexceptional.").

regulation "passes muster only if it restricts some nuisance-like behavior."²²⁹

In our hypothetical situation involving *A*, the issue is posed like this: Is federal regulation of *A*'s appropriation right, under the ESA, a type of regulation which comports with a common-law nuisance or property principle that would have also restricted *A*'s appropriation right? This test raises an interesting federal jurisdiction question. Under Scalia's test, will federal regulation of a private property owner be treated the same as state regulation of a private property owner?

In articulating this test, Justice Scalia opines that only those state regulations that comport with an existing state common-law nuisance restriction will be allowed, without necessitating the payment of compensation.²³⁰ However, the ESA is a federal statute, and the regulation of private lands would be federal in nature. In order to avoid paying compensation to *A*, must the ESA's regulation to save an endangered fish be an action that could have been brought under the state's common law of nuisance, or under some federal common-law principle? This question can be answered by analyzing the factual situation.

Property rights, with few exceptions, are derived from state common and statutory law. The Supreme Court has taken the position that it will look to the state to identify cognizable property interests. In *Kaiser Aetna*, a case of federal regulation, the court looked to Hawaiian common law to determine if non-navigable marinas could be privately owned.²³¹ Thus, the Court already looks to a state's common law to define the property rights that may be protected against uncompensated federal takings. Similarly, the Court looks to state common law when no federal body of law covering the issue exists. In *DeSylva v. Ballentine*,²³² the Supreme Court dealt with the Copyright Act and the renewal of copyrights by the original holder's illegitimate children.²³³ In its effort to define whether illegitimate children were "children" covered by the statute, the Court

229. Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993).

230. *Lucas*, 112 S. Ct. at 2900.

A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Id.

231. *Kaiser Aetna*, 444 U.S. at 178-79.

232. 351 U.S. 570 (1956).

233. *Id.*

looked to the relevant state law because "there is no federal law of domestic relations, which is primarily a matter of state concern."²³⁴ Thus, there is no reason to assume that the Court would refer to any area of law other than the common law of nuisance in *A*'s state in order to determine if the ESA regulation is analogous to one of the states common-law actions.

Having decided that the courts would use state laws to determine the compensability of the ESA regulation of *A*, the final question is whether a common-law nuisance action exists in the prior appropriations states that would restrict *A* in order to protect an endangered species of fish. The simple answer to this question is that no specific common-law nuisance action to protect endangered species exists in the prior appropriation states. However, general nuisance principles must first be explored in order to determine if ESA regulation is equal to a nuisance action.

There are two types of nuisance actions: private nuisance and public nuisance.²³⁵ A private nuisance involves the disturbance of an individual landowner's use and enjoyment of property.²³⁶ Although private nuisance actions have been extended to cover property rights holders, like *A*,²³⁷ the individual bringing suit is the party who must show ownership of property and an interference with the use and enjoyment of that property. In our hypothetical, the government is clearly not to be considered a private individual with a proprietary interest in the endangered species of fish. Therefore, the federal government's regulation under the ESA would not be equivalent to any state common-law private nuisance action against *A*.²³⁸

The more difficult issue is whether this regulation would be equivalent to the general public nuisance action that exists at common law. The nature of the public nuisance is similar to a private nuisance, except that a public nuisance affects an interest that is shared by the public, not just an

234. *Id.* at 580.

235. PROSSER & KEETON, TORTS § 86, at 618 (5th ed. 1984).

236. *Id.* § 87, at 619 ("The essence of a private nuisance is an interference with the use and enjoyment of land.")

237. *Id.* § 87, at 621.

238. Although the federal government has regulatory power over its wildlife, this power creates only an interest in protecting wildlife, and not a proprietary interest in the wildlife itself. *See Hughes v. Oklahoma*, 441 U.S. 322 (1979) (noting that the Commerce Clause and Tenth Amendment act to give the federal government power to regulate wildlife).

individual.²³⁹ Public interests generally covered under public nuisance actions include: public health, safety, peace, comfort, and convenience.²⁴⁰ In order to enjoin another's noxious activities in a public nuisance action, one must be able to show that he or she incurred greater harm than other members of the public exercising the same right.²⁴¹ Alternatively, one may sue as a public official on behalf of a political entity.²⁴²

In *A*'s case, one must decide whether the federal government's interest in maintaining species preservation is an interest that was commonly protected at common law through nuisance actions. It is certainly true that public nuisance actions have been brought against individuals whose activities caused harm to the environment.²⁴³ However, those public nuisance actions focused on various activities causing pollution.²⁴⁴ Moreover, no common-law nuisance claims have been brought in the prior appropriations states in order to preserve endangered or threatened species.

Nonetheless, in *Lucas*, Justice Scalia noted that when engaging in the general public nuisance analysis, one must look to "the degree of harm to public lands and *resources*" caused by the property owner's use.²⁴⁵ The analysis must further include assessing the "social value" of a property owner's activities, as well as the "relative ease with which the alleged harm can be avoided through measures taken by the [property owner] and the government."²⁴⁶ Faced with these assessments, *A*'s activities may well fit into what, under Justice Scalia's test, would be a public nuisance. *A*'s actions certainly harm a public resource—an endangered species of fish. Furthermore, *A*'s appropriations, which could be easily curbed, probably lack the social value inherent in saving a species. The result of this analysis is that both parties, the federal government and *A*, would have valid points with which to argue their case.

D. Result of the Lucas Analysis to A's Case: Ad Hoc Inquiry

The previous application of the *Lucas* test demonstrates that the opinion

239. PROSSER & KEETON, *supra* note 235, § 90, at 645 ("To be considered public, the nuisance must affect an interest common to the general public, rather than peculiar to one individual, or several.")

240. RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (1977).

241. *Id.* § 821C(1), (2)(a).

242. *Id.* § 821C(2)(b).

243. PROSSER & KEETON, *supra* note 235, § 90, at 645.

244. *Id.*

245. *Lucas*, 112 S. Ct. at 2901 (emphasis added).

246. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 826, 827, 828, 830, 831 (1977)).

is not as significant as expected and is, moreover, troublesome in its application. The first problem with *Lucas* is that the total economic deprivation test employed by the majority will rarely, if ever, be applied.²⁴⁷ When is a property ever *totally* without value? From whose point of view is the value to be determined? In the hypothetical situation, because *A*'s farm lost money, even if *A* sold the remainder of the appropriations rights to a willing buyer *A* may still come out with a net loss. The value of the right as sold was less than the value of the right, as purchased and used, resulting in a net loss. Would *A*'s right be considered valueless? The answer seems to be that if *A* could find a buyer for the fifty percent reduced right, then the property right has a market value.²⁴⁸ Thus, property will almost always be viewed as having some value. As a result, it has been asserted that most trial courts, after *Lucas*, will never apply the total economic deprivation test, opting instead to apply the ad hoc factual analysis.²⁴⁹

The second problem with the *Lucas* test, as mentioned, is that many different tests for background nuisance principles may exist. Under the previous analysis, it would seem that even if *A*'s property right had no value because of the ESA regulation, whether *A* deserves compensation would depend on the nuisance law in the state in which *A* lives.²⁵⁰ The combined effect of these criticisms is that *Lucas* is much less significant than expected.

Thus, while *A* has some very good arguments to support the total economic deprivation takings claim, *A* will probably fail. Most, if not all, courts will find that *A*'s appropriation right still retains *some* value and thus apply the ad hoc factual analysis.²⁵¹ Under this analysis, the Court would

247. *Lucas*, 112 S. Ct. at 2908 (Blackmun, J. dissenting). Justice Blackmun argued that *Lucas* had not lost all the value of the property because he could still "picnic, swim, camp in a tent, or live on the property in a movable trailer." *Id.* Justice Blackmun also noted that property only loses all of its value in very rare circumstances. *Id.* Because of this view, Justice Blackmun would not have heard the case, or analyzed it under the per se compensable takings analysis. *Id.*

248. The *Lucas* majority glossed over the discussion of whether *Lucas*' property had value. As a result, the Court also glossed over how, and based upon whose interest, the value would be determined. Nonetheless, value is defined as "[t]he utility of an object in satisfying, directly or indirectly, the needs or desires of human beings Also the estimated or appraised worth of any object or property, calculated in money." BLACK'S LAW DICTIONARY 1551 (6th ed. 1990). Thus, if a buyer were willing to pay any money for the remainder of *A*'s allotment right, then the right would have some value.

249. See Richard Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1428 (1993).

250. See *supra* notes 227-46 and accompanying text.

251. Lazarus, *supra* note 249, at 1428.

evaluate *A*'s right and balance it with the nature and effect of the regulation.²⁵² Specifically, the economic impact and interference with *A*'s investment expectations in the water right would be balanced against the public's interest in protecting endangered species and the extent of the ESA regulation to *A*'s property right. In the face of this burdensome test, a court may defer to the government and find no taking at all.²⁵³ Therefore, despite facing a significant economic loss, *A* may ultimately receive no compensation for the government's regulatory action under the ESA.

V. CONCLUSION

The ESA, if applied to regulate private property rights, would pose significant problems regarding the federal government's ability to regulate private property in its effort to protect endangered species. The prior appropriations water right serves as a vehicle for demonstrating some of the possible conflicts between federal regulatory powers and a purely private, state-derived property right. When this unique situation is examined under the *Lucas* regulatory takings analysis, both the ESA regulation and *A*'s right to appropriate face difficult hurdles.

It is clear that ESA regulation of private property, like any property regulation, could lead to a takings action.²⁵⁴ However, *Lucas* only added to the confusion surrounding the takings doctrine.²⁵⁵ Because *Lucas* does not place ESA regulation of a prior appropriator, such as *A*, in either a per se compensable or uncompensable category, the Courts will be left to balance the public interest and social value of species preservation versus those interests in a system of water resource allocation.²⁵⁶ Under the weight of this balance, it seems likely that the ESA regulation could survive unscathed.²⁵⁷ Such an outcome could threaten the tenuous stability of a water resource allocation system that has served the Western states for well over a hundred years. More importantly, the political and economic ramifications of such an outcome could cause an unfortunate

252. *Penn Central*, 438 U.S. at 123-24.

253. Lazarus, *supra* note 249, at 1428 ("Faced with the unprincipled vagaries of the multifaceted balancing test prescribed by *Penn Central*, the court will most likely apply rational basis scrutiny and simply sustain the governmental action.").

254. *See supra* notes 105-10 and accompanying text.

255. *See supra* note 186.

256. *See supra* notes 247-53.

257. Professor Richard Lazarus has stated that "because environmental protection laws almost never result in total economic deprivations, that categorical presumption will rarely apply . . . [C]ourts will likely apply the opposite presumption that no taking has occurred." Lazarus, *supra* note 249, at 1427.

backlash against the ESA and the resolve to preserve endangered and threatened species. This Note and the hypothetical it poses serves notice to the courts and Congress that they should ready themselves to face the new challenges that ESA regulation could pose to private property rights in the future.

Michael A. Yuffee