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## The Economy of Nature, Private Property, and the Endangered Species Act

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# THE ECONOMY OF NATURE, PRIVATE PROPERTY, AND THE ENDANGERED SPECIES ACT

ALBERT GIDARI\*

## INTRODUCTION

For the past thirty years, Professor Sax has been promoting a view of the law that would permit the government to force private landowners to maintain their property in an undeveloped state without any compensation for the benefit of Nature.<sup>1</sup> His goal has been “to propel nature’s economy onto the legal agenda”<sup>2</sup> where the state may “subordinate private [property] use to demands for the maintenance of natural services, *even where the private owner’s property is left valueless.*”<sup>3</sup> These theories of Professor Sax and other proponents of his philosophy might best be viewed as the Romantic period of takings scholarship because they are grounded in an idealized view of Nature and divorced from science, history, and the roots and branches of the common law of property.<sup>4</sup>

Romantics wrongly believe that Nature is in “delicate balance”<sup>5</sup> and, a fortiori, any human development is destructive of that equilibrium. Nature, of course, is neither in nor out of balance in any mean-

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1. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993) [hereinafter *Property Rights*].

2. *Property Rights*, *supra* note 1, at 1444.

3. *Id.* at 1453.

4. Of course, Professor Sax does not stand starry-eyed alone. See also David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public’s Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311 (1988); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974).

5. See, e.g., Chadwick D. Oliver, *A Landscape Approach: Achieving and Maintaining Biodiversity and Economic Productivity*, 90 J. FORESTRY 20, 20 (Sept. 1992):

Historically, natural forest communities were thought to exist in a benign steady state, sometimes associated with climax, old-growth, or ancient forests. Disturbances were considered unnatural, and the steady-state forest was assumed to be most conducive to stability and diversity. Thus, preserving all species meant maintaining the forest in a natural, old condition—with human intervention especially avoided.

ingful sense of the word. After all, one can only know what is in balance by knowing what to weigh (and similarly, one knows the rate of loss of "biodiversity" only by knowing the baseline of what is present).

Rather, Nature is dynamic, exemplified by natural disturbances on a small scale to catastrophic proportions, and is fully capable of accommodating human disturbance within the dynamic.<sup>6</sup> There is no "natural state" in Nature; there is only change,<sup>7</sup> and change has no way of differentiating between human and natural disturbance.

The very calculated use of the term "Nature" by Professor Sax is revealing because in fact there are few places left that are undisturbed by humans. What Professor Sax really means by "natural" is land stripped of *economic* development potential. Thus, this is the true connection between nature and "economy."<sup>8</sup>

As Professor Sax sees it, there are two fundamentally different ways to view land, which in turn lead to two different ways to view property rights:

[L]and in the "transformative economy" and land in the "economy of nature." The conventional perspective of private property, the transformative economy, builds on the image of property as a discrete entity that can be made one's own by working it and transforming it into a human artifact. A piece of iron becomes an anvil, a tree becomes lumber, and a forest becomes a farm. Traditional property law treats undeveloped land as essentially inert. The land is there, it may have things on or in it (e.g., timber or coal), but it is in a passive state, waiting to be put to use. Insofar as land is "doing" something—for example, harboring wild animals—property law considers such functions expendable. Indeed, getting rid of the natural, or at least domesticating it, was a primary task of the European settlers of North America.

An ecological view of property, the economy of nature, is fundamentally different. Land is not a passive entity waiting to be transformed by its landowner. Nor is the world comprised of distinct tracts of land, separate pieces independent of each other. Rather, an ecological perspective views land as consisting of systems defined by their function, not by man-made boundaries. Land is already at work, performing important services in its unaltered state. For example, forests regulate the global climate, marshes sustain marine fisheries, and prairie grass holds the soil in place. *Transformation*

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6. *Id.* at 21.

7. *E.g.*, Robert T. Lackey, *Ecosystem Management: Desperately Seeking a Paradigm* (1994) (unpublished paper on file with Robert T. Lackey, Deputy Director, EPA Environmental Research Laboratory, Corvallis, Oregon) (discussing ecosystem management as a management approach to help solve complex ecological and social problems).

8. As an economic model, Nature is a poor guide for a sustainable society.

*diminishes the functioning of this economy and, in fact, is at odds with it.*<sup>9</sup>

The implications are plain: "Viewing land through the lens of nature's economy reduces the significance of property lines"<sup>10</sup> and, thus, the significance of property rights. In the Economy of Nature, a landowner no longer has the exclusive use and possession of property. Rather, the very nature of land ownership changes. Instead of property being in the service of its owner, it has the following limitations and characteristics:

- connections dominate and boundary lines are irrelevant;
- ecological services determine land units, not the ingenuity of willing sellers or the entrepreneurial ambitions of willing buyers;
- land is in the public's service; it is part of a community or commons where single ownership of an ecological unit is rare;
- land use is governed by ecological needs rather than the needs of the owner or the enterprise; land has a destiny, a role to play, so use rights are determined by physical nature and no use inconsistent with the physical features of the land is permissible (i.e., recharge areas [known as wetlands or swamps] cannot be filled and wildlife habitat [known as commercial forests] cannot be destroyed);
- "landowners have a custodial, affirmative protective role for ecological functions. . . . The line between public and private is blurred where maintenance of ecological service is viewed as an owner's responsibility."<sup>11</sup>

Thus, in the Economy of Nature, "the landowner's desire to do anything at all creates a problem, because any development affects the delicate ecosystem which the untouched land supports. . . . The notion that land is solely the owner's property, to develop as the owner pleases, is unacceptable."<sup>12</sup>

Against this backdrop, it is easy to comprehend the Romantics' dissatisfaction with the decision in *Lucas v. South Carolina Coastal Council*.<sup>13</sup> In *Lucas*, the United States Supreme Court determined that a South Carolina law that, without just compensation, prevented petitioner David Lucas from building homes on his two beachfront lots (as the State had previously permitted his neighbors to do on their lots) was an unconstitutional taking, unless the State was abating a

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9. *Property Rights*, *supra* note 1, at 1442 (footnote omitted) (emphasis added).

10. *Id.* at 1445.

11. *Id.* at 1445-46.

12. *Id.* at 1445. Of course, Professor Sax overstates his premise to prove his point. The law of nuisance certainly constrains the uses to which property may be put whether the landowner is pleased with the restriction or not.

13. 112 S. Ct. 2886 (1992).

nuisance.<sup>14</sup> In the Economy of Nature, the *Lucas* decision is incorrect and compensation is not required because the property performs an "ecological service" with which the owner has no right to interfere.<sup>15</sup> Put in Romantic terms:

The majority's current zeal to repel the perceived environmentalist assault on private property rests on serious misperceptions regarding the nature of land. The Court does not appreciate the now-settled ecological notion that land "is not merely soil; it is a fountain of energy flowing through a circuit of soils, plants, and animals." Land is not a discrete, severable resource that respects the surveyor's binary-based boundaries. It is part of a complex, interdependent ecological system.<sup>16</sup>

However, Romantics would extend these values beyond beach dunes to all ecosystem functions so that, for example, forests become habitats for birds and wildlife instead of discrete tracts of land containing the commodity timber.<sup>17</sup> For Romantics, protecting each tree is important because Romantics also view Nature as the sum of all its parts and, due to the interconnection of all things, no part may be lost—the cogs and wheels must be kept, as the euphemism goes.<sup>18</sup>

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14. *Id.* at 2900.

15. *Property Rights*, *supra* note 1, at 1439 ("Lucas addresses legislation imposed to maintain ecological services performed by land in its natural state."). The Romantics' use of the terms "ecological services" is unfortunate because it has been the tradition of our representative democracy to pay for the services provided to the public. Ecological services are no different in kind than the services performed by the armed forces in defense of the nation or welfare services provided to the poor. The public as a whole pays the cost.

16. Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 *STAN. L. REV.* 1411, 1421 (1993) (footnote omitted). Lazarus also contends that "[l]and is now a highly regulated commodity, and its ownership is no longer the touchstone of human autonomy or the source of individual freedom." *Id.* By way of rejoinder, one need only cite Walter Lippmann:

[T]he only dependable foundation of personal liberty is the personal economic security of private property.

... There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely. Men cannot be made free by laws unless they are in fact free because no man can buy and no man can coerce them. That is why the Englishman's belief that his home is his castle and that the king cannot enter it . . . [is] the very essence of the free man's way of life.

WALTER LIPPMANN, *THE METHOD OF FREEDOM* 101, 102 (1934).

17. *Property Rights*, *supra* note 1, at 1445. Of course, ownership of "the commodity timber" has, as much as a fee simple absolute, "a rich tradition of protection at common law," *Lucas*, 112 S. Ct. at 2894 n.7, called a *profit a pendre*. See, e.g., *Sequim Bay Canning Co. v. Bugge*, 94 P. 922, 923 (Wash. 1908) ("[I]f the state has authority to invest one with the private ownership . . . , such investiture must carry with it the right to exercise dominion and ownership over what is upon the land . . . ."); *Layman v. Ledgett*, 577 P.2d 970 (Wash. 1978) (right to cut timber for 40 years is a property right).

18. The quote, "[t]o keep every cog and wheel is the first precaution of intelligent tinkering," is from the famous conservationist Aldo Leopold in *THE ROUND RIVER*,

“Ecosystem management” is the current manifestation of Professor Sax’s “everything is connected” rule. While there is no generally accepted definition of the concept, it has become the hallmark of current environmental thinking and governmental policy. As the Congressional Research Service recently noted:

The intensity of the effort is also striking. All these agencies are devoting significant resources, both staff and financial, to this effort at a time of budget constraints and Federal downsizing. But the benefits of this approach, as they are defining it, seem to outweigh *any* costs, assuming successful implementation. Equally striking is the faith that the many government employees . . . appear to place in an ecosystem approach as a more rational way of serving the public good.<sup>19</sup>

This quote is revealing for several reasons. First, it shows that there is no defined approach to ecosystem management; rather, it is *being* defined, at significant cost, as the agencies muddle along. Even Professor Sax sees the opportunity for governmental abuse to “become more intense as traditional property distinctions fade” into ecosystems, which is what ecosystem management accomplishes.<sup>20</sup>

Second, the end of ecosystem management is the “public good,” yet the proponents do not include just compensation for private landowners restricted in the use of their property as among the “any costs” worth paying. Cost is no object in redefining land-use management within an ecosystem, even when implementation is doubtful, because the price is paid by individual landowners within the ecosystem, not the agencies. This is not even an instance of the majority resorting to rule to take private property for public use without compensation because the agencies are not answerable to the electorate.<sup>21</sup>

Lastly, the concept is not sound science but based on the “beliefs” of the bureaucrats. In truth, ecosystems and the Economy of Nature

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quoted in William R. Irvin, *The Endangered Species Act: Keeping Every Cog and Wheel*, 8 NAT. RESOURCES & ENV'T 36 (Summer 1993). The Romantics never explain why intelligent tinkering to conserve Nature is any less anthropocentric than tinkering with Nature to make it more productive for humankind. In other words, what happens when you find out that you do not need every cog and wheel, reaching the fundamental policy decision that an unadorned bicycle gets you there as well as a car even though it has fewer cogs and two less wheels.

19. WAYNE A. MORRISSEY ET AL., ECOSYSTEM MANAGEMENT: FEDERAL AGENCY ACTIVITIES 4 (Congressional Research Service Report for Congress No. 94-339 ENR, 1994) (emphasis added).

20. *Property Rights*, *supra* note 1, at 1454.

21. See Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1387 (1993) (“[P]eople should never be allowed to take by majority vote without compensation what they would have to pay for if they acted cooperatively in their private capacities. To allow otherwise would cause a mass migration from the market and to the political process.”).

are nothing more than “mental constructs” fashioned by the Romantics to forward their agenda of redefining property rights.<sup>22</sup>

The U.S. Fish and Wildlife Service (“FWS”), one of the agencies charged with administering the Endangered Species Act (“ESA”), states that “[a]n ecosystem approach to fish and wildlife conservation means protecting or restoring the function, structure, and species composition of an ecosystem while providing for its sustainable socioeconomic use.”<sup>23</sup> The FWS, like Professor Sax, is prepared for the challenge of the Economy of Nature, recognizing that “[a]dopting an ecosystem approach to fish and wildlife as an underlying foundation for [their] operational activities will mean significantly changing the way [they] think, act, and solve problems.”<sup>24</sup> The FWS warns that it will apply the concept of managing and protecting ecosystems to carry out all of its functions, which include: reviewing permits, managing National Wildlife Refuges, stocking fish, and other activities.<sup>25</sup> In other words, the overarching goal of ecosystem management in the Economy of Nature is ecosystem protection at any cost. This is a remarkable assertion since ecosystem management is not authorized by statute or any other law.<sup>26</sup>

Ecosystem management can be seen as the policy tool for tinkering with property rights in the Economy of Nature. As one commentator recently asserted:

[R]esource use must bow to the paramount needs of the ecosystem. Because the assumption is that maintenance of the ecosystem is the highest good, any use that would impact the ecosystem must be measured against that standard and justified on those terms. The

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22. See Allan K. Fitzsimmons, *Federal Ecosystem Management: A “Train Wreck” in the Making*, Policy Analysis No. 217, at 9-10 (Cato Institute Oct. 26, 1994) (“[T]he ecosystem concept is geographically amorphous—a useful attribute in the realm of research but a fatal flaw in the world of people, property, policy, and regulation. Ecosystems in reality are mental constructs fashioned by researchers to forward some particular analysis. A pond can be an ecosystem; so can the territory shared by two species of trees or the space that forms the habitat of an insect or an eagle. Rather than discrete entities, ecosystems are devices of analytic convenience and reflect all the vagaries of research (e.g., project purpose, budget, data availability and quality, and time constraints).”).

23. U.S. FISH & WILDLIFE SERV., *AN ECOSYSTEM APPROACH TO FISH AND WILDLIFE CONSERVATION: AN APPROACH TO MORE EFFECTIVELY CONSERVE THE NATION’S BIODIVERSITY* 1 (Mar. 1994).

24. *Id.* at 5.

25. *Id.*

26. Even though the ESA has as one of its principal purposes “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” 16 U.S.C. § 1531(b) (1988), the ESA provides precious little statutory basis for doing so, other than land acquisition by the government under § 5 of the Act. See *infra* notes 36 to 42 and accompanying text. But protecting ecosystems is reminiscent of the pronouncement by the Supreme Court in *Tennessee Valley Auth. v. Hill* about the ESA—that Congress intended species to be protected at “whatever the cost.” 437 U.S. 153, 184 (1978). But at whatever cost to whom? Private landowners or government institutions?

burden of proof in an ecosystem management regime is therefore on those who would use the resources within the ecosystem.<sup>27</sup>

Additionally, under an ecosystem management regime in the Economy of Nature, anyone in the ecosystem should have standing to challenge a particular land use activity as harmful—a form of “ecosystem standing.” The concept is that “any person who uses *any part* of a ‘contiguous ecosystem’ adversely affected . . . has standing even if the activity is located a great distance away.”<sup>28</sup>

The consequences to property rights are clear. Ecosystems, however [ill-]defined, transfer the private use of property into a partial common pool in the Economy of Nature. To slightly paraphrase Richard Epstein, ecosystem management schemes like:

Land use regulation place[ ] the land back into a modified common pool, where many persons can limit the future use of the land, even though only one person, the owner, can actually use it. Ill-defined rights replace well-defined ones, and transaction cost barriers are likely to exceed the gains that otherwise are obtainable from any shift in land use or ownership. Another negative-sum game.<sup>29</sup>

In terms of traditional property law, in the Economy of Nature the landowner’s fee simple *absolute* is converted into a mere usufruct with executory<sup>30</sup> and contingent remainders in some unknown class of non-human heirs in perpetuity. The Rule against Perpetuities<sup>31</sup> becomes a Rule for Perpetuities<sup>32</sup>—or, stated in modern jargon, a Rule of Sustainabilities. Of course, this is contrary to the history of the common law of property,<sup>33</sup> which is based upon bringing certainty to real property transactions and eliminating uncertain and unpredictable results when the fee simple is not absolute. In the Economy of Nature, no

27. Thomas C. Jackson & Joshua S. Wyner, *The New Hot Doctrine: Ecosystem Management*, NAT’L L.J., Dec. 5, 1994, at C6, C7.

28. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2139 (1992) (rejecting ecosystem standing). In addition to rejecting the “inelegantly styled ‘ecosystem nexus’” for standing, Justice Scalia, writing for the Court, also rejected the “‘animal nexus’ approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the ‘vocational nexus’ approach, under which anyone with a professional interest in such animals can sue.” *Id.*

29. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 265 (1985).

30. An executory remainder is a contingent remainder “where the estate is limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event.” BLACK’S LAW DICTIONARY 1293 (6th ed. 1990).

31. The Rule against Perpetuities prohibits granting an estate that will not vest in some person within a time limited by a life in being and 21 years thereafter. *Id.* at 1331.

32. “A perpetuity is a limitation which takes the subject-matter of the perpetuity out of commerce for a period greater than a life or lives in being and 21 years thereafter, plus ordinary period of gestation.” *Id.* at 1141.

33. The common law tradition of Livery of Seisen would likely be a criminal act, or at least one requiring a dredge and fill permit, in the Economy of Nature.



amount of due diligence could protect the purchaser unless all habitat has first been removed—hardly a desirable outcome for wildlife.

Thus, one sees that in the Romantics' world, the Economy of Nature is not a place for the fainthearted. The high roller may risk everything for resources today, only to see the dividend sequestered for some future generation neither related by blood nor through risk of investment in the land. Indeed, Nature's economy is an endless series of forced exchanges between always-unwilling sellers and never-unwitting buyers. These exchanges occur randomly with no predictability, leaving the property subject to contingent, executory interests in others or things.

While pluralism demands a place for the views of such Romantics in the marketplace of ideas, the implications of their ideas are antithetical to the foundations of our society and its constitutional underpinnings. While property had been viewed historically as the bulwark of representative democracy and the springboard to freedom, the Romantics view it as principally in the service of society. Ownership is transformed into mere use contingent upon its consistency with the greater needs of society. Society takes the rent from the ecological services provided by the property, while the owner gets the remainder, which, in many cases, is precious little due to the transaction costs.

#### I. THE ROLE OF THE ESA IN THE ECONOMY OF NATURE AND THE IMPACT ON PRIVATE PROPERTY

Professor Sax has argued that "[t]he target of *Lucas* is broader than its immediate concern of coastal dune maintenance; the opinion . . . anticipates cases that will be brought under section nine of the Endangered Species Act, under which private landowners may be required to leave their land undisturbed as habitat."<sup>34</sup> His prediction will be tested this Court Term because the regulation that defines an unlawful "take" of a threatened or endangered species as including "significant habitat modification" is presently before the Court.<sup>35</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* is an important case because it will determine whether the ESA has a role in the Economy of Nature and, potentially, whether government can require landowners to keep their land in its natural state as wildlife habitat.

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34. *Property Rights*, *supra* note 1, at 1439.

35. *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, 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), *rev'd in part*, 17 F.3d 1463 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (1995) (No. 94-859).

A. *The ESA in the Economy of Nature*

The importance of preserving the habitat of threatened or endangered species is recognized throughout the ESA. A species may be listed as endangered on the basis of "the present or threatened destruction, modification, or curtailment of its habitat."<sup>36</sup> Concurrent with listing, to the maximum extent prudent and determinable, the Secretary is to "designate any habitat of such species which is then considered to be critical habitat."<sup>37</sup> Once a species is listed, all federal departments and agencies are required to ensure that no actions are authorized, funded, or carried out that are likely to jeopardize the continued existence of the species in the wild or result in the destruction or adverse modification of designated critical habitat.<sup>38</sup> In addition, in developing recovery plans for the conservation and survival of listed species, the government must include "site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species."<sup>39</sup>

Indeed, one of the principal purposes of the ESA when it was enacted in 1973 was "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be con-

36. 16 U.S.C. § 1533(a)(1)(A) (1988).

37. 16 U.S.C. § 1533(a)(3)(A) (1988). Critical habitat was not defined in the 1973 ESA, but a joint interagency regulation promulgated a definition in 1978:

"Critical habitat" means any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.

Interagency Cooperation—Endangered Species Act of 1973, 43 Fed. Reg. 870, 874-75 (1978).

The definition of critical habitat was redefined and incorporated into the statute in the 1978 Amendments as follows:

The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.

Endangered Species Act Amendments of 1978, sec. 2, § 3(5)(A), 92 Stat. 3751, 3751 (codified as amended at 16 U.S.C. § 1532(5)(A) (1988)).

38. 16 U.S.C. § 1536(a)(2) (1988).

39. 16 U.S.C. § 1533(f)(1)(B)(i) (1988).

served."<sup>40</sup> However, to the extent this hortatory comment has been viewed as a herald of the role of the ESA in the Economy of Nature, it is a herald doomed to disappoint because Congress provided precious little statutory authority to achieve the objective. The only express prohibition against destruction of habitat applied exclusively to the government under section 7 but only as to designated "critical habitat."<sup>41</sup> As to protection of this and other habitat, section 5 of the ESA provided the only other mechanism—federal land acquisition.<sup>42</sup> Once acquired, the critical habitat protections of section 7 would then apply.

Thus, where does the claim that the ESA restricts the use of private property originate? The answer can be found in agency application of section 7's consultation requirement and section 9's prohibition on "take" to private landowners.

### 1. Section 7 Impacts on Private Lands

Section 7(a)(2) prohibits the government from authorizing, funding, or carrying out any action likely to jeopardize the continued existence of a threatened or endangered species or result in the destruction or adverse modification of the critical habitat of such species.<sup>43</sup> Under section 7, private landowners can be affected by the ESA if they require some form of federal approval for their activities, such as a per-

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40. 16 U.S.C. § 1531(b) (1988). It is interesting to note that nowhere else in the ESA is the term "ecosystems" even mentioned or defined.

41. The original ESA bill referred to the Senate Committee on Commerce, S. 1983, defined prohibited take to include "the destruction, modification, or curtailment of its habitat or range." S. 1983, 93d Cong., 1st Sess. § 2(6) (1973), *reprinted in* STAFF OF SENATE COMM. ON ENV'T & PUB. WORKS, 97th Cong., 2d Sess., *A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980*, at 228 (Comm. Print 1982). The Senate ultimately rejected the habitat destruction language in favor of the current definition but without comment in the legislative history.

42. 16 U.S.C. § 1534 (1988). In passing the ESA, Congress noted:

Often, protection of habitat is the only means of protecting endangered animals which occur on non-public lands. With programs for protection underway, and worthy of continuation into the foreseeable future, an accelerated land acquisition program is essential.

S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2992. *See also* Remarks of Senator Tunney (D-Cal.), 119 CONG. REC. 25,668, 25,669 (1973):

Many species have been inadvertently exterminated by a negligent destruction of their habitat. Their habitats have been cut in size, polluted, or otherwise altered so that they are unsuitable environments for natural populations of fish and wildlife. Under this bill, we can take steps to make amends for our negligent encroachment. The Secretary would be empowered to use the land acquisition authority granted to him in certain existing legislation to acquire land for the use of the endangered species programs. . . . Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.

43. 16 U.S.C. § 1536(a)(2) (1988).

mit or license, or if their project involves federal funding. If any of these federal activities are likely to affect listed species or their critical habitat adversely,<sup>44</sup> the permitting or funding agency and private applicant must “consult” with the FWS to determine: (1) whether the project is likely to jeopardize the continued existence of the species or result in destruction or adverse modification of critical habitat, and (2) what measures will be required to minimize the impacts of the project.<sup>45</sup>

If the result of the consultation is a finding by the FWS that the proposed action—i.e., issuance of a permit to dredge and fill a wetland under section 404 of the Clean Water Act<sup>46</sup>—is likely to jeopardize the continued existence of the species or result in the destruction of designated critical habitat, the FWS must propose reasonable and prudent alternatives that will avoid the jeopardy or critical habitat destruction.<sup>47</sup> According to the FWS, jeopardy may be the result of the cumulative effects of multiple unrelated projects, even though the impacts from the project standing alone would not lead to such a result.<sup>48</sup>

In the end, the action cannot be authorized if the result is jeopardy or destruction of habitat.<sup>49</sup> To proceed, the applicant or federal agency project proponent would have to seek an exemption from the Endangered Species Committee, a rare and seldom used procedure.<sup>50</sup>

If the project is not likely to result in jeopardy or destruction of critical habitat, but may “incidentally take” a listed species, it may proceed with an exemption from the prohibition against “take” in ESA’s section 9, provided the take is incidental to the purpose of the otherwise lawful activity.<sup>51</sup> The FWS will issue an incidental take statement imposing such “reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact.”<sup>52</sup>

It is in the incidental take statement that the government extracts concessions from landowners who are at a distinct disadvantage in the bargaining process because of the need for a permit to commence or continue the project. The Government Accounting Office (“GAO”)

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44. The FWS’s position is that formal consultation is required when there is discretionary federal involvement in or control over the project, whether obvious (as in issuance of a permit) or less direct (such as State administration of a program that retains federal oversight like the National Pollution Discharge Elimination System Program under the Clean Water Act). See U.S. FISH & WILDLIFE SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING SECTION 7 CONSULTATIONS AND CONFERENCES 2-7 (Nov. 1994 Draft).

45. 16 U.S.C. § 1536(a), (b) (1988).

46. 33 U.S.C. § 1344 (1988).

47. 16 U.S.C. § 1536(b)(3)(A) (1988).

48. U.S. FISH & WILDLIFE SERV., *supra* note 44, at 4-34 to 4-35.

49. 16 U.S.C. § 1536(a)(2), (b).

50. 16 U.S.C. § 1536(e) (1988).

51. 16 U.S.C. § 1536(o) (1988).

52. 16 U.S.C. § 1536(b)(4)(C)(ii) (1988).

recently acknowledged that routinely “nonfederal landowners have been required to modify their planned or ongoing activities to minimize and/or mitigate the impacts of their activities on protected species.”<sup>53</sup>

The examples provided by the GAO in its Report illustrate that the focus of mitigation measures imposed under section 7 has been to protect habitat, rather than to minimize the taking of listed species. The GAO cited the example of a California developer that proposed building a retail outlet mall on land containing wetland habitat for the Sebastopol meadowfoam, a protected plant.<sup>54</sup>

Because the developer needed authorization from the U.S. Army Corps of Engineers (Corps) to fill wetland areas, the Corps consulted with the Service on measures the developer needed to take to mitigate the project’s impact on the plant. The consultation, which proceeded to the formal stage, resulted in the developer’s agreeing to (1) establish a new Sebastopol meadowfoam colony in an off-site area and (2) acquire and protect additional habitat containing an existing natural population of the species.<sup>55</sup>

This example is remarkable for several reasons. First, listed plants under the ESA are protected only on federal lands or to the extent protected by state law.<sup>56</sup> Nothing but good conscience would have prevented the developer from picking all of the plants in the wetland before applying for the fill permit. Yet, through the fill permit, the prohibitions on destruction of the plant are applied to the private landowner.

Second, critical habitat had not been designated for the species for fear of vandalism,<sup>57</sup> but this occurrence on the developer’s land clearly was not the only known population. The fact that the project was allowed to proceed demonstrated the FWS’s opinion that neither the critical habitat of the plant nor its likelihood of survival in the wild was threatened by the development, otherwise section 7 would have mandated disapproval of the fill permit.

Third, to use the developer’s own land, the developer had to acquire new land off-site. This amount of the exaction was not stated by the GAO, but numerous examples of such “mitigation ratios” exist in reported cases. For instance, in *Morrill v. Lujan*,<sup>58</sup> a developer owned eight acres of beach frontage upon which he sought to build a hotel

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53. See U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 7 (GAO/RCED-95-16, Dec. 1994) [hereinafter GAO REPORT].

54. See Determination of Endangered Status for Three Plants . . . *Limnanthes Vinculans* (Sebastopol meadowfoam), 56 Fed. Reg. 61,173 (1991) (codified at 60 C.F.R. § 17) [hereinafter Three Plants Determination].

55. GAO REPORT, *supra* note 53, at 7 (footnote omitted).

56. 16 U.S.C. § 1538(a)(2)(B) (1988).

57. See Three Plants Determination, *supra* note 54, at 61,177-78, 61,180-81.

58. 802 F. Supp. 424 (S.D. Ala. 1992).

and dock. To do so, he needed a federal permit from the Army Corps of Engineers ("Corps"), and, because the proposed dock was "in the vicinity" of habitat occupied by the endangered Perdido Key Beach mouse, consultation under section 7 with the FWS was required.<sup>59</sup>

The FWS determined that development of the property would jeopardize the continued existence of the mouse and offered as a "reasonable and prudent alternative" to a denial of the Corps permit that the developer "purchase the remaining 21.5 acres of privately-owned property and deed it to the State 'for preservation and management as habitat for the Perdido Key Beach mouse.'"<sup>60</sup> As a consequence, the developer dropped the plan to build a dock and simply proceeded with the hotel, which did not require a federal permit.<sup>61</sup>

As the foregoing illustrates, section 7 of the ESA relies on a habitat modification rule as a prohibited take to impose "reasonable and prudent measures" forcing landowners to leave some or all of their land in a natural state for the benefit of wildlife.<sup>62</sup> The genesis of that habitat rule, however, really is in section 9 of the ESA.

## 2. Section 9 of the ESA

Section 9 of the ESA, which makes it unlawful for any person to "take" any listed species of fish or wildlife,<sup>63</sup> has been the true catalyst for habitat protection. The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>64</sup>

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59. *Id.* at 428.

60. *Id.*

61. *Id.* The developer was sued anyway by a private citizen who contended that the development would result in a prohibited "take" of the beach mouse by habitat modification. *Id.* at 426. The complaint argued that a take might occur (1) because construction could kill or injure any mice on the property, (2) habitat would be degraded, and (3) the completed project would lead to an influx of house mice, feral cats, and human foot traffic on designated critical habitat to the south of the developer's property. *Id.* at 430. The court rejected these claims because no mice had ever been seen on the property, habitat modification alone was insufficient to prove a take, and there was insufficient cause and effect to find a take. The court unmasked the plaintiff's central purpose: "The plaintiff . . . would like to preserve every square inch and grain of sand of the potential beach mouse habitat, and stop any possibility of outside human or predator intrusion with the truly laudable goal of affording a tiny creature every conceivable possibility of survival. But to paraphrase Stuart Little, their wishes and the law are not the same . . ." *Id.* at 433-34. Stuart Little is a literary reference to a story of the same name by E.B. White about a mouse born to human parents and its travails.

62. The GAO Report concluded that "80 of the 105 species for which critical habitat has been designated have a portion of that critical habitat on nonfederal lands. More than half of these . . . species . . . have over 80 percent of their critical habitat on nonfederal lands." GAO REPORT, *supra* note 53, at 6. Over 90% (712 of 781) of the listed species have some or all of their habitat, whether designated critical or not, on nonfederal lands. *Id.* at 4.

63. 16 U.S.C. § 1538(a)(1)(B) (1988).

64. 16 U.S.C. § 1532(19) (1988).

Through regulation, the FWS has defined the term "harm," as it appears in the definition of "take," to prohibit significant habitat modification that kills or injures wildlife: "Harm in the definition of 'take' in the [ESA] means 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."<sup>65</sup>

The breadth of this definition is astounding. The FWS has provided some example of how the definition is to be applied:

Identifying habitat modifications that harm individuals of a species involves understanding the species' life history. For example, the Florida scrub jay is highly territorial and relies for its existence on food cached within its territory. A project that destroys occupied habitat and thus the food supply for that family group is likely to result in their starvation. Similarly, a number of birds are highly site-tenacious, returning year after year to the same nesting site. Removal of nesting habitat on that site is likely to result in loss of the pair's reproductive capability, and may result in loss of the pair for lack of available feeding or nesting habitat. Opening up or fragmenting the habitat may similarly affect the species by introducing increased predation or parasitism.<sup>66</sup>

The FWS has employed the broad harm definition, both under section 7 and section 9, to stymie a variety of otherwise lawful land uses, such as the harvesting of timber over vast areas of land.<sup>67</sup> Perhaps the most illustrative example of the FWS's application of the "harm" definition is the so-called northern spotted owl guidelines.

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65. 50 C.F.R. § 17.3 (1993).

66. U.S. FISH & WILDLIFE SERV., *supra* note 44, at 4-43.

67. The evolution of this definition and its application are beyond the scope of this article. For a complete discussion, see Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419 (1994).

a. *Spotted Owl Guidelines*<sup>68</sup>

The northern spotted owl (*Strix occidentalis caurina*) was listed as a threatened species on June 26, 1990.<sup>69</sup> In July 1990, FWS Region 1 promulgated "informal" guidelines to determine when a prohibited take would occur from timber harvesting and related activities in and around known spotted owl sites.<sup>70</sup>

The Guidelines established "owl circles" of various sizes centered around a nest site or center of activity. Timber harvest and other forest management activities were prohibited if such actions left (1) "less than 70 acres of the best available suitable owl habitat" around the nest site, (2) "less than 500 acres of suitable habitat within a 0.7-mile radius (1000 acres) of a nest site," or (3) less than a 40% suitable owl coverage within a circle with a radius of 1.2 to 2.2 miles, depending on

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68. It is not just the case of the owl of course that has lead to landowners being forced to keep their property in its natural state for the benefit of wildlife. The testimony of one private citizen in the recent reauthorization hearings sums up the dilemma nicely:

I am here to speak for those millions of Americans who would like to see a fair and balanced ESA. . . . In 1984 my husband and I purchased 1.45 acres to build our homestead. We worked hard for the next nine years to make enough money so that we could build our home. By the summer of 1993 we had managed to save enough to finally begin the process of planning and construction.

As some of you may know, the area around Austin, Texas is home to a number of species listed under the ESA. One of those species is the golden-cheeked warbler. On the advice of our architect, we sought from the FWS a document, known as a "bird letter," without which we could not likely obtain a loan. Essentially, the bird letter acknowledges that a property owner's land has been unoccupied (by warblers) for at least three years, or that there is no suitable habitat on the land. . . .

FWS told us that . . . our property was in a suitable habitat area, thus, the FWS said, we would need a section 10(a) permit before we could build our home.

We asked what a 10(a) permit was, and what it would require us to do. The FWS told us that we would need to "mitigate" by setting aside land for habitat. I told them that we only had 1.45 acres, and that we didn't have any land to set aside. Their response was that we could purchase other land elsewhere that was good mitigation habitat. We were astonished—this felt like extortion—buying land for the government in exchange for the right to use our own land.

*Endangered Species Act Amendments of 1993: Hearings Before the Subcomm. on Clean Water, Fisheries, and Wildlife of the Senate Comm. on Environment and Public Works, 103d Cong., 2d Sess. 219-20 (1994) (statement of Mary A. Davidson).*

69. Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (1990) (codified at 50 C.F.R. § 17.11) (the effective date of the rule was July 23, 1990).

70. U.S. FISH & WILDLIFE SERV., REGION 1, PROCEDURES LEADING TO ENDANGERED SPECIES ACT COMPLIANCE FOR THE NORTHERN SPOTTED OWL (July 1990) [hereinafter GUIDELINES]. The Guidelines were promulgated without the benefit of public notice, comment, or other rule-making procedures required under the Administrative Procedures Act. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1365-71 (1992).



location.<sup>71</sup> In other words, the FWS set aside 3960 acres of timber (40% of a 2.2 mile circle) per nest site under the guise of preventing a prohibited take under section 9 of the ESA.

The substantive and procedural validity of the Guidelines were challenged by a grassroots timber industry group in *Sweet Home Chapter of Communities for a Great Oregon v. Turner*.<sup>72</sup> In light of this challenge, FWS withdrew the Guidelines and moved to dismiss the suit as moot.<sup>73</sup> Based on the unequivocal revocation of the Guidelines, the court dismissed the suit, declaring that "plaintiffs are seeking to prevent enforcement of the Guidelines. That is precisely what the FWS has now done: FWS declared that the Guidelines were rescinded, thereby clearly indicating its intention no longer to apply or enforce them."<sup>74</sup>

Notwithstanding the express representations to the court, and the court's reliance on those representations in dismissing the suit, the FWS continued to apply the 70-500-40 Rule as a bright-line test to determine whether a prohibited take might occur and whether such action should be enjoined or prosecuted.<sup>75</sup> Landowners in Washington State who, under state law, could lawfully harvest all but 500 acres of suitable habitat around known owl sites,<sup>76</sup> received letters from an Assistant United States Attorney for the Western District of Washington threatening prosecution for illegal takes under federal law if such operations commenced.<sup>77</sup>

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71. GUIDELINES, *supra* note 70, at 10. This is the so-called 70-500-40 Rule.

72. Complaint for Declaratory and Injunctive Relief, No. 91-2218 (D.D.C. filed Aug. 30, 1991).

73. See Letter from H. Dale Hall, Assistant Regional Director, FWS, to Wayne S. White et al., Field Supervisors, FWS Field Offices (Oct. 2, 1991) (on file with the *Fordham Environmental Law Journal*).

74. *Sweet Home Chapter of Communities for a Great Oregon v. Turner*, No. 91-2218, slip op. at 4 (D.D.C. Feb. 27, 1992).

75. See, e.g., Letter from Russell D. Peterson, Field Supervisor, FWS, to Aaron Jones, Seneca Sawmill Corp. (Mar. 30, 1992) (advising that a planned harvest and road construction within the median home range of a known spotted owl pair would result in a prohibited take by "reducing the amount of suitable habitat to below levels that would maintain the reproductive success of this pair") (on file with the *Fordham Environmental Law Journal*); see also Letter from Curt Smitch, Director, Washington Department of Wildlife and David Frederick, Field Supervisor, FWS, to Washington Forest Practices Board Members 2 (June 25, 1992) (urging the Board to "reconsider" a proposed state rule for the owl that would provide less protection than the 70-500-40 Rule because it "could lead to actions that may be in conflict with provisions of the [ESA].") (on file with the *Fordham Environmental Law Journal*).

76. WASH. ADMIN. CODE § 222-16-080(1)(h) (1993).

77. See, e.g., Letter from Mike McKay, United States Attorney and Brian C. Kipnis, Assistant United States Attorney, to Peter R. Waldrip, Rayonier Timberlands Operating Co. (Jan. 26, 1993) (on file with the *Fordham Environmental Law Journal*).

b. United States v. Anderson & Middleton Logging Co.<sup>78</sup>

Anderson & Middleton Logging Co. ("A&M") received one of the prosecutor's threatening letters. A&M owned seventy-two acres of old growth timber on the Olympic Peninsula in Washington. Under Washington State's 500-acre rule, A&M had a valid state permit to harvest the timber and notified the government of its intent to proceed before commencing harvesting.

On December 9, 1993, the United States Department of Interior sought to enjoin A&M from harvesting the timber, claiming that such harvesting would violate section 9 of the ESA by "harming" or "harassing" a pair of spotted owls sited on federal lands almost two miles away.<sup>79</sup> The Complaint alleged that unlawful harm would occur from harvest by the possible "impairment of reproductivity" or possible "death by starvation or exposure to predators" at some future time.<sup>80</sup> In the Declaration accompanying the Complaint, the government's expert admitted that there was no proof that any spotted owl had ever flown through, let alone nested, roosted, or foraged on the property.<sup>81</sup> Notwithstanding, the biologist declared under oath that the harvest had to be enjoined to prevent a take that would diminish the owl circle to below 40% cover.<sup>82</sup>

Remarkably, only three months earlier, the government had approved the incidental take of the same owl pair through a section 7 consultation with the Bureau of Indian Affairs ("BIA"). BIA requested formal consultation on a Quinault Indian Nation timber sale of seventy-five acres of old growth adjacent to the A&M property.<sup>83</sup> FWS provided the Quinault Tribe with an incidental take statement permitting harvest of this timber within the same owl circle as the A&M property while A&M and other landowners in Washington were being threatened with prosecution if they cut their timber. As the Biological Opinion for the Quinault indicated,<sup>84</sup> no part of the owl circle at issue is within designated critical habitat for the spotted owl.<sup>85</sup>

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78. Complaint, United States v. Anderson & Middleton Logging Co., No. C93-5697 (W.D. Wash. filed Dec. 9, 1993).

79. *Id.*

80. *Id.* at 7.

81. Declaration of E. Charles Meslow for the United States at 7, 12-13, United States v. Anderson & Middleton Logging Co., No. C93-5697 (W.D. Wash. filed Dec. 9, 1993).

82. *Id.* at 12 ("The further the amount of suitable habitat falls below 40%, the more precious each remaining patch of suitable habitat becomes.").

83. See U.S. FISH & WILDLIFE SERV., 1993 BIOLOGICAL OPINION ON FORMAL SECTION 7 CONSULTATION ON THE NORTH FIVE TIMBER SALE, QUINAULT INDIAN NATION 1-2 (FWS Ref. 1-3-93-F-515, Aug. 30, 1993).

84. *Id.* at 3.

85. The FWS previously determined that the 6.9 million acres of designated critical habitat on federal lands for the owl were sufficient to ensure the conservation and recovery of the owl. Thus, the FWS decided to exclude non-federal lands from consideration as designated critical habitat. Determination of Critical Habitat for the

More recently, the FWS released for public comment a draft rule for conservation of the spotted owl on non-federal lands under section 4(d) of the ESA.<sup>86</sup> If this rule is adopted, A&M would have no obligation to preserve any habitat. Under the proposed rule, larger owl circles would be maintained within proposed special emphasis areas ("SEAs"). The property on the Olympic Peninsula where the owl pair was spotted is not a SEA. Since the particular owl pair is located outside of a designated SEA, it would receive only seventy acres of protection around its nest site.<sup>87</sup>

c. *Sweet Home Challenge to the FWS's Harm Regulation*<sup>88</sup>

The same parties that challenged the owl Guidelines in *Sweet Home* also challenged the FWS's harm regulation. In essence, the plaintiffs averred that they were private landowners forced to maintain some or all of their private property in its natural state for the benefit of a threatened or endangered species to avoid prosecution under the ESA.<sup>89</sup> Typical of the plaintiffs is Emmy G. Birkenfeld, the trustee of the William F. Birkenfeld Trust, the corpus of which includes 5600 acres of land eligible for timber harvest near Carson, Washington. As averred in the *Sweet Home* Complaint:

The income derived from harvesting timber from these lands supports Mrs. Birkenfeld, her two sons, and her sons' families. Mrs. Birkenfeld had been able to harvest timber from the 5600 acres until recently when spotted owls were discovered nearby, and under the regulations challenged in this lawsuit Mrs. Birkenfeld risks prosecution for an ESA "taking" if she harvests her land. Every application for approval to harvest timber submitted by Mrs. Birkenfeld has been substantially denied.

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Northern Spotted Owl, 57 Fed. Reg. 1796, 1811 (1992). The designation of critical habitat was challenged successfully in *Douglas County v. Lujan*, 810 F. Supp. 1470 (D. Or. 1992), for failure to comply with the National Environmental Policy Act ("NEPA"). However, the Ninth Circuit, stating that NEPA does not apply to the Secretary of the Interior's decision to designate a critical habitat for an endangered species under the ESA, reversed in part *Douglas County*. *Douglas County v. Babbitt*, Nos. 93-36013, 93-36016, 1995 U.S. App. LEXIS 3532 (9th Cir. Feb. 24, 1995).

86. See Proposed Special Rule for the Conservation of the Northern Spotted Owl on Non-Federal Lands, 60 Fed. Reg. 9484, 9500 (1995). Section 4(d) of the ESA grants the Secretary the authority to apply any or all of the prohibitions in § 9 for endangered species to threatened species. 16 U.S.C. § 1533(d) (1988).

87. See Figures 4 and 5, Proposed Special Rule for the Conservation of the Northern Spotted Owl on Non-Federal Lands, 60 Fed. Reg. 9484, 9520-21.

88. *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, 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), *rev'd in part*, 17 F.3d 1463 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (1995) (No. 94-859).

89. Complaint at 2-3, *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, 806 F. Supp. 279 (D.D.C. 1992) (No. 91-1468), *aff'd sub nom. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993), *rev'd in part*, 17 F.3d 1463 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (1995) (No. 94-859).

Moreover, Mrs. Birkenfeld has been denied the right to harvest three parcels, each approximately 200 acres in size, for which approval had previously been given. After harvesting had begun pursuant to those approvals, the Washington State Department of Natural Resources issued stop orders to the trust, in reliance on the challenged regulations, claiming that its operations might harm or harass a spotted owl through habitat modification and therefore result in a take. Since the operations were allegedly within 1.8 miles of a known spotted owl nest or breeding pair and would reduce available suitable habitat for the owl, the state ordered all timber falling on these parcels stopped indefinitely.

Because of the foregoing restrictions which have been placed on Mrs. Birkenfeld's use of the trust property, in reliance on the challenged regulations, Mrs. Birkenfeld is currently unable to cut timber from *any* of the 5600 acres that would otherwise be available for harvesting. The Birkenfelds have accordingly been deprived of the needed income from the trust and, as a result, have lost the financial support that the trust was designed to provide.<sup>90</sup>

The plaintiffs sought to invalidate the FWS's regulatory definition of harm on several theories, including void for vagueness, but the District Court rejected all challenges.<sup>91</sup> The Court of Appeals for the District of Columbia affirmed the district court decision but split on the issue of the scope of the "taking" prohibition and whether it encompassed habitat modification.<sup>92</sup> In upholding the FWS's definition, Judge Mikva wrote:

[T]here are obviously types of activity, including habitat modification, that 50 C.F.R. § 17.3 clearly prohibits without a hint of vagueness. For example, it obviously forbids the very sort of conduct that appellants argue it should be limited to—habitat modification that causes ascertainable physical injury or death to an individual member of a listed species. Furthermore, § 17.3 unquestionably prohibits major acts of habitat degradation that destroy a species' ability to breed, feed, or shelter. For instance, a person aware of the regulation would undoubtedly be held accountable for clear-cutting an entire forested area known to be populated by spotted owls.<sup>93</sup>

However, after a petition for rehearing, the court reversed on the habitat modification rule, relying on the principle of *noscitur a sociis*—that a word is known by the company it keeps—to find that the FWS's definition of harm far exceeded Congressional intent in including the term harm in the definition of take in the statute.<sup>94</sup> The court applied this principle because of "the gulf between the [FWS's] habitat modification concept of 'harm' and the other words of the stat-

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90. *Id.* at 6-7.

91. 806 F. Supp. 279 (D.D.C. 1992).

92. 1 F.3d 1 (D.C. Cir. 1993).

93. *Id.* at 4-5.

94. 17 F.3d 1463, 1465-66 (D.C. Cir. 1994).

utory definition, and the implications in terms of the resulting extinction of private rights."<sup>95</sup> Drawing support from *Lucas*, the Court of Appeals for the District of Columbia stated:

As a matter of pure linguistic possibility one can easily recast any withholding of a benefit as an infliction of harm. . . . [I]t is linguistically possible to read "harm" as referring to a landowner's withholding of the benefits of a habitat that is beneficial to a species. A farmer who harvests crops or trees on which a species may depend harms it in the sense of withdrawing a benefit; if the benefit withdrawn be important, then the [FWS's] regulation sweeps up the farmer's decision.<sup>96</sup>

The decision goes to the heart of private landowner concerns about FWS's application of the habitat modification rule:

The implications of the [FWS's] definition suggest its improbable relation to congressional intent. Species dependency may be very broad. One adherent of aggressive protection, for instance, notes that "[s]ome scientists believe as many as 35 million to 42 million acres of land are necessary to the survival of grizzlies", about as much land in the northern Rockies of the United States and Canada as is still usable grizzly habitat.<sup>97</sup>

The decision also goes to the heart of the Economy of Nature. As the government stated in its petition for certiorari, "[t]he issue in this case is one of exceptional importance."<sup>98</sup> The government is correct. Underscoring the application of harm in the Economy of Nature, the government asserted in the petition that "the cutting of a nest tree in which an endangered species dwells and breeds can effectively kill the bird, regardless of whether the bird is at home when the tree falls."<sup>99</sup> The government's petition was an echo of the Romantics who have long urged that section 9's reach includes habitat modification:

[I]f an activity results in the destruction of an area essential for nesting by an endangered migratory bird, that activity will be considered to "harm" the species by preventing it from nesting and reproducing even though the activity may have occurred while the birds were on their wintering grounds and thus may not have caused any immediate physical injury to any individual bird.<sup>100</sup>

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95. *Id.*

96. *Id.* at 1464-65.

97. *Id.* at 1465 (citing ROCKY BARKER, SAVING ALL THE PARTS 34 (1993)).

98. Petition for a Writ of Certiorari at 23, *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, 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), *rev'd in part*, 17 F.3d 1463 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (1995) (No. 94-859).

99. *Id.* at 25-26.

100. MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 344 (1983).

The Supreme Court granted review of *Sweet Home* on January 6, 1995 and heard oral arguments April 17, 1995.<sup>101</sup> In the end, we will know whether the ESA prohibits some or all habitat modifications. If it does prohibit habitat modification, the question becomes whether such a result "takes" private property for public use and requires payment of just compensation to the aggrieved landowner. If it does not, the takings question is moot.

## II. DOES THE ESA "TAKE" PRIVATE PROPERTY?

Some argue that the ESA does not have the capacity to "take" private property.<sup>102</sup> For example, during reauthorization hearings in 1994, Michael J. Bean of the Environmental Defense Fund testified before the Senate Committee on Environment and Public Works that "no claim has yet been filed in the U.S. Court of Claims, the federal court empowered to hear takings claims, that any landowner anywhere has suffered a taking of his land as a result of any requirement of the Endangered Species Act."<sup>103</sup>

The analysis should start with the admonition of Justice Scalia in *Lucas v. South Carolina Coastal Council*:<sup>104</sup>

[A]ffirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. . . .

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101. 63 U.S.L.W. 3814 (May 16, 1995).

102. For an excellent summary of Fifth Amendment takings and wildlife law, see Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369 (1994), although the author concludes incorrectly, in my view, that the ESA does not work an unconstitutional taking.

103. *Endangered Species Act Amendments of 1993: Hearings Before the Subcomm. on Clean Water, Fisheries, and Wildlife of the Senate Comm. on Environment and Public Works*, 103d Cong., 2d Sess. 71 (1994) (statement of Michael J. Bean, Environmental Defense Fund); see also *id.* at 4 (statement of Senator Max Baucus (D-Mont)) ("It is important to note that there has never been a case under the Act in which a court has found that the Act has resulted in unconstitutional taking of private property.").

But this facile argument proves too much and is too clever by half. Simply because no one has been charged with theft, tried for the crime, or been convicted of stealing does not mean that the property still is not missing. If every victim of a crime of theft had to pay for the prosecution of the thief, prove that all of the property and not just some part of it had been taken, and exhaust all other possible administrative remedies, such as development of a repayment plan with the thief, before going to court to obtain the return of their property, one might well come to imagine that we live in a crime-free society. Of course, the government is no common thief when it comes to taking private property, but there can be no doubt that the property is still missing.

104. 112 S. Ct. 2886, 2894-95 (1992); but see *id.* at 2921-22 (Stevens, J., dissenting) ("New appreciation of the significance of endangered species . . . shapes our evolving understandings of property rights.") (citations omitted).

We think, in short, that there 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.<sup>105</sup>

Thus, Professor Sax has acknowledged, as he must, that *Lucas* stands for the proposition that “[s]tates may not regulate land use solely by requiring landowners to maintain their property in its natural state as part of a functioning ecosystem, even though those natural functions may be important to the ecosystem.”<sup>106</sup> Professor Sax suggests that “*Lucas* addresses legislation imposed to maintain ecological services performed by land in its natural state.”<sup>107</sup> The ESA generally, and section 9’s habitat modification rule in particular, can be categorized in such a manner.

The practical effect of the habitat modification rule is to impose a servitude across the landscape for the benefit of wildlife. Yet, section 5 of the ESA authorizes acquisition of such important habitat “by purchase, donation, or otherwise, lands, waters, or interest therein . . . in addition to any other land acquisition authority vested in [the appropriate Secretary].”<sup>108</sup> In *Lucas*, Justice Scalia reviewed many existing statutes authorizing the use of the eminent domain power to impose such servitudes on private scenic lands, preventing developmental uses, or to the acquisition of such lands altogether. Justice Scalia concluded that South Carolina had unconstitutionally taken Lucas’s property.<sup>109</sup>

Thus, the Court held in *Lucas* 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.”<sup>110</sup> Further support for extending the *Lucas* holding to other “public purpose” cases is found in *Loveladies Harbor, Inc. v. United States*, a dispute over the use of pri-

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105. *Id.* at 2894-95. Justice Brennan probably would have agreed with this formulation:

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner’s point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.

San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting) (footnote omitted).

106. *Property Rights*, *supra* note 1, at 1438.

107. *Id.* at 1439.

108. 16 U.S.C. § 1534(a)(2) (1988).

109. *Lucas*, 112 S. Ct. at 2895 (citing, for example, 16 U.S.C. §§ 3921-3923 authorizing acquisition of wetlands, etc.).

110. *Id.*

vately-owned wetlands.<sup>111</sup> In *Loveladies*, the Clinton Administration decided not to seek U.S. Supreme Court review of a ruling by the Federal Circuit Court of Appeals affirming a decision that the government must provide just compensation for forcing a landowner to maintain his property in its natural condition by denying a dredge and fill permit for a wetlands parcel.<sup>112</sup>

*Loveladies* accepted the proposition that the government can lawfully prevent a property owner from filling or otherwise injuring or destroying vital wetlands but may not let the cost of obtaining this public benefit fall solely on the affected property owner.<sup>113</sup> Like *Lucas*, *Loveladies* recognized an exception to the compensation rule when the regulatory imposition results from the State's inherent police power to abate a public nuisance as defined by the "background principles of the State's law of property and nuisance."<sup>114</sup>

While common law principles "rarely support prohibition of the 'essential use' of land,"<sup>115</sup> the *Lucas* nuisance inquiry nevertheless requires an analysis of several factors:

- the degree of harm to public lands and resources, or adjacent private property, posed by the activities;
- the social value and suitability of the activities to the locality in question;
- the relative ease with which the harm can be avoided through measures taken by the claimant and the government or adjacent private landowners;
- the fact that a particular use has long been engaged in by similarly situated landowners, which ordinarily imports a lack of a common law prohibition;
- changed circumstances or new knowledge that may make what was previously permissible no longer so; and
- the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.<sup>116</sup>

The *Lucas* nuisance factors can be argued both ways and give little certainty of outcome to landowners, particularly because the law of property and nuisance will vary from state to state.<sup>117</sup> In essence,

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111. 28 F.3d 1171 (Fed. Cir. 1994).

112. See Environmental Policy Alert, Feb. 1, 1995, at 26.

113. *Loveladies*, 28 F.3d at 1175.

114. *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 (or other uniquely affected persons) 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.").

115. *Id.* at 2901 (citing *Curtin v. Benson*, 222 U.S. 78, 86 (1911)).

116. *Id.*

117. Especially problematic for landowners is the changed circumstances factor. Justice Stevens, for example, dissenting in *Lucas*, suggested that "[n]ew appreciation of the significance of endangered species . . . shapes our evolving understandings of



however, a case like A&M<sup>118</sup> squarely presents the taking question. A&M's entire parcel<sup>119</sup> has been sequestered for the duration of the injunction<sup>120</sup> and perhaps permanently if *Sweet Home* is not upheld. The government has permitted neighboring landowners, the Quinault Tribe, to engage in exactly the same activity disallowed for A&M. There is no economic value to the land in its natural state and the value of the old growth timber on the land once harvested likely exceeds five million dollars. Timber harvest per se has never been a public nuisance in Washington, and the State Legislature has declared that a viable forest products industry is of prime importance to the State's economy.<sup>121</sup>

Balanced against these factors in favor of A&M is the speculative harm that might befall the owl pair living almost two miles away.<sup>122</sup> The potential loss of reproductivity or foraging opportunities or the increased exposure to predation are all dependent on factors outside the control of A&M (i.e., which way the bird flies to forage and what predators might be waiting that would not otherwise be present but for the A&M harvest). Recall that the owls in question have never been seen on the property. One might query whether the cause of any harm to the owls would be the result of the A&M harvest or the previously government-approved harvest by the Quinault Tribe in which the government authorized the incidental take of the very pair at issue. And, the government itself conceded with the announcement of the special rule for the conservation of the spotted owl that the A&M owl pair was not essential to the survival of the species as a whole because the government chose not to protect the A&M habitat under the special rule.

Given these facts it would be difficult to conclude, regardless of the outcome of *Sweet Home*, that a *Lucas* taking had not occurred in the A&M case. Two takings cases presenting A&M-like facts—one in Oregon and one in Washington—based on prohibitions on harvest for protection of spotted owls are pending. In *Boise Cascade Corp. v.*

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property rights" and may lead to regulation to protect such species. *Id.* at 2921-22 (Stevens, J., dissenting) (citations omitted). Thus, some could argue that the *Lucas* nuisance exception is not quite so narrow or protective of private property rights.

118. *United States v. Anderson & Middleton Logging Co.*, No. C93-5697 (W.D. Wash. filed Dec. 9, 1993). See *supra* notes 78-87 and accompanying text.

119. The fact that the entire parcel is covered avoids the difficult question of the relevant parcel for takings analysis. *Lucas*, 112 S. Ct. at 2894 n.7.

120. Damages for temporary takings, of course, are recoverable. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (holding that temporary deprivations of use are compensable under the Just Compensation Clause).

121. WASH. REV. CODE ANN. § 76.09.010(1) (West 1994).

122. Indeed, the United States has pursued settlement with the Company because of the apparent lack of demonstrable harm to the owl. The settlement framework permits the Company to log the property or the government to acquire it at fair market value. Telephone conversations with counsel for Anderson & Middleton Co. (dates not available).

*Board of Forestry*,<sup>123</sup> the Oregon Court of Appeals reversed the dismissal of Boise's claim of inverse condemnation due to a total deprivation of economic value from the imposition of a 70-acre owl circle covering its parcel of timber it was contracted to harvest.<sup>124</sup> The court determined that Boise stated a claim but that further evidentiary development was necessary, remanding for a trial.<sup>125</sup>

In *SDS Lumber Co. v. Washington*,<sup>126</sup> a stop work order issued against a lumber company prevented it from harvesting 230 acres of privately owned commercial forest. The order was issued to preserve habitat for a spotted owl that had moved into the area after a harvesting permit had been approved. The company alleged inverse condemnation by "creating a public wildlife reserve on private land."<sup>127</sup>

Although SDS Lumber pleaded inartfully, it should not hinder the claim. It is well settled that "the State has the absolute right to maintain its game and wild animals upon any and all private lands, and in that act there is no element of trespass or taking."<sup>128</sup> Indeed, a State can establish a wildlife refuge or sanctuary on private lands within which the killing, trapping, or possession of the protected species is prohibited, even when the protected species damage crops or other property.<sup>129</sup> The operative pleading should have been that the State compelled the landowner to refrain from the productive use of his property for the benefit of wildlife, thereby imposing a conservation easement or negative servitude across the property without compensation.

Even though the categorical A&M-type cases should be the easiest to decide under *Lucas*, they will not be the most common. More

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123. 886 P.2d 1033 (Or. Ct. App. 1994).

124. *Id.*

125. *Id.* at 1041.

126. Complaint, *SDS Lumber Co. v. Washington*, No. 93-200003-6 (Klickitat County Superior Court, filed Jan. 11, 1993).

127. *Id.* at 1.

128. *Cook v. State*, 74 P.2d 199, 201 (Wash. 1937). The case law in the states suggests that when it maintains wildlife on private land, it is not a physical occupation requiring compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This is not, however, the same as a rule aimed at keeping the land in its natural state to house wildlife. Justice Scalia suggested this very distinction in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 n.14 (1992) ("The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion is a law that destroys the value of land without being aimed at land. Perhaps such a law . . . cannot constitute a compensable taking") (citation omitted). The habitat protection rule protecting wildlife imposes affirmative obligations on a landowner to use the property in a manner often inconsistent with the purpose for which it was acquired and has traditionally been used. This is a far cry from saying to the landowner, who has a refuge imposed over his private lands, "Don't shoot the King's game."

129. *Cook*, 74 P.2d at 202 (quoting *Barrett v. State*, 116 N.E. 99, 100 (1917) (holding that government re-introduction of beaver to area did not make it liable for damage to valuable trees)); see also *Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989).

likely, takings cases under the ESA will require courts to analyze the claims under the three-part test set out in *Penn Central Transportation Co. v. New York City*: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the government action."<sup>130</sup>

Unfortunately, *Lucas* provides little assistance in formulating an analytical approach to partial takings cases. Thus, *Lucas* leaves open whether the government can force a private landowner to keep *some* of his or her land in its natural condition for the benefit of the public without compensation, such as riparian management zones and streamside buffers, wildlife reserve and recruitment trees, road buffers and other such aesthetic "landscape architecture."

The distinction between partial and total takings "leads to massive doctrinal discontinuities"<sup>131</sup> and dubious outcomes. As Justice Scalia admitted in *Lucas*:

It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations.<sup>132</sup>

Justice Scalia suggested that "[t]he answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value."<sup>133</sup> If he is correct, timber companies, for example, should be pleased because states historically have recognized the right of timber owners to extract the profit from the land.<sup>134</sup>

Ultimately, the marriage of *Sweet Home* and *Lucas*, if it comes at all, may come in the canon of construction that says a statute should be construed narrowly<sup>135</sup> to avoid entanglement with the Just Compensation Clause. Such an approach to statutory interpretation is appropriate in an "identifiable class of cases in which application of a

130. 438 U.S. 104, 124 (1978) (citation omitted).

131. Epstein, *supra* note 21, at 1375.

132. *Lucas*, 112 S. Ct. at 2895 n.8 (emphasis added).

133. *Id.* at 2894 n.7.

134. *See supra* note 17.

135. *See, e.g.*, *United States v. Security Indus. Bank*, 459 U.S. 70 (1982).

statute will necessarily constitute a taking."<sup>136</sup> Applied to *Sweet Home*, the Court could speak volumes about the reach of *Lucas* and the future prospects of the Economy of Nature while eliminating the habitat modification rule on the grounds that it exceeds the scope of Congress's statutory authorization.

#### CONCLUSION

The Economy of Nature prefers economic harm to humans over environmental harm to wildlife, however indirect, caused by human activities. This may be a valid policy preference, but it is not the law. If it becomes the law, the fundamental building blocks of our representative democracy will be imperiled. Property rights protect liberty. To the extent property rights are viewed as interfering with sound environmental practice, the public should either acquire the necessary interests to avoid the harm (assuming that the harm does not rise to the level of a public nuisance subject to abatement without compensation) or provide incentives to landowners to forego voluntarily the rents from full use of the land.

In sum, Professor Sax's argument reduces to an assertion that the state can forbid all uses of land without compensation for whatever legitimate state purpose(s) the Romantics decide. One could easily envision the opposite regime in which the state could prohibit *no* use without payment to the affected individuals.<sup>137</sup> This, after all, was *Lucas's* position in the trial court and on appeal, at least as to total deprivation.<sup>138</sup> The answer more likely falls in between, well grounded in and limited by traditional concepts of nuisance and property law.

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136. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985) (rejecting application of the doctrine in wetlands permit case when no permit had been sought).

137. A host of property rights legislation at the state and federal level adopts this very approach, requiring compensation for some or any diminution in value. See Robert H. Freilich & RoxAnne Doyle, *Taking Legislation: Misguided and Dangerous*, LAND USE LAW 3-6 (Oct. 1994).

138. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2890 (1992) ("Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives").

