COMMENTS

Lucas and Endangered Species Protection: When "Take" and "Takings" Collide

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INTRODUCTION

Suppose that a landowner, Maria Developer, wanted to subdivide her ten-acre parcel in Kern County, California,[1] to develop several ranch-style homes.[2] State law requires her to obtain a development permit from the county before subdividing the property.[3] Under the Subdivision Map Act,[4] Maria Developer's first step in obtaining the permit is filing a tentative map.[5]

When Maria Developer filed the tentative map, Kern County also required her to file an Environmental Impact Report (EIR).[6] The EIR disclosed that several blunt-nosed leopard lizards[7] and a pair of San Joaquin kit foxes[8] reside on the ten-acre parcel.[9] The Federal

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1 This Comment focuses on California because more endangered species make their home in California than in any other state. Robert I. Bowman, *Evolution and Biodiversity in California, in* PETER STEINHART, CALIFORNIA'S WILD HERITAGE: THREATENED AND ENDANGERED ANIMALS IN THE GOLDEN STATE 3 (1990); *see infra* note 68 (defining endangered and threatened species).

2 *See generally* Lynn Elber, *These Californians Are Paying a High Price for Low Housing Costs*, CHI. TRIB., June 6, 1991, at 1G (describing pressures of urban sprawl, turning California's desert into Los Angeles' suburbs).

3 CAL. GOV'T CODE § 66426 (West 1983) (requiring counties to follow specific procedures when approving subdivision of parcels into five or more pieces); *id.* § 65850 (West Supp. 1993) (granting counties general authority to regulate land use).

4 *Id.* §§ 66410-66499.58 (West 1983 & Supp. 1993). The primary goals of the Subdivision Map Act include: (1) encouraging orderly community development; (2) insuring that areas dedicated to public purposes are improved properly; and (3) protecting the public from fraud and exploitation. 61 Op. Cal. Att'y Gen. 299, 301 (1978).

5 CAL. GOV'T CODE § 66426 (West 1983). *See generally* DANIEL J. CURTIN, JR., CALIFORNIA LAND-USE AND PLANNING LAW 55-72 (13th ed. 1992) (outlining requirements for tentative maps under Subdivision Map Act).

6 CAL. PUB. RES. CODE § 21100 (West 1986). The California Environmental Quality Act (CEQA), *id.* §§ 21000-21178.1 (West 1986 & Supp. 1993) requires landowners to file an Environmental Impact Report (EIR) whenever a governmental agency uses discretion when issuing a permit for a project that may have adverse environmental impacts. *Id.* § 21100 (West 1986); *see infra* notes 94-101 and accompanying text (discussing CEQA and EIR requirements).

7 The blunt-nosed leopard lizard is an endangered species under both the California and Federal Endangered Species Acts. STEINHART, *supra* note 1, at 50; *see infra* notes 66-102 and accompanying text (discussing California and Federal Endangered Species Acts).

8 The Federal Endangered Species Act (ESA) lists San Joaquin kit foxes as endangered and the California Endangered Species Act (CESA) lists them as threatened. STEINHART, *supra* note 1, at 39; *see infra* note 68 (defining

Endangered Species Act (ESA)[10] lists these animals as endangered species.[11] Because the development would have harmed endangered species, the county denied the development permit, thereby forcing Maria Developer to forego the economic advantage of developing her property.[12] Maria Developer then sued Kern County, claiming that the county violated her constitutional rights by taking her property when it denied her request for a permit.[13]

Maria Developer premises her takings claim on *Lucas v. South Carolina Coastal Council*.[14] The *Lucas* Court held that restrictions that deprive a landowner of all economic use of her land constitute a taking and must be compensated by the government.[15] Because

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threatened species as a species in danger of becoming an endangered species).

9 California law (under CEQA) requires that the EIR list all potential adverse environmental impacts posed by a proposed project. CAL. PUB. RES. CODE § 21083 (West 1986). Further, the California Legislature intended that CEQA aid in preventing the elimination of species due to human activities. *Id.* § 21001(c).

10 The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988). The California Endangered Species Act also protects species which are endangered throughout their California range. CAL. FISH & GAME CODE §§ 2050-2098 (West 1984 & Supp. 1993). State endangered species laws are not preempted by ESA if they establish more strict regulations. 16 U.S.C. § 1535(f); *see infra* notes 66-104 and accompanying text (comparing Federal Endangered Species Act with California Endangered Species Act).

11 The Secretary of the Interior lists a species on the Endangered Species List when human activity threatens the species with extinction throughout all or part of its range. 16 U.S.C. § 1533(b); *see* 50 C.F.R. § 17.11 (1993) (providing federal list of endangered wildlife species); *id.* § 17.12 (providing federal list of endangered plant species).

12 *See* CAL. GOV'T CODE § 66474(e) (West 1983) (permitting counties to deny tentative map approval if proposed project is likely to substantially injure fish, wildlife, or their habitats).

13 The Fifth Amendment protects individuals by providing that private property shall not be taken for public use without just compensation. U.S. CONST. amend. V; *see also* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992) (holding that state land-use regulation can be a taking); *infra* notes 105-37 and accompanying text (discussing development of regulatory takings and case law prohibiting certain types of land-use regulations).

14 112 S. Ct. 2886 (1992); *see* Peter Samuel, *Taking It Back Somewhat*, WASH. TIMES, July 12, 1992, at B4 (suggesting that *Lucas* decision enables landowners to challenge constitutionality of ESA and state endangered species acts).

15 *Lucas*, 112 S. Ct. at 2893; *see* William Fulton, *Just Whose Property Is It? U.S. Supreme Court Boosts Developers*, SACRAMENTO BEE, July 26, 1992, at F1 (discussing ramifications of *Lucas* decision); *infra* notes 123-34 and accompanying text (discussing *Lucas* decision in depth).

ESA deprived Maria Developer of all use of her property which could result in the death or injury of a listed animal, it effected a taking under *Lucas*.[16] Furthermore, since Maria Developer resides in California, she must also comply with the California Endangered Species Act (CESA).[17] CESA has additional prohibitions that prevent Maria Developer from even modifying her property because her land contains important habitat for the species.[18] Therefore,

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16 Both ESA and CESA prohibit Maria Developer from causing the death of an endangered or threatened animal. 16 U.S.C. § 1538(a), CAL. FISH & GAME CODE § 2080 (West Supp. 1993). Such a death would constitute a "take" under both Acts. 16 U.S.C. § 1532(19), CAL. FISH & GAME CODE § 2080. *Compare infra* notes 69-71 and accompanying text (defining "take" within context of ESA) *with infra* notes 92-93 and accompanying text (defining "take" within context of CESA).

Maria Developer's situation is typical of many landowners throughout the country who cannot develop their land due to endangered species regulation. *See* Martin Dickson, *Competing Claims of Man and Nature*, FIN. TIMES, May 11, 1992, at 14 (describing severe financial burden ESA and state Endangered Species Acts have caused several landowners). In Tennessee, ESA halted the development of a hydroelectric dam on a stream where an endangered fish lived. *Id.* One Oregon landowner shut down his sawmill because the Northern spotted owl resided in his area. *Id.* ESA prohibits the cutting of old growth trees, thereby eliminating the sawmill owner's source of wood. *Id.*; *see also* Victoria Griffith, *Business and the Environment: Halting Industry in Its Tracks*, FIN. TIMES, Feb. 10, 1993, at 9 (describing more instances in which ESA affects landowners). A Kansas landowner used to make a living selling gravel he collected from streams on his land. *Id.* ESA forced him to cease operations to protect an endangered catfish laying eggs in the gravel. *Id.*; *see also* Maura Dolan, *Nature at Risk in a Quiet War*, L.A. TIMES, Dec. 20, 1992, at A1 (describing California residents unable to plow their lands for weed control, build additions to their homes, or pave their driveways). One Ventura County resident could not till his agricultural land because blunt-nosed leopard lizards made their homes in the field. *Id.* *See generally* Jim Mayer et al., *Can We Co-Exist with Animals?*, SACRAMENTO BEE, Oct. 11, 1992, at A1 (describing pressure put on legislators by developers and environmentalists to revise key aspects of endangered species legislation).

17 CAL. FISH & GAME CODE §§ 2050-2099 (West 1984 & Supp. 1993).

18 *Id.* § 2080 (West Supp. 1993). CESA prohibits any "take" of endangered species through otherwise legal activities, on all lands, both public and private. *See* Department of Fish & Game v. Anderson-Cottonwood Irr. Dist., 11 Cal. Rptr. 2d 222, 228 (Ct. App. 1992); *see infra* note 93 (discussing *Anderson-Cottonwood* decision); *infra* notes 92-93 and accompanying text (defining "take" within context of CESA).

ESA permits states to enact laws or regulations prohibiting takings of endangered or threatened species that are more restrictive than federal law. 16 U.S.C. § 1535(f); *see infra* notes 94-101 and accompanying text (discussing more stringent requirements of California land-use regulations). *See generally*

Maria Developer claims that the Fifth Amendment requires the government to compensate her because ESA and CESA deprive her of all economically viable use of her land.[19]

This Comment argues that the Fifth Amendment does not require the government to compensate landowners who cannot develop their properties due to endangered species regulations.[20] The *Lucas* Court held that most restrictions depriving a landowner of all economically viable use of her land constitute a taking.[21] However, the *Lucas* Court also declared that regulations that codify common law nuisance and property law are not takings.[22] This Comment suggests that ESA and CESA codify these common law principles.[23] Therefore, although ESA and CESA deprive Maria Developer of all economically viable use of her land, courts cannot require Kern County to compensate her for the foregone financial gain.[24]

Dolan, *supra* note 16, at A1 (describing how CESA forces landowners to leave agricultural land untilled); H. Jane Lehman, *Landowners Drawing the Battle Lines*, L.A. TIMES, Oct. 11, 1992, at K2 (discussing stringent land-use requirements in California forcing landowners to leave their property in natural state).

19 *See* MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA 125 (1993) (suggesting that ESA acts contrary to Fifth Amendment); John Echeverria, *A Troubling New Ruling on Property Rights*, CHRISTIAN SCI. MONITOR, July 16, 1992, at 19 (arguing that *Lucas* decision will force states to pay landowners for use of their lands for endangered species protection); Samuel, *supra* note 14, at B4 (insisting that ESA allows government to block development on private land and is therefore taking property without compensation); Susan M. Trager, Species Protection Regulations as Water Rights Takings 1-10 (Mar. 18, 1993) (presentation given at water law conference in San Francisco suggesting that federal government takes water rights through endangered species regulations) (unpublished manuscript on file with *U.C. Davis Law Review*); *see also infra* notes 188-99 and accompanying text (detailing basis of regulatory takings claim based on ESA or state endangered species acts).

20 *See infra* notes 206-40 and accompanying text (arguing that ESA and CESA codify nuisance and public trust doctrines).

21 *Lucas*, 112 S. Ct. at 2893; *see* Fulton, *supra* note 15, at F1 (discussing ramifications of *Lucas* decision); *infra* notes 123-34 and accompanying text (discussing *Lucas* decision in depth).

22 *Lucas*, 112 S. Ct. at 2901.

23 *See infra* notes 206-36 and accompanying text (arguing that ESA and CESA codify common law nuisance theory and that CESA also codifies common law principle of public trust doctrine).

24 *See infra* notes 198-203 and accompanying text (discussing *Lucas* decision and its effects on ESA and state endangered species acts).

Part I of this Comment discusses the need for endangered species protection.[25] Part II examines the Federal and California Endangered Species Acts,[26] Fifth Amendment takings jurisprudence,[27] and common law property principles, including the public nuisance and public trust doctrines.[28] Part III argues that ESA and CESA codify these common law principles.[29] Part III then resolves the regulatory taking issue by juxtaposing ESA and CESA with the *Lucas* decision.[30] Because endangered species laws codify common law nuisance and property principles, *Lucas* does not bar California's regulation of critical habitat[31] on Maria Developer's land.[32]

I. Reasons for Protecting Endangered Species

It is not always obvious that protecting endangered species protects the health, safety, and welfare of society. People often question the value of saving seemingly insignificant endangered plants and animals.[33] One answer to the question lies in ecosystem interaction.[34] The way animals relate to their habitat often depends on human use of the same resources.[35] Humans and animals share the

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25 *See infra* notes 33-58 and accompanying text (discussing need for species protection).

26 *See infra* notes 66-103 and accompanying text (discussing ESA and CESA).

27 *See infra* notes 106-35 and accompanying text (outlining history of regulatory takings law).

28 *See infra* notes 138-85 and accompanying text (discussing nuisance theory and public trust doctrine).

29 *See infra* notes 206-36 and accompanying text (arguing that endangered species regulation codifies public nuisance and public trust doctrines).

30 *See infra* notes 206-36 and accompanying text (suggesting that endangered species protection codifies common law principles discussed in *Lucas* decision).

31 *See infra* note 72 (defining critical habitat).

32 *See infra* notes 239-51 and accompanying text (concluding that endangered species regulations do not constitute regulatory takings).

33 *See* Dolan, *supra* note 16, at A1 (describing landowners who believe that kangaroo rats are not worth saving); John James, *Endangered Species Act Is Threatened*, Hous. Chron., Sept. 27, 1992, at 7 (suggesting that Americans unfamiliar with ESA believe it threatens country's economy).

34 *See* Stanley Anderson, Managing Our Wildlife Resources 52-62 (1985) (describing various types of interactions among species and advantages these interactions give to general populations).

35 *See* Mark S. Boyce, *Natural Regulation or the Control of Nature?*, *in* The Greater Yellowstone Ecosystem 183, 197-98 (Robert B. Keiter ed., 1991) (describing how human activities in Yellowstone National Park caused grizzly bears to become dependent upon human refuse dumps and eventually

same habitat: the same air, water, and food.[36] The environment's inability to support the continuing existence of a species is a strong signal of potentially greater problems.[37] Scientists still do not understand all aspects of species interaction.[38] They agree, however, that as one species disappears, other species dependent on them for food or protection also disappear.[39]

For example, an unchecked sea urchin population severely depleted giant kelp production off the California coast at the beginning of this century.[40] California sea otters, threatened with extinction due to unregulated hunting, normally prey heavily on sea urchins.[41] The lack of natural predators caused a rapid increase in the number of sea urchins.[42] This increased sea urchin population, in turn, depleted the kelp population.[43] The otters are now protected, and in areas where they have recovered, the kelp has also

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become listed as threatened species); Jacqueline Thorpe, *Toxic Chemicals Persist in Great Lakes*, REUTER LIBRARY REP., Jan. 18, 1993, at A6 (indicating that migration patterns of bald eagles over Great Lakes are strong indicator of water and environmental quality).

36 Humans, plants, and animals are all part of an interdependent food chain. ALDO LEOPOLD, A SAND COUNTY ALMANAC 203-07 (1964). Humans, mountain lions, and wolves all share a taste for lamb. *Id.* Additionally, all species compete for shelter on limited land space at or about the earth's surface. *Id.* at 83.

37 Phillip M. Klasky, *Desert Tortoise vs. Nuclear Dump*, S.F. EXAMINER, Feb. 5, 1993, at A23.

> Degradation of watersheds, emissions of noxious fumes, destruction of wetlands, contamination of rivers and lakes, defoliation of forests, poisoning by oil spills and erosion of topsoils all result in expensive and wasteful resource management practices. A chain reaction of environmental problems can become an uncontrollable nightmare of disasters. . . . But the Endangered Species Act is a powerful law that recognizes the tortoise as an indicator species foretelling the health of the desert.

Id.; *see* John Balzar, *Environment: Conference on Trees vs. Jobs Will Put Clinton's Ideas to the Test*, L.A. TIMES, Apr. 1, 1993, at A5 (defining indicator species as species at top of food chain whose health indicates overall health of other species in ecosystem). Klasky used the ESA to obtain a temporary restraining order against the use of tortoise habitat for a nuclear waste dump. Klasky, *supra*.

38 LEOPOLD, *supra* note 36, at 205; ROBERT E. RICKLEFS, ECOLOGY 479 (3d ed. 1990).

39 *See infra* notes 40-45 and accompanying text.

40 STEINHART, *supra* note 1, at 6.

41 *Id.*

42 *Id.*

43 *Id.*

recovered.[44] The otter and kelp recovery has further promoted the recovery of an entire community dependent on the kelp habitat.[45]

A species' extinction also deprives the human community of potential material benefits.[46] Although many prescription drugs come from plants,[47] scientists have researched only ten percent of plant species for their potential uses.[48] An endangered species of plant or animal could contain genetic material that may lead to a cure for Acquired Immune Deficiency Syndrome (AIDS).[49] Unfortunately, discovering the species containing a cure may be endangered because more than thirty species of plants and animals worldwide become extinct every day.[50]

Protecting habitat[51] is just as important as protecting species.[52] If the government merely protects an animal but allows unfettered development of its habitat, the species will still decline.[53] However,

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44 *Id.*

45 *Id.*

46 COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1980: ELEVENTH ANNUAL REPORT 34 (1980). Plants and animals provide us with "renewable supplies of food, energy, industrial chemicals, and medicines." *Id.*

47 Penicillin, used to cure bacterial infections, was originally discovered in a fungus growing on oranges. DORLAND'S POCKET MEDICAL DICTIONARY 526 (23d ed. 1982).

48 STEINHART, *supra* note 1, at 9.

49 *See* Sara Engram, *The Earth's Medicine*, PLAIN DEALER (Cincinnati), Jan. 6, 1993, at 5B (suggesting that because earth harbors viruses causing AIDS, perhaps it also holds substance that will provide cure).

50 *See* Pratap Chaterjee, *Environmental Auditing Still Awaits Its Green Signal*, FIN. TIMES, Feb. 4, 1993, at 10 (lamenting that loggers cut down all but last few Pacific Yew trees before researchers discovered that substance derived from tree helps treat breast cancer patients). The only way to avert such a potential loss is to ensure that people do not completely deplete any stocks of "natural capital." *Id.*; Robert Cooke, *As Earth's Riches Decline, So Do Its Healing Powers*, L.A. TIMES, Jan. 31, 1993, at E4 (suggesting that mankind is causing extinction of unresearched species which could have great curative powers).

51 *See* LEOPOLD, *supra* note 36, at 203 (describing habitat as natural environment species depend upon for breeding, food and shelter).

52 *See* JAMES M. PEEK, A REVIEW OF WILDLIFE MANAGEMENT 123-26 (1986) (suggesting that single species habitat management works best when it takes into account presence of other animals and maintains habitat diversity); Katherine S. Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811, 818 (1990) (preferring management of habitat or ecosystem over single species management).

53 Brett J. Morris, *DFG - Legal Trustee of Wildlife, Habitat*, OUTDOOR CAL., Nov.-Dec. 1992, at 16; *see also* Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106, 1108 (9th Cir. 1988) (holding that destruction of habitat resulted in further decline of protected bird species).

by protecting a species' habitat, the government supports the survival of every other species dependent on that ecosystem.[54]

Unfortunately, landowners tend to discount the importance of species diversity if it requires them to forego economic gain.[55] In addition, species protection may require the government to spend limited tax dollars purchasing habitat.[56] Taxpayers, often landowners themselves, are frequently unwilling to make such financial sacrifices in order to ensure that a species survives.[57] Thus, if the Fifth Amendment requires state and federal governments to pay landowners to maintain their land for endangered species habitat, species diversity will suffer.[58]

II. Current Law on Endangered Species

Although taxpayers are unwilling to make financial sacrifices, the Federal Endangered Species Act[59] demonstrates the federal government's desire to protect species.[60] ESA permits states to protect endangered species with more restrictive endangered species regulations.[61] In order to protect species, ESA and state endangered

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54 Leopold, *supra* note 36, at 239-43. For example, the Northern spotted owl in the Pacific Northwest is an indicator species. Carrie Casey & Paula E. Langguth, *The Bird of Contention*, 97 Am. Forestry 28 (Sept. 1991); *see* Balzar, *supra* note 37, at A5 (defining indicator species). Plans for protecting the species are aimed at protecting the old growth forests in which they live. Casey & Langguth, *supra*. Because the law protects the habitat of the Northern spotted owl, it also protects the other species dependent on that area. *Id.*; *see* Steinhart, *supra* note 1, at 25 (describing marbled murrelet that also depends on old growth forest habitat).

55 *See* Fulton, *supra* note 15, at F1 (suggesting that polls show Americans would not be ardent environmentalists if forced to commit billions of tax dollars to preserve species).

56 *See* Fulton, *supra* note 15, at F1 (indicating that species preservation would cost billions of tax dollars if government were required to purchase habitat).

57 *See* J. Michael Kennedy, *'Critters vs. People' Ruling Has San Antonio Up in Arms*, S.F. Chron., Feb. 5, 1993, at A14 (describing popular outcry in San Antonio, Texas, after judge ruled that up to half of town's water supply must be used to maintain flow for endangered fish).

58 *Id.*; *see* L. Gordon Crovitz, *Justices Have No Reason to Fear Private Property*, Wall St. J., Nov. 27, 1991, at A11 ("The takings clause, if enforced, would stop endless debates about wetlands, [and] timber inhabited by spotted owls. . . . All this could be regulated, but only if taxpayers decide it's worth regulating.").

59 16 U.S.C. §§ 1531-1544.

60 *See infra* note 67 (discussing congressional intention to preserve species regardless of cost).

61 16 U.S.C. § 1535(f).

species acts often force landowners to forego economic use of their land.[62]

Fifth Amendment jurisprudence has developed to protect landowners from regulations that deprive them of all economic use of their land.[63] However, states may prohibit public nuisances or uses that violate the public trust without providing compensation to the landowner.[64] One such public nuisance is the extensive development of land that contributes to the disappearance of endangered species.[65]

A. Preventing "Take:" Federal and State Endangered Species Acts

In 1973, Congress enacted the Federal Endangered Species Act[66] to curb the disappearance of species and natural diversity.[67] ESA requires the Secretary of the Interior to maintain a list of all species in danger of extinction.[68] ESA then protects those species by mak-

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[62] *See supra* note 16 (describing landowners unable to develop their property due to ESA).

[63] Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2889 (1992); *see infra* notes 105-37 and accompanying text (outlining development of Fifth Amendment jurisprudence).

[64] *Lucas*, 112 S. Ct. at 2901; *see infra* notes 132-87 and accompanying text (discussing nuisance and public trust doctrines).

[65] *See infra* notes 200-24 and accompanying text (arguing that ESA prohibits public nuisances).

[66] 16 U.S.C. §§ 1531-1544.

[67] *See id.* § 1531(a)-(c) (providing findings, purposes, and policies pertaining to Endangered Species Act). The plain intent of Congress was to halt and reverse the trend toward species extinction, whatever the cost. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978). *See generally* LEOPOLD, *supra* note 36, at 237-79 (discussing disappearance of diverse array of plants and animals which make up healthy ecosystem and need for this natural diversity).

[68] 16 U.S.C. § 1533. The Secretary must publish in the Federal Register a list of all species she determines to be endangered or threatened. *Id.* § 1533(c)(1). A species is endangered if it is in danger of extinction throughout all or a significant portion of its range where it lives and feeds. *Id.* § 1532(6). A threatened species is any species which is in danger of becoming an endangered species within the foreseeable future. *Id.* § 1532(20). Every five years the Secretary must review all listed species to determine whether she should remove or change the status of those species. *Id.* § 1533(c)(2). The Secretary must develop and implement recovery plans for the conservation and survival of listed endangered and threatened species. *Id.* § 1533(f)(1). The recovery plan includes a description of necessary management actions, criteria for recovery, and time and cost estimates to carry out the recovery plan. *Id.* § 1533(f)(1)(B).

ing it a crime to "take" any plant or animal listed as an endangered species.[69] The Federal Endangered Species Act defines a "take" as the harming or killing of an endangered plant or animal.[70] Modifying habitat does not constitute a "take" under ESA unless there is proof of an ensuing death of an endangered species.[71]

Subsequent amendments to ESA include a provision protecting habitat by permitting the Secretary of the Interior to designate critical habitat[72] for listed species.[73] If the Secretary designates an area as critical habitat, she must develop a recovery plan[74] for species

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69 *Id.* § 1538(a). *Compare id.* § 1532(19) (defining "take" as unacceptable destruction of endangered species' lives) *with* DANIEL MANDELKER & ROGER CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 84 (1990) (defining "takings" as governmental acquisitions of private property for uniquely public functions). *See generally supra* note 68 (discussing why species are listed and how listing protects those species). Any person who knowingly violates the Endangered Species Act may be subject to a civil penalty of $25,000 for each violation. 16 U.S.C. § 1540(a)(1). Violators may be additionally subject to a criminal fine of $50,000, imprisonment of not more than one year, or both. *Id.* § 1540(b)(1).

70 16 U.S.C. § 1532(19). "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id.*; *see* Sweet Home Chapter of Communities v. Lujan, 806 F. Supp. 279, 284 (D.D.C. 1992) (holding that definition of "take" may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns including breeding, feeding, or sheltering), *aff'd*, 1 F.3d 1 (D.C. Cir. 1993); *see also* S. REP. NO. 307, 93d Cong., 1st Sess. 7 (1973) (providing that definition of "take" should be interpreted in "broadest possible manner to include every conceivable way in which a person can 'take' . . . [a] fish or wildlife.").

71 *See* Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106, 1108 (9th Cir. 1988) (holding that destruction of habitat which could result in extinction falls within definition of "harm"). The court held that actual harm is not limited to acts which result in the immediate destruction of the species' food sources. *Id.* at 1108. The Secretary of the Interior changed the regulation defining harm in 1981, after the filing of *Palila*, to clarify that habitat modification would not be considered a taking unless there was proof of attendant death or injury. *See* 50 C.F.R. § 17.3 (1992).

72 *See* 16 U.S.C. § 1532(5)(A)(i) (defining critical habitat as geographic areas where physical or biological features exist which are essential to conservation of endangered or threatened species).

73 *Id.* §§ 1533(a)(3), (f). The Secretary must designate critical habitat on the basis of the best scientific data available after taking into consideration the economic impact of designating a particular area. *Id.* § 1533(b)(2).

74 *Id.* § 1533(f)(1). The recovery plan includes a description of necessary management actions, criteria for recovery, and time and cost estimates to carry out the recovery plan. *Id.* § 1533(f)(1)(B).

survival in that area.[75] However, this critical habitat provision applies only to federal agency actions that are likely to jeopardize the endangered species.[76]

The National Environmental Policy Act (NEPA)[77] extends critical habitat protection to major actions[78] which a federal agency has discretion to approve.[79] This includes actions on private lands that require a federal permit.[80] Therefore, when a private landowner

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[75] *Id.* § 1533(f)(1)(B)(i).

[76] *See id.* § 1536(a)(2). The Federal Endangered Species Act requires federal agencies to insure that their activities will not "jeopardize the continued existence" of any endangered or threatened species or "result in the destruction or adverse modification" of critical habitat. *Id.*; *see* National Wildlife Fed'n v. Coleman, 529 F.2d 359, 371 (5th Cir. 1976). In *Coleman*, the Federal Highway Administration had to prove that its highway project did not jeopardize the existence or destroy the habitat of endangered Mississippi sandhill cranes. *Id.* at 372. ESA's prohibition against adverse modification of habitat applies only to federally authorized actions. 16 U.S.C. § 1536.

[77] 42 U.S.C. §§ 4321-4347 (1988).

[78] *See* Port of Astoria, Oregon v. Hodel, 595 F.2d 467, 477 (9th Cir. 1979) (holding that building hydroelectric dam is major federal action); Scottsdale Mall v. Indiana, 549 F.2d 484, 489 (7th Cir. 1977) (finding major federal action when Army Corps of Engineers issued permit for building highways), *cert. denied*, 434 U.S. 1008 (1978). Major federal actions may include timber sales, issuing mining permits, and building highways. *See infra* note 80 (discussing the difficulty in defining major federal action).

[79] 42 U.S.C. § 4332(2)(c). A federal agency must make an Environmental Impact Statement (EIS) for any major federal action which may significantly affect the quality of the environment. *Id.* The EIS must include an analysis of the unavoidable adverse environmental impacts of the proposed action as well as any alternatives. *Id.* Such adverse impacts include impacts on endangered species and critical habitat. 40 C.F.R. § 1508.27(9) (1992). *But see* Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985) (holding that mitigation measures may preclude finding significant adverse impact).

[80] *See* Sierra Club v. Morton, 514 F.2d 856, 862 (D.C. Cir. 1975) (requiring EIS when government issues mining permits), *rev'd on other grounds*, 427 U.S. 390 (1976). Actions requiring federal permits include timber harvest plans, mining activities, and mineral exploration. *See Scottsdale Mall*, 549 F.2d at 489 (requiring EIS when Army Corps of Engineers issues permit for building highways); Blue Ocean Preservation Soc'y v. Watkins, 767 F. Supp. 1518, 1522 (D. Haw. 1991) (requiring EIS when Department of Energy issues permit for geothermal exploration).

Federal courts have often avoided placing private actions in the purview of NEPA's requirements because issuing a permit is often not a major federal action. *See* Winnebago Tribe of Neb. v. Ray, 621 F.2d 269, 272 (8th Cir. 1980) (holding that private pipeline development requiring federal permit was not major federal action under NEPA), *cert. denied*, 449 U.S. 836 (1980). The

receives a federal permit in an area designated as critical habitat, the permitted activity may not jeopardize endangered species.[81]

Although NEPA expands the reach of ESA, it does not preclude an agency from permitting a project which might have adverse environmental impacts.[82] For example, an acting agency must issue an Environmental Impact Statement (EIS) for any project that will cause an adverse environmental impact.[83] However, an EIS is designed only to ensure an informed decision about the project, not to mandate any particular course of action.[84] If the project modifies endangered species habitat but does not jeopardize the continued existence of the species, the acting agency may permit the project.[85] Therefore, an agency can ignore the adverse impacts and permit a project that might modify endangered species habitat.[86] This has prompted some states, including California, to

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court reasoned that a minor federal permit is not an action "significantly affecting the quality of the human environment." *Id.* at 273; *see also* Save the Bay, Inc. v. United States Army Corps of Eng'rs, 610 F.2d 322, 326-27 (5th Cir. 1980) (holding that NEPA did not apply to private pipeline development), *cert. denied*, 449 U.S. 900 (1980).

Additionally, a major federal action does not always include issuing a permit. *See Port of Astoria, Oregon*, 595 F.2d at 477 (requiring EIS before approving federal contract to build hydroelectric dam). *But see* Alaska v. Andrus, 429 F. Supp. 958, 962 (D. Alaska 1977) (not requiring EIS when Secretary of Interior chooses not to halt state wolf kill), *aff'd*, 591 F.2d 537 (9th Cir. 1979).

81 40 C.F.R. § 1508.27(9); *see, e.g., Friends of Endangered Species*, 760 F.2d at 986.

82 Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978). The Court indicated that NEPA is designed to ensure an informed decision, not to require particular results. *Id.*

83 42 U.S.C. § 4332(2)(C)(i). Projects having adverse environmental impacts include those that will potentially modify endangered species habitat. *Friends of Endangered Species*, 760 F.2d at 986; 40 C.F.R. § 1508.27(9).

84 *Vermont Yankee*, 435 U.S. at 558.

85 Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 687 (D.C. Cir. 1982) (holding that Forest Service could permit mining operation that affected grizzly bear habitat but did not jeopardize continued existence of species).

86 *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) (allowing Forest Service to issue permit for ski area even though development adversely affected local wildlife). ESA would only prohibit an agency from permitting a project if the area was a designated critical habitat or if issuing the permit would jeopardize the continued existence of an endangered species. 16 U.S.C. § 1536(a)(2); *see* Sweet Home Chapter of Communities v. Lujan, 806 F. Supp. 279, 284 (D.D.C. 1992) (prohibiting private parties from modifying critical habitat when they actually jeopardize

develop more stringent restrictions on the use of habitat located on private property.[87]

The federal government has left significant authority to regulate endangered species in the hands of the states.[88] Many states have responded by enacting modified versions of ESA to protect indigenous species.[89] Some states require non-landowners to obtain a permit to "take" endangered species, but allow landowners flexibility in modifying their own lands.[90] In California, however, the Cali-

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continued existence of endangered wildlife), *aff'd*, 1 F.3d 1 (D.C. Cir. 1993). Rather than expressly banning adverse modification of critical habitat, as 16 U.S.C. § 1536(a)(2) does for actions by federal agencies, the court in *Sweet Home* focused on the definition of "harm" included in the definition of "take" in ESA, which applies to all citizens. *Id.* at 282-85. The court held that the definition of harm includes habitat degradation that kills or injures species by impairing certain types of behavioral patterns. *Id.* at 284; *see* 50 C.F.R. § 17.3 (1991) (defining "harm"); *supra* note 70 (discussing definition of "take"). *See generally* Christopher A. Cole, *Species Conservation in the United States: The Ultimate Failure of the Endangered Species Act and Other Land Use Laws*, 72 B.U. L. REV. 343, 349-52 (1992) (discussing failure of ESA to protect habitat on both private and public lands).

87 *See, e.g.*, California Endangered Species Act, CAL. FISH & GAME CODE §§ 2050-2099 (West 1984 & Supp. 1993) (prohibiting take of endangered species on public and private lands); VT. STAT. ANN. tit. 10, § 5405 (Supp. 1993) (providing for conservation plans for protection of endangered species); *see also infra* notes 91-102 and accompanying text (describing California's land use and species protection regulations). ESA only prohibits federal agencies from undertaking actions that would adversely affect critical habitat. 16 U.S.C. § 1536 (1988). Conversely, restrictions on a "take" of particular animals apply to all persons. *Compare supra* notes 79-86 and accompanying text (discussing how ESA applies to developments on private land requiring federal permit) *with supra* note 70 (discussing cases that consider destroying essential habitat to constitute a "take" of an endangered species). *See supra* note 72 (defining critical habitat).

88 *See* 16 U.S.C. § 1535(f). A state law regulating the taking of an endangered or threatened species may be more restrictive than the Federal Endangered Species Act. *Id.*; *see* Holmes Rolston III, *Property Rights and Endangered Species*, 61 U. COLO. L. REV. 283, 287 (1990) (discussing several states that have enacted more stringent endangered species regulations).

89 *See, e.g.*, ALASKA STAT. § 16.20.180 (1992); CAL. FISH & GAME CODE § 2052 (West Supp. 1993); COLO. REV. STAT. § 33-2-105 (1990); CONN. GEN. STAT. § 26-311 (Supp. 1993); HAW. REV. STAT. § 195D-4 (1985); ILL. ANN. STAT. ch. 8, para. 333 (Supp. 1992); IND. CODE § 14-2-8.5-7 (1983).

90 *See* Rolston, *supra* note 88, at 287; *cf.* CONN. GEN. STAT. § 26-311(b) (Supp. 1993) (permitting legal activities by landowners on their own land that result in incidental taking of listed species); ILL. ANN. STAT. ch. 8, para. 333 (Supp. 1992) (permitting landowners to take species on their own land if take is incidental to legal activities).

fornia Endangered Species Act[91] prohibits a "take" of endangered species on all lands, both public and private.[92] Under CESA, the term "take" includes the modification of critical habitat through otherwise legal activities, even on private land.[93]

Additionally, the California Environmental Quality Act (CEQA)[94] imposes stronger restrictions on development than NEPA.[95] CEQA applies to all projects for which a government agency has discretionary approval, not just major state actions.[96] The agency must determine if the project will have a significant effect[97] on the environment.[98] This includes effects on endangered species habitat.[99] If the project may have an adverse effect, CEQA requires an EIR,

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91 CAL. FISH & GAME CODE §§ 2050-2098 (West 1984 & Supp. 1993).

92 *Id.* § 2080 (West Supp. 1993). Taking an endangered species is permitted only for scientific, educational, or management purposes. *Id.* § 2081. The California Department of Fish & Game enters into management agreements permitting landowners to modify critical habitat in exchange for the landowner agreeing to protect an additional area for the benefit of the species. Interview with Brett J. Morris, Staff Counsel, California Department of Fish and Game, in Sacramento, Cal. (Feb. 7, 1992).

93 Department of Fish & Game v. Anderson-Cottonwood Irr. Dist., 11 Cal. Rptr. 2d 222 (Ct. App. 1992). In *Anderson*, the court ordered defendant Irrigation District to discontinue the diversion of water from the Sacramento River during the months of August through October. *Id.* at 225. The court ordered the discontinuation because Winter-run chinook salmon, designated as an endangered species under CESA, utilize the habitat during migration to the sea. *Id.*; *see* Morris, *supra* note 53, at 17 (discussing California Department of Fish and Game's duty to prevent all parties from using endangered species habitat in harmful manner). *But see* A.B. 249, 1993-1994 Regular Session (1993) (attempting to redefine "take" so as to exclude loss or potential loss of animals as a result of any habitat modification).

94 CAL. PUB. RES. CODE §§ 21000-21178.1 (West 1986 & Supp. 1993).

95 *Compare id.* § 21081 (West 1986) (requiring mitigation or findings of infeasibility for approval of permits) *with* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978) (holding that EIS under NEPA is informational and does not require specific mitigation actions). *See supra* notes 77-86 and accompanying text (discussing NEPA's restrictions on major federal actions).

96 CAL. PUB. RES. CODE § 21080. At least one appellate court has held that CEQA applies to projects not requiring agency discretion as well as those requiring agency discretion. People v. Department of Housing & Community Dev., 119 Cal. Rptr. 266, 272 (Ct. App. 1975).

97 *See, e.g.*, Sierra Club v. Gilroy City Council, 271 Cal. Rptr. 393, 396 (Ct. App. 1990). A significant effect on the environment includes the modification of critical habitat for endangered or threatened species. *Id.*

98 CAL. PUB. RES. CODE § 21083 (West 1986).

99 *Id.* § 21104.2.

including a plan to mitigate the effects of the project.[100] If the developer cannot adequately mitigate the effects, the agency must reject the project or permit.[101]

California's prohibitions against modifying critical habitat compel many private property owners to maintain their land in a substantially natural state.[102] It is in this context that Maria Developer's claim of a regulatory taking arises.[103] She claims that the Constitution prevents California from depriving her of all economic use of her land through land-use regulations.[104]

B. Preventing "Takings:" Fifth Amendment Case Law Developments

State and federal governments may regulate land use through exercise of the police power,[105] within constitutional limits.[106] The police power enables the government to pass laws that promote the health, safety, welfare, and morals of the community.[107] Land-use regulations promote the health, safety, welfare and morals of the community by providing for reasoned development and preventing nuisances.[108] However, land-use regulations which do not conform with constitutional limits are invalid.[109]

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100 *Id.* § 21100.

101 *Id.* § 21081 (West Supp. 1993). When an agency approves a project without mitigation, it is the agency's burden to prove that mitigation was infeasible. City of Poway v. City of San Diego, 202 Cal. Rptr. 366, 371 (Ct. App. 1984).

102 *See* Mayer et al., *supra* note 16, at A1 (discussing complaints of private landowners concerning their inability to develop property because of endangered species regulations).

103 *See supra* notes 1-13 and accompanying text (describing hypothetical landowner's predicament).

104 *See supra* notes 13-19 and accompanying text (describing hypothetical landowner's claim).

105 *See generally* MANDELKER & CUNNINGHAM, *supra* note 69, at 50-125 (providing general overview of case law regarding use of police power).

106 *See infra* note 111 (discussing constitutional provisions prohibiting taking of private property without just compensation).

107 Mugler v. Kansas, 123 U.S. 623, 662 (1887).

108 Village of Euclid v. Ambler Realty, 272 U.S. 365, 375 (1926).

109 *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985) (invalidating group home regulation violating Equal Protection Clause); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438-41 (1982) (invalidating regulation violating Fifth Amendment); Islamic Ctr. of Miss., Inc. v. City of Starkville, 840 F.2d 293, 300 (5th Cir. 1988) (invalidating regulation prohibiting churches on First Amendment grounds).

One constitutional limit on land-use regulation is the Fifth Amendment.[110] The Fifth Amendment prevents the federal government from "taking" private land without compensating the owner.[111] The Fourteenth Amendment applies the requirements of the Fifth Amendment to state governments.[112]

Courts have held that a physical invasion—the placing of physical objects on private property—constitutes a per se "taking," no matter how minimal the occupation.[113] On the other hand, state and federal governments can deprive landowners of all economic use of their land, thereby "taking" property, through noninvasive regulations such as zoning laws.[114] These noninvasive regulations often achieve the same result as if the government had physically appropriated the land.[115] Courts have deemed these de facto appropriations regulatory takings.[116]

The Supreme Court first addressed the question of when state governments must compensate property owners for regulatory tak-

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110 *See infra* notes 111-34 and accompanying text (discussing Fifth Amendment jurisprudence in relation to land-use regulations).

111 U.S. CONST. amend. V ("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."); *id.* amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . "). The United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment makes the Compensation Clause of the Fifth Amendment applicable to the states. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 236 (1897).

112 *Chicago, B. & Q.R.R.*, 166 U.S. at 239.

113 *See Loretto*, 458 U.S. at 438-41 (holding that invasion of less than one-eighth cubic foot for cable installation constituted taking because it resulted in permanent physical invasion).

114 *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (historical landmark regulation preventing landowner from adding on to Grand Central Terminal); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning law preventing landowner from renting property); Mugler v. Kansas, 123 U.S. 623 (1887) (law prohibiting liquor businesses). These restrictions are non-invasive because the government is not placing physical objects on the land.

115 *See* Miller v. Schoene, 276 U.S. 272 (1928) (disease prevention regulation requiring destruction of trees).

116 *See Penn Central*, 438 U.S. at 124 (stating that courts may easily characterize regulations that cause physical invasions as takings, but laws that do not invade can also be regulatory takings); *infra* notes 117-34 and accompanying text (discussing when regulations constitute takings).

ings in *Pennsylvania Coal v. Mahon.*[117] In *Mahon*, the Court held that an exercise of the police power results in a compensable taking if it "goes too far."[118] The Court later held in *Village of Euclid v. Ambler Realty Co.*[119] that unless a regulation is clearly arbitrary and unreasonable, it does not reach that threshold.[120] In subsequent cases, plaintiffs have challenged state regulations, claiming these regulations are unconstitutional because they are arbitrary and unreasonable.[121] In those cases, the Court has weighed the public and private interests involved to determine if a regulation resulted in a taking.[122] The *Lucas* case arose against this background.

In *Lucas v. South Carolina Coastal Council*,[123] the Supreme Court held that a regulation depriving a landowner of all economically viable use of her land is arbitrary and unreasonable and, therefore,

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117 260 U.S. 393 (1922). In *Mahon*, a group of landowners sued a coal company to prevent the mining of coal beneath their land because the mining could result in erosion of the surface property. *Id.* at 395. The landowners' deeds reserved the right of the coal company to remove all coal from under the property. *Id.* The Pennsylvania legislature passed a regulation in 1921 prohibiting the mining of coal if its removal would result in the subsidence of buildings on the surface. *Id.* The Court found that the regulation resulted in a taking of the coal company's property. *Id.* at 414-16.

118 *Id.* at 415. The Court did not address what would be considered "too far." The Court indicated that the government "hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413.

119 272 U.S. 365 (1926).

120 *Id.* at 390.

121 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-28 (1978) (stating that historical preservation regulation could constitute taking); Armstrong v. United States, 364 U.S. 40, 49 (1960) (recognizing Fifth Amendment aim to prevent government from making certain citizens bear burden that should be borne by entire public); United States v. Causby, 328 U.S. 256, 260-67 (1946) (holding that low-flying airplane flights over plaintiff's property which destroyed current use of land as chicken farm constituted taking). The arbitrary and unreasonable taking argument is based on the Court's holding in *Mahon*, suggesting that a statute which furthers important public policies may frustrate the landowner's investment-backed expectations to the point of becoming a taking. *Penn Central*, 438 U.S. at 124. *But see* Miller v. Schoene, 276 U.S. 272, 277 (1928) (finding statute valid that permitted destruction of trees without compensation when purpose was to protect another group of trees from disease).

122 *See* Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (utilizing balancing test to determine if taking had occurred).

123 112 S. Ct. 2886 (1992).

a taking.[124] South Carolina enacted a statute prohibiting new structures along the coastline, thus depreciating the value of Lucas' beachfront property.[125] The statute included legislative findings that the regulation functioned to protect life and property.[126] The Court balanced those state interests with Lucas' interest in maintaining some economic use of his land.[127] The Supreme Court held that there was a taking because the statute acted unreasonably in depriving Lucas of all economically viable use of his land.[128]

The *Lucas* Court then considered whether there could be any situations in which a regulation eliminating all economically viable use of land without compensation would not constitute a taking.[129] The Court held that a state may enact a regulation that deprives an owner of all economically viable use of her land only if the regulated interests were not originally part of the landowner's title.[130] Thus, landowners can reasonably base their expectations on the property rights granted in their title.[131]

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124 *Id.* at 2893. Justice Scalia insisted that the rule had previously been laid out in *Agins*, that land-use regulation violates the Fifth Amendment when it "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" *Id.* at n.6 (citing *Agins*, 447 U.S. at 260) (emphasis added).

125 S.C. CODE ANN. § 48-39-290(A) (Law. Co-op. Supp. 1990). The lower court addressed the problem as if the regulation did in fact leave Lucas' land with no economic value. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898-902 (S.C. 1991). Neither party contested this finding on appeal. *Lucas*, 112 S. Ct. at 2896. Justice Kennedy questioned the finding that a beach front lot would lose all economic value due to a restriction on development. *Id.* at 2903 (Kennedy, J., concurring).

126 *Lucas*, 112 S. Ct. at 2896 n.10. The findings indicated that the statute additionally provided for the habitat of "numerous species of plants and animals, several of which are threatened or endangered." S.C. CODE ANN. § 48-39-250 (Law. Co-op. Supp. 1992).

127 *Lucas*, 112 S. Ct. at 2901. The Court suggested that the "total taking" inquiry should entail an analysis of the degree of harm to public lands and resources posed by the regulated activity. *Id.* The inquiry also includes the social value of the regulated activity and its suitability to the area, and the ease of avoiding the alleged harm. *Id.*

128 *Id.* at 2896.

129 *Id.* at 2898.

130 *Id.* at 2899. The Court acknowledged that a regulation that destroys the value of land may not constitute a compensable taking. *Id.* at 2899 n.14; *see* Mugler v. Kansas, 123 U.S. 623, 655-56, 675 (1887) (upholding regulation that minimized use of property by prohibiting manufacture of alcoholic beverages).

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

Certain legitimate exercises of the police power do not infringe upon the landowner's title because they are implied limitations on ownership rights.[132] The Court announced that landowners should be aware that the government's assertion of those implied limitations may render their properties entirely worthless.[133] Implied limitations must reside in the title itself, inherent in all land ownership through the background principles of nuisance and property law.[134]

State and federal governments may, therefore, regulate land use without compensation if neighboring landowners or the state could have prohibited the use as a nuisance.[135] When reviewing potentially unconstitutional land use restrictions, a court must determine which property law principles a state or federal government used when enacting a development prohibition.[136] A reviewing court must also determine whether the regulation is rationally related to those common law principles.[137]

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132 *See, e.g.*, Andrus v. Allard, 444 U.S. 51, 68 (1979) (upholding prohibition on sale of eagle feathers from birds legally killed prior to protection under Eagle Protection Act). When an owner has a bundle of property rights, destroying one strand of the bundle is not a taking. *Id.* at 65-66. The *Lucas* Court stated that the regulations of land that need not be compensated must be pre-existing limitations on the title. *Lucas*, 112 S. Ct. at 2900. *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-35 (1982) (disallowing physical invasion for cable lines without compensation) *with* United States v. State Water Resources Control Bd., 227 Cal. Rptr. 161, 166 (Ct. App. 1986) (upholding statute asserting government's public trust right to navigable waters without compensation).

133 *Lucas*, 112 S. Ct. at 2899-900.

134 *Id.* at 2901.

135 *Id.* The Court discussed several land uses nuisance law could prohibit. *Id.* at 2895. A regulation could prohibit the owner of a lakebed from filling it and thereby flooding other lands. *Id.* The government may also destroy property to prevent the spread of a fire. *Id.* at 2900 n.16. While the Court discussed nuisance, it did not elaborate on situations that would fall under the elusive "background principles of the State's law of property." *Id.* at 2900; *see infra* notes 154-87 and accompanying text (describing common law principle of public trust which might be used to regulate all economic use without requiring compensation).

136 *Lucas*, 112 S. Ct. at 2901-02. On remand, the Court directed the lower court to reconsider the regulation and not to accept conclusory legislative findings regarding its common law basis. *Id.*

137 *Lucas*, 112 S. Ct. at 2902.

C. Common Law Principles of Nuisance and Property

Public nuisance and public trust are the major common law principles relevant to endangered species regulations.[138] Common law public nuisance prohibits acts that unreasonably interfere with rights common to the general public.[139] The public trust doctrine vests government with the authority to protect the public's interests in air, water and wildlife.[140] Through exercise of the police power, state and federal governments protect the community's health, safety, welfare, and morals by prohibiting nuisances and uses of property inconsistent with the public trust.[141]

1. The Public Nuisance Doctrine

Traditionally, courts have determined what actions constitute common law nuisances by balancing the value of an action with the harm it creates.[142] An action may be a public nuisance if the activity poses a threat to public lands and resources.[143] Courts balance that harm with the social value of the activity,[144] the activity's suitability to the locality,[145] and the ease with which the actor can avoid causing harm.[146] The activity is unreasonable, and there-

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138 *See infra* notes 200-40 and accompanying text (discussing public nuisance and public trust doctrines in context of endangered species regulations).

139 RESTATEMENT (SECOND) OF TORTS § 821B (1978).

140 Joseph Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 185 (1980) (citing J. INST. 1.2.1-2.1.6).

141 Mugler v. Kansas, 123 U.S. 623, 668-69 (1887). In *Mugler*, the Supreme Court upheld a law prohibiting a nuisance because the police power permits states to enact laws protecting public health, safety, morals, and welfare. *Id.* at 669-75.

142 RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1978); *see* MARK A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 578-80 (4th ed. 1987) (discussing history of public nuisance).

143 RESTATEMENT (SECOND) OF TORTS §§ 826, 827 (1978).

144 *Id.* § 828(a); *see* Mandell v. Pivnick, 125 A.2d 175 (Conn. Super. Ct. 1956) (holding that awning extending over walkway was not nuisance).

145 RESTATEMENT (SECOND) OF TORTS § 828(b) (1978).

146 Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (citing RESTATEMENT (SECOND) OF TORTS). Although long-time use by other owners may indicate a lack of common law nuisance, "changed circumstances or new knowledge may make what was previously permissible no longer so." *Id.* This language may prohibit uses that threaten the existence of newly listed endangered species. *See* RESTATEMENT (SECOND) OF TORTS §§ 827(e), 828(c), 830 (1978).

fore a nuisance, if the gravity of harm outweighs the utility of the conduct.[147]

Most states have developed statutory schemes to codify certain nuisances as criminal conduct.[148] In those cases, the state legislatures have determined that the threat to public rights outweighs the value of the prohibited conduct.[149] Those statutes include regulations prohibiting land uses that unreasonably interfere with rights common to the public.[150]

Because statutes regulating land use can deprive owners of all economic use of their land, those statutes are susceptible to regulatory takings claims.[151] The *Lucas* Court held that a takings analysis begins with an inquiry into the common law basis of the statute.[152] If common law principles of nuisance or property could have prohibited the use, then there is no taking.[153] Therefore, legislatures may continue to enact statutes that codify common law principles of nuisance and property without risking takings claims.

2. The Public Trust Doctrine

States may also enact statutes based on other common law property principles, such as the public trust doctrine.[154] The public

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147 RESTATEMENT (SECOND) OF TORTS § 826(a) (1978); *see, e.g.*, Burgess v. M/V Tomano, 370 F. Supp. 247, 249 (S.D. Me. 1973) (finding oil spill to constitute nuisance); Morgan v. High Penn Oil Co., 77 S.E.2d 682, 690 (N.C. 1953) (finding oil refinery emanating strong odors to be nuisance); Tennessee *ex rel.* Swann v. Pack, 527 S.W.2d 99, 113 (Tenn. 1975) (finding public handling of poisonous snakes to be nuisance), *cert. denied*, 424 U.S. 954 (1976).

148 *See, e.g.*, ALA. CODE § 6-5-123 (1977) (granting right of action to private parties injured by public nuisance); KY. REV. STAT. ANN. § 438.060 (Michie/Bobbs-Merrill 1985) (criminalizing contamination of water courses with smelly objects).

149 *See, e.g.*, LA. CIV. CODE ANN. art. 667 (West 1980) (limiting property use to those uses that do not damage neighboring property); *supra* note 148 (providing statutes that prohibit public nuisances).

150 *See* United States v. Alford, 274 U.S. 264, 267 (1927) (citing Camfield v. United States, 167 U.S. 518 (1927)) (holding that Congress may prohibit acts on privately held lands that imperil publicly owned forests).

151 *Lucas*, 112 S. Ct. at 2893. A regulation that deprived a landowner of all economically viable use of his land was held to be a taking. *Id.*; *see supra* notes 103-37 and accompanying text (discussing regulatory takings jurisprudence).

152 *Lucas*, 112 S. Ct. at 2901-02.

153 *Id.*

154 *See, e.g.*, Cleveland Park Club v. Perry, 165 A.2d 485 (D.C. 1960) (prohibiting trespass to land); *infra* notes 155-82 and accompanying text (describing public trust doctrine).

trust doctrine is a common law property principle originating in Roman law.[155] The doctrine holds that all persons, through government, control the rights to air, water, and wildlife.[156]

The public trust doctrine has been a developing area of legal interest for many years.[157] In *Illinois Central Railroad v. Illinois*,[158] the Supreme Court used the public trust doctrine to vest control of lands under navigable waters in state government.[159] The Court held that a state holds the trust interest in those lands for the benefit of all the people of the state.[160] Several states continue to apply the public trust doctrine only to lands under navigable waters, refusing to expand it to comparable natural resources like wildlife.[161] Additionally, several commentators strongly oppose extending the doctrine beyond streambeds.[162]

One court, however, has applied the public trust doctrine to wild animals, because wildlife belongs in common to all citizens of the state.[163] In *In re Steuart Transportation Co.*,[164] the state of Virginia

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155 Sax, *supra* note 140, at 186. The public trust doctrine originates in the Roman idea of *res communis*, which held that certain things like seashore and wildlife could not be said to belong to anyone in particular. *Id.* at n.6.

156 *Id.*

157 *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); *Symposium: Public Trust Doctrine, the Modern View*, 19 ENVTL. L. 425-735 (1989); *The Public Trust Doctrine in Natural Resource Law and Management: A Symposium*, 14 U.C. DAVIS L. REV. 181 (1980).

158 146 U.S. 387 (1892).

159 *Id.* at 452.

160 *Id.* The state could only give up control of trust lands in two specific instances: (1) to further public trust purposes such as improving navigation, or (2) for purposes that could not harm the public trust. *Id.* at 452-53.

161 *See* Idaho Forest Indus. v. State, 733 P.2d 733, 737 (Idaho 1987) (holding that there is no public trust relating to land that is wholly independent of or unconnected with navigable waters); Bott v. Natural Resources Comm'n, 327 N.W.2d 838, 841-42 (Mich. 1982) (holding that public trust applies only to lands under navigable waters).

162 *See* Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 519 n.19 (arguing that doctrine is historically tied to navigable waters and may not be strong enough to extend to other resources); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 648 n.92 (suggesting that Supreme Court has never applied public trust doctrine beyond navigable waters despite opportunity to do so).

163 Geer v. Connecticut, 161 U.S. 519, 522 (1896). The Supreme Court traced the history of wildlife law back to Roman Law and held that the States owned wildlife found within their borders. *Id.*

and the federal government each filed damage claims against the perpetrator of an oil spill.[165] In denying the defendant's motion for summary judgment,[166] the district court expressly stated that under the public trust doctrine, the states and the federal government have a duty to protect and preserve wildlife resources.[167] The federal government has also indicated that natural resources fall within the public trust by declaring that the government should act as trustee of the environment for future generations.[168]

Classifying wildlife and its habitat as public trust resources is important because landowners do not own the rights to trust resources located on their property.[169] The California Supreme Court noted in *National Audubon Society v. Superior Court*[170] that there can be no vested rights in trust property.[171] Since the trust inheres in all property interests,[172] landowners take fee simple

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> Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people . . . .

Id. at 529. While the Supreme Court overruled the idea of state ownership of wildlife in Hughes v. Oklahoma, 441 U.S. 322 (1979), the Court advanced the notion that the state still has a duty to exercise legitimate public concerns for conservation, protection, and regulation of wildlife. *Id. See generally* Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 729-30 (1989).

164 495 F. Supp. 38 (E.D. Va. 1980).

165 *Id.* at 39.

166 The defendant moved for summary judgment on the grounds that the government does not own the waterfowl and therefore is not allowed to recover for its loss. *Id.*

167 *Id.* at 40. In deference to *Hughes*, the court distinguished the rights as deriving from a duty owed the people of the state rather than from state ownership. *Id.*

168 National Environmental Policy Act of 1969, 42 U.S.C. § 4331(b)(1) (1988); *see also* California Environmental Quality Act, CAL. PUB. RES. CODE § 21000(a) (West 1986) (declaring that California protects state environment for future generations).

169 *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453-54 (1892); *see infra* notes 170-76 and accompanying text (discussing relationship between ownership rights and trust resources).

170 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).

171 *Id.* at 723.

172 *Id.*

title[173] subject to an implied servitude[174] restricting uses inconsistent with the public trust.[175] The trust acts similarly to the nuisance doctrine in restricting uses of property inconsistent with the public's interest.[176] Therefore, the public trust doctrine embodies the type of limitation the *Lucas* Court exempted from takings claims.[177]

In several cases, courts have held that state land-use restrictions were not takings when the restricted uses were inconsistent with the public trust.[178] For example, restrictions on filling tidelands did not constitute a taking because the restricted landowner held the tidelands subject to the public trust.[179] Moreover, this trust allows states to take affirmative action to enforce water quality standards.[180] Federal and state governments may also protect fish in waters subject to prior appropriation rights.[181] Thus,

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173 *See* BLACK'S LAW DICTIONARY 615 (6th ed. 1990) (defining fee simple title as absolute estate in land). An owner of land in fee simple "enjoys full possession and use of the property to the extent permitted by public law . . . ." ROBERT G. NATELSON, MODERN LAW OF DEEDS TO REAL PROPERTY § 2.1 (1992).

174 *See* BLACK'S LAW DICTIONARY 1370 (defining servitudes as burdens on estates in land). Servitudes may restrict the owner's use of land or they may impose affirmative obligations on the owner. NATELSON, *supra* note 173, § 13.2.

175 *See* Orion Corp. v. State, 747 P.2d 1062, 1072-73 (Wash. 1987) (holding that public trust acts as restriction on owner's use of estate), *cert. denied*, 486 U.S. 1022 (1988).

176 *See id.*

177 Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992).

178 *See supra* notes 179-82 and accompanying text (discussing cases where land-use restrictions were not deemed takings because they involved public trust doctrine).

179 Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 449-50 (1892). *See* Marks v. Whitney, 491 P.2d 374, 381 (Cal. 1971). *But see* Kaiser Aetna v. United States, 444 U.S. 164, 177-79 (1979) (requiring compensation for navigational easement across artificially created marina because land was not naturally subject to public trust doctrine).

180 United States v. State Water Resources Control Bd., 227 Cal. Rptr. 161, 200-02 (Ct. App. 1986).

181 United States v. Cappaert, 375 F. Supp. 456 (D. Nev. 1974) (prohibiting landowner from pumping water on his land because lowered water table would result in destruction of Devil's Hole pupfish breeding grounds on neighboring government property), *aff'd*, 508 F.2d 313 (9th Cir. 1974); Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist., 11 Cal. Rptr. 2d 222 (Ct. App. 1992) (prohibiting water company from pumping water because pumping sucked endangered salmon through turbines); *see* JOSEPH L. SAX & ROBERT H. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 278-79 (1986) (defining prior appropriation right as right of first beneficial water user to continue that beneficial use).

the public trust doctrine may provide a defense to a takings claim.[182]

The wording of the *Lucas* decision supports an argument that the public trust doctrine provides a defense to takings claims. The *Lucas* Court held that certain legitimate exercises of the police power do not infringe upon the landowner's title because the police power impliedly limits ownership rights.[183] Those implied limitations must reside in the title itself, inherent in all land ownership through the background principles of property and nuisance law.[184] The public trust doctrine is a background principle of property law that acts as an implied limitation on landowners' title.[185] In states that extend the public trust doctrine to wildlife protection, the government may prohibit land uses inconsistent with the trust.[186] Thus, endangered species regulations that codify the public trust doctrine would also withstand a takings claim.[187]

D. When "Take" and "Takings" Collide

The case of Maria Developer illustrates how endangered species regulations, takings jurisprudence, and common law principles of nuisance and property intertwine.[188] Maria Developer believes that endangered species regulation causes an unconstitutional "taking" of her property.[189] While state and federal governments regulate the use of land in many ways,[190] few regulations totally deprive land-

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182 One commentator has specifically argued that the public trust doctrine provides a defense to takings claims. *See* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 584-87 (1989) (arguing that trust properties are encumbered with implied servitudes restricting uses inconsistent with trust values); *supra* notes 170-82 and accompanying text.

183 Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992); *see supra* notes 170-82 and accompanying text (discussing implied limitations on ownership rights).

184 *Lucas*, 112 S. Ct. at 2901.

185 *See supra* notes 167-77 and accompanying text (discussing implied servitude relationship between public trust and ownership rights).

186 *In re* Steuart Transportation Co., 495 F. Supp. 38 (E.D. Va. 1980).

187 *See infra* notes 225-40 and accompanying text (placing endangered species protection within framework of public trust doctrine).

188 *See supra* notes 1-13 and accompanying text (describing how ESA deprived Maria Developer of ownership rights).

189 *See supra* notes 14-19 and accompanying text (advancing theory that endangered species regulation constitutes taking).

190 *See generally* MANDELKER & CUNNINGHAM, *supra* note 69 (providing cases and materials on government control of land development).

owners of all economic use of their land.[191] Yet, when the Secretary of the Interior designates an area as critical habitat, the landowner might not receive a federal permit to modify her land.[192] She may not make any modification that causes the death of certain animals by disrupting essential behavior patterns.[193] In other words, she may not "take" an endangered species.[194] In California, she may not modify her land unless a state agency decides that she can mitigate the adverse effects.[195]

These regulations have forced landowners, such as Maria Developer, to maintain their land in a substantially natural state.[196] In Maria Developer's view, the government has committed a "taking" of her land by prohibiting her from committing a "take" of endangered species.[197] Several landowners have attempted to argue that such regulation constitutes a "taking" without compensation.[198] Under *Lucas*, however, states may defeat such "takings" claims because endangered species regulations codify common law principles of nuisance and property.[199]

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191 *Lucas*, 112 S. Ct. at 2895. Justice Scalia conceded this point in the *Lucas* decision. *Id.* Regulations that merely reduce the value of the property without destroying all economic uses may or may not require compensation. *Id.* at 2895 n.8.

192 *See supra* notes 72-84 and accompanying text (discussing federal protection of critical habitat under NEPA).

193 *See* 50 C.F.R. § 17.3 (1992) (defining "harm" to include modifying habitat that results in animal death or injury).

194 16 U.S.C. § 1538(a).

195 *See supra* notes 89-101 and accompanying text (discussing California's regulation of habitat through CESA and CEQA).

196 *See supra* notes 14-19 (discussing landowners' complaints regarding regulation of use of their land).

197 *See supra* notes 69-70 (comparing "taking" in regulatory context with "take" in endangered species context).

198 *See* Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992) (dismissed for lack of ripeness), *cert. denied*, 113 S. Ct. 1586 (1993). Courts already have found that statutes protecting endangered species are constitutional exercises of the police power since wildlife protection is in the interest of the public. People v. K. Sakai Co., 128 Cal. Rptr. 536, 538-41 (Ct. App. 1976). This limits a landowner to the argument that the regulation amounts to a taking requiring compensation. *See supra* notes 188-98 and accompanying text (describing argument that state and Federal Endangered Species Acts constitute taking).

199 *See supra* notes 123-34 and accompanying text (discussing *Lucas* decision).

III. PROPOSAL: COMMON LAW BASES OF ENDANGERED SPECIES PROTECTION

This Comment proposes that courts interpret ESA and state endangered species acts as codifying common law principles of nuisance and property within the meaning of *Lucas*.[200] Thus, a California court should reject Maria Developer's takings claim. The court reviewing Maria Developer's claim should follow the guidance of the *Lucas* Court.[201] As the *Lucas* Court required, a reviewing court analyzing a takings claim must consider the common law bases for endangered species regulations.[202] Accordingly, the inquiry should resemble an inquiry under state nuisance law.[203] Additionally, the court would conduct an inquiry into the public trust doctrine.[204] Since endangered species regulations fall firmly within the categories of nuisance prevention and public trust doctrine, the court should find that ESA and CESA do not constitute a taking of Maria Developer's property.[205]

A. Endangered Species and the Public Nuisance Doctrine

In reviewing Maria Developer's takings claim, a court should first identify the relevant elements of public nuisance law and analyze the claim with respect to those elements.[206] The key element in public nuisance is the degree to which the land use will harm public resources.[207] Both the United States Congress and the California Legislature have declared that unrestricted development threatens certain species of fish, wildlife, and plants with extinc-

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200 *See infra* notes 200-40 (suggesting that courts inquire into endangered species regulations' bases in common law nuisance and public trust doctrines).

201 *See supra* notes 123-34 and accompanying text (discussing *Lucas* decision).

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

203 *See supra* notes 142-50 and accompanying text (outlining requirements for public nuisance analysis).

204 *See supra* notes 154-77 and accompanying text (discussing development of public trust doctrine).

205 *Lucas*, 112 S. Ct. at 2899. A regulation rooted in common law nuisance or state property law is not a taking. *Id.*; *see supra* notes 202-36 and accompanying text (arguing that ESA and state endangered species acts codify common law nuisance and public trust doctrine).

206 *See supra* notes 142-50 and accompanying text (outlining requirements for public nuisance analysis).

207 RESTATEMENT (SECOND) OF TORTS §§ 826, 827 (1978).

tion.[208] These species possess important aesthetic, educational, ecological, historical, recreational, and scientific value.[209] The purpose of ESA and CESA is to conserve the habitat upon which endangered and threatened species depend.[210] ESA and CESA prevent unreasonable interference with these ecosystems, just as nuisance law prevents unreasonable interference with public rights.[211] Further, because humans and animals often depend on the same habitat,[212] the Acts prevent unreasonable interference with the public's right to ensure a healthy ecosystem.[213]

Because nuisance law requires balancing various factors,[214] the court reviewing Maria Developer's takings claim must consider the utility of the uses in question.[215] It must weigh the utility of the prohibited development against the social value of the use by endangered species.[216] Endangered species regulations prohibit a common law nuisance when the benefit to endangered species outweighs Maria Developer's interest in developing her land.[217]

A court may have some difficulty measuring the benefit of endangered species regulation.[218] However, the Secretary of the Interior's designation of critical habitat provides a good indication of

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208 16 U.S.C. § 1531(a); CAL. FISH & GAME CODE § 2051(a) (West Supp. 1993).

209 16 U.S.C. § 1531(c); CAL. FISH & GAME CODE § 2051(c).

210 16 U.S.C. § 1531(b); *see also* CAL. FISH & GAME CODE § 2052 (stating that it is state policy to conserve, protect, restore, and enhance endangered species habitat).

211 *See supra* notes 143-50 and accompanying text (describing how nuisance law prevents unreasonable interference with public rights).

212 *See supra* notes 36-50 and accompanying text (describing interdependencies between humans and animals).

213 *See supra* notes 40-50 and accompanying text (discussing ramifications of species' extinction).

214 *See supra* notes 142-47 and accompanying text (describing balancing courts use in nuisance cases).

215 RESTATEMENT (SECOND) OF TORTS § 826(a) (1979).

216 *Id.* §§ 828(a), 827(c).

217 *See* John E. Bryson & Angus Macbeth, *Public Nuisance, The Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241 (1972) (discussing use of public nuisance law to regulate environmental concerns); *supra* notes 148-50 and accompanying text (discussing states' ability to enact statutes prohibiting common law nuisances).

218 *See supra* notes 33-58 and accompanying text (discussing divergent views regarding value of species protection).

the regulation's benefit.[219] ESA requires the Secretary of the Interior to consider the value of species protection as well as its economic effects when designating critical habitat.[220] She must exclude an area from designation if she determines that the benefits of exclusion outweigh the benefits of designation.[221] Thus, the Secretary of Interior already will have balanced the gravity of prohibiting habitat use with the utility of protecting the species when she designates land as critical habitat.[222] The Secretary already will have determined that the habitat is more critical to the species, a national resource, than to the landowner. Courts should defer to this determination when the Secretary's findings are supported by the best scientific data available.[223] The regulation codifies common law nuisance when the data shows that the utility of species protection outweighs the private interest.[224]

B. Endangered Species and the Public Trust Doctrine

In addition to codifying nuisance law, endangered species regulation embodies the common law public trust doctrine.[225] The ancient public trust doctrine placed control over the interest in air, water, and wildlife in the general public.[226] The doctrine has devel-

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219 16 U.S.C. § 1533(a). The Secretary must consider many factors when listing a species, including the effects of commercial, recreational, and scientific use of the species habitat. *Id.*

220 *Id.* § 1533(b)(2). In designating critical habitat, the Secretary must consider the economic impact and other relevant impacts that the listing will cause. *Id.*

221 *Id.* The Secretary of the Interior considered effects on the logging industry when listing nearly 7 million acres as critical habitat for Northern spotted owls. *See generally* 50 C.F.R. 17.95 (1992) (providing map of critical habitat for Northern spotted owl).

222 16 U.S.C. § 1533(b)(2).

223 The Secretary must study the impacts of designation and those studies must support decisions not to list critical habitat. Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 628 (W.D. Wash. 1991). Additionally, she must base the determination of critical habitat on the best scientific data available. 16 U.S.C. § 1533(b)(2); *see* Echeverria, *supra* note 19, at 19 (arguing that courts should defer to Secretary of the Interior and legislature's considerations of public utility).

224 *See supra* notes 148-50 and accompanying text (discussing state's ability to enact statutes prohibiting common law nuisances).

225 *See infra* notes 226-40 and accompanying text (arguing that state endangered species acts embody public trust doctrine).

226 *See supra* notes 154-87 and accompanying text (discussing development of public trust doctrine).

oped over time to vest water-related interests in the state sovereign to be held in trust for the benefit of the people.[227]

A court reviewing a takings claim based on endangered species regulation must inquire whether courts have extended the public trust doctrine to wildlife resources in that state.[228] At least one court has expressly expanded the government's responsibility under the public trust doctrine to preserving wildlife species.[229] Where the public trust doctrine encompasses wildlife resources, the common law protects habitat necessary for survival as well.[230]

As state governments continue to classify wildlife and habitat as public trust resources, regulations based on the public trust may appear to infringe on vested property rights.[231] In those states, however, fundamental rights incident to land ownership do not include the right to destroy habitat necessary to species survival.[232] Instead, landowners hold their property subject to a public right to protect endangered species pursuant to the public trust doctrine.[233] This is the type of regulation the *Lucas* Court declared immune to a takings claim.[234] Therefore, when the government regulates

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227 *See* Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 197-200 (1980) (discussing development of public trust doctrine relating to water resources).

228 *See* Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2900 (1992) (requiring courts to discern what background principles of property law permit regulation).

229 *In re* Steuart Transportation Co., 495 F. Supp. 38 (E.D. Va. 1980); *see supra* notes 164-67 and accompanying text (discussing *In re Steuart*).

230 *See* Meyers, *supra* note 163, at 723 (basing argument for wildlife protection on doctrine's historical roots in public resource protection); *supra* notes 154-87 and accompanying text (describing historical origins of public trust doctrine); *see also supra* notes 163-67 and accompanying text (describing state that extends public trust doctrine to wildlife).

231 *See supra* notes 55-58 and accompanying text (describing landowner complaints that endangered species regulation deprives them of all economic use of their land).

232 *See* Rolston, *supra* note 88, at 293 ("Ownership of a species has never been part of the explicit bundle of property rights.").

233 National Audubon Soc'y v. Superior Court, 658 P.2d 709, 727 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).

234 *Lucas*, 112 S. Ct. at 2899. The Court acknowledged that a regulation that destroys the value of land may not always constitute a compensable taking. *Id.* at 2899 n.14. The Court held that a state may enact a regulation that deprives an owner of all economically viable use of her land only if the regulated interests were not originally part of the landowner's title. *Id.* at 2899.

habitat in jurisdictions that consider wildlife a public trust resource, there can be no "taking."[235] The landowner holds the property subject to the public's interest in the resource.[236]

In states which do not classify wildlife as a public trust resource, a court reviewing a takings claim may still rely on an inquiry into public nuisance.[237] The *Lucas* Court directed those courts to inquire into the background principles of nuisance and property law.[238] Since ESA and state endangered species regulations codify the principles of public nuisance, a court cannot declare them a taking.[239] Additionally, courts may uphold state regulations prohibiting development of endangered species habitat in states which classify wildlife as a public trust resource because the laws codify the public trust doctrine.[240]

CONCLUSION

ESA and state endangered species acts prohibit landowners from developing their land if the development will cause the death of an endangered species.[241] California has developed even stronger restrictions on land development.[242] These restrictions have forced many landowners, similar to the hypothetical Maria Developer, to maintain their land in a substantially natural state.[243] By prohibiting development, ESA and CESA have deprived Maria Developer of all economic use of her land.[244] The *Lucas* Court declared that such regulations normally violate the Fifth Amendment,[245] which

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235 *See supra* notes 231-34.

236 *See* James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust Doctrine and Reserved Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171, 174-75 (1987).

237 *See supra* notes 142-53 and accompanying text (describing an inquiry into public nuisance).

238 *Lucas*, 112 S. Ct. at 2901.

239 *See supra* notes 206-24 and accompanying text (arguing that ESA and state endangered species acts codify common law nuisance).

240 *See supra* notes 225-39 and accompanying text (arguing that state endangered species acts codify public trust doctrine).

241 *See supra* notes 66-102 and accompanying text (discussing ESA and CESA prohibitions of take).

242 *See supra* notes 91-102 and accompanying text (discussing CESA).

243 *See supra* notes 16-19 and accompanying text (discussing landowner complaints regarding ESA and CESA regulations).

244 *See supra* notes 1-13 and accompanying text (describing how ESA and CESA affect Maria Developer's property).

245 *Lucas*, 112 S. Ct. at 2899.

prohibits government from taking property without just compensation.[246]

While the *Lucas* decision does require compensation for most regulatory takings, the Court held that states may base land-use regulations on common law principles of nuisance and property without requiring compensation.[247] States may enact these regulations because the right to engage in the prohibited uses was never part of the landowner's title.[248] Laws that protect endangered species simply codify the common law principles of nuisance and property.[249] Therefore, Maria Developer never owned the right to disrupt the habitat on her land to the point of endangering the species that depend on it.[250]

Courts should interpret ESA and CESA as codifying common law principles of nuisance and property.[251] The common law nuisance and public trust doctrines prohibit Maria Developer from destroying critical habitat, even on her private land, because extinguishing a species harms all people.[252] Therefore, when considering Maria Developer's claim, a reviewing court should conclude that ESA and CESA do not constitute a taking and Maria Developer need not be compensated.[253]

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246 *See supra* notes 110-34 and accompanying text (discussing Fifth Amendment limitations on taking property).

247 *See supra* notes 123-34 and accompanying text (describing *Lucas* decision).

248 *Lucas*, 112 S. Ct. at 2899. *But see* Meyers, *supra* note 163, at 729-30 (indicating that many courts only protect navigable waters under public trust doctrine); *supra* note 161 (discussing cases in several states expressly refusing to extend public trust doctrine to wildlife resources).

249 *See supra* notes 225-40 and accompanying text (arguing that endangered species regulations codify common law principles of nuisance and public trust).

250 *See supra* notes 170-77 and accompanying text (discussing relationship between ownership rights and implied limitations).

251 *See supra* notes 225-40 (arguing that endangered species regulations codify common law principles of nuisance and public trust).

252 *See supra* notes 206-24 and accompanying text (considering protecting endangered species as codifying nuisance law); *supra* notes 33-54 and accompanying text (describing interdependencies between humans and animals and ramifications of species extinction).

253 *See supra* notes 205-40 and accompanying text (arguing that ESA and state endangered species acts codify common law and therefore do not require compensation to regulated landowners).