

---

---

## “Taking” a Different Tack on Just Compensation Claims Arising Out of the Endangered Species Act

*Brian Scaccia\**

*In Casitas Municipal Water District v. United States, the Federal Circuit again grappled with the difficult question of how to analyze Fifth Amendment just compensation claims arising out of endangered species protections. Currently, the doctrine distinguishes between physical and regulatory takings, with numerous per se tests created to classify especially problematic situations. However, by simply focusing on the classification of particular government actions while ignoring their consequences, the jurisprudence continues to move away from the underlying concerns of fairness that motivate the Fifth Amendment, leaving the government, private landowners, and the courts with remarkably little guidance in specific cases.*

*I argue that the nexus and rough proportionality tests articulated by the Supreme Court in Nollan v. California Coastal Commission and Dolan v. City of Tigard provide a better means of achieving fair results and should be extended from the context of development exactions to endangered species takings claims.*

*Applied to the fish ladder construction mandated to protect the West Coast steelhead trout in Casitas, the Court's exaction tests would redirect the focus in takings cases to the fairness of the government action, while also providing a strong incentive for cooperation between the government and private parties at the initial permitting stage. These benefits increase the transparency of judicial decisions and reduce the difficulty in classifying hard cases concerning endangered species protections.*

---

Copyright © 2010 by the Regents of the University of California.

\* J.D. Candidate, University of California, Berkeley, School of Law, 2010; B.A., Political Science, University of California, Irvine, 2002. I would like to thank Holly Doremus, Bob Infelise, and Andrea Peterson for their insights and thoughtful comments throughout the writing process. I am greatly indebted to Sara Clark, Chris Raftery, Lala Wu, and the rest of the ELQ staff for their excellent editorial suggestions. Finally, I owe a great deal of gratitude to my friends and family for their constant support and encouragement.

|   |     |
|---|-----|
| Introduction .....  | 656 |
| I. The Current Physical / Regulatory Distinction Fails to<br>Provide Consistent Results in Environmental Cases .....        | 660 |
| A. The Current State of Affairs: Takings Doctrine after<br><i>Lingle</i> .....  | 660 |
| 1. Physical Takings .....   | 660 |
| 2. Regulatory Takings .....   | 661 |
| 3. Development Exactions.....   | 663 |
| 4. The Distinction between the Doctrines: Physical and<br>Regulatory Takings and the Impact of “Parcel as a<br>Whole” ..... | 664 |
| II. <i>Casitas Municipal Water District v. United States</i> .....  | 665 |
| A. What Was Left Out and Why It Matters .....   | 669 |
| III. <i>Nollan’s</i> and <i>Dolan’s</i> Exaction Approach Provides a Solution ...   | 670 |
| A. <i>Nollan</i> : The Essential Nexus Requirement .....  | 671 |
| B. <i>Dolan</i> : The Rough Proportionality Requirement .....   | 673 |
| IV. <i>Casitas</i> through the <i>Nollan / Dolan</i> Lens .....   | 676 |
| A. Some Initial Matters: When to Apply the<br>Unconstitutional Conditions Doctrine.....                                     | 676 |
| B. Demonstrating the Essential Nexus in ESA Protection<br>Takings.....  | 678 |
| C. Proving Rough Proportionality.....   | 680 |
| Conclusion.....   | 682 |

#### INTRODUCTION

Poor Judge John Wiese. A respected twenty-five-year member of the Court of Federal Claims bench, the judge finds himself caught once again in the middle of a raging debate between environmental groups and property rights advocates over Fifth Amendment just compensation claims arising out of protections mandated by the Endangered Species Act of 1973 (ESA). His most recent decision in *Casitas Municipal Water District v. United States*,<sup>1</sup> and its subsequent reversal by the Federal Circuit,<sup>2</sup> is the latest salvo in an ongoing battle to resolve these cases within the current takings doctrine.

The debate implicates the conflict underlying the disparate goals and considerations of the nation’s endangered species protection scheme and the Fifth Amendment of the U.S. Constitution. The Supreme Court described the ESA as the “most comprehensive legislation for the

1. *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100 (2007).

2. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008), *reh’g denied*, 556 F.3d 1329 (Fed. Cir. 2009) (denying both panel rehearing and rehearing en banc).

preservation of Endangered Species ever enacted by any Nation."<sup>3</sup> Congress's clear goal in enacting the statute was to "halt and reverse the trend toward species extinction, whatever the cost."<sup>4</sup> The principle is "reflected not only in the stated policies of the Act, but in literally every section of the statute."<sup>5</sup> Conflicting with the ESA's goals is a deep and abiding respect for private property enshrined in the Fifth Amendment's command that property not be taken for public use without the payment of just compensation.<sup>6</sup> Tempering the interests of the state, the amendment is motivated by a desire to prevent the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>7</sup> As more than two-thirds of the nation's endangered species inhabit private land,<sup>8</sup> the tension between these two competing "national imperatives" frequently erupts in the form of heated litigation between property owners and the federal government.<sup>9</sup>

Over the past several years, Judge Wiese has often been at the center of these debates.<sup>10</sup> During the last decade, the judge has been involved in a remarkable number of controversial environmental takings decisions, with his opinions being alternately praised and scorned by groups on both sides.<sup>11</sup> For example, in an early 2001 decision lauded by environmentalists, the judge determined that temporary logging restrictions and permit requirements designed to protect the northern spotted owl were not compensable takings.<sup>12</sup>

---

3. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

4. *Id.* at 184.

5. *Id.*

6. U.S. CONST. amend. V.

7. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893).

8. U.S. FISH & WILDLIFE SERVICE, WORKING TOGETHER: TOOLS FOR HELPING IMPERILED WILDLIFE ON PRIVATE LANDS 2 (2005), available at <http://library.fws.gov/ES/workingtogether.pdf>.

9. *See Robin L. Rivett, Why There are so Few Takings Cases under the Endangered Species Act, or, Some Major Obstacles to Takings Liabilities*, SB14 ALI-ABA 507, 509-510 (1996).

10. Though it may be unusual for a single judge to have been involved in such a significant number of cases, takings claims are not unusual for the Court of Federal Claims. The court has exclusive jurisdiction, pursuant the Tucker Act, over non-tort claims for damages greater than \$10,000. *See* 28 U.S.C. §§ 1491, 1346 (2006); *see also Chelsea Cmty. Hosp. v. Mich. Blue Cross Ass'n*, 630 F.2d 1131, 1136 (6th Cir. 1980).

11. *See, e.g., Rith Energy, Inc. v. United States*, 44 Fed. Cl. 108 (1999) (holding that the federal government's rejection of a proposed mining plan due to adverse environmental impacts was not a regulatory taking); *Boise Cascade Corp. v. United States*, No. 99-860, 2001 U.S. Claims LEXIS 277 (Fed. Cl. Apr. 10, 2001), *aff'd*, 296 F.3d 1339 (Fed. Cir. 2002); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001).

12. *Boise Cascade*, 2001 U.S. Claims LEXIS 277, at \*16-17. (dismissing the complaint on the ground that an injunction preventing the harvesting of old-growth timber without the

But only a few months later, the tide of approval from environmentalists turned against Judge Weise in a water law decision that held that pumping restrictions designed to protect the endangered delta smelt and winter-run chinook salmon populations in the Sacramento-San Joaquin River Delta constituted per se physical takings.<sup>13</sup> *Tulare Lake Basin Water Storage District v. United States* was the first decision in which endangered species protections under the ESA were found to constitute a compensable taking in the nearly forty years following its enactment.<sup>14</sup> The response was deafening. The critics argued that the opinion contained “dubious legal reasoning”<sup>15</sup> that reflected “confusion about both takings law and the fundamental nature of water rights.”<sup>16</sup> Representatives from the California State Attorney General’s office condemned the decision as “ill-conceived and poorly reasoned”<sup>17</sup> and “flaw[ed] on its face.”<sup>18</sup> The judiciary was no more kind. Fellow Court of Federal Claims Judge Francis Allegra wrote that the opinion “appears to be wrong on some counts, incomplete in others and, distinguishable, at all events.”<sup>19</sup> In a subsequent decision, Judge Oliver Wanger of the Eastern District of California also declined to follow the case, noting that the

---

incidental take permit required by the ESA, and the later removal of the permit requirement, did not state a claim for either a regulatory or physical taking under the Fifth Amendment).

13. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319 (2001). Interestingly, part of this decision seems also to conflict with Judge Wiese’s prior holding in *Rith Energy*. In *Rith Energy*, a state environmental statute codified the public trust doctrine as a “background principle” under *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). *Rith Energy*, 44 Fed. Cl. at 113. The *Tulare* decision rejected this argument. See Zachary C. Kleinsasser, Note, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421, 441–44 (2005).

14. Kevin Moore, *Seized by Nature: Suggestions on How to Better Protect Animals and Property Rights under the Endangered Species Act*, 12 GREAT PLAINS NAT. RESOURCES J. 149, 162 (2008); Eric Brazil, *Valley Farmers Win Ruling on Water*, SAN FRANCISCO CHRON., May 5, 2001, at A3.

15. Bettina Boxall, *U.S. Billed for Lost Water*, L.A. TIMES, Jan. 26, 2004, at B1.

16. Esther L. Westbrook, *Recognizing the Limits of Water Rights: Rejecting Takings Claims in Klamath Irrigation District v. United States*, 36 Env’tl. L. Rep. (Env’tl. Law Inst.) 10726, 10732 (2006).

17. Bettina Boxall, *U.S. to Pay \$16 Million in Water Rights Case*, L.A. TIMES, Dec. 22, 2004, at B1 (quoting California Chief Deputy Attorney General Richard Frank).

18. Bettina Boxall, *State Fears Ruling’s Effect on Environmental Water Policy*, L.A. TIMES, Dec. 7, 2004, at B5 (quoting California Deputy Attorney General Clifford Lee).

19. *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 538 (2005). Judge Allegra also noted that “Tulare has been the subject of intense criticism by commentators who, inter alia, have challenged the court’s application of a physical taking theory to what was a temporary reduction in water.” *Id.* at 538 n.59 (citing Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 329 (2005); Cori S. Parobek, Note, *Of Farmers’ Takes and Fishes’ Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Rights Collide*, 27 HARV. ENVTL. L. REV. 177, 212–23 (2003); Brittany K. T. Kauffman, Note, *What Remains of the Endangered Species Act and Western Water Rights after Tulare Lake Basin Water Storage District v. United States?*, 74 U. COLO. L. REV. 837 (2003)).

"conclusory reasoning" of the decision was "without analytical foundation" and "suspect."<sup>20</sup>

In January 2005, Judge Wiese again found himself presiding over a controversial takings claim in *Casitas Municipal Water District v. United States*.<sup>21</sup> And, once again, the issue revolved around the proper characterization of Fifth Amendment takings claims in disputes concerning water rights and endangered species protections. With the benefit of hindsight and the Supreme Court's intervening decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>22</sup> Judge Wiese granted summary judgment on a motion arguing that the restriction of stream-flow diversions attributable to fish habitat protection required by the ESA should be analyzed under the multi-factor balancing test required of regulatory takings.<sup>23</sup> The judge's opinion, distinguishing *Casitas* from his earlier *Tulare* decision, did not convince the Federal Circuit. The decision was reversed and remanded on appeal and rehearing was later denied.<sup>24</sup>

The travails of Judge Wiese serve to illustrate the difficulty of characterizing and appropriately resolving takings claims arising out of endangered species protections. Broadly speaking, takings claims are analyzed through either a per se takings analysis applicable to permanent, physical takings or through the multi-factor analysis applicable to regulatory takings.<sup>25</sup> Though recent decisions by the Supreme Court have done much to clarify the tests used to resolve takings claims,<sup>26</sup> the current distinction between physical and regulatory takings fails to clearly articulate the fairness goals of the Takings Clause and provides little decisional guidance to courts attempting to apply the tests in specific cases. As discussed below, in situations where the proposed species protections plausibly fall into either category, the choice of test becomes determinative. *Casitas* illustrates the current doctrine's inability to meaningfully and consistently resolve takings claims in the context of endangered species protections. In doing so, it provides motivation to move outside of the doctrine's physical / regulatory distinction and embrace a test that more closely tracks the concerns of fairness that form the foundation of takings doctrine.

---

20. *Meeker v. Belridge Water Storage Dist.*, No. 05-CV-00603, 2006 U.S. Dist. LEXIS 91775, \*55 (E.D. Cal. Oct. 18, 2006).

21. *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100 (2007).

22. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

23. *Casitas*, 76 Fed. Cl. at 106.

24. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, 556 F.3d 1329 (Fed. Cir. 2009).

25. *See Tahoe-Sierra*, 535 U.S. at 322.

26. *See* John D. Echeverria, *The Death of Regulatory Takings*, 34 *ECOLOGY L.Q.* 291, 291-94 (2007).

Such tests do exist. Previously limited to development exactions, the nexus and rough proportionality tests articulated by the Supreme Court in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*<sup>27</sup> provide a clearer means of reaching fair results and should be extended to the context of ESA-related takings claims.

I. THE CURRENT PHYSICAL / REGULATORY DISTINCTION FAILS TO PROVIDE CONSISTENT RESULTS IN ENVIRONMENTAL CASES

A. *The Current State of Affairs: Takings Doctrine after Lingle*

The Takings Clause of the Fifth Amendment provides that private property shall not “be taken for public use without just compensation.”<sup>28</sup> Made applicable to the states through the Fourteenth Amendment,<sup>29</sup> the Takings Clause does not dispute the implicit power of the sovereign to take private property, but rather conditions the exercise of that power through the “public use” and “just compensation” requirements.<sup>30</sup> The Takings Clause rightly focuses on the ability of affected property owners to secure compensation when the government interferes with their rights in pursuit of the public good.<sup>31</sup> The Supreme Court has repeatedly recognized that the clause is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>32</sup>

Attempts to animate the above policy concern have resulted in the creation of several frameworks for analyzing physical and regulatory takings claims.

1. *Physical Takings*

As recognized in *Lingle v. Chevron U.S.A., Inc.*, the “paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.”<sup>33</sup> Physical takings claims,

---

27. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Though *Lingle v. Chevron* seemingly restricts the *Nollan* and *Dolan* tests to development exactions, I argue that the doctrine should be extended to endangered species protections under the ESA. 544 U.S. 528, 546–47 (2005).

28. U.S. CONST. amend. V.

29. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 238–39 (1896).

30. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987); see also Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307, 310 (2007) (citing *United States v. Carmack*, 329 U.S. 230, 241–42 (1946)).

31. *First English*, 482 U.S. at 314.

32. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893).

33. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

including those resulting from condemnation or physical appropriations are "typically obvious and undisputed."<sup>34</sup> The magnitude of the physical invasion is irrelevant to the takings analysis.<sup>35</sup> In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court made explicit that a compensable taking arises even if the government permanently invades only a minimal portion of the claimant's land.<sup>36</sup> In reviewing a state law requiring landowners to allow the installation of cable television equipment on their rental properties, the Court observed that the question of "a taking does not depend on whether the volume of space it occupies is bigger than a breadbox."<sup>37</sup>

## 2. Regulatory Takings

The formulation of a per se rule that requires compensation in the event of any permanent physical taking is distinctly different from that applied in the event of regulatory action, where "the analysis is more complex."<sup>38</sup>

Prior to the Court's seminal decision in *Pennsylvania Coal Co. v. Mahon*,<sup>39</sup> "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession.'"<sup>40</sup> However, it became apparent as government increasingly restricted the use of private property during the early part of the twentieth century that government regulation could also result in a takings claim. The *Mahon* decision addressed this very issue. In reviewing Pennsylvania's Kohler Act requirement that coal not be mined in such a way that caused subsidence of structures used for human habitation, Justice Holmes recognized that government regulation may be so intrusive that it becomes tantamount to a direct appropriation or ouster of the owner's property, and that these

---

34. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 n.17 (2002).

35. *Id.* at 322 ("Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, or when its planes use private airspace to approach a government airport, it is required to pay for that share no matter how small." (citations omitted)).

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

37. *Loretto*, 458 U.S. at 438 n.16.

38. *Tahoe-Sierra*, 535 U.S. at 322 n.17.

39. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

40. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (citations omitted); see also William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985). But see Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far"*, 49 AM. U. L. REV. 181, 182 (1999) (arguing that an originalist analysis of the text and circumstances surrounding the ratification of the Fifth Amendment is at best equivocal regarding the theory that takings reached only physical ouster).

takings should be compensable under the Fifth Amendment.<sup>41</sup> Noting that the “[g]overnment 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,” Justice Holmes recognized that some ability to regulate was inherent in the police power.<sup>42</sup> However, this power was not unbounded. Rather, while the state may regulate property “to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>43</sup>

Determining exactly how far is “too far” has plagued courts since Justice Holmes’ enunciation of the principle. The line is more apparent in situations where a regulation completely deprives a landowner of “all economically beneficial use.”<sup>44</sup> The Supreme Court has declared that complete economic deprivation requires compensation unless the state’s “background principles of nuisance and property law” signify that the regulated behavior was always unlawful.<sup>45</sup> Short of a complete wipeout of the property’s economically beneficial use, takings claimants must instead use the multi-factor inquiry established by *Penn Central Transportation Co. v. New York*.<sup>46</sup>

The *Penn Central* decision, involving historic landmark preservation restrictions on the development of proposed office space above New York’s Grand Central Terminal, acknowledged that the Court had previously “been unable to develop any ‘set formula’ for determining when ‘justice and fairness’” require compensation.<sup>47</sup> Rather, the particular circumstances of each case required “essentially ad hoc, factual inquiries,” to determine whether a valid takings claim had been raised.<sup>48</sup> Of “several factors that have particular significance,” the Court identified three: (1) “the economic impact of the regulation on the claimant”; (2) “the extent to which the regulation has interfered with [his or her] distinct investment-backed expectations”; and (3) “the character of the

---

41. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). *But see* *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987) (finding no compensation due on substantially similar facts).

42. *Mahon*, 260 U.S. at 413; *see also* *Tahoe-Sierra*, 535 U.S. at 324 (noting that treating all regulations “as per se takings would transform government regulation into a luxury few governments could afford”).

43. *Mahon*, 260 U.S. at 415.

44. *Lucas*, 505 U.S. at 1027 (holding that the South Carolina Beachfront Management Act prohibition on the construction of permanent habitable structures rendered two parcels valueless, thus requiring the payment of compensation under the Fifth Amendment).

45. *Lucas*, 505 U.S. at 1030. *But see* *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (holding that statute prohibiting beachfront development did not deprive landowner of all economically beneficial use because upland portions retained substantial value).

46. *Penn Central Trans. Co. v. New York*, 438 U.S. 104 (1978).

47. *Id.* at 124.

48. *Id.*

governmental action."<sup>49</sup> In examining the effect of a challenged regulatory action using these factors, courts look to the "parcel as a whole,"<sup>50</sup> measured "by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest."<sup>51</sup> Though each of these factors have "given rise to vexing subsidiary questions,"<sup>52</sup> they provide guidelines for courts in determining whether regulatory actions are functionally equivalent to direct appropriation or ouster, or if they merely "adjust the benefits or burdens of public life to promote the common good."<sup>53</sup>

### 3. *Development Exactions*

The final type of regulatory actions governed by the Takings Clause are those in which the government conditions development approval on the provision of an impact fee, dedication, or payment of an exaction by the landowner. Exaction cases are analyzed by the two-part test enunciated in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.<sup>54</sup> Though discussed in greater detail below, the cases require that there be an "essential nexus" between the legitimate state interest and the permit condition imposed by the government.<sup>55</sup> If the required degree of nexus is found, then a "rough proportionality" must be shown between the impact of the proposed development and the exaction demanded by the government's permit condition.<sup>56</sup> Government conditions that violate either of these prongs are deemed compensable takings under the Fifth Amendment.<sup>57</sup>

---

49. *Id.* at 124–25.

50. *Id.* at 130–31.

51. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331–32 (2002).

52. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005). Prior to *Lingle*, as many as nine different definitions had been used for the "character" component of the test. After *Lingle*, they were whittled down to merely "two discrete, narrow definitions of character, and two more general definitions." John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 203 (2005).

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

54. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

55. *Nollan*, 483 U.S. at 837.

56. *Dolan*, 512 U.S. at 388–90.

57. Prior to these decisions, government exactions were analyzed through the "substantially advances" due process inquiry espoused in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Although both *Nollan* and *Dolan* quoted the *Agins* language, the Supreme Court's emphatic rejection of due process inquiry with respect to Fifth Amendment takings claims in *Lingle* confined exaction analysis to the "doctrine of unconstitutional conditions." *Lingle*, 544 U.S. at 547; see also *infra* text accompanying note 137; Lauren Reznick, Note, *The Death of Nollan and Dolan? Challenging the Constitutionality of Monetary Exactions in the Wake of Lingle v. Chevron*, 87 B.U. L. REV. 725, 748 (2007); Daniel Pollack, In Brief, *Regulatory Takings*:

4. *The Distinction between the Doctrines: Physical and Regulatory Takings and the Impact of “Parcel as a Whole”*

While the above tests comprise various frameworks used by courts in analyzing takings claims under the Fifth Amendment,<sup>58</sup> it is important to remember the distinction between physical and regulatory takings enunciated by Justice Stevens in his *Tahoe-Sierra* opinion.<sup>59</sup> Examining the constitutionality of a development moratorium in the Lake Tahoe region of California and Nevada, the Court reiterated the distinction between physical and regulatory takings. In cases concerning permanent physical invasions, the Court held that compensation is required regardless of the degree or extent of the invasion.<sup>60</sup> In contrast, regulatory takings must instead look to the “parcel as a whole” as identified by the *Penn Central* Court.<sup>61</sup> This focus on the “effect of the regulation on the property as a whole, both geographically and temporally,”<sup>62</sup> is frequently the basis of decisions denying compensation in regulatory takings cases.<sup>63</sup> For plaintiffs, the requirement that a regulatory taking be analyzed under the “parcel as a whole” rule frequently means that they will be unable to support their just compensation claims for onerous, but less than total, takings.<sup>64</sup> As noted by the *Penn Central* Court, a reduction of the vast majority of a property’s value alone is insufficient to support a regulatory takings claim.<sup>65</sup> As discussed later, the Casitas Municipal Water District (Casitas) conceded that it “could not prevail under the regulatory takings

---

*The Supreme Court Tries to Prune Agins Without Stepping on Nollan and Dolan*, 33 ECOLOGY L.Q. 925, 925 (2006).

58. See Reznick, *supra* note 57, at 748 (noting that the *Lingle* decision was the first time that the identified takings tests enjoyed the support of a unanimous Court).

59. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321 (2002).

60. *Id.* at 322 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). As noted by Professor Andrea Peterson, this extends to partial invasions of property. Andrea L. Peterson, *The False Dichotomy between Physical and Regulatory Takings Analysis: A Critique of Tahoe-Sierra’s Distinction between Physical and Regulatory Takings*, 34 ECOLOGY L.Q. 381, 387 (2007).

61. *Tahoe-Sierra*, 535 U.S. at 327 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978)).

62. Peterson, *supra* note 60, at 388.

63. See *Tahoe-Sierra*, 535 U.S. at 331.

64. See Parobek, *supra* note 19, at 214 (arguing that in *Tulare*, “[h]ad the regulatory takings three-tiered test been employed, it is highly unlikely that the Court would have found a compensable taking”).

65. *Penn Central*, 438 U.S. at 131 (noting that diminution in values of 75 percent and 87.5 percent were insufficient to support the takings claims in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) respectively); see also *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (94 percent diminution of between pre- and post-regulation values insufficient to support a takings claim).

framework” as only a minimal proportion of water would be diverted by its fish ladder facility.<sup>66</sup>

The interaction between the strict per se rules of physical takings and the more flexible balancing approach of regulatory takings, coupled with the “parcel as a whole” rule, frequently means that the choice of framework for analyzing a particular problem becomes determinative. While the determinative nature of a doctrine is not problematic in and of itself,<sup>67</sup> by focusing solely on the nature of the challenged government action, current takings analysis moves away from the Fifth Amendment’s underlying fairness and equity concerns, as expressed by *Armstrong*.<sup>68</sup> The choices left to courts are then to endorse either unfair results or inconsistent reasoning. The tension is particularly evident in cases involving ESA protections because they often contain elements of both regulatory and physical action.

## II. CASITAS MUNICIPAL WATER DISTRICT V. UNITED STATES

The Federal Circuit decision in *Casitas Municipal Water District v. United States* attempts to clarify the treatment of Fifth Amendment takings claims with respect to water rights, ultimately relying on the physical takings doctrine to determine that an impermissible taking had occurred.<sup>69</sup> Casitas operates the Ventura River Project (the Project) on behalf of the United States Bureau of Reclamation (BOR).<sup>70</sup> In 1956, Congress authorized the construction of the Project to provide water for irrigation and municipal, domestic, and industrial uses to Ventura County, California, through a system of dams, reservoirs, canals, pipelines, and pumping stations.<sup>71</sup> The United States completed construction in 1959 and transferred operation to Casitas pursuant to contract, providing Casitas the “perpetual right to use all water that becomes available through the construction and operation of the Project” in exchange for repayment of the construction costs over a forty-year period, as well as the operation and maintenance expenses.<sup>72</sup>

---

66. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1283 (Fed. Cir. 2008), *reh’g denied*, 556 F.3d 1329 (Fed. Cir. 2009).

67. See Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002).

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

70. *Casitas*, 543 F.3d at 1280.

71. *Id.*

72. *Id.* at 1281–82.

In August 1997, the National Marine Fisheries Service (NMFS) listed the West Coast steelhead trout as an endangered species.<sup>73</sup> As a result of this determination, it became unlawful under section 9 of the ESA “for any person subject to the jurisdiction of the United States to . . . take any such [endangered species] within the United States.”<sup>74</sup> In order to ensure that any action authorized, funded, or carried out by the agency would not jeopardize the continued existence of the steelhead, Casitas requested that the BOR initiate informal consultation with NMFS pursuant to section 7 of the ESA.<sup>75</sup> The result of these consultations was a Biological Opinion approving the construction of a fish ladder facility and the adoption of revised operating criteria.<sup>76</sup> The fish ladder facility consists of fish screens, a fishway, fish bypass channels, and stone weirs located at the Robles diversion dam and canal.<sup>77</sup> The revised operating criteria also prescribed an increase in downstream flow to support fish migration and downstream habitat. Taken together, the Biological Opinion required annual diversions of water that otherwise would have flowed through Robles-Casitas Canal and ultimately into Casitas Reservoir.<sup>78</sup>

Casitas filed suit in January 2005 alleging that the fish ladder construction and water diversions constituted a breach of contract and a compensable Fifth Amendment takings claim.<sup>79</sup> The United States moved for summary judgment on the breach of contract claim, contending that the actions were not reimbursable under the contract and, even if breached by the government, the sovereign acts doctrine shielded them

---

73. Endangered and Threatened Species: Listing of Several Evolutionary Significant Units (ESUs) of West Coast Steelhead, 62 Fed. Reg. 43,937 (Aug. 18, 1997).

74. 16 U.S.C. § 1538(a)(1) (2006).

75. *Id.* § 1536(a)(2).

76. NAT'L MARINE FISHERIES SERV., BIOLOGICAL OPINION: AUTHORIZATION FOR THE CONSTRUCTION AND FUTURE OPERATION OF THE ROBLES DIVERSION FISH PASSAGE FACILITY 8 (2003) [hereinafter STEELHEAD BIOP], available at <http://swr.nmfs.noaa.gov/robles.pdf>; see also 16 U.S.C. § 1536(b)(3)(A). The Biological Opinion determines whether the proposed action will either jeopardize the continued existence of the species or result in adverse modification of its habitat. If so, then reasonable and prudent alternatives that would not result in jeopardy or adverse modification must be adopted. *Id.* The reasonable and prudent alternative need not be the one which best protects the species, but is only required to avoid jeopardy. See *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998). If the proposed action will not cause jeopardy or adverse modification, the agency deems its impact on the species “incidental” and the agency action can proceed without violating section 7. See *Nat'l Wildlife Fed'n v. Nat' Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008).

77. STEELHEAD BIOP, *supra* note 76.

78. *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100, 102 (2007); see STEELHEAD BIOP, *supra* note 76, at 6–13.

79. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 2182 (Fed. Cir. 2008), *reh'g denied*, 556 F.3d 1329 (Fed. Cir. 2009).

from liability.<sup>80</sup> The government also moved for partial summary judgment on the takings claim, alleging that the fish ladder facility and diversion of water resources was a regulatory, rather than a physical, taking and should be analyzed under the balancing test laid out in *Penn Central*.<sup>81</sup> Judge Wiese, at the Court of Federal Claims, agreed with the United States, and granted both motions.<sup>82</sup> Casitas appealed.

The Federal Circuit issued its panel decision on September 25, 2008, affirming in part the trial court’s decision with respect to the breach of contract claim and reversing with respect to the takings claim.<sup>83</sup> The Federal Circuit held that the claim was more properly analyzed as a physical, rather than regulatory, taking under existing precedent.<sup>84</sup> After distinguishing between the tests for physical and regulatory takings, the court determined that a trilogy of Supreme Court cases dictated the appropriate framework for analyzing water rights takings.<sup>85</sup> The cases, *International Paper Co. v. United States*, *United States v. Gerlach Live Stock Co.*, and *Dugan v. Rank*, all involved claims that the government caused water to be physically diverted from the plaintiff’s property and dedicated to government or third party use.<sup>86</sup> In its brief, the government advanced the argument that, rather than diverting water from Casitas, it merely restricted the use of natural resources by requiring that water be left in the stream.<sup>87</sup> The court disagreed, finding the government’s admissions for purposes of summary judgment—that Casitas was required to construct the fish ladder facility and that the water diverted to the ladder reduced the amount available to Casitas—did not “merely require some water to remain in the stream, but instead actively caused the physical diversion of water away” from the Project.<sup>88</sup> “The water, and

---

80. *Casitas Mun. Water Dist. v. United States*, 72 Fed. Cl. 746 (2006).

81. *Casitas*, 76 Fed. Cl. at 101 (citing *Penn Central Trans. Co. v. New York*, 438 U.S. 104 (1978)).

82. *Casitas*, 72 Fed. Cl. at 746 (granting summary judgment on the breach of contract claim); *Casitas*, 76 Fed. Cl. at 100 (granting partial summary judgment on the takings claim).

83. *Casitas*, 543 F.3d at 1280–81.

84. *Id.* at 1289–90.

85. *Id.*

86. *Int’l Paper Co. v. United States*, 282 U.S. 399 (1931) (finding a taking when a wartime requisition by the United States for increased hydroelectric power production caused the diversion of water from a paper mill for a nine month period); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (finding a physical taking requiring compensation under the Reclamation Act when the construction of an upstream dam ceased overflow irrigation of downstream lands); *Dugan v. Rank*, 372 U.S. 609 (1963) (finding a physical taking when the same dam as in *Gerlach* left insufficient water to supply downstream landowners’ water rights).

87. Brief of Appellee the United States at 45, *Casitas*, 543 F.3d 1276 (Fed. Cir. 2008) (No. 2007-5153).

88. *Casitas*, 543 F.3d at 1291.

Casitas' right to use that water, [was] forever gone," resulting in a physical taking.<sup>89</sup>

Additionally, the government argued that the Project should be distinguished from the trilogy of Supreme Court cases because the diverted water was not appropriated by the United States for its own or a third party's use.<sup>90</sup> Relying on congressional findings in the ESA, however, the court determined that the preservation of habitat "is for government and third party use—the public—which serves a public purpose."<sup>91</sup> As such, the Project was governed by the trilogy of Supreme Court cases.

Finally, the government argued that if the physical diversion of water was indeed a taking, it would have been carried out under the more obvious exercise of the government's eminent domain powers rather than through the less obvious means of regulation, as recognized by *Tahoe-Sierra*.<sup>92</sup> The court also found this argument unpersuasive, noting that, in the trilogy of Supreme Court water rights cases, the "obviousness" of a physical taking was less apparent than the government contended.<sup>93</sup> The court further noted that the recent *Tahoe-Sierra* decision did not concern claims of physical taking or water rights. Additionally, the *Tahoe-Sierra* decision did not "overrule, modify, or even mention" the trilogy of Supreme Court water rights cases, preserving their precedential value.<sup>94</sup> Distinguishing the temporary moratorium restricting the development of land surrounding Lake Tahoe from the permanent diversion of water by the fish ladder, the court characterized the government action as a physical diversion for public use, extinguishing Casitas's right to use the water forever.<sup>95</sup>

A strongly worded dissent criticized the majority's characterization of the fish ladder diversion as a physical taking. Recognizing that Casitas only possessed a usufructuary interest in the water, the dissent observed that it was "difficult to imagine how its property interest in the water could be physically invaded or occupied."<sup>96</sup> Additionally, the dissent noted that the United States could neither "make proprietary use of the water denied to Casitas by the ESA, nor . . . divert Casitas's use rights to a third party."<sup>97</sup> In situations where the property could not physically be

---

89. *Id.* at 1294.

90. *Id.* at 1292.

91. *Id.* at 1293–94.

92. *Id.* at 1293 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002)).

93. *Casitas*, 543 F.3d at 1293.

94. *Id.* at 1296.

95. *Id.* at 1294.

96. *Id.* at 1298 (Mayer, J., dissenting in part).

97. *Id.*

invaded and where the government did not make proprietary use of the property or transfer it to a third party, the claim of physical taking was inapposite.<sup>98</sup> Rather, the dissent characterized the government action as the imposition of regulatory operating criteria restricting Casitas’s use of the water by requiring that a portion of the diverted water be returned to its natural flow.<sup>99</sup> This characterization required that the multi-factor *Penn Central* regulatory takings inquiry control the decision.<sup>100</sup>

The government’s subsequent petition for rehearing and rehearing en banc was denied in February 2009 with the concurrence and dissent again disputing the appropriate framework for reviewing water takings claims under the Fifth Amendment.<sup>101</sup>

#### A. *What Was Left Out and Why It Matters*

The Federal Circuit opinions did not have the opportunity to touch on several key takings analysis issues, particularly the contours of Casitas’s usufructuary right to divert the Ventura River water and what it means to “appropriate” that right.<sup>102</sup> Clearly defining these terms is particularly important for two reasons. First, as noted by Circuit Judge Haldane Mayer’s dissent to the panel decision, it is doubtful that Casitas owns the diverted water “because all water sources within California belong to the public.”<sup>103</sup> California recognizes a dual system of riparian and appropriative water rights, subject to the public trust and reasonable use doctrines.<sup>104</sup> These doctrines include the consideration of “the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources,” making it unlikely that

---

98. *Id.*

99. *Id.* at 1299–1300.

100. *Id.* at 1297.

101. *Casitas Mun. Water Dist. v. United States*, 556 F.3d 1329 (Fed. Cir. 2009). The Federal Circuit decisions hold particular precedential weight for several reasons. First, decisions by the Federal Circuit are binding on the Court of Federal Claims, which hears the vast majority of federal takings cases pursuant to the authority granted by the Tucker Act. *See* 28 U.S.C. § 1491 (2006). Second, as Robert Meltz notes, because so “few takings cases are appealed from the Federal Circuit to the U.S. Supreme Court, the Federal Circuit has a leading role in articulating takings law in the many areas where the High Court has not yet spoken.” ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION* 43 (1999).

102. The Supreme Court has been especially opaque in defining the type of property protected by the Takings Clause, alternately arguing that property consists of tangible property or economically valuable legal rights. *See generally* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II – Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53, 61–77 (1990).

103. *Casitas*, 543 F.3d at 1297 (citing CAL. WATER CODE §§ 102, 1001 (West 2008)).

104. For a concise history of the development of the California water rights system, see generally *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *see also* SCOTT S. SLATER, *CALIFORNIA WATER LAW AND POLICY* §§ 1.11, 2.01–.07 (2009).

Casitas could defend an exclusive usufructuary right.<sup>105</sup> However, the government's concession, for purposes of summary judgment, that Casitas had a valid property right in the diverted water under California law precluded this discussion.<sup>106</sup>

Second, both the initial panel discussion and the later petition for rehearing and rehearing en banc focused on whether the revised operating criteria and fish ladder facility requirements "appropriated" Casitas's water.<sup>107</sup> "Appropriate" is alternately defined as to either "take exclusive possession" or to "set apart for or assign to a particular purpose or use."<sup>108</sup> It is vitally important to distinguish between these definitions, for while it is difficult to imagine how to possess exclusively a usufructuary right, it seems less problematic to assign that right to a particular use. The majority, concurrence, and dissent all failed to clarify what appropriation means in the context of Fifth Amendment takings claims.<sup>109</sup> Though the issue is open to consideration on remand, a finding that Casitas did not possess a valid property right could turn these decisions into an elaborate, and particularly expensive, intellectual exercise.

As a result, the *Casitas* decision currently allows analysis of a government regulatory action under a physical takings framework when the action results in the appropriation of the plaintiffs' property. The current distinction between physical and regulatory takings as enunciated in *Tahoe-Sierra* provides an unworkable framework in situations where the line blurs between physical and regulatory action. The distinction, in which mere classification of an action as either physical or regulatory is determinative, encourages opaque judicial decision making in an attempt to reach just and fair results. The Court should instead look to the fundamental principles of fairness and equity that animate the Fifth Amendment's prohibition on the taking of private property for public use without just compensation.

### III. *NOLLAN'S* AND *DOLAN'S* EXACTION APPROACH PROVIDES A SOLUTION

Much like the endangered species protections described above, development exactions are not naturally located within the current physical and regulatory takings jurisprudence. The numerous forms of development exactions include "land or easement dedications for schools, parks, or trails; impact fees to defray the cost of increased traffic or

---

105. CAL. WATER CODE §§ 1243 (West 2008); *see also id.* § 1257.

106. *Casitas*, 543 F.3d at 1288; *Casitas*, 556 F.3d at 1331 (Mayer, J., concurring).

107. *Casitas*, 543 F.3d at 1290; *Casitas*, 556 F.3d at 1332 (Mayer, J., concurring).

108. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 61 (11th ed. 2003).

109. *Casitas*, 543 F.3d at 1276.

facility usages; purchase or donation of equipment or off-site parcels for public use; and linkage fees to finance affordable housing for the employees of incoming commercial tenants."<sup>110</sup>

The varying forms of exactions, and their associated government actions, present special challenges for courts trying to apply the appropriate takings test. A recent case is telling. In *Rogers Machinery, Inc. v. Washington County*, the Oregon Court of Appeals considered a traffic impact fee assessed under a Washington County ordinance by the city of Tigard.<sup>111</sup> At the beginning of its analysis, the court observed that "[e]xactions do not fit neatly within the more conventional Takings Clause analytical construct."<sup>112</sup> The court noted that the physical takings doctrine under the Fifth Amendment was "particularly protective" of property interests, while the regulatory takings doctrine was much less so.<sup>113</sup> Development exaction cases frequently contain elements of both types of takings claims. When an exaction case concerns a regulatory use restriction on further development, "such a restriction [] trigger[s] a lenient takings standard" under the regulatory framework.<sup>114</sup> However, if "as a condition for relaxing the use restriction, the government required the property owner to suffer a physical occupation or invasion," the exaction would implicate physical takings analysis.<sup>115</sup>

The *Nollan/Dolan* test resolves this dilemma by moving beyond the physical and regulatory analytical distinction and focusing on the fairness of the government restriction. In doing so, it effectuates the balancing of public and private interests that underlie the fairness concerns of the Fifth Amendment, a balancing that is notably absent from the current physical/regulatory framework.

#### A. Nollan: *The Essential Nexus Requirement*

The first of the Supreme Court's exaction cases, *Nollan v. California Coastal Commission*, established that when the government conditions the grant of a development permit on the dedication of a public easement, the exaction constitutes a taking unless there is an essential nexus between the proposed condition and the legitimate state interest being advanced through the development ban.<sup>116</sup>

---

110. D.S. Pensley, Note, *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 CORNELL L. REV. 699, 700 (2006).

111. *Rogers Mach., Inc. v. Washington County*, 45 P.3d 966 (Or. Ct. App. 2002). Tigard is the same city that assessed the fee at issue in *Dolan*.

112. *Rogers Mach.*, 45 P.3d at 973.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

In *Nollan*, James and Marilyn Nollan attempted to obtain a coastal development permit in order to replace their small, oceanfront bungalow with a three-bedroom home similar to those already in the neighborhood.<sup>117</sup> After the California Coastal Commission (Commission) approved their permit subject to a deed restriction granting a lateral easement across their property, the Nollans appealed to the Ventura County Superior Court alleging that the permit condition was not supported by sufficient evidence of the development's impact.<sup>118</sup> On remand, the Commission justified the easement on the grounds that the Nollans' development would block views of the ocean, creating a psychological barrier to coastal access, while also increasing private use of the beach.<sup>119</sup> After the Superior Court again invalidated the easement condition, the California Court of Appeal reversed and reinstated the Commission decision. The Nollans subsequently appealed to the U.S. Supreme Court.<sup>120</sup>

Justice Scalia, writing for the Court, declined to treat the development exaction as a per se physical taking. He observed that:

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.<sup>121</sup>

The Court then considered whether requiring the conveyance of the easement as a permit condition altered the outcome.<sup>122</sup> Acknowledging the Commission's police power to deny a permit to protect visual access to the coastline, the Court reasoned that this power also included the lesser power to condition the granting of the permit.<sup>123</sup> Given the state's legitimate interest in preventing individuals from impairing the public's visual access, the Commission could have attached a "height limitation, a width restriction, or a ban on fences," even going so far as to require "the Nollans [to] provide a viewing spot on their property for passersby."<sup>124</sup> The constitutional problem arose, however, when the "condition substituted for the prohibition utterly fail[ed] to further the end advanced

---

117. *Id.* at 827–28.

118. *Id.* at 828.

119. *Id.* at 828–29.

120. *Id.* at 829–31. During this time period, the Nollans exercised their purchase option by demolishing the bungalow and constructing the new home, all without notifying the Commission. *Id.* at 830.

121. *Id.* at 831.

122. *Id.* at 834.

123. *Id.* at 836.

124. *Id.*

as the justification for the prohibition."<sup>125</sup> The lateral beach access requirement did nothing to reduce visual obstructions to the beach.<sup>126</sup> The lack of nexus between the easement and the purpose of the restriction therefore converted the condition from a valid land use regulation to an "out-and-out plan of extortion."<sup>127</sup> Thus, where a nexus between regulation and purpose is absent, development exactions become takings under the Fifth Amendment.

*B. Dolan: The Rough Proportionality Requirement*

Following the *Nollan* decision, state and federal courts struggled to determine what degree of connectedness was required to find an essential nexus. The Supreme Court resolved the issue in a similar development exaction case.

In *Dolan v. City of Tigard*, the Court addressed the question of "[h]ow much of a connection is necessary between the exaction by the city and the likely impact of the proposed development?"<sup>128</sup> The central business district zoning in Tigard included open space and landscaping requirements, as well as a requirement that proposed developments facilitate pedestrian and bicycle pathways.<sup>129</sup> Florence Dolan, the owner of a plumbing and electrical supply store within the central business district zoning area, sought to redevelop the site by increasing the size of her store, paving additional parking spaces, and building an additional structure.<sup>130</sup> As a portion of her property was bounded by the Fanno Creek floodplain, the City Planning Commission (Planning Commission) approved her permit subject to the conditions that she dedicate roughly 10 percent of her parcel to satisfy the development plan's storm drainage and pedestrian/bicycle pathway requirements.<sup>131</sup>

Dolan sought variances from these conditions from the Planning Commission, arguing that her development plan did not conflict with the city's zoning requirements.<sup>132</sup> The Planning Commission denied her request, finding that the pedestrian/bicycle dedication was a reasonable response to the increased customer and employee traffic generated by

---

125. *Id.* at 837.

126. *Id.* at 838–39.

127. *Id.* at 837 (quoting *J. E. D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14–15 (N.H. 1981)).

128. Jane C. Needleman, Note, *Exactions: Exploring Exactly When Nollan and Dolan Should Be Triggered*, 28 *CARDOZO L. REV.* 1563, 1568 (2006) (citing *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994)).

129. *Dolan*, 512 U.S. at 377.

130. *Id.* at 379.

131. *Id.* at 379–80.

132. *Id.* at 380–81.

her development.<sup>133</sup> Further, the paving of additional parking spaces would increase the impervious surface area of the parcel and lead to a corresponding increase in storm drainage, mitigated by the floodplain dedication.<sup>134</sup> After denying Dolan's appeal that the exaction was not related to her development and thus resulted in a taking under the Fifth Amendment, the Oregon Court of Appeals and the Oregon Supreme Court affirmed the decision of the Land Use Board of Appeals.<sup>135</sup> Dolan then appealed to the U.S. Supreme Court.

Writing for the Court, Chief Justice Rehnquist cited *Nollan*, noting that if Tigard flatly required dedication of even part of Dolan's land, it would unquestioningly have been a taking, while exaction of the same dedication could avoid the Takings Clause.<sup>136</sup> The Court noted that an exaction could not create an "unconstitutional condition" requiring a "person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."<sup>137</sup>

In response to Dolan's contention that the city forced her to choose between just compensation and the building permit, the Court introduced a two-prong test for determining the required extent of the relationship between the exaction and the property needed to find a taking.<sup>138</sup> Unconstitutional conditions are first examined under *Nollan* to determine if there is an essential nexus between the permit condition and the "legitimate state interest."<sup>139</sup> In *Dolan*, the Court found that both the floodplain development restrictions and pedestrian/bicycle pathway conditions were justified given the city's legitimate concern for flood prevention and traffic control.<sup>140</sup>

Upon finding a nexus between the permit conditions and the city's interest, the Court then examined state court decisions to determine what degree of relationship must exist between the permit conditions and the projected impact of the development. The Court rejected a standard that allowed the government to make "very generalized statements as to the necessary connection between the required dedication and the proposed

---

133. *Id.* at 381–82.

134. *Id.* at 382.

135. *Id.* at 382–83.

136. *Id.* at 384–85.

137. The requirement that person exchange a constitutional right for a discretionary benefit is known as the "Unconstitutional Conditions" Doctrine. *Id.* (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)).

138. *Dolan*, 512 U.S. at 385–86.

139. *Id.* at 386.

140. *Id.* at 387–88.

development" as "too lax."<sup>141</sup> A "specific and uniquely attributable" test was rejected for being too "exacting . . . given the nature of the interests involved."<sup>142</sup> The Court finally settled on an "intermediate position" closer to the "federal constitutional norm" that required municipalities "to show a 'reasonable relationship' between the required dedication and the impact of the proposed development."<sup>143</sup> In order to avoid confusion with rational basis scrutiny under the Equal Protection Clause, the Court determined that the rough proportionality test "best encapsulates what we hold to be the requirement of the Fifth Amendment."<sup>144</sup>

Applying the test in *Dolan*, the Court determined that there was no rough proportionality between the impact of the proposed development and the required dedications.<sup>145</sup> With respect to the floodplain dedication, the Court agreed that the development would increase the quantity of storm water flow, but saw no reason for the dedication of a public easement when a private development restriction, such as that already required by the city, would satisfy the city's concerns.<sup>146</sup> With respect to the pedestrian/bicycle pathway, the Court determined that the city had not met its burden of showing that the increased traffic caused by Dolan's development was roughly proportional to the amount of traffic offset by the easement.<sup>147</sup> Noting that "no precise mathematical calculation" was required, Rehnquist stressed that the city "must make some effort to quantify its findings" to support a claim that the permit condition is roughly proportional to the impact of the proposed development.<sup>148</sup>

Commentators note that *Dolan* appears to require three determinations by the municipality before rough proportionality can be found between the proposed exaction and the projected development.<sup>149</sup> First, the government bears the burden of proving rough proportionality,

---

141. *Id.* at 389 (citing *Billings Props, Inc. v. Yellowstone County*, 394 P.2d 182 (Mont. 1964); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (N.Y. 1966)).

142. *Dolan*, 512 U.S. at 389–90 (citing *Pioneer Trust & Savings Bank v. Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961)).

143. *Dolan*, 512 U.S. at 390–91 (citing *Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980);

*Jordan v. Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965); *Collis v. Bloomington*, 246 N.W.2d 19 (Minn. 1976); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807 (Tex. 1984); *Call v. W. Jordan*, 606 P.2d 217, 220 (Utah 1979); Nicholas V. Morosoff, Note, "'Take' My Beach Please!": *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823 (1989); *Parks v. Watson*, 716 F.2d 646, 651–53 (9th Cir. 1983)).

144. *Dolan*, 512 U.S. at 391.

145. *Id.* at 394–95.

146. *Id.* at 393–94.

147. *Id.* at 395.

148. *Id.* at 395–96.

149. Needleman, *supra* note 128, at 1569, 1590 n.42 (citing Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U. L. REV. 513, 537 (1995)).

where it had previously been placed on the takings claimant.<sup>150</sup> Second, the government must make an individualized determination of the relationship.<sup>151</sup> Third, the government must make an effort to quantify its findings.<sup>152</sup> In doing so, the *Nollan/Dolan* exaction tests require the government to articulate clearly the harm a particular exaction seeks to mitigate and to balance fairly this mitigation with the protection of private property.

#### IV. CASITAS THROUGH THE *NOLLAN/DOLAN* LENS

Given the difficulties experienced by courts in applying both the physical and regulatory takings frameworks in the context of endangered species protection, and the inability of these theories to adequately provide workable guidelines for judicial decision making, the desire for a more suitable test is particularly strong. Though previously limited to government exactions, the unconstitutional conditions doctrine expressed by the essential nexus and rough proportionality standards in the Supreme Court's *Nollan* and *Dolan* decisions effectively articulate the fairness goals underlying contemporary takings jurisprudence. Extending these tests to the endangered species context, especially when water rights are at issue, ensures that the government clearly articulate the expected harm and closely tailor the solution to the demands placed on the affected party. When these demands exceed the need for protection, the payment of compensation ensures the realization of *Armstrong's* command that no individual bear alone what is otherwise a public burden.<sup>153</sup>

##### A. *Some Initial Matters: When to Apply the Unconstitutional Conditions Doctrine*

First, as noted earlier, the unconstitutional conditions doctrine disallows exactions where the government requires a "person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."<sup>154</sup> Inherent in this construction is the requirement that an individual actually seek a government benefit. In the ESA context, this

---

150. *Dolan*, 512 U.S. at 391 n.8.

151. *Id.* at 391.

152. *Id.* at 395.

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

154. *Dolan*, 512 U.S. at 385 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). *But see* *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) ("But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

likely occurs either when an individual seeks approval to initiate a project or when changed circumstances require a permit for continued operation of an existing facility, as in *Casitas*.

Second, there is a strong presumption against the retroactive application of a statute to existing facilities.<sup>155</sup> This presumption is founded on the idea that government should minimize the disturbance of settled expectations that are based on current law. In fact "people are entitled to, and should, govern their behavior according to the existing rules."<sup>156</sup> As relates here, *Casitas* may argue that the initial approval of the Project without a fish ladder facility, and its continued operation during the following forty years, prevents the disturbance of their settled expectations. This argument, however, is unconvincing. *Casitas* was aware of the need to protect fish populations at the time of construction.<sup>157</sup> The California Department of Fish and Game pressed for the inclusion of a fish ladder in the initial construction plans, relenting only upon receiving assurances that one would be constructed if later deemed necessary.<sup>158</sup> Additionally, the 1973 passage of the ESA further emphasized the national desire to protect threatened and endangered species, providing *Casitas* notice of the possible effects of species protection on the Project's continued operation.<sup>159</sup> Finally, as the court noted, "*Casitas* recognized that once the West Coast steelhead trout was listed as endangered, *Casitas* and its officers could be subject to civil and criminal liability for continuing to operate the Project in the absence of an incidental take permit."<sup>160</sup> Each of these events undermines *Casitas*'s potential argument that its settled expectations about the continued operation of the Project should exclude application of the unconstitutional conditions doctrine.

---

155. *U.S. Fid. & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) (noting the general rule that the "presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other").

156. Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. LAW 1, 14–15 (2003). Though settled expectations are not entitled immunity from disturbance, there is a sense that individuals should receive sufficient notice of changes so that they may either comply or challenge the requirement. *See id.* at 9–11 (citing the variety of theories about the role of notice in takings analysis articulated by the separate opinions in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)).

157. *Casitas Mun. Water Dist. v. United States*, 72 Fed. Cl. 746, 748 (2006).

158. *Id.* at 748 (noting that the Department only acquiesced when it received the "plaintiff's written assurance that 'if and when [the] need develops our District will cooperate fully with your Department toward the installation of an adequate fish ladder'").

159. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

160. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1285 (2008), *reh'g denied*, 556 F.3d 1329 (Fed. Cir. 2009).

Finally, incidental take permits, such as the one Casitas applied for, provide the ideal opportunity to apply the unconstitutional conditions doctrine to ensure that the government fairly balance the harm avoided with the required conditions. Should the party accept the imposed conditions, it may proceed without further interference.<sup>161</sup> If the party believes that the permit condition is unfair, then the denial of the permit provides the ripeness necessary to challenge the condition and a sufficient record for judicial review.<sup>162</sup>

*B. Demonstrating the Essential Nexus in ESA Protection Takings*

The first step of the *Nollan / Dolan* analysis asks whether there is an essential nexus between the permit condition and a legitimate state interest.<sup>163</sup> In the case of endangered species protections, section 2 provides that the purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such endangered species and threatened species.”<sup>164</sup> As elaborated in *Tennessee Valley Authority (TVA) v. Hill*, the language, legislative history, and structure of the ESA show that “Congress intended endangered species to be afforded the highest of priorities.”<sup>165</sup> The language “admits of no exception.”<sup>166</sup> The listing, pursuant to section 4, of the West Coast steelhead trout by NMFS on August 18, 1997, supports the government’s view that the protection of the species is a legitimate state interest.<sup>167</sup>

The imposed condition—the construction of the Casitas fish ladder facility and imposition of the revised operating criteria—must then be

---

161. Cf. Jennie L. Bricker & David E. Filippi, *Endangered Species Act Enforcement and Western Water Law*, 30 ENVTL. L. 735, 767 (2000).

162. Though outside the scope of this Note, “a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a *final decision* regarding the application of the regulations to the property at issue.” *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (emphasis added). The ripeness requirements also serve to limit the parties and interests and provide an adequate administrative record for review in an adjudicative context. Cf. Pensley, *supra* note 110, at 709 (discussing the “rough proportionality” test in the context of legislative and adjudicative determinations).

163. *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994).

164. 16 U.S.C. § 1531(b) (2006).

165. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

166. *Id.* at 173; see also Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say about Whether Restrictions on Private Property to Protect Them Constitute “Takings”?*, 80 IOWA L. REV. 297, 306 (1995) (“the government’s strong interest in [ESA] protection is incontrovertibly a valid public purpose”).

167. See *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100, 102 (2007). Listing under section 4 is the first step toward achieving the government’s conservation goals under the ESA.

shown to advance this state interest. Alternatively, it may be shown that the operation of the Project in the absence of the condition would “substantially impede these purposes.”<sup>168</sup> Casitas understood that continued operation of the Project would frustrate the government’s interest in protecting the steelhead trout by continuing to harm the species. In the Court of Federal Claims, Judge Wiese observed that:

Casitas itself was concerned about the adverse effects of the project’s operation on the steelhead population in the watershed and began planning for impending federal ESA requirements. Casitas ultimately joined with a number of its local water users to create a Habitat Conservation Plan to minimize the water supply impacts of listing the steelhead trout as an endangered species.<sup>169</sup>

After several years of continued consultation between Casitas, NMFS, and the BOR, the Final Biological Opinion, issued on March 31, 2003, reflects the nexus between the construction of the fish ladder facility, the revised operating criteria, and the government’s legitimate interest in preservation of the species. The opinion “concluded that construction of the fish passage facility as designed, together with a new set of operating criteria to facilitate upstream and downstream passage of the fish, *were necessary to avoid jeopardy* to the steelhead trout.”<sup>170</sup> Showing a clearly elaborated and statutorily endorsed purpose, in conjunction with the stipulated fish ladder’s ability to achieve that purpose, is more than sufficient to support a finding of an essential nexus. Like the *Nollan* court observed, “[w]hatever may be the outer limits of ‘legitimate state interests’ in the takings and land-use context, this is not one of them.”<sup>171</sup>

The *Nollan* test ensures that the government clearly articulates the harm to be prevented and how the mitigation measures act as a solution. Under what circumstances then may endangered species protection measures not be found to constitute an essential nexus, given the structural requirements of the ESA? Though the consultation requirement of ESA section 7 may render this a rare scenario, the *Nollan* test ensures that the government clearly identifies the harm a particular condition seeks to mitigate.<sup>172</sup> Attempts by the government to obtain additional rights or property under the guise of species protection will be limited insofar as the measures adopted will not effectuate the state’s interest. For example, the government may attempt to obtain a

---

168. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 835 (1987).

169. *Casitas Mun. Water Dist. v. United States*, 72 Fed. Cl. 746, 748 (2006).

170. *Id.* at 749 (emphasis added).

171. *Nollan*, 483 U.S. at 837.

172. The comprehensive guidelines for cooperation under section 7 require a significant exchange of information between parties. *See* Interagency Cooperation — Endangered Species Act of 1973, 50 C.F.R. §§ 402.01–.48 (2008).

conservation easement for a large tract of land under the guise of protecting an endangered species with a range limited to only a portion of the tract. Unless the government can show that the easement results in the likely protection of the species, the proposed action will fail the *Nollan* test as a threshold matter.

If the proposed measure does not fail the essential nexus requirement, the court would then apply the *Dolan* standard.

### C. Proving Rough Proportionality

Once the essential nexus between the state's interest in protecting the steelhead trout and the Project's fish ladder and revised operating criteria is established, *Dolan's* rough proportionality requirement ensures that the proposed condition is closely tailored to the prevention of harm. Determining rough proportionality is a three-step test: first, *Dolan* places the burden of proof on the government in exaction cases;<sup>173</sup> second, the state must make an individualized determination of the relationship between the condition and state interest;<sup>174</sup> finally, the state must make an effort to quantify its findings.<sup>175</sup>

In a challenge to a proposed action under *Dolan*, the responsible agency bears the burden of proving rough proportionality.<sup>176</sup> In *Casitas*, the BOR, as the entity imposing the fish ladder facility and revised operating criteria, bears the burden of proving that a quantified, individualized determination was made with respect to *Casitas*.<sup>177</sup> The consultation procedures required pursuant to section 7 of the ESA are the likely foundation of any individualized determination finding.<sup>178</sup> The Technical Advisory Group created to coordinate the planning of the fish ladder facility consisted of NMFS engineers and biologists, BOR officials, and representatives of *Casitas*.<sup>179</sup> The documents created during these planning sessions, including both the Biological Assessment and the

---

173. *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994).

174. *Id.* at 393.

175. *Id.* at 395.

176. *Id.* at 391; *see also* Needleman, *supra* note 128, at 1590 n.42 (citing Cordes, *supra* note 149, at 537).

177. *Cf. Dolan*, 512 U.S. at 391 n.8; *see also* Needleman, *supra* note 128, at 1590 n.42 (citing Cordes, *supra* note 149, at 537).

178. *Casitas Mun. Water Dist. v. United States*, 72 Fed. Cl. 746, 749 n.3 (2006) (noting that "consultation with and with the assistance of the Secretary" is the first step in the process of determining whether any action that is authorized, funded, or carried out by a federal agency is 'likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.' 16 U.S.C. § 1536(a)(2)."); *see also* Interagency Cooperation—Endangered Species Act of 1973, 50 C.F.R. §§ 402.01–.48 (2008).

179. STEELHEAD BIOP, *supra* note 72, at 1.

Biological Opinion, are the result of a cooperative determination individualized to Casitas's particular needs.<sup>180</sup> The appellate briefs of both parties chronicle the significant discussions undertaken in producing the comprehensive Biological Opinion determination.<sup>181</sup>

Next, the BOR is required to prove that its proposed condition is roughly proportional to the problem created or exacerbated by the Project.<sup>182</sup> Quantifying the demands of the proposed action to establish rough proportionality involves establishing that the construction of the fish ladder facility and the diversion of water pursuant to the revised operating criteria alleviate the danger to the steelhead trout caused by the continued operation of the Project. Additionally, the amount of water needed by the fish must be roughly proportional to the diversions required by the Biological Opinion. In *Casitas*, the Biological Opinion notes that the "*minimum* flow rate providing successful steelhead migration through the lower river is 50 [cubic feet per second]."<sup>183</sup> This amount is exactly correlated with the flows required for fish migration during storm events.<sup>184</sup> *Dolan* does not require a "precise mathematical calculation," only that the government "must make some effort to quantify its findings."<sup>185</sup> As such, the revised operating criteria prescribed by the Biological Opinion under the Endangered Species Act are more exacting than that required by the court. Agencies, as part of their statutorily mandated responsibilities under the ESA, likely will exceed the degree of relatedness required by the rough proportionality test.<sup>186</sup> Barring a showing that the government condition is wildly out of proportion to the needs of state, minor variances should not result in

---

180. *Id.* at 6–12.

181. Brief of Plaintiff-Appellant at 13–16, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) (No. 2007-5153); Brief of Appellee the United States at 9–14, *Casitas*, 543 F.3d 1276 (No. 2007-5153).

182. Richard Duane Faus, *Exactions, Impact Fees, and Dedications — Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 STETSON L. REV. 675, 680, 691 (2000) (interpreting *Burton v. Clark County's* four propositions interpreting the requirements of *Nollan* and *Dolan*. 958 P.2d 343 (Wash. Ct. App. 1998), *reh'g denied*, 978 P.2d 1097 (Wash. 1999)).

183. STEELHEAD BIOP, *supra* note 76, at 7.

184. *Id.* at 7–13. Note that diversions to the fish ladder facility during storm events must be ramped down to close migration windows when the inflow drops below 50 cfs. Diversions are also not required in the event that a drought causes the level Lake Casitas to drop below a predetermined storage amount.

185. *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994).

186. 16 U.S.C. § 1536(b)(3)(A) (2006) (requiring "a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives . . . .").

required compensation by the agency.<sup>187</sup> Should the government condition dramatically exceed what is required to address the harmful behavior, private parties will receive compensation to the extent necessary. The exaction framework provides a strong incentive at the outset for agencies to ensure that their demands are only as great as necessary to resolve the problem.

#### CONCLUSION

Contemporary takings law is a “muddle”<sup>188</sup> so convoluted that the Supreme Court has cautioned that “[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court’s takings jurisprudence.”<sup>189</sup> The current doctrinal distinction between physical and regulatory takings, and the numerous per se tests created to classify especially problematic cases, has done little to clarify the law. By simply focusing on the classification of particular government actions and ignoring their consequences, jurisprudence continues to move away from the underlying concerns of fairness that motivate the Fifth Amendment. In doing so, it leaves the government, private landowners, and the courts with remarkably little guidance in specific cases, as the classification of a particular action becomes determinative. It is no wonder that judges who find themselves presiding over a number of takings claims often struggle to alternately distinguish or analogize previous decisions. When the classification of a particular government action is difficult and fact-specific, as it was with the diversion of usufructuary water rights in *Casitas*, the unconstitutional conditions doctrine should be a beacon to guide judicial decision making.

The essential nexus and rough proportionality tests expressed in *Nollan* and *Dolan* provide a two-fold benefit in difficult cases. The standards rightly redirect the focus in takings cases to the fairness of the government action, speaking to *Armstrong*’s caution that no individual alone bear a burden that should rightly be borne by the public as a whole.<sup>190</sup> At the same time, the requirement that the government clearly identifies an actor’s harmful behavior ensures that the proposed action

---

187. See Houck, *supra* note 166, at 306 (“Assuming the measure is rational—for example, a prohibition on cutting trees occupied by listed species—it should satisfy the *Dolan* test.”).

188. See generally Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

189. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

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

**We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact [ecologylawcurrents@boalt.org](mailto:ecologylawcurrents@boalt.org). Responses to articles may be viewed at our website, <http://www.boalt.org/elq>.**

actually mitigates those harms while providing a strong incentive for cooperation between the government and private parties at the initial permitting stage. These benefits increase the transparency of judicial decisions and reduce the difficulty in classifying hard cases concerning endangered species protections.

Judge John Wiese is a respected member of the federal bench. His difficulty in satisfactorily resolving ESA takings cases is illustrative, but it is by no means confined to his courtroom. The lack of clarity in takings doctrine is an endemic problem and can only be resolved by properly balancing police power and private property rights. *Nollan* and *Dolan* can do this.