

Reconciling Property Rights and the Endangered Species Act

by Paul Gross

"Every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it."

-President Theodore Roosevelt, 1910

I. Introduction

The Endangered Species Act (ESA) is currently facing its greatest challenge since its inception over 20 years ago. An immediate danger is posed by the takings legislation before Congress, and already passed by some states, that will provide compensation to private property

While opposition to the ESA is nothing new, the danger currently facing the Act is unprecedented ...

owners whose property values are decreased by enforcement of environmental regulations such as the ESA. Leading the fight against the ESA are the numerous property rights advocacy groups and the elected officials who perceive that the ESA has gone too far. While opposition to the ESA is nothing new, the danger currently facing the Act is unprecedented for three significant reasons. First, property rights

advocates have adopted a new strategy to achieve their aims, shifting their focus from the courts to the legislatures. Second, the November 1994 elections created a legislative forum more favorable to property rights issues. Finally, there is a broadening perception across the country that governmental regulation, and environmental regulation in particular, is infringing not just on business and industry anymore, but on the private citizen and his or her home. Each of these factors alone is significant, but they combine to place the accomplishments and goals of the ESA in serious jeopardy.

While the property rights and takings debate covers a broad range of environmental regulation, for simplicity I will confine discussion in this article to its effect on the Endangered Species Act. I intend to give a brief profile of the parties to the controversy and their goals, survey a representative sample of the pertinent legislation, discuss the arguments for and against their passage, and offer some possible solutions or compromises.

A. Pro-takings Advocates

The takings legislation includes both broad measures that by their scope will encompass the ESA, and specific measures targeting restrictions under the ESA. All of the legislation contains one or more of three common threads: forcing government to compensate landowners whose property contains species habitat; reducing the action government can take to protect species; and decreasing protection for a broad range of species. The basis for their claim for compensation is the so-called "takings" clause of the Fifth Amendment of the Constitution: "nor shall private property be taken for public use without just compensation."¹ The assertion is that any loss in value to private property resulting from compliance with government regulation constitutes a taking of private property for public use.

The takings backers include three primary groups: independent lobby groups, industry and businesses with interests to protect, and legislators opposed to excessive government regulation. Private-sector backers of the legislation include Defenders of Property Rights, the self-described sole national non-profit legal defense fund dedicated exclusively to property rights.² The National Association of Home Builders has provided testimony for the Senate debate on the takings legislation,³ and is an active supporter of takings provisions. In many instances, the proposed legislation is not only supported, but is written by private property groups and businesses with interests in seeing a relaxation of enforcement of the ESA and related regulation.⁴

Backers of the legislation in Congress include Representatives Don Young (R-AK) and Richard Pombo (R-Calif), co-sponsors of HR 2275, the Endangered Species Conservation and Management Act of 1995. Representative Billy Tauzin (D-LA), the sponsor of HR 790, a broad takings bill aimed at the ESA and wetlands policy,⁵ is another strong advocate of compensation for property owners. In the Senate, Slade Gorton (R-Wash) is the sponsor of S 768, the Endangered Species Reform Act of 1995.

To promote support for the legislation among small landowners and homeowners, the property rights movement offers anecdotes of individual homeowners affected by the ESA. A typical example is that of Alan and Bonny Riggs, who bought five acres of land on Puget Sound and found that they had a pair of bald eagles nesting 50 feet beyond their property line. State wildlife officials required them to sign a 32 page eagle management plan and plant a screen of trees in front of their house before allowing a house-building permit. When the screen was deemed insufficient, the Riggses were criminally cited and ordered into court.⁶ Understandably, this sort of story creates anxiety and opposition to environmental regulation among small landowners.

B. Anti-Takings Crowd

Opposing the takings legislation is a surprisingly broad-based coalition comprising not only environmentalists, but interest groups averse to the significant indirect impacts the takings provisions will cause. Environmental organizations actively involved in the debate include the Sierra Club, National Audubon Society, and many other national and regional organizations. Grass-roots organizing has revealed a broad base of public support for environmental protection laws, including the ESA.⁷ Unions fear that the expansive takings laws will affect the health and safety of workers. John Sheehan, legislative director of the United Steelworkers of America also expressed skepticism at management's argument of environmental blackmail and the danger of loss of jobs because of environmental regulation.⁸

To promote support for the legislation among small landowners and homeowners, the property rights movement offers anecdotes of individual homeowners affected by the ESA.

Opponents of the takings provisions counter the anecdotes provided by the property rights advocates. For those skeptical that the Riggses could have been treated so badly as a result of environmental regulatory enforcement, there is another side of the story. When a storm blew

down the eagles' nesting tree, the eagles moved to another tree 50 feet away. The Riggsses hired another lawyer, this time an expert in natural resources law, who negotiated a simpler two page plan. The new plan didn't require either screening trees or a fence. Elizabeth Rodrick, the state's

At its core the debate comes down to a question of the value of protecting endangered species as measured against its impact on a right as fundamental as that of a property owner to use her property without governmental interference.

eagle management coordinator, asserts that much of the Riggs' problem was caused by their "attitude that they didn't have to obey the law," and the fact that the logger who cleared their land cut down far more trees than his permit allowed.⁹

At its core the debate comes down to a question of the value of protecting endangered species as measured against its impact on a right as fundamental as that of a property owner to use her property without governmental interference. The force of the prop-

erty rights movement is understandable in light of most Americans' view that the disposition of private property is and should be solely for the owner to decide. The problem comes when the use of property impacts an objective on which the public has placed a premium. The Endangered Species Act (ESA) is a focal point in the property rights debate because its goals are admittedly less immediate and tangible (than those of pollution and toxics regulation, for example) to most Americans. Also, environmentalists and bureaucrats are perceived as being overly zealous in the application of the regulations of the ESA, putting the welfare of obscure species ahead of the property rights of individual citizens. The question, however, is have the property rights issues overtaken environmental goals, or is protection of endangered species still viewed as a worthy and important goal? Can these interests be reconciled?

II. Overview of Takings Legislation: Current and proposed Statutes.

The drive to enact takings legislation is the latest point in an evolution, rather than a new debate. The property rights movement began with attempts to win compensation from the courts, asserting Fifth Amendment rights. Those attempts have been largely unsuccessful, except in cases where it was found that a total loss in value of the property resulted from the regulation. Dissatisfied with progress in the courts, property rights advocates have turned to the legislatures to enforce what they claim as constitutional rights. Nancie Marzulla, the president of Defenders of Property Rights, told the Senate Judiciary Committee that "Courts alone cannot adequately protect private property rights," and that legislation can provide a clearer definition of when a taking has occurred.¹⁰ A review of Supreme Court decisions on takings issues raises the question of whether Marzulla and her legislative allies are seeking a clearly defined takings law or a clearly different takings law.

A. Proposed federal legislation

Legislative threats to the ESA come in the guise of both direct reforms of the ESA and expansive property compensation bills addressing a whole range of regulatory issues. Direct reforms of the ESA in Congress include the Endangered Species Conservation and Management Act (HR 2275), the House version of the ESA reauthorization; and the Senate's Endangered Species Act Reform Amendments of 1995. General takings legislation affecting the Endangered Species Act includes the Senate's Omnibus property rights bill (S 605); and the House property

rights bill (HR 925) , which was inserted into HR 9, the Job Creation and Wage Enhancement Act.

1. Broad Takings Measures

On March 3, 1995 the House approved HR 925 by a vote of 277-148. The bill provides for agencies to pay landowners for decreases of property value when a reduction in value of at least 20% of any portion of the property occurs as a result of agency rulemaking. The agency actions which trigger compensation are restricted to specific wetlands protections, rules under the ESA, and water rights provisions of certain laws.¹¹ Rejected attempts to minimize the scope of the bill indicate the expansive scope of compensation property rights advocates are seeking. During consideration of HR 925 various amendments were rejected which attempted to restrict the scope of compensation, by reducing possibilities for abuses and limiting compensation to circumstances where it truly resulted in a burden on a private homeowner. These included attempts by Rep. Porter Goss (R-Fla) and Rep. Norman Mineta (D-Calif) to raise the threshold for compensation and remove portions allowing compensation for landowners suffering devaluation of portions of property, rather than the whole. Also rejected were measures offered by Rep. Don Wyden (D-Ore) to restrict "any activity likely to diminish the fair market value of any private home and clarify the meaning of 'private home'", and by Rep. Patricia Schroeder (D-Colo) to require that "any compensation paid to property owners be reduced by an amount equal to any increase in the value of the same property that resulted from any other agency action."¹² Attempts to raise the threshold of devaluation that would trigger compensation to 20% of the value of the entire property were defeated, and the threshold level was only raised from 10% to 20% by a bill by Goss. This amendment looked at any portion of the land to meet the threshold of devaluation, rather than the entirety.¹³

Dissatisfied with progress in the courts, property rights advocates have turned to the legislatures to enforce what they claim as constitutional rights.

2. Specific ESA reforms

The Senate's ESA Reform Amendments, sponsored by Slade Gorton (R-WA) would dramatically reduce the ESA's protective measures. One of the effects of the bill would be to redefine "'harm' as any direct action 'that actually injures or kills a member of an endangered species of fish and wildlife.'"¹⁴ The significant result of that provision would be to explicitly reject destruction of habitat as within the definition of harm to a species, presumably in direct response to the Supreme Court holding in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*.¹⁵

B. State legislation.

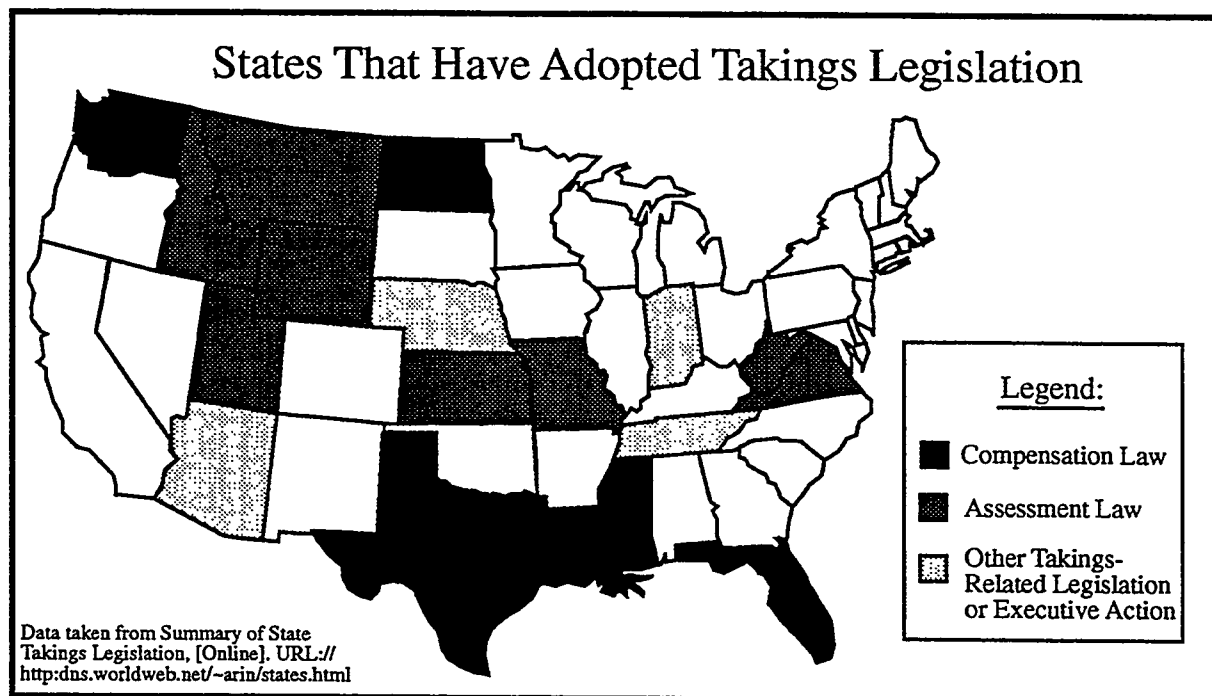
Similarly, many state legislatures have recently considered measures to protect private property rights. Since 1991, 17 states have passed takings bills, ranging from simply requiring agencies to conduct a "takings assessment" before regulatory actions, to the broadest one, enacted in Washington state which provides compensation for any reduction in private property value resulting from state or local regulation.¹⁶ Earlier this year, the state of Washington passed

Initiative 164, the Private Property Regulatory Fairness Act, requiring all state and local governments to compensate property owners for any reduction in property values as a result of regulations or other governmental activity, unless the regulated activity is deemed a public nuisance.¹⁷ In 1995 eleven states enacted takings legislation, and 39 states considered more than 90 takings bills.¹⁸ Not all of the bills result in compensation for property owners, however. Of the eleven bills passed in 1995, seven required an impact assessment and only four provided for compensation of any sort.¹⁹ Of the bills providing compensation, the provisions are somewhat limited. For example, North Dakota enacted S.B. 2388 in 1995, defining "regulatory takings" as a 50% reduction in value of private real property. The law then exempts regulatory actions that "substantially advance legitimate state interests, do not deny the owner economically viable use of the land, or comply with applicable state or federal laws."²⁰

While not all agree on the extent to which compensation should be allowed, the issue of takings is a cornerstone of the Republican platform.

Furthermore, not all of the takings laws survive even once enacted. An Arizona law enacted in 1992 requiring takings impact assessments was rejected by referendum in 1994.²¹ The Washington initiative also has since been rejected. Opponents of the measure had until July 21 to gather 90,384 signatures on a petition to force the issue as a referendum on the November 7 ballot;²² the coalition had collected 228,000 signatures by the deadline, more than twice needed.²³ Initiative 164, on the ballot as Referendum 48, was defeated by a 60-40 margin.²⁴

While not all agree on the extent to which compensation should be allowed, the issue of takings is a cornerstone of the Republican platform. The property rights issue has been described as a "litmus test for GOP presidential hopefuls."²⁵ Sen. Bob Dole abandoned a milder piece of legislation he had sponsored to sign onto Phil Gramm's expanded version in the same week he moved to the right on several other issues, including affirmative action, in order to enhance his



credentials among party conservatives.²⁶ As moderate Republicans find they have to ally themselves with the property rights advocates to maintain credibility within their party, the takings laws gain momentum that few legislators have the ability to overcome, regardless of their inclination. Environmentalists in Arizona opposing a takings bill in the state legislature, found that even legislators opposed to overly broad provisions approved it, saying "they simply didn't know how to argue against it."²⁷

III. Policy Considerations

The primary policy arguments against passage of the takings provisions break down into three main issues.²⁸ First, ample evidence indicates that public support for the ESA and related environmental protection laws is overwhelmingly against any measures that would reduce their effectiveness. Second is the unfavorable result of, in effect, paying citizens to obey the law as passed by Congress, upheld by the courts, and backed by the general public. Finally, passage of takings laws is imprudent economic policy.

A key issue of the property rights argument is whether public support for the ESA outweighs the opposition to the Act's conflicts with property rights. The history of takings bills indicates that when faced with a choice, voters usually will choose in favor of environmental protection.

A. Public support for ESA and its goals

It is probably fair to say that a substantial majority of Americans still approve of the goals of the ESA, and of the other environmental protections statutes that would be affected by takings laws. An ABC News/Washington Post poll in May 1995 surveyed public opinion on environmental protection. Seventy percent felt the government had "not gone far enough," while only 17 percent felt the government has gone too far in protecting the environment.²⁹ Writing on the problem of reconciling the seemingly conflicting goals of development and environmental protection, Professor Lindell L. Marsh observed that "one had only to observe the audiences watching *Dances with Wolves* to know that the national polls are correct in concluding that sentiment runs broad and deep that we are destroying our natural wildlife heritage and that it should be protected."³⁰ He proposes that the ethic is growing in strength, and that legislative events from 1987 through 1990 bear this out.³¹ Consistent failure of compensation bills in state legislatures indicates that this trend continues.³²

A key issue of the property rights argument is whether public support for the ESA outweighs the opposition to the Act's conflicts with property rights. The history of takings bills indicates that when faced with a choice, voters usually will choose in favor of environmental protection. Sierra Club activist Joni Bosh remembers a 1991 meeting where an Arizona cotton grower complained of restrictions on spraying toxic pesticides, claiming the regulations amounted to a taking of his property by preventing him from using pesticides without regard to the effects of them on his neighbors or their lands. That spring there were 17 takings bills introduced in the Arizona legislature, and despite reluctance to support them, many legislators felt powerless to resist them. Within three months 72,000 signatures had been collected to put one bill to a public vote in a referendum, which resulted in a rejection of the measure. By presenting the bill as broad and arbitrary, "undermining everything from safety at day-care to

clean water and clean restaurants,” a diverse coalition was built to oppose the takings law. The law was rejected by a decisive 60 percent of the vote in the November 1994 election.³³

B. Compensating Citizens for Obeying Laws?

Another issue is the questionable social utility of paying citizens to follow our laws. A significant objection to providing compensation to landowners affected by regulation is the view that we are compensating citizens for following laws enacted for public benefit. Takings bills would result in “running up the deficit by forcing taxpayers to pay polluters not to pollute,” according to John Friedrich, national political director for Clean Water Action.³⁴ The potential for misuse and abuse of compensation provisions has been cited by many in objection to takings laws. In criticizing the passage of HR 925, Environmental Defense Fund senior attorney Tim Searchinger noted that the bill would require the government to pay farmers for the wetlands restrictions they voluntarily agree to in return for farm subsidies.³⁵

C. The Economic Implications of Takings Legislation

Economic considerations also weigh against the proposed takings laws. In a letter to Senate Judiciary Committee Chairman Orrin Hatch (R-Utah), Office of Management and Budget Director Alice Rivlin said that Senate bill S 605 could cost “several times” the \$28 billion cost of the House bill (HR 9) over seven years.³⁶

Attorneys critical of the Washington state initiative point out that it is so broad that it is uncertain what qualifies for compensation. The initiative could possibly prompt years of litigation just to determine its intent.³⁷ The initiative, like many of the takings bills, was drafted by builders, timber companies, and realtors,³⁸ which begs the question of who the law is really intended to benefit.

Property rights advocates focus on only one aspect of the regulations they oppose: reduction in land value resulting from the regulations.

In addition to the objections that the law would have the net effect of preventing enforcement of a wide variety of regulations, opponents cite the financial effect the law would have on state and local communities. A University of Washing-

ton study concluded that the law is “very broad, often internally inconsistent and susceptible to many different interpretations.”³⁹ The study estimated that the law would cost local governments about \$300 million to \$1 billion annually for assessments and could potentially require them to pay up to \$11 billion in takings compensations.⁴⁰ It is also possible that the law could impact the state’s double-A bond rating. Elizabeth Bush, assistant vice-president at Moody’s San Francisco office, says they don’t know the effect now, but are being cautious and “will be watching very carefully how implementation of this new measure would impact ongoing governmental operations.”⁴¹

Species protection is not just an environmental issue; the fishing and pharmaceuticals industries, and thereby the public, stand to lose from a loss of species. Property rights advocates focus on only one aspect of the regulations they oppose: reduction in land value resulting from the regulations. However it is a multi-faceted issue – protection of species clearly has economic

value to some sectors. "Our national commitment to protecting species and their habitats is neither simple altruism nor sentimentality."⁴² While it is sometimes difficult to present protection of endangered species as a present and tangible public benefit, there are some strong cases. The Pacific Coast Federation of Fishermen has lobbied against Gorton's reform of the ESA, warning that it will have "devastating economic impacts on the commercial fishing industry and the many thousands of fishing families we represent."⁴³ Here is a clear-cut case where regulation to protect endangered species has a measurable benefit to society in terms of jobs and dollars. The benefit of species protection extends to other industries as well. Approximately 40% of all prescription medicines sold in the United States are derived from plants, animals or microorganisms. These include taxol, a cancer fighting agent derived from the Pacific Yew tree; L-Dopa, a suppressant of Parkinson's disease; and digitalis, a cardiac stimulant derived from the common foxglove plant.⁴⁴ The reliance of the multibillion-dollar pharmaceuticals industry on plants and other organisms is a clear indication of their value, even necessity, to society.

Among the arguments against the takings laws are ones based on economics. In his testimony before the Senate Committee on Environment and Public Works, Professor Lazarus asserted an economic rationale for opposing takings laws that had two elements. First, Lazarus stated that the assertion that governmental regulation causes a reduction in the property's value is a logically flawed premise, because it is based on the assumption that the value absent the regulation is somehow the "correct" value. Government regulation may just be a correction of market defects, by restricting one's use of property in a way that causes costs to spill over to others. "The upshot is not, however, that such governmental restrictions are always appropriate. There may, of course, be instances when the government mistakenly imposes a restriction or imposes a restriction that is unnecessarily harsh. The lesson is instead that one cannot make the necessary determination by focusing on reduction in market value alone."⁴⁵ Professor Lazarus then noted that the need to focus on more than market alone is the same conclusion reached by the Supreme Court, and that the Court has adopted a multi-faceted analysis rather than a simple formulaic approach.

Lazarus' second assertion is that both private property rights and public rights in natural resources will suffer rather than benefit from this legislation. Federal environmental laws, in many instances, protect property rights by restricting one property owner's ability to infringe on another's rights. The environment is a common resource to be shared by all, and government regulation mediates disputes as conflicts arise between adjacent holders of property rights. The idea of government regulation is that everyone, including the "burdened" landowner, will benefit from the restriction. A restriction to one owner is another's gain; government regulation enhances and protects much of the positive market value of property.⁴⁶

Lazarus points out that the takings laws ignore any positive role the regulations have in protecting property rights, thereby endangering those safeguards. Without funding to pay the compensations triggered by regulations, the regulations are unenforceable. Lazarus finds that "the single most logical source [for the funding] would be for the government to exact from all those property owners whose market values have increased as a result of the governmental restriction an amount equal to that increase." He recognizes the political objections and practical difficulties associated with that scheme, not to mention the inability of most landowners to actually pay for the increase in the value of their land.⁴⁷ Such a proposal, while seeming bizarre

or even perverse, can certainly be seen as the logical counterpart to compensation for reduction in value caused by governmental regulation.

In a paper discussing the implications of wider compensation for takings based on an empirical study of the results of takings compensation in agriculture, C. Ford Runge provides a sobering prediction of the long term results of takings compensation for environmental regulation. He found that potential compensation becomes a part of expectations and investment behavior, encouraging riskier investments and over-investment in compensated vs. non-compensated property. Takings laws “provide incentives to rational agents to misrepresent their expectations; to direct investments toward, rather than away from, regulated schemes of compensation; to expand through special interests the scope of this regulation; and to increase benefits flowing to those who can capture the regulatory process. If this is not what advocates of wider compensation for takings have in mind, then agriculture provides a bitter foretaste of where such policies might lead.”⁴⁸ He further asserts that wider compensation for takings results in increased regulation⁴⁹ – what must certainly be an unintended result of an attempt to minimize perceived excessive regulation.

IV. Proposal

A. Does the ESA already provide sufficient exemptions for minimal impact activities?

Many of those critical of the takings laws oppose them not because property rights are not a valid concern, but because of the belief that if abuses occur, they are best corrected by better application of current regulations or correction of misguided ones. According to former Sen.

Many of those critical of the takings laws oppose them not because property rights are not a valid concern, but because of the belief that if abuses occur, they are best corrected by better application of current regulations or correction of misguided ones.

Paul Tsongas (D-Mass), Congress should “get serious about where there are abuses and fix them,” rather than undermining environmental laws by passing takings legislation.⁵⁰ A major goal of some of the bills is to legislatively overturn the Supreme Court’s finding in *Sweet Home* that destruction of habitat constitutes harm to a species, because they object to the inclusion of land itself under the protection of the ESA.

In fact however, the ESA does not automatically place all potential habitat into the “critical” category, and beyond the reach of landowners. The Bills’ concern, therefore, is overstated.⁵¹ The Act specifies that except in those circumstances determined by the Secretary, the critical habitat for a species shall not include the entire geographical area which the species can or does occupy.⁵² The ESA specifies that the Secretary shall “designate habitat . . . after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.” Furthermore, the Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of designating it as critical habitat, unless loss of that particular area will result in extinction.⁵³ Also, the Act provides for petitioning for review of designated species and critical habitat, and mandates a review at least once every five years under the provisions cited above.⁵⁴ Thus, the regulations provide a situation where it would be possible to receive compensation for loss of value to land

under a takings law, then at a later date, have the value restored by the same Act under which devaluation was claimed.

Another provision of the ESA provides for incidental "takings"⁵⁵ – those peripheral to, and not the purpose of, an otherwise lawful activity⁵⁶. An applicant can request a permit for an incidental take, which must include a conservation plan which specifies the impact likely to result from such taking, steps the applicant will take to mitigate impacts, and alternative mitigating courses of action and why they are not being used. If the Secretary finds that the taking will be incidental, that the applicant will, to the maximum extent practicable, minimize and mitigate the impacts, and that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild, the Secretary shall issue the permit.⁵⁷ The applicant's activity may then go forward without subjecting her to liability under the ESA.

Government agencies have also proposed reforms to existing laws. Primarily in response to the property rights movement, Interior Secretary Bruce Babbitt has proposed additional modifications and exemptions to be included in the pending ESA reauthorization. For example, Babbitt has stated that "small landowners should be exempted from conservation burdens . . . most species won't

The most likely solution to address the concerns of both views is to allow existing provisions within the ESA (and other environmental regulations) to work as intended.

survive on small tracts of land and it's not fair to tie up small landowners."⁵⁸ On March 6, 1995 the Interior and Commerce departments issued ten principles for balancing species protection with property rights and economic development. Included among these principles were: minimizing social and economic impacts, creating incentives for landowners to conserve species, and allowing for greater input from state and local governments.⁵⁹ Also, the Interior Department will propose new regulations based on the above principles, including a presumption that land with a single household used solely for residential purposes and activities affecting less than five acres have a negligible impact on endangered species.⁶⁰ This amounts to an exemption from regulation under these circumstances.

B. Striking a Proper Balance

Notwithstanding the vociferous claims of property rights advocates and horror stories of private homeowners brutalized by draconian environmental regulation, small landowners are the least likely beneficiaries of the takings laws, says John Echeverria, an attorney with the National Audubon Society.⁶¹ It is unlikely that regulations will diminish the value of small parcels of land, and even if they do, the amount won't be enough to make it worth litigating, he says. However, it is these landowners that will be paying the taxes to pay off the immense claims made by those with enough undeveloped land and sufficient economic interest to make it worthwhile to sue.⁶² It stands to reason that small landowners, in most cases, are not developing their land any further, and are therefore least likely to trigger any of the regulatory bars to development.

In the end it is extremely difficult to reconcile the crusade for private property rights with environmental protection regulation. It is a deeply imbedded cultural value that individuals have a right to enjoy the value of property they own, yet we also feel strongly about protecting the environment. In many instances, environmental regulations are clearly intended for the health

and safety of the public, and even ones, such as the ESA, that don't clearly involve health and safety issues, have tangible benefits that a majority of society appreciates and values. It is when these desires clash that the choice becomes difficult. The answer is to find a mutually agreeable ground, if possible. The most likely solution to address the concerns of both views is to allow existing provisions within the ESA (and other environmental regulations) to work as intended. Governmental regulatory agencies must ensure that their agents enforce the regulations in a common sense manner, being ever watchful for the over-zealous protector of the environment.

If the advocates of property rights must have their compensation provisions, situations which trigger compensation must be very narrowly and strictly defined. The proponents of takings laws purport to be advocates of the small, private landowner whose home is threatened by excessive regulation. Therefore, a limitation of compensation to individual homeowners with a limited property interest of 5 acres would protect these Americans from the harmful consequences of regulation. However, before compensation will be given, the claimant must show that all available statutory provisions for relief were exhausted. A limitation to private homeowners, in addition to protecting most property owners, is logical and fair. The government, and by extension, the public, has no obligation to protect commercial investors, land speculators, and businesses from all market risks.

About the Author: Paul Gross graduated from the Naval Academy with a degree in History. He is currently a 1L at King Hall.

Article Editors: Geoffrey Pay and Chad Carlock

NOTES

¹ U.S. CONST. amend. V.

² *Property Rights*, CQ Researcher, June 16, 1995, vol. 5, no. 22, at 531.

³ *Statement of the National Association of Home Builders for the Environment and Public Works Committee of the United States Senate*, Federal Document Clearing House, June 27, 1995, available in LEXIS, Nexis Library, Curnews File.

⁴ Robert T. Nelson, *Gorton Puts Endangered Species Act on Notice – His Bill Would Dramatically Alter Guidelines for Protection*, THE SEATTLE TIMES, May 9, 1995, at A1.

⁵ A.B. Stoddard, *H.R. 790*, STATE NEWS SERVICE, August 23, 1995.

⁶ *Property Rights Movement Gaining Ground and Opposition*, THE SUNDAY GAZETTE MAIL, July 30, 1995, at 13A.

⁷ Amy Wilson, *The Education of a Lobbyist*, SIERRA, May/June 1995, at 80.

⁸ James L. Tyson, *Tilling Middle Ground of Property-Rights Debate*, CHRISTIAN SCIENCE MONITOR, June 27, 1995.

⁹ THE SUNDAY GAZETTE MAIL, *supra* note 6, at 13A.

¹⁰ CQ RESEARCHER, *supra* note 2, at 519.

¹¹ Bureau of National Affairs, "House passes Takings Compensation Bill, Clears HR 9 Regulatory Relief Package," March 6, 1995. The article reports that HR 925 was inserted back into HR 9, which was subsequently passed by a vote of 277-141.

¹² *Id.*

¹³ *Id.*

- 14 Nelson, *supra* note 4, at A1.
- 15 *Babbitt v. Sweet Home Chapt. Comms. for a Greater Oregon*, ___ U.S. ___, 115 S.Ct. 2407, 132 L.Ed.2d 597, (Jun 29, 1995).
- 16 CQ RESEARCHER, *supra* note 2, at 520.
- 17 Antonio A. Prado, *Foes of Property Rights Measure Likely to Force Vote in Washington State*, THE BOND BUYER, July 26, 1995, at 2.
- 18 American Resources Information Network (1995), *Summary of State Takings Legislation*, [Online]. URL: <http://dns.worldweb.net/~arin/states.html>.
- 19 *Id.*
- 20 *Id.*
- 21 CQ RESEARCHER, *supra* note 2, at 520. Arizona voters rejected the measure with a final vote of 614,626 against the measure, and 412,585 for it. *Id.* at 532.
- 22 *State Voters Get Time to Consider Takings' Law*, THE COLUMBIAN, July 24, 1995, at A12.
- 23 THE SUNDAY GAZETTE MAIL, *supra* note 6, at 13A.
- 24 *Voters Saw Flaws in Referendum 48*, THE NEWS TRIBUNE, November 9, 1995, at A10.
- 25 Vincent J. Schodolski, *Property Vote Causes Split in Northwest; Owners' Rights at Issue in Washington State Initiative*, CHI. TRIB., August 20, 1995, at 17.
- 26 *Id.*
- 27 Wilson, *supra* note 7, at 80.
- 28 An additional argument, beyond the scope of this article, is the view that takings legislation is a departure from established case law.
- 29 *Slants & Trends: The Fine Print*, AIR WATER POLLUTION REPORT, May 22, 1995.
- 30 Lindell L. Marsh, *Endangered Species Act: Reconciling Economic Development and Wildlife Conservation*, LAND USE FORUM, vol. 1, no. 1, Fall 1991, at 45.
- 31 *Id.* Marsh states in his article that efforts to amend the ESA were "disastrously rebuffed" in both the House and the Senate. Evidence presented to back his assertion included a 1990 amendment by Sen. Packwood addressing the spotted owl that was defeated in the Senate 62-34, and three amendments in the House addressing ESA-related complaints were all defeated by margins of 273-136, 270-147, and 266-151.
- 32 American Resources Information Network (1995), *Summary of State Takings Legislation*, [Online]. URL: <http://dns.worldweb.net/~arin/states.html>
- 33 Wilson, *supra* note 7, at 82.
- 34 BNA, *supra* note 11.
- 35 *Id.*
- 36 *OMB Chief Highlights Concerns Over Cost, Abuses Under Takings Bills*, BNA NATIONAL ENVIRONMENT DAILY, July 13, 1995.
- 37 Prado, *supra* note 17, at 2.
- 38 *Id.*
- 39 *Study Analyzes Proposed Property Rights Measure*, GREENWIRE, September 28, 1995.
- 40 *Id.*
- 41 Prado, *supra* note 17, at 2.
- 42 Tim Eichenberg and Robert Irvin, *Congress Takes Aim at Endangered Species*, NAT'L L. J., February 13, 1995, at A22.
- 43 Nelson, *supra* note 4, at A1.
- 44 Eichenberg and Irvin, *supra* note 42, at A22.
- 45 *Testimony July 12, 1995 Richard J. Lazarus Professor of Law, Washington University in St. Louis, Senate Environment Environmental Regulations and Property Rights*, Federal Document

Clearing House, July 12, 1995, available in LEXIS, Nexis Library, Curnews file. Lazarus noted that the assertion that governmental regulation causes a reduction in the property's value is a flawed premise. "It irrebuttably presumes the validity of the higher market value of the property absent the governmental restriction. In many circumstances, however, the purpose of the governmental restriction is to correct a market defect that has caused that initial valuation to be too high. For instance, free market forces are not operating properly when a market participant need not pay all the cost of its activities and can instead impose those costs on nonconsenting third parties. Correction of just this type of market defect is the primary function of most environmental protection laws. They are aimed at restricting one person's use of his property that imposes costs on others because of pollution's spillover effects.

The upshot is not, however, that such governmental restrictions are always appropriate. There may, of course, be instances when the government mistakenly imposes a restriction or imposes a restriction that is unnecessarily harsh. The lesson is instead that one cannot make the necessary determination by focusing on reduction in market value alone."

46 *Id.*

47 *Id.*

48 C. Ford Runge, UNIVERSITY OF MINNESOTA CENTER FOR INTERNATIONAL FOOD AND AGRICULTURAL POLICY, *Economic Implications Of Wider Compensation For "Takings"*, Staff Paper P92-27, November 1992, at 20.

49 *Id.*, at 3.

50 *OMB Chief Highlights Concerns Over Cost, Abuses Under Takings Bills*, BNA NAT'L ENV'T DAILY, July 13, 1995.

51 Only critical habitat is protected by the ESA. ESA § 3(5)(C), 16 USCA § 1532(5)(c).

52 ESA § 3(5)(C), 16 USCA § 1532(5)(c)

53 ESA § 4(b)(2), 16 USCA § 1533(b)(2)

54 ESA § 4(c)(2), 16 USCA § 1533(c)(2)

55 ESA § 3(19), 16 USCA § 1532(19). Under the ESA, the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." This is not to be confused with "taking" in the sense of a Fifth Amendment property rights discussion.

56 ESA § 10(a), 16 USCS § 1539(a).

57 ESA § 10(a), 16 USCS § 1539(a).

58 *Endangered Species: Babbitt Announces Landowner Relief Plan, Urges Legislative Changes to Improve Act*, BNA, March 7, 1995.

59 *Id.*

60 *Id.*

61 THE SUNDAY GAZETTE MAIL, *supra* note 6, at 13A.

62 *Id.*