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What's the Cost?
Private Property, Public Use

By Charles E. Gilliland

Currently, many property owners and environmentalists are locked in a controversy about the need for compensation when environmental regulations limit property uses. Essentially this disagreement results from divergent concepts of the nature of private property rights. This article explores these two views, outlines the fundamental difference between them and explains why compensating owners may provide a superior result when compared with a purely regulatory approach.

Traditional View

The implementation of various environmental laws, but most notably the Endangered Species Act, has created a confrontation between property owners on one side and environmentalists and government agencies on the other. This dispute centers on rival concepts of the basic nature of private property rights that ultimately focuses on the methods used to finance environmental preservation. The traditional view of private property is founded on the belief that individuals have a right to gain the fruits of their labors. By combining their industry with land, individuals create wealth and thus are inherently justified in claiming exclusive rights to the property they own.

Responding to this belief, the founding fathers incorporated protection for private property in the Bill of Rights by barring government's taking private property for public purposes without compensating the owners. The goal is to leave a property owner economically whole when a public taking becomes necessary and to have the public share the cost of a public project.

Protected by this Fifth Amendment guarantee, owners have the incentive to pursue the wisest use of their property guided by the preferences and mores of society. Personal gain from increasing values leads owners to produce the goods that are in demand. As a result, property owners generally conserve and care for their property rather than exploit or destroy it recklessly. Without these guarantees, individuals have few incentives to conserve resources.

Two centuries of American development have institutionalized the eminent domain process to provide just compensation for public takings of private property. When roads, dams, floodways and other public projects require private property, owners receive monetary or in-kind settlements that reflect the market value of their properties prior to the taking. Creation of national wildlife refuges on private lands resulted in compensation to owners. As national parks and national forests expanded, owners were compensated with cash or land. Although owners sometimes feel short-changed, the eminent domain process has served well to transfer property to public projects while leaving the previous owners economically intact.

Providing for preservation of endangered species and wetlands appears to fit this time-honored tradition. In creating the Aransas Wildlife Refuge that serves as home to the whooping crane, for example, the government purchased and permanently set aside an area for the endangered species. This process left private property owners' wealth unchanged and provided a home for the threatened creatures. Similar preserves could be acquired for more recently identified endangered species.

Alternative Perspective

For several reasons, proponents of environmental preservation reject the idea of compensating owners for losses resulting from regulations. The Endangered Species Act regards all threatened creatures as deserving equal protection. Species such as the pacific yew may hold secrets for treating cancer and provide valuable service to countless generations. Accumulating these benefits indicates an enormous value for such a specie. Because no one knows which specie harbors this kind of potential use, all species, including non-descript beetles, blind salamanders, prairie chickens and pandas, are equal under the act. Thus, the benefit of salvaging each endangered specie is assumed to be infinite.

Since the act was adopted, the numbers of species classified as endangered have multiplied. Currently, U.S. Fish and Wildlife Service lists 632 endangered species in the United States (January 1994). The public budget simply cannot stretch far enough to purchase a home for them all. Requiring compensation to property owners would necessitate choosing which species can be preserved within budget constraints. Current law, however, does not contain a mechanism for making such choices.

Another view of property rights eliminates the need to compensate current owners for restrictions on property uses. Under this doctrine, nonowners have a stake in the way owners manage properties; current owners then are stewards temporarily entrusted with the property to preserve it for the public and for future generations. From this perspective, property is not a justified claim but rather an entitlement granted to individuals by the public stakeholders.

Property ownership then becomes similar to a driver's license, which can be revoked or modified at any time. Owners–or licensees–can pursue only those activities that have been approved by licensing authority. In other words, any land use not previously approved by the

government conceivably could be prohibited unless the government first grants permission. Government could even bar previously allowed uses as societal values change.

These differing views have collided as agencies have fashioned regulations to accomplish the objectives of various environmental laws. For example, the Endangered Species Act makes it a crime to "take" an endangered creature, be it bald eagle or beetle. The act further defines *take* to include harassment of the creature in question, and the U.S. Fish and Wildlife Service has extended the law to cover modification of habitat even when the endangered creatures are not present. These actions have forbidden many previous property management practices such as removing cedar, building fences or even driving a tractor near the endangered animals.

The celebrated cases of the spotted owl in the Northwest and red-cockaded woodpecker in the South illustrate the effects of this kind of regulation. In another widely known case, the act precluded California homeowners from plowing firebreaks around homes near Los Angeles because the area contained habitat for an endangered kangaroo rat. As a result, several homes that could have escaped destruction burned to the ground when wildfires swept through southern California. Similar cases have been documented throughout Texas and the nation. Property rights advocates believe that such regulations restrict entire areas of privately owned land to use as endangered species habitat. Advocates of the alternate view believe the regulations simply preserve endangered resources without changing property rights.

To Take or Not To Take

Many landowners and property rights advocates view these regulations as a serious abrogation of their property rights. They reason that such regulations clearly preclude or severely restrict profitable uses of their land and, in effect, take their property without just compensation. They retain the obligations of property owners but no longer reap the benefits. Few, if any, potential buyers want property with such restrictions in place. Because of this decrease in demand, the market value of their holdings has markedly diminished. The regulations have provided a good to society, namely preservation of endangered species, while imposing the cost on selected property owners.

Advocates of the entitlement view of property insist that a "taking" has not occurred. Rather, they believe, the actions instituting the regulations reflect a change in social values that places a premium on preserving the rapidly diminishing biodiversity of the earth. Under this system, owners can still use their property as they choose if the use does not transgress these new societal norms. Property owners have not lost the right to use their property in another fashion, these advocates contend, because they never really had that right in the first place. This kind of regulation is similar to the adoption of zoning without grandfathering; the regulations are simply adjusting behavior to the new social climate. This view holds that compensation should not be required.

The new societal norms reflected by this view see private habitat modification as an enormous cost to this and succeeding generations. By prohibiting any modification, the government keeps current owners from imposing those costs. From this perspective, the action is much like barring landowners from dumping pollutants on others.

On the other hand, private owners of land with endangered species habitat have managed their property in a manner that has sustained habitat. Because there has been no mechanism to pay them for that activity, these owners have provided this benefit to society without compensation.

Battleground

Battles surrounding property rights issues currently are being fought in the courts, in congress and in the court of public opinion with much of the controversy focusing on just compensation issues. In 1960, the Supreme Court ruled in the case of *Armstrong vs U.S.* that the costs of providing public goods should not be imposed on selected individuals. Consequently, if preservation of endangered species is a public good, the cost of preservation should be spread to all beneficiaries. Dealing with regulatory impact on land values in the *Lucas* case, the U.S. Supreme Court ruled that new regulations destroying all or substantially all of the economic value of an owner's property require compensation to that owner. Now the *Dolan* case, argued before the U.S. Supreme Court in March 1994, has the potential to further clarify the circumstances when regulation requires compensation.

Meanwhile, environmentalists are urging congress to renew the endangered species act with its current provisions intact. In response, some property owners have organized to protect private property rights. Property rights advocates are pushing for legislation that specifies when regulation becomes a "taking" requiring compensation. Further, these groups are lobbying to amend environmental acts to require compensation when regulations become burdensome. Finally, property rights advocates believe that all environmental legislation should require reasonable cost-benefit analyses before regulations are imposed.

Search for Cooperation

Although this struggle appears to affect only selected property owners, the outcome has broad implications. First, restricting property use may cause values to fall. Second, if owners are not compensated for declines, their net worth will fall, reducing their ability to participate in economic activity. Even with reimbursement, the value of property-based assets will decline. Lenders have begun to express concern about this potential new source of risk. Because of the prospect of value losses, lenders may reject these properties as security for loans, leading to reduced borrowing power among property owners. Third, declining values on affected properties may reduce tax bases and force local taxing jurisdictions to raise tax revenues from the remaining pool of value. And finally, government actions that seem to so readily restrict control of property because of endangered species lessens the certainty of everyone's property rights.

The regulatory approach taken on this issue excludes private property owners from active participation in the solution. In fact, property owners are also part of the public with unique opportunities to contribute to the solution. The current approach to these property owners ignores the potentially powerful influence of compensation in pursuit of environmental goals.

Precedents for reaching a cooperative solution exist. Faced with continuing erosion on fragile lands throughout the country, environmentalists, agricultural policy administrators and farmers and ranchers cooperated to establish the Conservation Reserve Program (CRP). The CRP made soil conservation, an environmental good, a priority for landowners by providing direct payments to owners or operators. The program consisted of a ten-year lease agreement between farmers and the government during which the farmer returned highly erodable cropland to grass with no grazing taking place. Between 1986 and 1992, more than 36 million acres were enrolled in this program, preserving an average of 19 tons of soil per acre per year. In this case, landowners were enlisted as partners in the drive to reduce soil erosion.

Compensation may further contribute to the solution because it imposes discipline on all sides in the decision-making process. Studies demonstrate that individuals respond one way when choosing between costly alternatives for which they bear no cost and another way when the choice requires money from them. Not surprisingly, individuals consume more of a good when someone else pays for it than they do when acquisition requires a personal sacrifice.

When individuals can opt for endangered species preservation without defraying part of the cost, they will likely opt for preservation at all cost. Further, without compensation, landowners have the incentive to adopt management practices that discourage endangered species from entering their land and to limit the amount of available habitat. Without lease payments, it is unlikely that CRP could have produced the more than 375,000 individual contracts that it elicited.

As history has demonstrated, governments can redefine the bundle of rights held by property owners. However, our traditional regard for property owners' rights have made compensation the norm, and owners are unlikely to surrender the use of their property without compensation or a prolonged struggle. Perhaps a more cooperative approach based on recognizing current owners' contributions to the drive to restore endangered species would achieve the desired results at a minimum cost. Because of the large numbers of species and extent of their habitat, compensating owners could be so costly that the public would not support blanket preservation. If budget constraints preclude outright purchases, perhaps leases similar to the CRP contracts could be devised or government could fashion a tax credit for owners who promote habitat production.

Given the potential pitfalls of the current course, a search for alternatives based on eliciting cooperation may yield a more effective method of achieving the objectives of environmental legislation. Without cooperation, the goal of environmental preservation will be subject to a continuing series of legal and political battles.

Dr. Gilliland is an associate research economist with the Real Estate Center at Texas A&M University.

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