Regulatory Takings and Resources: What Are the Constitutional Limits? (Summer Conference, June 13-15) 1994

6-14-1994

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Robert Meltz, *The Endangered Species Act and Constitutional Takings*, *in* REGULATORY TAKINGS AND RESOURCES: WHAT ARE THE CONSTITUTIONAL LIMITS? (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1994).

THE ENDANGERED SPECIES ACT AND CONSTITUTIONAL TAKINGS

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June 13-15, 1994

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I. INTRODUCTION AND REFERENCES

A. Introduction

The future of the Endangered Species Act (ESA) lately has come under intense scrutiny. 16 U.S.C. §§ 1531-1544. Probably the most intractable aspect of the debate is the property rights issue. The Act has at least the *potential* to affect private property in various ways -- whatever its actual impact may be. Its detractors call it absolutist in commmanding the protection of every endangered species regardless of private property impacts, while its partisans find in it ample accommodation of landowners' concerns.

To no one's surprise, the more than 800 domestic species listed as endangered or threatened under the ESA are sometimes found on private land. When they are, the ESA may pit private economic activity against national concern for aesthetic, ecological, scientific, and recreational values. *See* ESA § 2(a)(3). The landowner may suffer direct economic loss, while the benefits reaped as a member of the public are delayed, uncertain, and noneconomic. Moreover, if the land is not purchased by the government, the public enjoys the claimed benefits without cost.

Anecdotal accounts of negative ESA impacts on private property abound, though there appears to be little hard documentation from neutral sources. A General Accounting Office report requested by the House Committee on Merchant Marine and Fisheries and expected late summer, 1994, is slated to look at the issue. In the meantime, this outline concentrates more on the law than the disputed reality.

Analyzing the property impacts of the ESA in terms of whether there exists a constitutional taking is the currently fashionable approach, but such impacts have also been challenged as due process violations, government torts, or exceedances of the police power. Other federal wildlife statutes that have spawned property-related court challenges are the Migratory Bird Treaty Act, Eagle Protection Act, and Wild Free-Roaming Horses and Burros Act.

B. References

Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation within the Terms of the Act*, 24 ENVTL. L. ___ (1994) (issue no. 2).

Albert Gidari, *The Endangered Species Act: The Impact of Section 9 on Private Landowners*, 24 ENVTL. L. ___ (1994) (issue no. 2).

Oliver A. Houck, *The Endangered Species Act and Its Implementation by the Departments of Interior and Commerce*, 64 COLO. ST. L. REV. 277 (1993)

Thomas Lambert and Robert J. Smith, THE ENDANGERED SPECIES ACT: TIME FOR A CHANGE (Center for the Study of American Business 1994)

Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 Envtl. L. (1994) (issue no. 2).

II. A PROPERTY-RIGHTS TOUR OF THE ESA

A. Listing and critical habitat designation

The possibility of private property impacts begins when the Secretary of the Interior, through the Fish and Wildlife Service (FWS), lists a species as endangered or threatened. (The Secretary of Commerce, through the National Marine Fisheries Service (NMFS), administers the Act for marine species.) Listing is to be done "solely on the basis of the best scientific and commercial data" -- i.e., without reference to economic costs or private property impacts. ESA § 4(b)(1).

Along with listing, the FWS must designate critical habitat for the species when "prudent and determinable." ESA § 4(a)(3). Such designations are to be based *both* on

scientific data and "economic impact and any other relevant impact" -- plainly allowing property impacts to be weighed. ESA § 4(b)(2). This distinction between listing and habitat designation, allowing analyses of property impacts only with the latter, was made by Congress quite deliberately. *See, e.g.*, H.R. Rep. No. 567, 97th Cong., 2d Sess. 12 (1982).

B. Section 9: "takings" on private land

Section 9 bans, *inter alia*, the "taking" of endangered animals and various commercial transactions involving them, with lesser protections for listed plants. It applies to actions anywhere -- on private land, public land, or waterways -- and regardless of whether on designated critical habitat. By rule, the FWS has extended section 9's prohibitions to *threatened* animals and plants. ESA § 4(d); 50 C.F.R. § 17.31 (wildlife), § 17.71 (plants).

The pivotal section-9 term "take" is defined to mean "to harass, harm, pursue, hunt, ... capture, or collect" a listed animal. As discussed below, how broadly to read the "harm" component of this definition is key to the ESA/property rights issue.

> *Note: the "taking" of listed species is shown herein by quotation marks; the taking of private property under the Fifth Amendment is shown by absence of same.*

Exceptions from section 9 to allow economic growth are authorized for "takings" incidental to otherwise lawful activity, allowing a project to go forward even if it harms some individuals of a listed species. ESA § 10(a)(1)(B). Incidental "take" permits (popularly, "section 10 permits") are issued by FWS once the landowner submits a "habitat conservation plan."

C. Section 7: private development with federal nexus

Section 7 calls upon each federal agency to consult with FWS or NMFS to ensure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of" designated critical habitat. Thus, private development may be thwarted if a requisite federal permit cannot be

issued consistently with section 7. Incidental "taking" of species members may be allowed by FWS/NMFS if section 7 is nonetheless satisfied (popularly, a "no jeopardy" opinion).

As a last resort, a cabinet-level Endangered Species Committee ("God Squad") may allow certain federal agency actions to proceed despite a threat of extinction.

III. SOME POSSIBLE TYPES OF ESA PRIVATE PROPERTY IMPACTS

A. Direct limits on land uses that might adversely affect listed species

1. ESA provisions

The FWS' reading of section 9's "take" prohibition to embrace certain substantial habitat alterations is a key reason the ESA is in tension with private property interests. FWS' reading comes about in two steps: (1) "take" is defined by the Act to include "harm," and (2) FWS defines "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife ...." 50 C.F.R. § 17.3.

Though early scholarly writing questioned the inclusion of habitat modification *per se* in the definition of "harm," the matter was considered settled until recently because the only court rulings, in *Palila v. Hawaii Dep't of Land and Natural Resources*, supported the FWS' definition. 639 F.2d 495 (9th Cir. 1981) (*Palila I*); 852 F.2d 1106 (9th Cir. 1988) (*Palila II*). On March 11, 1994, however, the D.C. Circuit rendered a contrary 2-1 ruling, holding that "harm" was intended by Congress to be confined to "direct application of force to the animal taken" -- which, in the court's view, did not include habitat alteration. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, No. 92-5255, *petition for reconsideration filed*.

Sweet Home Chapter does not affect ESA section 7, hence there is no dispute that alteration of designated critical habitat on private land remains subject to that section's restrictions when there is a federal nexus. However, section 7 conflicts are found in only a small minority of consultations, and in most instances can be resolved by

alternative proposals or mitigation conditions. U.S. General Accounting Office, ENDANGERED SPECIES ACT: TYPES AND NUMBER OF IMPLEMENTING ACTIONS 31-32 (GAO/RCED-92-131BR 1992). Pursuing an Endangered Species Committee exemption is a legal and realistic option only for the largest projects.

2. Babbitt initiatives

Under Secretary Babbitt, the Department of the Interior has been exploring how to make the existing ESA more flexible, where a species cannot be adequately protected by using federal land alone. Attention has focussed on more innovative use of (1) section 10's incidental "take" mechanism, underutilized in the past because of the expense, complexity, and delay in negotiating the required habitat conservation plans (only 21 approved by FWS as of early 1994), (2) section 4(d) "special rules" for threatened species, as a means of incorporating new conflict-reducing techniques (density transfers, off-site mitigation, dedications) not practical in small-parcel incidental-"take" permits, and (3) section 6(c) federal-state cooperative agreements. *See, e.g.*, Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher, 58 Fed. Reg. 65,088 (1993) (providing that an incidental taking of species members does not violate section 9 if it results from activities consistent with California's Natural Community Conservation Planning Act (NCCPA) and the NCCPA plan for protection of coastal sage scrub habitat).

3. Case law

While direct land-use restrictions under the ESA spark impassioned debate, there have been no court rulings on such restrictions in ESA taking suits. Indeed, there are no such cases pending in the U.S. Court of Federal Claims (the trial court with jurisdiction). By contrast, another federal effort caught up in the property-rights

debate, the wetlands protection program, had generated 28 takings filings in that court, as of May, 1993, and 7 takings rulings in the past year.

What this dearth of ESA cases means is disputed by environmentalists and property rights advocates. At the very least, one cannot infer that the ESA *never* causes significant adverse impact to private property, since the daunting demands of taking law discourage suit in all but extreme instances of property value loss or project delay. For example, a taking action based on ESA restrictions would likely have to demonstrate roughly 90% fair market value loss, or near-total elimination of economic use, determined with regard to the parcel as a whole. A temporary taking action would have to show that project delays had been "extraordinary" -- which no federal court appears to have ever found. (Recent federal delay cases appear to have all arisen from wetlands regulation. *See, e.g., Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993).

Additionally, takings law imposes exacting ripeness requirements. Thus, mere listing cannot support a ripe taking claim. Rather, the landowner must first apply for and be denied an incidental "take" permit, then (unless futile) propose one or more scaled-down versions which also are barred. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).

And while there have been no decisions yet, there is ongoing taking litigation involving the ESA directly and indirectly, with intimations of more to come. *See, e.g., Four Points Utility Joint Venture v. United States*, No. 93-655 (W.D. Tex. filed Oct. 22, 1993) (plaintiffs allege that FWS and City of Austin have effected taking by adopting policies, partly under ESA, to keep portion of developer's tract in its natural state); *Boise Cascade v. State of Oregon*, No. 93-2018 (Ct. App. filed Feb. 1, 1993) (claiming

that state logging prohibition on 56 acres surrounding nesting spotted owls, listed as threatened under state law, has effected taking).

ESA takings litigation conceivably may also arise from government measures to protect aquatic species, especially where such measures impinge on state-law water rights. The ESA provides no exception to persons holding such rights. *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992). For example, efforts to maintain instream flows to conserve listed species of salmon found in the Columbia and Sacramento Rivers have been suggested by commentators to conflict with such rights.

Two recent takings decisions in the direct-limits category have arisen under *state* wildlife protection laws. *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992) (finding no taking in state's denial of permit for development that would overlap protected "deeryard area"), *cert. denied*, 113 S. Ct. 1586 (1993); *Florida Game and Fresh Water Fish Comm'n v. Flotilla, Inc.*, No. 93-00554 (Fla. Dist. Ct. App. Mar. 16, 1994) (discerning no taking when acreage in an ongoing subdivision development had to be left undisturbed for several years while occupied by a nesting pair of bald eagles). These decisions suggest that the high-priority purpose of the ESA to avert the extinction of species will not prompt courts to place ESA-based property restrictions in categorical status, removed from the customary case-by-case approach to testing for takings.

B. Limits on defensive measures protecting private property from harm by listed species

1. Introduction

Limitations on one's ability to protect property from the depredations of certain animals are of older vintage than the previous category. State hunting bans have long been attacked when protected birds or deer fed on private crops or forage. Under the

ESA, debate usually involves protected predators (grizzly bears and wolves) that may kill private livestock.

2. ESA provisions

The ESA allows a defense to the "take" prohibition based on good-faith belief that one was protecting persons, but not property. ESA §§ 11(a)(3) (civil defense), 11(b)(3) (criminal defense). However, FWS "special rules" under section 4(d) allow government agents to "take" members of threatened species and experimental populations that have actually harmed property. Two such special rules are for threatened grizzlies and experimental populations of red wolves. 50 C.F.R. §§ 17.40(b)(1)(c), 17.84(c)(5), respectively. By contrast, special rules are *not* authorized for endangered species.

3. Case law

Most taking decisions under federal wildlife laws concern limits on defensive measures, *not* direct limits on land use. All such cases have ruled against the landowner. Prominent in the decisions is a refusal by courts to attribute the actions of wild animals to the government, despite government's role in limiting defenses and even when such animals are managed by government. This government nonresponsibility is an extension of the common law doctrine of *ferae naturae*, under which no person is liable for injuries by animals in a state of nature, until they are reduced to possession by skillful capture. *See Sickman v. United States*, 184 F.2d 616, 618 (7th Cir. 1950), *cert. denied*, 341 U.S. 949 (1950); *Rubinstein v. United States*, 338 F. Supp. 654 (N.D. Cal. 1972).

In the only ESA case in this category, a rancher shot a grizzly bear menacing his sheep, after losing many sheep to bears. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989). He was administratively assessed a civil penalty of $2,500 for his "take" of a threatened species member. The court found no

regulatory taking of Christy's sheep because, in its view, the FWS' regulations left him with a complete bundle of property rights in them. The court found no physical taking of the sheep because the United States neither owns nor controls the wildlife it protects; the rancher's loss is merely the "incidental result" of reasonable regulation. In lone dissent from the denial of certiorari, Justice White asked whether "a Government edict barring one from resisting the loss of one's property is the constitutional equivalent of an edict taking such property in the first place." 490 U.S. at 1115-16.

Non-ESA depredation cases in the federal courts all have reached the same no-taking holding as *Christy*. *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1430-31 (10th Cir. 1986), *cert. denied*, 480 U.S. 851 (1987) (horses protected under Wild Free-Roaming Horses and Burros Act consumed private forage for livestock); *Fallini v. United States*, No. 92-809 (Fed. Cl. Apr. 4, 1994) (water sources on federal land, used for watering livestock under federal permits, had to be shared with WFHBA-protected horses); *United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502 (10th Cir.), *cert. denied*, 488 U.S. 980 (1988) (compelled removal of fence on private land, leading to competition for private forage between rancher's cattle and pronghorn antelope); *Bishop v. United States*, 126 F. Supp. 449 (Ct. Cl. 1954) (geese protected under the Migratory Bird Treaty Act damaged private crops), *cert. denied*, 349 U.S. 955 (1955).

Most state court decisions, typically involving hunting bans on game animals, also deny compensation to the landowner. *See, e.g., Barrett v. State*, 220 N.Y. 423, 116 N.E. 99 (1917) (government-reintroduced beavers destroyed trees on valuable private woodland); *Collopy v. Wildlife Comm'n*, 625 P.2d 994 (Colo. 1981) (goose hunting ban inflated goose population, causing crop losses).

Perhaps the most compelling case for a taking through restrictions on property defenses occurs when protected animals are introduced, or reintroduced, into an area *by the government*. Here, the *Christy* argument that wild animals are not "instrumentalities of the government" seems most open to challenge. *Christy* expressly left this issue open. 857 F.2d at 1335 n.9. The two known cases in the area, involving *re*introduction into the animals' historic range, have gone for the government. *Barrett v. State*, *supra*; *Moerman v. State*, 17 Cal. App. 4th 452, 21 Cal. Rptr. 329 (no taking by state-relocated Tule elk that allegedly occupied plaintiff's ranch almost continuously, ate crops raised for rancher's livestock, and damaged fences), *review denied*, No. S034811 (Cal. S. Ct. 1993), *cert. denied*, 62 U.S.L.W. 3684 (U.S. Apr. 18, 1994). Notwithstanding, conservative legal foundations are looking for cases to file.

Depredation cases also have invoked due process and tort theories, again unsuccessfully. *See, e.g., Christy v. Hodel*, *supra* (no fundamental due-process right in U.S. Constitution to protect livestock from protected predators that would subject ESA to strict scrutiny); *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950) (United States not responsible for waterfowl's feeding on private crops merely because of protection afforded such birds under Migratory Bird Treaty Act), *cert. denied*, 341 U.S. 939 (1951). With regard to due process, note that state cases, in contrast with federal cases, have recognized a state constitutional right to defend one's property from wild animals even when contrary to state conservation laws. *See, e.g.*, Cross v. State, 370 P.2d 371, 376-77 (Wyo. 1962) (due process clause in state constitution read to guarantee "the inherent and inalienable right to protect property").

C. Post-listing limits on commercial dealing in species members acquired prior to listing

1. ESA provisions

Section 9 includes many provisions that bar commercial dealings in endangered species (by rule, extended to threatened species), but no general grandfather clause for species members and items made therefrom acquired prior to listing. There is only a limited exemption available to persons who have entered into a contract before the species was considered for listing, if they otherwise would suffer "undue economic hardship." ESA § 10(b).

2. Case law

The second of the two reported ESA/taking cases falls into this category. In *United States v. Kepler*, 537 F.2d 796 (6th Cir. 1976), no taking was discerned in the ESA's ban on interstate transport of listed animals that were allegedly held lawfully as of the ESA's enactment. The court reasoned that the ESA barred sales of the listed animals only in interstate and foreign commerce, allowing sales in *intra*state commerce and possibly for scientific and species propagation purposes. Thus, listing did not completely destroy the value of the animals.

This category also includes a Supreme Court ruling: *Andrus v. Allard*, 444 U.S. 51 (1979). *Allard* addressed the Eagle Protection Act and Migratory Bird Treaty Act, banning commercial transactions in bird parts even if they were acquired pre-ban. The Court saw no taking of plaintiff's Indian artifacts made from eagle feathers, explaining that while the ban foreclosed the most profitable use of the artifacts (commercial sale), other uses, including possession, transport, donation, or exhibition for an admission charge, remained open to plaintiffs. This holding was cited in *Lucas v. South Carolina Coastal Council* as illustrating that government control over commercial dealings in

personal property, as opposed to land, can rarely be a taking. 112 S. Ct. 2886, 2899-00 (1992).

In light of *Andrus* and *Lucas*, future successful taking actions in this category would seem unlikely.

D. Miscellaneous impacts

Other theoretical types of private property impacts from the ESA include expenditures voluntarily made by landowners to dispute FWS claims as to the presence of an endangered species, banks unwilling to make construction loans until assured that protected species are not present, trespasses by members of the public curious to observe a newly listed species, etc. For many of these impacts, however, it is unlikely that liability, if any, would attach to the United States.

III. CROSS-CUTTING ISSUES

A. Physical taking or land-use regulation?

Taking plaintiffs would benefit greatly if courts were to view wildlife protection laws as bringing about a government-caused permanent physical occupation of land by members of the protected species, or a government-caused appropriation of consumed livestock or forage. So characterized, many ESA impacts would constitute a *per se* taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

But if ESA strictures are viewed as land-use regulation, takings law raises difficult and complex evidentiary barriers that each plaintiff must relitigate anew -- in particular, proving total or near-total reduction in the value of a parcel viewed as a whole. One suspects that in the overwhelming majority of ESA cases, such a showing cannot be made, since non-"take" economic uses of the property will remain. Most courts wrestling with takings challenges to federal wildlife statutes have adopted the land-use regulation label. *See, e.g., Mountain States*, 799 F.2d at 1428.

B. Government's non-ownership of wildlife, but special relation thereto

Government does not own the wildlife within its borders. Rather, the ownership language once used by the Supreme Court has been called by that Court a legal fiction reflecting the state's broad power to regulate wildlife in the public interest. *Hughes v. Oklahoma*, 441 U.S. 322, 334-35 (1979). Federal wildlife cases infer from the absence of traditional ownership, the absence of government control, and the doctrine of *ferae naturae* that government is not accountable for the acts of wildlife. Caveat: the nonaccountability argument, as noted, is weaker in the case of government-introduced animals.

In the ESA, Congress has elevated government's long-recognized interest in managing wildlife for the public good to "the highest of priorities." *TVA v. Hill*, 437 U.S. 153, 174 (1978). Notwithstanding, the few pertinent federal cases suggest that regulation to protect wildlife -- even to avert extinction -- will be evaluated for takings under the same standards as other government action. *Lucas* appears to endorse this view. There, the Court specifically noted conservation of endangered species habitat as a governmental purpose easily characterized as both prevention of public harm (traditionally held to be noncompensable) and creration of public benefit (often held compensable) -- in the course of debunking the harm-bebnefit distinction generally. 112 S. Ct. at 2898 n.11. In addition, *Lucas* is explicit that its rule of *per se* compensability for "total takings" -- complete elimination of a parcel's economic uses -- applies regardless of the public interest advanced as justification for the restraint. *Id.* at 2893.

Another facet of *Lucas*, however, opens the door for new wildlife protective elements to enter the takings analysis. *Lucas* pronounced that total takings are *not* compensable when the landowner's plans are inconsistent with "background principles of the State's law of property and nuisance" existing when the property was acquired. This exemption from compensability cannot logically be confined to state "background principles" (as opposed to

federal ones), to total takings (as opposed to partial ones), or to regulatory takings (as opposed to physical ones). Under this broad view of "background principles," the historical involvement of states in wildlife protection, and indeed perhaps the ESA itself, may stand as an obstacle to the taking plaintiff. *See Sierra Club v. Dep't of Forestry*, 26 Cal. Rptr. 2d 338, 21 Cal. App. 4th 603 (Ct. App. 1993) (noting in dictum that "wildlife regulation of some sort has been historically a part of the pre-existing law of property," and hence seems to qualify as a *Lucas* background principle).

While the U.S. Court of Federal Claims might eventually accept some wildlife laws as *Lucas* background principles, it may be speculated that the court will not condone extension of the public trust doctrine to federal protection of wildlife, at least to the extent that wildlife protection is thereby made categorically noncompensable.

C. Requirements for affirmative action or expense by landowner

As long as the ESA asks the property owner to address only a harm that his own activity would create, it should make little difference to the takings analysis whether the impact is prohibitory or mandatory. Affirmative requirements under the ESA may take the form of land dedication and mitigation requirements contained in HCPs. *See, e.g.,* population monitoring and habitat enhancement requirements in San Bruno Mountain Area Habitat Conservation Plan. In one case, use of "turtle excluder devices" in the nets of shrimp fishermen was attacked as a taking. *Concerned Shrimpers of America, Inc. v. Mosbacher*, No. CA C-90-39 (S.D. Tex. Mar. 8, 1990) (dismissed for lack of jurisdiction).

Takings law requires that the burden on the landowner, whether prohibitory or mandatory, be proportional to the harm that his proposed action might have -- a relationship that may soon be given more precise definition by the Supreme Court in *Dolan v. City of Tigard* (No. 93-518, orally argued March 23, 1994).

D. Benefits to the property owner from the ESA

The discovery of a listed species on or near private land conceivably may yield benefits for the owner (beyond those enjoyed as a member of the general public) as well as burdens. For example, one brochure promoting the sale of homes in a self-described environmentally sensitive development extols the presence there of several endangered species of birds. Such positive impacts, assuming they occur, are plainly relevant to the Fifth Amendment analysis.

E. Supreme Court endorsement of wildlife protection generally

In recent decades, the High Court has consistently embraced wildlife protective arguments in construing federal protection statutes. In addition to *Andrus v. Allard*, *supra*, *see Cappaert v. United States*, 426 U.S. 128 (1976), *Kleppe v. New Mexico*, 426 U.S. 529 (1976), and especially *TVA v. Hill*, 437 U.S. 153 (1978) (interpreting ESA). At a minimum, these decisions indicate that the Court accepts wildlife protection as a legitimate governmental objective that can support reasonable interference with property rights.

IV. LEGISLATIVE ASPECTS

A. General

Congress is almost certain not to reauthorize the ESA this year, for two reasons. First, the Administration has sought time to see how Secretary Babbitt's effort to better accommodate economic pressures under existing ESA mechanisms will play out. Second, the ESA's partisans fear that reauthorization would open up the Act to property-rights amendments. House deliberations during October, 1993, on creation of a National Biological Survey, resulting in adoption of several property-rights amendments, are viewed as foreshadowing a property-rights melee if the ESA is brought up soon.

One must understand that the property rights issue, on the Hill and elsewhere, reaches far beyond constitutional takings. Because taking actions can be costly and difficult to win, some members appear to take little comfort from the open door of the U.S. Court of Federal

Claims. Rather, they seek to prevent property impacts from occurring in the first place ("assessment bills"). Where impacts do occur, some members seek a standard of compensation more liberal than that in the Takings Clause ("compensation bills").

B. Specific legislation

H.R. 2043 and S. 921, introduced by the relevant committee chairmen, would address the ESA concerns of landowners through relatively minor programmatic adjustments -- by allowing landowners to learn in advance whether a proposed activity would be a "taking," authorizing HCPs for candidate species (so that post-HCP listings do not change the ground rules for the landowner), and compensating landowners for non-mandatory private conservation measures.

A competing pair of ESA-amendment bills, H.R. 1490 (Rep. Tauzin) and S. 1521 (Sen. Shelby) would address property rights more aggressively by, *inter alia*, giving property owners a statutory right to compensation when final actions under the ESA substantially eliminate the economically viable use of property. The same members have also introduced a "Private Property Owners Bill of Rights" (H.R. 3875, S. 1915), applicable solely to the ESA and wetlands program, that sets a value loss of "50 percent or more of the fair market value ... of the affected portion of the property" as a trigger for compensation.

V. SUMMARY

Legal and ethical duties to endangered species are novel and not universally accepted. The ESA forces a "seminal rethinking" in both areas. *See* Holmes Rolston III, *Property Rights and Endangered Species*, 61 U. Colo. L. Rev. 283 (1990). One can reasonably expect, however, that the great majority of ESA impacts will be constitutionally noncompensable -- for the reasons above. The only solid prospect for compensability may be in narrow, special circumstances -- for example, if extensive property damage were to be caused by government-

introduced and -managed animals against which no adequate landowner defense was allowed.

Plainly, however, there are imponderables. The courts may qualify the "parcel as a whole" rule of taking law, at least in its more exotic applications (such as to noncontiguous parcels owned by plaintiff). The Supreme Court might resolve *Dolan v. City of Tigard* in a way that heightens judicial scrutiny of dedications and mitigation conditions in HCPs. And the takings jurisprudence of the Federal Circuit (to which ESA taking actions against the United States would be appealed) may continue to evolve in a plaintiff-friendly direction. See most recently, *Florida Rock Industries, Inc. v. United States*, No. 91-5156 (Mar. 10, 1994) (suggesting that distinct "interests" in a parcel should be analyzed separately in determining whether a regulatory taking occurred).

In any event, a broad response to the property rights issue from the political branches is preferable to sole reliance on the courts, given the expense and unpredictability of takings litigation and the perception of some observers that the Act could achieve its goals with greater accommodation of landowner aspirations.