Pace Environmental Law Review

Volume 14
Issue 1 *Fall 1996*

Article 1

September 1996

Using Property Rights to Attack Environmental Protection: Second Annual Lloyd K. Garrison Lecture on Environmental Law

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PACE ENVIRONMENTAL LAW REVIEW

Volume 14 Fall 1996 Number 1

THE SECOND ANNUAL LLOYD K. GARRISON LECTURE ON ENVIRONMENTAL LAW

Conducted at Pace University School of Law
April 23, 1996

Using Property Rights to Attack Environmental Protection

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My subject is how a quarter century of development in environmental protection is jeopardized by ill-conceived legislative proposals that purport to protect property rights. Those proposals - sometimes directly, sometimes indirectly - particularly target two important but controversial environmental programs, governance of wetland development under the Clean Water Act (CWA),[1] and the Endangered Species Act (ESA).[2] Wetlands regulation not only protects some of

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1. Federal Water Pollution Control Act [Clean Water Act] (CWA) §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994).

2. Endangered Species Act (ESA) §§ 2-18, 16 U.S.C. §§ 1531-1544 (1994).

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our most productive biological areas, but also serves to protect nearby properties from inappropriate filling and development that can cause costly flooding.[3] The ESA protects our biological heritage not only by selecting out species that are in jeopardy, but even more importantly, by conserving "the ecosystems upon which [such] species . . . depend."[4] In pursuit of that goal, the law is being administered in cooperation with state and local governments in a special effort to begin recovery programs before species become threatened in order to keep them from being put on the critical list and in need of intensive care.[5]

Beginning early in 1995, bills were introduced in the Congress to the effect that any regulation that diminished the full developmental value of property in order to protect species could only be implemented if the public paid for that diminution, even if its extent was very small.[6] The bills were particularly far-reaching because they provided that loss of a specified value, not to a property as a whole, but to *any* affected portion of a property must be paid by the public. This was explained during a debate on the House floor as requiring compensation if development was restricted on even one acre out of a 100 acre tract, where that one acre was a wetland or habitat for a listed species.[7] In many, if not most, cases the bills would have generated claims for compensation

3. *See* CWA § 404, 33 U.S.C. § 1344.

4. ESA § 2(b), 16 U.S.C. § 1531(b).

5. *See, e.g.*, Ralph K. Haurwitz, *Salamander Pulled From Endangered Consideration; U.S., State Agreement*, AUSTIN AMERICAN-STATESMAN, Aug. 29, 1996, at A1; Joan Laatz Jewett, *Kitzhaber Drafts Plan To Revive Coho Salmon*, OREGONIAN, Aug. 24, 1996, at A-01.

6. The principal bills in the 104th Congress were H.R. 925 (also H.R. 9), which passed the House in March, 1995, and S. 605, which was reported out of the Senate Judiciary Committee, but was not brought before the full Senate, largely because its proponents lacked sufficient votes to break a threatened filibuster. *See* Chuck McCutcheon et al., *Lott Tells Lobbyists Property Rights Bill Is Dead for This Year*, CQ MONITOR, Sept. 9, 1996, at 5.

7. *See* 141 CONG. REC. H2509 (daily ed. Mar. 2, 1995)(statement of Rep. DeFazio). For a useful survey of the provisions of the bills *see* David Coursen, *Property Rights Legislation: A survey of Federal and State Assessment and Compensation Measures*, 26 Envtl. L. Rep. (Envtl. L. Inst.) 10,239 (May, 1996). The first such bill was H.R. 3875, introduced by Rep. Bill Tauzin of Louisiana in 1994. 140 CONG. REC. H679 (Feb. 23, 1994).

from the first dollar, or first acre, of loss of development value, though there is no evidence that wetland regulation and the ESA diminish values any more than conventional local zoning and building codes for which compensation is not required.

The idea that owners should be compensated for restrictions that have any economic impact whatever represents a radical departure from existing law and precedent, not only in this country but everywhere in the world, and it would enact a view that has been repeatedly and explicitly rejected by the Supreme Court of the United States over its entire history.[8] It has never been the law that a property owner has a right to exact every possible economic benefit permitted by virtually unbridled use and development, whether the subject is regulation of land or drugs, airplane safety or banks, mine safety, or setbacks and height limits.

Despite this unbroken history and tradition, proponents of compensation legislation persist. Their bills are almost certainly intended to undercut environmental protection, though of course the text says nothing to that effect. For example, the bill that passed the House of Representatives last year, though its title is general, the "Private Property Protection Act,"[9] in fact, applies only to "specified regulatory laws" which are defined solely as the ESA and the wetlands program of the CWA, and several auxiliary areas that are affected by those laws, such as the federal reclamation program.[10]

The Senate, in a remarkably candid report issued in March, 1996, on S.605 (its version of compensation legislation), explains that the compensation provision "is designed to address situations . . . such as when the Army Corps of Engineers forbids an owner from developing . . . a wetland

8. Most recently in the unanimous opinion in Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993).

9. H.R. 925, 104th Cong. (1995).

10. *See id.*

. . . ."[11] The Report emphasizes that while the bill allows the government a limited defense to paying compensation in some instances, "[w]etlands and endangered species land use limitations" will rarely be able to escape the bill's mandate that the public must pay to obtain compliance with the law.[12] The ESA and wetlands programs, according to the Report, are the laws that most harm property owners and that therefore need special controls.[13]

The limited defense to which the Report refers is a provision stating that the requirement that the public pay compensation can be avoided only if the conduct in question is a "nuisance" according to state law.[14] This standard has never been the governing rule for takings cases. The Supreme Court has never taken the position that to avoid compensation a regulation must constitute a common law nuisance. The Court made this point clear in the *Mugler v. Kansas*[15] in 1887, again in *Euclid v. Ambler Realty*[16] in 1926, and yet again in *Miller v. Schoene,*[17] in 1928. It has never departed from that view.

Plainly, nuisance is an inappropriate standard by which to measure compensability. Private nuisance is a rather technical category that involves using one's land so as to interfere with neighboring land uses.[18] In some states, it does not even cover routine wrongs that do harm to neighboring land, such as filling a wetland that backs water up onto a neighbor's land,[19] or land subsidence from mining.[20] In many states - such as California - even draining hazardous agricul-

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11. The Omnibus Property Rights Act of 1995 - S. 605, S. Rep. 104-239, at 24, (1996), *available in* LEXIS, Legis Library, Cmtrpt File.

12. *Id.* at 27.

13. *See id.* at 21.

14. *See* H.R. 925, 104th Cong., § 4 (1995).

15. 123 U.S. 623 (1887). The conduct in *Mugler* only became a nuisance by the statutory enactment which was challenged as a taking. The conduct was perfectly lawful at the time the defendants purchased their breweries.

16. 272 U.S. 365 (1926).

17. 276 U.S. 272 (1928).

18. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 86-87 (5th ed. 1984).

19. *See, e.g.,* Johnson v. Whitten, 384 A.2d 698 (Me. 1978).

20. *See* M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995).

tural wastes onto adjacent lands would not amount to a nuisance because commercial agricultural practices are declared not to be nuisances under state statutory laws known as "right to farm" legislation.[21]

Moreover, private nuisance requires a judicial standard of proof of causation between the defendant's action and the harm to the plaintiff, a proof that is often very difficult to adduce where large numbers of indistinguishable pollution sources are involved, as often occurs with common air and water pollutants.[22] Federal pollution laws - whose purpose is to limit risk to the public health - often restrict pollution to levels below that which would be prerequisite to judicial intervention in a suit between two parties.[23] Nor does nuisance law protect persons of greater than normal sensitivity, as do some federal environmental statutes.[24] On the other hand, public nuisance, which deals with harms to the general public, covers a grab-bag of unrelated wrongs that run from blocking a highway to running a brothel, or - at one time - bowling on Sunday, a list that induced Dean Prosser to declare nuisance the most impenetrable jungle in the entire law.[25]

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21. *See* CAL. CIV. CODE § 3482.5 (West Supp. 1996).

> No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began.

Id. § 3482.5(a)(1). *See generally*, Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right To Farm: Statutory Limits on Nuisance Actions Against The Farmer*, 1983 WIS. L. REV. 95, 118 n.108 (1983).

22. *See* 1 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 1.05, at 1-44 (1996). The various differences noted in this paragraph are discussed in a memorandum prepared for congressional debate on the compensation bills, and widely distributed during the 104th Congress. Memorandum on the Nuisance Exceptions in H.R. 925 and S. 605 (revised, May 25, 1995) (on file with author).

23. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 1.4, at 53 (2d ed. 1994).

24. *See* KEETON, *supra* note 18, § 88, at 628-29.

25. *See id.* § 86, at 616-19.

Why, exactly, the proponents of this legislation selected nuisance as their single defense is not entirely clear. The consequence of doing so, however, is unmistakable. A nuisance standard operates to restrict regulation to preexisting covered areas, and to impose judicial standards of proof designed for private litigation, rather than for public standards which are often designed to deal with risks to public health and welfare while proof is still uncertain. A standard drawn from traditional common law undercuts a central purpose of modern environmental law. Nuisance law is poorly suited both to cumulative harms and to those matters that involve sophisticated science, and difficult decisions about risk—precisely the reason that common law nuisance has largely given way to statutory regulation across the spectrum of environmental matters. Indeed, if you go back and examine the legislative history of modern environmental laws, you will see statements such as this: "we could not find a successful vehicle under the common law, under nuisance law, that would adequately protect these individuals."[26]

The idea that whatever was not treated as a nuisance in the past, whether specifically or generically, cannot be prohibited without violating property rights was rejected by the Supreme Court back in 1926 when zoning was first challenged. Justice Sutherland's words, in *Euclid*,[27] are as fresh today for environmental protection as they were then for the protection of urban development:

> Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are . . . apparent . . ., a century ago, or even a half a century ago, probably would have been rejected as arbitrary and oppressive. . . . [W]hile the meaning of the constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly

26. *Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Sen. Comm. on Environment and Public Works*, 96th Cong., pt. 4, 693 (1979).

27. 272 U.S. 365 (1926).

> coming within the field of their operation. In a changing world it is impossible that it should be otherwise.[28]

Another notion that has been advanced by proponents of compensation legislation is that only matters that deal with health and safety (and perhaps morals) are legitimate subjects of regulation that need not be compensated.[29] This too is a notion without historical foundation. The Court has never imposed any such limitation. The scope of regulation to which property owners must accommodate includes the public welfare, under which much environmental legislation is included. Public welfare laws embrace economic regulation of all kinds, historic preservation, open space zoning and height and density limits, and the whole range of fish and wildlife protection, as well as the ability to protect songbirds against what Rachel Carson described as a Silent Spring.[30]

As the Supreme Court has put it on numerous occasions, "the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety, and morals."[31] The Court has never drawn distinctions, as to the duty to compensate, among those different police or regulatory powers.

Those who urge the enactment of laws that could effectively shut down the ESA seem to believe that protection of wildlife - of which the ESA is a modern, scientifically directed version - is somehow new and unprecedented. But this too is simply wrong.

In 1900, in response to the virtual extermination of its beaver populations, the New York Legislature enacted a law

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28. *Id.* at 387.

29. H.R. 925 contains a limited health and safety hazard exception. H.R. 925, 104th Cong., § 5(a) (1995). Senator Hank Brown of Colorado at one time discussed incorporating a similar exception in S. 605, but it was never introduced. A modified version of S. 605, S. 1954, introduced by Senator Orrin Hatch, contained an exception for civil rights and disability-based discrimination, § 602.

30. *See* RACHEL CARSON, SILENT SPRING (1962).

31. Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405, 429 (1935).

prohibiting the hunting, molestation, or disturbance of beaver.[32] A few years later, the State acquired a number of beaver and began restocking certain Adirondack streams with them.[33] One of those streams, where the new population flourished, happened to abut a tract of forested land held by a Mr. Barrett.[34] The beaver assiduously felled hundreds of Barrett's trees.[35] Since the State had in effect installed the beaver on his land, Barrett claimed they were agents of the State.[36] He sued for compensation for the damage the beaver had done.[37] The Court rejected his claim, noting that the public has a right to protect wild animals, and had been doing so at least going back to the Colonial laws of the 1700s.[38] The court said there was no doubt of the validity of the ban on harming the beaver and went on to say:

> Wherever protection is accorded, harm may be done to the individual. Deer or moose may browse on his crops, mink or skunks kill his chickens, robins eat his cherries. . . ., and no one can complain . . .
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> . . . The police power is not to be limited to guarding merely the physical or material interests of the citizen. . . . The eagle is preserved not for its use, but for its beauty. The same thing may be said of the beaver. . . . [Their preservation] does not unduly oppress individuals . . . .
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> . . . The prohibition against disturbing the beaver is not different from that assumed by the Legislature when it prohibits the destruction of the nests and eggs of wild birds even when the latter are found upon private property.[39]

Similar laws have been sustained throughout our history. Fifty years after the Barrett case, a similar issue arose

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32. *See* Barrett v. State, 116 N.E. 99, 100 (N.Y. 1917).
33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.*
37. *See Barrett*, 116 N.E. at 100.
38. *See id.*
39. *Id.*

in Montana. There, a rancher complained that elk were coming on his land and eating his pasture.[40] He was prohibited from shooting them and the Fish and Game Commission refused his demand that it come out and rid him of the intruding elk.[41] The State Supreme Court said:

> Montana is one of the few areas in the nation where wild game abounds. It is regarded as one of the greatest of the state's natural resources, as well as the chief attraction for visitors. Wild game existed here long before the coming of man. One who acquires property in Montana does so with notice and knowledge of the presence of wild game and presumably is cognizant of its natural habits. Wild game does not possess the power to distinguish between [natural food and crops], and cannot like domestic animals be controlled through an owner. Accordingly a property owner in this state must recognize the fact that there may be some injury to property or inconvenience from wild game for which there is no recourse.[42]

These are not unique or unusual examples. Similar cases can be found in many States. I emphasize this tradition because the Senate Report to which I referred earlier appears to take the position that owners subject to wetlands and endangered species laws are especially deserving of compensation because the regulation does not grow out of preexisting regulatory schemes. Therefore, the authors of the report apparently conclude, owners should not expect to be regulated. If that is their premise, they may be unaware of the long, evolving tradition of wildlife protection, as well as the decades-long regulation of wetlands, and the fact that the ESA itself has been in place now for more than a quarter of a century.

The statute books abound with laws that call on landowners to accommodate to the protection of our wildlife heri-

40. *See* Montana *ex rel.* Sackman v. State Fish & Game Comm., 438 P.2d 663, 664 (Mont. 1968).

41. *See id.*

42. *Id.* at 666 (quoting State v. Rathbone, 100 P.2d 86, 92-93 (Mont. 1940).

tage.[43] Among these are the Migratory Bird Conservation Act[44] which restricts taking protected animals and the Eagle Protection Act[45] which governs trade in protected birds. In addition, under the Wild Free Roaming Horses and Burro Act[46] and the Unlawful Inclosures Act,[47] courts have rejected taking-of-property claims by those whose forage is eaten by wild horses, or by antelope that cannot be fenced out. More than 100 years ago, in 1894, the Supreme Court allowed a state to destroy private fishing nets to protect a public fishery, noting that "preservation of game and fish . . . has always been treated as within the proper domain of the police power . . . ."[48]

Proponents of compensation laws say they do not oppose environmental laws like the ESA. They just say that when such laws are implemented, the public must pay, and that the money is to come out of the program agency's existing budget.[49] I have so far urged that neither the Constitution nor tradition supports any such requirement. It is also necessary to understand the practical implications of compensation bills. One doesn't have to follow congressional affairs very closely to know that there will be no money, or very little money, to pay compensation claims in this era of efforts to achieve a balanced budget and deficit reduction. The bills' proponents know this. Their expectation is that agencies will simply regulate less, not because the agencies will determine that less regulation is needed to implement congressional goals, but because they won't be able to afford to regulate any more. As the Congressional Budget Office put it in its gentlest bureaucratic language: "CBO expects that enacting [S. 605] would cause federal agencies to attempt to avoid paying compensation by modifying their decisions, processing per-

43. For many examples see 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 (1995).

44. *See* 16 U.S.C. §§ 715 - 715s (1994).

45. *See* 16 U.S.C. §§ 668 - 669j (1994).

46. *See* 16 U.S.C. §§ 1331 - 1340 (1994).

47. 43 U.S.C. §§ 1061 - 1066 (1994).

48. Lawton v. Steele, 152 U.S. 133, 138 (1894).

49. *See* 141 Cong. Rec. H2509 (daily ed. Mar. 2, 1995).

mits more quickly, or otherwise changing their behavior."[50] More bluntly put, agencies with ESA and wetlands responsibilities would significantly have to dismantle their programs if compensation bills were enacted.

Of course, if there were a constitutional duty to pay, lack of money would not be the issue. But as I have noted, there is no such duty and there never has been. Similarly, if these programs were costing landowners vast sums of money, there would be a serious question of fairness to them, but there is no evidence of that. While the Office of Management and Budget (OMB) has estimated that the cost to the taxpayers of enacting such laws would be enormous - some $28 billion over seven years just for the ESA and wetlands programs[51] - much of that would not be costs actually incurred by property owners. The reason is that the bills are drafted so as to inflate claims. For example:

(1) One need not actually realize a loss. Where possible, prospective development is affected (though there may be no plan whatever of development, e.g. farmland that is likely to stay farmland), that potential loss can be claimed, and claimed now.

(2) Experience shows that costs of compliance with regulation are almost always much less than projected at the outset (though values would have to be determined according to such projections under these bills). For example, when pollution controls for cars were first proposed in 1970, estimates of compliance costs were $3,000/car. In fact, actual costs were about one sixth of that.[52] Also, emission reductions and fuel efficiency gains have fully offset the increased purchase price.[53] Acid rain controls are only one fifth of estimates as re-

50. Congressional Budget Cost Estimate [of S. 605], *reprinted in* S. Rep. 104-239, *supra* note 10, at 41.

51. *See* Letter from Alice M. Rivlin, Director of the Office of Management and Budget, to Senator Orrin Hatch (June 7, 1995).

52. *See* Gregg Easterbrook, *Why Things Are Looking Up*, USA WEEKEND, Apr. 16, 1995, at 4.

53. *See id.*

cently as 1990.[54] These are typical real costs in the light of experience, and innovativeness by companies.

(3) Compensation bills would create a situation in which there is no incentive to cooperate or to seek adaptations or innovations of the sort that make compliance costs lower than estimated; indeed, they create precisely the opposite incentive, making it profitable for owners to sit back and wait for compensation, rather than seeking cost-effective ways to comply.

So far I have focused largely on the legal framework of compensation laws and their potential to tear down some of the basic building blocks of our environmental protections. But legal rights are not the only issue. In recognition of the potential of these programs - indeed of any regulatory scheme - to impose undue burdens on some of those affected, the Department of the Interior, at the behest of Secretary Bruce Babbitt, has put into operation a series of administrative reforms designed to assure that implementation of the ESA does not impose such burdens, especially on small property owners, for whom compliance is likely to be especially difficult (other Departments have adopted similar policies tailored to their programs). I will close simply by mentioning the most important of these programs:

(1) Habitat Conservation Plans are agreed-upon arrangements that permit economic development to go forward, while protecting a species from jeopardy. They are authorized under the ESA.[55] Secretary Babbitt has initiated a "no surprises" policy so that owners who agree to a plan will not later be called on to contribute additional land or money.[56] This policy has encouraged many landowners to participate in such

54. *See* Mathew L. Wald, *Acid Rain Pollution Credits Are Not Enticing Utilities*, N.Y. TIMES, June 5, 1995, at A11.

55. *See* ESA § 10(a), 16 U.S.C. § 1539(a).

56. *See* U.S. Dep't of the Interior, *Administrator's New Assurance Policy Tells Landowners: "No Surprises" in Endangered Species Planning* (News Release), Aug. 11, 1994, *available in* WESTLAW, FENV-NR Database, 1994 WL 440313 (D.O.I.).

plans, showing that the ESA can be made to work without undue economic burdens on landowners.

(2) The ESA authorizes so-called 4(d) rules as to threatened species, which allow some take of individual listed species so long as adequate protection is provided for the survival and recovery of the species as a whole.[57] For example, in the habitat area of the Spotted Owl in the Pacific Northwest, a 4(d) rule was employed to free up tracts of as much as 80 acres so that small forest products companies were not blocked from maintaining harvest plans.[58]

(3) The Department seeks to alleviate burdens on owners by contributing public resources (highway mitigation money, lands from closed military bases, unallocated water from federal dams to produce instream flows) where the burdens of compliance can be severe for private parties.

(4) The Secretary has adopted a presumptive exemption for homeowners and small landowners whose activities only cause small impacts, up to 5 acres.[59]

(5) The Fish and Wildlife Service issued a policy directive on July 1, 1994, that requires it to identify, to the extent known at the time of a final listing of a species, specific activities that are exempt from or that will not be affected by the prohibitions of the ESA regarding take of listed species. The purpose of the policy is to give direction and notice to landowners, and to indicate activities that are not ordinarily affected by the Act, such as existing agricultural practices.

(6) The Secretary has adopted a "Safe Harbor" program, which provides that owners will not be disadvantaged if they manage their land in a way that makes it more attractive in the future as habitat. Owners will be able

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57. *See* ESA § 4(d), 16 U.S.C. § 1533(d).

58. The plan is explained in a Department of the Interior News Release. *See* U.S. Dep't of the Interior, U.S. Fish and Wildlife Service, *Fish and Wildlife Service Proposes Special Easing Regulatory Burden on Timber Harvest on Non-Federal Lands* (News Release), Feb. 7, 1995, *available in* WESTLAW, FENV-NR Database, 1994 WL 53206 (D.O.I.).

59. A proposed rule was issued on July 20, 1995. *See* Endangered and Threatened Wildlife and Plants; Proposed Rule Exempting Certain Small Landowners and Low-Impact Activities From Endangered Species Act Requirements for Threatened Species, 60 Fed. Reg. 37419 (1995).

> to manage their land as they wish, and will be allowed to reduce new habitat back to an original baseline if they wish, without being responsible for destroying additional habitat they have voluntarily created. Safe Harbor provisions, where applicable, can be included in habitat conservation plans.

Each of these administrative innovations demonstrates that the ESA and similar basic environmental values can be protected vigorously while at the same time protecting economic values for both private landowners and commodity users of the public lands. They are elements of an effort to show that the ESA can be administered so it functions effectively and fairly, and need not be undermined by ill-conceived, grossly expensive, and unnecessary compensation schemes. Direct attacks on the environment can be easily seen for what they are. Indirect attacks, as in compensation bills, are more difficult to parry. Their workings and their potential impacts are largely hidden from public view. But they are as threatening as direct assaults on environmental protection. Fortunately, the compensation bills advanced in the 104th Congress, in 1995 and 1996, were turned back. That is the fate they richly deserved.