The High Price of Habitat Protection

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THE HIGH PRICE OF HABITAT PROTECTION

Under the new Species At Risk Act, the federal government would compensate landowners whose property values are reduced by habitat protection orders. This is a very bad idea.

Stepan Wood

Shortly after the new session of Parliament began in January 2001, the Liberal government introduced a new endangered species bill to replace the one that died with the fall 2000 federal election.1 Committee hearings were held through the spring, and it was expected that the bill would be reported back to the House of Commons in early summer and enacted shortly afterward.

Critics have identified many flaws in the proposed Species at Risk Act (SARA), but one alarming feature has been largely overlooked: the legislation proposes to compensate landowners if mandatory habitat protection orders reduce the value of their land. Such orders would be issued when private stewardship and economic incentives fail to protect critical wildlife habitat. As the government explained in December 1999:

If the use of one's land has to be highly restricted by the use of the federal habitat safety net to protect species' habitats, then individuals should be able to apply for compensation.2

This proposal is found in section 64 of the current bill, which authorizes the federal Minister of the Environment to "provide compensation to any person for losses suffered as a result of any extraordinary impact of the application" of SARA's critical habitat protection provisions.

Proponents of compensation argue that critical habitat protection measures imposed by the government might drive already beleaguered family farmers and other vulnerable individuals out of business and possibly out of house and home.3 Clearly nobody wants this result. In addition, proponents argue that American experience shows that enforcement of endangered species legislation without compensation may give landowners a perverse incentive to destroy wildlife habitat before it is discovered by the authorities.4 This, too, is a result that everyone agrees should be avoided.

Nonetheless, leaping from these extreme cases to a general rule that landowners and possibly holders of timber leases or mineral licenses on federal land are entitled to compensation whenever habitat protection laws cause them business losses or reduce the market value of their land would be unprecedented in Canadian law. Moreover it would be unjustified.

The general rule in Canada is that there must be an actual taking of property by the state or deprivation of its entire reasonable economic value, before a right to compensation is triggered; there is generally no right to compensation for laws or government actions simply because they severely restrict the uses to which property may be put, reduce its market value or limit (or even freeze) its development.5 A wide range of federal, provincial and municipal laws severely restrict land use, but do not normally give rise to a right to compensation: for example, prohibitions on disturbing fish habitat or archaeological sites, restrictions on logging or farming in riparian buffer zones, regulation of industrial air and water pollution, and municipal zoning by-laws. Under Canadian law, property owners do not have a right to be paid to comply with validly enacted laws that affect the market value of their property.6

Proponents of the compensation proposal argue that government regulation that reduces property values may amount to a "regulatory taking" of property that must be compensated out of taxpayers' wallets. This argument has been used by property rights advocates and industry groups in the United States to attack a broad range of government measures relating to health, safety, social welfare and environmental protection. Some courts in the United States have used the regulatory takings doctrine to invalidate, or order compensation for, municipal land-use planning decisions and state and federal measures to protect environmentally sensitive areas such as wetlands and endangered species habitat.

Not surprisingly, the regulatory takings movement has generated furious controversy in the United States.7 If the status of the regulatory takings doctrine is doubtful in a country where private property is constitutionally protected against government takings, it should be even more so in Canada where we have consciously decided against constitutional entrenchment of private property rights. Indeed, the "regulatory taking" argument has been raised infrequently before Canadian courts and has not met with much success.8

Even the federal government's own expert consultant expressly recognizes that the compensation proposal is a radical departure from past practice. Noted economist Peter Pearse, in his February 2001 report on compensation, states very clearly that:

[T]hese courts and governments have historically drawn a distinction between expropriation of property, for which compensation is due, and restrictions on the use of property for some public purpose, for which compensation is generally not payable. Restrictions that might be imposed under the Species at Risk Act are of this regulatory type, so compensation for them conflicts with long established policy in Canada.9

Strangely, very few voices have been raised in opposition to the federal government's compensation proposal. Indeed, some prominent conservation groups have refused to condemn the proposal, possibly because they do not fully appreciate its implica-

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If the funds earmarked for compensation were redirected to incentives and assistance, the resulting benefits to endangered species could be substantially enhanced.

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