ISSUE NO. 3

WILDLIFE CONSERVATION

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There is agreement that endangered wildlife should be saved from extinction. The only questions are (1) what species genuinely require protection, and (2) who will bear the conservation cost?

COST

It is a long-standing principle of public resource conservation that he who benefits shall pay. In water conservation projects, for example, elaborate systems have been devised to identify the beneficiaries, measure their respective benefits, and allocate costs proportionally.

In the case of wildlife conservation, the general public is the beneficiary. Society at large should therefore bear the cost. But neither the Federal nor State governments have shown much inclination to do so. Instead the "solution" has been to shift the cost to private citizens who happen to own undeveloped land. They are being required to pay for the national program in one or more of the following ways:

1. Their land is in effect being "taken" for conservation purposes by imposing large-lot zoning or other uneconomic restrictions on its use, or

2. They are being required to pay substantial "mitigation" fees in order to develop their land, even if no endangered species are present, or

3. They are being denied the right to develop their land unless they buy "replacement habitat" and donate it to the program, or

4. They are being required to buy "development rights" or "conservation credits" in order to make use of their land, or

5. Intentionally or not, the market value of their land is being driven down, permitting its acquisition at an artificially low price. This is being done by establishing "study areas", "planning areas", or boundaries of prospective preserves.

SPECIES

Initially, wildlife conservation efforts focused on unique animals that the public holds in esteem. As the program has grown, however, a wide variety of minor animals, rodents, insects, and vegetation have been added to the list. The program has also been expanded to include species deemed to be "threatened" or "sensitive" rather than "endangered".

In Riverside County, it is being proposed that:

1. No development be allowed that might harm a species listed for protection under the State or Federal Endangered Species Acts.

2. No development be allowed that might harm the habitat of a listed species, whether or not the land currently is occupied by that species, and

3. No development be allowed that might harm other, unlisted species (or their habitats) that environmental groups feel should be protected, even though that protection is not required by law.

PRESERVE BOUNDARIES

It is also being proposed that the boundaries of the future preserves be established in advance, before the land is acquired. These boundaries would be shown on a regulatory land-use map adopted by the County, even though some or much of the designated land ultimately might not be needed.

Doing this would destroy the marketability and value of the property involved. Affected owners could not develop their land and few buyers would be interested in purchasing their property. Thus, as in the case of the K-rat "study areas", landowner lawsuits would likely follow, on grounds that at least temporary "takings" had occurred without compensation.

REPLACEMENT HABITAT

The Federal and State resource agencies (U.S. Fish and Wildlife Service and the California Department of Fish & Game) administer the Endangered Species Acts and determine what "mitigation" requirements must be met before a development can proceed. Their most onerous requirement has been to make developers find and buy land of comparable biological value and donate it to the conservation program.

Complying with this requirement is difficult and costly. No two properties have identical habitat values, and finding a match is almost impossible. Hence the resource agencies frequently have required replacement ratios as high as four or five to one, rather than acre for acre, regardless of the cost.

Because "habitat replacement" inherently is unfair, its legality is questionable. Environmentalists, moreover, are challenging the concept on grounds that it allows protected species to be destroyed; species occupying the property being developed are "lost", in presumed violation of the law.

CONSERVATION CREDITS

There is considerable interest in the use of "conservation credits", also termed TDR's, or "transfers of development rights".

Under this concept, people with protected species on their land can develop their property if they buy someone else's development rights. Sellers of the credits, whose land also harbors the protected species, agree to consign their properties permanently to conservation use.

Attraction. The idea appeals to those landowners who otherwise would be required to find and buy replacement habitat.

The concept also appeals to landowners who are unable to develop or sell their land; they can earn money by selling their development rights. Their land becomes a designated "mitigation bank" from which credits must be bought, at whatever price the market will bear.

Public agencies also tend to favor the idea. It is a mechanism for acquiring as much private land as they wish, at no public cost. And, if they are able to sell credits themselves, the concept offers another way to derive revenue from public lands.

Defects. In essence, the concept is "habitat replacement" in another form. An owner wishing to develop his land is required to buy another property's development rights rather than the land itself. The effect is the same; the cost of the public conservation program is shifted to the participating landowners, freeing Government from its funding responsibilities.

There are other "catches" as well:

1. To be designated a "mitigation bank", a property must have substantial biological value as determined through studies paid for by the owner.

2. Not every property that passes these biological tests can be designated a "bank". If more than one or two banks are established for a particular area or species, the supply of credits is likely to exceed demand, and credit prices will drop. The same thing will happen if development activity declines and the market for credits dwindles. Thus, unless the number of banks is sharply limited, bank owners may find it difficult to sell their credits, either at all or at an acceptable price. Hence only a few landowners can be permitted to be credit sellers; the rest must be buyers.

3. There are also risks involved in becoming a credit seller. As the program presently is structured by the resource agencies, the following provisions apply:

   a. The bank land must be consigned irrevocably to conservation use before any credits are sold (the market cannot be tested before the commitment is made).

   b. Withdrawal from the program is not permitted, regardless of what happens to credit markets and prices.

   c. The banker must provide for the ongoing management and maintenance of his preserve, in accordance with a plan approved by the resource agencies. He must also establish an endowment fund that generates enough interest income annually to pay the preserves operating and maintenance expenses.

   d. The banker continues to hold title to the land and has accompanying liability exposure.

   e. The banker has no assurance that his property taxes will be reduced as a result of the land's commitment; the granting of any relief is at the discretion of the County Assessor.

   f. The banker has no protection against competition, either from other landowners or public agencies that might later by authorized to sell credits.

Other Considerations. From the standpoint of the County, there are further considerations:

1. If a landowner is unable to sell his credits after having been induced to contribute his land to conservation use, the result might be construed as an unlawful appropriation of private property for public purposes without compensation.

2. Environmental groups are pointing out that the buying and selling of conservation credits does not prevent the destruction of protected species. They therefore want credit buyers to demonstrate that development of their own land will not prove harmful. Yet a requirement of that kind would eliminate the principal feature of the TDR concept.

MITIGATION FEES

The K-rat mitigation fee has been reduced from $1,950 per acre to $500, and further reductions are possible.

With respect to other species, property owners and builders properly can be required to pay a mitigation fee only if:

1. Pursuit of their project will do identifiable harm to a species listed for protection under the State or Federal Endangered Species Acts, and

2. As noted in Dolan v. Tigard, 1994, the fee is related both in nature and extent to the impact of the proposed development.

Mitigation fees, then, cannot be used just to raise money. They must be narrowly focused.

REGULATORY RESTRICTIONS

Imposing large-lot requirements on a property, or placing other restrictions on its use, can easily make its development infeasible financially. These regulatory devices, however, produce unwanted results.

As discussed under ISSUE NO. 1 (LARGE-LOT ZONING), they encourage lot splits and other low-cost parcel-map land divisions that frequently lead to development of poor quality, depressed property values, a loss of tax base, infrastructure deterioration and, ultimately, the creation of permanent wastelands.

Because the restrictions prevent reasonable economic use of the land, moreover, they may well constitute improper "takings" of private property for public purposes without compensation.

CONCLUSIONS

In light of these findings, Riverside County's wildlife conservation program must not:

1. Require landowners and builders to buy "replacement habitat" or "conservation credits" in order to make use of their land, nor

2. Charge landowners and builders unfocused mitigation fees, nor

3. Obtain free use of private land through large-lot zoning, open-space designations, or other regulatory actions, nor

4. Establish "study areas", "planning areas", or boundaries of prospective preserves without taking purchase options on the land and making fair option payments.

Land Acquisitions. If private land is to be acquired, it should either be:

1. Purchased at the outset at the "fair market value" it had prior to the County's announcement of its acquisition plans, or

2. Bought on a project-by-project basis as development occurs, at its then-current market value, or

3. Secured through voluntary land dedications requested at the time of development approval, in return for density increases, land exchanges, development concessions, or other non-cash compensation.

Land Dedications. When Government needs private land for some public use, such as a fire station site, it either buys it or obtains it free of charge through a voluntary land dedication. The property owner makes the dedication in return for offsetting density increases or other economic compensation.

Setting land aside for wildlife conservation should be handled no differently; if funding is available, buy the land; if funding is not available, negotiate a land-dedication agreement with the owner. Owners generally are willing to dedicate land to public use provided they are "made whole" economically.

A workable solution would be for the County to:

1. Defer acquisitions of habitat land until land-use applications were received (there can be no threat to wildlife until and unless development actually occurs).

2. During the development review process, ask the applicant to set aside a reasonable amount of land as open space, and

3. In return, negotiate density concessions or other non-cash compensation with the owner, based on the economic value of the dedicated land.

Density compensation has particular appeal. The procedure is not new. It is a long-accepted way of obtaining private property, and it can be put in place simply by allowing density transfers and "clustered" development. There is no need for the County to diminish its tax base or spend scarce financial resources by buying land, and there is no net loss of property value.

"Listings". Endangered-species "listings" too often have been made on questionable scientific grounds. As the K-rat studies conducted by the Riverside County Farm Bureau demonstrate, listings have tended to become too casual and based on skimpy evidence.

The County should therefore insist that species within its boundaries not be listed for protection unless the proposed listings are supported by conclusive scientific findings. And the County's staff should be equipped professionally to evaluate and challenge these proposals.

Unlisted Species. It is not at all clear that the County has an obligation to extend regulatory protection to species not listed for preservation under the State or Federal Endangered Species Acts. Thus, unless there are legal findings to the contrary, the County's conservation program should be confined to "listed" species. The County should also seek the de-listing of species that no longer require protection.

County's Role. In carrying out its conservation program, the County needs to protect private property rights and interests, safeguard its tax base, preserve and enhance the local economy, ensure that property owners are treated fairly and legally, and promote the idea that development and wildlife conservation must go hand-in-hand (it is the public revenue generated directly and indirectly by development that makes conservation programs possible financially).

The County must be free to oppose State or Federal habitat conservation measures that would depress property values, needlessly remove private land from the tax rolls, hinder agricultural activities, prevent the conversion of rural and agricultural land to urban uses, or foreclose other economic opportunities.

To be able to do this, the County must not act in effect as an agent of the State and Federal resource agencies. It should manage its own conservation program independently, albeit in compliance with State and Federal law.