

The House takes an ax to the Endangered Species Act By John Echeverria

As former Supreme Court Justice Louis Brandeis put it, the states can serve as "laboratories of democracy" by testing new approaches to see if they might work for the nation as a whole. The idea is that if a new approach falls flat, the rest of the country can learn from the mistake without going through the same experience.

Unfortunately, state experiments sometimes fail, and politicians still don't learn the lesson.

A case in point is Oregon's Measure 37, a sweeping "takings," or property rights measure passed by Oregon voters in November 2004. The measure has been a surprising disaster for Oregonians. Nonetheless, the U.S. House of Representatives recently passed a bill amending the Endangered Species Act that would convert Oregon's isolated mistake into national policy. By so doing, the House took an ax to the law, effectively repealing the law as it applies to private lands.

The Oregon measure requires the public to pay landowners when regulations limit development. The measure applies, subject to several narrow exceptions, regardless of how modest the restrictions, or how small the economic impact on the owner.

The kicker is that the measure includes no funding mechanism, and at the same time authorizes officials not to enforce the law if they lack funds to pay claims. In less than a year, over 2,500 claims have been filed in Oregon under Measure 37. So far, Oregon officials, with no room in tight budgets to pay the millions of dollars in claims, have waived the law in every instance.

The result is that Oregon's highly regarded land-use protections are being shredded by proposals to place billboards along scenic roadways, dumps in established communities, and subdivisions in agricultural areas. It should be no surprise that some Oregonians are beginning to express public regret for having voted for Measure 37.

Now comes the House ESA bill, passed on Sept. 29, that borrows Oregon's "pay or waive" approach. The bill requires the secretary of the Interior to pay for the value of any use of private property restricted under the Endangered Species Act. At the same time, the bill indicates that the Interior secretary can avoid liability by simply not responding to a landowner's petition for a determination on whether the law restricts use of the property. This odd non-response would then give the owner or developer the signal to go ahead.

Paying people to comply with the law is fundamentally unfair. Under established law, wild animals that happen to be present on private land still belong to the public. That means that any landowner activities that injure or kill the public's wildlife infringe on public rights. Should a trespasser, for instance, be able to seek financial compensation for trespassing?

Paying landowners also would confer unfair windfalls on developers at considerable taxpayer expense. Just because a developer is not permitted to develop every square inch of a property does not necessarily mean he will suffer an economic loss; savvy developers treat conserved open space as an amenity that can increase their profits. In addition, all of us, including landowners, share in the benefits from the Endangered Species Act, as well as other land use and environmental laws.

Finally, if the payment idea in the House bill were actually implemented, it would encourage gaming of the system. It would create an incentive for speculators to propose destructive development projects on environmentally sensitive lands just to be able to demand cash from the public.

Ultimately, however, the worst aspect of the House bill is that it is designed to use the threat that the public would have to pay developers to comply with the law, not to actually secure payments, but as leverage to gut the law.

As Oregon's experience under Measure 37 shows, the pay or waive approach means, in practice, that the law cannot be enforced at all.

Congress would undoubtedly decline to pass a bill that clearly gutted the Endangered Species Act, just as Oregon voters probably would not have voted to repeal land protections in that state. But that is the likely effect, and no doubt the intended consequence, of the present effort in Congress to build on Oregon's bad example.

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