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Estimates of payments under Pombo bill vary widely
CBO says $10M per year possible in first years of law; bill opponents say landowners could get billions

By Steve Davies

The biggest difference between the bill put forth by Rep. Richard Pombo (R-Calif.) and the substitute bill offered by Reps. George Miller (D-Calif.), Sherwood Boehlert (R-N.Y.) and others, was the absence in the latter of language requiring the government to pay landowners who abandon "proposed use" of any "affected portion" of their property if that use would take a species under Section 9 of the ESA.

The cost of the requirement to pay landowners was the subject of spirited discussion during debate on the House floor and, of course, beyond. Opponents called it a "giveaway" and an "entitlement"; Pombo and supporters said the public should compensate landowners whose property is home to listed species.

With the ESA, "You are taking land away from people," Pombo said during the debate. "Every little small farmer, rancher across the country, every homeowner across the country who has had their property taken away from them should be compensated for it."

The Congressional Budget Office, which had less than a week to come up with a report on the bill's economic impacts, said estimated federal payments to landowners from 2006 through 2010 "would likely total less than $10 million because of likely delays in resolving conflicting interpretations of the law, implementing the necessary administrative mechanisms, and processing requests. The costs of those payments [once] the program has been fully implemented could be much more significant—despite the likely small size of individual payments—because the volume of requests could be very large at first."

CBO also said civil litigation would likely increase as a result of H.R. 3824, "at least in the short run, because many requests for aid would likely involve conflicting interpretations of the statute that could require the courts to resolve."

The White House, in a Statement of Administration Policy on the bill, said the requirements in it "related to the species recovery agreements, new statutory deadlines, and the new conservation aid program for private property owners provide little discretion to federal agencies and could result in a significant budgetary impact."

Rep. Norm Dicks (D-Wash.) called CBO's dollar estimate "laughable," and environmental groups offered similarly scathing assessments.

"The CBO estimate of costs for Pombo's bill is absurdly low, conclusory, and in conflict with economics, experience, the amount of pending ESA takings claims (not to mention Pombo's and the Resources Committee's estimates of lost profits and land value from ESA), logic and OMB's estimate of the

costs of similar provisions" in the Contract with America in 1996, said Glenn Sugameli, senior legislative counsel at Earthjustice.

But when Dicks used the Contract with America analogy to say that H.R. 3824's aid provision would cost $3.2 billion, Pombo hotly disputed it. **"**This provision was not in the Contract With America. Nobody seems to be constrained by the truth here. This is a brand-new way of dealing with compensating property owners whose land is taken. CBO scored this at $10 million. This is a brand-new way of dealing with a very real problem and assuring some kind of protection to my property owners and your property owners."

Under the bill, landowners could demand an answer from the Fish and Wildlife Service within 180 days on whether a proposed use of their property would result in take of a species. If the landowner wanted to build a home, for example, but could not because of the presence of an endangered species, then FWS would have to pay. If FWS didn't come up with an answer by the deadline, the proposal would be considered to not be a take of species under Section 9.

The amount of the payment would be "no less than the fair market value of the use that was proposed by the property owner," the bill says.

Pacific Legal Foundation attorney James Burling said he sees the aid provision as "a way of providing relief without the present obstacles found in the law of regulatory takings. This should make landowners much more amenable to taking steps that promote the recovery of species on their land."

As Burling sees it, the bill would compensate owners for the lost use of their property. "For example, suppose a landowner is unable to cut trees on 25 acres because of a spotted owl nest that the Secretary [of Interior] determines will be in existence for 10 years. In exchange for a contract or lease wherein the owner agrees not to cut the trees for a period of years, the owner would be paid the fair market value of that lost use."

The fair market value would be the difference between the value of the trees on property that can be cut, versus the value of the trees that cannot. "The amount paid here is very likely to be much less than either the fair market value of the underlying land or the trees, as neither has been permanently taken. This should reduce both the government's liability and the impact on property interests."

Bill does not expressly target small landowners

CBO adopted the same interpretation of the bill advanced by its proponents — that H.R. 3824 was a way to help small landowners, as Rep. Dennis Cardoza (D-Calif.), the chief Democratic sponsor of the bill, and other H.R. 3824 supporters said during floor debate.

Cardoza called the payment provision "crucial, especially to the little guy who does not have millions and millions of dollars to hire lawyers, biologists and surveyors needed to take on the service."

In the same vein, CBO said it "expects that most aid payments eventually made by the government would be relatively small (often as little as a few thousand dollars) because the vast majority of aid requests would likely involve small parcels of land or some minor fraction ("affected portion") of larger tracts."

"We expect that it would be difficult for landowners to receive aid for larger claims above $1 million under the section 13 process because most larger land-use projects would be ineligible to receive written determinations under section 12," CBO's report said.

But nothing in the bill says that FWS would not have to make written determinations for larger land-use projects. Asked for clarification, CBO pointed to language in Section 12 that says landowners cannot get written determinations for property that

is subject to Section 7 consultation. The bill says that the language requiring that FWS provide landowners with written determinations "shall not apply with respect to agency actions that are subject to consultation under section 7."

Michael Bean, chairman of the wildlife program at Environmental Defense, said, "There are a lot of large-scale and expensive land uses that don't trigger section 7. Timber harvest on private land is one example."

If landowners are able to avoid any federal nexus by avoiding wetlands, that would be one way to ensure there was no consultation.

Bean said that "in general, I suppose it is probably the case that the bigger the project the more likely it is that it will have some section 7 nexus, but there certainly are many big projects that don't and huge numbers of small ones." Examples of those probably include the hundred or so individual lot HCPs in the Austin area for the Balcones Canyonlands Conservation Plan.

"Under the Pombo bill, every one of those lot owners would have had to be compensated for foregoing development," Bean said.

John Kostyack, senior counsel at the National Wildlife Federation, called CBO's assumption "absurd."

"Look at all of the HCPs that have been approved for large landowners," Kostyack said. "In the future, every one of those large landowners would avail itself of Pombo's cash machine. In fact, I would expect that a far greater number of large landowners would step forward than before, considering how easy it would be to take money from the taxpayer."

The future of the provision is uncertain, at best. Sen. Lincoln Chafee (R-R.I.), chairman of the Environment and Public Works Committee's Fisheries, Wildlife, and Water subcommittee, disagrees vehemently with it (*see story, page 3*).

James McElfish, an attorney with the Environmental Law Institute in Washington, D.C., said in an analysis of the bill that it "is ambiguous as to the connection between these [determination and payment] provisions and ESA section 7."

"[A] conflict may arise if a private owner requests a written determination for a proposed use and does not apply for, or only later applies for, a permit subject to section 7 consultation," McElfish said. "If the owner receives immunity, is it still valid if consultation imposes conditions? Is the owner still required to comply with consultation conditions? And if the owner seeks payment rather than pursuing the project, to what extent is 'fair market value' affected by potential mitigation provisions that could have been required after consultation if consultation was never initiated?"