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Private Property Interests, Wildlife Restoration, and Competing Visions of a Western Eden*

Holly Doremus**

I. INTRODUCTION

Recent years have produced a few hopeful signs for those seeking to restore ecological integrity to the western United States. In January 1995, gray wolves brought from Canada raced into the snow of the central Idaho wilderness, returning after a fifty-year absence. Late in 1996, condors soared above the sun-washed Vermillion Cliffs of northern Arizona for the first time in nearly a century.1

Not all observers were pleased, however. Property owners in the northern Rockies and Southwest, respectively, fiercely opposed each of these reintroductions. Each dramatic homecoming occurred against a backdrop of stylized battles in dignified courtrooms. But the battles weren't limited to those bloodless courtroom confrontations. About two weeks after the Idaho wolf release, one of the wolves was found shot to death near the body of a dead calf. Two years later the bullet-riddled body of another reintroduced wolf was dumped in a river near Yellowstone Park.2 Of course disputes between property interests and environmentalists are neither new nor unexpected. Environmental regulation can have heavy financial consequences. Restrictions imposed on timber harvesting to protect dwindling species, such as the northern spotted owl, can cost landowners as much as $40,000 per acre. But money does not fully explain the furor of the battles over wildlife restoration. Offers of compensation for damages have not silenced opposition to wolf releases or bison restoration. One explanation for the continued resistance is that the significance of these struggles is not limited to their financial consequences. These are battles for control of the relationship between humankind and nature, pitting the individual

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against the government, local interests against national ones, and rural residents against urbanites. Appropriately, they are fought primarily in the West, home to most of the country's remaining wildlands, heir to a fierce tradition of rugged individualism and self-determination, and currently the site of a wrenching transition from rural to urban domination.

Combatants on both sides of these battles are striving to construct or maintain what they imagine to be a western paradise. Their utopian visions, however, are diametrically opposed. On one side the environmentalists of the New West seek a paradise where nature represents an awesome presence, an intricate and beautiful dance to be admired and respected in its own right. These advocates of wild nature measure choices against the standards articulated by Aldo Leopold: Things are morally right if they tend to preserve the integrity and beauty of nature; they are morally wrong if they tend otherwise. On the other side are the ranchers, loggers, and miners of the Old West, seeking to preserve the western utopia their forebears created through arduous labor and single-minded determination. Their Eden is a garden in which nature has been tamed, stripped of its wildness in order to maximize its utility as the servant of humankind.

Efforts to restore wildlife species to areas they once called home present this struggle over the dominant vision of paradise in a particularly acute form. Although their financial impacts on property owners often seem relatively small, restoration efforts carry great symbolic weight. When the government undertakes such efforts, it is choosing moral sides, affirming the naturalist's vision of paradise, and the primacy of wild nature over human control. As such, restoration projects offer a useful lens through which to view this larger conflict.

II. RESTORATION IN HISTORICAL PERSPECTIVE

Wildlife restoration, in the narrow sense of returning species to their historic range, has a long history in the United States. The second half of the 19th century was a time of rapid liquidation of game and fur species; although the buffalo slaughter may be best remembered, many other species were hunted, trapped, or driven by development to near extinction. When the toll on these species became apparent, state and federal governments began systematically seeking to prevent further declines and to restore the remaining populations.
One early restoration project brought the beaver back to the Adirondacks of upstate New York. At the time of European settlement, roughly 60 million beaver were spread across the continent. By 1900, though, extensive trapping had reduced that number to about 100,000. In an effort to restore the commercially valuable beaver, New York became the first state to experiment with beaver reintroduction. Beginning in 1904, state game officials live-trapped beaver in their remaining strongholds and moved them to unoccupied, but suitable habitat.

Predictably, the relocated beaver set right to work gnawing down trees. Just as predictably, vociferous objections from impacted landowners followed. The Barretts owned a woodland abutting Eagle Creek, one of the sites chosen by the state for beaver release. The beaver severely damaged the Barretts' trees, which in turn greatly reduced the land's value as a potential building site. The Barretts sued, claiming that the state must pay for the damage. In a decision that foreshadowed the future for property owners aggrieved by restoration efforts, they lost.

Those early restoration efforts, although they certainly imposed financial costs on landowners like the Barretts, did not carry the symbolic freight of today's programs. They concentrated on species with significant utilitarian value, typically as the source of commercial products or the object of recreational hunting. They sought to increase wildlife populations in order to facilitate continued exploitation. Such projects did not challenge popular views about the primacy of humankind over nature or conflict with the desires of most local landowners. Consequently, they typically enjoyed widespread popular support. The Depression-era restoration of beaver, a valuable income commodity, to rural America was one highly popular example.

III. PRIVATE PROPERTY AND ENDANGERED SPECIES

Many of today's restoration efforts have a different focus, one far more likely to arouse local opposition. They seek to bring wild nature back for its own sake, and for its aesthetic and symbolic value, rather

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3 See Edward P. Hill, Beaver Restoration, in RESTORING AMERICA'S WILDLIFE 1937–1987, 281 (Kallman et al., eds. 1987).
4 See Barrett v. State, 116 N.E. 99 (1917).
5 See Hill, supra note 3, at 282.
than for its economic resource value. The architects of the gray wolf restoration program in the northern Rockies and the condor program in the desert Southwest, for example, do not envision those programs primarily as a source of trophies for future hunters. Rather, they see wolves and condors as essential elements of the natural world, and their restoration as a way to heal an old wound. Restoration projects of this type endorse the Leopoldian vision of paradise, and inevitably call into question the competing vision upon which many rural western communities were founded.

The rhetorical salvos launched in the battle over wolf reintroduction illustrate the extent to which this fundamental clash of values underlies the dispute. Ranchers, whose predecessors only recently brought nature to heel in the region through a concerted effort to eradicate wolves and other predators, are appalled at the idea of reversing that course. They stress the importance of choosing “man’s way” over nature’s. Environmentalists use many of the same words, but urge precisely the opposite choice. They talk of an obligation to make amends for past mistakes, and describe wolves as the ultimate symbol of wilderness.

Inevitably, private property rights have become the focus of many restoration battles. The legal institution of property in the United States has come to symbolize the search not only for human dominion over nature, but for personal dominion over individual slices of nature. The early English commentator Blackstone described property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other...”

See L. David Mech, A New Era for Carnivore Conservation, 24 WILDLIFE SOCY BULL. 397 (1996); see also Ed Timms, Revival of the Species, THE DALLAS MORNING NEWS, Mar. 18, 1996, at A1 (quoting the head of a group seeking reintroduction of wolves to Colorado as saying that returning wolves is “making nature the way it should be... putting Humpty Dumpty back together again”); RICK BASS, THE NINEMILE WOLVES 35 (1992) (quoting Renee Askins of the Wolf Fund as explaining that reintroducing wolves to Yellowstone “is an act of making room, of giving up the notion of ‘bigger, better, and more,’ to hold onto ‘complete, balanced, and whole.’ It is an act of giving back, a realigning, a recognition that we make ecological and ethical mistakes and learn from them... [It] is a symbolic act just as exterminating the wolves from the West was a symbolic act”).

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, 300 n.15 (1995) (quoting Roger Schlickeisen of Defenders of Wildlife that the howl of the wolf “is synonymous with the call of the wild... Putting wolves back into Yellowstone is like putting the ‘wild’ back into the wilderness”). See also Wolves at Our Door N.Y. TIMES, Nov. 24, 1996, at D14.
individual in the universe." Although that absolutist description has never been an accurate statement of American property law, many Americans, particularly in the rural West, subscribe to the mythic image of property it embodies. That image dovetails with their view of paradise as a place where rugged individuals control their own destiny and that of their land.

However, the urge to heal wounded nature also enjoys widespread public support. Its influence is felt in a variety of state and federal laws. The federal Endangered Species Act (ESA) is perhaps the strongest expression of these preservationist urges, as well as the one that throws the longest shadow over private land in the West. The ESA is best known for its two strong prohibitory provisions, one forbidding federal actions likely to jeopardize the continued existence of a listed species and the other barring any actions, private or governmental, that kill or harm listed species. The reach of the ESA, however, potentially extends well beyond these stopgap measures, which are designed to impose a last barrier between listed species and extinction. The law's ultimate purpose is to return listed species to surer ground, bringing them to the point where they no longer need legal protection.

To that end, the ESA directs the government to prepare a recovery plan, a blueprint to guide recovery efforts, for each listed species. By the time species reach the protected list, many are severely depleted. Recovery of those species will often require relocation or reintroduction to areas beyond their current range. Not surprisingly, a 1993 study of recovery plans found that fully 70 percent called for transplanting individuals from one wild population to another, and 64 percent incorporated captive breeding, presumably with the eventual goal of reintroduction.

Reintroduction efforts create or threaten a variety of conflicts with private property interests. Wolves and other predators may prey on privately owned livestock. Herbivores may be feared as a source of communicable livestock diseases. Wild herbivores may also trample...
crops, knock over fences, and compete with livestock for forage. Undoubtedly, the most feared threat is that land use restrictions will eventually be imposed on surrounding landowners.12

IV. WHY THE TAKINGS CLAUSE DOES NOT APPLY

Like the Barretts, property owners opposed to reintroduction programs often appeal to the "Takings Clause" of the Federal Constitution, which requires the government to provide compensation when it takes property for public use.13 And like the Barretts, those property owners typically do not prevail. Notwithstanding Blackstone's absolutist description of property, the government is not required to pay for every encroachment on private property interests. Although the Takings Clause protects more than just economic value, it does not protect against the symbolic loss of control these landowners must endure.

As currently interpreted by the United States Supreme Court, the Takings Clause requires compensation, at a minimum, for two classes of government actions: physical invasions and regulations that deny an owner all economically viable use. Wildlife reintroduction programs will rarely fall in either category.

The prototypical physical taking is the acquisition of a right-of-way for a road across private property. The government becomes the owner of the roadway, taking from the prior owner the rights to possess, control the use of, and exclude others from that property. Compensation is always required for physical takings, no matter how minimal the financial impact, how small the area occupied, or how strong the government interest it advances. Requiring compensation in these circumstances vindicates the owner's interests in possession, use, and control, all of which are important incidents of ownership. But there is more to the special treatment accorded physical takings. Physical invasion of an owner's land, the Supreme Court has observed,

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13 See U.S. CONST. amend. V. The takings clause does not by its terms provide a means for property owners to prevent government action; as long as the government is prepared to pay compensation, it can take any property for which it has a public use in mind. The compensation requirement, however, can act exert a powerful inhibiting force on financially strapped governments.
"literally adds insult to injury," completely shattering the owner's symbolic and psychological, as well as physical, control of the property.14

Claims that damage caused by protected wildlife amounts to a physical taking have a long but unsuccessful history. Property owners who have watched helplessly as elk ate their forage or bears feasted on their sheep, prohibited by government regulations from killing or driving off the marauders, understandably tend to view these incidents as equivalent to physical confiscation of their property. Their interests in possession and control of their crops and livestock have plainly been infringed. Nonetheless, state and federal courts have consistently rejected the argument that the government bears responsibility for that invasion.

Probably the best known of this line of cases is Christy v. Hodel. Christy, a Montana rancher, fatally shot a grizzly bear that was attacking his sheep. Because the bear enjoyed the protection of the ESA, the government levied a civil penalty against Christy. He challenged that penalty, arguing that enforcement of the ESA under the circumstances unconstitutionally deprived him of his property without compensation. The Ninth Circuit rejected that claim. Although it conceded that the bear had physically taken Christy's sheep, the court refused to attribute that taking to the government. Essentially, the decision equates losses of livestock to wildlife predation with losses to fire, floods, or other natural disasters. The government, the court concluded, need not insure landowners against such losses.

Because the marauding grizzly bear found its way to Christy's ranch without government intervention, the court in that case did not have to decide whether the government would be liable for damage by wildlife it introduced to the vicinity. Other courts, however, have rejected the notion that reintroduction or relocation of wildlife makes the government liable for any resulting damage. In the Barrett case mentioned earlier, for example, New York's highest court refused to hold the government responsible for harm caused by transplanted beavers. The California Court of Appeals reached a similar result in 1993, rejecting government liability for crop and fence damage caused by relocated Tule elk. So long as the government does not directly place protected creatures on private property without the owner's

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14 See Loretto v. Manhattan Teleprompter, 458 U.S. 419, 436 (1982) (requiring compensation when the government compelled the owner of an apartment building to suffer installation of a television cable and two small metal boxes on the building's exterior).
consent—something it has yet to attempt—claims of physical takings are likely to fail.

Nor are landowners likely to succeed, absent unusual circumstances, with claims that wildlife restoration denies them all economically beneficial use of their property. Although Christy lost all use of the sheep consumed by grizzlies, that type of loss is not sufficient to create a categorical regulatory taking. The relevant test is whether the regulated parcel as a whole retains any economic viability. As long as the government does not prohibit ranching in grizzly territory or farming within historic Tule elk range, this type of taking has not occurred.

If the challenged government action does not fall into either of these per se taking categories, compensation may still be required in some circumstances. The Supreme Court has suggested that, absent physical invasion or deprivation of all economically beneficial use, any regulation that substantially advances a legitimate state interest will survive a takings challenge. Indeed, if that is the test, wildlife reintroduction programs will nearly always pass muster. Wildlife conservation has long been recognized as a legitimate state interest. Because wildlife restoration efforts are expensive and often politically controversial, they are not undertaken lightly. Few reintroductions will be so carelessly designed or executed that they will fail to substantially advance the legitimate government interest in conservation.

In a footnote in *Lucas v. South Carolina Coastal Council*, a majority of the Supreme Court hinted that the Court might entertain a regulatory takings challenge even if all economically viable use were not taken and the government action were not wholly irrational or illegitimate. The federal courts of appeals have split on whether to take up that veiled suggestion. If appropriate at all, scrutiny of such regulations would take the form of an ad hoc, fact-specific inquiry, with the burden on the landowner to show that the challenged regulation forced her to bear burdens that properly belong to the general public. Important factors to consider would include the economic impact of the regulation, the extent to which it interfered with reasonable investment-backed expectations, and the character of the government intrusion, that is, whether the government action more closely resembled a physical invasion or an adjustment of “the benefits and burdens of economic life.”

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Although it is obviously difficult to make a generic prediction about the outcome of such an ad hoc test, it seems likely that most existing wildlife reintroduction programs would survive. The economic impact of such programs is often relatively small, is shared among all landowners in the vicinity of the release, and may be counterbalanced by widespread economic gains to the region. In the Yellowstone area, for example, wolf reintroduction was expected to produce livestock losses on the order of $5,000 to $50,000 per year, but annual economic benefits from increased tourism in the region were projected at about $25 million. The impact on reasonable investment-backed expectations is difficult to evaluate. On the one hand, ranchers might argue that the government’s role in funding, encouraging, and even carrying out past wolf eradication efforts led them to expect that wolves would never return to plague their ranches. On the other hand, environmentalists might draw on the long tradition of government regulation of wildlife conservation to argue that no landowner could reasonably expect complete freedom from wildlife damage. Finally, as already explained, courts have been reluctant to view wildlife protection regulations as a kind of physical invasion, which means the third factor is likely to weigh in favor of the government.

V. INTO THE POLITICAL ARENA

Typically, then, constitutional claims raised by property owners will fail. Given the nature of the dispute, that outcome is perfectly appropriate. The political process rather than the constitution is the usual forum for resolving disputes about both the nature of the earthly paradise society should seek, and the steps the government might take to reach it. Nor does removing this issue from the constitutional arena give government the ability to run roughshod over the interests of either landowners or environmentalists. There is a great deal of sympathy in the political community for each of the competing visions of paradise: for the rugged individualist triumphing over nature on the one hand, and for nature as an increasingly essential wild counterpoint to civilization on the other. The result is a series of compromises through which neither vision of paradise will be fully achieved, but perhaps the two can coexist.

Government reintroduction programs under the ESA vividly illustrate these compromises. The ESA seeks to preserve wild nature, but the agency regulations implementing reintroduction efforts provide
numerous protections for impacted property owners. The government must, for example, consult with affected landowners before undertaking any release of a listed species. Reintroduced populations are generally designated as “nonessential,” and therefore not entitled to the full protection of the ESA. Special protective regulations are drafted for each introduced population, in consultation and, insofar as possible, agreement with affected landowners. The regulations often require that the government physically remove the transplanted creatures if they stray onto private land, and in some cases, even allow property owners to kill wildlife they find attacking their livestock.¹⁶

These compromises have eased political tensions and reduced conflicts between landowners and introduced wildlife. Livestock losses to wolves in the northern Rockies, for example, have been considerably lower than anticipated. At the same time, of course, these concessions to property owners both increase the costs of restoration programs and decrease the extent to which they move the West toward the wild vision of paradise.

The compromise position embodied in the ESA and other laws deserves continued scrutiny from all sides. Wildlife restoration efforts are one context in which we must grope our way toward the compromise Wallace Stegner envisioned between humans and nature, between economic health and the health of the earth. We cannot give up the image of nature as servant; none of us can walk through the world without leaving any trace. We are unlikely ever to return to the days when 25 million bison roamed the plains, and grizzlies could be found from northern California to Kansas. We are equally unlikely to give up our ingrained, and very human, urge to transform and control the landscapes we inhabit. But we have also come to recognize the intricate and fragile beauty, as well as the awesome power, of uncontrolled nature. Most of us, I think, seek both kinds of paradise. If we craft our compromises with that in mind, perhaps we can create a place in the West for condors and wolves, as well as for humans.

¹⁶ See Mimi S. Wolok, Experimenting With Experimental Populations, 26 ENVTL. L. REP. 10018 (1996) (describing special rules developed for each release prior to 1996). In the case of the Arizona condor release, the Fish & Wildlife Service went so far as to sign an agreement promising to recapture the condors should they ever become “essential” to the species, thereby threatening serious land use restrictions. See Jim Woolf, Land Use Debate: Condor Compromise Shows Talk Works Better Than Fighting, SALT LAKE TRIB., Dec. 24, 1996, at A1.