Unintended Consequences of Regulatory Takings Reform on the SDCP and Arizona Water Management

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Introduction:

Regulatory laws are often passed with the best intentions, but they are often plagued with inadvertent consequences. Proposition 207, a voter initiated ballot measure, entitles a property owners to just compensation if the value of a person’s property is reduced by the enactment of a land use law. Prop. 207 passed in Arizona, November, 2006 by a margin of 65 to 35 percent. This research investigates the consequences that this regulatory law will have on the Sonoran Desert Conservation Plan (SDCP). Very few regulatory laws of this nature currently exist in the United States; Oregon’s Measure 37 is one of the few exceptions. The experience Oregon has had with Measure 37 may provide an indication as to what Arizonans can anticipate.

The Sonoran Desert Conservation Plan (SDCP) is a long term vision for protecting the heritage and natural resources of Pima County. The SDCP combines short-term actions to protect and enhance the natural environment with long-range planning to ensure that our natural and urban environments not only coexist, but develop an interdependent relationship where one enhances the other (SDCP brochure). Although Pima County is among the more rapidly growing areas in the United States, the SDCP suggests that citizenry senses the urgency to protect our lands and desert heritage. The SDCP has taken the steps necessary to preserve and protect the lands in Pima County that are of environmental, cultural, or historic importance.

The SDCP area covers 5.9 million acres which includes 2 major eco-regions known as the Sky Islands and the Sonoran Desert, the second largest Native American Nation, and approximately 1 million residents. The conservation plan addresses the problem of declining natural resources and the loss of cultural identity. The SDCP in sum addresses problems of land consumption, declining tax base, circulation, water availability, equity, accessibility, and affordability.

The consequences of the partial regulatory takings legislation passed in Arizona is virtual unknown leaving Southern Arizonans to speculate what the future might hold. Uncertainty over the future is not limited to cities but also to Arizona’s conservation areas. Arizona, particularly Pima County, has made premium conservation efforts in comparison to the rest of the country. The American Planning Association, in 2002, presented the Sonoran Desert Conservation Plan with the National Outstanding Planning Award. The SDCP is recognized internationally for its conservation efforts.

Our research explores the potential consequences of partial regulatory takings legislation on the SDCP to elucidate issues that have arisen from the passage of Prop. 207 and eliminate some uncertainties of what the future holds. The partial regulatory takings legislation will not only impact our conservation areas but may also affect the limited water supplies of Arizona. This research will attempt to address the possible affect on the water supply and how this may influence policies in the future.

Arizona Water Issues:

One of our research focuses is on water availability and the riparian restoration element of the plan of the SDCP. After two years of research and review the SDCP concluded that riparian resources and aquatic areas are the most vulnerable and least protected habitats. The SDCP proposes that some natural riparian systems such as streams, springs, and creeks be preserved, restored and managed to compensate for the decades of largely unintended destruction of these systems. Restoration of these riparian
corridors will require the use of either Central Arizona Project (CAP) water, effluent, or in some cases groundwater. The SDCP will need to acquire these water supplies in order to successfully complete their riparian restoration projects. The use of water supplies to support riparian conservation and restoration projects is a fundamental question to be addressed in Pima County. Bark (2006) et al. has shown that such a use of water resources will provide significant private property benefits, flood control and recreational benefits.

Our research reviews the potential market mechanisms that the SDCP may utilize in order to solidify their water portfolio from an economic and policy perspective. Several opportunities exist for the SDCP to acquire water rights. They have the option of purchasing or leasing excess CAP water, purchasing Type II groundwater rights, and one of the most feasible options, purchasing effluent. The SDCP will not have the option of acquiring surface water supplies, other than CAP, as nearly all of these supplies are already accounted for.

Currently water market activity exist in Arizona for CAP water, effluent and Type II groundwater rights. Effluent is currently being purchased for landscape irrigation in both the Tucson and Phoenix metropolitan areas. Effluent is the only source of water that grows as the population grows. With increasing pressures on Arizona’s water supply one can expect to see a continuation of market activity for effluent. Effluent will play a key role in many of the SDCP’s riparian restoration efforts. Type II water is non-irrigation groundwater that can be transferred within an Active Management Area (AMA) only. Type II water rights must stay within their own AMA. Type II water rights are sold at a specific quantity that may not be divided. Both the Tucson AMA and Phoenix AMA have shown significant market activity for Type II water rights. The SDCP may also have the opportunity to purchase Type II water rights.

The water needs of the SDCP should be met by a variety of water sources. The SDCP needs to have a broad profile of water sources, so during times of shortage they have the ability to cope. The key source of water that they need to secure is the 10,000 acre feet of effluent provided by the Conservation Effluent Pool. The SDCP should also investigate legal ownership of excess effluent. Changes to the property structure of effluent which place it in the hands of the SCDP, may afford greater protection to environmental causes than effluent in the hands of politically influential municipalities. The SCDP may wish to consider water markets as a viable option for acquiring water sources for their riparian efforts.

This leads us to our currently ongoing research regarding Arizona water resources and the potential consequences Prop. 207 will have on the SDCP and water management throughout the State of Arizona. These issues will be integrated through the remaining sections of the report.

Methods:
A brief review of the partial regulatory takings literature provides us with the background necessary to compare and contrast Arizona and Oregon’s regulatory laws. A partial regulatory takings is when a government deprives a person of the use of property by the application of regulations that have not changed the ownership of the property. Oregon was the first state to pass a regulatory takings law during 2004, Arizona followed suit two years later with Prop. 207. Relatively little literature has been published that
examines the regulatory laws that Oregon and Arizona are facing. Jacobs (2007a) highlights the implications of existing regulatory laws and the challenges that Oregon and Arizona may face in the future. This work discusses the current partial regulatory takings reform that is occurring in the United States. The author suggests that this movement has emerged in response to government abuses of regulatory takings law, most notably *Kelo v. New London*. In 2005 the U.S. Supreme Court in *Kelo v. New London*, held that a local government may use eminent domain to acquire private land and transfer the land to a private developer for a public purpose (Jacobs, 2007b). Kusy and Stephenson (2007) note that Arizona’s Proposition 207 was proposed in response to the *Kelo* decision.

Jacobs (2007a) argues that the partial regulatory takings solutions that have been implemented in Oregon and Arizona, are too extreme, “By raising regulatory costs and failing to provide an alternative to regulation, the regimes could stifle government regulation and prevent individuals from influencing the growth and character of their neighborhoods”. Kusy and Stephenson suggest that Arizona’s Prop. 207 will limit the evolution of development standards for developed communities, while new development standards can and will be imposed on new, essentially “unzoned” suburban areas. This they conclude will likely result in older communities being forced to live with less development standards than new suburban areas. They suggest these older communities will suffer from a diminished appearance.

Jacobs (2007a) defines the goals of the partial regulatory takings regimes that have occurred in Arizona and Oregon. The author states that the first aim of the partial regulatory taking movement is to focus on regulations, particularly land use laws that affect real property. The second aim is at broadening compensation claims, hence eliminating the threshold values that trigger the right to compensation. In Jacobs 2007b, the author argues that under new partial regulatory takings legislation landowners need not prove the means by which they arrived at their requested compensation value. Jacobs and the Tahoe Sierra Court (2002) argue that these goals result in high compensation and administrative costs. Jacobs (2007b) concluded that these increased costs will leave governments with little if no option, but to “waive” land use regulation for those filing claims. This has already occurred in Oregon as Martin et al. (2007) illustrates. Jacobs (2007b) argues as does Martin et al. that this will leave neighbors of the “waived” properties with little recourse for the development that occurs on bordering property.

Much of the literature, to date, on partial regulatory takings legislation highlights the enormous burden the governments will face. This has been illustrated in Oregon since the passing of Measure 37. The overriding conclusion, in the literature, suggests that partial regulatory takings legislation will lead to costs the government can not bare, resulting in “ waivers” or the failure of the government to enact regulations. The following section will provide a case study of Oregon’s Measure 37 to examine whether the findings in the literature may be applied to Arizona and what that may signify for the SDCP.

**Oregon’s Experience:**
Measure 37, Oregon’s partial regulatory takings legislation, was passed November 2, 2004 by a margin of 61 to 39 percent. It allows owners of property to demand compensation from state and/or local governments for statues and rules that restrict a person’s use of real property and reduce its value (Oregon State Government).
The government instead of paying compensation may allow the claimant to use the property for a use that the claimant could have carried out when he or she acquired the property; this is referred to as a “waiver”. Measure 37 requires compensation for claims based not only on the enactment of new regulations but also on the enforcement of any land use regulation enacted prior to the effective date. This means that land owners may file claims for land use regulations that have occurred since they owned the land, making this legislation retroactive. As of October 19, 2007 Measure 37 claims totaled 7,562 resulting in more than $19,721,450,072 of total compensation that has been requested and accounting for 750,898 acres statewide (Oregon State Government). To date, the Oregon legislature has not appropriated funds to pay Measure 37 claims; instead the government has been issuing Measure 37 waivers.

Martin et al. (2007) provide a detailed study on the driving forces behind many of the Measure 37 claims in Oregon. This analysis may provide clues as to what might be anticipated in Arizona. The authors review over 7,500 Measure 37 claims to explore the factors which are key drivers for compensation claims. These claims have the ability to change the landscape in Oregon as they account for more than 750,000 acres. The right to make a claim is determined by two factors: the date a property owner bought the land and the date of the land use regulation.

Martin et al. (2007) points out that of the 7,500 claims that have been filed only one claim has been awarded compensation. Written into measure 37 is the right for a landowner to sue for compensation and attorney fees in circuit court if the government applying the land use regulation continues regulation 180 days from the date of written demand for compensation. Most governments have proceeded to waive regulations for claims because of the lack of funding available for compensation.

The institute of Portland Metropolitan Studies (IMS) established a database for Measure 37 claims. The Oregon Department of Administrative Services sent monthly updated spreadsheet to IMS of claims that the State had received. The authors used this data, as well as, data for county and city claims that came from copies of applications and staff reports or from information posted on a jurisdiction’s website in their empirical analysis.

Through the analysis of the claims the authors found that almost 65 percent of the claims and 40 percent of the claim acreage are located in the 11 counties of the Northwest and Willamette Valley, including Hood River County. The distribution of Measure 37 claims is geographically defined by the urban growth boundaries (UGB) that surround municipalities in Oregon and by the presence of public land. The authors made two general observations: Claims are, in general, associated with proximity to UGB and they are particularly concentrated in the Portland tri-county area.

The authors found that the size of the claims varies by region, with the largest claims in Eastern Oregon, and the smallest in the Willamette Valley. The authors point out that the Oregon land use system was designed to limit urbanization on resource lands therefore, it is not surprising that the majority of the claim acreage is on land that is currently zoned for either farm or forest land. Martin et al. (2007) reported that the claims are overwhelmingly requesting residential development.

Martin et al. (2007) suggest that the claims most likely to be developed are those close to the UGB, where population pressure is greatest, and near public lands, where amenity values make the land desirable for residential development. The authors also
argue that the development of parcels that are not-too-far outside the cities may have devastating effects for agriculture and conclude with the notion that under Measure 37 ‘we no longer have land zones, we have time zones’.

Contrasting Proposition 207 and Measure 37

While Measure 37 and Proposition 207 are comparable in many aspects, predominantly in their efforts to provide compensation for diminished property values, they are dissimilar in several ways. It should be noted that initial differences may lead to significantly different outcomes.

A fundamental difference between Proposition 207 and Measure 37 is the effective date. Proposition 207 allows compensation claims only for land use laws enacted after the proposition’s effective date, when it was enacted into law. Measure 37, as mentioned before, requires compensation for claims based not only on the enactment of new regulation but also on the enforcement of any land use regulation enacted since the owner purchased the land. Retroactive regulatory takings initiatives, as seen in Oregon, undermines the governments’ ability to apply or enforce existing regulations. These differences have serious implications as to the number of claims that will be filled (Martin et al. 2007). This may be illustrated by the significant number of claims in Oregon under Measure 37.

Another key difference is that Proposition 207 has an explicit provision that any waiver issued in lieu of compensation is transferable to future property owners. Measure 37 does not include such a provision. It has been argued that non-transferable waivers are essentially worthless, as very few property owners are in the position to finance development projects themselves (Reason Foundation, 2007). Waivers that are transferable with the land ensure the property owner of the resale value of their home.

One last way that Oregon and Arizona’s partial regulatory takings laws differ can be found in the SDCP. Oregon’s legislature has not appropriated funds to pay Measure 37 claims, neither has Arizona’s, but Pima county passed a bond in May 2004 that appropriated $174.3 million for open space and habitat conservation. The SDCP may be able to use this money to pay compensation claims that their conservation efforts contribute to.

Potential Consequences:

Several prominent individuals and organizations in Arizona opposed Proposition 207. The Coalition for Sonoran Desert Protection issued a statement saying “Action Alert: PROP: 207 Will Kill Sonoran Desert Conservation Plan”. Chuck Huckelberry the County Administrator was quoted as saying “It makes zoning potentially a lot more difficult”. Carolyn Campbell, executive director of the Coalition for Sonoran Desert Protection and a Pima County employee said “The proposition would make it difficult to institute new regulations to protect the environment under the Sonoran Desert Conservation Plan” she also said “Under 207, it makes it very clear that if a property owner feels you have restricted them from developing their property in any way through a regulatory action, then they need to be compensated.” (Tucson Weekly, Eminent Diaster) We have yet to see the consequences these individuals feared materialize, but that does not mean they will not occur as new land use regulations are enacted.
Proposition 207 has resulted in relatively few compensation claims but several property owners have threatened with claims. For example, in April 2007 the Phoenix City Council voted to repeal a historic designation it had placed on an area in central Phoenix after being threatened with a Prop. 207 challenge from a landowner. The Arizona State Senate had to factor Prop. 207 into its decision making process when examining a proposed amendment to House Bill 2102 which would forbid counties from issuing building permits for houses, churches and schools near Luke Air Force Base (Reason Foundation, 2007). Some individuals have predicted that a lawsuit over Proposition 207 could arise from a current land use controversy in Tucson, over the adoption of a neighborhood preservation overlay district surrounding the University of Arizona, to protect areas from the construction of new mini-dorms (Reason Foundation, 2007).

This past June the Pacific Legal Foundation filed a demand letter with the City of Flagstaff that starts the clock ticking towards filing a lawsuit under Proposition 207. The case challenges the new city ordinance which imposes a “historic district overlay” on a portion of the city. This zoning imposes severe height and width restrictions on properties in the area. It will be interesting what comes of this case as Jaeger (2006) points out that the designation of a historic district has had a positive effect on land values in general and illustrated in a 1991 study, on historic designations in Chicago neighborhoods, that historic designation increased average housing values 29-38%.

The potential unintended consequences of a partial regulatory law include: (1) an increase in the cost of basic land use laws which may lead to: (2) an inability to limit irresponsible development, protect open spaces and preserves and (3) restrict community planning efforts. This may make it difficult to institute ordinances that protect hillsides, wildlife habitat area, and buffer areas near preserves or military bases. This has already been illustrated by the Luke Air Force Base case.

Key Findings:

To this point few consequences of Prop. 207 have been released however, it is clear from the evidence illustrated in Oregon that partial regulatory takings legislation can bring forth serious implications. One issue Arizona can expect is that Prop. 207 will make it more difficult to enact additional planning tools. The literature on partial regulatory takings also suggests that these types of regimes can restrict community planning options. Lastly, prospective regulatory takings laws can prevent future land planning regulations. This may mean an end to conservation and buffer zones, unless our government or we as tax payers are willing to pay for those harmed. A worse case scenario for Arizona’s environmental concerns and the SDCP would be: land use restrictions continuously waived in the place of monetary compensation which would effectively stop community planning and conservation efforts.

The partial regulatory takings law may have a profound and unforeseen influence on the water supply in Arizona. Chuck Huckelberry likely agrees and is worried that if a government denies subdivision approval based on an inadequate water supply that this could be seen as a “taking” under Prop. 207, meaning that the county would have to pay developers. This may not be a real possibility within the Active Management Areas (AMA) but in the rural areas, this may be a reality.
In 1980, Arizona created the Groundwater Management Act to establish a strong regulatory water management and conservation program within the AMAs. Assured Water Supply Rules were adopted in 1995, as required by the 1980 Groundwater Management Act; these assured water supply requirement form the foundation of Arizona’s effort to reduce groundwater overdraft in the AMAs. These rules prohibit the subdivision of land until an applicant can meet the necessary criteria, one of which is the physical, legal, and continuous availability of water for 100 years (Arizona Water Policy, 2006). If a subdivision within an AMA is turned down, based on an inadequate water supply, this is not likely to be challenged on the base of Prop. 207 because the assured water supply rules existed prior to the enactment of this act.

This may not be the case outside the AMA areas. The areas outside the AMA are not governed by the Assured Water Supply Rules but instead the Adequate Water Supply Rules that were established in 1973. The adequate water supply program requires a demonstration of whether a 100-year water supply exists, but a subdivision can still proceed if the supply is inadequate. Senate Bill 1575, which became law in September, 2007 allows county supervisors to adopt ordinances, requiring subdivision developers to obtain an adequate water supply from the State, before giving approval. Prior to the passing of this bill local rural governments lacked the ability to deny development for lack of water (Sierra Vista Herald, Sept 2007). If local rural governments develop such ordinances this may be seen as a takings from developers under Prop. 207 and compensation would be required.

Conclusion:

The future of conservation and the water supply in Arizona may be jeopardized by the passing of Prop. 207. Oregon’s Measure 37 has been met with several challenges that have the potential to occur in Arizona. While Prop. 207 and Measure 37 are strikingly similar there is one distinguishing difference that may alter the outcome significantly, that is the retroactive nature of Measure 37 and the prospective regime of Prop. 207. The passage of Prop. 207 will make enactment of new land use regulations a challenge in Arizona. This has already been demonstrated by the challenges of individuals in the State of new zoning regulations. Some uncertainty remains how this will play out for the SDCP and water adequacy throughout the State. However our findings suggest passing of new regulations will be cumbersome.

Currently we are working on compiling a land database for Pima County. Statistical analysis of this data will demonstrate the liability that Pima County and the SDCP may face from potential Prop. 207 claims. Further research will investigate the outcome of the pending lawsuits and what this may mean for future claims and government liability. Additionally, we will continue to research the impact that regulatory takings laws will have on water management throughout the State in order to alleviate the current uncertainty.
References:


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