Natural lands preservation and the profit corporation

by James H. Davenport

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During the recently concluded 98th Congress 8,581,055 acres of federal land were designated wilderness. 1.4 million of those are new national park land wilderness. However, the 98th Congress added no new acreage to the nation's recreationally important National Park System. The Coastal Barrier Resources Act, protecting the Atlantic and Gulf Coasts barrier islands against development, Pub. L. 97-348, 16 U.S.C. 3501-#510, and the Protection Island National Wildlife Refuge Act, Pub. L. 97-333, 16 U.S.C. 668 dd., protecting seabird habitat in Puget Sound were two of the 97th Congress' few gestures at preserving natural land. Wetland protection bills before the 98th Congress (S 1329, HR 3802), authorizing a major expansion of the wetland acquisition program, failed to pass. A two year extension of the Wetlands Loan Act (HR 5271) did pass. But, overall, the prospect of the federal government committing new major resources to natural lands acquisition is very small.

It is now appropriate to attempt to analyze the current status of our national recreational and natural properties and to develop strategy in order to move forward. Natural and recreational properties policy is not the only policy area undergoing reanalysis. Like health and welfare programs and federal retirement programs, natural and recreational lands acquisition and development has depended primarily on federal largess for its current well-being. Also like those program's proponents, those of us who believe that growth in the national inventory of natural and recreational lands is desirable initially react that largess should be restored. Congress' recent gestures in that direction encourage that reaction. But that reaction should be checked in favor of the development of creative methods of lands acquisition and designation which do not require reliance on Congressional appropriations.

The alternatives for natural lands acquisition or preservation fall in two categories; governmental or non-governmental. The governmental category includes outright acquisition in fee, the traditional approach of the federal government where designated park land was not already in federal ownership; designation of lands with important governmental value placing encumbrances upon development, as through the National Wild and Scenic Rivers Acts, 16 U.S.C. 1271 *et. seq.*, or the State of Washington Shorelines Protection Act, Ch 90.58 RCW; and exercise of the police power by state and local government, i.e., zoning.

The first governmental alternative, acquisition in fee simple absolute, has been the basic tool of development of our natural lands system. This tool has been utilized actively, by purchase or by condemnation, and passively, by retention of fee ownership where the government has had the good sense to hold on to desirable properties. The virtue of fee acquisition is that once ownership is obtained, protection of the resource is perpetual. Even the legal maxim that a fee owner's title is completely lost upon sale or divestiture can be modified were government to encumber subsequent owners by legislation designating the park status of the subject land. No more permanent status could be accorded national park land than the governmental ownership plus statutory designation which it enjoys, unless the national parks were also Constitutionally protected. Fee acquisition is also the tool which has created the important state park systems.

Governmental fee acquisition has been possible primarily because of the availability of desirable properties, the availability of public funds to purchase them, and the exercise of the power of eminent domain, both by the federal and state governments, where unwilling sellers did exist. The obvious current problem with fee acquisition is that with a growing population there are fewer willing sellers and with major federal deficits there are fewer available public funds.

A subcategory of fee acquisition is acquisition of property rights less than fee simple absolute. Governmental purchase of a right to use property can preserve a consumptive use from occurrence, thereby protecting the natural amenities of particular property. For instance, the acquisition of scenic easements or development rights have placed in public ownership the right to view across property, the right to prevent vertical development, or the right to develop property at all. Another subcategory is acquisition of a nonfreehold estate, for example an estate for years. This acquisition would allow complete control for the period of years and may be successful in preserving natural property through a period of stress of demand for use, but does not carry the feature of perpetual protection.

The second category of governmental natural lands preservation is by designating the natural importance of given property, either by general category or specific description, through statute and placing an encumbrance upon its development. An example of this method is the Pinelands National Reserve System, Pub. L. 92-625, 16 U.S.C. 47li, or the National Wild and Scenic Rivers Act, *supra.* The nature of the encumbrance on development varies widely. Development permits consistent with pre-established preservation plans or restrictions against specific governmental projects on public lands within an encumbered area are common.

This method of land preservation is valuable at "keeping things the way things are" and can be particularly useful where demand for more rigorous or consumptive land use has not yet occurred. Where that is imminent, however, this method is the most roundly criticized because it places encumbrances upon the use of land without transferring value to private owners. This criticism is based on the incorrect notion that these encumbrances constitute taking of property without compensation. Statutory encumbrances are as perpetual as the statute which creates them, which is to say long lasting but not permanent.

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The third method of governmental land protection is exercise of the police power. The police power is the general constitutional power of a state or its subdivisions to protect the health and safety of its people. It is pursuant to this power that the laws of zoning have developed. Under the police power local governments can and have placed restrictions on property prohibiting all but certain uses. The virtue of this zoning approach to natural lands preservation is that no acquisition cost is involved. The other virtue is that it is ordinarily performed by persons with local knowledge of areas worthy of natural lands protection. It is, of course, most suitable for use in a local setting, a method having been used primarily in urban growth planning. The problem with this method of natural land preservation is that all zoning designations are subject to change. Though comprehensive plans limit arbitrary alternation of zoning designations, land use choices and the laws memorializing them, comprehensive plans and zoning ordinances, are dynamic, hopefully representing the attitude of the people at any given point. Though federal statutes have condoned and assisted state land use planning the concept of land use planning by the federal government has never taken hold in Congress, with the notable exception of the recent Coastal Barrier Resources Act, *supra.*

Another governmental method of natural lands preservation is taxation. Through the exercise of state property taxing power, tax preference can be given to those owners who own property capable of inclusion in natural land designations. Tax preference can be conditioned upon commitments to the continued natural character of such property. Designations as forest land or open space under State of Washington tax law, Ch. 84.34 RCW, are examples.

The second category of methods for natural land preservation is nongovernmental. The single power which is possessed by nongovernmental entities which governments also have is the power to acquire property through voluntary purchase. It is well known that private entities do not possess the powers of eminent domain (though some public interest corporations have been delegated this power by legislative bodies) or the police power (zoning, parks designation). It is this fact which has caused conservationists to rely so heavily on governmental lands preservation. However, if we desire a greater amount of preserved land and, if governmental acquisition is limited by political or fiscal restraint, then the nongovernmental acquisition approach must be pursued.

The nongovernmental acquisition of land for preservation purposes is performed credibly at the present time by environmental-charitable corporations like Nature Conservancy and the Audubon Society. But the overall volume of lands which can be purchased, and consequently the success, of these groups is limited by the amount of money which can be raised and the specter of operation costs.

The inevitable conclusion is that we must develop a method of participation in natural lands preservation for the American profit corporation. Because the traditional American profit corporation is motivated by factors different than the environmental charitable corporation, the method and approach by which American profit corporations may participate in natural lands acquisition must be tailored to its different motives. The following is one possible

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The board of directors of a for-profit corporation (P. Corp.) create a free-standing charitable corporation (C. Corp.), organized under Section 501(c)(3) of the Internal Revenue Code, of which the board of directors is identical to that of P. Corp. The two corporations are thus linked for purposes of corporate decision-making. This linkage is significant and is discussed more fully.

The stated purpose of C. Corp. is the accumulation of monies through donations from P. Corp. and other donative sources to acquire natural properties for preservation. So far this approach appears to be nothing other than the standard Nature Conservancy type charitable corporation. However, further investigation reveals that this charitable corporation can offer more to the profit corporation, and hence secure greater donations, than can the free-standing charitable corporation.

There are several benefits to P. Corp. which result from use of a linked C. Corp. Because of the linkage between P. Corp. and C. Corp. through their common boards of directors, P. Corp. can donate to C. Corp. and retain control of the donation. P. Corp.'s donation must, of course, be unencumbered and the value of its donation must be forever committed to C. Corp.'s charitable purpose in order that P. Corp. realize any tax benefit.

The fiduciary obligation which the board of directors assume with respect to C. Corp.'s charitable purposes assures also that the charitable purpose is fully realized. The directors of P. Corp., also directors of C. Corp., would have fiduciary obligations to both corporations. To the extent that those respective corporation's purposes were at odds the exercise of either obligation would be frustrated. This is, of course, one policy reason why the fiduciary obligation carries with it the prohibition against commingling the interests of the entity to which the fiduciary obligation extends with the personal interests of the fiduciary, at least without disinterested party approval (usually judicial). In this example then, an advisory group of persons committed exclusively to C. Corp.'s purposes should be established to approve or ratify the acts of C. Corp.'s directors which involve P. Corp.

It is important to distinguish, at this point, between control over the value which has been donated and control over the asset donated. The value of the asset which was donated is forever lost to P. Corp., but the use of that value during the time when the asset is in C. Corp.'s corpus is within the control of C. Corp.'s (and consequently P. Corp.'s) board of directors.

Several potentially significant benefits inure to P. Corp. because of the retention of control over the donation after it is made. During the period before C. Corp. has accumulated enough money to acquire property, it may desire to invest its money in the interim. It may loan some or all of its money to P. Corp., at terms advantageous to C. Corp.'s charitable objectives. C. Corp. becomes a source of financing for P. Corp. C. Corp's charitable purpose earns interest rather than P. Corp.'s banker. P. Corp. has created a tax deduction and a funding source for itself. This approach is already in use in employee profit sharing or pension systems.

P. Corp. may also derive benefit from the donation of properties other than money which have little short term value to P. Corp. P. Corp. may donate fee title to properties not in current use or lesser interests in property such as development rights or scenic easements which are not of significant value to P. Corp. because it has no present demand for them. The properties may have higher value for donation purposes (P. Corp.'s book value) than for P. Corp.'s use.

The transfer of development rights or scenic easements present a creative possibility for large landholding companies, as for example, timber, railroad or mining companies, if they can retain control of the transferred rights or easements. P. Corp., a timber company might donate the scenic rights to its standing timber lands to its linked C. Corp. The value of those scenic rights would be forever donated to C. Corp.'s charitable purpose. When the timber is matured and harvestable, P. Corp. might repurchase the scenic right, thereby transferring, C. Corp.'s asset from rights to money thereby making cash available for land acquisition, or might trade C. Corp. the scenic rights to other properties, thereby limiting net deforestation. The fundamental point, in either case, is that C. Corp.'s charitable purpose is enhanced by the original donation and that that donation might not have been made were it not for the control P. Corp. was able to maintain.

P. Corp. may find it advantageous to make gifts of its own corporate securities to C. Corp., either because of their appreciation or diminished present value. Repurchase of those shares for P. Corp.'s treasury or by directors for their personal accounts could generate revenues for C. Corp. and tax benefit beyond a charitable deduction for P. Corp. Securities laws prohibiting insider trading and fiduciary limits or C. Corp. directors would, of course, apply to such transactions.

The linked nature of the two corporations also provides P. Corp. some advantages in its own tax planning. Currently, profit corporations can make charitable contributions in a year in which it would be advantageous to obtain deductions against significant income. Profit corporations with linked charitable corporations could establish long-term donation plans giving themselves a predictable deduction. Because of the control linkage, however, these plans could be amended to meet income circumstances within the long-term total donation objective. Because of the loan back possibility, the corpus of both P. Corp. and C. Corp. can be used by P. Corp. in its financial planning as well as tax planning.

The linked nature of P. Corp. and C. Corp. may also contribute significantly to marketing P. Corp.'s product or to enhancing P. Corp.'s goodwill, both com-

mon profit corporation objectives. This may be particularly true where P. Corp.'s products are purchased by consumers interested in C. Corp.'s charitable purposes. For instance, P. Corp., a sporting goods company and expedition outfitter, offers products for sale 10% of the purchase price of which will be donated to C. Corp. for eventual purchase of lands for back-country fishing and hiking. Consumer, impressed with P. Corp.'s donative spirit (goodwill), purchases from P. Corp. rather than its competitor and makes a contribution through P. Corp. and C. Corp. to lands preservation. (P. Corp. also creates more potential demand for its products by creating more space to use them.)

There are also advantages to C. Corp. which are derived from linkage to P. Corp. That is, there are advantages which inure to the final benefit of C. Corp.'s charitable objectives.

The relationship between P. Corp. and C. Corp. is symbiotic: P. Corp.'s donations to C. Corp. help both's purposes. Because donations to C. Corp. are motivated by benefit to P. Corp., C. Corp.'s purposes should be well funded. Because donations to C. Corp. can never be devalued by subsequent P. Corp. actions, C. Corp. is the inevitable beneficiary of creative benefits for P. Corp. This is so because of the fiduciary obligation of C. Corp.'s directors (and consequently P. Corp.'s directors) to the charitable objective.

C. Corp. should also gain advantage from its mere closeness to P. Corp. This may be particularly true in property acquisition funding. One of the problems inherent in land acquisition by private foundations is the accumulation of sufficient funding or favorable financing to make an outright purchase. With linked corporations, P. Corp.'s donation plan could provide a predictable income with which C. Corp. could obtain financing, particularly where P. Corp. would agree to guarantee repayment. P. Corp. could fund a purchase to the extent of C. Corp.'s inadequate funding and transfer P. Corp.'s acquired interest to C. Corp. over time in amounts consistent with its earlier donation plan. P. Corp.'s (and C. Corp.'s) directors may have better access to and credibility with standard financial institution lenders and other money pools from which C. Corp could borrow, as for example pension funds, insurance companies or P. Corp.'s capital accounts. (P. Corp.'s loans to C. Corp. at rates advantageous to C. Corp. should be donations to C. Corp. to the extent of the difference from market rate.)

P. Corp. could identify C. Corp.'s borrowing needs, then include those sums in P. Corp.'s borrowing from its lender. Once received, P. Corp. could pay borrowed proceeds over to C. Corp. for use in lands acquisition. P. Corp.'s donation value would include the value of its borrowing costs. This method might be particularly attractive where P. Corp. is a recreational developer whose facility relies upon proximity to natural or recreational lands.

C. Corp., with a financially astute board, linked to P. Corp., a financial institution, might identify its charitable purpose as acting as banker to other C. Corps., thereby increasing the funding alternatives available to meet the charitable objectives of other C. Corps. Banking C. Corp. might, for instance, on the basis of its knowledge of the assets of the respective C. Corps., arrange inter-C. Corp. lending or joint C. Corp. acquisitions. Banking C. Corp. might also identify asset rich C. Corps. who might provide security for other C. Corps. borrowing or security against default of public bonds sold for land acquisition, thereby lowering public (municipal) bond premiums for less predictable bond ventures.

If this proposal for linked corporations provides benefit for profit corporations as well as charitable purposes, why isn't it now common? First, the idea has not been sold to profit corporations. Second, the idea has been used in a modified way where profit corporations make donations to a specific charitable project which bears the corporate identity (Ronald McDonald House). Third, government has performed the function of funding charitable activity including land preservation, avoiding the need to develop creative institutions. Fourth, the ownership of natural lands brings with it the responsibilities and costs of land management. Fifth, many people involved with lands preservation do not honor the values which motivate the leaders of profit oriented American corporations.

In order to bring the proposal discussed here into general use we must sell the idea to profit corporations. The idea must be prepared and presented in a businesslike way which stresses the advantages which will inure to the profit corporation. The corporation form of the charitable corporations involved must be developed to integrate with the business practices of the profit corporations to which the idea is promoted, pattern legal forms, e.g., incorporation documents, documents of donation, loan-back, security, should be developed for analysis by corporate counsel. Also we must stress the changing ability of government to preserve property and the growing responsibilities of the private sector.

One problem which profit corporations will surely identify is one already encountered by the environmental-charitable corporations like the Audubon Society. Who will manage properties which C. Corp. acquires pursuant to its charitable objectives and who will pay for that management? A related problem is the potential liability of C. Corp. (or possibly P. Corp. on a modified theory of *respondeat superior*) for injury to the public on those lands. These problems have been addressed by government ownership through public operating funds, agency management, and sovereign immunity. In order to encourage private acquisition of natural lands new concepts must be developed to address property management. Possibilities include user-fee funded private management, governmental management of privately held lands, deed-over to governmental ownership and management, statutory liability protection for natural land owners holding land open for public use, and natural land owners' insurance.

The profit corporation should not be viewed only as a potential donor toward land preservation but as a participant in land acquisition in a way in which it can realize benefit in its own profit-oriented terms. We must allow the private sector to contribute in its own way, preserving those values by which it is motivated. The profit corporation should become wholly involved in an important national objective of maintaining our natural lands in an undeveloped state. But it should become involved in its own way, using its own peculiar manners, methods and motives.