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THE COMPETITIVE ENTERPRISE

INSTITUTE'S

PROPERTY RIGHTS READER

January 1995

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PROPERTY RIGHTS READER

The system of private property is the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not.

— Friedrich Hayek

Private property is a natural fruit of labor, a product of intense activity of man, acquired through his energetic determination to ensure and develop with his own existence and that of his family, and to create for himself and his own an existence of just freedom, not only economic, but also political, cultural and religious.

— Pope Pius XII

Edited by Jonathan H. Adler

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INTRODUCTION:
PROPERTY RIGHTS FACT AND FICTION

by Jonathan H. Adler

The rise of property rights activism was one of the untold stories of 1994. For without significant economic resources or political expertise, the property rights movement came of age in the last year, growing from a dispersed, loosely-organized collection of grass-roots groups and concerned individuals into an important political force.

Conventional wisdom in Washington, D.C. is that the environment was not an issue in the 1994 election. This may be true of the environment, per se, but property rights was a hot button issue in many parts of the country. Candidates in California, Idaho, Texas, Arizona, Washington, and elsewhere made property rights an issue and responded to the concerns of landowners who are subject to federal land-use regulation. Property rights was one of the central issues in the Texas gubernatorial campaign — George Bush Jr. rode the property rights issue to victory, despite efforts by the Clinton administration to aid his opponent through announcements of planned regulatory relief. Increased Property rights protections are also contained in the GOP "Contract with America," the national platform upon which Republican House candidates campaigned and won. Voters did not cast ballots against the environment, but they did register a call for reining in environmental regulation.

The organizations that represent America's environmental establishment have not taken this news all that well. The Sierra Club, for instance, claims that regulatory reform proposals, including increased protection for property rights, amount to a "war on the environment." Glenn Sugameli, an attorney with the National Wildlife Federation, charges that under the guise of protecting property rights "extremists are trying to take away the ability of Americans to act through their government to protect neighboring property owners and the public welfare." *Washington Post* columnist Jessica Mathews agrees with that sentiment, claiming that proposed property rights laws would mean "the end of government's role as protector of the little guy and provider of amenities the market alone cannot provide."

In fact, the property rights movement is not "anti-environment," nor is it about eviscerating the government's ability to protect the American people. The property rights movement is about compensating landowners when they are denied the reasonable use of their land, such as when the federal government prevents a landowner from building a home on a designated wetland, or bars a timber company from cutting trees on private land when an endangered owl lives nearby.

When the federal government denies reasonable land uses — i.e. those land uses that do not directly infringe upon the rights of others — it is referred to as a regulatory "taking." Most "takings" cases arise not when public health is placed at risk due to the actions of a landowner, but when the rights of landowners are suppressed by the exercise of government power.

If the public wants to protect an endangered species or preserve a scenic vista, the public should be willing to pay for it, just as it pays for highways, parks, military installations, and other "public goods." The costs should not be imposed on whoever is unfortunate enough to hold title to a coveted piece of land. When the government wants land for a military base, it seizes the necessary land, and the landowners are compensated. However, when the government wants someone's land to create a wildlife preserve, the land

is not bought and paid for. Rather, government can simply prohibit use of that property without paying compensation. It is this sort of situation that property rights legislation is typically designed to address.

Laws that propose requiring the federal government to compensate landowners are routinely portrayed as anti-environmental laws. If compensation were required, "government would have to pay polluters not to pollute," according to Jessica Mathews, and "the rest of us [would] have to buy off landowners who are prevented from using their property in ways that endanger their neighbors," according to the Sierra Club. This is a gross distortion of the position espoused by most "takings" compensation proponents.

Respecting property rights requires protecting landowners from both excessive government regulation as well as infringements caused by private actors. A private corporation should have no more right to dump toxic sludge onto someone else's land without permission than should the government have the right to effectively seize private lands through regulatory fiats. This point has been made abundantly clear by University of Chicago law professor Richard Epstein, author of *Takings: Private Property and the Power of Eminent Domain*. Epstein writes:

> Two justifications for uncompensated takings are in principle available to the government in all cases. It can show that regulation is reasonably calculated to prevent the infliction of some present or threatened harm to others; or it can show that the in-kind benefits the regulation provides the landowners offset the losses that it imposes.

There is simply a fundamental difference between preventing a property owner from despoiling the property of his neighbor and enacting land-use controls in order to provide "public goods." (Perhaps the D.C. environmental establishment's insistence to the contrary is due to the fact that most environmental regulations would fail to pass the criteria outlined by Epstein.)

Opponents of compensation also argue that regulating property should simply be a prerogative of legislative majorities. In other words, if the majority of voters wants your land, you are out of luck. Such arguments are typically cloaked in the rhetoric of empowering communities to make collective decisions. Yet communities are routinely prevented from infringing upon individual rights, such as those protected in the Bill of Rights. Opponents of property rights seem to forget about the "takings clause" of the Fifth Amendment to the Constitution: "nor shall private property be taken for public use, without just compensation." Requiring the government to pay compensation, as is Constitutionally required, forces public officials to consider the costs of "public goods" — officials must consider whether the benefits of such goods outweigh the costs of compensation. Those restrictions that are truly beneficial will be imposed, even with a compensation requirement.

Another anti-compensation argument is the idea that since government provides benefits to citizens, it is acceptable for the government to impose regulatory costs through land-use controls. "Recent complaints about the 'taking' of private property ignore 'givings' that have increased the property's value in the first place," argues Edward Thompson, Jr., director of public policy for the American Farmland Trust.

It is certainly true that the government provides benefits to citizens by building roads and bridges, providing police and fire protection, and so on. However, such benefits are paid for through taxes and user fees for government services. Arguing that the generic "giving" of roads and the like justifies stringent land-use controls is absurd, as these are "givings" for which taxpayers have already paid.

In those cases where there is a specific government "giving" to particular landowners, as in the case of subsidized crop insurance, land-use controls may be justified if they are designed to control potential side-effects of the government program, i.e. a requirement that beneficiaries of subsidized crop insurance adhere to responsible farming practices. However, in these instances as in most, it would be preferable for the government to neither "give" nor "take." If the government is concerned about the potential environmental impact of subsidized coastal development, then the government should simply end the subsidies.

It is difficult to oppose the idea that landowners should be compensated when they lose the right to use their land. Polls indicate that a clear majority of Americans supports compensation for regulatory takings. Perhaps this explains the insistence by environmental lobbyists that the property rights movement is the result of a massive corporate lobbying effort and that environmental laws are not denying property owners the use of their land.

William Callaway, Washington representative of the National Parks and Conservation Association, claims that "oil, gas, mining, and timber companies, along with ranching interests, are the major supporters" of property rights. Yet studies conducted by the Wilderness Society and the W. Alton Jones Foundation have come to the opposite conclusion. These studies found that the property rights movement is a truly grass-roots phenomenon and that it is popular with the American people.

Claims such as Callaway's are further belied by the fact that property rights groups are simply not well funded, whether by corporate interests or anyone else for that matter. When Greenpeace compiled a list of "anti-environmental organizations," including many groups supportive of property rights, the combined annual budgets of the fifty-plus groups listed was still less than Greenpeace's budget alone. When environmental groups have budgets in the tens of millions of dollars, property rights groups can only compete through the mobilization of genuine grass- roots support.

John Kostyack, counsel to the National Wildlife Federation, makes even more outrageous claims than most, arguing that horror stories of property owners losing the right to use their lands are simply myths. According to Kostyack, the Endangered Species Act (ESA) "has never prevented property owners from developing their land." Interior Secretary Bruce Babbitt, whose agency administers the ESA, takes quite a different view. In a speech before the Society of Environmental Journalists, Secretary Babbitt, himself the former head of the League of Conservation Voters, explained:

> Why do you keep reading stories about hardships? The tough case is a small landowner on a strategic piece of property. When a species is listed, there is a freeze across all of its habitat for two to three years while we construct a habitat conservation plan which will later free up the land.

Sometimes the land is not freed up; conservation plans inevitably free up some land while restricting or prohibiting the use of other land. Indeed, at the time of Kostyack's statement, the federal government had already initiated legal proceedings to prevent the Anderson and Middleton timber company from harvesting timber on 72 acres of its own land. Why? Because a pair of spotted owls had been discovered nesting on government land over a mile away. Wetlands laws infringe on property rights too, such as when Howard and Grace Heck, 81 and 76, were barred from building homes on their 25-acre plot once the land was classified as a wetland. The wetland designation ruined the Hecks economically, and as a result a Florida bank foreclosed on their home. Clearly such cases belie the claims of property rights opponents.

The property rights issue is not going to go away. Landowners, enraged at their government for its regulatory excesses, are demanding increased protection of private lands. Such protections are long overdue.

* * *

Most of the selections in the *Property Rights Reader* were previously published in *CEI UpDate*, the monthly newsletter of the Competitive Enterprise Institute. Additional articles were added to round out the discussion. These articles summarize the current conflicts over government regulation of property in the name of species conservation and wetland protection; analyze the political context of the property rights debate; discuss the treatment of property rights in the courts; and examine the role of private property in encouraging conservation and sound environmental stewardship. A closing essay addresses the extent to which property rights are supported by the American public and the CEI environmental staff has compiled a short list of additional readings for those who wish to pursue this issue.

Since its inception, CEI has focused on property rights as one of the most important policy issues. The protection of property rights is central to the promotion of free enterprise and limited government. Without the protection of property rights there can be no economic liberty — indeed no true liberty at all. Property rights are the foundation upon which the institutions of a free society are built. It is our hope that the selections in this reader will communicate that message.

Jonathan H. Adler is Associate Director of Environmental Studies at CEI.

January 1995

PROPERTY WRONGS:
The Growth of Federal Land-Use Control

by Ike C. Sugg

In the spring of 1974, the last bill to explicitly call for nationwide federal land use control failed in Congress. Never since has Congress considered such legislation. The Endangered Species Act and wetlands regulations have brought federal control of private land, but such regulations have been for the most part piecemeal, applying only to parcels that contain federally listed species or designated wetlands. Theoretically, wetlands and wildlife have had to satisfy certain "scientific" criteria to trigger those regulations. Indeed every regulation is predicated on *some* justification, however weak. Unfortunately, these limits to regulation are on the brink of extinction.

The historic rationale for water and wildlife regulations has generally been that neither can be privately owned, thus giving "the public" something between a "right" and an "interest" in them. Historically, the obvious tension between the public's interest in such unowned entities and private rights in land was mitigated by common law traditions such as respecting a landowner's right to bar access to his or her land; respecting landowner rights to the sedentary elements of private property; and the common law of public and private nuisance, the touchstone of which was harm to people or property. Until recently, statutory law was constrained by a common law that made at least some common sense. After all, landowners may not be able to own water or wildlife; but if they can't own land, what do landowners really own?

The Fifth Amendment's "takings clause" has atrophied under duress from ever expanding Congressional power and bureaucratic largess.

Intended to protect private property owners from government thievery, the Fifth Amendment's "takings clause" has atrophied under duress from ever expanding Congressional power and bureaucratic largess predicated on protecting the nation's wildlife and waterways. Of the two, federal encroachment on private property owners and their constitutional rights first began with water.

Since our nation's founding, waterways have been under federal jurisdiction in order to prevent economic protectionism and facilitate commerce within and between states. The Federal Water Pollution Control Act of 1965, which sought to protect "navigable waters" from pollution, was amended in 1972 to regulate the discharge of pollutants into waters that eventually flowed into navigable waterways. This act became the Clean Water Act in 1977, and codified a federal District Court ruling earlier the same year that dramatically expanded "waters of the United States" to include wetlands (aka, "swamps"). By 1985 the EPA had extended the Clean Water Act's coverage to millions of acres of *isolated* wetlands. EPA's rationale for regulating such prairie potholes and intermittently wet drylands was that they

were actual or potential habitat for migratory birds or endangered species.

While this so-called "glancing goose" test was so absurd that a Circuit Court rejected it in 1988, it is consistent with the current approach to regulating wildlife. By the end of the first quarter of this century, interstate commerce in wildlife had been effectively outlawed. Over time, however, the Commerce Clause has been interpreted to justify myriad regulations not even remotely connected to interstate commerce. In 1966 and 1969, two federal laws protecting imperiled wildlife were enacted, neither of which regulated private land use. At the time, the federal government's authority to regulate the taking of wildlife even on federal land was very much in doubt, as such jurisdiction was traditionally given to states unless harm to federal land or migratory birds were involved.

Whereas having an abundance of diverse wildlife on private land was once a great source of pride and joy for a landowner, owning habitat for even one species listed under today's ESA means losing the use and enjoyment of that land.

The Endangered Species Act passed in 1973. It prohibited "taking" (i.e. killing or injuring) threatened or endangered species anywhere they were found. Specific language prohibiting habitat destruction on private land was stricken before passage. As Michael Bean of the Environmental Defense Fund wrote in 1977, interpreting the ESA to proscribe habitat modification was "improper. . . [as] there is a substantial amount of legislative history that suggests a narrower interpretation was intended." Indeed, Bean noted that "if 'taking' comprehends habitat destruction, then it is at least doubtful whether Section 7 of the Act is even necessary." Section 7 prohibits *federal agency* actions in habitat destruction, not private actions.

Today, however, Bean would likely disavow his original analysis, for habitat modification is precisely what the ESA now prohibits. This radical but gradual shift in interpretation over time has come at the expense of wildlife and landowners alike. Whereas having an abundance of diverse wildlife on private land was once a great source of pride and joy for a landowner, owning habitat for even one species listed under today's ESA means losing the use and enjoyment of that land. Indeed, today's ESA can prevent property owners from using their own land even if it is devoid of listed species. Owning merely "potential" or "suitable" habitat has become sufficient justification for expropriation without compensation. Worse, the environmental establishment is now calling for regulations to protect *unlisted* species — ones that do not even satisfy the ESA's already lax criteria — and "ecosystems."

To prevent species from becoming extinct, we are told, the ESA must prevent them from becoming threatened in the first place. To do this, the federal government will "protect" the ecosystems on which they depend. If enacted, this so-called "ecosystem approach" will be the effective end of the right to private property in rural America.

The fundamental threat is in the ecosystem concept itself. According to Paul Colinvaux, a renowned American ecologist, the word ecosystem is essentially just another term for nature. During the first quarter of this century, plant sociologists had busied themselves trying to locate and understand

discrete communities among plants. However, what they found was that there were no such things. They realized that there were no truly disconnected communities of plant life in nature — that the fate of plants was tied in some unknown way to that of other organisms in "an endless blending" with soil, climate and the conditions of other variables. Thus the concept of "ecosystems" was born.

"The idea," Colinvaux wrote in 1978, "was that patches of earth, of any convenient size, could be defined and studied to see how life worked there." In other words, an ecosystem is arbitrarily demarcated; it is an invisible fence erected around a plot of land by Man for his scientific convenience. There are no objective scientific criteria by which to define where one ecosystem ends and another begins; nor is there any meaningful way to measure their health or otherwise gauge their status without resorting to subjective value judgements. Even Interior Secretary Bruce Babbitt was forced to acknowledge that ecosystems are "in the eye of the beholder." To talk of ecosystems as objective realities in nature upon which to base value-laden public policies is pure, and disingenuous, nonsense.

The ecosystem approach is nothing more than a pretext for shattering what few fragile limits remain on government's ability to regulate land use.

Since, by definition, ecosystems are everywhere, every piece of land in the nation is part of an ecosystem. In short, the ecosystem approach is nothing more than a pretext for shattering what few fragile limits remain on government's ability to regulate land use. As Babbitt told *Rolling Stone* in a recent interview, "ecosystems can't survive behind fences." Thus, Babbitt believes the federal government must "manage" entire ecosystems.

If some do not think that ecosystem management is a call for national land-use control, they are not paying attention. Secretary Babbitt, the new pied piper of this twenty-year-old siren song, has made his intentions quite clear: Babbitt talks of "discarding the concept of property and trying to find a different understanding of natural landscape." Ultimately, Babbitt believes that the "individualistic view of property" should be given a "communitarian interpretation." Defenders of property rights be forewarned, "ecosystem management" is the new rhetoric for regulating everything.

Ike Sugg is aFellow in Wildlife and Land-Use Policy at CEI.

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PUTTING PEOPLE LAST:
Endangered Species vs. People

by Mike Vivoli

Law-abiding, workaday Americans all across this once great country shoulder an increasingly heavy burden: their government. For some, the burden is even greater; they are forced to take care of the government's wildlife, at their own expense. As U.S. wildlife laws grant the government monopoly control, private property owners and rural land users are providing public goods and services free of charge. In return for their good stewardship, the Endangered Species Act (ESA) is taking away their land.

The reality of the ESA is that it allows more for the taking of private property than the "taking" of species.

Passed into law in 1973 and amended in 1979, 1982 and 1988, the ESA has been called one of the most ambitious and wide-reaching pieces of environmental legislation in the world. As it currently exists, any concerned citizen with a twenty-nine cent stamp and a post card can petition the Department of Interior's Fish and Wildlife Service (FWS) to list any population of plant, animal or microorganism under the ESA. Once on the list, the species and the habitat deemed critical for its existence are protected by the Federal Government against any potential harm. If "potential harm" sounds a little arbitrary or capricious, that is because it is. For example, FWS has determined that a birdwatcher could be guilty of "taking" a species simply by walking within a few hundred yards of habitat typically inhabited by protected species, but totally devoid of them in actuality!

To environmental groups, the ESA is a monumental piece of legislation. To those who own private lands they deem critical for their *own* survival, however, it is a Trojan Horse full of bureaucrats trying to effect national land-use planning. To these land owners, the reality of the ESA is that it allows more for the taking of private property than the "taking" of species.

Case in point: In Klamath Falls, Oregon, the shortnose and Lost River sucker fish were added to the Endangered Species list in July of 1988. After five years of drought in the region, the FWS declared that water levels had fallen low enough to threaten the continued existence of the suckers. They therefore announced, in the Spring of 1992, that the delivery of water from the Klamath Lake reservoir to its irrigation district was cancelled. The economic impact of this decision was not lost on the farmers, who promptly filed a complaint with FWS. In the words of one farmer, a "bureaucratic nightmare" ensued.

Infighting between the irrigation district, the FWS and the Army Corps of Engineers sparked turf wars, power struggles and jurisdictional disputes. By the time the FWS capitulated and allowed for a paltry 7,000 acre feet of water (the normal amount is 30,000 feet), delivery was a month late and over

20,000 acre feet had evaporated. Irreparable damage was done to crops and property owners were left to absorb the costs. At the Running Y Ranch in Klamath Falls, for example, crop production fell markedly and half of their 1,800 acres reserved for grazing had to be allowed to dry.

If that weren't enough, it turns out that the suckers may not even be in trouble. While the FWS estimated the sucker population at 2,000, biologists hired by the farmers have counted more than 50,000. Despite this evidence, and historical evidence demonstrating high populations of fish during low water levels, the FWS refuses to reconsider the suckers' status.

Small property owners are the real victims of the ESA's draconian regulations.

Near San Diego, California, a rancher had been leasing a 100-acre meadow to graze his cattle for nine years. Three years ago, he was told by the forestry service that the Cuyamaca meadow-foam, a small white flower that flourishes on the meadow, had been placed on the Endangered Species list. As a result, he would no longer be allowed to graze his cattle there until two months after his usual release date. As this would result in the overgrazing of his other field, the rancher sought compromise with the FWS. He pleaded with them, arguing that the cattle and the flowers had always coexisted in the past, but to no avail. Finally, after months of argument, they struck a deal.

To comply with the ESA, the rancher built fences around the patches where the flowers were most abundant. He did so at his own expense. When construction was finished, an FWS representative came out to approve the renewed grazing of his cattle. When the official decided that the danger to the flowers had been eliminated, the rancher was permitted to bring his cattle back into the field. What happened next contradicted virtually everything the FWS had previously argued.

Inside the protective cover of the fence, the flowers diminished both in number and size. The unchecked grass had grown up to the extent that it blocked adequate sunlight from reaching the flowers. Outside the fence, however, the small patches of Cuyamaca meadow-foam left unprotected from the "deleterious" bovines flourished, and even spread, in the cattle-cultured grass. The end results of the whole ordeal: overgrazing of the rancher's other field while he wasn't allowed to graze his stock in the protected one; considerable time, money and energy spent needlessly complying with a Byzantine array of bureaucratic dictates; a purposeless, indeed harmful, fence; and fewer flowers than before the FWS applied the ESA.

The dim prospect of compensation for regulatory takings leads many rational landowners to "preempt" the problem.

While such horror stories might not be the rule under the ESA, they do constitute a laundry list of exceptions. Small property owners in eastern Maryland cannot even set foot on their own land because of nesting bald eagles. Property owners along the Neosho River in Kansas can no longer pay their property taxes with revenue from river gravel because of the Mad Tom catfish, which no one ever has reported seeing. These small property owners

are the real victims of the ESA's draconian regulations, but rarely are they ever noticed. One reason why is that they haven't the time nor the financial resources to defend their rights in court. Thus, very few takings cases are ever brought to court, which means small property owners are rarely compensated for their losses. In other words, landowners are impaled on the horns of a dilemma: either give up their property rights or violate the ESA outright.

The ESA has forced some property owners to make a conscious decision that certain species never appear on their land.

If it is discovered that the ESA has been violated, they lose their property anyway. Given that most small property owners rely on the economic use of their land to put food on the table and pay property taxes, either option is unbearable. In this way, the ESA creates perverse incentives. The dim prospect of compensation for regulatory takings leads many rational landowners to "preempt" the problem. Or, as the sentiment is commonly expressed in the Pacific Northwest, "Shoot, Shovel and Shut-up." It shouldn't come as a surprise, then, if more than one tree hugger has inadvertently embraced the corpse of a northern spotted owl staked to the object of his affection.

Pitting property owners against species, by refusing to compensate the transfer of land from the owner to the listed species, creates enemies of conservation instead of conservationists. By doing this, the ESA has forced some property owners to make a conscious decision that certain species never appear on their land. The ESA has also prompted small timber companies in the Pacific Northwest to accelerate their timber harvesting projects for fear of losing the use of their lands and the value of their investments in them. The hostility and distrust bred by the ESA's perverse incentives have engendered a code of silent non-compliance that does nothing but thwart conservation.

Property owners nationwide are getting the message that government places more value on the existence of species like sucker fish and meadow-foam than on humankind. That message is conveyed by environmental groups and bureaucrats who are far too removed from the cost side of the equation. It is a message made explicit in the ESA itself, which precludes consideration of all factors other than the supposed "intrinsic value" of certain species. After all, Congress has declared that such species are of "incalculable" value, prompting the Supreme Court to rule that "the plain intent of Congress was to stop extinction, *whatever the cost.*" Is it any wonder then that Constitutional rights of humans are relegated to a secondary status behind the non-Constitutional rights of meadow-foam? To land owners across the nation, the answer, quite understandably, is no.

Mike Vivoli was a research assistant at CEI in 1992.

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RECONCILING PROPERTY RIGHTS AND ENDANGERED SPECIES

by Ike C. Sugg

There is little doubt that the Endangered Species Act (ESA) needs to be reformed. Even A. A. Berle, president of the National Audubon Society, acknowledges that "unfortunately, the [A]ct is not working well enough to accomplish its purpose."

The purpose of the ESA is to "recover" threatened and endangered species — i.e., to bring them to a point where the ESA's regulations "are no longer necessary," at which time the species is pronounced "recovered" and removed from the list. Not only has the ESA failed to achieve this goal, it has also wreaked immeasurable havoc on local communities and especially, individual liberties. Unfortunately, however, the prospects for ESA reform are not as great as the need.

Small property owners, the real victims of the ESA, have no organized representation in Washington.

Generally, mainstream environmentalists support more funding, broader application and stronger enforcement of the ESA. Such changes do not constitute reform. Indeed, if all else remained the same, they could be expected to exacerbate the very problems that need to be solved, particularly the ESA's impact on private landowners. Corporate America, while widely viewed as being against the Act, has not called for fundamental reforms, but only marginal changes. Members of industry trade associations must weigh the risks of appearing 'anti-environment' against the costs of complying with the ESA. Unlike many corporations, most individuals cannot easily afford the costs imposed by regulations. A cost of doing business for some is enough to propel others into bankruptcy. Moreover, small property owners, the real victims of the ESA, have no such organized representation in Washington.

While fundamental reform may not appear likely at present, as a result of the spotted owl embroglio and other ESA-engineered "train wrecks," the prospects for serious reexamination of the ESA are increasing. In describing what might be an increasingly common sentiment held by elected officials whose constituents share land with listed species, Senator Mark Hatfield (R-OR) told *The Washington Post*:

> I have supported — and I continue to support — the Endangered Species Act. I helped write it. I offered the 1972 version of the act that eventually became law in 1973. I want it to survive. But unlike many of my colleagues from urban areas, I also have to deal with the human side of this act, and thus have special reason to know that it has come to be an environmental law that favors preservation over conservation. There is no question that the act is being applied in a manner far beyond

> what any of us envisioned when we wrote it 20 years ago. . . . But today the act is being applied across entire states and regions, with the result that it now affects millions of acres of publicly and privately owned land, and many thousands of human beings. . . . The fact is that Congress always considered the human element as central to the success of the ESA. . . . The situation has gotten out of control.

Perhaps Congress did once view the human element as central to the ESA's success. Over time, however, the human element has become peripheral in our nation's campaign to save each and every species, "whatever the cost." Not only is it unrealistic to expect that any society can or will abide by such a mythical standard, it is also unrealistic to expect that the present ESA will save many species. Environmentalists are learning this crucial lesson elsewhere in the world, where such political luxuries as the ESA are unaffordable. In Zimbabwe, for example, previously imperiled species are recovering and more land is being dedicated to wildlife since the government rejected the centralized western model of wildlife protectionism, and devolved proprietary rights to wildlife to the people who bear the costs of having wildlife on their land.

The act is being applied across entire states and regions, with the result that it now affects millions of acres of publicly and privately owned land.

Adopting approaches such as those utilized in Zimbabwe and elsewhere will be extremely difficult in the United States. First, the Lacey Act, which effectively outlaws interstate commerce in native wildlife taken against state law, would probably have to be repealed. Second, a federal statute would have to be enacted to preempt state laws that preclude or otherwise thwart the sustainable utilization of wildlife on private property. Ultimately, management authority over native, non-migratory wildlife would be granted to landowners. Federal, state and private landowners could then contract with third parties — including environmental organizations — to manage their wildlife resources. In this way, wildlife producers could meet the desires of wildlife consumers.

By establishing and enforcing such property rights, economic and ecological concerns could be equitably and effectively integrated. Yet, given our history of government-owned wildlife and the anti-commercial bias that has been the hallmark of U.S. wildlife law, the trend toward this type of arrangement is extremely controversial.

Short of privatizing wildlife, however, there is much that can and should be done to better protect native species and their habitat, while also protecting private property rights in land. The most important reform would be to eliminate the perverse incentives created by the ESA. "I am convinced," Dr. Larry McKinney of the Texas Parks and Wildlife Department recently testified, "that more habitat for the black-capped vireo, and especially the golden-cheeked warbler, has been lost in those areas of Texas since the listing of these birds than would have been lost without the ESA at all." Fearing the

loss of their property rights and income from their land, landowners are intentionally destroying endangered species habitat because of the ESA.

One of the more instructive examples of this phenomenon is the case of Benjamin Cone, of Greensboro, N.C. Mr. Cone is unable to harvest trees on 2,000 of his 8,000 acres because of the presence of red-cockaded woodpeckers, which are listed as endangered under the ESA. Mr. Cone has already lost some $2 million because the old trees attract woodpeckers. "I cannot afford to let those woodpeckers take over the rest of my property," he says. "I'm going to start massive clear-cutting. I'm going to a 40-year rotation instead of a 75 to 80-year rotation." Red-cockaded woodpeckers prefer old-growth pine trees. Had Mr. Cone exploited his timber resource for short-term gain, he would be much richer, and freer, today. Had the ESA not punished him for electing not to harvest that timber, there would likely be more habitat for Red-cockaded woodpeckers as well.

Landowners are intentionally destroying endangered species habitat because of the ESA.

Pitting people against wildlife in this way is good for neither. We would do well to remember and heed a warning that the Supreme Court made over seventy years ago: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Thus, compensating property owners for the lost use of their land would be a significant improvement over the current ESA. Without such profoundly negative incentives, at least landowners would not destroy habitat that would otherwise remain intact. Indeed, there is ample evidence that landowners would go out of their way to help imperiled wildlife. Over the years, landowners did exactly that, putting up tens of thousands of nesting boxes for wood ducks and erected countless nesting platforms on Maryland's eastern shore for ospreys. These efforts have been of tremendous help in recovering both species. Indeed, the wood duck would probably have become extinct without the assistance of private landowners.

Compensating property owners for the lost use of their land would be a significant improvement over the current ESA.

However, one can safely surmise that such assistance would not have been provided had either species been listed under the ESA. Few landowners, no matter how conservation-minded, would have sought to attract listed species to their property if doing so would risk losing the use of their land.

Whatever course Congress chooses to follow in the near future, it is clear that we must eventually clear a path on the road to reform. The biggest step in that direction will require fundamentally changing our collective attitude toward wildlife and property protection arrangements. The urban public may well have a strong interest in preserving wildlife, but the individuals who own the land on which the wildlife depends have rights. Until such time as markets are allowed to develop freely, we should recognize that providing habitat for America's wildlife is a public good, not unlike national defense. Our society does not compel individuals to provide for our nation's defense, and

we pay those who do. These costs should be made explicit. Only then will the consuming and taxpaying public have a legitimate basis upon which to determine how much they value wildlife.

If we continue to abide by the myth that "only in the absence of markets can wildlife thrive," we will continue failing in our efforts to conserve wildlife.

Ultimately, if we continue to abide by the myth that "only in the absence of markets can wildlife thrive," we will continue failing in our efforts to conserve wildlife. If we cling to the canard that "any material benefits should be allocated for the public good by law and not by marketplace," we will fail to make wildlife conservation a viable option for private landowners and to encourage private conservation efforts. In short, if we maintain our antipathy toward markets and private property, we will destroy our best hope of creating the infrastructure for a successful and sustainable wildlife conservation movement in America.

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THE REGULATORY QUAGMIRE OF WETLANDS POLICY

by Jonathan Tolman

"The IRS is a walk in the park compared to the Corps," says John Piazza, president of Piazza Construction Co. To most Americans the worst government agency is the IRS, but to a handful of entrepreneurs and property owners the IRS is edged out by another government bureaucracy, the Army Corps of Engineers.

In 1991, Mr. Piazza obtained a local government permit to build a mini-storage facility on a tract of land in Mount Vernon, Washington. But before Mr. Piazza could begin construction, "wetlands" were discovered on the site. The wetlands were in three small sections and totaled less than an acre. Mr. Piazza designed his facility so its construction would only impact, 0.18 of an acre of wetlands, small enough for him to apply for one of the Corps exemptions, known as nationwide permits.

The current regulations tend to treat every wetland as if it were a national treasure.

The Corps had other ideas. After several delays, bureaucrats from the Corps visited the site and decided that the wetlands were adjacent to a "water of the U.S." The Corps determined that Mr. Piazza would have to apply for an individual permit, which included an extensive analysis of alternatives, an updated site plan, a mitigation plan, and consultation with two other federal agencies, not to mention public notice and comment.

While waiting for his permit, the Corps adopted a different manual for identifying wetlands. Under this new definition of wetland, Mr. Piazza's wetlands totaled a mere 0.089 of an acre. But even this did not release Piazza from the Corps' regulatory grip. To date, Mr. Piazza has spent more than $25,000 to preserve his wetlands. At an average cost of nearly $300,000 an acre, this is costly conservation, by any calculation.

The current regulations, as interpreted by the Army Corps of Engineers, tend to treat every wetland as if it were a national treasure. During his three year wait for a permit, Mr. Piazza gave one of his Senators a tour of his property in an attempt to explain his problem. At one point during the tour, the Senator asked how long it would take them to get to the wetland. Mr. Piazza replied, "You're standing in it."

The biggest tragedy of Mr. Piazza's situation is that draconian command-and-control wetland regulations are no longer necessary. In the last ten years the federal government has made dramatic changes in its wetland policy. The result of these changes is that the U.S. is currently restoring more wetlands every year than it is converting to other uses. The U.S. has effectively achieved what former President George Bush would call, "no-net-loss."

In 1994, the government's top three wetland restoration programs will restore a combined total of 157,000 acres of wetlands. Data from the government's National Resource Inventory (NRI) concludes that on net the U.S. will only convert 66,000 acres of wetlands to other uses. Some of the federal government's restoration programs are included in the NRI wetland report, but it is unclear how many. For example, no wetlands restored under the Wetlands Reserve Program are included in the net 66,000 acre figure. In 1994, the Wetland Reserve Program will restore 75,000 acres of wetlands.

Thus, at a minimum the U.S. will have a net gain of 9,000 acres in 1994, and potentially as much as 91,000 acres. Analysis of previous studies suggests that the U.S. will gain roughly 60,000 acres in 1994. In any case, by the end of 1994 there should be tens of thousands more acres of wetlands than there were at the beginning.

The U.S. is currently restoring more wetlands every year than it is converting to other uses.

Another surprising development which has emerged from the wetland restoration efforts is how economical they are compared to regulations. Faced with relatively meager budgets, government agencies have developed cost-effective ways to restore large quantities of wetlands without trampling on the rights of property owners. For example, the U.S. Department of Agriculture's Wetland Reserve Program will restore 75,000 acres of land to wetland status for less than a thousand dollars an acre. This figure includes the cost of purchasing a permanent easement on the land to ensure that it remains a wetland.

The biggest problem facing the Wetland Reserve Program right now is that they have 500,000 acres of land on the waiting list to be restored and a budget capable of restoring only 75,000 a year.

It would have cost the Department of Agriculture $89 to restore the wetland acreage which would have been lost due to Mr. Piazza's development. In contrast, Mr. Piazza and thousands of developers, homebuilders, and property owners across the country are wasting millions of dollars hiring experts, filling out permit applications, paying loans and taxes while they wait for the Corps to reach a decision.

Wayne Schell is another property owner who knows just how long the Corps can take to make a decision. Mr. Schell owns a 70 acre private nudist resort southeast of Sacramento, California. In 1987, Mr. Schell expanded his resort. Part of the expansion included the extension of an existing man-made lake.

By moving an earthen dam, Mr. Schell expanded the lake from 8 acres to more than 27 acres. According to Mr. Schell, the new lake provides habitat for 25,000 fish, 2,000 bullfrogs, 100 wild ducks, 8 geese, 4 blue herons and 6 white herons. (Not to mention providing a scenic walking path for 12,000 to 15,000 nudists a year.)

Of course the Army Corps of Engineers did not see it quite the same way. The area Mr. Schell expanded his lake into was classified as a wetland. During the spring the area is often flooded with water, but by June it is bone dry. Even though he was essentially replacing a temporary wetland with a permanent one, the Corps told Mr. Schell that he should have applied for a permit to place a dam in the seasonal wetland.

Mr. Schell proceeded to apply for an "after the fact" permit. The Corps denied his permit and demanded that he remove his dam. The only environmental rationale the Corps of Engineers offered for removing the dam is that the nearby Consumnes river could conceivably flood over the top of the dam when salmon are spawning and thereby trap the salmon in the lake. The Corps has been dutifully ignoring the fact that no salmon have been seen in the Consumnes river for over 30 years.

In the long run, the 404 program is doing little to restore wetlands and plenty to mistreat tax-paying property owners. Unfortunately, after nearly four years of waiting Mr. Piazza still does not have a permit, and after seven years Mr. Schell is still battling with the Corps. Unless Congress changes the law, the American people may have to wait even longer for rational wetland regulation.

The 404 program is doing little to restore wetlands and plenty to mistreat tax-paying property owners.

Jonathan Tolman is an enviornmental policy analyst at CEI.

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IT'S TIME TO LOSE "NO NET LOSS" OF WETLANDS

by Jonathan H. Adler

In the past several months a virtual firestorm has erupted over the federal government's efforts to enforce President Bush's campaign pledge that there would be "no net loss" of America's wetlands. At the center of the controversy has been the 1989 delineation manual that greatly expanded the federal definition of wetlands to encompass lands that were only marginally wet, and frustrated attempts by hundreds of landowners to pursue reasonable uses of their land, such as farming or residential development. As EPA Administrator William Reilly noted, "We suddenly found ourselves in the center of a maelstrom. Everywhere I traveled I heard a local wetlands horror story — not just from farmers, but from developers and respected political leaders."

The important question is not so much "What qualifies as a wetland?" but rather "Do wetlands need or deserve federal protection?"

As a result this summer has seen efforts by both Congress and the Administration to replace the 1989 manual with a more rational and accurate definition of wetlands. One result of these efforts was a recent compromise between the White House and EPA over a new wetlands manual which is currently in the 60-day public comment period required for federal regulations before they take effect. A process, interestingly enough, circumvented in the case of the 1989 delineation manual, which has since been declared invalid by an amendment to be passed by Congress.

Under the new definition of wetlands announced by the White House, several million acres of dry land will no longer be declared wetlands. It is possible that under this new definition many landowners barred from making productive use of their land will no longer be prosecuted by the federal government. Nonetheless, even with modifications to the 1989 manual, much of the opportunity for abuse remains. The government's policy of protecting all wetlands will stay in place and tens of millions of acres will retain the "wetlands" definition, effectively preventing use of that land.

While it is a step in the right direction — however meager — to move toward a biologically more accurate definition of wetlands, the latest federal effort is still inadequate. The important question is not so much "What qualifies as a wetland?" but rather "Do wetlands need or deserve federal protection?" particularly if such protection must come at the expense of private property — private property that is currently being taken without just compensation or any act of Congress authorizing the takings.

It is generally accepted that the EPA and US Army Corps of Engineers have the authority to regulate the use of wetlands. However, the only law ever passed authorizing such power was the Clean Water Act of 1972, in which section 404 merely authorized protection of "navigable waters of the United

States" from the discharge of pollutants. There was never any mention of wetlands in section 404, nor has the Congress authorized any regulation of wetlands since. As the Heritage Foundation's William Laffer noted, "the Corps and the EPA have actively circumvented the Constitution's requirements. They have been treating the Clean Water Act as a convenient vehicle by which to provide the wetlands preservation program that Congress never enacted."

Those who support federal protection of wetlands often cite the benefits of thriving wetlands. True, wetlands trap sediments and serve to break down pollutants in the water, and they can play an important role as coastal buffer zones. Many animals, including whooping cranes, alligators, and two-thirds of North American species of ducks and geese either live or breed on wetlands. Yet all wetlands are not created equal. There are many benefits that can accrue from allowing swamps to be drained, from increased agricultural production to disease control.

Imagine if the federal government had declared a "no net loss" of woodlands policy in the 18th century. Most of the development in the eastern United States would never have occurred. Some deforestation was necessary to enable the Northeast to become a thriving center of commerce and industry. Similarly, much of the wetlands loss in the United States has facilitated significant steps forward. In fact, several of this nation's cities, such as Houston and even Washington, D.C., would never have been built if development of wetlands had been prohibited.

Several of this nation's cities, including Washington, D.C., would never have been built if development of wetlands had been prohibited.

All different types of land, from prairies to jungles, can provide ecological benefits. To protect all of them would require an absolute halt of all human activity. What is important to recognize is that many elements, not just water saturation and vegetation, determine the ecological importance of a particular tract of land. Any government policy which merely attempts to define types of land, such as "wetlands," and set them aside for the purpose of "environmental protection" ignores the fact that not all lands of a particular type are equally valuable.

While many federally managed wetlands, such as the Florida Everglades, are in decline, the efforts of private groups stand as a testament to the ability of private conservation efforts to protect ecological resources. Ducks Unlimited, for example, has constructed over 3,000 wetlands projects covering almost four million acres in order to protect land "wherever waterfowl breed, nest, migrate or winter." However, some efforts, such as the attempted construction of a private hunting and conservation preserve in Maryland, have been barred under the guise of wetlands protection. The developer who designed the Maryland project, conservationist Bill Ellen, has been sentenced to serve six months in jail and four months of home detention. The federal government would do better to encourage such private efforts at conservation

rather than to bar all development on what it defines as wetlands through bureaucratic fiat.

The central problem with the current federal wetlands strategy is that it aims to protect all wetlands irrespective of the economic costs or ecological benefits.

The central problem with the current federal wetlands strategy is that it aims to protect all wetlands irrespective of the economic costs or ecological benefits. This policy prevents many landowners from pursuing reasonable uses of their land and ignores strategies which have been most successful at protecting those wetlands which are ecologically vital. While a revision of the existing wetlands definition has been long overdue, it is time to lose the federal policy of "no net loss."

Jonathan H. Adler is Associate Director of Environmental Studies at CEI.

September 1991

GREENS V. PROPERTY RIGHTS:
The Environmental Backlash

by Jonathan H. Adler

David Howard never intended to become an activist. Living in upstate New York, he never thought that he would need to fight the government to defend his own property. Then his land became subject to the land-use dictates of the Adirondack Park Agency, an agency of New York State empowered to regulate the five-million-plus acres in and around the Adirondack State Park, the majority of which is owned by private citizens.

The groundswell in defense of property rights has not gone unnoticed.

The APA's regulations restrict development and alteration of all land — public and private — in the region. So strict are these regulations that over half of the privately-owned land under the APA's authority is not permitted to contain more than one home per 43 acres. The APA has even threatened to require modifications to private lands deemed aesthetically unsuitable for the APA's design. New York governor Mario Cuomo responded to these concerns, commenting, "Yes, we have taken away some of the rights of the people living in the Adirondacks, but that's the penalty they have to pay for living there."

Given this regulatory environment, it is no wonder that David Howard is now an activist. Faced with restrictions on his own land, Howard began to work in defense of private property rights. Then, in 1991, he joined with property rights activists nationwide to found the Alliance for America, a loose coalition dedicated to defending property rights nationwide. Less than two years later the Alliance includes approximately 500 member organizations that represent well over a million Americans. The Alliance now has members in all fifty states.

The ability of green lobbyists to force their proposals through the legislative system is threatened more than ever before.

The groundswell in defense of property rights has not gone unnoticed. Members of Congress on both sides of the aisle recognize that the property rights groups are a force to be reckoned with. For the first time, when Representatives support "environmental" initiatives that impose draconian land-use restrictions or increase the federal government's land holdings, there are groups that will take notice. The League of Private Property Voters, for one, publishes an annual property rights voting index that evaluates members of Congress based upon their voting records on private-property related issues.

It is not surprising that the environmental establishment is less than pleased with this development. The ability of green lobbyists to force their proposals through the legislative system is threatened more than ever before. Yet rather than attempting to accommodate the concerns of small-property owners around the country, the environmental establishment has embarked on

a campaign of disinformation, attempting to portray property-rights advocates as corporate fronts and right-wing lunatics. In a booklet distributed to members of Congress last fall, the National Wildlife Federation proclaimed that "these groups represent the front line of the new environmental destruction coalition." Rather than acknowledge that their policies have destroyed individuals' lives and decimated communities, the environmental establishment is attempting to bury its opponents — on their own private land if necessary.

The environmental establishment is attempting to bury its opponents — on their own private land if necessary.

This environmentalist agenda was laid bare at a recent meeting of the Environmental Grantmakers Association in Washington State. The EGA is a loose confederation of private foundations and corporations that fund environmental causes. Together, its members contribute several hundred million dollars to environmental organizations each year. The EGA, operated by the Rockefeller Family Fund, sponsors meetings where representatives of these organizations can discuss long-term strategies and coordinate funding efforts. At the meeting in Washington, the EGA discussed how to handle the growth of property-rights activism and the so-called "Wise-Use" movement. "Wise use" efforts focus on the elimination of environmental restrictions on public land. "Wise-Users" are particularly concerned with restrictions on cattle grazing, timber harvesting, and mineral development.

The W. Alton Jones Foundation — by itself responsible for $7 million in grants to environmental organizations in 1991 — has studied the nature of the property rights movement. The Jones report was presented at the EGA conference at a session entitled "The Wise Use Movement — Threats and Opportunities." Its conclusions confirmed the environmental establishment's greatest fears.

"We have come to the conclusion that this is pretty much generally a grass roots movement," explained Debra Callahan, Director of the W. Alton Jones Foundation's Environmental Grass Roots Program. "[This] is a problem," she continued, "because it means there's no silver bullet." Moreover, she added, "this is happening in every single state. We think of this as being a western phenomenon — it's not true." Callahan explained that the surging defense of property rights is anything but a corporate front. As an investigation by *U.S. News & World Report* would conclude independently, these groups have "so far received only modest financial support from industry." The major environmental groups can make no such claim about themselves.

That the realities of the growing grass-roots environmental backlash pose a threat to the environmental establishment's agenda was not lost on conference participants. One commented during the session that "this is a class issue. There is no question about it. . . . the environmental movement is, has been traditionally, . . . an upper class, conservation, white movement." This, in turn, is sparking strong rural opposition. Another added that "It's not simply

that they don't get it, it's that they do get it. They're losing their jobs." Wondered Callahan aloud, "How do you say to somebody, 'No, I don't want you to have your job.'" As their regulatory agenda becomes increasingly expensive, the environmental establishment is now face-to-face with this dilemma.

In all likelihood the proceedings of this EGA conference would never have been made public had it not been for the presence of several property rights activists protesting the EGA's agenda. These activists obtained order forms for tapes of the EGA proceedings, and the contents of these tapes were subsequently written up by Eric Veyhl in the *Land Rights Letter*. The EGA no longer makes copies of these tapes available to the general public.

"We have come to the conclusion that this is pretty much generally a grass roots movement," explained Debra Callahan of the W. Alton Jones Foundation.

While many of those who are drawn into the environmental movement are motivated by a genuine concern for the quality of life, it is becoming increasingly apparent that the leadership of the environmental establishment does not share these concerns. More concerned with elitist environmental objectives than the plight of ordinary Americans, these leaders are rapidly distancing themselves from the American heartland.

As Ann Corcoran, a former lobbyist for the National Audubon Society, notes, "The private-property-rights movement consists of ordinary people — farmers, families, retirees — who think that they can take care of their land as well as or better than the government can, and who are not about to let the public authorities confiscate their property." The more the environmental establishment ignores this message, the more removed they become from the grass-roots they purport to serve.

Jonathan H. Adler is Associate Director of Environmental Studies at CEI.

May 1993

THE ANTI-PROPERTY RIGHTS CRUSADE

by Robert J. Smith

The birth of the environmental movement in the late 1960s brought an end to the conservation movement and its respect for the institution of private property. Fueled by the rhetoric and beliefs of the contemporary left it viewed the market, business, the profit system and private property as the sources of environmental degradation.

One of the major thrusts of the young environmental movement was the bipartisan effort to bring a system of national land-use control to America.

One of the major thrusts of the young environmental movement was the bipartisan effort to bring a system of national land-use control to America. In 1969, Congress created the President's Council on Environmental Quality (CEQ) with the National Environmental Policy Act, the same law that established the Environmental Protection Agency. One of the first projects of the CEQ was the creation of an intellectual, philosophical and legal justification for national land-use control. How, in a nation built upon the rights of free men and women, on the inalienable rights to life, liberty, and property, was the federal government going to gain control of all private land? Of particular concern to the new CEQ staff was how to get around the vexing little problem of the Fifth Amendment to the Constitution, which admonishes "nor shall private property be taken for public use without just compensation."

Controlling the use of private property was of paramount importance to environmentalists. Russell E. Train, the first CEQ chairman, testified before Congress that land use was "the single most important element affecting the quality of our environment which remains substantially unaddressed as a matter of national policy." In other words, there was one area of American life where people remained free, and something had to be done about it.

Among those who pursued the land-use control agenda was William K. Reilly, then a CEQ staff member. He vigorously threw himself into the task of rationalizing the destruction of private property in America. So assiduous and skillful were his efforts that a later Republican president appointed him to be Administrator of the Environmental Protection Agency.

Early in President Nixon's first term he established the Citizens Advisory Committee on Environmental Policy by executive order. The citizen who chaired the Committee was Laurance S. Rockefeller. This unelected group of citizens effectively ran federal environmental policy for some while. In August 1972, the Citizens Advisory Committee, then chaired by Rockefeller associate Henry L. Diamond, Commissioner of the New York State Department of Environmental Conservation, created the Task Force on Land Use and Urban Growth. In addition to Rockefeller and Diamond, this twelve-member Task Force included Pete Wilson, then mayor of San Diego.

The major product of the Task Force was a book edited by Reilly, entitled *The Use of Land: A Citizens' Policy Guide to Urban Growth*. It was subtitled "A Task Force Report Sponsored by the Rockefeller Brothers Fund." Sample chapter heads demonstrate the scope of the book: "Challenging the Ideal of Growth: A New Mood in America," "Creating What We Want: Regulating Development," and "Subdividing the Great Outdoors." Senator Henry M. Jackson was a big fan of the book; "I commend this report to all who wish to insure that we do not bequeath an unsightly, unproductive, and unrewarding land resource to future generations of Americans."

The attacks on the Fifth Amendment's "takings clause" were quite explicit as was the regulatory agenda.

Another book laying out the property control agenda was *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control*, published in 1973 by the CEQ. This book focused "on the clause of the Fifth Amendment to the United States Constitution that poses by far the most significant restraint on the regulation of land use, the 'taking clause.'" This issue was viewed as "the weak link" in environmental policy because "attempts to solve environmental problems through land use regulation are threatened by the fear that they will be challenged in court as an unconstitutional taking of property without compensation."

An implicit theme in both books is that private property was a quaint anachronism the nation could no longer afford. The attacks on the Fifth Amendment's "takings clause" were quite explicit, as was the regulatory agenda: Land kept for open spaces should be regulated, rather than purchased, by the federal government to prevent unsuitable land uses. In addition, both books called upon the Supreme Court to reevaluate earlier precedents limiting the regulatory power of government over private land.

Over the past twenty years, the agenda laid out in these two books has been realized. The federal government has in essence taken or nationalized tens of millions of acres of private lands. Federal land-use controls protect endangered species, wetlands, wild and scenic rivers, open space, national trails, coastal zones, historic sites, natural landmarks, scenic highways, and so on. Thus, without any national land-use control legislation ever having been passed, without any legal takings through condemnation and compensation, the government's quiet use of massive regulatory takings has placed a straightjacket over America's private land ownership.

The federal government has in essence taken or nationalized tens of millions of acres of private lands.

Indeed, over the past several years Americans in every region of the country have awakened to the full implications of government land-use control. People have seen everything they worked for, everything they saved, everything they sacrificed for their lives and their children's taken from them. And taken not only without just compensation, but with no compensation whatsoever. Hispanics in Southern California have seen their homes and worldly belongings burned to the ground, because they were told they could not disc firebreaks around their homes. Retired women in the Texas Hill

Country have lost their life's savings because they were told if they developed their land they would be fined or imprisoned. Farmers have been prevented from planting corn on land their fathers had plowed because the government said the land was a wetland. Tree farmers have been told that if they cut their own trees on their own land they will be fined and/or jailed. For countless Americans, the American dream has turned into a nightmare.

It will require a property rights revolution for Americans to win back their property rights.

The scope and extent of the federal government's taking of private land through regulation is so vast that it will require a property rights revolution for Americans to win back their property rights. The November elections were a first step in this direction. And since neither the administration nor the courts have yet seen fit to uphold the Constitution's Fifth Amendment protection of private property rights, it appears that the only recourse available is to demand that the Congress pass legislation making property rights protection the law of the land.

Robert J. Smith is CEI's Senior Environmental Scholar.

January 1995

LUCAS LEAVES EVERYBODY HANGING:
Lucas vs. South Carolina Coastal Council

By James Joseph

The Supreme Court's recent decision in *Lucas v South Carolina Coastal Council* was expected to galvanize the property rights movement by laying the groundwork for the elimination of most welfare-state interference with private property — especially environmental regulations. *Lucas*, it was hoped, would implement the modest goal that the government always pay for the private property it confiscates.

But *Lucas* gave us . . . well, no one is really sure what *Lucas* gave us. Neither advocates of property rights nor of regulation claimed victory (or defeat) after the case; the only basis for agreement is that more litigation will soon ensue.

Developer David Lucas bought two plots of island beach property in South Carolina six years ago for nearly $1 million; he planned to build a house for himself on one plot and to develop and sell the other plot. Regulations forbade construction close to the beach, but Lucas' property was past the regulations' boundary — until South Carolina changed the law and moved the no-construction boundary so that it included Lucas' plots, which were rendered nearly worthless. The law did not affect houses already standing. Lucas filed suit, claiming that the regulation was a taking under the Fifth Amendment, and that he was therefore owed compensation.

Lucas' case was expected to herald a new era in which those who concocted legislation like South Carolina's would be required to consider the impact of their behavior — and then pay owners accordingly. Instead, defenders of property rights received only a tepid reaffirmation of their principles.

Neither advocates of property rights nor of regulation claimed victory (or defeat) after the case.

After the case, the guidelines for the compensation of a total taking are relatively simple: an owner must show (1) that he was not subject to a private restriction which the state is merely enforcing (like a right of way), (2) that his property has been physically invaded or removed, or (3) that the government regulation has rendered his property valueless.

The Court ruled that an owner's compensation for taken property depends on citizens' reasonable understanding of the "bundle of rights" which comes with owning property. In other words, an owner "necessarily expects the uses of his property to be restricted from time to time" by the legitimate exercise of "police power" by the state.

However, the line between police power and compensable taking is still vague after seventy years of litigation *Lucas* included. But *Lucas* partly resolves some questions.

If a regulation deprives a present owner of all economically viable use of his land, the state must compensate him for the lost value.

On the up side, the Court mercifully decreed that the application of "noxious use" analysis to justify police power was itself noxious and should cease. Under this analysis, states could traditionally escape compensating owners by claiming that regulation was justified to protect other citizens from (real or perceived) harms of the regulated private use. In other words, South Carolina cannot declare (as it did in part) that the development of Mr. Lucas' property is offensive to tourism (a clearly pressing environmental concern) and should therefore be halted without compensation.

Second, the Court dealt environmental regulations a potentially serious blow by saying that a citizen's understanding of his rights does not include the possibility that his property be rendered worthless; in other words, if a regulation deprives a present owner of all economically viable use (read: a significant amount of the value) of his land, the state must compensate him for the lost value.

On the down side, the Court did not go nearly as far as it could have with *Lucas*. It could have ruled that, in the absence of a valid state police power (invoked under common law nuisance), no government could appropriate land from a private owner without just compensation, period. Instead, the Court constricted its decision to Mr. Lucas' all-or-nothing argument that compensation was due for a *total* taking; the question of partial takings was left unresolved.

On the confusing side, in a footnote that can be read two ways, Justice Scalia wrote that the "assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation" is incorrect (hurrah!). But he continued that a 95 percent taking which is uncompensated happens all the time; he gave no hint that this was undesirable (uh-oh).

Lucas *may merely offer crumbs, but it may also open the door to more favorable property rights and economic liberty jurisprudence.*

Finally, the Court muddled the heretofore clear but clearly unpleasant holding of *Penn Central v New York*, which declared that a total taking of part of an owner's property is acceptable if the owner still has other economically viable property. Whether this bodes ill or well remains to be seen. The Court left unclear which, if either, is a taking: no value for all of the property, or no value for all of the property *that was taken* even if some of the owner's other property is left intact.

Lucas may merely offer crumbs, but it may also open the door to more favorable property rights and economic liberty jurisprudence. Perhaps the Court did not want to go out on a limb in a case which technically offered a poor opportunity to sanctify property rights. The true meaning of *Lucas* may therefore be: just sit tight, folks, more is on the way.

James Joseph was a CEI research associate at the Competitive Enterprise Institute in the summer of 1992.

July 1992

SWEET HOME, SWEET JUSTICE:
Sweet Home vs. Babbitt

by Ike C. Sugg

On March 11, 1994 the U.S. Court of Appeals for the District of Columbia invalidated the Endangered Species Act's regulation of ordinary land uses on private property. According to the three-judge panel, that regulation "was neither clearly authorized by Congress nor a 'reasonable interpretation' of the statute."

The case, *Sweet Home Chapter of Communities for a Great Oregon v. Bruce Babbitt, Secretary of the Interior*, is destined for appeal to either the full Circuit (*en banc*), the Supreme Court or both. If upheld, the decision will bar the federal government from violating the rights of hapless property owners merely because they own habitat for endangered species. If upheld, Congress will have to explicitly authorize the Secretary of the Interior's onerous land use planning schemes for them to proceed under the ESA. Given the fact that the government has effectively taken millions of acres of private property under the ESA's now defunct regulation, this is a landmark victory for property rights.

If upheld, Congress will have to explicitly authorize the Secretary of the Interior's onerous land use planning schemes for them to proceed.

The reasons for hoping that the decision will be upheld rest in large part on the history of the Act and Congress' intent. On whether Congress originally intended to regulate private property when it passed the Act, the D.C. Circuit Court ruled that it did not. Indeed, environmentalists such as Michael Bean of the Environmental Defense Fund have lent credence to the arguments that won the day, most notably in Bean's 1977 book on wildlife law.

But things have changed since 1977. Foremost among them is that the environmental establishment, through a wide range of regulatory programs, has taken control of the use of private land without paying for it. All that the courts require to validate such actions is explicit legislative approval. The 2-1 decision, went 2-1 the other way when the Circuit Court first ruled on the case in July 1993.

Mr. Bean's view of the March decision differs from that of CEI. He views it as "a decision that says it is, in effect, OK for someone to come demolish your home if you're not in the home at the time, to put it in a human context, because it says it is OK to destroy homes of endangered species." Mr. Bean is wrong, of course, because he fails to grasp the concept of property rights. The decision's key finding is that property owners do not have a positive duty to provide endangered species with pristine living conditions at private expense. To put it in a human context, homeless people have the right not to be harmed, but they are not entitled to live on your back porch.

It is still illegal to physically harm an endangered species, just as it is to harm another human being.

The idea that imperiled wildlife have greater claims to private property than imperiled people has been invalidated. It is still illegal to physically harm an endangered species, just as it is to harm another human being. If the decision is upheld it will simply vitiate the previous obligation to provide food and shelter for listed species on private land.

If urban residents were required to house the homeless the way rural residents have been required to house endangered species, perhaps they would better understand the moral and economic outrage that has catalyzed the property rights movement. Regrettably, such appreciation and understanding is in no way guaranteed even if the decision is upheld. It is still generally accepted that the government may run roughshod over individual rights if it espouses some "public" purpose. Like the hearts and minds of urban America, the fundamental philosophical victory has yet to be won.

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April 1994

Editor's note: The Supreme Court will hear the Clinton administration's appeal of *Sweet Home* 1995.

HOME *NOT* ALONE:
New York's War on Landlords

by Sam Kazman

The key to rent control's political appeal lies as much in its restrictions on eviction as in its capping of rents. Artificially low rents mean little to tenants unless they can keep their apartments. Without that ability, they would be forced to compete with countless other potential tenants for below-market rentals, losing much of what they had gained politically.

For this reason, rent control schemes almost invariably restrict evictions. However, there is usually an exception for "owner-occupancy" evictions, where the landlord seeks to personally occupy the premises. In a way, these owner-occupancy provisions are a strange bit of nostalgia. Having eviscerated property rights, the state now turns around and tips its hat to their memory — it may not allow a building owner to do very much with his property, but at least it will let him live in it.

The state may not allow a building owner to do very much with his property, but at least it will let him live in it.

Nearly a decade ago, however, New York State decided that even this was going too far. It amended New York City's rent control law to prohibit owner-occupancy evictions of tenants who were elderly or disabled, or who had resided in their buildings for more than twenty years. The law took effect immediately upon passage. People who had purchased rent controlled buildings expecting to eventually reside in them found their plans smashed overnight.

Two of the people caught in this law's web of dashed expectations were Jerry and Ellen Ziman, whom were represented by CEI before New York's high court. After a seven year legal battle they finally succeeding in evicting their tenants. Their victory came not on any constitutional ground, but on an "economic hardship" technicality involving their low rate of return. CEI is now representing them in a second suit, arguing that the lengthy delay they endured before they could fully occupy their building amounted to a taking of property for which compensation is constitutionally required.

The Zimans were far from the only building owners affected in this manner. In November, 1983, Joan Dawson, a schoolteacher, bought a small Harlem brownstone as a home for herself and her two grown children, Paul and Tandra Dawson. They moved into the house and have lived there ever since, together with Tandra's daughter and two foster children for whom Joan Dawson currently cares.

When Joan Dawson purchased her house it contained two occupied rent-controlled units, whose tenants Ms. Dawson intended to eventually evict so that she and her family could have exclusive use of the house. Seven months later, however, her dream of single-family home was destroyed by the new law. Because her tenants had lived in the building for more than twenty years, they could no longer be evicted on owner-occupancy grounds.

In 1990, Joan Dawson and her two children filed suit in New York State Supreme Court, challenging the law as an uncompensated taking of their property. Because the Dawsons could not take advantage of the economic hardship provision utilized by the Zimans, their case was a straight constitutional challenge to the 20-year provision.

The Dawsons lost. The court ruled that there was an essential difference between the Dawsons' situation and the major cases invalidating housing regulations on takings grounds — specifically, the Supreme Court's 1982 *Loretto* case (which ruled that mandatory television cable installations in privately owned buildings constituted a taking) and New York's 1989 *Seawall* case (which overturned a single-room-occupancy conversion law). According to the court, these cases established that the state cannot impose a new tenancy upon a landlord. However, they did not restrict the extent to which the state could regulate *existing* tenancies, and this is all that the Dawsons' predicament supposedly involves. Since the tenants were in the building when Joan Dawson bought it, the argument goes, she has nothing to complain about.

Joan Dawson bought a house with evictable *tenants. Seven months later a new law turned them into* permanent *tenants.*

The Dawsons appealed, with CEI acting as co-counsel, and a hearing is now set for late January.

The state's argument is, needless to say, exceedingly curious. Joan Dawson bought a house with *evictable* tenants. Seven months later a new law turned them into *permanent* tenants. There is no real difference between this and the state imposing *new* tenants on a building owner. From the standpoint of government intrusion, there is no distinction between a landlord whose door is forced open by the state, and one who voluntarily opens his door to tenants only to be barred later from closing it. For landlords this is a serious issue, but for the state it's a game of one-way tag; if there's a tenant in your building then you're "it," forever.

The state also attacks Joan Dawson for thinking that the owner-occupancy eviction law would stay on the books. It claims that, given rent control's "highly regulated" nature and its "continuing trend toward tenant-protective measures," Joan Dawson "could not have imagined that the law would remain fixed." In short, under rent control there can be no legitimate expectations (at least not by landlords); instead, anything goes.

Rent control does many things. At the urban level, it is, as Swedish economist Assar Lindbeck put it, the most efficient technique known for destroying a city short of bombing. (This point is nicely driven home in *Rent Control: Myths and Realities*, a 1981 Fraser Institute book containing photos of urban devastation — you can't tell the bombing sites from the rent control sites.) At the social level, it has turned landlords and tenants into permanently warring parties, and it has made the apartment (who gets it? who keeps it?) the defining feature of thousands of lives and relationships. (See Tama Janowitz's *Slaves of New York* for a literary treatment of this phenomenon.) At the regulatory level, it has created an unparalleled labyrinth of bureaucratic snakes and ladders; if Kafka had built a theme park, this would have been it. And at the individual level, the level that really counts, it has had, in Professor Richard Epstein's words, "extraordinary impacts on ordinary people."

Rent control is the most efficient technique for destroying a city short of bombing.

New York City instituted rent control 50 years ago as a temporary solution to a temporary housing shortage. For a temporary fix, this is a pretty impressive resume. And if the Fifth Amendment puts a few dents in it, it will be an even more impressive coda.

Sam Kazman *is CEI's general counsel.*

January 1994

Editor's note: As of this writing, the Zimans' suit for damages under the Fifth Amendment takings clause is pending in New York trial court. As for the Dawsons, in April, 1994, the New York Appellate Division ruled against them. The court held that, given rent control's expanding nature, the Dawsons should have known better than to rely on existing law when they bought their house. This reasoning conveniently ignores the fact that the very purpose of the Fifth Amendment is to *restrain* such expansion; as Justice Oliver Wendell Holmes noted a half-century ago, the compensation requirement is intended to check "the natural tendency of human nature ... to extend [regulation] more and more until at last private property disappears." On appeal, New York's highest court dismissed the case, and the U.S. Supreme Court declined to review it. The Dawsons finally paid their tenants to leave; they may not have received justice, but at least they have their house.

PROPERTY RIGHTS, WE HARDLY KNEW YOU:
A Historical View

by Lee Kessler

When environmental well-being is at stake, most people are skeptical of capitalism's ability to deliver the goods. *Time* magazine, hardly a fringe publication, compares the Industrial Revolution to Pandora's Box, arguing that "the laissez-faire, free-market rules that allowed the industrial world to prosper must now be suspended."

Time is certainly not alone in its view. That the statute books are filled with thousands of pages of environmental regulations further indicates a deep distrust of the free market's ability to deal responsibly with environmental problems. Most people are genuinely convinced that it is capitalism which makes a mess and government which cleans it up.

The nineteenth century saw property rights, the cornerstone of individual liberty, gradually becoming obsolete.

It seems at first that they have a point; after all, there does exist a wealth of historical documentation revealing the environmental destruction which accompanied America's rapid development. The deforestation of vast wildernesses, the overgrazing of the open ranges of the West, the devastation caused by that powerful symbol of the American Industrial Revolution, the railroad — all were purportedly the result of market abuses.

That these environmental problems occurred is undeniable, but is capitalism really to blame? The evidence would suggest otherwise. Although at its founding the United States was based upon the principles of a free society, the nineteenth century saw property rights, the cornerstone of individual liberty, gradually becoming obsolete.

But by no means was this true in the eighteenth century. Early American courts had borrowed heavily from the British common law, adopting verbatim most of the legal rules developed in England over the previous 800 years. While property rights were first recognized in Britain, they were perfected and strictly enforced in the United States. This was made clear in *Merrit v. Parker*, a 1795 New Jersey Supreme Court case: "[t]he law prohibits any violation of the property of another, any infringement of his rights; and it does not permit the person who has committed outrages to shelter himself under the plea, that the person whose rights he has invaded has sustained no injury."

Such a strict interpretation had once worked well; however, the common law was much less well-equipped to handle the rapid economic growth of the 1800s. People were realizing before long that undue restrictions

were being placed upon what would otherwise be legitimate uses of property. Judges attempted to correct this problem in the early nineteenth century by making the criteria for a trespass less strict. For example, in *Palmer v. Mulligan*, an 1805 New York Court of Appeals case, Judge Livingston expressed his opinion that "the plaintiffs proved no injury, or one so remote and insignificant, as not to justify their insisting on an abatement of the defendant's dam, or damages for its erection." Invasions of property were still seen as trespasses, but it had now become necessary for property owners to show demonstrable harm.

A failure to modify the common law rule probably would have been undesirable. Imagine, for example, a situation in which A, a blacksmith, uncomfortable with competition posed by B and his new foundry, procures an injunction on the grounds that B's building casts a three-inch shadow onto A's property. Though conceivably a trespass under traditional common law, it seems unreasonable that A can restrict B's right to use his property and to earn a living by claiming damages which are virtually non-existent.

What formerly would have been considered a trespass had now become acceptable, so long as it could be argued that the overall social benefits exceeded the damage done to private individuals.

Although a relaxation of the requirements for trespass does manage to avoid such a problem, it nonetheless has a great potential for abuse: It depends upon the ability and willingness of judges to determine when damages arising from a trespass are truly insignificant. Thus it became only a matter of time before judges would afford a very different interpretation to this principle. By 1873, for example, one judge ruled that "the plaintiff's grievance is for a mere personal inconvenience and we are of opinion that mere private personal inconveniences, arising in this way and under such circumstances, must yield to the necessities of a great public industry."

The definition of trespass had been altered beyond recognition. Once this became the preferred interpretation, property rights ceased to exist in any meaningful sense. This is not to suggest that private property was abolished overnight. But whereas the right to property had once been sacrosanct, now it existed not by right but by permission. What formerly would have been considered a trespass had now become acceptable, so long as it could be argued that the overall social benefits exceeded the damage done to private individuals.

This idea was potentially a powerful tool in the hands of nineteenth century governments. Activities that federal, state, and local governments previously had no authority to support could suddenly be justified by citing the "public interest," meaning essentially that economic progress was a legitimate reason to violate individual rights. Such a conception of the "public interest," that the public could be somehow divorced from the individuals which comprised it, was at the time a radically new idea to Americans. The continuing erosion of property rights in the United States today suggests that it has left a deep legacy.

Government was responsible for the environmental destruction of the nineteenth century; why should it be trusted to protect the environment in the twentieth?

The railroads represent the classic case study of a nineteenth century government-sanctioned enterprise undertaken in the name of the "public interest." In fact, the "public's" interest was so overwhelming at times that individual rights were blatantly ignored in the process: In at least one instance, the New York Central Railroad was not required to pay compensation to a local resident whose house it burned down. (The courts argued that the resident should have foreseen such a possibility when he bought the property, even though at the time he had probably never heard of a railroad.)

Furthermore, federal and state governments frequently offered direct financial support to the railroads. Not only were they the recipients of many millions of acres in land grants, but also of loans — actually gifts, as most were never repaid — of $16,000 for each forty-mile section of track laid down. Moreover, and significantly from an environmental standpoint, railroads were given the use of all raw materials — especially timber and minerals — within a certain distance from the tracks, ranging from 200 feet to ten miles depending on its location.

The results were unsurprising: So long as natural resources were free of charge, railroads tended to build their lines through the most plentiful regions, and made use of all of the materials they could get their hands on.

Many people would cite this as one of capitalism's failures. More accurately, it resulted from a failure to have capitalism. With government picking up the tab, railroads normally found it cheaper to look for new areas to exploit rather than replenish old ones. Had the railroads been forced to bear the future costs of their shortsightedness, they undoubtedly would have been less wasteful.

Government was responsible for the environmental destruction of the nineteenth century; why should it be trusted to protect the environment in the twentieth? Let's give property rights a second chance — no, make that a first chance. This would be good for the environment, and besides, freedom is always in the public interest.

Lee Kessler was a research associate at CEI during the summer of 1991.

August 1991

PUBLIC VS. PRIVATE LAND MANAGEMENT:
Which is Better for the Environment?

By Nicole Arbogast

The United States is at a critical point in the management of federally-owned land. Under the guise of protecting the environment, environmental interest groups are calling for the federal government to acquire more land and to exercise stricter control over land it already owns. If successful, this movement will result in the erosion of private property rights and individual freedom.

Unfortunately, most Americans do not realize the extent of the federal government's land holdings. Taking into consideration all federal land (including the National Forest Service, the Bureau of Land Management, the National Park Service, the Fish and Wildlife Service, Department of Defense, etc.) the government controls approximately 724 million acres (or one-third) of America's 2.315 billion acres. Most of this public land is located west of the Mississippi River (63 percent of the 13 western states is owned by the federal government), a fact which devastates the economies of many of those states because it eliminates most of their tax bases, leaving little money for schools and other programs. Additionally, the federal government prevents localities from recovering this income by failing to pay most of the promised payments in lieu of taxes (PILT), which were to help offset the lost income.

Under the guise of protecting the environment, environmental interest groups are calling for the federal government to acquire more land and to exercise stricter control over land it already owns.

The amount of land under federal control is startling: The government controls 86.1 percent of land in Nevada, 63.8 percent of Idaho's territory, and 63.6 percent of Utah. However, even the most well-known and respected environmental groups are not satisfied with these figures. Today, for example, 94 million acres in our nation are designated as wilderness. But, as Mike Francis of the Wilderness Society recently explained in the *Washington Times*, environmental groups expect to "double the amount of wilderness" within the next 25 years. Debbie Sease, who tracks legislation dealing with wilderness issues on behalf of the Sierra Club, happily notes that it "looks like a really productive Congress."

If the federal government actually helped protect and improve the natural resources under its control, federal takeover might not be as objectionable. Unfortunately, this is simply not true. Case after case has proven that the government simply cannot effectively manage natural resources with the political pressures and perverse incentives of the current bureaucratic system. The government has historically produced policies and management decisions that are both economically inefficient and environmentally destructive, and there is no reason to believe that this behavior will change in the future.

The results of this poor management system are everywhere. In 1988, *The Economist* reported that the National Forest Service subsidizes timber

harvests in many areas that do not produce profitable timber sales. An example of this is the Tongass National Forest in Alaska, where the Forest Service spends $100 per tree harvested and sells each tree for only $2. This would not occur on privately owned land because landowners cannot continually operate at such a loss.

Unlike the federal government, International Paper does not log in areas that are not economically profitable.

Federal land managers often run into conflicts because of their need to respond to all political interests, no matter what the results. Take, for example, the Gallatin National Forest in Montana. Because of concern that prime grizzly bear habitat was being destroyed, logging roads in that area were closed. However, because the forest still had a timber goal to meet, it was forced to build other roads which opened up another area of the forest to logging. Ironically, this area was also considered prime grizzly bear habitat.

An example of private ownership as an alternative to federal control is International Paper, Inc. Because it operates within the marketplace, International Paper manages its land to provide the company with both long and short term profits. This means that, unlike the federal government, International Paper does not log in areas that are not economically profitable. It also means that IP has a strong incentive to prevent damage to its property, as such damage might decrease future productivity.

This does not mean, however, that IP must sacrifice its profits for the environment. By combining concern for both economics and the environment, International Paper has profited. Indeed, according to one analysis reported in *The Economist*, "35 percent of its operating profits in Texas, Arkansas and Louisiana [come] from leasing the hunting rights of its forests there." Not only is this good for IP's bank account, it's good for the environment because managing for quality game habitat creates benefits for non-game wildlife as well.

Ownership encourages people to look for creative ways to make the most of all of their assets.

Ownership encourages people to look for creative ways to make the most of all of their assets, and without compromising the long term integrity of those assets. The government, however, which lacks concern for the long term, focuses instead on short-term goals which can be translated into political victories. This incentive structure is further skewed by the rules, constraints, and incentive structures under which management agencies must operate.

Considering the current interest in environmental issues, now is an excellent time to address the alternatives available in the area of land management. Free-market environmentalism offers a way to conserve natural resources while at the same time promoting economic growth and individual liberty. While the latter two may not be priorities of some environmentalists, they should be of the utmost importance to anyone who cares about the human condition.

Nikki Arbogast was a research associate at CEI in the fall of 1991.

December 1991

PROPERTY-BASED CONSERVATION:
The Free-Market Approach

by Robert J. Smith

Few people doubt that America's natural heritage, its abundant natural resources, could be best developed through private ownership, but most have traditionally believed that only the government can protect it. However, a of free-market environmentalists are beginning to popularize the superiority of private ownership of land and resources for conservation as well as development.

Perhaps the most compelling argument for private ownership is that it would remove resource-management decisions from the realm of politics. Surely, people on both sides of the so-called "preservation vs. development" debate can agree that there must be a better way to manage scarce resources than subjecting them to the vagaries of the political tides with every change of administration. Just as Interior Secretary James Watt changed the direction of the buffalo on his department's official seal from face-left to face-right, so can each succeeding administration reverse the politics of its predecessor. If the goal of environmentalists is the careful use, management, and conservation of our unique natural resources, then they should seek to bypass the never-ending tug-of-war for political power to achieve this goal.

The most compelling argument for private ownership is that it would remove resource-management decisions from the realm of politics.

The concept of "the public domain" has been with us for so long that most Americans have difficulty believing that Yosemite National Park could be preserved in any other manner than through government ownership. For that matter, a system of common property appears to have worked well because for most of this century the demands placed upon the carrying capacity of the public domain have been relatively insignificant.

Many ecologists and economists have pointed out that when there is little demand for land and resources it matters little what system of property management is employed because the negative results of common property management will not be felt. But we have long since passed that day in America. There are no longer any lands that nobody wants. Ecologist Garrett Hardin has written that using property as a commons "may work reasonably satisfactorily for centuries because [use is] well below the carving capacity of the land. Finally, however, comes the day of reckoning. . . .At this point, the inherent logic of the commons remorselessly generates tragedy."

Hardin's concept of the "tragedy of the commons," articulated in his 1968 essay by that name, is crucial to an understanding of the inherent problems in managing "public" lands and resources as common property, and the growth of a free-market environmentalist movement. By definition, a commons is property or resources that "everyone" owns and has an equal right

to use. But such a system gives each user an incentive to use as much as he can — because if he doesn't, someone else will. This leads to deterioration and depletion of the resource, until nothing usable is left. Yet no one person can be held responsible, for was not everyone told that everyone had a right to use the resource? Hardin contrasts this system to private ownership where, for example, "each herdsman owns the pastureland on which his cows graze. . . .He has an *intrinsic* responsibility, because if he makes the wrong decision, he's going to suffer from it" (emphasis in the original).

Under "the logic of the commons," appeals by environmentalists to raise public consciousness of the need to treat publicly held resources wisely will do no more than postpone the day of reckoning, not avert it. The commons system, by itself, includes no way to settle equally valid but mutually incompatible claims by a wide variety of potential users. In a commons system, all of these decisions must be made politically.

Under the present system, each user group pushes for an ever-expanded share of the public domain to be reserved for its special interest — whether it be backpacking or cutting trees.

The day of reckoning has come. The public domain is already being overused and overexploited at today's population level. In recent decades an ever growing population, with larger discretionary income, a growing desire for recreation, and more interest in the outdoors and nature, has quickly pushed against the carrying capacity of almost all the public domain. The more spectacular and popular areas are rapidly beginning to deteriorate in quality: Some areas are now so overused and crowded that they appear ravaged and seem to have lost many of the very environmental amenities they were set aside to maintain. This is especially true of the national park system — several government studies have documented their deplorable state.

But the only answer of the environmentalists and bureaucrats has been to "take" more land and expand the parks. Given the growth of competing demands for scarce resources, this response hardly seems to be appropriate. We are no longer in a position where we can treat what is now the public domain as a static common pool. We have reached the point where attempting to satisfy some users has begun to impinge on others who can also legitimately claim their equal share of "the people's" lands through right of common ownership and payment of taxes to manage these lands. Under the present system, each user group pushes for an ever-expanded share of the public domain to be reserved for its special interest — whether it be backpacking or cutting trees. If users could no longer rely on the political process to obtain use of areas they desire, and could no longer tap the resources of another gigantic common-pool resource, the federal treasury, to pay for management costs, we would soon see the beginning of a far more rational society.

All of the lands now considered "public domain" could be allocated and transferred to applicable user groups. For instance, if the off-road vehicle associations were able to obtain their own lands — say so many tens of thousands of acres of desert land in southern California and Nevada, allocated so as to avoid destruction of archaeological sites and danger to plants and

wildlife — then they could not pass to others the costs of their recreation. If they destroyed their lands, they would be in the same situation as a farmer who kills or eats his breeding stock, or a tree farmer who neglects his seedlings. The officers and managers of these areas would then have a direct incentive to carefully manage and protect their lands, for those would be the only lands they would have. They would not be able to leave them degraded and then move on to other public lands. They would have to develop a careful program to avoid overuse, to restore eroded lands, prevent gullying, and replant and reseed denuded areas. And, of course, with adjacent lands also in private ownership, the activities of the vehicle users would be monitored to ensure that they were not causing harm to their neighbors. If there were harm, the aggrieved parties could obtain court injunctions or collect damages.

Those who fear potentially adverse environmental consequences of private ownership should recognize that there is a centuries-old tradition of successful private environmental-protection.

Those who fear potentially adverse environmental consequences of private ownership should recognize that there is a centuries-old tradition of successful private environmental-protection. In fact, in recent years private actions have been among the most effective in promoting conservation: In the 1970s alone, more than 1.6 million acres were acquired by private organizations for preservation purposes. Groups such as the Nature Conservancy, the Audubon Society, and the World Wildlife Fund in particular have done magnificent work in privately preserving wildlife, wetlands, coastal barrier islands, estuaries and tidal marshes, colonial nesting areas, cypress swamps, tall grass prairies, and an entire range of areas of unique natural diversity. Owning these areas privately, the environmental organizations have had all the advantages absent in public ownership. The security and exclusivity of their ownership means that owners and managers of these refuges and preserves can determine the optimal use of resources and then manage them accordingly *in perpetuity* — free from all the problems of conflicting multiple uses in the public domain, free from the uncertainties and vagaries of changing political priorities, and free from the pressures of the political decision-making process.

If, for example, the Nature Conservancy or the Audubon Society decides that an area is too sensitive environmentally for visitor use, then they can exclude visitors without fear that the next administration or Congress will determine that backpackers should be allowed to have access, or that cattle grazing is compatible, or that the public domain also belongs to off-road vehicle aficionados, or that 40 percent of the wildlife refuge should be made available for waterfowl hunters. However, if they do find that there are compatible multiple uses for all or part of their preserves, then they can allow carefully prescribed multiple uses that generate income to pay for management, educational activities, publication of conservation magazines and books, and the purchase of additional lands.

There are many examples of relatively small organizations, associations, and groups that have acted privately to preserve special areas, types of habitat, or wildlife. Groups throughout the Midwest have privately purchased or obtained nesting areas for prairie chickens and conservation easements for

The familiar equation of private ownership with environmental ruin is patently false.

mating grounds, and have developed observation blinds and towers for birders and photographers. One of the most important private conservation efforts in the nation's history is the Hawk Mountain Sanctuary, located in the Appalachian Mountains of Pennsylvania. Purchased quietly by conservationists for $3,500 in 1934 to protect hawks against bounty hunters and "sport" shooters, it is now a self-supporting research and educational center that attracts as many as 2,000 people a day from around the world to view the spectacular autumn hawk migration.

Thus it is evident that a substantial private demand for environmental preservation and conservation exists today in the United States, a demand that has been translated — even in a market heavily distorted by government intervention — into millions of acres held privately for environmental purposes. The familiar equation of private ownership with environmental ruin is patently false.

Of course, any process of privatization of public lands would mean that some formerly public lands could fall under the ownership of commercial and pro-development interests. Yet, from an environmentalist's point of view, this should not be viewed with alarm, particularly in comparison to the situation that exists at present. A profit-oriented entrepreneur would be hard put to find an economic justification for building a shopping center, a high-rise apartment building, or an industrial plant in a wilderness area hundreds of miles from the nearest population center or economic base — especially if his neighbors, the owners of adjacent stretches of land, could bring suit against him if he were to affect adversely their property rights. As for those interests seeking to develop and exploit such resources as timber and minerals, the present system of the commons, or government ownership, actually encourages waste, destruction and mismanagement by forcing the taxpayers to subsidize activities and practices that would not occur in a free market. Private ownership, on the other hand, would encourage careful, responsible development, managed with long-term conservation in mind.

Private ownership encourages careful, responsible development, managed with long-term conservation in mind.

Even in a "worst case" scenario, with a developer who, through ignorance or malice, actually does irreparable damage to his land, environmental losses would be held to a minimum — that is, to the extent of the developer's own holdings. He would not be free to claim and destroy additional land or resources under some notion of "common" ownership, or by grabbing control of the political process. In comparison, the "worst case" potential for destruction under the present system is virtually limitless: Conservationists must rely solely on the good will of government managers and the "wisdom" of the political process. Such faith hardly seems justified — for years, many of the federal government's land-management policies have been environmentally destructive, and in the event of some "national emergency" and accompanying calls for, say, rapid extraction of strategic raw materials, concern for future generations would be unlikely to carry much

weight in the Pentagon or the halls of Congress. Such a situation would quickly reveal whether or not the "public" lands are truely "owned by everyone."

Many of those who are both pro-free-market and pro-environment have put forth proposals for the actual method by which what is now the public domain can be transferred to private ownership. These range from giving land to environmental groups to gradual, parcel-by-parcel disposition over a period of years, to modern versions of homesteading, to wide-scale auctioning off of public property to the highest bidders. All such proposals merit at least further study. But more important is increasing people's recognition that government ownership and management of our cherished land and other natural resources is a policy that is failing, hurtling toward disaster with increasing speed, and that if the future of our environment is to be bright, we must turn to the alternative solutions offered by private ownership.

Government ownership and management of our cherished land and other natural resources is a policy that is failing, hurtling toward disaster with increasing speed.

Robert J. Smith is CEI's Senior Environmental Scholar.

This article is adapted from "Getting the Government Out of the Environment," published in the September 1982 issue of Inquiry.

APPENDIX:
ARE PROPERTY RIGHTS POPULAR?

by Brian Seasholes

Conflicting sides in the property rights debate claim popular allegiance. Yet there is not a wealth of publicly available polling data on property rights with which to evaluate the competing claims of public support. Nonetheless, a review of public survey data over the past several years suggests that a majority of Americans support property rights in principle and believe that strong property rights protections do not conflict with sound environmental protection.

Americans have long supported the idea of property rights. In 1964, Gallup conducted a poll where the following question was put to survey participants: "Here are several statements that people critical of the government sometimes make. Just tell me whether you agree or disagree. The government is interfering too much with property rights." 40 percent agreed with this statement, 38 percent disagreed and 23 percent did not know.

In the 1970s two separate property rights polls were conducted by Louis Harris and Associates, in 1973 and 1975, which asked the following questions:

1) "Here is a list of things some people think made America great. For each item, do you feel this was a major contributor to making America great, a minor contributor or hardly a contributor at all? . . . Allowing people to own private property." The responses were as follows.

	1973	1975
Major contributor	88%	87%
Minor/Hardly a contributor/Not sure	12%	13%

2) "Here is a list of things some people think made America great. In the next 10 years, do you think each of these items will be a major contributor to making the country great, a minor contributor, or hardly a contributor at all? . . . Allowing people to own private property." The responses were as follows:

	1973	1975
Major contributor	84%	82%
Minor/Hardly a contributor/Not sure	16%	18%

Both of these polls revealed strong support for property rights in principle.

A third poll taken in 1974 by Yankelovich, Skelly and White asked the following: "Here are some statements which represent some traditional American values. How do you feel about each one? . . . The right to private property is sacred." The responses again indicated support for private property:

I believe strongly in this statement	70%
I partially believe it	23%
I don't believe it	8%

While these three polls do not explicitly address the issue of when governments should or should not be allowed to infringe upon private property rights, they do indicate very clearly that Americans have a basic grasp of the importance of the ability for citizens to own property. This suggests that the growth of the property rights movement over the past several years, far from being a recent "backlash" against government regulation, is a result of a genuine appreciation of the importance of property rights among the American people. Given the significant increase in federal regulation of private land over the past two decades, this data would suggest that the "backlash" was inevitable.

Recent polling data supports the contention that property rights enjoy general support from the American people. In 1992, Gallup conducted the first National Environmental Forum for Times Mirror Magazines. In this poll, participants were asked "should the government compensate private property owners" in the following instances:

1) When "land is devalued by the need to protect an endangered species;" in this instance, 59 percent of respondents answered yes while only 28 percent answered no;

2) When "land is devalued by classification as a wetland;" in this instance, 52 percent answered yes while 32 percent answered no.

These results are quite interesting because this same poll also found that, with regard to current endangered species and wetlands regulations, 51 percent and 52 percent of Americans, respectively, did not think they had gone far enough, 26 percent and 24 percent, respectively, think a good balance has been struck while 16 percent and 9 percent, respectively, think regulations have gone too far. Majorities both supported the idea of increased federal environmental regulation in these areas while also supporting compensation to landowners, which is not current federal government policy. Americans want strong environmental protection, but they also want to ensure that property rights are protected in the process.

Indeed, Democratic pollster Celinda Lake told the *Times-Picayune* (July 3, 1994) that 80 percent of Americans consider themselves to be environmentalists, but 66 percent of Americans think property rights are not protected adequately under current law. These results reflect the data in the Times Mirror polls, namely that environmental protection, as an abstract idea, is widely supported, but that when confronted with the question of how government should or should not go about protecting environmental quality, Americans have also demonstrated a desire to see that private property is protected.

A number of regional polls have been conducted that also indicate support for private property. In October 1994, Florida people of voting age were asked by Fabrizio, McLaughlin and Associates to respond how they would vote on "a [state] ballot measure that would require state or local governments to fully compensate home or other property owners for any damages or losses that result from governmental decision or actions." 59.5 percent responded that they would definitely vote for such a measure, 16.3 percent said that they would probably vote for the bill and 9.5 percent said they probably or definitely would vote against the proposed measure; 14.7 percent were undecided.

The same firm conducted a similar poll in Georgia in December 1992. In this poll the following question was put to people of voting age; "do you agree or disagree that the government should be required to compensate private property owners if environmental regulations reduce the value of their property?" 63.3 percent of respondents were in favor of compensation, 29.5 percent were against, and 7.3 percent did not know or had no opinion.

Property rights was a pivotal issue in the 1994 Texas gubernatorial race, and as a result groups on both sides of the issue conducted statewide opinion polls. The consumer advocacy group Public Citizen released a poll on October 8, 1994 in which a number of questions about the environment, economics and property rights were asked.

1) When asked whether Texans have a "moral obligation to future generations to protect the diversity of wildlife from pollution and extinction, even if they have no current economic value," 80 percent of respondents agreed (39 percent strongly), 16 percent disagreed (4 percent strongly) and 3 percent fell into an unspecified "other" category.

2) When asked whether more or less public land needs to be set aside to protect endangered species, water quality and for recreation, 60 percent thought more public land should be set aside while 25 percent thought less should be set aside and the remaining 15 percent fell into an unspecified "other" category.

3) When the statement "allowing some people to do whatever they want with their land harms the common rights of all citizens to clean air, clean water, and wildlife diversity" was pitted against the opposing statement "governmental environmental laws are unfairly taking away the rights of some landowners to use their property however they want," 44 percent agreed with the former while 39 percent agreed with the latter.

4) When asked to choose one of the following two statements: "taxpayers are already paying for too much and can't foot the bill to compensate landowners," and "when some uses of a piece of land are prohibited or limited because of environmental laws, the taxpayers should be required to compensate the landowners," 56 percent chose the first statement while 29 percent chose the second.

5) When presented with the statement, "Texas charges property taxes on land set aside as habitat for endangered species or to preserve water quality. Some countries have a program that allows landowners to pay no taxes on land that is set aside for this purpose," 67 percent agreed with this policy and 25 percent opposed it, while 8 percent fell into the "other" category.

As the first statement shows, most people favor blanket statements about the need to protect the environment. Yet the other questions in the Public Citizen poll are worded in such a way as to make it appear that the people of Texas are not supporters of property rights, either in theory or practice. While 60 percent may believe more public land needs to be set aside to protect endangered species, water quality and for recreation, it is unclear whether respondents were advocating state acquisition of more land or specific uses for the land already in state ownership.

Perhaps the most misleading of the questions was the juxtaposition of the statement "allowing some citizens to do whatever they want with their land harms the common rights of all citizens to clean air, clean water, and wildlife diversity" with "governmental environmental laws are unfairly taking away the rights of some landowners to use their property however they want." These two statements are not mutually exclusive. Indeed, many property rights adovcates would agree with both statements as property rights have never meant that people can do "whatever they want" with their property. Under takings compensation proposals such as that proposed in the Republican "Contract with America," if the activity in question can be construed as a public nuisance by a court of law then that activity can be enjoined without requiring compensation.

The third question was similarly misleading, as it presupposed that requiring compensation would necessarily result in a tax increase to pay for it — something that most Texans would oppose. When government agencies are going to be forced to pay compensation for regulatory takings, they always have the option to rescind the regulatory action that would have caused the taking. The resulting prioritization of regulatory acitivities within government agencies will greatly reduce the cost of paying compensation, as agencies will engage in fewer actions for which compensation is requried.

The Texas Farm Bureau commissioned a poll in July 1994 that had very different results from the Public Citizen poll. A total of 78 percent of Texans disagreed (64.5 percent "strongly") with the statement, "in general, the government should have the right to restrict how private property is used." Only 12.3 percent agreed (4.3 percent "strongly") with this statement, while 9.8 percent were neutral.

In this poll, when presented with the statement "to protect the environment, the government should have the right to restrict how private property is used" the results were closer. 39.8 percent disagreed (22.3 percent "strongly"), 38.0 percent agreed (14.5 percent "strongly"), and 22.3 percent had no opinion or were undecided. Yet again, many of those who believe that the government should have the right to restrict the use of private property for environmental protection may still desire compensation.

This was borne out by responses to the following two statements in the Texas Farm Bureau poll:

1) "In general, property owners should be compensated if the value of their property is reduced by government-mandated restrictions on land use." 81 percent agreed with this statement (59.5 percent 'strongly"), 9.6 percent disagreed (5.8 percent "strongly"), and 9.5 percent were neutral.

2) "In general, property owners should be compensated if their ability to earn money is reduced by government-mandated restrictions on land use." 72.8 percent agreed with this statement (48.3 percent "strongly"), 11 percent disagreed (6 percent "strongly") and 16.3 percent were neutral.

The responses to these two statements show that an overwhelming majority of Texans still would favor compensation for takings.

The survey even went so far as to pose a legislative hypothetical with the statement "I would support a law that grants financial reimbursement to property owners who suffer financial losses due to government-mandated restrictions on land use." 73.0 percent agreed (47.0 percent "strongly"), 9.1 percent disagreed (5.3 percent "strongly"), and 18.0 percent were neutral. That Texans advocate passing a law to insure takings

compensation indicates broad belief in property rights.

The most extensive state property rights poll was taken in May 1994 for Arizona Citizens for Property Rights in conjunction with the state property rights ballot initiative, Proposition 300. Like the other polls it showed strong support for property rights. For instance:

1) When given the statement "people have a constitutional right to be compensated for a loss of value in their property," 65 percent agreed while only 27 percent disagreed.

2) When asked to evaluate government efforts aimed at "protecting the rights of property owners," only 5 percent felt that the government is doing too much while 48 percent felt that the government was not doing enough. The remainder either did not know or believe that government is protecting private property sufficiently.

3) When given the statement "the initiative is needed to protect property owners against the power of state government," 63 percent agreed, and only 27 percent disagreed. The remainder did not know or refused to answer.

While the poll showed strong support for property rights, Proposition 300 failed, largely because the bill was poorly worded and anti-property rights groups widely outspent property rights proponents.

The failure of Proposition 300 could have been foreseen from the results of the Arizona poll. When characterized in certain ways, property rights proposals lose public support. Consider two examples:

1) When given the statement "people should be compensated for losses in property value, but I won't support a property rights law if it means higher taxes." 66 percent agreed, 29 percent disagreed, and 6 percent did not know.

2) When given the statement "the last thing Arizona needs is another Proposition that requires government bureaucrats to write more reports and do more studies," 74 percent agreed, 22 percent disagreed, and 3 percent did not know.

These responses show that while Arizonans strongly support the concept of property rights they do not support compensation for public nuisances, compensation through taxes or compensation requirements potentially leading to more bureaucracy. These sentiments are consistent with the other polls that asked similar questions. Given Arizonan's strong support for property rights, the failure of the supporters of Prop. 300 to include provisions addressing the above three issues and the ability of the opposition to capitalize on them in large part explains the failure of the initiative.

The polling data on property rights is not overwhelming. Nonetheless, what limited evidence there is suggests that Americans support property rights in principle, and do not see strong property rights protection as something that conflicts with the protection of environmental quality.

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