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?

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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.

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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.

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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.

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