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United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

Effects of S. 605 and H.R. 925 on Western Water Use and Development

May 1, 1995

INTRODUCTION

Two bills currently under consideration in the Congress, S.605 (introduced by Senator Dole and others) and H.R. 925 (passed by the House of Representatives), provide for compensation to a property owner whenever federal action diminishes the value of property by amounts exceeding specified percentages. Both bills define property for compensation purposes as including rights to water.

These bills may have sweeping and disruptive effects on existing water management in the United States, especially in the West. Depending upon how their textual ambiguities are resolved, they could create a wholly new system of compensable federal water "rights," and put the federal courts in charge of defining and determining the contours of those rights. At minimum, they threaten to inject the federal courts deeply into water rights administration, unsettling longstanding state water management systems.

OVERVIEW OF THE BILLS

The two bills are generally similar in that they require compensation whenever federal agency action diminishes the fair market value of the affected portion of the property by 33 per cent (S. 605) or 20 per cent (H.R. 925). S. 605 applies to federal actions under any law. H.R. 925 is limited to federal agency action taken under a "specified regulatory law," which includes, among others, federal reclamation laws and the Endangered Species Act. In the water rights context, these limitations are not very significant, since the laws specified are by far the most important ones governing federal activity vis-a-vis water rights in the West.

S. 605 is also broader than H.R. 925 in that it requires the federal government to compensate for state agency actions that carry out, are funded by, or are delegated responsibility under, a federal regulatory program. S. 605 applies to takings of private property by, among other things, "regulation ... condition or other means." S. 605 also requires compensation in the amount of the diminution of fair market value, or business losses, whichever is greater. H.R. 925 applies to actions taken or directed by federal agencies. It requires compensation only for diminution in fair market value.

Both bills contain a "nuisance" exception. In S. 605, the government can avoid paying compensation where it can prove that use of the property would have constituted a nuisance "as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated." H.R. 925 excepts nuisances "as defined by the law of a State or ... already prohibited under a local zoning ordinance," and also excepts agency action where the primary purpose of the agency action is to prevent an identifiable "hazard to public health or safety . . . or damage to specific property other than the property whose use is limited."

DEFINITIONAL PROBLEMS

Both bills define property to include the "right" to "use" or "receive" water. S. 605 also includes "property rights provided by, or memorialized in, a contract." A fundamental determinant of the effects of these bills is the relationship between these definitions and what might be called traditional water rights developed in well over a century of state and federal law. In traditional property law, water rights are regarded as rights to "use" water, not to "receive" it. This suggests that both bills may be creating a new species of federal water law. They might, for example, give customers of water utilities a compensable right to "receive" water as a matter of federal law, even where they lack a "water right" under state law.

Furthermore, not all rights to "use" water are considered property rights under state or federal law, but these bills could be read to give them a right to compensation for interference with their use. For example, many federal reclamation projects serve recreational purposes, among others, and many interests could claim a right to "use" project water for recreation. A federal court could read these bills as requiring compensation to a marina owner or some other recreational/tourism interest if water flows or levels are changed in order to serve other project purposes; e.g., irrigation deliveries or flood control.

In the best of circumstances, federal reclamation project water management is a complicated task, requiring balancing judgments in determining how best to serve multiple project purposes like flood control, municipal, industrial and irrigation use, hydropower production, fish and wildlife mitigation, and satisfaction of Indian water rights.¹ The spectre of compensation hanging over virtually every such judgment would likely paralyze water managers.

¹The reclamation project network permeates the Western states: The Bureau of Reclamation operates nearly 350 dams and reservoirs, supplies municipal and industrial water to more than 30 million people and irrigation water to nearly 10 million acres of farmland, provides flood control, generates hydroelectricity, and its facilities provide more than 50 million visitor-days of recreation annually.

Under these bills, anyone affected by a change in project operation could have, and would be likely to assert, a claim for compensation.

Many other definitional and related ambiguities in these bills as they pertain to water have been noted in a memorandum prepared by the Congressional Research Service (April 11, 1995). For example, the memorandum notes:

The references to property or a "portion" of property are also ambiguous. "Portion" could be seen as referring to a share of a whole property, ... if one views the overall quantity of water delivered by the Bureau of Reclamation to a [water] district as the whole property, of which each farmer receives an individual "portion." On the other hand, the term might also mean a part of an individual's undivided interest The distinction is fundamental to interpreting when the compensation provisions of the bill are triggered.

To the extent such uncertainties remain in any version that becomes law, they will likely lead to a veritable flood of litigation and a prolonged period of uncertainty in water rights adjudication and administration.

LIMITATIONS ON WATER MANAGEMENT IMPROVEMENTS

Definitional problems aside, both bills literally apply to changes in patterns of water use occasioned or facilitated by federal actions regardless of whether they have a negative impact on crop production or other economic uses of water. This is because their compensation requirement can be triggered by any interference with any portion of any "right" to "use" or "receive" water, whether or not it has any effect on the creation of economic value with the water.

The bills' compensation requirements might well forestall any action by the United States under reclamation law to reduce or eliminate subsidies, or promote freer transfers and a more market-oriented approach to water management in the West -- steps long advocated by a wide array of governments, water managers and economists. Even governmental action requiring those it subsidizes (often heavily) to undertake the most modest of conservation measures - steps that could be taken at little cost without any diminution in economic production - might well be forbidden absent government compensation.

This is particularly troublesome where Congress has recently restructured federal reclamation projects to direct more economically and environmentally sensitive management, as it has done in California's Central Valley Project, the Central Utah Project and the Newlands Project in Nevada. Any steps the Department of the Interior takes to implement these congressionally

ratified improvements would doubtless result in demands for compensation by affected interests if these bills became law.

In this connection, the difference between the bills' diminution of value standards (33% for S. 605 versus 20% for H.R. 925) is likely illusory because both apply to any affected portion of the property. Creative compensation seekers could probably segment their rights to use or receive water under either bill in such a way as to qualify for compensation. Even if a farmer receiving subsidized federal reclamation water could produce the same crops with less water, the farmer could still argue that his or her "right" to "receive" water in the reclamation program ought to be segmented in such small portions as to qualify for compensation if any part of the water formerly made available is withheld.

WHAT IS A NUISANCE IN THE WATER CONTEXT?

The nuisance defense available under either bill will possibly be very limited. Because the bills refer expressly to "nuisance," the exception may apply only to those activities the courts have had occasion to declare as common-law nuisances. Almost all of the case law on nuisance arising out of water use was developed long ago. In the modern era, states as well as the federal government have favored regulatory rather than common law approaches to water quality, excessive use, water conservation, and related principles of prudent resource management. These modern restrictions are not expressly adopted to combat "nuisances," though they reflect the same general notion of defining the reasonableness of one's use of one's property in relation to others.

Case-by-case litigation would be required to determine the contours of the nuisance defense. Such litigation is almost unimaginably laborious and inefficient - the prime reason why more generic restrictions regulating water use were substituted for the common law of nuisance. These takings bills would in effect promote a return to such common law litigation, with its well-known disadvantages.

Ironically, even though nuisance law has traditionally developed in the state courts, the bills would put the federal courts in charge of determining whether particular water uses created nuisances so as to avoid the need for compensation.

Compensation might even be required in order to remedy serious pollution resulting from irrigation return flows. At Kesterson Reservoir in California's Central Valley, for example, irrigation runoff from a federal project was drained into a wildlife refuge, where, as a result of selenium concentration, migratory birds were severely affected. Under these bills the government could avoid paying the farmers not to produce the polluted runoff that created the problem only if it could establish, in what could be lengthy litigation, that the runoff created a legal nuisance. In that

litigation, S. 605 makes clear, the burden of proof would be on the government.

If the government were required to pay farmers to stop wasteful irrigation practices that cause excessive runoff and resulting water pollution, both bills could be read to obligate the government to pay the farmer the fair market value of the water, rather than simply to reimburse the farmer's cost of buying the water. The difference is huge, because farmers commonly receive federal reclamation project water at highly subsidized rates. The contract price for Central Valley Project water, for example, generally ranges from \$3.50 to \$7.50 per acre foot, while the fair market value may range from \$100-\$250 per acre foot. Under these bills, then, reclamation farmers could receive a windfall - the difference between what they pay for water and what the Nation's taxpayers subsidize. If that were not enough, S. 605 requires compensation for business losses claimed to result from water use restrictions, when those losses exceed fair market value.

A FEDERAL TAKEOVER OF STATE WATER LAW?

Beneficiaries of federal reclamation projects receive water pursuant to contract with the federal government. It is arguable whether any of these contracts contain a sufficiently clear "right" to "use" or "receive" project water to trigger the compensation requirements of these bills. A contract "right" to "receive" water is not the same thing as a vested property right under state water law. Each contract would have to be examined carefully to determine when compensation might be required for some modification in project water delivery to a particular beneficiary. The likely result - complex, prolonged litigation, and in the meantime confusion in project management.

More fundamentally, these bills could well be interpreted as a voluntary admission or acceptance by Congress of monetary liability for water restrictions, regardless of what federal reclamation project contracts or the law previously provided. A federal court of appeals, for example, recently had occasion to construe Central Valley Project contracts that immunized the U.S. from liability "for any damage, direct or indirect, arising from a [water] shortage on account of errors in operation, drought, or any other causes." The court held that this contract clause protected the federal taxpayer where reductions in water supply were caused by compliance with such federal laws as the Central Valley Project Improvement Act. These bills could well be read to reverse that result, and require compensation even where that was not the bargained-for result in the reclamation contracts, or contemplated by Congress in previous legislative enactments. This could upset many decades of legislation and reclamation contracting.

Section 8 of the Reclamation Act of 1902 specifically directs the Secretary of the Interior to comply with state law when acquiring

and administering water rights for reclamation projects. Through it "rights" to federal reclamation project water are intertwined with state water law. These and other federal statutes are intended to substantially integrate federal project water within states' water use administrative systems. Here too these bills offer the promise of disabling, disruptive litigation.

As noted earlier, the bills' imprecise definitions leave uncertain the extent to which the federal courts would rely on and interpret state water rights law, or instead develop an independent new federal statutory water rights law. To the extent the federal courts develop their own body of water rights law in dealing with compensation, opportunities for conflict with state water law abound. The result could well be the creation of an unwieldy new body of water law that fundamentally disrupts the existing system that has governed water use in the western states for most of this century. Furthermore, state courts or legislatures might be persuaded to follow the lead of these bills and require state governments to compensate water users for their actions in similar circumstances.

UPSETTING THE BAY-DELTA ACCORD

The implications of many of the questions raised here are neatly illustrated by the landmark December 1994 agreement on the California Bay-Delta. Signatories included the State of California, the major urban and agricultural water users of the state, a number of environmental organizations, and four federal agencies (Environmental Protection Agency, Fish and Wildlife Service, National Marine Fisheries Service, and the Bureau of Reclamation). The agreement was on a comprehensive set of actions to protect the resources of the San Francisco Bay/Sacramento and San Joaquin River Delta and Estuary, the fulcrum of water management in the state, on which nearly all important water users in the state depend.

The Bay-Delta accord, two decades in the making, embodied a landmark agreement among major water interests adjusting the management of significant quantities of water. It affected water use across much of the Nation's most populous state. Adopted in response to a complex variety of state and federal water quantity, quality, endangered species, and other environmental laws, the accord could readily be said to modify the "rights" of millions to "use" or "receive" water. These "rights" depend upon a complex interplay of, among other things, state water rights laws, the state public trust doctrine, state and federal water quality and endangered species laws, federal and state water contracts, and federal reclamation law.

The Bay-Delta accord requires the Bureau of Reclamation to take steps in some circumstances that will have the effect of restricting the amount of water delivered to its contractors or to

others whose water use is facilitated by the Central Valley Project. If either of these legislative proposals is enacted, the Bureau would face lawsuits seeking compensation by those whose water use is affected. A federal court that agreed that a "right" to "receive" water had been denied could order the federal government to undertake a compensation scheme of breathtaking scope and complexity. The effect would scuttle the Bay-Delta accord, throw California water management into chaos, chill the investment climate for water-dependent economic activities, doom endangered species, and threaten the entire Bay-Delta ecosystem.

IMPLICATIONS FOR INTERSTATE ALLOCATIONS

The effects of these bills on interstate water allocations are even more uncertain and potentially destabilizing. States can perfect, in some broad sense, "rights" to "use" or "receive" waters of interstate water bodies through interstate compact, congressional legislation, and Supreme Court decree. The waters of most of the major interstate rivers in the West; e.g., the Colorado, the Platte, the Laramie, the Arkansas, and the Rio Grande, have been apportioned to some extent this way. The Bureau of Reclamation facilitates many of these apportionments through the operation of its dams and delivery facilities.

The prime example is the 1922 Colorado River Compact and the 1928 Boulder Canyon Project Act (BCPA) which implements it. These landmark achievements, reached after much political turmoil, allocate the water of the most heavily used and litigated river system in the world among the Upper and Lower Basin states (the Compact), and among the Lower Basin states (the BCPA).

Under the bills now under consideration in Congress, potentially every river management action the Secretary takes could in some broad sense be said to affect these apportionments, and might therefore trigger a claim for compensation. On the Lower Colorado River, Congress in the BCPA effectively made the Secretary of the Interior the "water master." Storage, releases, diversions and deliveries on the lower River are managed by the Bureau of Reclamation. Every secretarial action - whether it be a change in river operations to better serve the multiple purposes of the reclamation projects on the river, or a secretarial refusal to allow inter-basin water transfers - could spawn claims for compensation under these bills. Even if the Secretary were to defend such actions as being required by the "Law of the River," those adversely affected could argue that their "right" to "use" or "receive" water trumps that Law.

CONCLUSION

If enacted, these bills would introduce a wild card of potentially enormous dimensions into the complex and delicate arrangements that govern water management in the West.

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EDITORIALS

● Congress' dangerous 'takings' bill

The otherwise promising 104th Congress appears to have fast-tracked a measure that would gut environmental protections, undermine the property values of American homeowners and rob taxpayers.

With so much important work to be done — welfare reform, tax cuts, streamlining government — it is discouraging that representatives would embrace this dangerous bill. It is one of the few wrong-headed provisions of the House Republicans' Contract With America.

The issue: A "takings" measure intended to protect landowners from costly government regulations. At first blush, this sounds appealing, and it's sure to play well with people who rightly want government off their backs and out of their pockets. Until, that is, they learn how this bill will affect their homes, their quality of life and their tax bills.

It's sure to play well with people who rightly want government off their backs and out of their pockets. Until, that is, they learn how this bill will affect their homes, their quality of life and their tax bills.

SOME OF THE PROPOSALS now being considered would deem any government regulation that reduced the market value of property by as little as 10 percent a "taking" and would require the regulating government — whether federal, state or local — to compensate the landowner. (Some proposals would apply only to federal regulations, less objectionable but still a bad precedent.) And the land value would be based on proposed use, not on its actual use. So taxpayers would have to pay off speculators for irresponsible schemes.

For instance, if a government prohibited a rock bar from being situated adjacent to a quiet neighborhood, the taxpayers would have to reward the landowner for not ruining surrounding residents' property values and endangering their safety.

The United States is no longer a pioneer nation. Land-use regulations were developed because of the unavoidable conflicts that arise when millions of people live and work close together.

Consider the possibilities if the "takings" standard is adopted throughout the country: A nude bar next to a school? A prison next to a retirement village? A toxic waste site next to mobile home park? A sprawling apartment complex next to a development of single-family homes? In each case, taxpayers would be on the hook if government prevented that particular use, regardless of how inappropriate. The legislation fails to acknowledge that govern-

ment regulations more often than not enhance land values.

Because it would make government restrictions inordinately expensive, the legislation could well eliminate land-use regulations. This would be disastrous in such high-growth states as Florida, where unregulated growth in the past produced tremendously costly problems, from traffic gridlock to violent crime.

It is amazing that this Congress, which wants to cut taxes and end unfunded mandates, would, with this measure, enormously increase government costs.

With good reason, the National Governors Association, the National Conference of State Legislators, the National League of Cities, the Western State Land Commissioners Association, virtually every national environmental group and more than 30 state attorneys general oppose the proposed legislation.

Borrowing a tactic from liberals, the Republicans' "takings" legislation creates a congressional solution when none is needed.

It's true that the right to own property is essential to a free society. But the Fifth Amendment of the U.S. Constitution protects private property, guaranteeing land shall not "be taken for public use without just compensation." Recently U.S. Supreme Court rulings have affirmed landowners' rights, requiring that they be compensated even if government demands their land be used for such public services as bike routes and parking places.

BUT EVEN IN THESE rulings, justices acknowledged the need to balance the public's welfare against the property owners' interests. Without question, government goes too far at times. Environmental regulations, in particular, often force an individual landowner alone to bear the price of achieving a public good, such as furnishing habitat for an endangered creature. In such cases, the owner should be compensated. Indeed, this innovative Congress should develop more market-driven ways to encourage conservation.

But Republicans should abandon this ill-considered "takings" legislation. Despite all its sound-bite appeal, the measure, fashioned more to protect land speculators than private citizens, would ultimately hurt the hardworking people who made the November Revolution possible.

The Tampa Tribune, Friday, February 10, 1995

The Tampa Tribune

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History may trip witness

What property rights advocate could tell Congress isn't the whole story.

By MICHAEL SZNAJDERMAN
Tribune Staff Writer

WASHINGTON — When U.S. Rep. Charles Canady, R-Lakeand, bangs the gavel today to launch a congressional hearing on a controversial element of the Republican "Contract with America," he will present a witness he hopes will dramatically bolster the cause.

But that witness, Grace Heck of New Jersey, may do more to damage the cause than help it.

Heck plans to testify about how she and her husband had their property rights "stolen by arrogant, abusive and overzealous bureaucrats" who refused to issue environmental permits that would allow them to develop homes on their land.

According to an advance copy of Heck's testimony, the six-year legal battle has left the Hecks destitute — unable to pay doctor bills or buy hearing aids.

The dramatic testimony is designed to prod lawmakers into adopting a bill that would force the federal government to compensate people when it takes actions that somehow reduces the value of their land.

The "takings" proposal is backed by a host of property-rights groups, land developers and conservative lawmakers. It's opposed by many environmental organizations, state and federal regulators and mayors who fear the measure would create a bureaucratic nightmare that will cost government and taxpayers billions of dollars.

"On behalf of my family, myself and untold numbers of abused mom-and-pop landowners, I am asking you to pass private property rights protections," Heck's statement says. "I am asking our gov-

Tampa Trib. 2/11/95

Property rights advocate loses chance to testify

By MICHAEL SZNAJDERMAN
Tribune Staff Writer

WASHINGTON

WASHINGTON — U.S. Rep. Charles Canady, R-Lakeland, abruptly pulled one of his witnesses Friday from a congressional hearing after The Tampa Tribune raised questions about her testimony.

Grace Heck, a New Jersey resident whose husband, Howard, is a developer, was to speak before Canady's Subcommittee on the Constitution about how government regulators had "stolen" their land by declaring it a wetlands. That decision, and the costly legal battle, has left the couple destitute, Heck says.

Canady said Friday he pulled Heck from the witness list because of questions about her background.

Heck was to testify in favor of a bill — part of the "Contract with America" — that would force the federal government to compensate property owners when federal mandates or regulations reduce their land's value.

But government documents indicate New Jersey officials, not federal regulators, declared the Hecks' land a wetland. New Jersey and federal records also show the Heck's development — if allowed to proceed — could have flooded the land of neighboring homeowners.

The project also posed a potential pollution problem for the aquifer that supplies much of the area with drinking water, officials said.

The Hecks also failed to finish roads in subdivisions they've already built, Farmingdale, N.J., officials said. The couple also owe tens of thousands of dollars in unpaid property taxes in town, officials said.

Howard Heck has also been the target of complaints that one of his

companies failed to honor home warranties. New Jersey revoked the company's builder's registration after the complaints.

Grace Heck's background problems indicated to U.S. Rep. Barney Frank, D-Mass., that the problem of government "takings" of property isn't as bad as Republicans say.

"You would think they would find some legitimate witnesses, give me some good examples. I guess those examples must be scarcer than they allege," said Frank.

Heck was recommended to Canady's subcommittee by a Maryland-based property-rights group, Fairness to Land Owners Committee. In many cases, advocacy groups provide witnesses, without the committee conducting any independent background check. Peggy Reagle, the group's chairwoman, criticized the Tribune story and blasted Canady for removing Heck.

But Dave Mason, a congressional scholar at the conservative Heritage Foundation, said unreliable witnesses are nothing new.

Most witnesses are advocates in favor of a side involved in the legislation, he said, rather than independent experts. In most cases, the witnesses are stacked in favor of the political party in control.

Canady agreed that there would be benefits to trying to choose more witnesses "who stand above the fray" on an issue. But doing extensive background checks on every witness would not be appropriate.

"Basically, we're asking people to come in and express their viewpoints," Canady said.

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MONTGOMERY ADVERTISER

INCORPORATING THE ALABAMA JOURNAL (1889-1993)
Beholden only to the common good and to conscience

PUBLISHER

RICHARD H. AMBERG JR.

SE. VICE PRESIDENT/OPERATIONS DAVID D. STILLWELL

V.P. NEWS/EXECUTIVE EDITOR WILLIAM B. BROWN

EDITORIAL PAGE EDITOR KENNETH HARR

MANAGING EDITOR JIM THARPE



A MULTIMEDIA NEWSPAPER

Wrong Results

Bill Hits Taxpayers, Homeowners

SELDOM WILL YOU SEE such a wrong-headed piece of legislation couched in such glowing terms as the Alabama Regulatory Impact Act of 1994, currently being pushed by representatives of farmers and foresters.

The legislation purports to protect the rights of landowners by forcing government to reimburse them if rules and regulations decrease the value of their land. While that sounds wonderful on its face, good intentions do not necessarily make good law. In this case, they would make lousy law.

Instead of protecting landowners, this bill could very well endanger the property values of many landowners — especially homeowners. In addition, it could cost taxpayers untold sums of money and create a bonanza for trial lawyers by creating the potential for all sorts of new tort litigation.

Ironically, the kinds of governmental actions that the coalition pushing the bill seems most concerned about preventing — federal laws and regulations, especially federal environmental laws — would not be affected by this bill.

But if adopted by the state Legislature, the bill would create a nightmare for zoning boards throughout the state.

Most of the time when government gets into the business of regulating someone's use of their land, it is to protect the health and well-being of society at large. In addition, through the use of zoning laws, government seeks to balance the competing interests of landowners so that uncontrolled development does not adversely affect the value of nearby property — usually residential property.

In balancing those interests, zoning boards and other governmental agencies are usually on safe legal ground as long as they allow due process and as long as they do not act capriciously or unfairly.

This law would allow property owners to sue whenever governmental action diminishes the value of their land. This decided tilt toward the developmental rights of landowners could make it very difficult — and certainly costly to taxpayers — for government to limit the growth of industry and businesses that could negatively impact on the property values of nearby homeowners.

THE SUPPORTERS of this bill are hard-pressed to give a single example in Alabama where someone's rights to develop property have been unfairly infringed upon, and certainly they have not made a case that there are widespread abuses. In fact, they readily admit that government in Alabama usually is supportive of the developmental rights of landowners.

If this law passes, every member of every zoning board in the state could be faced with a lawsuit whenever he or she votes to limit the rights of a property owner to develop land. So don't expect those zoning boards to continue to be zealous in keeping commercial or industrial developments from negatively impacting residential areas.

There are already strong constitutional protections for landowners when government unfairly and capriciously limits the use of their property. There is no good reason for this bill to pass (unless you're a trial lawyer looking for grounds for more lawsuits), the potential cost to taxpayers is astronomical, and it could end up hurting more landowners — especially homeowners — than it would help. The Legislature should kill this bill.

EDITORIALS

Legislature should quickly kill measure to scrap land-use controls

The state House Judiciary Committee last week passed what is called the Private Property Rights Act of Florida. The legislation is misnamed. This outrageous bill, which would strip government of the ability to regulate zoning or protect the environment, tramples the rights of Florida's landowners.

Under this measure, a factory could be built beside a retirement village, a massage parlor next to a church, or a night club on a quiet residential street. One irresponsible developer could spoil a neighborhood and ruin the property values of its residents without fear of government interference. This, apparently, is some legislators' idea of property rights.

Little wonder that Linda Shelley, secretary of the state Department of Community Affairs, calls it the "you-can-build-a-topless-bar-next-to-a-school" bill.

The legislation is sponsored by Rep. Bert J. Harris, a Lake Placid Democrat, and Sen. William "Doc" Myers, a Hobe Sound Republican, but it is the brainchild of a select group of wealthy landowners and big-time developers. Their aim is obvious. Destroy the state's growth regulations so they can build whatever they want, wherever they want, regardless of the consequences for others.

The measure would declare as a government "taking" any property that has lost 40 percent of its value since 1985 because of government regulations. It would require the state or local government to pay full cost of the property, not the 40 percent. Furthermore, the value of the land would be based on an imaginary use — whatever the landowner believes would be the most profitable.

Thus, if a county zoning code prohibits, say, a chicken farm on a lot in a subdivision, then that would be considered a taking and the county would be required to pay for the land. It would not matter that a number of other uses were possible on the site or that a chicken farm would adversely affect others.

Oh, the legislation does permit government:

to restrict uses that are a "demonstrable harm to public health or safety" or to stop "noxious" uses, but it permits property owners to appeal such restrictions. Unless there was overwhelming evidence that a certain land use would cause someone physical harm, it will be difficult to stop.

The kicker to this disgrace? Government would have to pay for the lawyers of the landowners. Harris and Myers virtually invite land speculators to make a grab for public funds.

The U.S. Constitution protects property rights, as does the state constitution. If regulations prohibit reasonable use of the land, the owner is entitled to compensation. Courts determine the amount, based on the specifics of the case. This is as it should be.

But under the Harris-Myers legislation, there would be no balanced consideration of the public good of the regulations, the options still available to the owner, or whether the use proposed by the owner is even viable. The guiding concept would be simple: The landowner wants to do something, he can't, therefore he's entitled to public moneys. Sweet deal, huh?

That's not all. Under this devious scheme, if the state tried to protect five acres of wetlands in a 100-acre development, the landowner could claim the wetlands protections as a taking and force the state to pay for the entire five acres. Never mind that the landowner profited nicely from the other 95 acres. If the measure is approved, Florida's natural resources are doomed.

Granted, regulators do go overboard. But the courts provide a remedy. A proposed revision of the state's growth management law rightly emphasizes landowners' rights. But this fresh attempt to undermine all land-use controls — controls that protect the public good and often enhance land values — is sheer madness. This shameful legislation and all those promoting it deserve the public's scorn and the lawmakers' boot.

The Atlanta Journal

THE ATLANTA CONSTITUTION

Today's editorial pages are edited by the editorial board of The Atlanta Constitution.

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Balancing greed and need

All over the country, conservative think tanks and business groups are attacking environmental laws by depicting the rules as "takings" of private property. They argue that any law that lowers the value of property is unconstitutional unless the owner is compensated for such loss.

Such complaints are pure hypocrisy. Those who scream loudest about government regulation of property are usually those whose property benefits the most from government investments.

For example, Arizona is one of the fastest-growing states in the country and a hotbed of property-rights legislation. But its cities and suburbs would still be worthless desert if not for water brought from hundreds of miles away at huge expense to the federal government.

They even grow taxpayer-subsidized cotton in Arizona, which means that farmers in states such as Georgia are subsidizing their competition.

Property owners and developers in coastal areas are also quick to raise the takings cry as government moves to protect wetlands and beaches from overdevelopment. But again, without the federal government, most beachfront homes and property would be almost worthless.

Private insurance companies refuse to cover those homes because they are too susceptible to flood and storm damage. And without insurance of some form, banks will not make loans that make buying and selling coastal property possible.

So to bail out those folks, the federal government runs a taxpayer-subsidized insurance program for beachfront property. When Congress looked into the possibility of ending that

program, some beachfront property owners even asserted they had a "property right" to the insurance.

In Florida, sugar companies are fighting government efforts to make them clean up fertilizer and pesticide runoff that is killing the Everglades. Those sugar plantations would not even exist if the federal government didn't block import of cheap sugar grown in the Caribbean and Latin America, an arrangement that costs the U.S. consumer billions of dollars a year in higher sugar costs.

The American Farm Bureau and its state affiliates, including the Georgia Farm Bureau, have championed takings bills all over the country. But without federal price support and crop insurance programs, the value of millions of acres of farm land would plummet.

The National Association of Home Builders and the National Association of Realtors have also joined the takings crusade. But the profits of those industries are made possible by public investment in new roads, highways, sewer systems, jails and schools. A developer who screams bloody murder about not being able to build on a wetland smiles quietly when a new highway quintuples the value of his property overnight.

Would he consider it a deal if government let him build on his wetland, but sent him a bill for the entire amount by which his property appreciated because of a government-built road?

The point is, over a period of time government and business have struck a delicate balance between private greed and public need. Those who now seek to disrupt that balance had better think twice, because they may end up destroying a system that has allowed so many to profit.

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EDITORIAL

Come back to earth

To hear people in Washington talk, Americans are angrily demanding a wholesale gutting of the nation's environmental laws. And Congress is frighteningly close to succumbing to that demand.

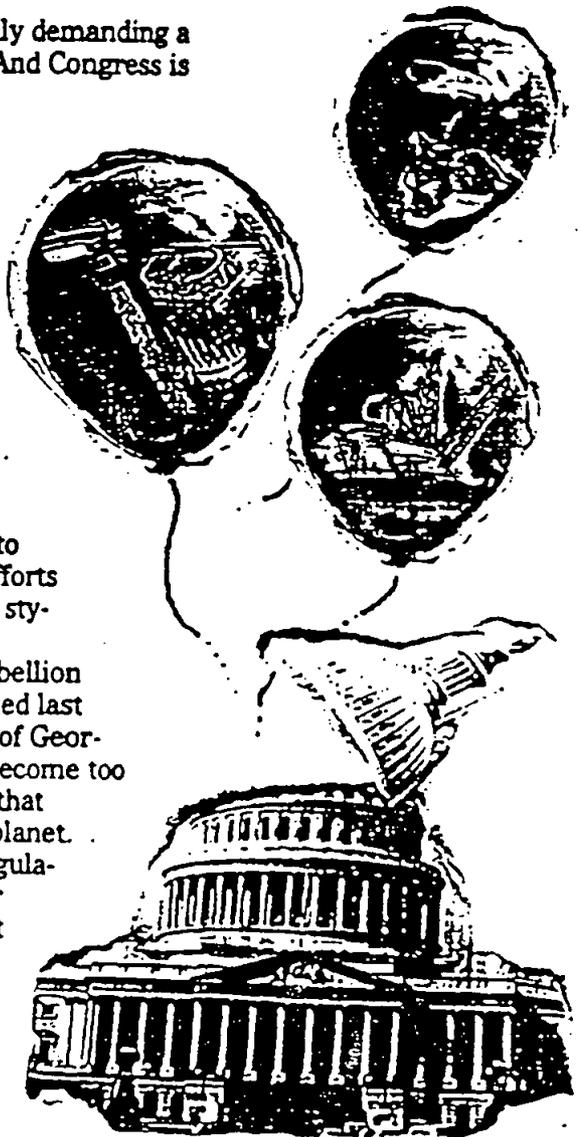
"It's almost tea party time in America," predicts an ebullient U.S. Rep. Billy Tauzin of Louisiana, one of the leaders of the anti-environment crusade. "Clearly, the teapot's boiling here. It's steaming and the lid's about to blow." The Wall Street Journal's editorial page chooses a different metaphor, observing that "a tsunami of anger is rolling across the land and, with any luck, it will drench Congress and its co-conspirator regulators."

Tsunami or Boston Tea Party, such talk has had a critically important impact in Washington. The Endangered Species Act, the Clean Water Act, the Safe Drinking Water Act, and the Superfund Act are all up for renewal and all are in danger of being gutted to appease this supposed popular rebellion. A bill to raise the Environmental Protection Agency to Cabinet-level status has been killed for the same reason, and efforts to protect federal land from mining and overgrazing have been stymied as well.

And yet, out here in the hinterlands where this tsunami of rebellion is supposedly building, things are oddly quiet. In a poll conducted last December by The Atlanta Journal-Constitution, only 6 percent of Georgians believed that environmental regulation in this state had become too strict. In polling data, 6 percent is a tiny number: You can find that many people who believe Bill Clinton is an alien from another planet.

Georgians are hardly unique in supporting environmental regulations. A nationwide poll conducted this spring for Times-Mirror Magazines found that only 16 percent of Americans believe that environmental regulation has gone too far, while 53 percent believe it has not gone far enough.

On individual issues, support for current or enhanced environmental protection is even more overwhelming. For example:



Los Angeles Times

DATE: 3-10-95
PAGE: All

Pay Me to Be Good—or I'll Sue



New from the 'contract': compensation for the laws' intrusion on profit-making noxious enterprises.

By DONELLA H. MEADOWS

PLAINFIELD, N.H.—I'm going to turn my farm into a gold mine. Old rumors about gold circulate around this town. Maybe some of it is under my farm. I plan to blast out the bedrock, grind the rubble and run cyanide through the grindings to dissolve out the gold. I think I can find as much as \$6 million worth.

What, you say the land isn't zoned for mining? The town well is just downstream? A third of my farm is protected wetland? The cyanide runoff will kill the endangered dwarf wedge mussel in the Connecticut River?

Well, too, too bad. If you block my mine, you're impeding my private property rights. Under the Fifth Amendment of the Constitution ("... nor shall private property be taken for public use without just compensation") that's a "taking." If you want me to preserve wetlands or keep water pure, pay me. Otherwise I'll sue the town (zoning), the state (water regulations) and the feds (Endangered Species Act). Collectively you owe me \$6 million.

That's not a crazy scenario. One like it just hit the courts in Colorado. The owners of the Summitville gold mine,

having extracted \$6 million in gold and poisoned 17 miles of the Alamosa River, are demanding compensation for a "taking," because their cyanide heap has been declared a Superfund site and they can no longer mine the land nor sell it.

"Takings" is the most terrible of all the terrible ideas in the "contract with America."

Takings laws are also being pushed at county and state levels, backed by oil companies, timber companies, mining companies, developers. Shucks, let's name a few: Weyerhaeuser, Exxon, Du Pont, Boise-Cascade, Texaco, the National Cattleman's Assn., the American Mining Congress and the National Assn. of Realtors.

You don't hear about those corporate interests in the takings rhetoric. You hear only about little guys. A man's got a right to do what he wants with his land. The

Founding Fathers. The sacredness of private property. The stupid government won't even let you make a buck anymore. The real message is: If I can make money doing something—if I can even imagine making money doing something—no one has a right to stop me. Money in my pocket is more important than public safety, clean air, clean water. Pay me not to pollute. In fact pay me if you want me to do anything for the public good.

Here are some takings cases that have come to the courts:

- A motel operator demanded compensation because the Civil Rights Act required him to rent to people of color, diminishing his business, he says.

- A dial-a-porn company sued the Federal Communications Commission for regulations that prevent children from using its service.

- A tavern owner sued the state of Arkansas because its highway sobriety checks cause people to drink less.

- A coal company mining an underground seam caused land to subside, ruptured a gas line, collapsed a highway and destroyed homes. The Office of Surface Mining told it to stop. The company said, pay us for the value of the coal you won't let us mine.

- The owner of a plumbing supply store sued when the city told her she couldn't pave her parking lot unless she left 10% of her land free (the land was in a flood plain) to reduce downstream flooding.

The courts threw out the first three of those claims and, unfortunately, granted the last two.

Legal interpretations of the Fifth Amendment takings clause started in 1887, when a beer brewer argued that a Kansas prohibition law was a taking. The Supreme Court said, "A government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use." Since then the courts have generally ruled that you need be compensated only when a public action takes most or all of your property. If the state wants your land for a highway, it has to buy it at a fair price. If it wants you to stop dumping sewage into a stream, it doesn't owe you a thing.

With increasingly conservative courts, the "takings" line has been pushed fur-

ther toward the individual good and away from the public good. The "contract with America" pushes it even further. Originally it defined a taking as any regulation that reduces property value by even 10%. The current version, passed by the House, now in the Senate, says 20%.

Either way, the real purpose of this legislation can't be to protect property rights. If it were, there would be some concern for the homeowners along the poisoned 17 miles of the Alamosa River, those downwind from polluting factories, those whose property value is diminished by ugly development.

The purpose can't be to redress private versus public imbalances, either. Takings advocates are strikingly silent about public givings—royalty-free mines on public lands, subsidized logging roads, underpriced grazing permits, tax breaks

for oil drillers, publicly funded roads, bridges and water projects that give some private property virtually all its value. The property rights folks have never, as far as I know, offered to share private gains that come at public expense.

Rather, their purpose, readily admitted by some, is to make environmental laws go away. If the cost of clean water is to pay every gold-crazed landowner her fantasy earnings from her land, so much for the Clean Water Act. So much for regulating toxic wastes, food safety, strip mining. Goodby endangered species.

You can see why developers and resource-extracting industries love this idea. You can see why no sane nation would allow it.

Donella H. Meadows is an adjunct professor of environmental studies at Dartmouth College.

The Washington Post

AN INDEPENDENT NEWSPAPER

"THE

Wrong Way on Takings

THE HOUSE continues to duck its responsibility and send the Senate what amount to campaign slogans in the guise of legislation. Even some supporters concede that the measures are too raw to be enacted in their present form. The takings bill the House passed last week is another example.

The Fifth Amendment to the Constitution says, "nor shall private property be taken for public use, without just compensation." But what constitutes a taking? That is the question that has preoccupied the courts over the years. Governments at every level, state and local as well as federal, are constantly taking actions that affect the possible use and value of private property. Sometimes the actions raise the value—choosing a particular spot for a freeway interchange, for example, or diverting water to help develop an arid area. Other times, by inhibiting use, they reduce the value. For fear of hobbling government in the pursuit of valid public purposes, the courts have generally said that a partial loss of value by itself is not enough to constitute a taking. There has to be more to warrant compensation. The courts engage in a kind of balancing act: How great was the loss, for how important a public purpose, and what were the reasonable expectations of the owner when he bought the property?

The House bill would override this careful standard, tear it up and toss it out. The original version said any property holder who suffered a loss of value above a certain threshold by virtue of federal regulation was entitled to compensation. The cost would be enormous; the government would in many cases be paying people and companies to stop doing things—polluting the air, destroying streams—inimical to the public

interest; and the likely effect if not intent would be to shut down a lot of federal regulation.

In response to objections such as these, the sponsors narrowed the measure to apply just to wetlands, certain western water and endangered species regulations. Why it should apply just to these and not to other statutes they never made clear, except that for these they had the votes.

Critics offered amendments. Surely the sponsors didn't mean that a property holder should be compensated if the government decided on environmental or some other grounds to reduce the amount of valuable water it was willing to sell him—but it turned out that the sponsors did mean that. They also defeated an amendment to the effect that property holder A ought not be compensated for a regulation meant to protect the fair market value of adjacent homes owned by B, C and D. A Republican critic, John Edward Porter, said the bill would create "a new entitlement" for property holders "that will cost . . . so much . . . that no Republican ought to support it," but 205 did, and the legislation passed, 277 to 148.

There is said now to be a risk that it or something like it will be offered as an amendment to another bill, without benefit of hearings, on the Senate floor. We hope not. Maybe there are some changes that can usefully be made in takings law, or in the takings rules with regard to certain statutes that can be shown to have had particularly harsh effects. But the courts have created a better balanced system over the years than some of the rhetoric surrounding this issue would suggest, and Congress should approach it with great care.



2ND STORY of Level 1 printed in FULL format.

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The Houston Chronicle

March 9, 1995, Thursday, 2 STAR Edition

SECTION: A; Opinion; Pg. 32

LENGTH: 749 words

HEADLINE: Mindless legislation to meet deadline

SUBJECT LINE: EDWIN M. YODER

LEAD:

AT just past the midpoint, the striking byproduct of the House Republicans' 100-day push for action on the "Contract With America" is a bad case of legislative indigestion -- an eating binge with little forethought of the aftermath at the medicine cabinet.

Consider, for instance, the Private Property Protection Act which the House rushed through the other day, all but unnoticed, by a 277-148 vote with little floor debate and even less committee scrutiny.

Should this bill become law, it will greatly alter the historic meaning of the Fifth Amendment "takings clause" ("Nor shall private property be taken for public use, without just compensation"), one of those magnificent general provisions whose meaning the Framers left open in the hope that it would survive the test of time.

For two centuries, with very limited exceptions carefully carved out by court decisions, the takings clause has been understood to apply only to exercises of the power of eminent domain -- the outright seizure of private property for well-defined public purposes. In such cases, compensation at fair market value is automatic -- as, for instance, when a state seizes your land for a highway right of way.

Rarely, however, has the takings clause been understood to offer compensation to property holders for the incidental effects of public policy decisions -- for instance, federal or state legislation protecting coastal wetlands.

In his popular guidebook, "Understanding the Constitution," first published in 1958, the late Edward S. Corwin, the most distinguished constitutional authority of his day, could state flatly: "The clause does not require that property losses incidental to the exercise of governmental powers be compensated for. For example the passage of a rent-control measure would deprive persons of the right to charge what the traffic will bear. So decrease, presumably, the value of their property, but the government is not required to award compensation." Nor, he added, would the lowering of a tariff or a declaration of war require

The Houston Chronicle, March 9, 1995

ensation, since no "taking" in the Fifth Amendment sense
 d be involved.

Now, almost casually, the House Republicans want the takings
 lause drastically redefined and expanded. Taxpayers may find
 hemselves paying huge compensation bills any time any public
 ction taken for the good of the community arguably shrinks the
 alue of someone's land. Supporters of the act argue that in the
 ast two decades or so, the enforcement of a new panoply of
 nvironmental legislation, notably the Endangered Species and Clean
 ir and Clean Water acts, has introduced new varieties of
 ncompensated expropriation.

There is modest force in the argument, as there is in the
 rgument that seeking compensation in court can be slow, costly and
 npredictable, and may discourage an aggrieved property owner from
 eeking legal redress. The Supreme Court hasn't been much help.

Back in 1922, in the governing precedent, the court said that the
 artial depreciation of property values short of outright seizure
 ay constitute a "taking," "if it goes too far."

How far is too far; how high is up? Well, if your land
 appens to end up under an airport approach path so as to render it
 nsuitable for other uses, that may be a "taking" -- so said the
 t back in 1962. Otherwise, "takings" in which there is no
 al taking have been few.

The House bill would set up a process in which, with certain
 ceptions, almost any official action that could be claimed to
 educe a property value by 20 percent would be compensated, with
 he agency involved paying out of its operating budget.

This is a vast change in the law; indeed, it involves no less
 han the creation of yet another federal entitlement that could
 ost the Treasury billions of dollars.

Environmentalists and historic preservation organizations
 rgue, moreover, that the new arrangement would paralyze their
 fforts. And any legislative measure that fiddles in any way with
 he Bill of Rights should be treated with special scrutiny --
 crutiny which this sweeping measure has yet to receive.

The House rolls mindlessly along, rubber-stamping
 evolutionary provisions in a frantic race to meet an arbitrary and
 eaningless hundred-day deadline. Fatigue is beginning to fray
 empers and dull judgments. It is a risky environment for
 egislative deliberation, and this episode proves it.

LANGUAGE: ENGLISH

: Editorial Opinion

OTES: Yoder, a Pulitzer Prize winner for editorial writing, is a syndicated
 olumnist based in Washington, D.C.

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ORGANIZATIONS OPPOSING "TAKINGS" BILLS

National and regional labor, civil rights, public health, consumer, conservation, historic preservation, planning, religious and scientific public interest groups that support private property rights and oppose "takings" bills include:

AFL-CIO, Industrial Union Department
AFL-CIO, Food and Allied Service Trades Department
Alliance for Justice
Alliance to End Childhood Lead Poisoning
American Farmland Trust
American Federation of State, County and Municipal Employees
American Forests
American Hiking Society
American Planning Association
American Public Health Association
American Rivers
American Society of Landscape Architects
Appalachian Mountain Club
Boone and Crocket Club
Center for Marine Conservation
Center for Resource Economics
Center for Science in the Public Interest
Chesapeake Bay Foundation
Clean Water Action
Coalition Against Childhood Lead Poisoning
Consumer Federation of America
Consumers Union
Defenders of Wildlife
Environmental Defense Fund
Farmworker Justice Fund
Friends of the Earth
Government Accountability Project
The Humane Society of the United States
Izaak Walton League of America
Juvenile Law Center (Philadelphia)
Land Trust Alliance
League of Conservation Voters
League of United Latin American Citizens
Mineral Policy Center
National Audubon Society
National Citizens Coalition for Nursing Home Reform
National Parks and Conservation Association
National Trust for Historic Preservation
National Urban League
National Wildlife Federation
National Wildlife Refuge Association
Natural Resources Council of America
Natural Resources Defense Council
OMB Watch
People for the American Way
Public Citizen

Public Lands Foundation
Rails-to-Trails Conservancy
Scenic America
Sierra Club
Sierra Club Legal Defense Fund
Southern Utah Wilderness Alliance
Sport Fishing Institute
Trout Unlimited
United Food and Commercial Workers Union
United Church of Christ
United Steelworkers of America
The Wilderness Society
Wildlife Society
Zero Population Growth

American Family Association

P. O. Drawer 2440

Tupelo, MS 38803

FOR IMMEDIATE RELEASE

January 13, 1994

Contact:

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WILDMON BLASTS PROPERTY BILL AS "PORN WELFARE" SCHEME

TUPELO, MS - Donald E. Wildmon, President of American Family Association, described a bill now pending before the Mississippi State Senate and House as a scheme for the owners of "adult" businesses to get richer quick, at the expense of the taxpayers.

The Bill, SB 2487, is ambiguously titled "Standards for Government Action Affecting Private Property." It provides that whenever a city, county or the state passes a law or regulation that causes private property to lose 40% or more of its value, the government must pay the difference or buy the property at the higher value. The bill applies to both real estate and personal property, and requires the government to pay for the owner's attorneys, as well.

"The title of this bill practically amounts to false advertising," said Scott Thomas, AFA General Counsel. "In fact, if the state, or a city, passes a law banning nude dancing, making an 'adult' business less valuable, this bill could require the taxpayers to pay the business owner many thousands of dollars." Thomas noted that the bill would also defeat local zoning efforts, in some cases.

"This bill is like a welfare program for the rich, and their attorneys," Wildmon observed. "It should be called the 'Porn Owners Relief Measure.'"



EVANGELICAL LUTHERAN CHURCH IN AMERICA

LUTHERAN OFFICE FOR GOVERNMENTAL AFFAIRS

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Division
for Church
in Society

Statement of the
Lutheran Office for Governmental Affairs
Evangelical Lutheran Church in America

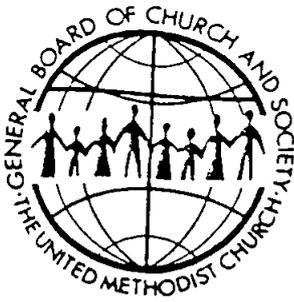
To the
Civil and Constitutional Rights Subcommittee
of the
House Judiciary Committee

February 10, 1995

Re: Takings Legislation

As a reflective body engaged in continual moral deliberation, the Evangelical Lutheran Church in America commonly finds itself confronted with difficult, often complex ethical questions, not unlike the questions now facing Congress regarding the proper role of government in regulating private affairs, and the appropriate balance of individual rights and communal responsibilities. Our community of faith responds to these concerns with careful deliberation, culminating in the procurement of official positions which are outlined in our social statements.

Through the social statements of the present church and those of its predecessor bodies, the Evangelical Lutheran Church in America speaks to the ethical debate surrounding the "takings" issue.



General Board of Church and Society of The United Methodist Church
100 Maryland Avenue, N.E., Washington, D.C. 20002 • (202) 488-5600

February 10, 1995

Dear Representative,

I am writing to you to express our concern regarding the proposed private property takings bills currently before you. These takings bills are based upon a radical reinterpretation of the "takings clause" of the Fifth Amendment. Although we agree with the need for just compensation for "private property taken for public use", the new "takings movement" is expanding the takings definition to include such things as regulations limiting grazing areas, zoning, medicare fees, pollution controls, and wetlands preservation.

If these bills were to become law the inevitable result would be to severely curtail the government's ability to protect public health and safety. Specifically they would undermine health, safety, labor, civil rights, consumer, and environmental protection laws. This legislation will also end up costing the government billions in new tax dollars.

As you debate these "takings" bills we ask that you consider certain ethical questions which the "takings movement" has left unanswered. How do property rights coexist with public rights? How do we strike a balance between an individual's right to property and the community's right to clean water, clean air, safe workplaces and safe playgrounds? Is it right to use taxpayers money to pay corporations for the decline in their profits caused by health, safety, and pollution regulations or should we expect all persons and corporations to bear a responsibility for the common good and for assuring that their neighbors are not harmed by their actions?

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Thom White Wolf Fassett".

Dr. Thom White Wolf Fassett
General Secretary



February 10, 1995

TO: House Judiciary Committee, sub-committee on the Constitution

From the colonial struggle to establish the United States of America to our present day, Presbyterian national decision-making bodies called General Assemblies have exercised their moral responsibility to witness in the political arena as an integral dimension of Reformed faith. In that sense, General Assemblies have understood themselves to have a normative function of speaking to the church and to the world.

The concept of stewardship is a central tenet in providing ethical guidance as to how to live individually and within community. The manner in which we as stewards deal with choices is one of the clearest indications of our values. Our faith compels us to acknowledge the need for the well-being of others as well as for self and for the environment, at a time in our nation when individual rights are not only raised above rights of the community but even threaten to damage them. As stewards of the earth's resources, we have the role to manage, not to dominate the land or water just for our own personal advantage. This includes the responsible use of property.

"Christian Responsibility for Environmental Renewal" is a Presbyterian General Assembly statement that relates to the issue of proposed legislation on private property takings. An excerpt states:

While the ecological crisis threatens catastrophe, it also offers unprecedented opportunity for social reconstruction, protection of nature, and more rewarding life styles. A new order of values comes into view, shaping an "eco-ethic" which can displace the present ethos. The new order of values revolves around a turning away from the amassing of physical power and consumer goods, and a movement to nurture deeper and unifying, but fragile, qualities...

Rights of Life over Property Rights. People and all other living things are to be valued above rights of property and its development...The structures of modern society and the priorities of contemporary politics seem to work in the opposite direction. Our laws and customs often function to give precedence to property rights over the rights of people and other life.

There are ethical implications to legislating private property rights that go beyond constitutional guarantees. We should not forget that the Preamble to the Constitution commits representative government to "ensure domestic Tranquility" and to "promote the general Welfare." This ethic is similar to the Christian one that features the concepts of neighbor love and social responsibility --the obligation to care about the impact on others due to economic endeavors and private practices.



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Mennonite
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For Immediate release
February 10, 1995

Contact Person
Reina C. Neufeldt

Mennonite Central Committee Washington Office Opposes "Takings" Legislation

The debate over private property "takings" is a debate over the relationship between private property and public interest, as represented by the government. Mennonites have traditionally understood their relationship to private property as one of stewardship; God is the owner of the earth (Psalm 24:1-2) while humans are but temporary stewards of creation (Gen. 1:26-28; Ex. 20:8-11; Lev. 25 and 26; and Luke 4:16-22). This stewardship involves being aware of how our actions impact the local and global environment and the lives of our sisters and brothers sharing God's earth with us.

It is the role of government to act justly and provide order as a separate, institutional servant of God. In dealing with private property, the government must be responsible for looking after the interests of all, from local to national to global. Government must not overextend its authority; indeed, as stated in the Fifth Amendment, just compensation should be given for "private property taken for public use." Society, however, can not afford for government to avoid using its authority in regulating land use when pursuing the common good. Government can play a crucial role in justly seeking the reconciliation of private interests with individuals, communities and with the earth.

Mennonite Central Committee Washington Office supports the emphasis of community and is concerned that the proposed "takings" legislation elevates property rights to the detriment of the common good and the environment. The earth belongs to no one, it is a sacred trust for which we are temporarily responsible. Is it not all our responsibility, including the government's, to ensure that we treat God's earth well?



American Planning Association
1776 Massachusetts Ave. NW
Washington, DC 20036
Phone 202.872.0611

Take the "Takings" Out of the Contract: Oppose Title IX in H.R. 9

Title IX would be a raid on the Treasury.

Title IX says property owners are due compensation if any federal regulation restricts the use of private property and results in diminution of speculative property value by 10 percent or more.

The intent of title IX is to protect property owners from big government. Good intentions do not necessarily make good law. Title IX, instead of helping small landowners, will be a bonanza for trial lawyers and a full-employment act for bureaucrats. Who pays? Taxpayers-- and it will be billions of dollars.

Title IX would create more government intervention and red tape.

Who decides what is 10 percent? How will speculative values and diminution be assessed when property values are sensitive to many factors apart from regulation? Title IX leaves this to *more bureaucrats*.

Americans are demanding less government. Title IX is a big government solution to a limited problem that is already addressed by constitutional protection. Why pass a bill that would create red tape and encourage law suits?

Title IX would engulf government agencies at all levels with costly, wasteful, and time-consuming paperwork.

At this time the property rights of an overwhelming majority of urban, suburban and rural Americans are not threatened. In fact, government safeguards -- from zoning to safe drinking water -- protect our homes, our families and our property.

In some specific instances, individual Americans have been harmed by overzealous government regulations. These Americans have redress. The government already compensates the taking of private property under the fifth amendment.

Instead of creating more government and more bureaucracy to address these special cases, we say keep politicians and bureaucrats out of it and keep the solution where it should be, in the courts.

Voters don't want this kind of law.

Title IX is a takings law--the kind that has already been defeated by conservative legislatures and voters in Florida, Alabama, Missouri, and Arizona. Voters in Arizona defeated a takings law by more than 60 percent.

WHY TAKINGS BILLS THREATEN THE PROPERTY RIGHTS AND VALUES OF MOST LANDOWNERS

In Congress and in most states, legislators have introduced "takings" bills that would require taxpayers to pay landowners whenever a government rule limits the value of their land. They claim that these bills would protect the "property rights" of the little guy. But a proper understanding of who owns land and what influences its value reveals that "takings" bills would actually threaten the property values of most landowners, while costing taxpayers billions.

Sixty million homeowners comprise more than 75% of all private landowners. Collectively, these homeowners hold a majority of all real estate values, but they hold only 2% of the private land. The three factors that most influence their home values are a cliché but still true: location, location, location.

That means that homeowner property values largely depend on the safety and attractiveness of their neighborhoods. Badly located or operated landfills or incinerators, excessive traffic, pornography shops, shopping centers in residential areas, water and air pollution have all been shown to lower property values.

But "takings" bills would make it prohibitively expensive to enforce the laws that regulate these activities. Any law that prohibits or even makes more expensive a highly profitable land use "lowers" the potential value of the land. Takings bills would ironically mean less protection for homeowner property values while imposing new costs on taxpayers in the tens of billions.

Most of those landowners who would make money from takings bills already receive large government subsidies. Three percent of all private landowners, all of which are in the farm and timber business, own 80% of all private land. Federal programs have increased farm land values on average by 15% to 20% and timber interests also benefit from federal programs. These landowners are entitled to their constitutional rights but not to new entitlement programs at taxpayer expense.

do not meet these standards or because meeting them would be more expensive. The Contract for America would require taxpayers to pay.

- *Superfund sites:* Many Superfund sites were operating, but leaky, landfills or other kinds of dumps, or were contaminated lands still in use. Before the Superfund law, they therefore had positive value. When identified as Superfund sites, however, they often became liabilities because owners faced the obligation to clean up. The Contract for America would make taxpayers pay.

- *Incinerator rules:* Garbage incinerators must meet toxic air pollution standards that vary to some extent according to the quality of a cities' air. Takings bills would require compensation where these laws preclude or inhibit siting garbage incinerators and therefore leave only a less valuable land use.

- *Flood hazard laws:* The federal government provides billions of dollars in disaster aid for flood victims and, at great expense, provides flood insurance that private insurers are unwilling to offer because of the high risk. In return, federal standards implemented through local governments prohibit bulky construction in flood hazard areas that might block flood waters and therefore raise flood levels elsewhere. Federal standards also require that any new buildings in flood zones be elevated on stilts or raised land above predictable flood heights. These rules lower the value of land and would require taxpayer payments even though the land has value largely because of federal disaster aid.

- *Mining laws:* Federal mining laws require that stripmined land be restored, that runoff water be controlled,

that offshore oil wells take expensive precautions to handle their waste, and that pillars of coal be left in the ground to protect miners digging around them from mine collapse. All these rules can make mining or drilling in some areas less economical or not economical at all, lowering the value of the rock, oil or coal. Takings laws would therefore require compensation of the mineral rights, which are normally considered an "interest in land."

Land markets are highly efficient. The value of land depends on the profitability with which it can be used. Any law that limits that profitability therefore lowers the value of the land. For that reason, even rules that establish broadly accepted standards of conduct will often "lower" land values and would require compensation under takings legislation.

4. Those basic rules protect the property values of American homeowners, who are three quarters of all private property owners.

The same efficiency of land markets explain why these rules that "lower" some land values protect the land values of homeowners. For real estate agents, it is a cliché that the value of a home depends on three factors: location, location, location. In other words, the value of a home depends on the overall attractiveness of the neighborhood. Any land use that makes an area less attractive lowers home values.

Basic federal standards limit the extent to which a wide variety of activities may adversely affect home values. Landfills or garbage incinerators in the wrong locations, Superfund sites, noise pollution, flood problems, and unrestored

6. Takings bills would lower the property values of homeowners by making basic environmental and zoning rules prohibitively expensive to enforce.

If takings laws passed, governments would lack the funding to enforce basic environmental and zoning laws except in the most onerous cases. Yet these laws protect homeowner property values. The result would be less protection and lower property values for America's homeowners.

7. Owners of undeveloped land do not deserve special compensation for rules that largely prohibit them from harming others.

Although "property rights" legislation would hurt the vast majority of private landowners, is legislation nevertheless necessary to assure fair treatment for other landowners, the owners of undeveloped land? The answer is no.

First, to a large extent, regulations that would require payment are designed simply to prevent some landowners from harming other landowners or the public. It is both fair, and economically efficient, to require that property owners not harm others. Property ownership in the United States has never included the right to use property regardless of the consequences to others.

Second, this payment requirement ignores the extent to which landowners benefit from government actions. For example, compensating developers for restrictions on developing land in floodprone areas ignores the extent to which disaster assistance, subsidized flood insurance, and federal flood control

projects increases the value of floodprone land. A compensation rule would require that taxpayers pay twice: once, for assistance programs that make any building in flood zones valuable; a second time for rules that restrict how much builders can take advantage of this government aid.

Finally, the same property owner who is harmed by a restriction benefits from the restrictions imposed on others. A landowner who cannot build a landfill or a shopping center benefits because neither can his neighbor.

This is true even of some of the most challenged environmental regulations that broadly restrict development in sensitive areas. These restrictions not only tend to increase the value of residential homes by large amounts, but they have often been shown to increase the value of restricted, undeveloped land by a lesser amount. (See note 3.) Even though property owners benefit from restrictions on others, takings bills would require payment because any single piece of land would have even higher value if it alone were unrestricted.

8. A few already subsidized industries, and a tiny number of landowners, would receive the overwhelming majority of payments from new "takings" laws.

Perhaps most importantly from the standpoint of fairness, new "takings" laws would shower taxpayer money overwhelmingly on a tiny number of landowners who already benefit heavily from federal subsidies. The 75% of all homeowners who own most of the real estate value but only 2% of the land would rarely if ever receive payment because their best use of property is almost always as a home.

NOTES

1. Land ownership, value and concentration data: The value of real estate in separate sectors was taken from National Realty Committee, *America's Real Estate: A Review of Real Estate and its Role in the U.S. Economy* (1989) Table 6.1. Data on timber ownership and concentration was based on the most recently available Forest Service information in Kaiser, F., Birch, T., & Lewis, D., "New Findings on Private Forest Landowners," *American Forest* 88(7): 28 (1982). A new survey is being assembled but the basic data remains the same. The calculations of overall land concentration were derived from these sources. The amount of housing owners, farm owners and timber owners, as well as the amount of land in each sector is set forth in United States Department of Agriculture, Economic Research Service, *Agricultural Resources and Environmental Indicators: Land Water Inputs Practices Technology Policies & Programs* (in press) (Figure 1.2.2). The same source provides information on the concentration of farm ownership, as does U.S. Department of Agriculture, Economic Research Service, *Owning Farmland in the United States: Agricultural Economics & Land Ownership Survey*, Agriculture Information Bulletin 637 (1991).

125,000 farm and timber interests own 38% of all private land: According to *Agricultural Resources*, farmland comprises 833 million acres. One hundred and twenty-four thousand farm interests own 47% of all farmland, or 391 million acres. Timber interests own 377 million acres, but 500 timber operators own 28% of these acres, or 106 million acres. Collectively, fewer than 125,000 landowners own 497 million acres out of 1.3 billion total private acres, or 38%.

3% of landowners own 80% of all private land: Collectively, farmland is 63% of all private land and has roughly 2.7 million owners. But 49% of all farmowners cumulatively own only 8% of all farmland. The remaining farmers number 1.35 million owners and they possess 92% of the farmland, which constitutes of 58% of all private land. Timberland constitutes 29% of all private land and has 8 million owners. But 8% of all timber owners (640,000) own 78% of all timberland, or 23% of all private land. Together, that means that roughly 2 million owners possess 81% of all private land. Because there are a total of 69 million private owners, that means that fewer than 3% of all landowners own 81% of all private land.

2. Who funds takings groups? The Alliance for America, a nationwide "property rights" coalition formed in 1991, receives its funding from the American Farm Bureau Federation, American Mining Congress, American Motorcyclist Association, American Petroleum Institute, American Pulpwood Association, Chemical Manufacturing Association, Land Improvement Contracts of America, Marigold Mining, National Rifle Association, National Cattlemen's Association, National Trappers Association, and the Rocky Mountain Oil and Gas Association.

One Florida "property rights" group that is a member of the national coalition and that was the primary sponsor of a takings referendum in Florida, was formed by seven landowners in the timber, development, and agriculture business. These seven owners collectively own one third of all the undeveloped land in Florida. Klas, Mary, "Powerful Landowners Fuel Property Revolt," *The Palm Beach Post* p. 1 (March 11, 1994).

Another state group, Arizonians for Private Property, spent \$719,000 to push a "takings" bill by referendum; the referendum was voted down by 60% of Arizona voters. The "property rights" group's effort was funded by realtors and developers (\$341,325.08), mining interests (\$121,230.00), agribusiness (\$65,489.45), ranching and dairy interests (\$37,940.00), banks (\$52,300.00), oil-gas utilities (\$34,100.00), and a few other larger commercial interests. These finance reports can be obtained through the Arizona Secretary of State and the figures filed on December 8, 1994.

3. Pollution and inappropriate land uses lower homeowner property values: A huge number of studies have found that pollution and certain land uses tend to lower residential property values. Some examples include: Crecine, J.P., Davis, O.A. & Jackson, J.E., "Urban Property markets: Some Empirical Results and Their Implications for Municipal Zoning," *Journal of Law and Economics* 10:79-99 (1967) (general review of literature); Greenberg, M. et al., "Impact of Hazardous Waste Sites on Property Value and Land Use: Tax Assessors' Appraisal," *Appraisal Journal* 61:42 (1993) (hazardous waste sites); Michaels, G. et al., "Market Segmentation and Valuing Amenities with Hedonic Models: The Case of Hazardous Waste Sites," *Journal of Urban Economics* 28:223 (1990) (hazardous waste sites); Adler, K.J., Cook, Z.L., Ferguson, A.R., Vickers, M.J., Anderson, R.C. & Dower, R.C., "The Benefits of Regulating Hazardous Disposal: Land Values as an Estimator"



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PRIVATE PROPERTY AND "TAKINGS" BILLS

FACT VS. FICTION

The so-called "wise use" movement is currently pushing "takings" bills in the U.S. Congress and state legislatures. Following are examples of what "takings" bills advocates say about their legislation and private property and the facts behind their fiction.

MYTH: "Takings" bills advocates say that their legislation will reduce the fiscal burden on all taxpayers from unnecessary "takings."

MYTH: "Takings" bills advocates say that their legislation will protect individuals' private property rights in their homes, backyards, and neighborhoods.

MYTH: "Takings" bills advocates say that we need "takings" legislation to protect our private property rights as our forefathers' intended.

FACT: False. Some "takings" bills will consume taxpayer money by requiring legions of new bureaucrats to go through added red tape in order to guess whether a particular regulation might conceivably cause a "taking" before an agency can act on behalf of the public good. Other "takings" bills will throw taxpayer money at those who claim that obeying public health and safety laws will affect their profit margins, in cases where the courts would not find that a "takings" had occurred.

FACT: False. "Takings" bills will undermine your property rights and health, safety, labor, civil rights, consumer, and environmental laws. "Takings" legislation will add another layer of bloated bureaucracy and burden agencies with miles of red tape and financial obligations that will deter them from fulfilling their duty to protect the public from unsafe and undesirable practices. "Takings" bills would damage the property rights of average Americans in favor of protecting other types of property such as factories, commercial real estate, and property interests in natural resources including oil and gas extraction, mining, and timber. Most "takings" bills are based on the same flawed "takings" test that the Reagan-Bush Administration relied upon to propose a rule that would have opened the nation's backyards to strip mining by coal companies. 56 Fed. Reg. 33,152 (1991).

FACT: Not true. Our private property rights are already fully protected. The 5th and 14th Amendments to the U.S. Constitution ensure that private property shall not be "taken" without just compensation. America's founders gave the U.S. Supreme Court the responsibility of upholding the Constitution and safeguarding our constitutional rights, including our property rights. Any person whose property has been "taken" has a right to be compensated in the courts.



Endangered Species Act: The Rest of the Story

The Allegations and Responses

Prepared By:

*The DOI Community Education Team
for the use of Government officials who receive
questions from the press and the public about the
Endangered Species Act.*

*For more information concerning these or other
cases, please contact 202-208-4131.*

California: The Stephens' Kangaroo Rat and Homebuyers

The Allegation

This little rodent cost 100,000 taxpayers of Riverside County, California, \$1,950 each in "impact fees" to raise the \$103 million needed to set aside 30 square miles of habitat. Farmers lost up to half their tillable acreage. One family lost \$75,000 in annual farm income. (Source: Timber Industry Labor Management Committee).

The Response

Under Riverside County's Habitat Conservation Plan for the Stephens' kangaroo rat, a mitigation fee of \$1,950 per acre of new development, not per taxpayer, is being collected to purchase permanent habitat reserves for the species, helping clear the way for development of other areas in the county. The mitigation fee translates into approximately \$215 per home, or less than one-fourth of 1 percent of the cost of a \$95,000 home.

ENDANGERED SPECIES ACT: THE REST OF THE STORY

California: The 1993 Fires

The Allegation

People's homes burned down in California because they could not clear vegetation around their homes in order to protect the endangered Stephens' kangaroo rat.

The Response

The General Accounting Office (GAO) investigated these allegations and reported to the Congress in June, 1994, that the California fire was fanned by 80-mile-per-hour winds, and jumped concrete barriers, highways and a canal. According to GAO, "while some owners continue to believe that disking around their homes prior to the fire would have saved their homes, we found no evidence to support these views. Homes where weed abatement, including disking, had been performed were destroyed, while other homes in the same general area survived even though no evidence of weed abatement was present. Overall, county officials and other fire experts believe that weed abatement by any means would have made little difference in whether or not a home was destroyed in the California fire." Firemen said clearing hundreds of feet of ground would not have mattered, because fires of such ferocity can leapfrog more than a mile with searing ashes or hot embers. A university professor who has studied such fires declared this one was something that "not even the entire U.S. Army could have stopped." Finally, GAO concluded, "on the basis of the experience and views of fire officials and other experts... the loss of homes during the California fire was not related to the prohibition of disking in areas inhabited by the Stephens' kangaroo rat."

California: The Kern County Farmer

The Allegation

A "strike force" of 25 agents swooped down by helicopter, arrested a Taiwanese immigrant farmer in Kern County, California, and seized his tractor for killing an endangered rat and other endangered species when he was unaware there were protected animals on his property.

The Response

Mr. Taung Ming-Lin, an immigrant from Taiwan, paid \$1.5 million for arid property in California. In November, 1992, he was notified by registered letter from the State of California that there were endangered species (Tipton kangaroo rat, San Joaquin kit fox and blunt-nosed leopard lizard) on his property and that he needed to contact state and federal wildlife officials to obtain permits before proceeding with development of his land. Other California landowners in similar situations have obtained such permits. In February, 1994, a State fish and game representative spoke with Mr. Lin's foreman about whether appropriate permits had been obtained for developing the land, since endangered species were present. The representative advised Mr. Lin's son during the same visit of the need to gain appropriate permits and provided names of individuals to contact. He advised them that cultivation should stop until permits were obtained. Two more contacts were made by state and federal agents advising of the need to obtain permits before a search warrant was eventually executed on February 20 by approximately four U.S. Fish and Wildlife Service agents, California fish and game wardens and biologists. No helicopters were used. Remains from endangered Tipton kangaroo rats were located. A tractor and a disc were seized under the authority of the search warrant. The government has elected to prosecute Mr. Lin's corporation, but not Mr. Lin.

ENDANGERED SPECIES ACT: THE REST OF THE STORY

Florida: The Scrub Jay

The Allegation

In Florida, a person's home is not his castle when it comes to the Florida Scrub Jay. More than 250 landowners (were) warned not to alter or remove underbrush from their property because "any activity which destroys scrub occupied by scrub jays may violate (the law)." Touch that scrub and you may land in jail for up to 1 year and pay to \$10,000 in fines. (Source: Timber Industry Labor Management Committee).

The Response

Letters were mailed to a large number of property owners in Florida explaining how they may obtain authorization to proceed with development plans. The letters contained information, not threats. Since the beginning of that initiative, hundreds of authorizations to proceed have been issued by the U.S. Fish and Wildlife Service in Jacksonville, and many of those were granted within a week of the request. Brevard County has requested and received a congressional appropriation to fund a Habitat Conservation Plan, which, when approved by the Service, will solve development conflicts in that county as they relate to scrub jays. Other large projects have proceeded with HCPs or were resolved without a need for permits. Overall, public reaction to the scrub initiative has been one of acceptance and cooperation. The Endangered Species Act has been used to its fullest to help solve conflicts related to this species.

Florida: Key Deer

The Allegation

To protect more than 400 head of endangered Key Deer on 8,000 acres of Florida Keys, elementary children are bused an additional 30 miles around the habitat. A plan to build a school at a closer location has been stalled because of opposition by environmental groups. (Source: Timber Industry Labor Management Committee).

The Response

The Florida Key Deer, listed as endangered in 1967, inhabits some 26 islands in the lower Florida Keys. The herd currently numbers between 250 and 300. Big Pine Key is believed to support two-thirds of this population due to its size, predominance of pineland and year-round availability of fresh water. The deer need to cross U.S. Highway 1 to gain access to seasonal fresh water and to maintain genetic diversity. More deer are killed each year by vehicles (60 to 65) than are being replaced by the herd and half the deaths occur on U.S. 1. In an effort to satisfy the recovery plan goal to establish underpasses and overpasses so the deer may safely cross the highway, the Service Key Deer recovery team needed to locate two areas that could be used as corridors. The proposed school is planned directly over one of the corridors. The Service has noted that construction of the school would constitute a taking under Section 9 of the Endangered Species Act, and opposes building the school at the suggested site. In addition to the Service, the suggested school site is also opposed by the state department of community affairs, state game agency, county planning department and state and local conservation groups. Alternative school sites are available on and within seven miles of Big Pine Key.

North Carolina: Timber and the Red-Cockaded Woodpecker

The Allegation

When the endangered Red-cockaded woodpecker arrived on Ben Cone's property in North Carolina, the Endangered Species Act put 1,000 acres of his land off limits to him. He has spent \$8,000 on biologists to make sure he is following the stringent rules and figures he has lost \$1.8 million in timber that is tied up in the protected zone. To protect his remaining land from being occupied by the bird and consequently falling under federal land control, Cone had no choice but to change his timber management practices to try to harvest the pines before they become old enough to attract woodpeckers and prevent him from using the rest of his land. (National Wilderness Institute, Endangered Species Blueprint).

The Response

Mr. Cone was initially offered the option of developing a Habitat Conservation Plan, which allows incidental take of an endangered or threatened species in pursuit of otherwise lawful activity—such as logging. Many organizations and developers are participating in such plans. Mr. Cone declined. In the meantime, he did submit a management plan to the U.S. Fish and Wildlife Service in Atlanta, which was approved. He is managing his land, and logging it.

North Carolina: The U.S. Army and the Red-Cockaded Woodpecker

The Allegation

The U.S. Army can defend against the armies of Saddam Hussein, but they are losing their battles with the Red Cockaded Woodpecker. Several areas of Fort Bragg, North Carolina, have been closed and construction of a needed maintenance division complex is on hold because of this bird, which may also threaten harvest of the Southern Forest. Some call the Red Cockaded Woodpecker the spotted owl of the future. (Source: Timber Industry Labor Management Committee)

The Response

There are 182 million acres of timberland in the South (90 percent privately-owned and 10 percent federal and state-owned). The U.S. Fish and Wildlife Service estimates that between 500 and 1,000 groups of Red Cockaded Woodpeckers may still survive on private lands. Based on the current habitat guidelines for Red Cockaded Woodpeckers, 1,000 groups would require 60,000 acres (i.e., 60 acres per group), or less than 1 percent of the total private timberland in the South. This is not considered a threat to the Southern Forest, which has already been harvested three complete times. Construction of the Army's maintenance division complex has gone forward at Fort Bragg following completion of the consultation process with the Service, and no necessary training activities have been stopped because of endangered or threatened species. In the case of the Army projects, consultation was the key. Endangered Species Act listings rarely require a substantial change in plans for development. A 1992 General Accounting Office audit found that of 18,211 consultations between 1988 and 1992, 99.9 percent went forward unchanged or with minor modifications.

Oregon: The Butterfly and the Golf Course

The Allegation

In a cover story entitled, "The Butterfly Problem," in the January, 1992 issue of *The Atlantic*, the authors portrayed an Oregon developer whose lifelong dream of carving fairways on a section of the Oregon coast was snuffed in the morass of Endangered Species Act protection of an endangered butterfly.

The Response

U.S. Fish and Wildlife Service personnel helped the developer obtain an incidental take permit under the Endangered Species Act, recognizing that development of a Habitat Conservation Plan in connection with the golf course would assist the long-term survival of the butterfly. The developer, however, was unable to satisfy Oregon's land use planning laws on grounds unrelated to the ESA, and the project was abandoned.

Texas: Endangered Species Lower Property Values

The Allegation

The presence of endangered species has lowered property values in Texas.

The Response

This allegation is frequently associated with anecdotal reports from individual landowners or with a study conducted by the Texas and Southwestern Cattle Raisers Association. Land values in the Austin area, to cite one example, did decline after the mid-1980s, but most of that decline occurred in 1987 because of the Savings and Loan crisis. The gold-cheeked warbler—the species usually blamed for the loss of property values—was not listed as endangered until 1991. The study by the TSCRA purported to show that land values in 33 Texas counties affected by endangered species listings had declined more than land values in other Texas counties. This study was analyzed by Dr. Stephen Meyer of the Massachusetts Institute of Technology (MIT), who found that TSCRA had analyzed the economic data incorrectly and that the data did not in fact support the conclusion that property value declines were associated with the presence of endangered species. Meyer's own study, meanwhile, noted that "... the evidence strongly contradicts the assertion that the listing of species under the Endangered Species Act has had harmful effects on state economies. The data show that animals and plants—endangered or otherwise—do not present much of (an) impediment to development activity at the state level."

ENDANGERED SPECIES ACT: THE REST OF THE STORY

Texas: Species Stalls Real Estate Sale

The Allegation

Margaret Rector owns 15 acres of commercially-zoned property in Travis County, Texas, which is habitat for the golden-cheeked warbler. Because an endangered species is present on her property, she is unable to either develop or sell it. Since the land cannot be developed, the value of the acreage has declined and Ms. Rector alleges she has not only lost a good deal of money, but now cannot find a buyer at all because of the presence of an endangered species on her land.

The Response

The U.S. Fish and Wildlife Service informed Ms. Rector that development of her property required a permit under either Section 7 or Section 10 of the Endangered Species Act. No application for such a permit has been received. Land values in the Austin area declined significantly in the wake of the Savings and Loan crisis, and the majority of Ms. Rector's property value decline occurred at that time, prior to the listing of the golden-cheeked warbler. The City of Austin paid about \$60,000 an acre for a nearby tract in 1986. That land is now valued at between \$2,000 to \$3,000 an acre. The property originally was sold in 1985 or 1986, but went to repossession because of a buyer default. The Balcones Canyonland Conservation Plan would address Ms. Rector's property, but the plan has yet to go forward. The City of Austin recently put Ms. Rector in contact with a prospective buyer who is fully aware of the endangered species issues on the property, and who is willing nonetheless to negotiate fair market value for the land.

Texas: Critical Habitat and the Golden-Cheeked Warbler

The Allegation

The U.S. Fish and Wildlife Service proposed 20 million acres in 33 Texas counties as critical habitat for the golden-cheeked warbler.

The Response

The Service never had plans for any proposal of the magnitude described above. There is less than 800,000 acres of potential warbler habitat in the entire State of Texas. Secretary Babbitt announced in October 1994 that designation of critical habitat would not be necessary for the conservation of the species if habitat conservation plans were put into place. Work on those plans is proceeding.

Texas: Cedar and Private Land

The Allegation

The U.S. Fish and Wildlife Service sues private landowners in Texas who try to control cedar on their property.

The Response

The Service supports private property rights and has repeatedly said that control of cedar regrowth and ongoing ranching practices do not harm the habitat of the golden-cheeked warbler.

 ENDANGERED SPECIES ACT: THE REST OF THE STORY

Texas: The Widow's Story

The Allegation

In testimony before the Senate Environment and Public Works Committee in April, 1992, a representative of the National Cattlemen's Association told of a widow near Austin, Texas, who wanted to clear her fencerow of brush, only to be threatened with prosecution by the U.S. Fish and Wildlife Service.

The Response

The woman was advised by the Service that her clearing of a 30-foot wide, one mile-long fencerow might harm endangered songbird nesting habitat, but after Service representatives met with her and assessed the situation, she was given the go-ahead to clear the fencerow.

Utah: Domestic Geese and the Kanab Ambersnail

The Allegation

The U.S. Fish and Wildlife Service forced domestic geese in Utah to vomit to see if their stomachs contained endangered Kanab ambersnails. The landowner was threatened with a fine of \$50,000 for each snail eaten by a goose. (Source: National Wilderness Institute, Endangered Species Blueprint).

The Response

Some geese were removed from a pond inhabited by Kanab ambersnails. None were forced to vomit, nor was anyone threatened with a fine for snails consumed by the geese.

Critical Habitat and Development

The Allegation

When the U.S. Fish and Wildlife Service declares "critical habitat" for an endangered or threatened species, private landowners are prevented from developing their land. Critical habitat designations "lock up" large sections of land, prevent most human activities and are the equivalent of setting aside wildlife sanctuaries. Critical habitat designations prevent all economic development.

The Response

A "critical habitat" designation means that federal agencies must consult with the Fish and Wildlife Service when their activities may adversely modify habitat designated as critical to the recovery of the species. If it is determined that a project will jeopardize the species, the Fish and Wildlife Service is required by the Endangered Species Act to offer "reasonable and prudent" alternatives that will protect the habitat while permitting the project to proceed. More than 99 percent of all projects do go forward. "Critical habitat" designations apply only to actions authorized, funded or carried out by federal agencies. Critical habitat does not affect private landowners unless they plan a development project that requires federal funding, permits, or some other action by a federal agency. A critical habitat designation in no way sets aside an area as a wildlife sanctuary or wilderness area.

 ENDANGERED SPECIES ACT: THE REST OF THE STORY

California: The Stephens' Kangaroo Rat

The Allegation

Ms. Cindy Domenigoni has had more than half of her farm's 3,100 acres of dry land wheat, barley, alfalfa and beef cattle severely impacted by the listing of the Stephens' kangaroo rat. She has been forced to idle 800 acres of her land due to restrictions even though her family has farmed and co-existed with the species for the last 120 years. The federal protections afforded the rat have stripped her of her fundamental property rights, diminished her land values and drained her family's financial resources. She has incurred nearly \$400,000 in lost income and direct and indirect expenses due to K-rat restrictions. (Summary of testimony of Cindy Domenigoni before the House Merchant Marine and Fisheries Committee, July 7, 1993, in Woodland, California).

The Response

The U.S. Fish and Wildlife Service is not familiar with 800 idled acres, but is aware that 400 acres of the Domenigoni farm originally was idled when it was believed that it may have been habitat for the Stephens' kangaroo rat. A Service biologist subsequently examined the land in question and determined that the land was not K-rat habitat. The Service then granted permission to the Domenigoni farm to proceed with farming on the acreage, in December, 1993. Ongoing farming activities in the Riverside County area have not generally been restricted because of K-rat habitat, and farming does not require a grading permit. Grading permits are required for new activities on the land, not continuing activities.

Economics and the Endangered Species Act

The Allegation

The Endangered Species Act has brought development across the country to a halt.

The Response

Properly implemented and enforced, the Endangered Species Act successfully balances economic needs with conservation needs—as evidenced by the U.S. Fish and Wildlife Service's consultation record. Endangered Species Act listings rarely require a substantial change in plans for development. A 1992 General Accounting Office audit found that of 18,211 consultations between 1988 and 1992, 99.9 percent went forward unchanged or with minor modifications. A Massachusetts Institute of Technology study, "Endangered Species Listings and State Economic Development," completed by Stephen M. Meyer in 1994 for the Project on Environmental Politics and Policy, concluded that "...the evidence strongly contradicts the assertion that the listing of species under the Endangered Species Act has had harmful effects on state economies."

Economic Development and the Endangered Species Act

The Allegation

Listing of species under the Endangered Species Act hurts economic development.

The Response

Between 1988 and 1992, only 6 in 5,000 projects was actually stopped because of the Endangered Species Act. The remainder went forward without major changes.

ENDANGERED SPECIES ACT: THE REST OF THE STORY

Tuna Cave Cockroach

The Allegation

The next thing you know, they'll try to put cockroaches on the endangered species list. Too late. They already have. The Tuna Cave Cockroach is found in Puerto Rico is a candidate for inclusion on the list. At least 40 percent of the candidates for endangered species are rodents, beetles, snails and moths. It will require \$144 million to list and study these candidates. (Source: Timber Industry Labor Management Committee).

The Response

The Tuna Cave Cockroach is not on the list of Endangered and Threatened Plants and Animals. It is on the candidate list, but the U.S. Fish and Wildlife Service has spent no money on the species and has no plans to. Rodents, beetles, snails and moths comprise 36 percent of the candidates for listing, and it is estimated that the study and listing of all 619 species would cost \$19.6 million, not \$144 million.

HORROR STORIES AND FAIRY TALES ABOUT THE ENDANGERED SPECIES ACT

We call on those who oppose the ESA to stop using the tactics of fear-mongering, and engage instead in an open debate on the merits of the law. These opponents apparently will go to almost any lengths of distortion, fabrication, and manipulation of the truth to gut America's most important conservation law. Following are a few of many such cases.

FAIRY TALE: IMMIGRANT LOSES AMERICAN DREAM TO FEDERAL ESA STORM TROOPERS!

CLAIM: Tuang Ming-Lin arrived in the United States three years ago and bought 720 acres of farmland near Bakersfield, CA, ready to fulfill his personal American dream. Mr. Lin, who cannot speak English, began cultivating his land to grow bamboo and other vegetables to cater to southern California's growing Asian population. He had purchased the land with the understanding that it could be farmed and there were no restrictions on what he could do. According to Tony Snow, an editorial columnist for the Detroit News, "{Mr. Lin} had no idea that his property was listed as natural habitat for the Tipton kangaroo rat, a member of the endangered species club. The feds keep such information secret and inform property owners of their legal liability only when they try to do something potentially criminal, like plowing a field..." Mr. Lin, who paid \$1 million for his land, a tractor, and an irrigation system, has been told he cannot farm his land until he gets state and federal permits. In addition, he has been charged with knowingly destroying the habitat of an endangered species and killing individuals of the species. If convicted, he faces one year in prison and \$300,000 fines. Mr. Lin has suffered a stroke as a result of the stress caused by these charges.

REALITY: Mr. Lin was fully informed of the situation but preferred to violate the law.

Mr. Lin was very well aware that his property included Tipton kangaroo rat habitat. He was informed of that fact by the U.S. Fish & Wildlife Service by letter dated November 24, 1992, almost two years before his employee was apprehended plowing a field containing endangered habitat. This letter stated "...the Department has identified this area [Mr. Lin's property] as native threatened and endangered species habitat that now contains significant populations of both state and federally listed threatened and endangered species..." He was advised that "unpermitted" development of the land would cause adverse impacts on endangered species and would constitute a violation of three environmental laws. He was also advised that "...development of threatened and endangered habitat through the incidental take permit process..." was provided for in all three laws. The letter signed by Scott Williams, USFWS game warden in Bakersfield, offered him assistance in obtaining a permit and gave him the names and phone numbers of agents with both the California Department of Fish & Game and the U.S. Fish & Wildlife Service whom he could contact. Mr. Lin did not request assistance or apply for an incidental take permit.

On February 12, 1994, a California game warden observed plowing activity on Mr. Lin's farm. She asked the employee doing the work, Mr. Robert Sanchez, if permits had been obtained. The answer was no. She advised Mr. Sanchez that the land being plowed was critical habitat for three endangered species, the San Joaquin kit fox, the Tipton kangaroo rat, and the blunt-nosed leopard lizard. Another employee stated that they (the workers) were aware of the existence of the kangaroo rats on the property. The warden then advised the employees, in the presence of Mr. Lin's son Yider "Joseph" Lin, of the necessity of obtaining an incidental take

(continued...)

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permit before doing any further plowing. On February 17th, an USFWS agent visited Mr. Lin's farm and observed that additional land had been plowed and vegetation destroyed since the California warden's visit on February 12. The same employee, Mr. Sanchez, confirmed that he had understood the warning given to him and that it had been passed on to the owner, Mr. Tuang Ming Lin. Contrary to the outraged accounts of various newspaper columnist, Mr. Lin was fully informed of the situation but preferred to violate the law rather than cooperate and apply for an incidental take permit. Even then, he was given a verbal warning through his employee and his son and had a second opportunity to comply with the law. He chose to ignore this warning and persisted in illegal destruction of endangered habitat. Under the circumstances, the USFWS had no alternative but enforce the law. All of this could have been avoided if Mr. Lin, in November 1992, had simply applied for an incidental take permit.

The allegation that Mr. Lin was ready to cultivate his 720 acres and grow profitable crops is also highly questionable. According to the Los Angeles Times, June 10, 1994, the land he had purchased was heavily polluted with salt and would require "years of irrigation" before anything could be grown. This fact, along with the fact that the land was designated as critical habitat, was apparently not communicated to Mr. Lin by the sellers of the property or their agent. Perhaps Mr. Lin is a victim, but he is of questionable real estate practices not of the Endangered Species Act or the Federal Government.

FAIRY TALE: ESA FORCES HOMEOWNERS TO WATCH HOMES GO UP IN SMOKE DURING CALIFORNIA WILDFIRES!

CLAIM: The Stephen's kangaroo rat was listed as endangered under the Endangered Species Act in 1988. After the listing, residents of Riverside County, California were prohibited from clearing firebreaks in the rat's habitat. The Fish & Wildlife Service admitted that disking is the most effective method of weed abatement for fire control purposes, yet the service barred property owners from disking based on habitat protections of the ESA. The Service also threatened to use sanctions against the fire department if it recommended the use of disking for weed abatement areas populated by the kangaroo rat. Many acres of land lay fallow from 1988 through 1993 as a result of the FWS restrictions. The Service barred property owners from removing brush, a known fire hazard, through methods of farming including disking. If these acres had been cleared, they would have created a firebreak. Instead, the fields of brush and high grass were fuel for the fire.

Twenty-nine homes and over 25,000 acres were lost in the October 1993 Riverside, California Wildfires. Many of these home owners believe that disking around their property would have would have prevented the fire from reaching their homes. "...One homeowner stated to the media after the fire that his last-minute disking about 120 feet beyond his property line was the only reason his home and property were saved." The bottom line here is that the habitat protection of the Stephen's kangaroo rat under the ESA put both property and human life at risk.

REALITY: The fire was unstoppable.

The Stephen's kangaroo rat is small nocturnal mammal within the rodent family. The species makes its home in burrows in the grasslands and costal sage of southern California. The Stephen's kangaroo rat was listed as endangered in 1988. The Fish and Wildlife Services determined that disking posed a threat to individual species and applied the incidental take permit requirements of the ESA if disking was to be performed within the

FAIRY TALE: THE KANGAROO RAT CAUSES OVERCROWDING FOR INNOCENT FAMILY!

CLAIM: When Michael Rowe applied for a permit to add to his house, he was told that his acreage was in the middle of a study area for the endangered Stephen's kangaroo rat, forcing Rowe to hire a biologist to survey his property at a cost of as much as \$5,000 before building. If a single rat was found, he could not build. If none were found, then he could develop his property if he paid the government "mitigation fees" totalling nearly \$40,000 to buy land elsewhere for a rat preserve. He is therefore unable to expand his house and cannot properly accommodate his large family.

REALITY: Mr. Rowe's total cost would be \$1000, not \$45,000 to obtain the necessary permit to expand his house, as provided by section 6 of Riverside County, CA ordinance no. 663.5, adopted January 2, 1990. Dr. John Bradley of the Carlsbad, CA office of the USFWS estimates that Mr. Rowe would pay only \$500 to \$1000 maximum for a survey; however, Dr. Bradley, a fully-qualified biologist, offered to do the survey for Mr. Rowe at no charge. Mr. Rowe did not accept this offer. If a survey was conducted and rats were discovered within 100 feet of Mr. Rowe's house, construction could proceed upon application for and receipt of a section 10 permit.

FAIRY TALE: THE STEPHEN'S KANGAROO RAT CAUSES WATER POLLUTION!

CLAIM: Outside Beaumont, California, an abandoned rocket test site polluted with hazardous chemicals was threatening ground water supplies. Yet, cleanup efforts were delayed for two years because they, too, might disturb the Stephen's kangaroo rat.

REALITY: The Lockheed Corporation owns the 9,117 acre abandoned rocket test site. Fourteen acres are polluted with hazardous chemicals and there is evidence of ground water contamination. The delay in cleaning up the contamination was caused by Lockheed's failure to take action, not by any provision of the Endangered Species Act. In 1992, Lockheed ask the USFWS to consider the approval of a clean-up plan that would be covered under a section 10 "scientific collection permit." The USFWS gave its approval and facilitated this approach, and the cleanup effort is still underway.

FAIRY TALES: THE RED-COCKADED WOODPECKER DESTROYS PROPERTY VALUES!

CLAIMS: Benjamin Cone, Jr. owns 8,000 acres of timberland near Greensboro, NC. 1,600 acres of this property has been affected by the red-cockaded woodpecker. Cone's sound forestry practices attracted the woodpecker by inadvertently creating prime nesting areas for the birds. Cone now says "I cannot afford to let those birds take over the rest of my property. I'm going to start massively clearcutting."

REALITY: Mr. Cone was offered two practical alternatives for dealing with the woodpeckers on his property which would permit him full use of his land. He has refused to utilize these alternatives, yet he complains that the ESA prevents him from "using" his property. However, he continues to use his land to take pine straw to sell for profit; he thins and clearcuts the timber on his land and sells it; and he operates a hunting lease, charging hunters a fee for hunting on his property. Although he has been prevented from clearcutting that portion of the land currently occupied by red-cockaded woodpeckers (approximately 600 acres, not 1,600 acres) he has been legally thinning the RCW habitat for a number of years.

kangaroo rat habitat. Based on the County counsel's concern that the ESA would be violated should disking occur, the Riverside County Fire Department issued a prohibition against disking as a form of weed abatement and fire prevention. The fire department, County Council and the Service all agreed that other forms of weed abatement that did not disturb the ground would provide adequate fire breaks and not harm individual species of the Stephen's kangaroo rat. The fire department recommended mowing with a low blade as an alternative fire prevention weed abatement procedure to disking. No one disagreed with the prohibition on disking until the wildfires of 1993.

The California wildfires of 1993 were a great tragedy. However, the loss of homes and private property was unavoidable. The wildfire could not be stopped. Winds of up to 80 miles an hour fanned the flames and 12,000 acres were burned in the first six hours, during which time most of the 29 homes were destroyed. The fire, characterized by walls of flame 100 to 150 feet high, jumped interstate highways, paved and gravel roads, cleared agricultural fields, and the San Diego canal.

A report by the General Accounting Office stated conclusively that the Endangered Species Act had nothing whatever to do with the destruction of 29 homes by the wildfire. Key findings of the report showed that "...the loss of homes during the California Fire was not related to the prohibition of disking in areas inhabited by the Stephen's kangaroo rat." They also noted that 18 of the 29 homes were mobile homes and as such were substantially more likely to fall prey to fire. Another key finding was that "...disking had been performed around some destroyed homes. For some of the homes that survived the fire, weed abatement by various methods including disking had been performed, while for others, no weed abatement had been performed." One homeowner who at first claimed disking would have saved her mobile home later stated that a rocky hillside behind her home could not be disked or mowed and the fire swept over the hill and destroyed her home in about five minutes. Also, the homeowner who claimed last minute disking saved his home later acknowledged that the wind direction changed as the fire approached his property, pushing the fire in a direction away from his home.

FAIRY TALE: BLACK-CAPPED VIREO DEPRIVES DEVELOPER OF HER LAND AND HER PROPERTY RIGHTS!!

CLAIM: Beth Morian, a lifelong environmentalist and member of the Board of Directors of the Houston Zoological Society, learned that 34 pairs of the Black-capped vireo had been found in and around her family's 1,300-acre Davenport Ranch, west of Austin, TX. The Morian family donated 62 acres, worth \$1.9 million, to the city of Austin for a nature preserve. Meanwhile, they started to sell 66 home sites on 89 of the remaining acres, investing at least \$2 million to develop the property. Then, the USFWS placed the Vireo on the endangered species list, freezing development activity. Now, half of the Morian's property and their investment remain in limbo. Morian says: "They have taken our land. We want to see species preserved, but people should have a place too."

REALITY: The Black-capped vireo was listed as endangered by the USFWS in 1987; the Morians decided they wanted to develop their land in 1991 — four years after the listing occurred. The Morians were very well aware of the status of the vireo, but attempted to develop vireo habitat without applying for an incidental take permit or otherwise complying with the law. They were caught. The USFWS advised them to stop development.

The Morians have received a 10(a) (incidental takings) permit which allows a proposed housing project to proceed on about half of their property. The second part of the project is still under review and the FWS is moving toward approving a permit.

FAIRY TALE: THE NATIONAL BIOLOGICAL SURVEY – A GOVERNMENT PLOT TO DESTROY PRIVATE PROPERTY RIGHTS?

CLAIM: Wall Street Journal, November 2, 1993: "...Dr. Thomas Lovejoy, the Interior Department's scientific adviser, says the [National Biological] Survey's findings would "determine development for the whole country and regulate it all, because that is our obligation as set forth in the Endangered Species Act."

REALITY: This quotation, widely distributed and constantly repeated by anti-environment groups, is an outright fabrication. Dr. Lovejoy did not say this. Representative Bruce Vento, Minnesota, on October 26, 1993, stated during debate on the National Biological Survey: "...On October 20, Dr. Lovejoy submitted a transcribed copy of his remarks from which the quote was reportedly taken, with a letter indicating that attributing this quote to him was not simply a gross misstatement of what he said, but rather it turns out to be a fabrication."

The source of this false quotation was Dr. Lovejoy's speech during the "From Rio to the Capitols: State Strategies for Sustainable Development" Conference, held in Louisville, KY, May 25-28, 1993. Dr. Lovejoy spoke on May 26. The transcript of his entire speech was reprinted in the Congressional Record, October 26, 1993, pages H8478-79. The ESA does not issue regulations to determine and control development. Under the Act all regulatory responsibilities are assigned to the National Biological Survey.

FAIRY TALE: THE BUTTERFLY PROBLEM

CLAIM: In a widely-read cover story entitled "The Butterfly Problem" in the January 1992 issue of The Atlantic Monthly, the authors portray an Oregon developer whose lifelong dream of carving golf course fairways on a section of the Oregon coast was snuffed out in the morass of ESA protection of an endangered butterfly.

REALITY: According to people involved in the project, FWS officials bent over backwards to help the developer obtain an incidental take permit under the ESA, recognizing the development of a habitat conservation plan in connection with the golf course would assist the long-term survival of the butterfly. Unfortunately, the developer could not satisfy Oregon's land use planning laws on grounds unrelated to the ESA, and he abandoned his project.

FAIRY TALE: TEXAS WIDOW – A VICTIM OF THE ESA

CLAIM: In testimony before the Senate Environment and Public Works Committee in April, 1992, a representative of the National Cattlemen's Association told of a widow near Austin, Texas who wanted to clear her fencerow of brush, only to be threatened with prosecution by an unfeeling USFWS.

REALITY: On February 12, 1991, concerned citizens notified the USFWS that Martha Rodgers was clearing an area of their property along the road. The FWS notified Rodgers that clearing of a thirty-foot wide, one-mile long fencerow might harm endangered songbird nesting habitat in violation of the ESA. Within three weeks Ms. Rodgers cooperated fully and returned all requested information. After meeting with Ms. Rodgers and assessing the situation, on April 25, 1991, the FWS gave her the go-ahead to clear the fencerow.

FAIRY TALE: AN INNOCENT FARMER'S LAND IS CONFISCATED BECAUSE OF THE BLUNT-NOSED LEOPARD LIZARD

CLAIM: Ted Off, a farmer in the California San Joaquin Valley, was accused of destroying the habitat of the endangered blunt-nosed leopard lizard when he plowed a field to plant barley. He says, "We had never seen any lizards on our land in the 50 years it was in our family. We had no idea we were doing anything wrong." To avoid an expensive legal fight, the Offs handed over 60 acres of their property to the USFWS, and the agency plans to purchase an additional 100 acres.

REALITY: Mr. Off's claim that "We had never seen any lizards on our land ... we had no idea we were doing anything wrong" is not supported by the facts. Twenty years prior, the Off family sold a portion of their land to the USFWS to be incorporated in the Pixley National Wildlife Refuge as valuable habitat for the blunt-nosed leopard lizard. Not only did the Offs know about the existence of the lizard on their land twenty years prior, they made money from the fact!

After the sale, the Offs were informed by the USFWS that an additional 160 acres of their property (which borders the refuge) is sensitive habitat area for the lizard. USFWS advised them that any activities, such as plowing, that would disturb the lizards would require an incidental take permit. In 1989, without seeking a permit, the Offs started plowing the 160-acre plot to prepare for the construction of three dairy buildings. This was done in full knowledge of and in direct violation of the law. In April 1992 a settlement resolving the charges against the Offs was entered between the Offs and the USFWS and the California Game and Fish Commission, a settlement was agreed which represented compromise and a favorable outcome for both the Offs and the USFWS.

FAIRY TALE: THE MOTHER OF ALL WOODPECKERS

CLAIM: According to the Timber Industry Labor-Management Committee's pop-up brochure, the red-cockaded woodpecker has done what Saddam Hussein could not do, defeating the US Army by closing or delaying construction of essential military facilities at Fort Bragg, NC.

REALITY: No areas of Fort Bragg are currently closed due to red-cockaded woodpeckers. In addition, construction of two buildings at Fort Bragg was delayed from November 1990 to July 1991 because of an Army construction moratorium, not because of the woodpecker. While the need for the Army to consult with FWS under the ESA has caused some temporary delays and area closures, no necessary training activities at Fort Bragg have been stopped due to endangered species issues.

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Setting the Record Straight on Wetlands, Private Property, and Takings

The issue of private property rights is cleverly being used by those who oppose wetlands protection as a battering ram against the Clean Water Act's Section 404 regulatory program. Myths are continuously perpetrated that constitutional rights to private property are violated by the Section 404 program, leading to calls for major legislative reforms. In truth, however, implementation of §404 *rarely* results in a "taking" of private property requiring compensation under the Fifth Amendment of the Constitution.

The unwarranted legislative solutions and compensation provisions that we have seen proposed in amendments to the National Biological Survey and *which are likely to cloud the debate over elevating the EPA to cabinet status* are based on misinterpretations of Constitutional law, threatening to place the public pocketbook at tremendous risk while unfairly providing a windfall of benefits for a select few.

Just as local governments do not compensate landowners for complying with local zoning ordinances, the federal government should not be expected to compensate property owners for protecting wetlands -- waters of the United States -- on their land. Public benefits provided by wetlands, such as flood control and water purification, are not restricted to property boundaries and should not be compromised by overly expansive definitions of private property.

The Status of Wetlands Regulations and Takings Law

Landowners share the responsibility to manage their lands so as not to jeopardize the public health, safety, and welfare of adjoining landowners and the community at large. If development of one landowner's wetlands floods another's private property downstream -- as has happened time after time throughout the United States -- have property rights been protected? For almost a century, our Nation has recognized the power of the government to place restrictions on the use of private lands in order to protect the public good. Just as the government restricted coal companies in the 1970's from exercising their mineral rights to the point of causing land subsidence, so too does the government enforce restrictions on landowners seeking to drain and fill into our Nation's waters.

Despite claims to the contrary, only rarely does the balancing of public and private responsibilities to protect wetlands raise a valid takings claim under the Fifth Amendment of the Constitution. In fact, the Supreme Court has found that where there is an overriding state interest -- as is the case with most environmental regulations -- a regulatory taking does not occur unless all economic uses of the land are eliminated and the landowner has been refused a legitimate use of his land. A landowner would not have a valid taking claim if, for example, he wanted to build an animal rendering plant in downtown Chicago but Illinois law prohibited construction of these odiferous plants in urban areas as a nuisance. In instances where a regulatory taking has occurred, the Constitution guarantees the landowner full and fair compensation for his property.

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Still, takings concerns have been grossly exaggerated in cases involving wetlands regulation. Contrary to the uproar being made over takings and Section 404, the stark reality is that -- despite the Army Corps of Engineers' annual processing of approximately 10,000 individual Section 404 permits and as many as 40,000 actions under general permits -- there have been only three cases in which the courts have found a "Constitutional taking" requiring the payment of just compensation. Moreover, two of these cases are currently under appeal by the federal government, and neither has yet reached the Supreme Court for review. Simply put, the jury is still out on two of the three Section 404 cases that even passed the muster to meet the court's Constitutional test for a taking.

Oppose any Takings Amendments to the EPA-Cabinet Bill

Attaching takings amendments to the EPA-cabinet bill is not the way to protect private property. Because very few wetlands restrictions have resulted in Constitutional takings, legislative "solutions" and compensation provisions are wholly unnecessary. Such heavy-handed measures would severely erode the protection for wetlands provided under Section 404.

Takings amendments that would require compensation for landowners affected by regulatory decisions are even more egregious in this era of budget-tightening. According to a 1992 Congressional Budget Office study, requiring federal acquisition of high value wetlands would cost American taxpayers between \$10 and \$15 billion. The federal government could not possibly afford to pay every landowner for every perceived reduction in property values that could result from needed environmental, health and safety regulations. Thus, not only would a takings amendment impose tremendous financial liabilities, it would also ignore the public's interest in waters of the U.S. The legal responsibility of landowners to use their property in a manner that does not harm neighboring property owners and the public in general must be maintained.

Summary

Takings issues should be resolved within the existing Constitutional legal framework not in the EPA-Cabinet bill.

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November 1993

THE REST OF THE STORY: The Juneau Middle School, Juneau, Alaska

The Story:

Due to severe overcrowding at one of its middle schools, the City of Juneau, Alaska decided to build a larger facility at a new location. Field investigations conducted on the proposed construction site determined that the project would involve the filling of approximately nine acres of wetlands and the re-routing of several tributaries of Switzer Creek and thus the City would require a Section 404 permit. A permit was applied for in March of 1991, thereby initiating the Section 404 permit process. According to some, because of the Army Corps of Engineers' rigid insistence on finding alternative sites where no practical alternatives existed, the project was delayed unnecessarily, its costs were greatly increased, and led the school board President to angrily conclude, "[w]e have a society that values skunk cabbage more than students." Thus began yet another case history in a long line of "horror stories" to demonstrate how the federal wetlands regulatory program is out of control.

The Rest of the Story:

The tellers of this sorry tale would have you believe that city officials of Juneau undertook a carefully planned project which was vital to Juneau's long-term future, only to be trapped, then torpedoed, by federal bureaucrats inflexibly applying Section 404 permitting requirements. However, as the rest of the story shows, quite the opposite is true.

The City of Juneau had selected as its new school site a location in the Lemon Creek valley north of downtown Juneau, adjacent to Switzer Creek. The site contained forested muskeg wetland, providing habitat for a variety of wildlife species, including black bear, deer, porcupine, mink, bald eagle, grouse, and owls. In addition, Switzer Creek served as a spawning and rearing area for coho, pink and chum salmon, and downstream trout fisheries. From the outset, members of the local community raised several serious concerns about the proposal to construct the school at the Switzer Creek. Some parents voiced reservations about threats to child safety resulting from black bear activity in the area. Others noted that development of the site would cause stream siltation and changes in drainage, streambed alterations affecting fish rearing potential, contamination from motor vehicle leaks, and an array of other water quality problems.

As part of the Section 404 permitting process, applicants must demonstrate that no alternatives to wetlands destruction exist. According to the law, if there are such alternatives, then the applicant should pursue these less destructive options. According to government files, several substitutes for the Switzer Creek site were available in Lemon Creek Valley. One of these involved constructing the middle school in an upland site that had originally been planned for a new high school. This alternative had several advantages over the Switzer Creek proposal, including broad community support, lower costs, and considerably less environmental impact. Despite this, it appears the City never even considered this option seriously, either before or during the permit process.

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After rejecting this alternative, but before receiving its Section 404 permit for the Switzer Creek site, the City commenced work on the project. Thus, when the Corps later visited the site, it noted that road construction had already begun to impact the wetland and that the City was in violation of the law. The Corps next sent the City a "notice of Section 404 violation," but in that document indicated it would likely issue an "after-the-fact" permit. The Corps then generously withheld any enforcement action in order to give the City time to apply for the after the fact permit. Thus, despite the hew and cry raised by the City, not only did it get its project, but it got it while the Corps turned its back, and at the expense of important wetlands.

The reality of the Juneau Middle School "horror story" demonstrates that federal agencies, rather than acting rigidly, actually bent over backwards to accommodate the development needs of the City of Juneau. Moreover, this case shows that, with better planning, and with greater cooperation from the City of Juneau during the permit process, the loss of nine acres of wetlands could have been easily avoided. Viable alternatives to wetlands destruction clearly existed, but now this valuable resource has disappeared. Presently, construction of the Middle School at Switzer Creek is underway.

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April 1993

The Rest of the Story: The Weston Community, Broward County, Florida

Most people agree that wetlands provide valuable functions for society, including flood control, groundwater and aquifer recharge, wildlife habitat, commercial and sport fisheries production and recreation. Development of wetlands destroys these functions, but the full impacts of the loss are not always apparent. In some cases, on the other hand, the results are painfully obvious. On a large planned community development called Weston, in Broward County Florida, residents are feeling the sting of wetlands destruction where it hurts — in their pocketbooks.

In the 1950's, a real estate developer named Arthur Vining Davis (whose company name is Arvida) purchased 10,000 acres of sawgrass marsh and swampland on the edge of the everglades for development of a planned community. The community of some 40,000 residents was to be built in prime wetlands, situated a few feet above the Biscayne aquifer, the sole source of drinking water for Broward County. Because the Weston development was conceived in the early days of wetlands regulation, the government did little to modify or review the project. Local public outrage, however, was strong enough to stop it for almost a decade and inspired passage of an 18 month moratorium on new construction in the area. Despite the local opposition, though, the project was eventually begun.

Just after its inception, the Broward County Planning Council had harsh words for the development. Weston was located in an area of standing water on the eastern edge of the Everglades—a wetland by anyone's definition. The Council stated, "By all traditional standards, the area is the type of environment in which development should be discouraged on both the short and long term basis." The site was deemed highly prone to severe and frequent flooding, and the Council suggested sales contracts should include warnings about the risks involved in purchasing such property.

The developer's high-tech solutions to the problems of building in wetlands included scraping rich organic muck from the surface, blasting and dredging canals and lakes, and using the spoil as fill on which to construct houses. Next, a system of pumps would help the lakes and canals route water out of the community. Weston would then be extensively landscaped. Instead of a natural wetland with native vegetation supporting native wildlife, the 10,000 acres would become a carefully manicured suburbia of exotic trees and shrubs. The elaborate flood control and design needs of the community would end up costing its residents \$330 million. Despite its elaborate construction, Weston quickly outstripped its water supply. The South Florida Water Management District has determined that the shallow aquifer (which had once been recharged by the wetland before the development occurred) can not accommodate any new wells. Engineers for Arvida agree, and now the residents must tap into a brackish aquifer some 1000 feet below ground. The new supply system, including a desalination plant, will cost the community \$270 million plus additional operations and maintenance costs.

In 1987, the Corps examined a portion of the property and found 3800 acres of wetlands. The Corps issued several cease and desist orders to bring the rest of the project into review under Section 404 regulations. Arvida stopped only when threatened with large fines for their violations. A subsequent meeting between high Corps officials and Arvida resulted in a reduction of the jurisdictional property to 1650 acres.

The tragic loss of almost 7,000 acres of wetlands, in total, to feed the profit venture of one real estate company has led to high costs of living for residents. Flood control and water supply

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must now be made up in expensive systems. Tax structures incorporate these costs in a blatant admission of the value of wetlands for flood control. Managers admit that tax rates are lower for larger properties because they absorb more water and require less mechanical drainage. The costs of this project are passed on to sometimes unwary buyers. Residents of Weston face a debt of \$600 million to be paid off with interest over 30 years. The elaborate service systems will also increase utility bills. Water, for instance, will now cost \$65 per 10,000 gallon rather than \$30 under a more conventional system. In many cases, taxes have also increased by more than 100% in the last three years. In response to the unexpectedly high costs of living in this community, more than 1000 residents have formed an association to make their complaints known.

The sad fact of the Weston community is that wetlands destruction is costly. In some cases, those costs are born by innocent victims of real estate marketing. Section 404 of the Clean Water Act is designed to help avoid these problems, but can only work when the regulations are enforced. In this case, the laws were not upheld. As a result, residents pay the cost and the developers run away with the profits. Where some have claimed the Section 404 program is too far reaching and is implemented by overzealous bureaucrats, the truth is that this project - as with many others - has sailed through unscathed the few regulatory restrictions it has faced. Yet in exchange for that freedom to destroy substantial tracts of wetlands, there has been very little compensation.

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April 1993

The Rest of the Story: The Crawfish Caper Melvin Wayne Domingue, St. Martin Parish, Louisiana

The Story:

Mr. Melvin Wayne Domingue found a parcel of land in south Louisiana on which he hoped to farm crawfish. He cleared the land of some trash, at an alleged cost of \$20,000, and began building and restoring levees in preparation for the venture. He was warned shortly thereafter by the U.S. Army Corps of Engineers that his property was a wetland and might require a Clean Water Act Section 404 permit for his activities. He continued the work and was issued a Cease and Desist order. Mr. Domingue then applied for an "after-the-fact" permit to continue to construct and maintain the levee system creating a 35 acre freshwater impoundment for crawfish production. The Corps denied the permit. The crawfish caper has since been publicized by the media and members of the Louisiana Congressional delegation as an example of why the Section 404 program needs to be radically overhauled. According to Senator J. Bennett Johnston "...some provision should be made for landowners like Domingue who make such improvements."

The Rest of the Story:

Mr. Domingue has been portrayed as yet another victim of over-zealous regulatory action by the Corps of Engineers and EPA. Yet even Mr. Domingue concedes that the land in question is a wetland. The site sits in a lowland with little drainage and is covered with wetland vegetation. The levees that were constructed were as high as seven feet—far more than required to cultivate crawfish—and were more likely designed to keep water out rather than to keep it on the site. The land is indisputably one within the jurisdiction of the Section 404 regulations.

After visiting the site and noting the illegal activity, the Corps posted a warning that the levee work might require a permit under Section 404 of the Clean Water Act. At the next visit, the warnings had been removed, and construction continued. The Corps continued to post warnings while trying to locate the property owner and the individuals responsible for the activity. Eventually the Corps identified Mr. Domingue as the person responsible for the work, and issued him a Cease and Desist order.

The owner of the land, however, remained in question. The previous land owner defaulted on a loan and the property was repossessed by a Lafayette bank. Although the exact nature of the transaction is unclear, Mr. Domingue arranged with the bank to use the land for crawfish production prior to actually purchasing the land. The agreement included an eventual price of \$850 per acre, but after learning that the site would require a permit for his activities, he returned to the bank and negotiated a new price of only \$350 per acre.

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The "after-the-fact" permit was ultimately denied based on a number of factors. Biologists familiar with the site have said that the property is not suitable for crawfish farming because it would be very difficult to drain the land sufficiently during summer months to sustain crawfish. The levee system was presumably constructed to help make it possible to dry the land, but any efforts to raise crawfish at this site would be risky. Mr. Domingue noted in his application that there were alternative, less damaging sites available in the area, and this was a major factor in the permit decision. In fact, crawfish farming is not a wetland dependent activity and the operation would likely have failed after substantially disturbing the wetland.

Several other factors were involved in the permit decision. First, the property was a bottomland hardwood forest and cypress swamp with a wide diversity of vegetation communities. The permit review considered the property valuable for providing many important wetland functions, including floodwater storage for the Vermilion River Basin and important nesting and wintering habitat for wading birds and waterfowl. The site also falls within an area known as Cypress Island, an important wetland listed for consideration as part of the National Priority Conservation Plan under the Emergency Wetlands Resources Act of 1986. It is also very close to the state's largest white ibis rookery.

Far from overzealous, the Corps has tried to work with Mr. Domingue to develop an alternative plan for his crawfish operation. With the help of scientists, the Corps developed a proposal for a small design change which, if agreed to by Mr. Domingue, would have precluded the need for a permit. Mr. Domingue steadfastly refused to incorporate these changes, however, and ultimately failed to obtain his permit. As for the trash that Mr. Domingue reportedly removed, agency staff have indicated that, while there was some illegally dumped trash on the side of the dirt roads bordering the property, it was a very small quantity that could not have cost \$20,000 for removal.

This story is typical of the half truths associated with ongoing efforts to weaken Section 404. The program was designed to protect wetlands, yet in most cases permits are issued for activities in these important and sensitive areas. The "faceless bureaucrats" in these agencies usually work hard to try to find solutions under which permits can be issued, but they receive little credit from the development community for their efforts. The government has almost always been more than fair in dealing with recalcitrant individuals like Mr. Domingue, and that is part of the reason the country continues to lose almost 300,000 acres of wetlands each year.

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April 1993

The Rest of the Story: St. Vincent de Paul Society

The Story:

In 1989, the St. Vincent De Paul Society began construction of a shelter for homeless people adjacent to a second-hand store it had operated for several years in the Mendenhall Valley of Juneau, Alaska. According to some, the project suddenly encountered difficulty when federal regulators determined that the final phase of construction would involve the filling of a small wetland and required a Section 404 permit before the work could go forward. Opponents to the Section 404 wetlands protection program have boldly depicted this incident as yet another example in the long litany of Section 404 "horror stories." In this case, so the story goes, wetlands regulators victimized the homeless, all for the sake of protecting a small, worthless wetland.

The Rest of the Story:

Although characterized by its champions as stopping wholesale the construction of a homeless shelter, the Section 404 permit in question actually involved the construction of a 26-space parking lot outside the shelter. Construction of the shelter itself did not impact any wetlands, and thus never triggered any provisions of the Section 404 program.

So what really happened? Because of the size of the shelter, the City of Juneau's building codes required construction of the parking lot. However, as far back as 1987, the U.S. Fish and Wildlife Service had studied the site, determined that there would be a wetlands impacted, and that these wetlands provided important hydrologic and water quality functions. The Service also concluded that the area supported a valuable salmon and trout fishery, as well as providing habitat for several species of birds and other wildlife.

In an attempt to resolve the impasse on how to provide parking facilities, yet protect the wetlands in question, the Fish and Wildlife Service suggested that, because families at a homeless shelter would probably not require a parking lot of the size envisioned, the Society should approach the City of Juneau and request a variance to reduce the size of the parking lot. By constructing a smaller lot that would not impact the wetland, the Service correctly argued that the need for a Section 404 permit would be obviated. The permit decision was then put on hold in order to allow the Society time to apply for a variance. Although the Society agreed with the Fish and Wildlife Service that the parking lot requirement was indeed excessive, it never applied for the variance. Thus, the project went forward and when the time came for the Army Corps of Engineers to issue its Section 404 permit, the Service refused to challenge the decision, because it would have slowed down the project substantially. Shortly thereafter, the Corps issued the permit and the full-scale parking lot was constructed.

-more-



The facts of this case illustrate that the Section 404 wetlands regulations had nothing to do with impeding construction of a homeless shelter, but rather a 26-space parking lot. As for the parking lot, which was—in fact—actually constructed, the loss of the wetland could have easily been avoided and project costs reduced, had there been better advance planning, or, in the later stages through the use of a variance. Unfortunately, the project's proponents refused to elect either of these options but, rather, chose to "pave paradise and put up a parking lot."

For additional information please contact:

Doug Inkley (202) 797-6878
Terry Schley (202) 797-6880
Linda Winter (202) 797-6881
Tony Turrini (907) 258-4800

April 1993

15





U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

June 16, 1995

The Honorable Joseph Biden
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

You have asked us to provide our views concerning the constitutionality of section 5(b) of S. 343, "The Comprehensive Regulatory Reform Act of 1995," now pending before the Senate. As reported by the Senate Judiciary Committee, that section would expand the jurisdiction of the United States Court of Federal Claims (CFC) by amending 28 U.S.C. §1491(a). It would grant the CFC power for the first time to invalidate "any Act of Congress or any regulation or action of an executive department that adversely affects private property rights in violation of the fifth amendment of the United States Constitution." It would also give the CFC new powers to grant injunctive and declaratory relief and to hear tort claims against the United States. We believe this radical expansion of the CFC's authority raises serious constitutional concerns.

First, section 5(b) plainly implicates Article III of the Constitution, which provides that "[t]he judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." Section 5(b) grants the CFC -- an Article I or legislative tribunal -- the power to invalidate acts of Congress that adversely affect property rights in violation of the Constitution. We believe that grant of power probably violates Article III.

In analyzing whether a particular delegation of adjudicative functions to a non-Article III body violates the Article III vesting clause, the Constitution requires that the delegation "be assessed by reference to the purposes underlying the requirements of Article III." Commodity Futures Trading Comm'n v. Schor, 478

U.S. 833, 847 (1986).¹ The authority to declare an act of Congress unconstitutional lies at the heart of the Article III judiciary's constitutionally ordained "province and duty . . . to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Section 5(b) would place this fundamental Article III power in an Article I tribunal. Furthermore, this provision would require some litigants to have their claims heard by judges who are not insulated from "potential domination by other branches of government," Schor, 478 U.S. at 848, and who do not have lifetime tenure as do all Article III judges.

Second, the expansion of the CFC's injunctive and declaratory powers also raises separation of powers concerns. The issue is whether the practical effect of a delegation outside Article III is to undermine "the constitutionally assigned role of the federal judiciary." Schor, 478 U.S. at 851. While section 5(b) would grant the CFC authority only over one set of claims -- fifth amendment claims -- the scope of that grant is significant. The CFC could hear constitutional challenges to any statute or regulation, enacted under any of Congress's powers, involving any department or agency of the federal government, as long as the challenge involves the claim that the government action adversely affects private property. That would give the court government-wide as well as nation-wide jurisdiction over a very important class of constitutional rights cases. By adding to the CFC's existing power to award damages the power to issue injunctions and declaratory relief, it would become indistinguishable from an Article III court in its remedial powers.

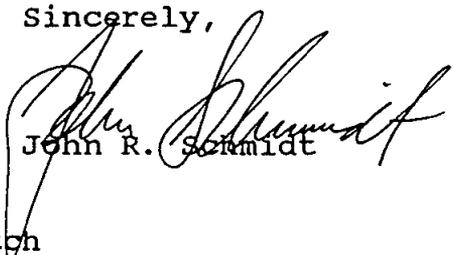
Finally, modifications to S. 343 which are currently being considered would only exacerbate these concerns. The bill as reported out by the Judiciary Committee granted the CFC jurisdiction over claims seeking the invalidation of statutes or regulations that "adversely affect[] private property rights in violation of the fifth amendment of the United states

¹ Some individuals have apparently turned to the so-called "public rights" doctrine in support of this delegation of authority to the Court of Federal Claims. Under that doctrine, all federal adjudication would be required to be conducted in an Article III forum except adjudication involving a "public right" which could presumably take place wherever Congress prescribed. See Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856). Although this approach was followed in Northern Pipeline Constr. Co v. Marathon Pipe Line, 485 U.S. 50 (1982), the Supreme Court has more recently moved away from the public rights doctrine. In 1985, the Court dismissed that approach as formalistic and admonished that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985). Schor builds on that approach.

Constitution." A June 12 draft staff revision of the bill authorizes the CFC to invalidate any statute, rule or agency action that "adversely affects private property rights in violation of the United States Constitution." It is unclear why the staff revision seeks to expand the CFC jurisdiction beyond the Fifth Amendment to all other provisions of the Constitution or what effect such an expansion may have. However, it is conceivable that if the draft revision becomes law it would be interpreted as granting the CFC jurisdiction over First Amendment claims and other constitutional claims far beyond its traditional jurisdiction so long as such claims involve private property rights.

In closing, the Department has serious constitutional concerns regarding section 5(b) of S. 343. Because of those concerns and the policy concerns I have already communicated to you, the Department of Justice continues to strongly oppose S. 343 as reported by the Senate Judiciary Committee.

Sincerely,


John R. Schmidt

cc: The Honorable Orrin Hatch
Chairman
Committee on the Judiciary
United States Senate



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

DATE:

5/30

NAAG?
economist-Brookings?
Sax/Michelman
budget Folger-

TO:

Marvin Kristov

FAX NUMBER:

61647

TELEPHONE NUMBER:

NUMBER OF PAGES (including cover):

3

MESSAGE:

57414

FROM:

Michael Mielke / Tom Jensen

TELEPHONE NUMBER: (202) 395-5750

FAX NUMBER: (202) 395-3744

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY

May 26, 1995

MEMORANDUM FOR TAKINGS TEAM MEMBERS

FROM

TOM JENSEN *TJ*

RE

PROPOSED SENATE EPW COMMITTEE TAKINGS HEARING

As we discussed on the call this morning, I would be grateful to receive by COB today your comments on the attached preliminary draft plan for two hearings on the takings issue. This draft was received from Senate EPW Committee staff, and they have requested our input.

Please fax or E-Mail your thoughts to me. FAX: 395 3744; EMail: Jensen_T@A1.EOP.GOV

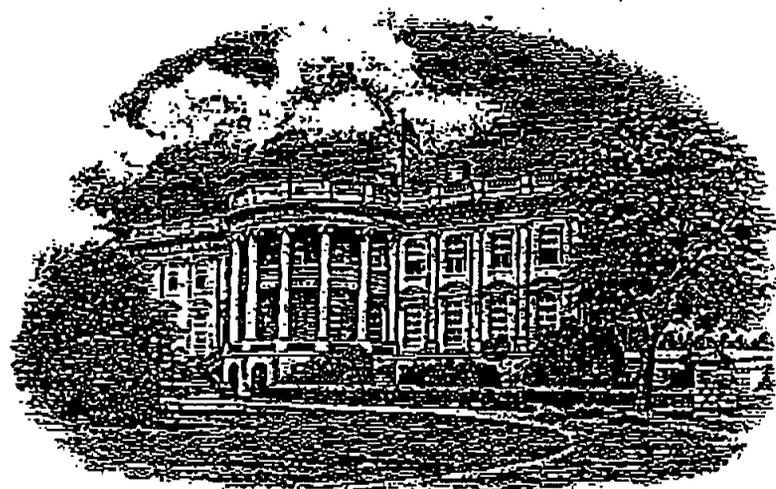
Thanks, have a great holiday weekend.

WHITE HOUSE OFFICE ON ENVIRONMENTAL POLICY

TO: Marvin Krislov
 FROM: Tom Jensen
 DATE: 6/13/95
 FAX: _____

Number of pages including cover: _____

COMMENTS: _____
Tauzin letter take two!



Jackson Place Office
 722 Jackson Place, N.W.
 Washington, D.C. 20503
 FX: (202) 456-0753

THE WHITE HOUSE

WASHINGTON

Dear Representative Tauzin:

Thank you for your letter regarding my remarks to the American Society of Newspaper Editors in Dallas. Your letter raises several questions based on a newspaper account of my statements about the House-passed "takings" bill. It appears that some of the questions in your letter arise from inaccurate press coverage of my remarks. In an effort to avoid further confusion, I am enclosing a copy of my comments. The discussion of the House takings bill appears at pages 15-16.

We are in agreement on the fundamental need to protect this nation's private property owners and to ensure that government action does not have unwarranted effects upon private property. I respect the balance between individual rights and community responsibilities provided by the courts in this area and am unwilling to agree to supplant it with a one-size fits all approach. As you know, I strongly disagree with the approach reflected in the House-passed takings bill and other similar compensation legislation. As written, these bills represent a marked departure from our constitutional traditions and our civic responsibilities.

As evidenced by my remarks, I did not suggest that the House bill would directly affect local zoning, but rather that pending compensation bills -- at any level of government -- are inherently flawed because they prevent necessary and time-honored protections for the public.

On another point, you suggest that the House legislation as passed is of limited scope because it is aimed only at the effect of government action regarding wetlands, endangered species, and western water rights. But that scope is already quite

Rep. Tausin
Page Two

broad and some versions of pending legislation are still broader.

Like you, I am concerned that the debate over these bills is being fed by misleading information. For example, some proponents claim the bills simply protect existing constitutional rights to compensation. In fact, the bills go far beyond established constitutional standards and impose unprecedented, expanded standards for compensation. These expensive standards would not only undermine important public programs and values, but would impose massive new financial burdens on the American taxpayer.

I am absolutely committed to the protection of property rights, just as I am committed to the protection of human health, public safety, the environment, and other values important to the American people. My Administration has taken many steps to address the impact of regulation on property owners, with specific attention to homeowners, family farmers, and small businesses. I hope we can work together to find additional ways to provide real protection for property rights and other values cherished by the American people.

Sincerely,



The Honorable W.J. "Billy" Tausin
House of Representatives
Washington, D.C. 20515

EXECUTIVE OFFICE OF THE PRESIDENT

16-Jun-1995 12:38pm

TO: (See Below)

FROM: Thomas C. Jensen
Council on Environmental Quality

SUBJECT: Takings team meeting

The EOP-Agency takings team agreed to meet in person on Monday, at 2:00 p.m., at the CEQ conference room (722 Jackson Place) to discuss the upcoming Senate hearings on the takings issue.

The draft agenda is as follows:

1. Adopt agenda
2. Update on hearing schedule and witnesses
3. Discussion of Administration message
 - how to allocate message among Admin's witnesses
 - how to reinforce, avoid redundancy and conflict
4. Schedule for testimony preparation; writing assignments
5. Other business

Please give me a ring or E-mail with your comments or agenda suggestions.

Distribution:

TO: Sally Katzen
TO: Tracey E. Thornton
TO: Martha Foley
TO: Dinah Bear
TO: Michael L. Goad
TO: Carol R. Dennis
TO: Ronald K. Peterson
TO: Marvin Krislov
TO: FAX (92608046, Gary Guzy)
TO: FAX (95140557, Bess Osenbaugh)
TO: FAX (95140557, Jim Simon)
TO: FAX (95145499, Jill Gibson)
TO: FAX (97610270, Lance Wood)
TO: FAX (56853, Mike Toman)
TO: FAX (97205437, Eric Olson)
TO: FAX (92191220, Ed Cohen)
TO: FAX (97036935407, Jim VanNess)
TO: FAX (92087508, Joe Sax)

TO: FAX (97615096, Mike Davis)
TO: FAX (93953744, Tom Jensen)
TO: Thomas C. Jensen

CC: Kathleen A. McGinty
CC: Shelley N. Fidler
CC: Michelle Denton

Oversight hearings on proposals to supplement the legal framework for private property interests to Federal environmental laws
DRAFT #4

Proposed Hearing #1 -- Full EPW Committee

Date: June 27, 1995 (Monday 9 AM)

Topics: (1) Position of Administration on private property legislation; (2) Baseline -- overview of (a) implementation of environmental laws on private property, (b) administrative initiatives to analyze and mitigate effects of laws on private property, and (c) currently available remedies, in particular Just Compensation Clause of Fifth Amendment; and (3) views from and experiences of States on private property legislation

Senators who have requested to testify:

Sen. Hatch

Task: Testify on topic not bill
Talks / Prep

Witnesses:

Panel One -- Views of the Administration

John R. Schmidt -- AAG, DOJ

Panel Two -- Baseline

Joseph Sax -- Counsel to Secretary of the Interior

Roger Marzulla -- former AAG, ENRD

Frank Michelman -- Harvard Law Professor

Jonathan Adler -- Competitive Enterprise Institute

Panel Three -- Views of affected interests

Edward Thompson, Jr. -- Dir. of Public Policy, American Farmland Trust

Jim Little -- National Cattlemen's Ass'n 347-0228

or Jon Doggett -- American Farm Bureau Fed'n 484-3619

Jim Ervin -- President, National Homebuilders Ass'n

Councilwoman Janice Lowe -- Friendswood, TX/NLC

or Councilman Pullman, Washington/NLC

or Rep. Richard Russman -- NH/NCSL

Samuel Pryor -- Pres., Appalachian Mountain Club

or American Public Health Association 789-5600

Proposed Hearing #2 -- Full EPW Committee

Date: July 12, 1995

Topic: Proposals for new statutory compensation remedy

Witnesses:

Panel One -- Potential budgetary impacts

Paul Tsongas -- former Senator (D-Mass.)

Billy Tauzin -- Representative (D-La.)

Panel Two -- Effects on Federal environmental programs

(fiscal, regulatory, and litigative)

Gary S. Guzy -- Deputy General Counsel, EPA

Dan Beard -- Commissioner, Bureau of Reclamation

Mike Davis -- Director, Wetlands Program, ACE

or OMB rep (if Panel One does not materialize)

Poss. Lois Schiller - get ADR

Agreements
was done properly
measures
EPW
state

Adm's
best friend
industry

What are the
institutions
Luther
re-structure
equity
Luther

Many reasons
state

Nat. Inst. to
P. Shore

S. 605 - should
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practices

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SW.

APR 2000
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restructure

Panel Three -- Effects on key property relationships

(relationships between ensuring single property owner does not bear inequitable burden and maintaining government's ability to act effectively to curb harmful property uses and serve the public welfare, between rights and responsibilities of individual property owners, and between property rights of single landowner and those of adjoining landowners)

Richard Lazarus -- Washington Univ. Law Prof.

Jerold Kaden -- Harvard/MIT -- Lincoln School of Design

or John Humbach -- Pace University Law Professor

or Carol Rose -- Yale Law Professor

Richard Epstein -- University of Chicago Law professor

or Gideon Kanner -- Loyola (L.A.) Law Professor

or Tom DiLorenzo -- Loyola (Ball.) Law Professor

Roger Pilon -- CATO Institute

Proposed Hearing #3 -- Full EPW Committee

Date: July 17-18, 1995

Topics: Non-compensatory proposals (statutory duty for agencies to analyze effects of actions on private property, claim procedure revisions, and preclusions against nonconsensual entry onto private property)

Witnesses:Panel One -- Views of the Administration

Lois Schiffer -- AAG, ENRD

Panel Two -- Experiences of the States

Tom Udall -- Attorney General, New Mexico

or South Dakota Attorney General

Marc DelPiro -- California Resource Control Board

Speaker Mark Killian -- Arizona House of Reps

Gale Norton -- Colorado Attorney General

Panel Three -- Views of outside experts

Jerry Jackson -- Skadden Arps (371-7000)

Dick Stewart -- former AAG, Bush Administration

Fred Bosselman -- Chicago-Kent Law Professor

Robert Meltz -- Legislative Attorney, CRS

Panel Four -- Views of Affected Interests

Nancie Marzulla -- Defenders of Property Rights

George Miller, takings lawyer -- Hogan & Hartson

John Echeverria -- NAS

American Planning Association 872-0611

**EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY**

June 7, 1995

MEMORANDUM FOR TAKINGS TEAM MEMBERS

FROM TOM JENSEN

RE ATTACHED DRAFT TALKING POINTS

As we discussed on this morning's conference call, I'm distributing for your review and comment a set of draft talking points prepared by Interior.

I think he's done a good job of capturing the overall message. All I'd add is the budget analysis prepared by OMB (which is now official!).

Please review these and send your comments, if any, to Ed Cohen at 208 4123.

Thanks.

Talking Points on Property Rights

The House has passed a bill that would require compensation whenever an action under the wetlands programs, the Endangered Species Act, or (for water) federal reclamation or land use laws, diminishes the value of a portion of a property by 20%. An even broader bill is pending in the Senate which would require compensation for an agency action under any federal law where the value of a portion of a property falls 33%.

These proposals are a bad idea because -

- They ignore the interests of other property owners and of the public.
- They force a choice between imposing enormous costs on the taxpayer or foregoing protection of the community and the environment.
- They require payment for losses that are speculative.
- They ignore 200 years of Constitutional tradition.
- They will create a claims industry that will enrich lawyers and appraisers and generate huge new bureaucracies.
- They are a budget buster.

A property owner never has had an absolute right to use property without regard to the impact of that use on other landowners or the community. Over a hundred years ago, the Supreme Court said, "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

- The fundamental flaw in these bills is that in general, the only factor which triggers the compensation requirement is whether the value of property is decreased.
- This "one-size-fits-all" prescription for takings cases ignores the array of other considerations to which the courts have looked for over 200 years, including the merits of the government's action, whether limitations were in place or could have been

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- The fundamental flaw in these bills is that in general, the only factor which triggers the compensation requirement is whether the value of property is decreased.
- This "one-size-fits-all" prescription for takings cases ignores the array of other considerations to which the courts have looked for over 200 years, including the merits of the government's action, whether limitations were in place or could have been

anticipated at the time of purchase, and the impact of the activity which the claimant wants to undertake on other property owners.

These bills will result in huge claims being made where the Constitution does not require compensation, where the losses are highly speculative or where payment is totally unwarranted.

- The bills are drafted in such a way that a property owner will be able to show a 20% or 33% reduction in the value of a "portion" of a property for countless types of government actions.
 - * If an owner of a 1,000 acre parcel of land is denied a permit to fill a wetland comprising only 1 acre of his property, he may file a claim under these bills with respect to only the 1 acre of land, thereby making the payment for a 20% or 33% loss in value thresholds almost irrelevant.
 - * This is contrary to decades of Supreme Court cases which have looked to the impact on the property as a whole to evaluate whether there has been a taking.
- Neither bill requires a claimant to show actual losses. Rather, simply showing that a government action prevented the claimant from undertaking some hypothetical activity at some time in the future could be sufficient to collect from the government.
- The government could be required to pay compensation under the Senate bill if a claimant loses a government subsidy as might occur if water deliveries are reduced to stop wasteful irrigation practices that cause excessive runoff resulting in water pollution.
- Exceptions to compensation requirements in the bills would not be sufficient to prevent unwarranted claims.
 - * The "nuisance" exceptions provided in the bills are technical and very limited, and ordinarily do not cover cumulative or long-term health and safety risks, civil rights protection or other vital protections.

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 - * The "nuisance" exceptions provided in the bills are technical and very limited, and ordinarily do not cover cumulative or long-term health and safety risks, civil rights protection or other vital protections.

- * Other exceptions in the House bill are vague, full of potential loopholes and would be subject to endless litigation.

If government is faced with the Hobson's choice of paying questionable claims or foregoing important health, safety and environmental regulations, neighboring property owners could be severely harmed. For example, prohibitively costly claims could be filed where

- Government requires controls on a strip-mining operation to prevent toxic waste flowing in to adjacent rivers.
- Restrictions are imposed on the movement of animals and plants necessary to prevent the spread of dangerous disease.
- Government prohibits the siting of a toxic waste dump adjacent to a school.

Indeed, these bills are so poorly conceived that a property owner could claim that the value of his/her property interests has been reduced where government -

- Bans assault weapons (potential claimants include manufacturers of weapons or ammunition)
- Requires that a restaurant expand bathroom facilities to accommodate persons in wheelchairs (claims for lost table space)
- Re-routes aircraft to reduce noise in residential areas (or refusing to re-route traffic)
- Establishes acreage allotments and marketing quotas for tobacco crops

These bills are budget busters.

- The House bill alone would cost taxpayers over \$28 billion over the next 5 years.
- The Senate bill is much broader in scope and will cost many times that amount.

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Contrary to popular belief, it is not the "little guy" that would be helped by these bills. The bills impose very sophisticated and complex legal questions that will create a business boom for lawyers and appraisers and provide large landowners and land speculators new opportunities to file claims against the government.

- Huge bureaucracies would be created to process claims.

While these proposals apply primarily to the federal government, it would only be a matter of time before they also spread to state and local government activity as well.

- Advocates will argue that if a 20% reduction in value standard is OK at the federal level, why not the state and local level as well?
- Basic zoning and other local land use planning functions of local government -- which represent more than 90% of governmental land use planning activity -- will become things of the past.
- Citizens will lose the ability to control the growth and development of their communities.

There is a better way.

- We need to examine federal laws to change those that unnecessarily burden landowners.
 - * The Administration already is taking steps to give relief to most homeowners from the requirements of the Endangered Species Act and wetlands regulation.
- We need to improve access to the courts for landowners who have suffered a "taking" as defined under the Constitution.
- The Administration has been working closely with the courts on approaches to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute techniques where appropriate.

June 13, 1995

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June 13, 1995