Evolving Environmental Law: Impacts on Private Landowners and Public Uses *

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Introduction

In the summer, I watch hummingbirds fly and hover near a feeder that my wife, Dot, carefully fills with nectar and hangs in view of the kitchen window of our country home in rural Georgia. The store-bought nectar is colored red, since people think that hummingbirds find that color attractive. Business around the feeder picks up following rains that wash away the birds' naturally-provided food. It is then that the feeder becomes crowded and a hummingbird struggle ensues. Almost always, there is at least one bird that attempts to control access to the feeder—what naturalists sometimes call a dominant male.

The dominant male, seeking to maintain control, will fly rapidly to the feeder, place its beak into the small opening for a quick draft of nectar, and then fly to a nearby perch where it vigilantly monitors the feeder. When other birds attempt to feed, the monitor quickly tries to intercept and force them away from the stock of sweet food. But, while the monitor engages in dogfights with one bird, another often swoops in and takes its fill.

Hummingbirds have no way to stake a claim to the feeder. So far as we can tell, hummingbird communities have no constitution that reflects evolved rules for establishing a social order. Most likely, a long process of adaptation and selection has generated hummingbirds capable of living in a world where nourishment is a common-access resource—a commons. Hummingbirds cannot store nectar for tomorrow; even their homes are constantly besieged. They live a life of flight, engaging in a constant search for nourishment to feed their high-energy lives and, at times, fighting for temporary control of valuable resources.

People are like hummingbirds in their attempts to use environmental resources. But unlike hummingbirds, people have built institutions that take the edge off a frantic commons struggle. People have found ways to improve land, invest in herds and crops, harvest, store, transfer to others, keep some and pass some along to their heirs. People invented property rights and the obligations that go with them. If

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rightholders do smart things with their environment, they reap rewards; if they do dumb things, they pay damages. Private property rights are the most powerful social invention ever to develop in man's pageant on this earth. The environmental tensions that affect agriculture and other natural resource activities begin and end with struggles over the definition and enforcement of property rights. My comments focus on crucial elements of the struggle. Starting with an explanation of private property rights, how they evolved and how they worked to secure environmental assets, I then describe the decline of those rights, the rule of law and the rise of the rule of politics. Along the way, we will observe a tendency for hummingbird economies to surface in our world, and then will note a growing trend that suggests a return to a world where private property rights again provide environmental security and a basis for the creation of new wealth.

Property Rights and Common Law

Private property rights did not evolve easily and are not well understood. Indeed, some are so misinformed as to believe that private property rights are the villain in the environmental saga; that politics and command-and-control are the solution. It is little wonder. Most people today have matured in a world governed by the rule of politics. Few can recall the time when the rule of law governed the use of property. Because of this, private property is constantly threatened. But even for people, all environmental problems, indeed all problems of resource use, begin with a commons and end with institutions—evolving environmental laws—that define and protect environmental rights.

Until around 1970, environmental rights were well established in this country by a system of common law, state statutes and local ordinances. No, environmental protection did not begin with the U.S. Environmental Protection Agency (EPA). Environmental law had been evolving for centuries. Until 1970, common-law rights protected citizens from unwanted air and water pollution, provided havens on public land for endangered species, and provided protection for wetlands and sensitive habitat through systems of purchased easements. Multi-state and regional compacts provided the means for managing entire river basins. The emphasis was on outcomes—not inputs, rules, technologies and permits.

Things operated differently in the pre-EPA days. If a large number of people were threatened by pollution, they could and did bring public nuisance actions against the polluter. Private nuisance actions were brought by individual occupiers of land who were harmed or threatened by pollution. The law, which was tailored to fit the controversy at hand, was tough. The remedies included injunction, which means operators were shut down, and/or damages to be paid to the aggrieved parties. The system, which was based on private property rights, was not perfect. But if someone wanted to alter land use, the process was rather simple. You found the landowner, negotiated with him or her and, if successful, purchased the rights to manage the land in your own way.

How did it work? Let me take you back to Jones County, Georgia. Along with the hummingbird feeders, a few bluebird boxes stand on the land that Dot and I own in rural Georgia. Cultivated plants, commonly called "butterfly shrubs," attract fragile insects to the porches of the old house where we spend our summers. These small but important assets are located on our property. The place has been in our family for almost 100 years; it is not for sale.

Our right to have bluebird boxes enjoys the security of law common to the people in our community; this provides a zone of autonomy that defines part of the essence of our life. The law common to the people is the same kind of law that Justinian's scribes recorded for the Roman Empire in 534. Environmental law is not new. The law common to the people is law discovered by community judges; it reflects common sense and rules of just conduct. Among the rights common to the people of Jones County we enjoy is the right not to be disturbed or harmed. Our neighbors enjoy similar rights. They have the right not to be bothered by us. These rights define zones of freedom and autonomy that allow for self-discovery, creativity and the generation of new thoughts and products.

Rules of common law limit these zones of freedom. If in exercising my freedom to cultivate land, runoff from my land pollutes the drinking water of my neighbor's cattle, my neighbor has a potential cause of action against me. If my neighbor's use of herbicides damages my apple trees, I have a potential cause of action against him. Our free zones are defined by environmental rights. The common-law rights that we enjoy are ancient. They are based on rules that emerged from natural law, which is another way of saying that the law of the land we unconsciously rely on has existed since "time out of mind."

If anyone damages our property or threatens us for having butterfly shrubs and bird feeders, we can call the sheriff and gain protection. We have never had to do that. Our neighbors watch our place, and we theirs. The rights we enjoy are really enforced by our small community, which is unincorporated. Extended lines of kinship and long-standing patterns of land ownership are dominant characteristics of the area. We have no local government. But, the laws we follow and maintain are sanctioned by the sheriff—who carries a gun. The property rights we hold in the community of Round Oak, which is located in Jones County, Georgia, provide us with a private sphere of action, a zone that cannot be invaded by ordinary people without our permission or the permission of our neighbors.

Not too far from our place, a neighbor plants, cultivates and harvests trees. Our neighbor unconsciously relies on the security of property rights when making 15-year plans for improving the soil, selecting seedlings, planting and harvesting. When harvested, the trees make their way to a Georgia-Pacific mill that produces merchant lumber and plywood. Chips from the process are carried by train to a paper mill that converts the chips to energy and paper. The paper mill, located on private property in the next county, discharges waste into the Ocmulgee River.

When I was in high school, some 45 years ago, a good friend was employed by the mill. He and other employees continually monitored the chemistry of the mill's discharge and the receiving waters of the Ocmulgee River. There were no water quality statutes that required this. Owners of land downstream from the mill held the common law right not to have deteriorated water pass their land. If those rights were violated, common law judges could shut down the mill. No government permit gave the right to pollute a river. In the 1950s, private property rights were dominant. Indeed, they were so dominant that some special interest groups began to agitate for federal legislation to secure a stronger voice in determining water quality rules. The easier law of politics began to displace the tougher law of the people.

The railroad that carries the chips is located on private property. The train travels on tracks that are just across the state highway from our place. The highway and its right-of-way are public property. Each year, highway workers come and trim some of my crepe myrtle trees because they infringe on the right-of-way. The highway department never asks my permission. It is serving a larger public interest that competes with my private interest. We ordinary folk understand this, and do not object. We enjoy reciprocal gains. But, the highway department can also only go so far, and it understands this. The zone of public authority is limited.

The railroad was built 120 years ago. The railroad company holds a deed to the right-of-way that has been contested infrequently. My neighbor—the tree farmer—the paper mill, the railroad company, and I enjoy private spheres of action that cannot be invaded by other private parties without our permission. But, we have little reason ever to think about all this. These rules of law are common to the people. They are a vital part of an informal order.

By informal order, I refer to an evolved social order based on rules of just conduct and common sense that are fundamental to a free society. Participants in the informal order follow unwritten rules, often doing so unconsciously. The informal order serves a vital purpose. Otherwise, it would cease to exist. It is economic in the deepest sense of the word. But, its existence can be eclipsed and, indeed, erased by formal actions that rely on statutes, regulations and politics.

The informal order that sanctions property rules and leaves an unspecified but constrained zone of freedom is based on the unanimous consent of rightholders; it is described as relying on a rule of law. The formal order, which depends on statutes and regulations and frequently defines positive rights and corresponding duties, relies on a rule of majoritarian politics. The ground is obviously set for conflict when the two order-generating systems collide. That is where we are in 1997.

Trees, butterflies, blue birds, paper mills, railroad track and land are real things; things that form part of our accumulated wealth. But, the property rights that surround these things are pure abstractions; social inventions that distinguish communities

of human beings from hummingbirds and other life forms. The invisible rights set boundaries that define and protect families, homes, schools, businesses and industrial facilities. Whether defined by the state or merely sanctioned by it, property rights form the basis for all trade and commerce. Indeed, the things we call property are valuable because of the underlying rights that connect the things to specific human beings.

Dot and I speak of our country home. My neighbor talks about his trees. The railroad company speaks of its right-of-way. The sanctity of our rights encourages conservation and long-term planning. Dot and I take pains to maintain our home; we enjoy the place, but we also expect to pass the property rights to our children. The right to exclude and to transfer to others encourages us to maintain assets that might otherwise erode away. Property rights of some type or form provide the foundation of all social life as we know it.

The Roots of the Law

This brief description of life in Jones County, Georgia, could be repeated countless times for just as many other places in the United States. Bundles of private property rights that evolved from custom, tradition and country courthouses form the bedrock of community life and make up a system of private law that, more often than not, silently supports the common transactions of day-to-day life in America. Resorting to litigation is the exception, not the rule. When considered relative to the number of transactions that occur in the course of a normal day, suits over property rights are indeed a minuscule part of private life. This system of law and property rights pre-existed the nation and the Constitution. The surrounding common law can be traced directly to England and a time when there was no national government. Indeed, the concept of nations did not exist at the time of its origin. But, legal scholars can trace what they term "law common to the people" to the dawn of history. The origin of private property rights is simply unknown. In that sense, private property rights per se are not the inventions of governments, parliaments, presidents and kings. They are a social phenomenon, part of a Darwinian process that has everything to do with people, survival and the accumulation of resources. But, they can be and are recognized, sanctioned and formalized by government. Still, we should never confuse law and the theory of society with politics and government.

While rights common to the people did not emerge from governments, governments have much to do with them. Governments were invented to provide more security to rights than might be obtained otherwise and to transfer wealth from one group to another. When governments were invented, shaped and reformed, some founders took pains to restrict government actions that might disturb the sanctity of their private rights. They were fearful of government's redistributional tendencies. The rights protectors attempted to reinforce the process that supported the private property customs, traditions and rules. At the same time, others saw the

machinery of government as a means to achieve another vision, one more favorable to their public property preferences. The issue is control, and the goal is to control and not pay.

Following an ancient struggle on the matter, we find in the Magna Charta (1215) these words supportive of the private meme: *No freeman shall be deprived of his free tenement or liberties or fee custom but by lawful judgment of his peers and by the law of the land.* I note that the term *law of the land* was used at the time to define common law. Four hundred years later, after struggling with a despotic ruler, the people of England wrote their Petition of Rights through Parliament in 1635, which says: *Englishmen are free in their property, which cannot be taken by government.* It is not surprising that the free Englishmen who formed this nation and penned our Constitution wrote what we call the takings clause: *Nor shall private property be taken for public use without just compensation.* There was really nothing novel about the statement, which some of the founders thought to be self-evident and redundant. Law common to the people had been operating in the older colonies for more than a century when the Constitution was adopted. But, those supporting the law of land wanted more assurance that the rule of law would be preserved explicitly in the Constitution. By having the statement included in the Constitution, the chances for survival were enhanced.

Takings clause requirements are extended to the states by the Fourteenth Amendment which says that *"any State [shall not] deprive any person of . . . property, without due process of law."* Indeed, protection of private property from state-government takings is buttressed by state constitutions, forty-eight of which contain takings clauses similar to that found in the federal constitution. In addition, twenty-four state constitutions extend protection to property that is "damaged" by government action, even if it is not "taken."

Repeating these significant social statements does not make obvious the notion that private property rights are a settled issue. Far from it. If that were so, the statements would not be there. The controversies that continue to surround the idea of private property rights suggest that the notion is certainly not all that obvious.

The Decline of Common Law Protection

Wetlands, endangered species protection and statute-based shields that deny common law rights provide fruitful examples for exploring tensions between informal and formal ordering systems. With endangered species, Congress, by statute, has empowered regulators to engage in activities that can and do interfere with traditional common-law rights. In the case of wetlands, regulatory agencies, acting as agents of Congress but without explicit statutory authority, have defined activities that allow for the attenuation of private rights. In addition, the Clean Water Act and a host of state legislation have taken environmental rights previously held by ordinary people.

For example, until 1972, citizens in Illinois could and did bring common law suits against polluters in Wisconsin who damaged Chicago's drinking water. They could expect to, and did, receive redress. Those environmental rights were taken by the 1972 Clean Water Act. Today, matters involving interstate pollution are in the hands of federal regulators. If Milwaukee meets EPA mandates but still deteriorates Chicago's drinking water, Chicago has no redress.

At common law, owners of adjacent land could and did bring suit against hog farmers if odors and other unpleasantness reduced the value of land or interfered with the enjoyment of property. Today, rightholders in 35 states cannot readily bring action against neighbors who operate confined animal feeding operations that inflict uninvited environmental costs on them. The polluters are shielded by statute. Private property rights have been converted to public rights and transferred to administrative agencies. A government permit is all that is needed; operators of confined animal feeding operations no longer worry about common law suits. They have a new and perhaps more costly worry—making the political process work in their favor.

This conversion of private to public rights expanded significantly in the 1970s and 1980s. Consider my country home in Georgia. If the American bluebird becomes listed as endangered, a conversion of rights occurs immediately. Agents of the U.S. government can dictate what we can do on our land in Georgia. Bluebird boxes will disappear overnight. If wetlands are found on my neighbor's land, then federal authorities can mandate how and where my neighbor will plant and harvest trees. Taking an expedient view, the logic of these mandates rests on the notion that politics should override the law of the land when important social benefits are at stake. Staying with expediency, others see the same actions as an unfair infringement of their property rights. If previously held rights are to be transferred, then the prospective owner should be willing to pay for the rights received. Otherwise, the transfer will not be valid in a common law sense.

As a result, people in my region are wary about providing habitat for the red-cockaded woodpecker, since they will lose the use of a large swath of land if the woodpecker is discovered. Indeed, one well-known conservationist, Ben Cone, of North Carolina learned this the hard way (Welch, pp. 151-197). Just as in the Pacific Northwest, timber operators revise their harvest plans and, in some cases, clear cut to avoid encounters with wetland regulators and endangered species. Species habitat is lost. Affected land values fall and previously profitable ventures become loss leaders.

Regulatory U-Turns and Property Rights Shifts

The U-Turn. The huge increase in environmental rules that dramatically affect the status of rights that were once private contributes significantly to a vibrant and highly vocal national property rights movement that is successfully obtaining relief

in courts and state legislatures. Even Congress has finally heard the voices of ordinary people who say "Enough is enough." But the two major topics which seem most inflammatory to farmers and ranchers, endangered species protection and wetlands, were not always controversial topics. The controversy arose when politicians substituted the rule of politics for the rule of law. That is, when the status of private lands rights shifted to become public property.

The Endangered Species Enforcement Shift. Federal statutes protecting endangered species have been on the books for almost 30 years, but few people were bothered by the law until recently. The reason for that is quite simple. The language of the first Endangered Species Act of 1966 and later versions of the law emphasized government purchase of sensitive lands, which were then set aside as a habitat for the targeted species. When government wanted private land for a public purpose, it paid the owner. Takings was the default position.

About 1985, a new property rights regime emerged. Enforcement of the Endangered Species Act took a U-turn. In addition to acquiring land through the market, the federal government began to use its regulatory powers to acquire land rights. A system of feudal land-use rights, public property, replaced private property rights. Under the new regime, government assumed the position of superior owner and dictated a system of actions to be followed by the citizen-tenant. The bundle of private property rights held previously by landowners was sharply reduced.

But before the U-turn, and even after, the purchase of habitats for the preservation of native endangered species drew on the 1964 Land and Water Conservation Fund Act (LWCFA), which created the Land and Water Conservation Fund (LWCF). This fund was established "for the acquisition of land, waters, or interests in land or waters .... for any national area which may be authorized for the preservation of species of fish and wildlife that are threatened with extinction (*Land and Water Conservation Fund of 1964*)."

The Act appropriated $15 million from the Land and Water Conservation Fund for such purchases. The "taking" of listed species was prohibited only on federal lands that were designated as wildlife refuges (*Endangered Species Preservation Act of 1966*). Since establishment of the LWCF in 1964, some $3.6 billion have been used to purchase sensitive land, and another $3.2 billion was allocated as matching funds for states to purchase land (National Research Council). Currently, the Fish and Wildlife Service maintains 89 million acres in its 472 wildlife refuges. But, the purchase of land was controversial to ranchers and farmers in the West and those in the Sage Brush Rebellion who saw even more private land falling into government hands.

As the environmental movement shifted into high gear during the 1960s and 1970s, federal land management agencies steadily increased their land base. When

private land was desired for public purposes, the land management agencies purchased it. From 1965 to 1979, total purchases increased from an average of 729 acres per year to 258,270 acres per year (National Research Council). By the mid-1970s, the wildlife refuge system had grown to more than 30 million acres. The system continued to grow in the late 1970s under President Carter, who added 12 million acres by Executive Order in 1978. In 1980, the Alaska National Interest Lands Act designated another 42.9 million acres of Alaskan territory as refuge lands. By 1980, the Fish and Wildlife Service's land base stood at 87 million acres (Shanks).

The potential for property rights takings emerged in 1980 when Congress cut appropriations to the Land and Water Conservation Fund. Land purchases fell to an annual average of 145,000 acres, down by almost 100,000 acres from the 1979 level (National Research Council). The Reagan administration brought a change in policy, largely as a result of Western concerns about the continuous expansion of public land ownership, and began to sell public land. A moratorium was placed on Land and Water Conservation Fund appropriations.

The government purchase of private land rights came to a halt, but the political mandate to provide habitat for endangered species continued apace. No longer constrained by budgets, the land control agencies found it easier to designate more land as serving the public purpose. Expansion of public ownership was replaced with expansion of takings.

The Wetlands U-Turn. What about wetlands? Examination of the story reveals another U-turn in property rights definition. In 1990, Congress established the Wetlands Reserve Program. The 1990 legislation stipulated that one million acres of wetlands be enrolled over a five-year period, beginning in 1991, by purchasing easements and property rights. No appropriations were made in 1991 but, in 1992, $46 million was allocated for the purchase of private land rights. Some 2,730 farmers expressed interest in selling easements on 466,000 acres (Dunlap; National Research Council). The program was not controversial. It was based on common sense and common law. You do not reap where you have not sown. There were no takings.

Unfortunately for owners of private land, the Wetlands Reserve Program died because of its great success. Far more farmers submitted offers to sell than appropriated funds would support. Funding ended, but the urge to set aside wetlands did not, especially when the price was zero. Eventually, President Bush made his famous pronouncement, "No net loss of wetlands," and the bureaucratic transmission shifted to high gear. Without funds to pay due compensation, private property rights were taken to serve the public interest.

With the regulatory process in high gear, and without the need to pay real money for property rights, the definition of wetlands expanded (Laffer). At one point, the definition included land that was dry 358 of 365 days in a year. Then,

interpretation of language in the Clean Water Act addressing discharge of pollutants into the waters of the United Stated began to be expanded. In 1975, a federal district court ordered the Clean Water Act to be applied to wetlands (*Natural Resources Defense Council v. Callaway*). After that, the commerce clause was invoked to include any waters involved in interstate commerce, which was then determined to be any water visited by migratory water fowl in their multi-state travels.

All along, Congress never passed a wetlands protection act. The entire regulatory struggle was based on interpretations of the Clean Water Act. Although Congress has not as yet amended the basic water pollution legislation to deal directly with wetlands, Congress had indeed dealt with the topic. That was when the U.S. Department of Agriculture was authorized to negotiate with landowners and pay them to keep their land in its natural conditions—the Wetlands Reserve Program.

Now, let me tell you about the U-turn. Today, a permitting program run by the U.S. Corps of Engineers involves 100 to 200 million acres of land and the processing of 95,000 permits annually. Under authority never officially delegated by Congress, but certainly with its knowledge, regulatory agents have now pressed criminal charges against farmers, ranchers and homebuilders for wetlands violations. Between the years 1983 and 1993, the U.S. Justice Department indicted 751 individuals and 329 corporations for criminal violations. Some 804 cases have resulted in convictions and more than 400 years of jail time have been collectively imposed.

In the earlier days of the Endangered Species Act and the wetlands program, there were two ways for interest groups to gain control of land. One was market-based, and based on a rule of law; the other was based on political control. With taxpayer funds taken from the public purse, the regulatory agencies could acquire private property and serve a public purpose. But when the funds dried up, and the legislative mandate continued, the agencies marched forward, relying on government's ability to use its police powers to serve the public interest.

Until now, the regulatory U-turn, which represents a major shift in property rights protection, has been passively accepted by the U.S. Congress and celebrated by environmental groups that believe their interests are superior to those of private land owners. But, there are signs that private property rights protection will re-emerge, with farmers and ranchers leading the effort.

The Property Rights Response

Interest group politics suggests that no coalition can hold sway forever. At some point, the costs imposed on those who bear the politically-determined burden become unbearable. In terms of the Fifth Amendment, a stretched constitutional constraint has only so much give to it. Eventually, the takings clause must either be disregarded totally and forgotten, or it must be reasserted. The veritable explosion

of environmental rules that generated so much controversy among holders of private rights to land eventually encompassed a huge number of people who recognized their common problem. The cost being borne by members of the group reached a point where rational behavior called for a response.

Concern over property rights protection led to failed efforts in the early 1990s to gain federal legislation. Later, the 104th Congress added property rights protection to the Contract with America. No final action was taken. Disappointed by the failed effort to gain federal legislative protection, property rights advocates moved to the states. In September 1997, some form of property rights legislation and related governor's executive orders were in place in 25 states. Three of these have statutes that set trigger points for compensation when government regulations reduce land values. Two provide for compensation without trigger points. The others are of the "look before you leap" variety, putting government agencies on notice that burdensome regulation can be costly.

Accompanying the property rights movement, we find major features of federal regulatory authority devolving to the states. The reasons are threefold:

- The federal government cannot afford to enforce the many statutes and regulations now on the books.

- Ordinary people have raised a ruckus about discriminatory and, in some cases, outrageous enforcement.

- After more than 20 years, the federal advantage in protecting environmental quality is far from persuasive. We have borne high costs, but we have not received high benefits. We also find common sense approaches being applied in river basin management that have brought nutrient-trading schemes for point and nonpoint sources of phosphorous and nitrogen.

But while these changes offer reasons to be optimistic about better prospects for the environment and productive life as we have known it, there are counter forces to consider. New air pollution standards are now in place that will augment those still not met by a vast number of locations. Pending treaties to control carbon emissions could impose extraordinary costs on energy consumers while delivering benefits that are only speculative. A Heritage Rivers program that extends national land-use planning has fallen into place. Additionally, efforts are increasing to impose urban visions of zoning and planning on agricultural communities.

Read optimistically, the combination of political actions and resumption of state control reveals an evolutionary pattern that cannot be denied. There is a quiet property revolution occurring in the United States, a revolution in the original sense

of the word—a return to an original position. The takings clause of the Fifth Amendment is slowly recovering its original meaning: "Nor shall private property be taken for public purposes without just compensation." But, the process is indeed slow.

Some Final Thoughts

The Fifth Amendment of the U.S. Constitution was intended to protect all citizens from an over-zealous government. Farmers, ranchers, retailers, land developers and environmentalists stand protected by a fundamental rule of law that forms the basis of their freedom. Even at the time of the founding, there was a controversy about just how much power to place in the hands of elected representatives. Some wanted the new government to generate order from the top down. Others believed that power should reside with ordinary people who would expect government to protect rights that had emerged over a long and arduous struggle. There were two competing visions of the role of citizens in a free society.

The new government established a new order, which in the Great Seal of the United States, is called a "New Order under Heaven." For the first time in history, ordinary people were given almost unlimited rights to seek and maintain their fortunes. The old order, control from the top down, was rejected.

In a free society where citizens hold the precious right to petition government, the tug and pull for government to address private and public problems has continued without limit. As time has passed, the federal government has expanded its powers at the behest of special interest groups who seek redress, comfort and profit. The force of Constitutional constraints today is a far cry from that felt in the first century after the nation's founding. Government's power to regulate has expanded almost without limit.

Farmers, ranchers and countless other citizens feeling the burden of government now call for a return to first principles. The restraint embodied in the takings clause is again being felt.

The issues that galvanize the interests of farmers and ranchers are often crystal clear. Private property rights have simply been redefined as public property, unaccompanied by compensation. In other cases, the issues are clouded by the presence of regulations that are substitutes for common law rules—regulations that attempt to deal with private and public nuisances.

If property rights are to be protected, there is a role to be played by an impartial referee. At times, private interests stand in the way of reaching goals that all citizens would embrace. But, while that may be government's role, there is no reason for the goals of the many to be obtained at the expense of the few. That unhappy outcome can readily be avoided.

When government seeks to serve the public, whether it be by preserving threatened and endangered species, securing sensitive habitat or altering the management of public lands, government has the power and the means to pay for legitimate rights that are taken. Recognition of that duty yields security to all who seek to improve life in this country, whether they be farmers, ranchers, environmentalists or university professors.

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