THE FREEMAN
IDEAS ON LIBERTY

Environmental Law Endangers Property Rights

by Sigfredo A. Cabrera

"The moment that idea is admitted into society that property is not as sacred as the Laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."

—JOHN ADAMS

According to Black's Law Dictionary, the term *property* "embraces everything which is or may be the subject of ownership." It is the "unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it." By definition, the term does not just apply to lumber companies, builders, ranchers, and farmers. If you own a home or business, you are a property owner. If you own a car, stocks, bonds, or an IRA, you are a property owner.

The Most Fundamental Right

It is often overlooked (or perhaps ignored) that private property rights are included as civil rights guaranteed by the United States Constitution. The Fifth Amendment declares that "no person shall be . . . deprived of life, liberty or *property* without due process of law. . . ." That Amendment further states, "nor shall *private property* be taken for public use, without just compensation." And in the Fourteenth Amendment, local officials are forewarned, "nor shall any state deprive any person of life, liberty, or *property.*"

Writing for the majority in last year's landmark ruling in *Dolan v. City of Tigard,* Chief Justice William Rehnquist of the U.S. Supreme Court stated that property rights are as important a part of the Bill of Rights as freedom of speech and religion or the protection against unreasonable searches and seizures: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation."

All other civil and political rights—the right of basic freedom, religious worship, free speech, the right to vote—are vitally dependent on the right to own private property. "Let the people have property," said Noah Webster, "and they will have power—a power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgement of any other privilege."

History has taught painfully what hostility toward private property rights accomplishes. The social and economic travesty caused by over 70 years of Communist control of private property in the former Soviet Union is a lesson that should neither be forgotten nor repeated. But that lesson

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has not been heeded by those writing and enforcing modern environmental laws.

A Slow, Subtle Erosion

Like rust eating away metal until it crumbles, the erosion of property rights is a very slow and subtle process that can take not just months, but years, even generations—one instance, one case at a time. And nearly always, the erosion is not apparent. It is "behind the scenes"—not evident on the evening news or in the daily newspapers, but buried in thousands of pages of documents accumulated each year around the country in the corridors of government. Indeed, this country's fourth president, James Madison, stated in 1788: "I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."

Ocie and Carey Mills (Florida)

On May 15, 1989, 58-year-old retiree Ocie Mills and his son Carey shocked the nation by becoming one of the first people to serve jail time for violating federal wetlands regulations. Their crime? Cleaning out a drainage ditch and putting clean sand on a parcel of land where Carey Mills planned to build a home. The Millses wanted to clean out the ditch to control mosquitos and to improve drainage. Although Ocie and Carey Mills had prior approval from the Florida Department of Environmental Regulation (DER), the U.S. Army Corps of Engineers (Corps) arrested them for filling in a "wetland" without a permit.

Believing the charges to be totally unfounded, Ocie did not hire an attorney, but defended himself and his son. "The charges were so incredibly trivial," he said, "I did not take them seriously and certainly didn't think that we could be in jeopardy of going to prison."

During their trial in Federal District Court, the judge refused to allow Ocie to present evidence confirming that the Millses' maintenance of the drainage ditch was allowed under Florida law and that DER officials authorized the placement of sand on his property. The judge also refused to allow DER employees to give their opinion that the property was not a wetland as defined by the Corps' regulations. Ultimately, the two men were each sentenced to 21 months in federal prison camp, were denied eligibility for parole, were each fined $5,000, and subsequently were ordered to restore the affected site within 90 days of their release.

After serving their time, the Millses were home with their family the day before Thanksgiving, 1990. But their ordeal would not be over. In March 1991, federal officials hauled the Millses back into court on charges that they failed to comply with the probation order to restore the property. After personally examining the property, U.S. District Judge Roger Vinson sided with the Millses and ruled that the "defendants have substantially complied with the site restoration plan." In his ruling he noted that the Corps' mandated "restoration" had left the lots "totally denuded and ugly" and that further "restoration" as required by the Corps would destroy the property's value.

In the spring of 1992, the Millses went back to the U.S. District Court to erase their convictions. But constrained by the present state of the law, the reluctant and sympathetic judge upheld their convictions. In his March 1993 ruling, Judge Vinson expressed astonishment of how the federal Clean Water Act had been interpreted in a manner "worthy of Alice in Wonderland" in which "a landowner who places clean fill dirt on . . . dry land may be imprisoned for . . . discharging pollutants into the navigable waters of the United States." The Eleventh Circuit Court of Appeals in Atlanta upheld their convictions on October 27, 1994; on May 15, 1995, the U.S. Supreme Court turned down their request for review.

Tom and Doris Dodd (Oregon)

In the January 1992 issue of *The Freeman*, I told the story of the Dodds ("Dream House Turns into Nightmare"). In 1983, Tom and

his wife, Doris, had put $33,000 of their life's savings into a 40-acre, scenic parcel in Hood River County, Oregon, overlooking beautiful Mt. Hood. A major factor in their decision to buy the lot was the prior assurances they received from local officials that building a home there was permitted. But a short time later, the zoning was changed. Under the new rules, they can use their property only for growing and harvesting lumber. A house is permitted only if absolutely necessary to accommodate a full-time forester on the property.

Twenty-two acres of the property are covered by a type of soil that will not support forest vegetation. The combined value of the land as now zoned and the estimated proceeds from harvesting the few merchantable trees from the forested area would be less than $700! Moreover, according to a forest expert, harvesting trees on the parcel would damage watershed yields, wildlife habitat, aesthetic qualities, and the protection to neighboring properties from wind.

As retirees, the Dodds have no desire to engage in the forestry business, and they certainly do not wish to be forced into a losing business venture. And so the inescapable conclusion is that unless Tom and Doris are allowed to build their house, their property is useless to them. After exhausting every possible administrative avenue and failing in the Oregon court system, the Dodds have now taken their fight into the federal court system. A ruling from the Ninth Circuit Court of Appeals is expected this year.

Lois Jemtegaard (Washington)

Mrs. Jemtegaard of Skamania County, Washington, owns a vacant 20-acre parcel that the county zoned for a single-family home. She would like to sell the parcel as a buildable lot so she would have money to repair her home, located on another parcel, that she says "is literally falling down around my ears." The proceeds would also help supplement the widow's retirement income.

The problem is that the parcel she wants to sell is considered to be a "resource" and "scenic" land under the Columbia River Gorge National Scenic Area Act. Under that federal law, the parcel may be used only for agriculture or timber operations. However, the property is not presently suitable for either of those uses.

Although Mrs. Jemtegaard holds formal title to the property, for all practical purposes she has lost any realistic use of it. Moreover, she has not received a nickel of compensation for the "taking" of her land for public benefit. Her parcel has lost its economic value as a buildable lot so long as the Columbia River Gorge Commission's decision disallowing a home remains in effect.

Hope Through Involvement

These instances of environmental regulation gone amok in America represent only the tip of an ugly iceberg whose body is submerged and invisible to most of us. Many more "silent encroachments" can be found in the legal files of Pacific Legal Foundation, a nonprofit organization defending in court the property rights of the Millses, the Dodds, Mrs. Jemtegaard, and others like them.

We are witnessing a gradual decay in the basic principle that government is supposed to *protect* private property—not to take it away, not to impede reasonable use and enjoyment of it, and not to destroy its economic value through overregulation. It is critically important that citizens stay informed and communicate their concerns to their elected representatives about proposed or existing policies that are harmful to private property rights.

Environmental laws are too often churned out with little or no regard for their costs or their consequences to human life, private property rights, and the free enterprise system. Under the federal Endangered Species Act, vast areas of land suitable for housing or other beneficial uses are being closed off to development, because of findings that the land is a current or potential habitat of

some endangered or threatened animal, fish, or plant. Appalling as it may seem, the social, economic, or environmental benefits of proposed projects are deemed *irrelevant* by federal regulators who decide if a species should be protected. Human existence is simply disregarded in efforts to save certain species.

The Delhi Sands Flower-Loving Fly, whose lifespan is about 10 days, enjoys the same protected status as the American bald eagle, grizzly bear, and California condor. Swat this little creature and you could face a year in jail and up to $200,000 in fines! This obscure insect, which inhabits 700 scattered acres in San Bernardino County, California, now threatens to hinder needed economic development in the area. The detrimental effect of this kind of overzealous regulation is aptly illustrated in the following abstract of a report entitled, "Impacts of Mitigation for the Endangered Delhi Sands Flower-Loving Fly on the San Bernardino County Medical Center":

> The Endangered Species Act as applied to the construction of the San Bernardino County Medical Center resulted in an expenditure of $3,310,199 to mitigate for the presence of eight Delhi Sands Flower-Loving Flies. The effort as negotiated with the U.S. Fish and Wildlife Service and California Department of Fish and Game resulted in moving and redesigning the facility to provide 1.92 acres of protected habitat for eight flies believed to occupy the site. The effort mitigates only for species on site. Cost per fly amounted to $413,774.25 and resulted in a one year construction delay. This cost is equivalent to the average cost of treatment of 494 inpatients or 23,644 outpatients.

When fires swept Southern California last October, the rural Winchester area of south Riverside County was hit particularly hard. Over 25,000 acres were charred and 29 homes destroyed. Many burned-out families in that area believe they could have saved their homes if only government officials had given them permission to create firebreaks around them. Brush fires can be kept away from homes by clearing out a strip of vegetation—a process called disking. Many of the victims of the Winchester fire have disked their property for years. But a few years ago officials from the U.S. Fish and Wildlife Service dissuaded them because doing so would disturb the burrows of the Stephens Kangaroo Rat, a rodent put on the federal endangered species list in 1988.

The Endangered Species Act either bans or strictly limits development on most of the 77,000 acres designated as "rat study" areas in Riverside County. Yshmael Garcia, a rancher who lost his home in the blaze, was quoted in the *Los Angeles Times:* "My home was destroyed by a bunch of bureaucrats in suits and so-called environmentalists who say animals are more important than people. I'm now homeless, and it all began with a little rat."

Private Property Rights Advocacy

There is no shortage in this country of organizations dedicated to representing the interests of various species of animals or plants. Unfortunately, in courtroom battles involving land use and environmental protection, the interests of mainstream Americans are typically *under-represented.*

Every intrusive land-use or environmental regulation that is upheld in court results in the creation of a legal principle that acts like a building block upon which another antiproperty legal principle can be erected in yet another case. Years of bad precedent inevitably will result in a frail social and economic fabric that will not hold up to the wear of tyranny. That is why Americans must begin to stop the legal erosion of property rights, and restore this bulwark of our personal liberties. □

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The Environmental Assault on Mobility

by John Semmens

I recently had the opportunity to attend a Federal Highway Administration workshop on air-quality analysis. This session was designed to train government bureaucrats to operate computer models for assessing a region's compliance with federal air pollution regulations. The experience was most enlightening.

Air-quality planning across the nation is heavily dependent on air-quality "models." Unfortunately, these models are insufficiently connected to reality to be reliable measures of actual air pollution in any metropolitan area. In the models, emission estimates for vehicles are based on a "standard trip" from a 1969 Los Angeles survey. Whether such a "trip" would be representative of the types of trips taken in other urban centers across America seems dubious. Whether the conditions pertaining in 1969 are relevant for today, some 25 years later, is also questionable. The specific amounts of emissions for each vehicle are based on a sample of cars taken in Indiana. Whether emissions for these types of vehicles might differ in the traffic and climatic conditions in other locations would seem a pertinent question, too.

Unfortunately, the federal bureaucrats in charge of this training session declined to address any of these questions. Even worse, an inquiry as to whether the air-quality monitoring program might be improved by a greater effort to actually measure quantities of pollutants was brushed aside. Apparently, the officials in charge of the air-quality monitoring program are not interested in attempting to actually measure pollution in the ambient air, nor to identify specific sources of emissions.

Within the models, the alleged pollution reductions to be achieved by various measures are not evaluated for net impacts. That is, there is no analysis of the potential offsetting negative consequences of implementing these measures. In the case of transit, for example, adding buses to the traffic stream would have some negative effects. The slower acceleration capabilities of buses and their frequent stops during peak-hour traffic significantly impede other traffic. This causes some increased vehicle emissions. But, since the model does not explicitly calculate or adjust for this effect, we do not *know* whether increasing the frequency and distances covered by buses decreases or increases pollution. During a question and answer session at the workshop, my inquiry on this issue was greeted with the cynical response that the data could be made to show whatever we wanted it to show. If this is true, then the models are useless as a guide to environmental policy-making.

Most of the emphasis in current air quality

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