IDEAS ON LIBERTY
APRIL 2003

# Decommissioning California's Coastal Tyranny

*by Steven Greenhut*

A California Superior Court ruling a year ago was an incredible bombshell that should have had defenders of private property rights rejoicing and California environmentalists gnashing their teeth. Yet the decision, declaring unconstitutional the California Coastal Commission, received surprisingly little media coverage and sparked only muted celebration and outrage at the time.

The decision was treated as a bizarre quirk that would no doubt be overturned at the appellate court. The reaction shows just how far we've gone down the road of accepting as permanent even the most noxious government agencies.

To those unfamiliar with it, the Coastal Commission is California's state agency that oversees the development of property along the coast, from the Oregon to Mexico border. Its authority over property, private and public, extends from three miles out to sea to as much as five miles inland, although in certain areas its authority only goes a few hundred feet east of the shoreline.

Within these Rhode Island-sized boundaries, including some of California's most sought-after and populated areas, the commission has near-dictatorial powers to approve, reject, or reform any development proposal. Created by initiative in 1972 and affirmed by legislative edict four years later, the commission has been as controversial as one would expect from a government agency with unchecked power. Those who share its values, goals, and messianic sense of purpose adore it and see it as a template for "guiding" development throughout the state. Those who cherish property rights and freedom despise it, as do many local government officials frustrated by its ability to trump local decisions. (Even "liberal" Malibu residents battled the commission after it trumped a local plan for regulating the coast in order to impose one of its own liking.)

Yet the Sacramento Superior Court's ruling—based mainly on separation-of-powers issues—was largely shrugged off. Then a funny thing happened. Last December the California Court of Appeal in the Sacramento district upheld the decision. Yes, the California Coastal Commission is unconstitutional, and many people now believe the decision will withstand the likely appeal to the state's supreme court.

The courts ruled that the makeup of the commission formed the heart of its constitutional problem. It has 12 members, with four selected by the governor, four by the speaker of the Assembly, and four from the Senate Rules Committee. All members can be removed for any reason at any time by those who appointed them.

"The flaw is that the unfettered power to remove the majority of the commission's voting members, and to replace them with others, if they act in a manner disfavored by

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the Senate Committee on Rules and the Speaker of the Assembly makes those commission members subservient to the Legislature," the appellate court ruled. "In a practical sense, this unrestrained power to replace a majority of the commission's voting members, and the presumed desire of those members to avoid being removed from their positions, allows the legislative branch not only to declare the law but also to control the commission's execution of the law and exercise of its quasi-judicial powers."

Environmentalists and legislature Democrats who are enamored with the commission can't understand what the fuss is about. They view the makeup of the commission as a clever means to share powers among different branches of government, and claim the court's ruling is an easily fixed, technical one.

But that "technical" problem goes to the heart of the American system of government. Legislative branches of government write laws, executive branches enforce them, and judicial branches adjudicate disagreements. When one agency has all three functions it is tyrannical. That was the view of America's founders, if not the current California Legislature.

If nothing else, the Coastal Commission is a tyrannical agency. Even its defenders basically admit as much, seeing such overwhelming power as a necessary means to check the ability of developers to turn the California coast into wall-to-wall concrete. The commission is the arbiter of the vague coastal protection provisions of the coastal act. Its staff relishes its ability to hammer developers, homeowners, and farmers with cease-and-desist orders for anything deemed harmful to the coast.

The appellate court pointed to Article III, section 3, of the California Constitution: "The powers of state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." There's no doubt, the court said, that the commission has various functions. It adopts or amends by a vote of its appointed members rules and regulations, as a legislative body would do. Like an executive agency, it contracts services, it undertakes investigations, it reviews the coastal programs of local governments for compliance with the coastal act, and it can refuse to approve those plans. "These duties in the interpretation and implementation of the Coastal Act are the very essence of the power to execute the law," according to the court.

So the commission writes, interprets, and enforces the law, and it also has quasi-judicial powers in granting and denying permits, ordering cease-and-desist orders, and reviewing coastal plans.

The Coastal Commission argued that the Legislature hasn't actually tried to control the commission so there is no constitutional problem with the appointment setup. The court: "[The plaintiff] does not need to demonstrate that the legislative appointing authorities have attempted to interfere with the commission members' execution of the Coastal Act. It is the commission members' desire to avoid removal—by pleasing their legislative appointing authorities—which creates the subservience to another branch that raises separation of powers problems."

The commission's defense was laughable given that its structure (and the very existence of such a powerful political body making decisions that are worth millions of dollars to involved parties) breeds corruption. Such corruption became publicized before the November election when a court unsealed records from Beverly Hills real-estate agent Mark Nathanson, who was convicted in the early 1990s of receiving more than $700,000 in bribes from developers to approve projects when he served as a coastal commissioner. Nathanson implicated then-controller and now-governor Gray Davis in a fund-raising scheme—something Davis denies and voters ignored. In other instances, commissioners were replaced with the apparent goal of passing certain development projects that legislators wanted.

## Genesis of the Case

Ironically, it wasn't a big developer who filed the lawsuit that knocked out the com-

mission. It was a French marine biologist and conservationist named Rodolphe Streichenberger. A decade ago, Streichenberger and his Marine Forests Society began an experiment to improve sea life off the Newport Beach coast.

"Used tires—not toxic when immersed in sea water—were attached in long rows and moored to the sandy bottom," wrote David Stirling, an attorney with the Pacific Legal Foundation, which filed an amicus brief on Streichenberger's behalf. "Floating plastic tubes were connected to the tires, forming vertical columns. Mussels and seaweed were then planted within this structure. In time, the ocean floor's tidal movements partially buried the tires, while the mussels, seaweed and other marine organisms attached themselves to the tires and plastic pipe, thus generating the colonization process." The process worked, attracting an impressive array of marine life around the artificial reefs, but it sparked the ire of the Coastal Commission which, Stirling notes, "in its San Francisco headquarters was growing increasingly intolerant of Streichenberger's 'different' ideas about ocean habitat restoration." Staff members—with no need for approval from elected members—issued a cease-and-desist order. With little financial support, Streichenberger filed a lawsuit against the commission.

Not surprisingly, the environmental movement has been downright scornful of this unusual conservationist who has devoted his life to promoting actual environmental improvement rather than to political activism. As Stirling pointed out, environmentalists tried to portray his experiment as the equivalent of dumping garbage into the sea, as if there were anything harmful about what he was doing or as if he were nothing more than a common polluter.

Now that Streichenberger has scored this unexpected court victory, the official line is to depict him as a tool of big developers. Yet Streichenberger told me in January that only after his first success in court did he receive some minor contributions from the building industry. "They [developers] are cowards," he said. "One developer said to me, 'you have nothing to lose. We have everything to lose.' These people on the commission have the power to ruin anyone in California."

"I myself am an environmentalist," Streichenberger said. "But these people have kidnapped the environmentalist movement. They are just people who are social engineers, radicals with their 1960s ideas. But socialism has failed and they have to find something else. So they ride this horse. . . . These are people who simply catch power through the law."

Few politicians in California would dare to describe the agency that way, but if anything Streichenberger is being too charitable. The Coastal Commission's elected members vary in outlook, although they lean heavily in the environmental direction. But the staff—and this is a staff-driven agency, whose decisions and policies largely reflect the preferences of its executive director—is run by a left-wing ideologue, Peter M. Douglas, who cowrote the 1972 Coastal Commission initiative and helped form the 1976 coastal legislation.

Douglas is surprisingly upfront about his beliefs, which suggest that society's laws should revolve around environmental protection rather than freedom.

"Californians have evolved an emotional, spiritual and enduring bond with the coast and coastal ocean: a bond that is at once mystical and pragmatic," Douglas said in 1997 before the California Chapter of the American Planning Association in Monterey. "It is rooted in the power of land's end to inspire renewal of body and soul and in its magical ability to give expression to a seemingly boundless array of natural and human artistry. It derives as well from the coast's earthly venue as a place to live, work and play."

## Anointed Planners

This mystical nature of the ocean, of course, cannot be left to the wiles of private enterprise or even to local governments. It must be left to planners, who "adjusted private uses of land, air and water in a manner protective of public environmental interests

and values at some not insignificant cost to individual rights and desires."

But there's a threat, Douglas explained. "Regrettably, something extremely corrosive has been injected into our social being and the body politic that has eroded our appreciation of the importance of collective well-being. And nowhere is this erosion of support for community interests more dramatic and of significant long-term consequence, especially to those of us in the field of environmental stewardship, than in the national debate over private property rights."

He insists that he favors private property rights, but explains that the budding property-rights movement is the work of wealthy special interests who exaggerate rare cases of government abuse. He proposes a solution to the problem of courts that insist on interpreting property-rights law in favor of property owners: "So unless we amend our national constitution to give Americans a constitutional right to a high 'quality' of life (as is the case in India) or to give standing and protection to the environmental commons of the country, it is the courts that will be the arbiters of the debate over property rights and the protection of environmental values."

Yes, far better to live in India, with its notoriously high (and government-guaranteed) standard of living, than in America where retrograde judges might rule in favor of property owners.

This would be scary stuff from your garden-variety leftist professor, but it is from the man with nearly dictatorial powers to determine what people get to do with their own property along the California coast. Douglas is clear about his messianic mission: "As I stated before, the coast, like any coveted reach of geography, is never finally saved. It is always being saved." He even feels sorry for himself as he goes about saving the earth: "It is not easy being in government these days. A cynical, shortsighted and self-centered segment of the public seems incapable of appreciating the good work, dedication and job commitment demonstrated by public employees every day."

We not only have to live under the dictates of men such as Douglas, but we need to thank them as they trample on our rights. This gives one an idea why the Coastal Commission is loathed by so many people.

## What Now?

The sensible solution to the commission's constitutional problems is obvious, but unlikely. How about restoring property rights and allowing coastal-development decisions to be based on the tried-and-true principles of freedom and ownership? I can dream, can't I?

Environmentalists insist the commission will emerge from this conflict more independent and committed to environmental protection than ever. They foresee a commission with less oversight by the legislature, which they hope would mean decisions even more in tune with their environmental theology.

That's possible. But the court is watching, and Streichenberger probably will have an easier time raising money for continued legal action if the commission is changed in less-than-satisfactory ways.

"The Legislature is looking for a cosmetic fix," Streichenberger said. "They want the same power, the same ideology, the same abuses. They hope so but it's not going to happen. The court is not going to be happy with a cosmetic fix by the Legislature."

The battle over the Coastal Commission is the latest battle between the traditional view of private property, in which owners are entitled to use of their land provided they don't do anything harmful to others, and the collectivist idea that puts experts in charge of every decision in the name of environmental protection.

The latter way of deciding development policies reminds me of a recent conversation I had with an acquaintance, who advocates a new way of making policy decisions based on saving the earth rather than private property.

"How exactly would we build a world based on environmentalism?" I asked him. In his view, the Constitution would have to give way to commissions of experts who would weigh the costs and benefits of any action. This is the stuff of dystopian novels,

where a society similar to our own has degenerated into a totalitarian netherworld.

I can imagine the plot line now. An individual, who wants to build homes on his own tract of land, finds himself in a bizarre and evil world in which he spends his entire adult life going from one panel to another amending his plans to their desires, then going back to square one after one insane problem after another, such as the discovery of a rodent some bureaucrat decides is endangered, or the declaration that a rut in the land caused by a tractor really is a precious wetland.

Unfortunately that scenario is based closely on true stories involving local regulators and the Coastal Commission. It's not just big developers who end up in this Kafkaesque totalitarian world. Small property owners who live near the beach must get commission approval for fences and vegetation, or must trade away property rights to get approvals for small additions.

Welcome to the California Dystopia. Our only hope is that, after three decades of the commission's abuse, the courts are now willing to restore some sense to California coastal-development decisions. □

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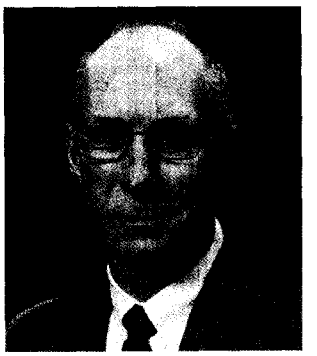

# How Politics Ruined the Northwest Salmon Fishery

When white men began to move into the Pacific Northwest in large numbers in the second half of the nineteenth century, they found numerous aboriginal tribes whose economies centered on a flourishing salmon fishery. The natives took advantage of the salmon's anadromous life course. These fish are spawned in the gravel beds of mountain streams. As juveniles, they migrate down the rivers to the ocean, where they live most of their adult lives. After two to six years (depending on the species), they return to the exact place of their origin to spawn and die. To capture the returning fish, the Indians employed a variety of fishing gear—traps, weirs, baskets, dip nets, spears, hooks and lines, gaffs, and assorted entangling nets and seines—where the runs became concentrated near the shore or in the rivers. Because the Indian fishers let the fish come to them, rather than sallying forth to catch still-dispersed fish in the open waters, they were highly productive.

The aborigines possessed property rights over the fishing places at which they captured the returning salmon. As described in a landmark federal court decision, "Generally, individual Indians had primary use rights in the territory where they resided and permissive use rights in the natal territory (if this was different) or in territories where they had consanguineal kin. Subject to such individual claims, most groups claimed autumn fishing use rights in the waters near to their winter villages. Spring and summer fishing areas were often more distantly located and often were shared with other groups from other villages. . . . Control and use patterns of fishing gear varied according to the nature of the gear. Certain types required cooperative effort in their construction and/or handling. Weirs were classed as cooperative property but the component fishing stations on the weir were individually owned."[1]

When the whites began to exploit the salmon resource, they improved the harvesting devices, relying on the Indians' sensible approach of letting the fish come to the fisher. The whites constructed bigger, more productive "fish traps," elaborate arrangements of netting by which the salmon could be induced to swim into small, nearly inescapable enclosures from which they could be scooped out at the fisher's convenience at low cost. Along the Columbia River, white fishers also constructed huge automatic "fish wheels," using the current to turn rotating scoops and often obtaining an enormous catch at low cost per fish.

As the fishery became more exploited, however, the whites began to disregard the productive system the Indians had used for centuries as well as the fishing rights that underpinned it, jeopardizing the survival of the resource. Using long gillnets and large purse seines, mobile fishers proceeded to "get in front of" the established catchers as

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