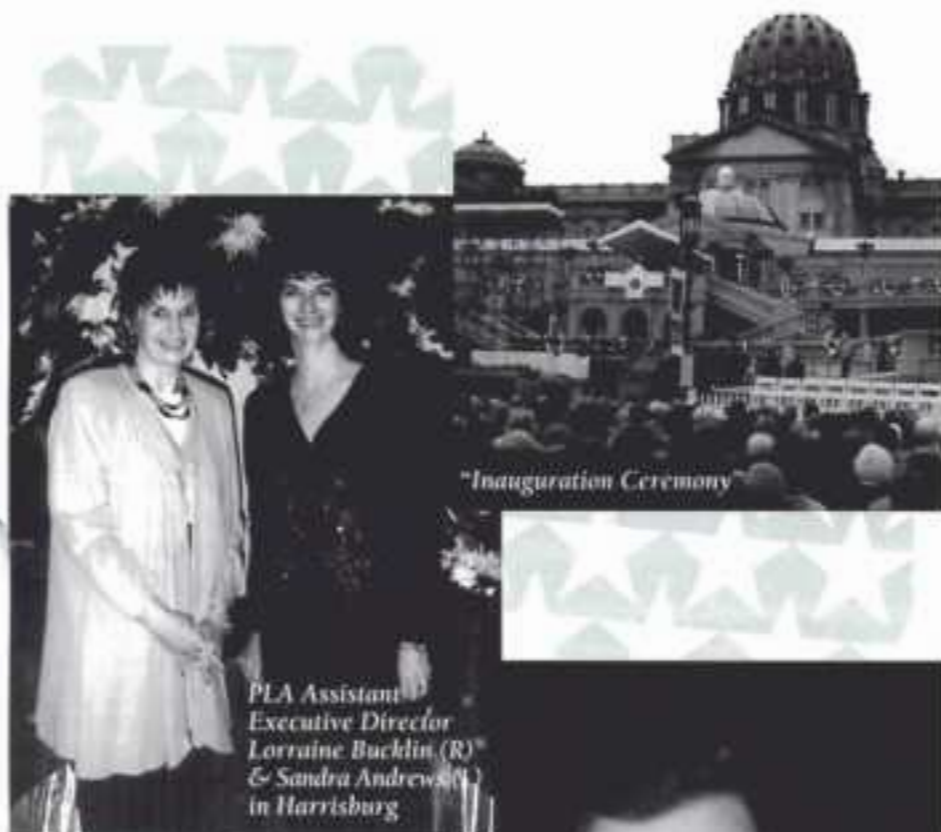




PENNSYLVANIA LANDOWNER

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MARCH 1995



"Inauguration Ceremony"

*PLA Assistant
Executive Director
Lorraine Bucklin (R)
& Sandra Andrews
in Harrisburg*



*Governor & Mrs. Ridge at
Inaugural Dinner*

*Governor
Tom Ridge*



★ ★ ★ ★ ★ **RIDGE INAUGURATION**

**Offers Hope and
Encouragement for
Citizens of the
Commonwealth**

For thousands of Pennsylvanians who gathered on January 17, 1995 to participate in the inaugural events for Thomas J. Ridge, Pennsylvania's 43rd Governor, a historic and memorable event was witnessed. Pennsylvania truly proved to be a "melting pot" where gender, race, occupation or ethnic background did not suggest any barriers for participation. As the oath of office was taken and the inaugural address given, signs of hope and encouragement appeared on the faces of countless citizens throughout the Commonwealth who optimistically await the many reform initiatives being contemplated for advancement by his administration.

PLA members are among those anxiously awaiting legislative and regulatory reform within the Commonwealth as we face a new political leadership concerned with changing bureaucratic policies and attitudes.

High among those initiatives supported by PLA is wetland reform, an issue which the Ridge administration promises to be of high priority.

It's no time to RELAX...

This issue of the *Landowner* is full of very illuminating information and news - some of it good but much of it bad and disheartening.

The devastating blow struck to the Brace family by the Third Circuit Court of Appeals, which deferred to counter-intuitive, regulatory finagling by unelected bureaucrats with the agricultural exemption over common sense, is discouraging. But the Braces refusal to knuckle under and resolve to continue their fight for their property rights is encouraging.

The reiteration of the enormous financial power and influence of the large anti-development, environmentalist advocacy groups that are arrayed against volunteer organizations with limited resources such as PLA is disheartening. And as discussed later, so are the continuing, disingenuous attacks on PLA which are sponsored and supported by some of these same groups.

We can take some encouragement in the 1994 Elections which seem to demonstrate that ordinary citizens have rejected big, intrusive government in many of its manifestations. You begin to think it may finally be possible to get EPA, the Army Corps of Engineers and the Fish & Wildlife Service out of our backyards. Think about it — three, maybe four, huge, federal executive agencies (not to mention our old friends, the DER, the Game Commission and the Fish and Boat Commission) looking over your shoulders when you clean a drainage ditch.¹ Have we lost our minds?!

It is also encouraging to read the clearly enunciated statement of PLA Mission, Philosophy and Agenda and realize that many newly elected officials have a similar philosophy, support PLA views and are willing and may at last be able to help landowners. Nevertheless, the imbalance of resources between PLA and the organizations arrayed against it, and the ongoing influence of such groups in government and the media, is disheartening.

Despite all the bad and disheartening news, there is reason for cautious optimism.

Nationally, the people have fired a shot across the bow of the big, command and control government armada and it is dead in the water for the moment. Clearly there is now an opportunity to restore reason and balance in environmental regulation, perhaps even to pare back some of the more ludicrous mandates emanating from inside the Beltway.

Closer to home, the extreme, anti-development advocacy groups and their environmental police allies are feeling the heat and you can take pride in the fact that it was PLA that turned up the flame! This last point was amply demonstrated when recently the self-proclaimed leaders of the Pennsylvania environmental community said this about PLA:

Over the past several years, a potent environmental backlash movement has emerged. This backlash, which originated in the West and spread nationwide, has adopted the reasonable-sounding name of the "Wise Use Movement." However, the stated aims of the various organizations attached to the "Wise Use Movement" are to dismantle legislation and regulations which protect public health and guide the management of our natural resources. The most visible Pennsylvania "Wise Use" group is the Pennsylvania Landowners Association (PLA) based in Waterford, Erie County. According to its literature, the PLA opposes: current wetlands and endangered species programs; designation of scenic rivers, prime watersheds, historic and archaeological sites; and information gathering processes such as natural heritage inventories and the Pennsylvania Natural Diversity Index.²

When you strip away the overblown rhetoric and outright distortion of PLA positions by these so-called leaders of the Pennsylvania environmental community, you realize that they recognize that they are beginning to lose their vise-like grip on public opinion and that the tide of such opinion is shifting.

Look at what else they say in the handout when instructing their followers on how to counter the Wise Use Movement:

ENHANCING THE IMAGE OF "CONSERVATIONISTS"

In addition to carefully crafting pro-environment, pro-property rights messages, environmentalists and conservationists should work on improving an already-positive public image. The following recommendations and observations can be applied to any issue and can be useful in any forum where one is making a case for environmental protection.

ENVIRONMENTALIST OR CONSERVATIONIST?

Some people perceive "environmentalists" to be groups with non-local, even global concerns and a clear political agenda. Environmentalists are not seen as elitist, but some people think of them as alarmist dedicated to their own agenda. On the other hand, people think of "conservationists" as more locally-oriented and less political than environmentalists.

BE BELIEVABLE AND BALANCED

People will gravitate toward those who espouse balanced approaches to resolving environmental disputes. To communicate pro-environmental messages beyond core supporters, take care to avoid extreme, absolute language. Use of extreme language plays to people's preconceptions of environmentalists as alarmists.

BE PATRIOTIC

Property rights are among our basic American rights — they protect each individual home. Environmentalists share this value 100 percent and affirm that it is one of our precious constitutional protections. Never use the term "property rights" to describe what anti-environmental activists support. Environmentalists should begin to describe themselves as property rights advocates and our opponents as supporters of "Takings."

TAKE THE HIGH ROAD

Avoid name-calling and labelling those who disagree with your position. Do not personalize this issue — hate the position, respect the opponent. State your arguments in positive terms. The environmental community has the moral high ground on this issue.

1 The Department of Defense (Corps of Engineers), the Department of Interior (U.S. Fish & Wildlife Service), the Department of Agriculture (Soil Conservation Service) and the Environmental Protection Agency.

2 This is an excerpt from a handout distributed at the First Environmental Congress held in Harrisburg, Pennsylvania on October 2, 3, 1994, which was organized and sponsored by The Pennsylvania Conservation Network, The Chesapeake Bay Foundation, The Sierra Club, The Pennsylvania Environmental Council and others.

I don't have to tell you that the strategy advanced here is to mislead and try to dupe the public on environmental and property rights issues. Next, they'll be talking about apple pie and motherhood!

The point is that the environmental community appears to be prepared to use all the tricks—innuendo, distortion and mischaracterization—to stifle the message and influence of organizations such as PLA. Sadly, they seem to get away with it.

A truly classic example of their double standard is found in the admonition to "Take The High Road" quoted previously. There, environmentalists are advised to avoid name-calling and labelling those who disagree with their position. However, in the very same handout, the environmental leaders label over 35 trade associations, businesses and civic organizations as "Misuse" and "Wetlands Destruction" Groups.³ They even slam the Pennsylvania Building and Construction Trades Council! We all know that many of the members of these mainstream, constructive and responsible statewide organizations have supported many of the environmental advocacy groups which are responsible for this handout. Why should these mainstream organizations be labeled "Wetlands Destruction" Groups when, from the environmentalist perspective, being accused of wetlands destruction, is the equivalent of being accused of a mortal sin? Sadly, the environmentalists seem to be able to get away with such namecalling.

An earlier issue of the *Landowner* pointed out the irony of having the Pennsylvania Environmental Council, once the leading voice of reasoned debate and consideration of multiple interests in environmental issues, allying itself with more radical, anti-development groups. Now, by signing onto the agenda of the First Environmental Congress, PEC participates in and promotes "name calling" and "labelling" of many of its longstanding and loyal supporters. I really don't understand this one.

Most all of these trade associations, which the "environmental leaders" now vilify as "Misuse" or "Wetlands Destruction" Groups have done nothing more than seek balance in wetlands regulation and try to cooperate with the environmental community. For that they get a slap in the face. It does bother me that no one calls a foul when a double standard is used.

Although we have come a long way, there is much, much more to do. Ordinary citizens finally have the attention of the politicians and the bureaucracies and their anti-development advocacy group allies. The environmentalists are running scared and have launched a counter attack on PLA and other organizations which are seeking to restore reason and balance in environmental regulation. But as is amply revealed elsewhere in this issue, the playing field is not level. Volunteer, grass roots groups are outgunned in terms of financial and technical resources and public opinion is still being influenced by the media, which continue to plow the same old ground with blinders on.

Don't let your friends and neighbors sit idly by on the sidelines. Get them involved in PLA.

This is not the time to relax and sit back to see what happens. This is the time to consolidate your gains, press the initiative and shove the pendulum back the other way. Contrary to the distorted rhetoric of some of the extremist groups opposing PLA, most ordinary citizens and landowners don't want to dismantle legislation and regulation which protect public health (as PLA is accused of wanting to do!), but they do want to get government off their backs and out-of-their backyards.

To take the next step, PLA more than ever needs the support of its members. To carry its

message, PLA has set a goal of having members in every municipality in Pennsylvania and to achieve an aggregate membership of 10,000 individuals and businesses. PLA must be able to demonstrate not only long-standing and new friends but also foes that it has the resolve to take a stand. PLA has the resources to back up its friends and supporters. Expanded membership is absolutely critical if PLA is to fulfill its mission and carry out its agenda.

Because PLA has limited financial resources, it can't engage a marketing or PR consultant to help spread the word of its success or to recruit new members. Thus, PLA needs the help of its membership in a very special way. Each of you is being asked to get involved and to recruit at least five new members. We all make that commitment and fulfill it, PLA can achieve its goal of having 10,000 members within a matter of weeks or a few months.

Please get in touch with your friends, acquaintances and other contacts, particularly in parts of Pennsylvania where PLA is not so well known or strong and ask them to join PLA. Reach out to your suppliers and the businesses which benefit from your patronage. Don't let your friends and neighbors sit idly by on the sidelines. Get them involved in PLA. Call the PLA office for informational materials you can use in recruiting. It is all part of our effort to get together to take a stand for your land. Your involvement can really help to restore balance and balance.

Henry Ingram is Chairman of the Natural Resources & Environmental Law section of Buchanan Ingersoll, P.C. and has practiced environmental and natural resources law for over 25 years. Mr. Ingram also serves as legal counsel for PLA. Questions or comments regarding this article or any other legal issue may be directed to Mr. Ingram in Pittsburgh at (412) 562-1691.

³ A handout distributed at the First Environmental Congress identifies (labels) as "Misuse" and "Wetlands Destruction" Groups the following: Pennsylvania Landowner's Association; Allegheny Hardwood Utilization Group; PA Independent Petroleum Producers; Hardwood Lumber Manufacturers Association; PA Mining Professionals; PA National Association of Realtors; PA Land Improvement Contractors; PA Builders Association; PA Chamber of Business & Industry; PA Farm Union; PA Farm Bureau (PA Farmers Association); PA Coal Association; PA Gas Association; PA Manufactured Housing Association; PA Manufacturers Association; PA Oil & Gas Association; PA Rural Electric Association;

PLA financial report & mission statement

In 1987, the founders of PLA came to recognize that many ordinary citizens and landowners were oblivious to the extent to which an extreme environmentalist philosophy had taken hold in the United States and the degree to which it was being accepted with very little question and virtually no debate by a disturbingly large number of elected officials and the media in Pennsylvania. PLA was formed to educate Pennsylvania landowners about the threat to property rights and personal freedom posed by increasingly intrusive regulation of land use, to generate public debate of the issues raised and to develop and implement a strategy to restore reason and balance in environmental regulation. PLA has achieved a great deal of recognition and success over the course of the last 8 years in regard to its mission, particularly in light of its operating budget. As indicated below, however, it pales in comparison to the astronomical budgets its opponents have to work with. Ironically, as indicated in the article on page 2, PLA has consistently been accused over the years of having "big dollars" behind its efforts. As witnessed by our most recent financial report, nothing could be further from the truth.

PLA's directors, members, and employees should be proud of the accomplishments they have achieved in generating public debate and awareness of land use issues and of the legislative initiatives they have been instrumental in creating. Many of these achievements would have been impossible on such a small budget without their generous volunteer efforts.

So much more, however, must still be done and so many more landowners assisted. But this can only be accomplished by increasing our operating funds. With this in mind, the board of directors is asking each member to set a goal of recruiting five new members. If each one of us does our share, PLA's membership and revenue can increase to numbers that can truly help to make a difference. And don't forget to remind your business and corporate friends that their donations and assistance are needed if the fight to protect property rights is to continue. Additionally, ask if they have donated to any of the environmental groups listed below. If they have, ask them if they are aware of the tactics and initiatives supported by these groups. It's time business and corporate America became aware of who their real adversaries are.

PLA Agenda

1. Education and Information

- a. Posting for Support
- b. Publishing *The Landowner*
- c. Initiation and Sponsorship of Pennsylvania Land Use Summit
- d. Promoting Sensitivity to Property Rights Issues Among Pennsylvania Legislators

2. Constitutional Protections

- a. Advocate Property Rights Legislation
- b. Insistence on Valid and Rational Public Purposes for Government Takings
- c. Advocate Compensation for Regulatory Takings

3. Government Ownership of Land

- a. Seek Amendments to Key '93 Curtailing Unsupervised Acquisition of Land by Government Agencies
- b. Advocate No Net Loss of Private Property
- c. Advocate Multiple Use of Government Holdings

4. Leveling the Playing Field

- a. Raise Costs Act Caps
- b. Put Teeth in Trespass Laws
- c. Seek Comprehensive Wetland Reform Including Mandatory Use of State Lands for Wetlands Mitigation
- d. Seek Comprehensive Endangered Species Act Reform

PLA Financial Report, 1994

Year Ended December 31, 1994

The Financial Statement as prepared by Monahan & Monahan Certified Public Accountants of Erie, PA is available for membership review at the PLA office.

Total revenues	\$ 49,672
Expenditures:	
Salaries	17,788
Printing expenses	12,617
Postage and mailing expense	3,071
Supplies	1,166
Computer hardware	731
Advertising	826
Tape costs	583
Memberships	400
Utilities and telephone	975
Payroll taxes	1,904
Insurance	527
Subscriptions	106
Meeting and seminar expense	1,507
Total expenditures	42,201

Environmental Organization Incomes

ORGANIZATIONS	REVENUE	EXPENSES	ASSETS	FUND BALANCES
The Nature Conservancy (fiscal 1993)	\$ 278,497,634	\$ 219,284,534	\$ 915,664,531	\$ 855,115,125
National Wildlife Federation (1993)	82,816,324	83,574,187	52,891,144	13,223,554
World Wildlife Fund (fiscal 1993)*	60,791,945	54,663,771	52,496,808	39,460,024
Greenpeace Fund Inc. (1992)	11,411,050	7,912,459	25,047,761	23,947,953
(combined different years)	(48,777,308)			
Greenpeace Inc. (1993)	37,366,258	38,586,239	5,847,221	<5,696,375>
Sierra Club (1992)	41,716,044	39,801,921	22,674,244	14,891,959
Sierra Club Legal Defense Fund (1993)	9,539,684	9,646,214	9,561,782	5,901,690
National Audubon Society (fiscal 1992)	40,081,591	36,022,327	92,723,132	61,281,006
Environmental Defense Fund (fiscal 1992)	17,394,230	16,712,134	11,935,950	5,279,329
Natural Resources Defense Council (fiscal 1993)	20,496,829	17,683,883	30,061,269	11,718,666
Wilderness Society (fiscal 1993)	16,093,764	16,480,668	10,332,183	4,191,419
National Parks and Conservation Association (1993)	12,304,124	11,534,183	3,530,881	769,941
Friends of the Earth (1993)	2,467,775	2,382,772	694,386	<120,759>
Izaak Walton League of America (1992)	2,036,838	2,074,694	1,362,975	414,309
Total	\$ 633,014,090	\$ 556,359,986	\$ 1,234,824,267	\$ 1,030,377,841

Notes: All figures most recent reporting year available. Some organizations had not filed reports for either calendar or fiscal 1993 as of September 1, 1994. Calendar year used unless noted.

The Nature Conservancy obtained \$76,318,014 of this amount from sale of private land to the government and \$20,402,672 from government grants.

National Wildlife Federation fiscal year 1993 ended August 31, 1993.

World Wildlife Fund fiscal year 1993 ended June 30, 1993.

Greenpeace Fund (a 501 (c) (3)) and Greenpeace, Inc. (a 501 (c) (4)) have substantial financial interactions annually. Most recent Form 990 year available for Greenpeace, Fund, Inc., is 1992. Greenpeace, Inc. figures are from 1993 financial statement.

National Audubon Society income includes \$93,623 in mineral royalties from natural wells on its Rainey Wildlife Sanctuary and \$505,850 from government grants.

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Property Rights and Wrongs

by Jonathan Tolman

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Over the last decade the environmental movement has undergone a subtle but profound shift. Originally, environmental laws were designed to curb the pollution of large corporations. But as Congress and federal agencies have expanded the scope of these laws, they have begun to reach far beyond big industry polluters.

Russell Jacobs, for example, is not a tycoon. Married, he lives in Raymond, Wis., and works for the post office. His wife, Gail, provides day-care for neighborhood children while their own three children are in school. In 1990, Mr. Jacobs did what many middle-class Americans dream of—he bought a plot of land in the suburbs to build his family a home. Before buying the lot he checked with the Racine County government, which assured him that he could build his house. The house would have been 80 feet from his neighbor's house and 50 feet from the highway.

Unfortunately for Mr. Jacobs, the federal government considered his small plot of land in the suburbs a "calcareous fen." For those unfamiliar with bureaucratic jargon, a fen is an area not quite wet enough to be a marsh, but still wet enough to qualify as wetland. Calcareous only means that it sits on top of limestone, typical of much of Wisconsin.

The Army Corps of Engineers told Mr. Jacobs that he needed a permit in order to build in his calcareous fen. He applied for his permit and received a letter, 242 days later, informing him that his permit had been denied. Richard W. Craig of the Corps of Engineers wrote, "The purpose of the project is to facilitate the construction of a single family home. I have determined that issuance of the requested permit would be contrary to the public interest."

Why the federal government concluded that Mr. Jacobs' half an acre of "calcareous fen" was ecologically vital remains a mystery. Nonetheless, the government decided that the public should continue to enjoy benefits from the calcareous fen. With the stroke of a pen, the federal government effectively stripped Mr. Jacobs of the right to use his property. Mr. Jacobs' case represents a glaring violation of the Takings Clause of the Fifth Amendment, which reads, "Nor shall private property be taken for public use without just compensation."

The new 104th Congress has an opportunity to step in and ensure that federal bureaucracies adhere to the Fifth Amendment. Well-designed property rights legislation, such as a bill sponsored by Texas Sen. Phil Gramm in the last Congress or the current property rights provisions in the House GOP's Contract With America, would go a long way in preventing the type of abuse suffered by Mr. Jacobs.

Not all property rights legislation would solve the problem, however. Proposition 300, a property-rights ballot initiative that failed in November in Arizona, is an example. Under the proposition, the state would have had to establish a five-step review process for all regulations prior to their enactment. In addition, the state attorney general's office would have had to develop takings guidelines that would cover all regulations. In essence, proposition 300 attempted to solve the problem of overzealous bureaucracies by creating another bureaucracy that could have cost hundreds of millions of dollars.

The Contract With America avoids the problem of Proposition 300 and focuses on the direct compensation of individuals when their property is taken for public use. When a municipality decides to build a park, or an agency decides to create a wildlife refuge, the government must compensate the landowners for the use of their property. The case of land-use regulation should be no different. When the Fish and Wildlife Service prohibits activities because of endangered species, the agency in effect creates a wildlife refuge. Unfortunately, when regulations take away property rights, individuals are rarely, if ever, compensated.

Environmental groups have argued that compensating people when government regulations restrict their ability to develop land is tantamount to paying people not to pollute. Nothing could be further from the truth. Property rights do not include the right to pollute. Pollution, like many other activities, is considered a public nuisance because it infringes on the property rights of others.

Governments have and will continue to regulate nuisances like noise pollution. The critical difference is that in the case of taking property, the actions the federal government

home, for example, is generally considered a necessity of life no less basic than food or clothing; few would consider a single-family home pollution.

Taking away a landowner's property rights decreases the value of his property. But the current House GOP legislation does not tie compensation solely to the economic value of the property. Many kinds of government actions can affect the value of land without infringing on property rights. Interstate highway construction, for example, can raise the value of the land near the interstate exits while lowering the value of land on the previously used roads. Route 29 used to be one of the only highways into Washington, D.C. from the west. When Interstate 66 was built the land in many of the small towns along Route 29 understandably declined. But building the interstate did not violate anyone's property rights along Route 29: their ability to use their land was in no way limited by I-66.

In the 1960 decision *Armstrong v. U.S.*, the Supreme Court determined that the primary purpose of the Takings Clause was "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." When a landowner is forced to provide a portion of his or her land for public purposes this principle should apply.

This is the fundamental reason why the government must compensate when it prohibits people like the Jacobses from building their house. A house does not infringe upon anyone else's property rights. The government prohibition did not seek to protect the property rights of others, rather it sought to benefit the "public interest." Hundreds of other government actions are also designed to benefit the public interest.

Whether the government builds a school, a park or a military base, the government must compensate when it takes the property of landowners, regardless of how important the activity is to the public interest. The case is no different with regulations, even when they protect "public interests" as important as calcareous fens.

Mr. Tolman is an analyst at the

GOOD NEWS

High Court Considers Key Ruling On Property Rights

In early 1995, the U.S. Supreme Court agreed to hear the appeal in *Babbitt v. Sweet Home Chapter of Communities of Oregon*. With this case comes the high court's opportunity to make a key ruling on how the Endangered Species Act affects the right of landowners to use their property.

During the summer of 1994, a federal appeals court overruled a Department of Interior regulation on the definition of "harm." At that time, the court said that "harm" did not include incidents where private citizens merely altered or destroyed an animal's habitat. Therefore, the court set apart these acts from others aimed directly at harming a species.

A return to the Department of the Interior's interpretation of the regulation is being sought by the Clinton Administration.

The government could be seriously limited in its ability to use the Endangered Species Act to restrict land use activities that affect an endangered species' habitat if the Supreme Court upholds the lower court's ruling.

High Court Denial Of Florida Rock A Property Rights Victory

On January 17, 1995, the U.S. Supreme Court denied a petition for a writ of certiorari in the case of *Florida Rock Industries, Inc. v. United States*. This is considered a major victory for property rights since it brings clarity to an issue left open by the Court's 1992 ruling in *Lucas v. South Carolina Coastal Council*. Specifically, whether less than 100% diminution of value can violate the Fifth Amendment.

In the Florida Rock decision, the High Court's refusal to review this case is profound for property owners because of the guidance the Federal Circuit has given on the open issue of partial regulatory takings.

Florida Rock is consistent with the original intent of the Fifth Amendment. Ensuring property owners are compensated regardless of how little or how much the government has taken.

Florida Rock Industries, Inc. purchased 1,560 acres of land west of suburban Miami in 1972 with the intent of mining the limestone

a cease-and-desist order against Florida Rock's mining operation.

The company stopped mining, restored the wetlands, and applied for a permit to continue mining on 98 acres, the maximum area the Corps would consider for a permit. In 1980, the Corps denied the company's permit to resume operations, and subsequently, Florida Rock filed suit.

In 1985, the Claims Court ruled that the denial of a permit was an unconstitutional taking. The case was appealed, tried a second time, rendering the same judgment for the plaintiff. The case was appealed yet again.

In 1994, the U.S. Court of Appeals for the Federal Circuit ruled against the property owner on the issue of the value of the property, but recognized the possibility of compensating a property owner when the government, through regulation, takes less than the full value of the property. As explained by Judge Jay Plager in his opinion, "there is no logical distinction between the taking of the entire property, which is compensable under the Fifth Amendment, and the taking of less than the full value of a parcel." He stated, "Logically, the amount of just compensation should be proportional to the value of the interest taken...whether the taking is by physical occupation for the public to use as a park, or by regulatory imposition to preserve the property as a wetland so that it may be used by the public for ground water recharge and other ecological purposes."

Roberges Win Wetlands Suit

by David B. Howard

Reprint permission courtesy of *Land Rights Letter*

Back in 1964 Gaston and Monique Roberge purchased a 2.8 acre parcel of land in Old Orchard Beach, Maine as a retirement investment. At the time, the purchase seemed to be a reasonable and prudent way to provide for their golden years.

In the intervening years very little was done to the property. In 1975-76 the Roberges drained excess fill from a sewage system upgrade the town was building, to fill a low spot on the property. In 1986 the Roberges received an offer for the property, an offer that proved their investment strategy was right on the money... a builder offered the couple \$440,000 for the lot. Gaston

ENTER THE FEDERAL GOVERNMENT

As the builder prepared his plans and commenced the permit process, The Army Corps of Engineers entered the picture. The builder was told by the Corps that it had been determined that wetlands had been filled on the property, and that in order to build, all dirt placed subsequent to 1 September 1976 had to be removed. The estimated cost of this remediation was \$50,000-\$100,000, the builder balked and the sale that would have secured their future was terminated. The Roberges spent thousands of dollars on consultants and lawyer's fees in an attempt to salvage the sale and their future. In 1988, unable to budge the process, they filed for an after-the-fact permit for the fill that had been placed some 12 years earlier. On 3 July 1991, the Corps denied the Roberges' permit and ordered that approximately 3,100 yards of dirt be removed. The Corps claimed the fill was dumped after the expansion of their authority in 1975 (under the court case: *NRDC v. Calloway*).

After five years of harassment by the Army Corps, the Roberges contacted Peggy Reigle, Chairman of the FLOC (Fairness to Landowners Committee). Ms. Reigle in turn was able to secure the help of Bernard Goode (a wetlands consultant and former Chief of Regulation of the Corps) and Stan Legro (an attorney and former Assistant Administrator for Enforcement with the EPA). Goode and Legro set about to file a suit against the Corps in the U.S. Court of Claims.

DISTURBING DOCUMENTS

During the discovery process some extremely disturbing documents began to surface. It became apparent that the Army Corps never had any intention of granting a permit, and in fact had targeted the Roberges to be used as an "example." Found on a routing slip to Rich Roach (a Corps Enforcement Officer) from Jay Clement (a Corps Field Agent) was the following communication: "Rich, I haven't assigned an applicator number to this. I think Wellman (the Roberges engineer) acting on behalf of Roberge is trying to sneak this one past you guys. Roberge would be a good one to squash and set an example - Old Orchard is heating up these days. Let me know what's going on. Thanks (Signed) Jay Clement MPO, formerly the Maytag repairman."

Bernard Goode was shocked and was

BAD NEWS

note was written, I was personally embarrassed to read it ... It is my opinion that this is a clear case of a predetermination by the Corps to deny the Roberges' application."

All too often we have seen the arrogance of government bureaucrats highlighted by comments such as these. It seems to be a common order of business, not an isolated incident. As the case wore on, and hundreds of hours were spent in research by Goode and Legro, it became increasingly clear that the Corps did not have jurisdiction. In the middle of June 1992 the Corps finally conceded that they had NEVER had jurisdiction. It was also noted that the property was a Phase III type wetland and was filled prior to the Corps having jurisdiction. Even though the Corps had admitted their "mistake," it would be another four months before the Roberges received the documentation that would finally free the property.

VICTORY!

Although the Roberges had won, the victory was bittersweet. As time progressed the Real Estate market had crashed and the solable value had diminished considerably from the \$440,000 they were offered in 1986. Consequently they decided to sue the U.S. Government. According to Ms. Reigle, "the suit charged The Army Corps of Engineers with a "taking" by denying all economic use of their property for 6 years, "extraordinary and unreasonable delays" and charged the Corps with "acting in bad faith." The suit also sought 6 years of interest on the \$440,000 of proceeds they would have earned on the sale of the lot, the differences in market value from 11/1/1986 Vs 10/14/1992 and the legal fees and costs

U.S. Appeals Court Denies Waterford Farmer Rehearing

On January 9, 1995, the Third Circuit Court of Appeals in Philadelphia denied a petition for rehearing filed by Waterford farmer Robert Brace regarding the Court's ruling on November 22, 1994 reversing a lower court decision.

The petition asked the Court to reconsider its interpretation of "normal farming practices" and agricultural activities clearly exempted from the permit requirements outlined by Section 404 of the federal Clean Water Act. In the Appellate Court's opinion of November 22, 1994 which reversed Erie County Court Judge Glenn Mencer's ruling in December of 1993, "normal farming practices" used by Mr. Brace and hundreds of other farmers throughout Pennsylvania and the nation, do not qualify under the guidelines promulgated by regulatory bureaucrats. In reaching this seemingly counter-intuitive decision, the panel completely sidestepped the statute enacted by Congress which specifically states that permits are not needed for agricultural activities related to normal farming practices including the maintenance of drainage ditches.

The Appellate Court's refusal to rehear this case now puts the Waterford farmer in a completely untenable position. The Third Circuit sent the case back to the District Court for enforcement of the EPA's restoration order and for determination of a civil penalty. Now that

him into complying with a restoration order, thus destroying his farm under threat of enormous fines, penalties, and even jail. To make sure citizens can't escape its clutches, the government goes on to adopt a policy that it won't process permit applications when the applicant is said to be "in violation." Thus, Mr. Brace could never claim his farm exemption or try to get a permit once the bureaucrats said he was in violation.

"It is disheartening," states Mr. Brace, "that 3 judges would reverse a decision made by a highly respected federal judge from Erie who actually saw my property and heard all the testimony which clearly established that my farming activities were exempt under applicable state and federal laws and that many of these same agencies aided and assisted me in my endeavors. It's just unbelievable."

After nearly 8 years of bureaucratic abuse and regulatory finagling with the agricultural exemption now rubberstamped by the Court of Appeals, Mr. Brace now faces his last hope to obtain justice. He plans to ask the U.S. Supreme Court to hear his appeal of the Third Circuit's decision.

He has also produced a short video detailing the events of his case which may be obtained through the order form on the back of this publication.

Nebraska Farmer Denied U.S. Supreme Court Appeal

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