

# *Fordham Environmental Law Review*

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*Volume 8, Number 3*

2011

*Article 2*

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## Waiting for Uncle Sam to Buy the Farm, or Wetland? A Call for New Emphasis On State and Local Land Use Controls in Natural Resource Protection

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# WAITING FOR UNCLE SAM TO BUY THE FARM . . . FOREST, OR WETLAND? A CALL FOR NEW EMPHASIS ON STATE AND LOCAL LAND USE CONTROLS IN NATURAL RESOURCE PROTECTION

*John M. Vandlik\**

In 1864, the naturalist George Perkins Marsh wrote of "civilized" man's inevitable destruction of the natural world. He marveled at the speed with which such degradation had already overtaken the North American continent:

Comparatively short as is the period through which the colonization of foreign lands by European emigrants extends, great, and, it is to be feared, sometimes irreparable, injury has been already done in the various processes by which man seeks to subjugate the virgin earth; and many provinces, first trodden by the *homo sapiens Europae* within the last two centuries, begin to show signs of that melancholy dilapidation which is now driving so many of the peasantry of Europe from their native hearths.<sup>1</sup>

To Marsh, such problems were caused from the abuse of the land, not its use.<sup>2</sup> Rural-based industry was not necessarily a problem, but the consumption of the land was a problem that threatened society as a whole. Indeed, he asserted that it was in the "general interests of humanity, that this decay should be arrested."<sup>3</sup> One method he suggested was that "future operations of rural husbandry and of forest industry, in districts yet remain-

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1. GEORGE PERKINS MARSH, MAN AND NATURE 46 (David Lowenthal ed., Belknap Press of Harvard University Press 1965) (1864).

2. *See id.* at 36, 280.

3. *Id.* at 46.

ing substantially in their native condition, should be so conducted as to prevent the widespread mischiefs."<sup>4</sup> Marsh recognized government's natural role in providing for the public interest, and he was skeptical that the commercial dealings of private corporations would yield results which met that interest.<sup>5</sup>

Yet, he seemed to have faith in the American experiment of the private laborer-landowner, provided that the landowner was adequately educated in the needs of the land. The "safeguards" of proper land use would be guaranteed by the landowner alone. Marsh maintained:

This can be done only by the diffusion of knowledge on this subject among the classes that, in earlier days, subdued and tilled ground in which they had no vested rights, but who, in our time, own their woods, their pastures, and their ploughlands as perpetual possession for them and theirs, and have, therefore, a strong interest in the protection of their domain against deterioration.<sup>6</sup>

Unfortunately, reality has never matched Marsh's nineteenth century optimism. Marsh's distrust of inherently self-interested corporations applies equally well to the individual landowner. Contrary to Marsh's contention, ownership interest translates into self interest of the landowner, not a trustee's interest in the land.<sup>7</sup> Pecuniary interest of the landowner, not the public interest, drives private land use decisions in this country.<sup>8</sup> That has been, and still is, the rule, not the exception.

Consumptive land use still dominates 130 years after Marsh idealistically thought it would wither in the enlightenment of education. Now, the rural environment is primarily consumed by residential and commercial development of the land.

Modern approaches to natural resource protection recognize the pecuniary foundation of private land use decisions, yet they often attempt to combat the problem by further solidifying that

4. *Id.*

5. *See id.* at 51 n.53.

6. *Id.* at 46.

7. *Cf.* Eric T. Freyfogle, *Ownership and Ecology*, 43 CASE W. RES. L. REV. 1269, 1276 (1993) (explaining that "[w]hen the land is owned by an individual and is managed for that human's more-or-less exclusive benefit, we must expect, as indeed we find, that long-term degradation of the Earth counts for little.")

8. *See id.*

base.<sup>9</sup> Instead of insisting that landowners desist in land use practices that are considered harmful to the public interest, government often seeks to "buy out" the landowner. Societal interests enter a bidding war, on the open market, for the landowner's cooperation. While this is perhaps the least confrontational method of achieving private natural resource protection, it is also an inefficient and unnecessary means to a long-recognized and necessary public end.<sup>10</sup>

This article will explore the advantages of state or local land use controls and the pitfalls of government acquisition of conservation easements. Part I of this article will discuss the federal government's role in protecting natural resources through the acquisition of conservation easements, as exemplified by two federal programs. It will note the inherent inefficiencies of such programs. Part II will then argue the viability of state or local land use controls, as an alternative to federal acquisition and provide a review of recent United States Supreme Court takings decisions. It will finally explore how one state, Wisconsin, has integrated that jurisprudence in the context of zoning for the protection of natural resources.

#### I. THE FEDERAL ROLE IN NATURAL RESOURCE PROTECTION THROUGH ACQUISITION OF CONSERVATION EASEMENTS

Even in the Nineteenth Century, Marsh recognized the difference between land-sensitive forestry/farming uses and uses which consume the rural character of the land. The former was to be encouraged and the latter decried. Today's society has also recognized the inherent value of such rural land uses by enacting laws to preserve those private uses through the expenditure of public funds.

Two federal programs exemplify the government's interest in keeping land in a rural, farm or forest based use. In these programs, that interest is advanced by the government's purchase of private interests, such as conservation easements. The Forest Legacy Program<sup>11</sup> was adopted as a part of the 1990 Farm Bill.<sup>12</sup> It

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9. See discussion *infra* Parts I.A & B.

10. See discussion *infra* Part I.C.

11. 16 U.S.C. § 2103c (1994).

12. Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (codified as amended in scattered sec-

authorizes the Secretary of Agriculture, through the Forest Service, to purchase conservation easements<sup>13</sup> in order to prevent "environmentally important forested areas from conversion to non-forest uses."<sup>14</sup> The Wetland Reserve Program (the "WRP")<sup>15</sup> was adopted under the 1985 Farm Bill.<sup>16</sup> Here, too, the Secretary of Agriculture, through the Natural Resource Conservation Service (the "NRCS"), is authorized to purchase conservation easements in order to "provide for the restoration and protection of the functional values of wetland."<sup>17</sup>

The federal government certainly has a legitimate interest in purchasing land or interests in land to achieve natural resource protection. Indeed, the Forest Service and National Forests were created to protect the nation's forestlands from imprudent exploitation by the timber industry.<sup>18</sup> It was believed that ownership by the federal government, with the management aim of sound scientific forestry, would provide the most effective means of protecting the nation's forest resources.<sup>19</sup> Unlike the National Forests reserved from the public domain in the West, Eastern National Forests were built parcel by parcel, as the federal government purchased land from private landowners, as well as local governments, pursuant to the Weeks Act.<sup>20</sup> Acquisition of private land for the National Forest System still continues. In the Omnibus Consolidated Appropriations Act, 1997, Congress authorized the expenditure of \$40,575,000 from the Land and Water Conservation Fund for the Forest Service to acquire lands

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tions of 7 U.S.C. and 16 U.S.C.).

13. While the Forest Legacy Law allows for the fee simple purchase of lands, the purchase of conservation easements has been the predominant focus of the program. See discussion *infra* Part I.A.

14. See 16 U.S.C. § 2103c(a) (1994). Recent amendments to the Forest Legacy Law allow states to purchase Forest Legacy conservation easements with grant money from the Forest Service. See *supra* note 11.

15. 16 U.S.C. §§ 1637 et seq. (1994).

16. See Food Security Act of 1985 § 221, Pub. L. No. 99-198, 99 Stat. 1507.

17. 16 U.S.C. § 3837a(b) (1994).

18. See generally GIFFORD PINCHOT, *BREAKING NEW GROUND* 84-85 (1974).

19. See *id.* at 293.

20. See 16 U.S.C. § 515 (1994).

and interests in lands.<sup>21</sup>

Given the federal goal of active management of the forests, outright fee simple ownership of the land by the United States is the simplest way to achieve the necessary control over the resource. The Forest Service is directed by law to manage the National Forests for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes."<sup>22</sup> This affirmative control, or management, over the land, including the public's use of the land, is distinctly different from the federal government merely seeking to limit how land is used. Adding to the equation the factor that the land to be restricted remains in private ownership, yields a product quite unlike the traditional model of federal ownership.

In these times of federal deficit concerns, federal agencies are faced with having to achieve their missions with increasingly limited budget dollars. At the same time, perhaps in part to justify downsizing of federal agencies, there exists a current trend in federal government that allows state and local governments to take over the field of play, leaving the federal government on the bench merely to cheer them on and monitor game strategy.<sup>23</sup>

While federal natural resource agencies were largely formed to address the *national* interest in natural resource protection or

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21. See Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009, 3206 (1996).

22. Multiple-Use Sustained Yield Act of 1960 § 1, 16 U.S.C. § 528 (1994). This section also states that "[n]othing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands" and the purposes of § 528 are to be considered supplemental to the purposes set forth at 16 U.S.C. § 475, which are "to improve and protect the forest", "secur[e] favorable conditions of water flows, and to furnish a continuous supply of timber."

23. An example of this in the welfare arena is the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 8 U.S.C. & 42 U.S.C.), where the Federal welfare program will be administered through block grants to the states, effectively giving the states greater control over this Federal program. The House Conference Report explains that the block grant aspect "restores the State's fundamental role in assisting needy families" and that "[t]he best welfare solutions come from those closest to the problems — not from bureaucrats in Washington." H.R. REP. NO. 104-725, at 8897 (1996).

preservation, it must be admitted that those missions have expanded to effectively include the protection of state and even local interests.<sup>24</sup> With federal budget limitations as a primary concern, it would not be surprising if this "mission creep" were assailed as an unnecessary luxury. That is, the expenditure of federal money for the purchase of conservation easements as a federal means of controlling *private* land use may not weather political scrutiny in the current fiscal context. Certainly, it is not unreasonable to expect that the federal government should first take care of assets that it owns outright through properly funded maintenance and administration.

It also cannot be ignored that many state and local officials are attempting to pull more decision-making influence from the federal government in the natural resource field; it is not merely the case of possible abdication of federal roles.<sup>25</sup> While some local officials seek local control over federal lands, the concept is one that cannot be legally defended, as evidenced in the recent Nye County, Nevada litigation.<sup>26</sup> Similarly, attempts to convey federal land to the states for management purposes run counter to the legitimate and traditional federal role in natural resource ownership and management that has existed in our laws and government over the past century.<sup>27</sup>

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24. See, e.g., Laura S. Beliveau, Comment, *The Forest Legacy Program: Using Conservation Easements to Preserve the Northern Forest*, 20 B.C. ENVTL. AFF. L. REV. 507, 508-09 (1993) (arguing that the impetus for the Forest Legacy Program arose from the inadequacy of state and local zoning measures to prevent development and harsh logging practices in the Northern Forest Lands).

25. See John W. Hart, *National Forest Planning: An Opportunity For Local Governments to Influence Federal Land Use*, 16 PUB. LAND L. REV. 137, 138-39 (1995).

26. *United States v. Nye County*, 920 F. Supp. 1108 (D. Nev. 1996) (holding that Nye County has no authority to manage roads on National Forest System land).

27. An example of this concept may be found in Senate Bill 1254, the Public Land Management Responsibility and Accountability Restoration Act of 1997, which was sponsored by Senator Larry Craig of Idaho and introduced in the 105th Congress. The bill would allow for the option of state management, and eventual ownership, of Federal lands currently administered by the Forest Service and Bureau of Land Management. See 143 CONG. REC. S10,330-32 (daily ed. Oct. 3, 1997)

Still, state and local governments may be quite willing, and appropriately so, to again become the central battlegrounds for natural resource protection issues involving non-federal land. With a "New Federalism" alive and well, we should not view environmental or natural resource protection as being merely a federal role. With respect to the federal programs of Forest Legacy and Wetland Reserve, there is nothing inherently federal about the objective, which is to control the use of private land.

#### A. *The Forest Legacy Program*

Under the Forest Legacy Program,<sup>28</sup> conservation easements are acquired for the purpose of "protecting environmentally important private forest lands that may be threatened by conversion to nonforest uses."<sup>29</sup> In short, the conservation easements are to be used for "promoting forest land protection and other conservation opportunities," such as "the protection of important scenic, cultural, fish, wildlife, and recreational resources, riparian areas, and other ecological values."<sup>30</sup> The conservation easements acquired by the Forest Service, or by the states with grant money from the Forest Service,<sup>31</sup> "may allow forest management activities, including timber management."<sup>32</sup> While the owner may not convert use of the property to uses inconsistent with the Forest

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(section-by-section description of the Federal Lands Management Adjustment Act inserted into remarks by Sen. Larry Craig).

28. 16 U.S.C. § 2103c (1994).

29. § 2103c(a); *see also* Revised Forest Legacy Program Guidelines, 61 Fed. Reg. 53,188 (1996) (guidelines effective Oct. 10, 1996).

30. 16 U.S.C. § 2103c(a).

31. Section 374 of the Federal Agriculture Improvement and Reform Act of 1996 amended the Forest Legacy Law by allowing states to purchase Forest Legacy conservation easements with Federal funds granted by the Secretary of Agriculture. Pub. L. No. 104-127, 110 Stat. 888, 1015 (current version at 16 U.S.C. § 2103c(1)). It also made amendments to the WRP. § 333, 110 Stat. at 995. Interestingly, the act created a new authority for U.S.D.A. to acquire up to \$35 million worth of conservation easements over farmland with "prime, unique, or other productive soil that is subject to a pending offer from a state or local government for the purpose of protecting topsoil by limiting nonagricultural uses of the land." § 388, 110 Stat. at 1020-21.

32. 16 U.S.C. § 2103c(h)(1).



Legacy Program, “[h]unting, fishing, hiking, and similar recreational uses shall not be considered inconsistent with the purposes of this program.”<sup>33</sup> The conservation easements are to be acquired from willing landowners for fair market value, as determined by federal appraisal and acquisition standards and procedures.<sup>34</sup>

Pursuant to the Implementation Guidelines developed by the Forest Service, the state, rather than the federal government, determines which forested areas are “environmentally important” and “threatened by conversion to nonforest uses.”<sup>35</sup> The state even prioritizes the tracts over which conservation easements should be purchased first.<sup>36</sup> This is true whether it is the Forest Service or the state which actually acquires the conservation easement. Even when the federal government is the entity which purchases the easement, the law allows the federal government to delegate or assign management and enforcement responsibilities to state or local governments.<sup>37</sup>

The key, though, is that even after the sale of the conservation easement, the landowner may make economic use of the property burdened with the conservation easement.<sup>38</sup> Indeed, the Forest Service’s Guidelines list, as one of the public values to be protected by the Forest Legacy, the ability of the land to “[p]rovide opportunities for the continuation of traditional forest uses, such as forest management, timber harvesting, other commodity use, and outdoor recreation.”<sup>39</sup> While public access may be acquired under a conservation easement,<sup>40</sup> the Forest Service Guidelines do not require that the public be allowed on the conservation

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33. § 2103c(I).

34. *See* § 2103c(c), (j)(1).

35. UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE, FOREST LEGACY PROGRAM IMPLEMENTATION GUIDELINES 5-6 (Aug. 15, 1996) [hereinafter FOREST SERVICE GUIDELINES]; *see also* Revised Forest Legacy Program Guidelines, 61 Fed. Reg. 53,188 (1996).

36. *See* Revised Forest Legacy Program Guidelines, 61 Fed. Reg. at 53,189.

37. *See* 16 U.S.C. § 2103c(h)(2).

38. *See* § 2103c(h)(1).

39. FOREST SERVICE GUIDELINES, *supra* note 35, at 6.

40. *See* 16 U.S.C. § 2103c(c).

easement area for recreational pursuits.<sup>41</sup> The state must also contribute at least 25% of the total cost of the Forest Legacy acquisition program.<sup>42</sup> That contribution may be made, in-kind, through management and administration activities.<sup>43</sup>

### B. *The Wetland Reserve Program*

The Wetland Reserve Program (WRP),<sup>44</sup> which is administered by the NRCS, directs that conservation easements be acquired "to provide for the restoration and protection of the functional values of wetland."<sup>45</sup> The law contains no express prohibitions on use that must be contained within every WRP conservation easement. Conservation easement terms are largely dependent upon the development of tract specific restrictions via a plan, and the restrictions may or may not be definitively articulated by the conservation easement itself.<sup>46</sup> Often, particular uses are allowed by approval of a local NRCS official.<sup>47</sup> Like the Forest Legacy Program, acquisition of a conservation easement is not intended to remove all economic uses from the property.<sup>48</sup> The law provides that

[w]etland reserve program lands may be used for compatible economic uses, including such activities as hunting and fishing, managed timber harvest, or periodic haying or grazing, if such use is specifically permitted by the plan and consistent with the long-term protection and enhancement of the wetlands resources for which the easement was established.<sup>49</sup>

Under the terms of the conservation easement, the landowner retains control over public access on the easement area.<sup>50</sup>

The WRP conservation easements are not to be purchased for more than fair market value.<sup>51</sup> While temporary easements may

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41. See FOREST SERVICE GUIDELINES, *supra* note 35, at 5-6.

42. See 16 U.S.C. § 2103c(j)(2).

43. See *id.*

44. See 16 U.S.C. § 3837a(b)(1994).

45. *Id.*

46. See § 3837a(b)(2).

47. See § 3837a(c).

48. See § 3837a(d).

49. *Id.*

50. See § 3837a(b)(1)(B).

51. See § 3837a(f).

be purchased under the WRP, the law directs the Secretary of Agriculture to "give priority to obtaining permanent conservation easements."<sup>52</sup> With respect to permanent conservation easements and in addition to the conservation easement purchase price, the federal government shall pay at least 75%, and up to 100%, of the costs<sup>53</sup> for implementing "conservation measures" and the "protection of the wetland functions and values" as directed by the plan.<sup>54</sup> The U.S.D.A. is also directed to "provide necessary technical assistance to assist owners in complying with the terms and conditions of the easement and the plan."<sup>55</sup> As in the Forest Legacy Program, the federal government "may delegate any of the easement management, monitoring, and enforcement responsibilities" to state authorities.<sup>56</sup>

### C. *Inefficiencies in this Federal Role*

In the case of both the Forest Legacy Program and WRP conservation easements, the federal purchase, or federally funded purchase, of conservation easements does not necessarily involve the acquisition of any affirmative rights that the federal government may exercise on the property.<sup>57</sup> Instead, such conservation easements equate to negative easements intended to limit the use of the land in order to keep it in substantially the same condition as it was prior to the easement.

The purpose of the Forest Legacy conservation easement is to

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52. § 3837c(d). The Federal Agriculture Improvement and Reform Act of 1996, *supra* note 31, effectively placed greater emphasis on the acquisition of temporary, as opposed to permanent, easements. In amending 16 U.S.C. § 3837, the act provides that, beginning October 1, 1996, acreage enrolled in the WRP should be categorized as follows: one-third in permanent easements; one-third in 30-year easements; and one-third in cost-share agreements. Also, the act directed U.S.D.A. not to acquire additional permanent easements until at least 75,000 acres in the WRP are enrolled as temporary easements. Pub. L. No. 104-127, 110 Stat. 888, 995.

53. *See* 16 U.S.C. § 3837c(b)(1)(A).

54. *See* § 3837c(a)(1).

55. § 3837c(a)(2).

56. § 3837f(a).

57. Of course, in both instances the United States obtains the affirmative right to enforce the terms of the conservation easement itself. *See* 16 U.S.C. §§ 2103(I), 3837f(a).

prevent conversion to nonforest uses.<sup>58</sup> While the WRP easement is geared to "restore" wetland values, the federal government must pay for most, if not all, of the restoration costs, notwithstanding that it already owns a conservation easement on the land.<sup>59</sup> Under the Forest Legacy Program, public access, for purposes such as outdoor recreation, may be acquired, but it is not mandated.<sup>60</sup> With WRP, the landowner retains control over any public access to the conservation easement area. Both types of conservation easements allow continued economic use of the property.<sup>61</sup>

Interestingly, even when these conservation easements are held by the United States of America,<sup>62</sup> the state, and even local governments, in the case of the Forest Legacy Program, may eventually manage, monitor, and enforce the terms of the conservation easements.<sup>63</sup>

While in the context of the overall federal budget, the amount of federal money spent in acquiring these types of conservation easements is minuscule, in actual dollars it is not insignificant. Since Fiscal Year 1992, Congress has appropriated a net \$25.848 million<sup>64</sup> to acquire Forest Legacy conservation easements and

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58. See 16 U.S.C. § 2103(a).

59. See 16 U.S.C. § 3837c(b)(1)(A).

60. See FOREST SERVICE GUIDELINES, *supra* note 35, at 6.

61. See 16 U.S.C. §§ 2103c(h)(1), 3837a(d).

62. As previously noted, Forest Legacy conservation easements may also be acquired by a state with federal funds. See *supra* note 31 and accompanying text.

63. See *supra* note 37 and accompanying text.

64. The Forest Legacy Program is funded under the Department of the Interior and Related Agencies Appropriations Act. The following are the fiscal year and corresponding amounts allocated to Forest Legacy, per the House Conference Report, for that year's act: FY 92, \$5 million (Pub. L. No. 102-154; H.R. CONF. REP. NO. 102-256, at 59); FY 93, \$10 million (Pub. L. No. 102-381; H.R. CONF. REP. NO. 102-901, at 50); FY 94, \$6.948 million (Pub. L. No. 103-138; H.R. CONF. REP. NO. 103-299, at 38); FY 95, \$6.7 million (Pub. L. No. 103-332; H.R. CONF. REP. NO. 103-740, at 39, H.R. REP. NO. 103-551, at 74), rescinded \$7.8 million (Pub. L. No. 104-19, H.R. CONF. REP. NO. 104-124, at 85); FY96, \$3 million (Pub. L. No. 104-134, H.R. CONF. REP. NO. 104-537, at 424, H.R. CONF. REP. NO. 104-402, at 50, H.R. REP. NO. 104-173, at 68); FY 97, \$2 million (Pub. L. No. 104-208, H.R. CONF. REP. NO. 104-863, at 1010).

\$343.2 million<sup>65</sup> for the WRP. In an era of fiscal conservatism such expenditures will not necessarily escape scrutiny.

There is nothing uniquely federal about the goals of the Forest Legacy and WRP conservation easement acquisitions; the same objectives of natural resource protection can be achieved through the exercise of old fashioned state and local land use control authorities.<sup>66</sup> Moreover, a state and local government can accomplish these same natural resource objectives without any direct cost to the taxpayer. In that light, it may be argued that the federal, or federally funded, purchase of conservation easements is not the most fiscally conservative means of natural resource protection.

These federal acquisitions also lack the political accountability inherent in land use control actions taken by state or local authorities. The conservation easements are negotiated between a private landowner and federal agency officials. The specific terms of the conservation easement will not necessarily reflect state or

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65. The WRP is funded under the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act. The following are the fiscal years and corresponding amounts allocated to WRP for that years act: FY 92, \$46.357 million (Pub. L. No. 102-142, 105 Stat. 878, 897); FY 93, \$0.0 (Pub. L. No. 102-341), \$60 million emergency supplemental for flood damage clean up, of which funds may be utilized by WRP, provided certain conditions exist (Pub. L. No. 103-75, 107 Stat. 739, 742); FY 94, \$66.675 million (Pub. L. No. 103-111, 107 Stat. 1046, 1064); FY 95, \$93.2 million (Pub. L. No. 103-330, 108 Stat. 2435, 2453); FY 96, \$77 million (Pub. L. No. 104-37, 109 Stat. 299, 315); FY 97, none expressly appropriated (Pub. L. No. 104-180). The Federal Agriculture Improvement and Reform Act, *supra* note 31, directed that the Commodity Credit Corporation fund the WRP. Pub. L. No. 104-127, 110 Stat. 888, 1007. The House Conference Report 104-726, which accompanied Pub. L. No. 104-180, explains: "Both the Wetlands Reserve Program and the Conservation Reserve Program were previously funded through appropriated accounts, but the Federal Agriculture Improvement and Reform Act provides that these programs now be administered through funds provided directly from the Commodity Credit Corporation."

66. See Beliveau, *supra* note 24, at 524, who concedes that with the Forest Legacy Program, the federal government is attempting "to perform what traditionally has been a local function."

local concerns or desires relative to particular, local land use issues.

The purchase of an individual conservation easement, even by the government, is a transaction that is more private than public in nature. On the other hand, action by local officials through the zoning process is fundamentally public. The zoning decision-making process often affords the opportunity for public debate and dialogue. There is also accountability of the decision makers to the public through the local electoral process.

Given that state and local authorities can accomplish the same natural resource protection ends through land use controls which need not cause the expenditure of public funds and given that such a process is inherently responsive to the will of the majority, it is difficult to ignore, or discount, this method of natural resource protection. Indeed, these very attributes argue forcefully that land use controls be considered a primary means of natural resource protection. Furthermore, fiscal constraints at the federal level as well as the movement in political dialogue to take decisions away from federal bureaucrats and place them in the hands of state and local governments may very well conspire to eliminate federal programs, like the Forest Legacy Program and WRP, that buy such natural resource protection.

Even if not persuaded as to the correctness of such an outcome, those interested in natural resource protection might have to consider it, anyway, as an imminent reality. This is not to say that the possible passing of federal dollars for the purchase of conservation easements must be viewed as defeat in the war for natural resource protection. Rather, it should be viewed as a time to regroup the troops on a new field of battle.

## II. NATURAL RESOURCE PROTECTION THROUGH STATE OR LOCAL LAND USE CONTROLS

State or local land use control authorities are a viable means of achieving natural resource protection. This is particularly so when government intervention is only needed to restrict what one may do with one's land. In particular, land use controls can be an extremely efficient means for the public to address natural resource protection when exercised in situations where the following three conditions are present: (1) the public, or govern-

ment agencies, need not possess the private property to meet the natural resource objectives; (2) the private property is already in a condition that essentially achieves the natural resource objectives; and (3) some economic use may be made of the property even after imposition of the land use controls. Additionally, as an exercise of government authority, local land use restrictions become a function of local public support.

Due to some well-publicized cases, some may believe that the United States Supreme Court, in the name of the Fifth Amendment, has taken the steam out of the local land use controls engine, depriving it of the ability to pull the full load needed for natural resource protection.<sup>67</sup> However, that is a misconception. The fear of takings is perhaps more potent than the law of takings, when it comes to any perceived inability to exercise local land use controls through the long-recognized constitutionally sound tool of zoning.<sup>68</sup>

The type of zoning restrictions necessary to accomplish the same goals as conservation easement programs such as Forest Legacy Program and WRP do not legitimately raise takings concerns. While the law of takings is not always clear, the legislative exercise of zoning authority finds sufficient foothold to withstand takings challenges with some degree of certainty.

#### A. *Federal Courts on Takings*

In *Dolan v. City of Tigard*, the Supreme Court reviewed conditions imposed on a permit to expand an existing retail store.<sup>69</sup>

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67. See, e.g., Tom Arrandale, *Environmental Regulation and The Private-Property Line*, GOVERNING, June 1994, at 82 (discussing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), anticipating a decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and noting that “[a]ctivist courts and state legislatures could wind up eroding governments’ fundamental authority to look out for the common good.”); James W. Ely Jr., *A Breather on the Takings Clause*, A.B.A. J. 42-43 (Jan. 1996) (discussing *Dolan*, 512 U.S. 374 and *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), and concluding that these decisions are a “strong signal that the constitutional tide has turned in favor of private property rights.”).

68. See generally, *infra* Part II.A.

69. 512 U.S. 374.

The conditions required that the landowner dedicate her property abutting a creek as a public greenway and that she allow a public bike path through her property. The Court found that these conditions involving public access violated the Fifth Amendment because there was no "rough proportionality" between the conditions imposed and the public burdens resulting from the expanded development of the store.<sup>70</sup>

In deciding *Dolan*, the requirements of mandating public recreational use along the creek's greenway and the bike path were determinative of the Court's takings conclusion. The discussion on the greenway is particularly revealing.

[The city] not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S., at 176. It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek . . . .<sup>71</sup>

However, the Court took care to distinguish the *Dolan* situation from one involving more general and traditional zoning requirements. The Court explained:

[T]he authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 . . . (1926). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 . . . (1922). A land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).<sup>72</sup>

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70. *Id.* at 391.

71. *Id.* at 393.

72. *Id.* at 384-85.



In *Dolan*, the Court suggested that the above-quoted analysis had continued validity when land use controls were imposed via “essentially legislative determinations classifying entire areas of the city,”<sup>73</sup> and when the land use restriction was merely “a limitation on the use [the landowner] might make of her own parcel.”<sup>74</sup>

When land use controls also effectively allow continued economic use of the property, the taking situation addressed in *Lucas v. South Carolina Coastal Council*, is not implicated.<sup>75</sup> *Lucas* concerned a situation where a state land use restriction was concluded, by the trial court, to have rendered the subject property valueless.<sup>76</sup> The Court of Appeals decision in *Florida Rock Industries v. United States*<sup>77</sup> explained the impact of *Lucas* on existing takings law as follows:

How to determine whether a regulatory taking under the Fifth Amendment has occurred is a subject of on-going debate. The Supreme Court has provided various articulations, influenced, as could be expected, by the particular circumstances of the cases before it. One formula that has emerged and has been repeated in several cases requires that the court balance several pragmatic considerations in making its regulatory takings determination. These considerations include: the economic impact of the regulation on the claimant, the extent to which the regulation interferes with investment-backed expectations, and the character of the Government action. (The leading case is *Penn. Central Transportation Co. v. New York City*, 438 U.S. 104, 124 . . . (1978)). . . .

The recent Supreme Court decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 . . . (1992), teaches that the economic impact factor alone may be determinative; in some circumstances, no balancing of factors is required. If a regulation categorically prohibits all economically beneficial use of land — destroying its economic value for private ownership — the reg-

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73. *Id.* at 385. Such a situation is unlike that in *Dolan* which involved “an adjudicative decision to condition . . . [an] application for a building permit on an individual parcel.” *Id.*

74. *Id.* Again, the Court contrasted this type of situation with the challenged requirement in *Dolan*, which required that “she deed portions of the property to the city” for use as a public bikeway. *Id.*

75. 505 U.S. 1003 (1992).

76. *Id.* at 1016 n.7.

77. 18 F.3d 1560, 1564-65, (Fed. Cir. 1994) (en banc), *cert. denied*, 513 U.S. 1109 (1995).

ulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.

If, however, a regulation prohibits less than all economically beneficial use of the land and causes at most a partial destruction of its value, the case does not come within the Supreme Court's "categorical" taking rule.<sup>78</sup>

As a result, if property may be used for some economical purpose after imposition of a land use control, then a categorical taking, as discussed in *Lucas*, is not present.

*Agins v. Tiburon* presents a situation more analogous to the type of natural resource protection that is the focus of this article.<sup>79</sup> After *Agins* purchased five acres in the City of Tiburon, California, the city re-zoned the parcel to effectively limit residential development and protect open space. *Agins* brought an inverse condemnation action against Tiburon as a result of the re-zoning. The Supreme Court concluded that there was no taking.<sup>80</sup>

The Court succinctly articulated the principle with respect to zoning laws and takings. "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land."<sup>81</sup> In concluding that the zoning ordinance "substantially advance[d] legitimate government goals," the Court noted the State's statutory provision which provided that the "development of local open-space plans will discourage the 'premature and unnecessary conversion of open-space land to urban uses.'"<sup>82</sup> The Court further stated that "[t]he specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization. Such governmental purposes long have been recognized as legitimate."<sup>83</sup>

In addressing the benefits and burdens of the zoning ordinance the Court found:

The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for

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78. *Id.* at 1564-65 (footnotes omitted).

79. 447 U.S. 255 (1980).

80. *See id.* at 258.

81. *Id.* at 260 (citations omitted).

82. *Id.* at 261 (citations omitted).

83. *Id.* (footnote omitted).

open-space areas. There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.<sup>84</sup>

*Agins*, which was cited by the Court in *Dolan* and *Lucas*, confirms that a comprehensive zoning scheme with a goal of preventing or controlling development of open space, and that effectively allows existing, economically-viable uses of the land to continue, does not violate the Fifth Amendment.<sup>85</sup> In short, federal jurisprudence recognizes, and protects from successful takings challenge, measured natural resource protection goals achieved through zoning laws.

B. *One State's Perspective of Takings and Natural Resource Protection*  
— *The Wisconsin View*

Since most controversies surrounding local zoning actions are ultimately resolved in state, not federal, courts,<sup>86</sup> it is appropriate that we analyze how these issues are resolved by a state judiciary. Wisconsin caselaw provides such an illustration.

The Wisconsin Supreme Court recently addressed the issue of takings in the context of a local zoning ordinance that was aimed at preserving existing use of property for natural resource protection. In *Zealy v. City of Waukesha*, the plaintiff, Zealy, owned 10.4 acres of land.<sup>87</sup> Approximately 8.2 acres of that parcel was re-zoned, along with 20 acres under other ownership, from R-1, which permits residential use, to C-1, conservancy district, which is to protect wetlands and which allows agricultural use. When Zealy brought his action seeking compensation for an alleged taking due to the re-zoning, he used his property for peat mining.<sup>88</sup> There was evidence that the re-zoning did indeed lower the value of Zealy's property. Prior to the zoning change the City

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84. *Id.* at 262.

85. *See id.* at 260-64.

86. *See, e.g.,* North Haven Planning & Zoning Comm'n v. Upjohn Co., 753 F. Supp. 423, 427 (D. Conn. 1990).

87. 548 N.W.2d 528, 529 (Wis. 1996).

88. *Id.* at 530.

assessed the property at \$81,000, whereas, after the zoning change, the assessed value was \$57,000.<sup>89</sup>

The Wisconsin Supreme Court viewed the *Zealy* case as an opportunity to “settle issues presently unclear in [Wisconsin’s] law of regulatory takings.”<sup>90</sup> After reviewing the leading United States Supreme Court cases concerning takings, the court concluded that Wisconsin caselaw only worded the takings test in a slightly different manner.<sup>91</sup> According to the court, “the rule emerging from opinions of our state courts and the United States Supreme Court is that a regulation must deny the landowner all or substantially all practical uses of a property in order to be considered a taking for which compensation is required.”<sup>92</sup>

Further, the court concluded that the “property” at issue was the entire 10.4-acre parcel, since the court found that there was no convincing support in the decisions of the United States Supreme Court for the segmentation of property ownership in the context of a takings evaluation.<sup>93</sup> The court noted that 2.1 acres of the parcel were unaffected by the re-zoning and were still zoned for residential use. Also, the City’s assessment indicated that the property retained approximately 75% of its pre-zoning change assessed valuation.<sup>94</sup> The court stated, “[f]inally, we note that under the City’s current zoning ordinance, the 8.2 acres of land zoned C-1 *may still be used for its historical use, farming*. Viewed as a whole the parcel retains a combination of residential, commercial, and agricultural uses.”<sup>95</sup> Hence, the court could not conclude that the re-zoning “deprived Zealy of all or sub-

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89. *See id.*

90. *Id.* at 531.

91. *See id.*

92. *Id.*

93. *See id.* at 533.

94. *See id.* at 534. Zealy disputed the assessed value of his land claiming that the property would be worth \$200,000 if residential uses were allowed. *See id.* The court responded to Zealy’s argument by stating: “While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.” *Id.*

95. *Id.* (emphasis added).

stantially all of the use of his land."<sup>96</sup> There was no taking.<sup>97</sup>

Again, the crucial point is that even after the imposition of the land use restrictions, the property may be used in the same manner as before the re-zoning. When the zoning restriction merely preserves an existing rural use, such as an agricultural use, it is not considered a taking.<sup>98</sup>

This concept was touched upon by the Wisconsin Supreme Court in *Just v. Marinette County*,<sup>99</sup> when it made the distinction between restrictions imposed to create a public benefit, as opposed to those imposed to prevent a public harm.<sup>100</sup> *Just* concerned shoreland zoning provisions designed to protect wetlands. There, the court concluded that the "exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses."<sup>101</sup> The protection of natural resources is certainly an appropriate goal of zoning restrictions in Wisconsin. As the court stated in *Zealy*, "Wisconsin has a long history of protecting its water resources, its lakes, rivers, and streams, which depend on wetlands for their proper survival."<sup>102</sup>

Notwithstanding the government's ability to effectuate such natural resource protection through the imposition of local land use controls at no cost to the public fisc, there is movement in Wisconsin to adopt strategies employed by the federal government in the Forest Legacy and Wetland Reserve programs. That is, the purchase of private property rights, such as conservation easements, are being advocated as the favored mechanism to preserve existing uses and open space.<sup>103</sup> Unlike the federal gov-

96. *Id.*

97. *See id.*

98. *See id.*

99. 201 N.W.2d 761 (Wis. 1972).

100. *See id.* at 767-68.

101. *Id.* at 768.

102. *Zealy*, 548 N.W.2d at 535.

103. Under the heading of protecting "prime agricultural land and sensitive natural areas," and "private property rights," Wisconsin's State Interagency Land Use Council, which was convened by the Governor, recommends that "the potential use of Purchase of Development Rights (PDRs), Transfer of Development Rights (TDRs) and other

ernment, though, the state and local governments of Wisconsin clearly have existing authority to impose land use restrictions on private land. The appropriate question for Wisconsin — “America’s Dairyland” — is “why buy the cow, when you can get the milk for free?”

#### CONCLUSION

As seen from the above discussion, fear of taking due to imposition of measured land use controls is not warranted. It cannot be credibly argued that the purchase of development rights is necessary to protect natural resources due to constitutional takings provisions. As the federal government has discovered through its conservation easement purchase programs, it is politically easier to buy protection than it is to mandate it. Perhaps such political expediency is a reason why some, at a state level (as seen in Wisconsin), are also advocating the purchase of development rights, presumably via mechanisms such as conservation easements.

It is not fiscally conservative, or even appropriate, for governments to embark upon a program of buying natural resource protection when they can, through the exercise of existing authorities, achieve the same level of protection at no public cost. This is not to suggest that there will not be times when a state or local government will have to purchase property rights in order to secure the necessary level of protection or public use. Also, the purchase of private property rights by private land trusts is often the only mechanism such organizations have at their dispo-

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forms of compensation should also be fully explored” by local units of governments. *PLANNING WISCONSIN: REPORT OF THE STATE INTERAGENCY LAND USE COUNCIL TO GOVERNOR TOMMY G. THOMPSON 13* (July 1, 1996). Similarly, the Chamber of Commerce of scenic Door County, Wisconsin has developed a program in an attempt to insure that Door County retains its charm and attraction to tourists, who greatly support its economy. In addition to advocating the adoption of zoning ordinances, the Chamber is also recommending that municipalities of the county purchase development rights to check unwanted development. *See Resolution of the Door County Chamber of Commerce Board of Directors, Door County Chamber Resolves to Rein In Development Forces* (Aug. 22, 1996).

sal, as they lack the police power possessed by government. But when government purchases property rights merely to limit use of property to substantially its current use, that very action reinforces erroneous expectations on the part of many members of the public that their property rights are inviolate.

Certainly, such expectations help fuel legislative proposals that have surfaced recently in Congress, as well as the Wisconsin legislature, which require government compensation for diminution of value, irrespective of whether there exists a constitutionally compensable taking.<sup>104</sup> These expectations will also make it politically more difficult for local governments to enact zoning restrictions, for residents will have a false view of the need for compensation. After all, as Justice Holmes recognized in 1922, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."<sup>105</sup> Natural resource protection proponents should pause to consider the potential long-term consequences before advocating government purchase of private property rights.

George Perkins Marsh was correct when he argued, in the nineteenth century, that it was in the best interests of society to have restrained use of forests and fields in order to protect the land from consumptive uses that would otherwise forever change the landscape. Twentieth century governmental bodies should own up to their inherent responsibility in meeting those societal interests. Concomitant to that responsibility exists the long-standing authority of government to effect that end through state and local land use controls. This type of natural resource protection does not need to be bought with federal dollars by far away government agencies. It can be achieved through the cost effective and politically responsive processes of local government. As basic is the threat of development, so basic is its solution.

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104. See Carlyle H. Whipple, *Just v. Marinette County Revisited: Contract with America Redefines Land Use Regulation*, WIS. LAW., June 1995, at 10.

105. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).