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### Environmental Issues for the '90s: Golden-Cheeked Warblers and Yellowfin Tuna

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ENVIRONMENTAL ISSUES FOR THE '90s:  
GOLDEN-CHEEKED WARBLERS AND  
YELLOWFIN TUNA

*Ernest E. Smith*

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## ENVIRONMENTAL ISSUES FOR THE '90s: GOLDEN-CHEEKED WARBLERS AND YELLOWFIN TUNA<sup>1</sup>

*Ernest E. Smith*<sup>2</sup>

Environmental issues have transformed the areas of law that I have taught for the last thirty-one years. A decade ago environmental law went virtually unmentioned in courses in property, domestic oil and gas law, and international transactions. By 1995 environmental concerns had moved from the periphery to center stage in these legal fields. To someone who teaches and writes about these subjects, the clearest manifestation of this development has been that virtually every first-year property casebook,<sup>3</sup> mining or oil and gas law casebook,<sup>4</sup> and international business transactions casebook,<sup>5</sup> written in the last five years now includes segments on environmental law. In many older casebooks that have been revised within this period, environmental coverage frequently has appeared for the first time.<sup>6</sup>

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1. This article is based on the Godfrey Lecture the Author delivered at the University of Maine School of Law on November 17, 1994. The Author wishes to acknowledge the honor bestowed on him by being selected the 1994 Godfrey Distinguished Visiting Professor. It was a special privilege to hold a Professorship named for the distinguished former dean of the Maine School of Law, Edward S. Godfrey. The Author also would like to express his appreciation for the hospitality shown him by Dean Donald Zillman and the faculty of the Maine School of Law, as well as for the opportunity to have taught both the students in his first-year property class and an upper division course in protection of wilderness and wildlife. Although the views expressed in this article are solely those of the Author, several of these ideas originated in discussions with Maine students both during and after class.

2. Rex G. Baker Centennial Chair in Natural Resources Law, University of Texas School of Law; Godfrey Distinguished Visiting Professor, University of Maine School of Law, 1994-95; B.A., Southern Methodist University, 1958; LL.B., Harvard Law School, 1962.

3. *E.g.*, JESSE DUKEMINER & JAMES E. KRIER, PROPERTY 614-15, 776-80, 986-89 (3d ed. 1993); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 633-40 (1993).

4. *E.g.*, BARLOW BURKE, JR., ET AL., CASES AND MATERIALS ON MINERAL LAW 505-698 (1994); RICHARD C. MAXWELL ET AL., CASES AND MATERIALS ON THE LAW OF OIL AND GAS 117-20, 1025-39 (6th ed. 1992).

5. *E.g.*, JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 559-95 (3d ed. 1995); ERNEST E. SMITH ET AL., MATERIALS ON INTERNATIONAL PETROLEUM TRANSACTIONS 556-64 (1993) [hereinafter *INT'L PETROLEUM TRANSACTIONS*].

6. *E.g.*, JON W. BRUCE & JAMES W. ELY, CASES AND MATERIALS ON MODERN PROPERTY LAW (3d ed. 1994); JOHN E. CRIBBET ET AL., CASES AND MATERIALS ON PROPERTY (6th ed. 1990); EUGENE O. KUNTZ ET AL., CASES AND MATERIALS ON OIL AND GAS LAW (2d ed. 1993).

But correspondingly, as environmental law and regulations have assumed greater importance, resistance and opposition to them also have increased. One form of that opposition has come from analogous theoretical sources: absolutist claims of freedom from external interference in making decisions within one's own territory. Domestically, the opposition has been based on constitutional protection of property rights; internationally, it has been based on protection and vindication of national sovereignty. To both practicing lawyers and academic theoreticians, these parallel developments will present some of the most significant environmental issues of the decade—within our nation and beyond.

## I. THE IMPORTANCE OF ENVIRONMENTAL LAW IN REAL ESTATE AND INTERNATIONAL TRANSACTIONS

Although environmental issues now extend across virtually the entire legal spectrum, their rapidly growing importance can be illustrated by briefly examining two rather specialized fields: real estate and international transactions.

### A. *Environmental Law and the Real Estate Lawyer*

To the domestic real estate lawyer, environmental regulations have become almost as important as taxation as the major external factor that drives land transactions and private land use planning. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)<sup>7</sup> is an example of how profoundly a single environmental statute can affect real estate. Under the statute, current and prior landowners, along with the companies that produce and transport hazardous substances, may be held strictly liable for the cost of cleaning up a hazardous waste disposal site.<sup>8</sup> This potential liability has had repercussions for virtually every step of the real estate transaction.

The impact of CERCLA is especially obvious with respect to a purchaser's ability to obtain financing. Any lending institution must be concerned both about the value of the property securing the loan and its own potential liability. If a loan is secured by land that is later discovered to be environmentally contaminated, the value of the security promptly disappears. If the environmental contamination is discovered after the borrower defaults and the lending institution has foreclosed on the property, the lender faces other dire possibilities.

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7. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

8. 42 U.S.C. § 9607(a) (1988) (listing "potentially responsible parties," recoverable costs, etc.).

Every lending institution in the country is certainly familiar with *United States v. Maryland Bank and Trust Co.*<sup>9</sup> A bank made a \$335,000 mortgage loan that it foreclosed when the borrower defaulted. After the bank took title to the land, it discovered that it had acquired a contaminated waste site, along with CERCLA liabilities for clean up costs that totalled well over \$500,000.<sup>10</sup> Although the statute since has been amended to protect persons who acquire property without reason to know that it is contaminated,<sup>11</sup> a foreclosing bank still faces effective loss of its security if the land is a hazardous waste site as well as potential liability to a new purchaser if it is aware of the contamination and transfers ownership without disclosing this information to the purchaser.

Even apart from the financing problem, a purchaser's risk of liability has added costs to the land transaction in the form of environmental assessments. The statutory exemption for purchasers who buy property without "reason to know" that it is a hazardous waste site has created an entirely new profession devoted to environmental "due diligence."<sup>12</sup> Environmental assessments are conducted for prospective buyers to determine the identity of all previous owners and occupants of the property and all its previous uses. Chemical tests are done on suspicious property to discover possible contamination.<sup>13</sup>

Further, CERCLA has led to at least one additional step in negotiations for purchase. Negotiations for allocation of the risk of CERCLA liability are becoming an increasingly common part of many real estate transactions.<sup>14</sup> The extent to which CERCLA actually allows the shifting of risk and whether private agreements are as valuable as buyers and sellers (or their lawyers) seem to believe

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9. 632 F. Supp. 573 (D.Md. 1986).

10. *Id.* at 575-76.

11. 42 U.S.C. §§ 9601(35)(A), 9607(b)(3) (1988).

12. See, e.g., Carolyn M. Brown, *Environmental Liabilities and the Innocent Landowner*, 10 E. MIN. L. FOUND. § 2.01, §§ 2.05(c)-2.06 (1989) for a discussion of the types of consultants used by real estate purchasers to establish the innocent landowner defense under CERCLA. For comment on the environmental auditing-consulting business generally, see Terrell E. Hunt and Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENV'T'L L. REV. 365 (1992).

13. The statute provides that "[t]o establish that the defendant had no reason to know . . . the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." 42 U.S.C. § 9601(35)(B) (1988). For suggestions as to what constitutes an appropriate inquiry by a real estate purchaser, see Brown, *supra* note 12.

14. See Thaddeus Bereday, *Contractual Transfers of Liability Under CERCLA Section 107(E)(1): For Enforcement of Private Risk Allocations in Real Property Transactions*, 43 CASE WESTERN LAW REV. 161, 163 (1992); J. GORDON ARBUCKLE, ENVIRONMENTAL LAW HANDBOOK 96-97 (1989).

may still be open questions,<sup>15</sup> but they are questions that point toward the continued and growing importance of CERCLA in property transactions.

The potential liability posed by CERCLA also has had an impact on private land use and land use planning. No residential developer wants to build over a potential Love Canal. Even the location of industrial developments is influenced by potential clean-up liability. An industry may prefer an area where no industrial activity ever has occurred rather than an otherwise attractive site previously occupied by some other industry.<sup>16</sup> As the awareness of the reach of this potential liability grows, as states enact their own clean-up responsibilities acts,<sup>17</sup> and as the push continues to expand CERCLA and related statutes to hitherto exempt industries and wastes, such as those produced by oil field drilling,<sup>18</sup> it seems inevitable that concern over hazardous waste liability will become increasingly central in shaping land transactions and in private land use planning decisions.

The discussion so far has focused only on CERCLA. Add to CERCLA wetlands protection<sup>19</sup>—or critical habitat designation under the Endangered Species Act<sup>20</sup>—and consider their potential impact both on land transactions and land use. Add new substantive concepts, such as the scenic and environmental easements,<sup>21</sup> and the environmental impact upon real estate law becomes still

15. See Bereday, *supra* note 14.

16. See Thomas R. Kline, *Overview*, in 2 ENVIRONMENTAL LAW ANTHOLOGY xvii, xix (Allison P. Zabriskie ed., 1992-1993).

17. *E.g.*, The New Jersey Environmental Cleanup Responsibility Act (ECRA), N.J. Rev. Stat. Ann. § 13:1K-6 to 1K-13 (West 1991).

18. CERCLA specifically excludes petroleum and natural gas from its definition of hazardous substances. 42 U.S.C. § 9601(14) (1988). Similarly, regulations issued under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988), exempt most wastes from oil and natural gas exploration and production from being classified as hazardous. *See, e.g.*, 40 C.F.R. § 261.4(b) (1991).

19. Under the Clean Water Act, a person wishing to deposit fill material into waters of the United States, including wetlands, must obtain a permit from the Army Corps of Engineers. 33 U.S.C. § 1344.

20. 16 U.S.C. §§ 1531-1544 (1988).

21. Section 1(1) of the Uniform Conservation Easement Act (UCEA), 12 U.L.A. 66, 70 (1981 & Supp. 1994), defines a conservation easement as:

[A] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

The Act has been adopted by sixteen states and the District of Columbia. 12 U.L.A. 66 (1981 & Supp. 1994). Maine adopted the UCEA in 1985, but with some variations. *See* ME. REV. STAT. ANN., tit. 33 §§ 476 to 479-B (West 1988). Many other states have statutes that are similar to the UCEA.

greater. One prediction that a property teacher can make to his law students with some confidence is that if a student is practicing real estate law five, ten, or fifteen years from now, he or she also will be practicing environmental law.

### B. *Environmental Law and the International Practitioner*

There has been a parallel development on the international front. To an oil and gas lawyer, who has seen his field almost completely internationalized within the last two decades, one of the striking developments within just the last five or six years has been how much "greener" it has become. An oil or mining company that begins operations abroad can no longer safely assume that all of its environmental responsibilities end when it leaves North America. Environmental law and environmental responsibilities also have become internationalized.

While this development is not limited to the extractive industries, it is especially apparent there. Other countries, including Third World and developing countries, now routinely impose environmental restrictions on mining and petroleum companies, either in the form of specific clauses in mining contracts negotiated with individual companies, or of general pollution-control legislation.<sup>22</sup> As a practical matter, such requirements often may be vague, ignored, or laxly enforced,<sup>23</sup> but their relatively recent appearance reflects at least an incipient awareness of the importance of environmental protection. This is the case even in developing countries where the extractive industries traditionally have been viewed quite favorably as producing both hard currency and employment and so have been given the highest land-use priority.

Perhaps more importantly from the perspective of the practicing lawyer, host country environmental requirements affect the structure of international transactions and their content. Regardless of current enforcement, environmental restrictions cannot be ignored in drafting agreements that are intended to govern parties' rights and responsibilities over several decades.<sup>24</sup> One example will serve

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22. See, e.g., the contract clause in Brazil's 1979 Model Service Contract for On-shore and Offshore Operations and the Seychelles Petroleum Mining (Pollution Control Act of 1976), excerpted in INT'L PETROLEUM TRANSACTIONS *supra* note 5, at 566-68.

23. One commentator, who surveyed the petroleum arrangements in over 100 developing countries, has concluded that agreements tend to contain general references to environmental protection, but that systematic and substantive requirements are missing. Zhiguo Gao, *International Petroleum Exploration and Exploitation Agreements: A Comprehensive Environmental Appraisal*, 12 J. ENERGY & NATURAL RESOURCES L. 240, 249 (1994).

24. For example, the petroleum concession granted by Thailand has a term of 26 years, with a permissible renewal period of 10 years. Indonesia's production sharing contract has a 30 year duration. Zhiguo Gao, *Recent Trends and New Directions in*

to illustrate the point. Many countries now require that an oil company, upon discontinuing production, remove its installations and perform some restoration work.<sup>25</sup> If the oil field installations are on shore, removal and restoration may pose no significant problem; but if the oil field is beneath a deep-water area, such as the North Sea, removal of drilling installations presents quite serious engineering and financial challenges. Typically located miles from land, the production platforms resemble small islands in size, and the cost of removal is enormous. Even five years ago estimates of the cost of removing drilling and production platforms from just the United Kingdom segment of the North Sea ranged from £6 billion to £8 billion.<sup>26</sup> From an accounting standpoint, the issue is whether decommissioning costs should be recognized as a current expense of production or whether recognition of decommissioning costs should be delayed until the end of a well's life, when the "cost" of producing the last barrel of oil may then be £1 billion.<sup>27</sup>

As an environmental issue, accounting theory and private agreements allocating decommissioning costs do not sound very sexy; but to the private business person—and to the lawyer helping to structure the transaction—they are life or death. Does the tax code permit treating future reclamation costs as current operational expenses?<sup>28</sup> Should a private agreement among joint participants in such an off-shore venture require that each contribute periodically to a reclamation fund?<sup>29</sup> Does it make sense to set aside millions of dollars or pounds in such a fund?<sup>30</sup> How can the private parties who

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*International Petroleum Exploration Agreements*, 17 WORLD COMPETITION 109, 129 (1994). Depending upon the licensing round, development agreements granted by the various countries bordering the North Sea may last for almost 50 years. See INT'L PETROLEUM TRANSACTIONS 321-33 (1993).

25. See, e.g., Paul McDade, *The Petroleum Bill: The Removal of Offshore Installations and Pipelines [1986/87]*, 6 OIL & GAS L. & TAX. REV. 158 for a discussion of the decommissioning requirements in the United Kingdom. Even developing countries that impose few environmental requirements upon foreign petroleum companies usually require at least some clean-up operations. See Gao, *supra* note 23, at 250.

26. INT'L PETROLEUM TRANSACTIONS, *supra* note 5, at 545-46.

27. *Id.*

28. See, e.g., Catherine Redgwell, *Abandonment and Reclamation Obligations in the United Kingdom*, 10 J. ENERGY & NAT. RESOURCES L. 59, 83-84 (1992) (discussing the United Kingdom tax); Hans J. Bull & Knut Kaasen, *Abandonment and Reclamation of Energy Sites: Norway*, 10 J. ENERGY & NAT. RESOURCES L. 37, 42-43 (1992) (discussing the Norwegian system of government grants for decommissioning and its relation to the Norwegian tax code); I.R.C. §§ 162(a), 461(a), (h) (1988); Treas. Regs. §§ 1.461-1(a)(1), (2) and 1.612-2(a); Rev. Rul. 80-182, 1980-2 C.B. 167 (dealing with removal of oil and gas well fixtures and offshore platforms).

29. See Ernest E. Smith, *Techniques for Assuring Compliance with Abandonment and Reclamation Requirement*, ENERGY AND RESOURCES LAW '92, 293, 306 (1992) for a discussion of agreements that establish such funds.

30. Although the operator invariably has primary responsibility for reclamation, nonoperators may be secondarily liable. See, e.g., *Railroad Comm'n v. Olin Corp.*,



are not primarily responsible for operations make sure that the operator, who is primarily responsible, performs the reclamation satisfactorily and that they do not become ultimately liable at a time when all income from the project has ceased? These are just a few of the *contract* issues raised by a relatively minor and straightforward environmental requirement.

Mandatory reclamation also raises planning and land use issues. One way to avoid excessive reclamation costs and concomitant legal issues is to avoid excessive environmental impact. A relatively new development in the extractive industries has been the promulgation of environmental guidelines by international trade groups. For example, the International Association of Geophysical Contractors recently released draft guidelines<sup>31</sup> containing both a general policy statement of environmental responsibilities of their member companies and quite detailed provisions for conducting exploratory operations in various types of ecosystems, including rain forests, in order to minimize impact.

In addition to the incipient "greening" of the domestic law of Third World countries, there have been other developments that have had even more profound effects on international business. One has been the explosion of environmental multilateral treaties and conventions, such as the International Convention on Civil Liability for Oil Pollution Damage,<sup>32</sup> which imposes strict liability upon the owner of an oil tanker if an oil spill occurs within the territorial waters of a contracting state. Many other treaties are bilateral agreements that deal with specific transboundary problems, such as disposal of hazardous waste or water quality.<sup>33</sup>

Another development has been the attempted extraterritorial reach of U.S. environmental laws. Extraterritorial application of domestic law is hardly a new phenomenon, nor one that is necessarily unique to the United States. It commonly is encountered in connection with taxation, for many countries routinely tax their citizens' foreign incomes. Two well known examples of U.S. statutes with

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690 S.W.2d 628 (Tex. App. 1985, *writ ref'd n.r.e.*) (nonoperators liable for costs of controlling and plugging a gas well under Texas statute); Richard Beazley, *Abandonment of UKCS Installations: Security Against Default*, 1 OIL & GAS L. & TAX. REV. 6 (1986-87) (nonoperator liability under United Kingdom statute); Gunther Kuhne, *What Happens When the Operator Fails to Meet Its Obligations?* ENERGY AND RESOURCES LAW '92, 308 (1992) (detailed exposition of nonoperator liability imposed through regulation, statute and judicial decision in various western European countries).

31. Environmental Guidelines for Worldwide Geophysical Operations, *excerpted in* INT'L PETROLEUM TRANSACTIONS 571-75.

32. 973 U.N.T.S. 3, *reprinted in* 9 INT'L LEGAL MATERIAL 45 (1970).

33. *E.g.*, Agreement of Cooperation Between the United States of America and the United Mexican States Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances, 26 INT'L LEGAL MATERIAL 25 (1987).

extraterritorial reach are the Foreign Corrupt Practices Act,<sup>34</sup> which provides criminal and civil penalties for American companies that attempt to bribe foreign officials, and the Sherman Antitrust Act,<sup>35</sup> which in some instances applies to anti-competitive conduct outside the U.S. that is intended to affect commerce within the U.S.<sup>36</sup> What is relatively new is the attempted extraterritorial application of domestic environmental laws. The National Environmental Policy Act (NEPA),<sup>37</sup> the Endangered Species Act (ESA),<sup>38</sup> the Clean Air Act (CAA),<sup>39</sup> the Clean Water Act (CWA),<sup>40</sup> and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>41</sup> all have been argued to apply beyond our national boundaries. For example, in *Greenpeace USA v. Stone*<sup>42</sup> an environmental organization attempted to enjoin the United States from transporting hazardous chemicals from Germany to a Pacific atoll for storage and disposal on the grounds that the Department of Defense (DOD) had violated NEPA. Greenpeace argued that NEPA required DOD to prepare a comprehensive Environmental Impact Statement covering all aspects of the transportation and disposal of the chemicals. In *Lujan v. Defenders of Wildlife*<sup>43</sup> an environmental group argued that Section 7 of the ESA, which prohibits actions by federal agencies that jeopardize the continued existence of threatened or endangered species, applies to action abroad as well as domestically. Indeed, applicable regulations under the ESA had reflected this position prior to their revision in 1986.<sup>44</sup>

It is true that most of these attempts to extend U.S. environmental laws extraterritorially have been rebuffed. The point, however, is not whether U.S. environmental regulations can be validly applied abroad, or whether foreign environmental regulations provide adequate environmental protections. The point, rather, is that environmental regulations, whether effective or ineffective, have become increasingly central to international business transactions and to

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34. 15 U.S.C. §§ 78dd-1 to -2 (1988).

35. 15 U.S.C. §§ 1-2 (1988).

36. See, e.g., *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

37. 42 U.S.C. §§ 4321-4347 (1988 & Supp. IV 1992).

38. 16 U.S.C. §§ 1531-1544 (1988).

39. 42 U.S.C. §§ 7401-7671q (1988 & Supp. IV 1992).

40. 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

41. 42 U.S.C. §§ 9601-9675 (1988).

42. 748 F. Supp. 749 (D. Hawaii 1990).

43. 112 S. Ct. 2130 (1992).

44. *Id.* at 2135. Arguments for applying the Endangered Species Act extraterritorially and the problems that such an application would pose can be found in George Cameron Coggins & John W. Head, *Beyond Defenders: Future Problems of Extraterritoriality and Superterritoriality for the Endangered Species Act*, 43 WASH. U. J. URB. & CONTEMP. L. 59 (1993).

land use decisions. Indeed, whether teaching real estate law, domestic oil, gas and mining law, or international business transactions, I find myself advising my students of much the same thing: If you practice law in the fields with which I am most familiar, a significant part of your practice is going to be devoted to dealing with environmental regulations.

## II. OPPOSITION TO THE INTRUSION OF ENVIRONMENTAL LAW

Although one of the most pronounced legal trends within the last five years has been the decided "greening" of real estate, oil, gas, and mining law, international transactions, and many other fields, a second and much different phenomenon has emerged during this same period: a strong opposition to this intrusion of environmental regulation and protection. Significantly, the opposition on the international level parallels that on the national level.

### A. *The Domestic Property Rights Movement*

Within the United States there has been an extraordinary resurgence of concern over the erosion of property rights, a concern that is perhaps as high or higher than that produced by the New Deal legislation of the 1930's. The clearest way in which this concern has been evidenced is the growing number of challenges to environmental restraints as "takings" of private property under the United States Constitution.<sup>45</sup> At least one noted environmental law authority has referred to claims based on private property rights as "constitutional clouds over the current system of environmental law in the United States."<sup>46</sup> If these claims are clouds, they are not likely to dissipate any time soon. In fact, if past, pending, and threatened litigation is any measure, the clouds are building into a real northeaster.

The first clear sign that a storm might be brewing was the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*.<sup>47</sup> The "regulatory takings" issue did not, of course, begin with *Lucas*,<sup>48</sup> but that case brought it squarely to the attention of both environmentalists and property rights advocates. The facts by now are known fairly well. In 1986 Lucas bought two lots on a South Carolina barrier island for just under \$1,000,000, planning to develop them for single-family homes similar to those on adjacent lots. His plans were brought to an abrupt halt two years later when the South Carolina Coastal Council, acting under the authority of the

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45. U.S. CONST. amend. V.

46. Michael C. Blumm, *Introduction*, 2 *Environmental Law Anthology* xi, xv (Alison P. Zabriskie ed., 1993).

47. 112 S. Ct. 2886 (1992).

48. Its lineage dates at least as far back as Justice Oliver Wendell Holmes's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

state's newly enacted Beachfront Management Act, established a beach erosion line that was landward of Lucas's two lots. The stated purpose of the act was environmental: to protect the beach from erosion by preventing construction that would damage the dunes and by allowing the dunes to be stabilized through the growth of native plants. The effect of the Coastal Council's action on Lucas was to bar all construction whatsoever on his million-dollar lots. In dealing with Lucas's complaint, the United States Supreme Court concluded that this action had effected a "regulatory" (and hence compensable) taking of Lucas's property under the Fifth Amendment. The Coastal Council's action fell into a category that normally requires the private property owner to be compensated regardless of the public interest advanced in support of the regulation: action that denies the landowner "all economically beneficial or productive use of [his] land."<sup>49</sup>

Given the facts of the case and the narrow holding, *Lucas* should not have caused environmentalists especially grave concern or inspired excessive euphoria among property rights advocates. Relatively few environmental regulations deprive a landowner of "all economically beneficial or productive use" of his or her land. Is *Lucas* indicative of anything more than a holding on highly-specialized facts?

It well may be. Some commentators believe that the Supreme Court is becoming increasingly receptive to claims that governmental regulations, especially environmental regulations, constitute a taking of private property.<sup>50</sup> *Lucas* by itself may be no more than a summer shower; but there are also other recent cases. These include *Nollan v. California Coastal Comm'n*<sup>51</sup> and *Dolan v. City of Tigard*,<sup>52</sup> holding that a state cannot condition a building permit upon the landowner's granting a public easement or greenway across part of her land, and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,<sup>53</sup> requiring the state to compensate a landowner for a "temporary" taking when a landowner has been denied all economic use of his property for some period of time. When all these cases are considered in the context of regulations preventing development of wetlands or modification of the critical habitat of an endangered species, the storm clouds of private property rights thicken noticeably over the environmental horizon.

In fact, it is already raining pretty hard in the lower courts. Under traditional "takings" jurisprudence, a landowner may establish a

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49. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. at 2893.

50. *E.g.*, Blumm, *supra* note 46, at xi, xv.

51. 483 U.S. 825 (1987).

52. 114 S. Ct. 2309 (1994).

53. 482 U.S. 304 (1987).

regulatory taking even though an environmental regulation does not deprive the landowner of all economically viable uses of his property. He may claim compensation successfully if the economic impact on his land is severe and interferes with what the Supreme Court has called "distinct investment-backed expectations."<sup>54</sup> In at least four recent cases<sup>55</sup> involving privately owned wetlands, the United States Court of Claims has found that a landowner suffered a compensable regulatory taking. One of these cases, *Formanek v. United States*,<sup>56</sup> illustrates the conflict between property rights and environmental concerns. Over a six-year period the plaintiff and his partners bought 112 acres upon which they planned to develop a multi-lot industrial park. Since the 112 acres included ninety-nine acres of wetlands, considerable filling was necessary before the project could get underway. Unbeknownst to the plaintiff, however, the ninety-nine acres of wetlands included part of the Savage Fen Wetland Complex, an area that supported an unusual and rare combination of wetland plants and was subject to the Clean Water Act.<sup>57</sup> The Army Corps of Engineers refused to grant the plaintiff a permit to fill the wetland, and the plaintiff successfully sued the Corps on the theory that this action constituted a regulatory taking. Application of the wetlands regulation had interfered with the plaintiff's "investment backed expectations" and effected a severe economic impact on the value of his land, decreasing it from \$933,000 to \$112,000.<sup>58</sup> Significantly, the fact that the Minnesota National Heritage Program had made several offers to buy the land from the plaintiffs, including one offer as high as \$590,000, did not deter the court from its conclusion.<sup>59</sup> The court held that the offer did not establish that the land, as subject to the wetlands regulation, had a "solid and adequate fair market value"<sup>60</sup> because the offer was "not the product of negotiations between a willing buyer and seller under no duress."<sup>61</sup>

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54. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).

55. *Bowles v. United States*, 31 Fed.Cl. 37 (1994); *Formanek v. United States*, 26 Cl. Ct. 332 (1992); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), *motion to vacate judgment and dismiss complaint denied*, 27 F.3d 1545 (Fed. Cir. 1994), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161 (1990); *vacated and remanded* 18 F.3d 1560 (Fed. Cir. 1994).

56. 26 Cl. Ct. 332 (1992).

57. *Id.* at 333.

58. *Id.* at 340.

59. *Id.* at 334.

60. *Id.* at 340 (quoting *Formanek v. United States*, 18 Cl. Ct. 785, 797 (1989) (quoting *Florida Rock Indus., Inc. v. United States*, 1791 F.2d 893, 903 (Fed. Cir. 1986))).

61. *Id.* (quoting *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161, 175 (1990)).

Four decisions by the Court of Claims, which have met with a mixed reception by the Federal Circuit on appeal,<sup>62</sup> may not sound like a storm warning to a Constitutional law scholar, but they should to an environmentalist. There are approximately twenty additional cases pending in the Court of Claims involving landowners' claims that denial of a Clean Water Act Section 404 permit for filling privately-owned wetlands has resulted in a compensable taking.<sup>63</sup> Moreover, private property claims are not limited to wetlands permitting. The Endangered Species Act already has been challenged once in federal court as accomplishing an uncompensated taking,<sup>64</sup> and threats of suits are multiplying almost as fast as black flies in June. For example, The Texas and Southwestern Cattle Raisers Association threatened suit if the U.S. Fish and Wildlife Service attempted to implement a proposal to designate portions of thirty-three central Texas counties as the critical habitat of the golden-cheeked warbler, a listed endangered species under the Endangered Species Act.<sup>65</sup> The basis for the threat is the ranchers' perception of the consequences should their ranches be included within the warbler's critical habitat. They believe they not only will be prevented from developing their land for residential, commercial, and retail purposes, but even may be precluded from clearing brush and juniper trees in order to expand or improve grazing areas.<sup>66</sup>

It would be a mistake to dismiss these cases and threats of cases on the ground that many of them—perhaps most of them—are legally unsound, and that no matter how receptive the United States Supreme Court may be to regulatory taking theory, the theory is unlikely ever to reach as deeply as many of these plaintiffs hope it will. Even if that practical legal analysis proves correct, the mere concern that there may be constitutional infirmity in environmental regulation will affect regulation. It already has. Faced with the threat of lawsuits by both the ranchers' coalition and the Texas Attorney General<sup>67</sup> and with opposition by former Texas Governor

62. Compare *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (affirming lower court's decision), with *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (reversing and remanding decision).

63. See William J. Haynes II & Royal C. Gardner, *The Value of Wetlands as Wetlands: The Case for Mitigation Banking*, 23 ENVTL. L. REP. 10261, 10262 (1993).

64. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988).

65. Letter from Tom Beard, President of the Texas and Southwestern Cattle Raisers Association to TSCRA Members (Aug. 1, 1994) (on file with author).

66. See *Federal Land Regulations Are Assailed; Environmentalists Say Groups Are Overreacting*, DALLAS MORNING NEWS, Aug. 24, 1994, at 21A, 26A, reporting a statement by Bob Stallman, president of the Texas Farm Bureau, that if the U.S. Fish and Wildlife Service designated approximately 800,000 acres as critical habitat of the golden-cheeked warbler, he "would not be able to build a fence or cut down a cedar tree on his property without first getting a permit from the federal government."

67. Office of Attorney General of the State of Texas, *Morales To Sue Interior Department If Additional Counties Designated As "Critical Habitat,"* (Aug. 24,

Ann Richards, the U.S. Fish and Wildlife Service called off its study of the golden-cheeked warbler's critical habitat.<sup>68</sup> The United States Court of Appeals for the D.C. Circuit almost certainly had possible constitutional infirmity in mind when it ruled that regulation under the Endangered Species Act effectively precluding a private landowner from significantly modifying an area critical to the survival of an endangered or threatened species was outside the intended scope of the statute.<sup>69</sup>

Litigation is only one manifestation of the intensified concern over private property, however. Agitation for legislative change is another. Property advocacy groups have called for statutory modifications of wetlands regulation and of the Endangered Species Act. In Texas, rural and agricultural groups formed a coalition called Farmers and Ranchers for Property Rights to fight against government regulation of their land, to oppose the Endangered Species Act, and to seek additional state protection for property rights.<sup>70</sup> Politicians from both parties have joined the property rights bandwagon. Texas Senator Kay Bailey Hutchison, a Republican, denounced a proposed habitat conservation plan as forcing landowners to pay "ransom" to build a house on their own property.<sup>71</sup> Texas Attorney General, Dan Morales, a Democrat, is at one with the ranchers in opposing determination of golden-cheeked warbler habitat.<sup>72</sup>

The property rights movement certainly is not limited to Texas. In at least a dozen states, including Maine, "Private Property Rights Acts" have been introduced that would require compensation if state regulation reduces the value of privately owned land by a specified percent.<sup>73</sup> Similar legislation has been introduced into both houses of Congress in the last two sessions. As this article was going to print, the House of Representatives passed the "Private Property Protection Act of 1995," introduced by Congressman Billy Tauzin, a Democrat from Louisiana, and a group of bi-partisan co-sponsors. The bill would require compensation to property owners if federal regulations deprive them of twenty percent or more of the fair mar-

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1994) (press release on file with author) [hereinafter Attorney General Press Release].

68. *U.S. to Halt Work on Designating Central Texas Land for Bird Habitat*, DALLAS MORNING NEWS, Sept. 28, 1994, at 24A.

69. Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt, 30 F.3d 190, 193 (D.C. Cir. 1994).

70. See Stefanie Scott, *Organizations Heat up Flap over Golden-cheeked Warbler*, SAN ANTONIO EXPRESS, Aug. 24, 1994.

71. See Ralph K. M. Haurwitz, *Revised BCCP Is up for Public Debate at Hearing Today*, AUSTIN AMERICAN-STATESMAN, Jan. 31, 1995, at B2.

72. Attorney General Press Release, *supra* note 67.

73. See, e.g., AN ACT TO REQUIRE THE STATE AND POLITICAL SUBDIVISIONS TO PAY PROPERTY OWNERS WHEN REGULATIONS LOWER THE VALUE OF PROPERTY BY MORE THAN 50%, L.D. 170 (117th Legis. 1995) (presented by Senator Hanley).

ket value of their property. If the diminution in value exceeds fifty percent, the property owner would have the option of requiring the federal government to buy the property. In the Senate, Phil Gramm, Republican from Texas, introduced a bill similar to the "Private Property Rights Restoration Act" that he had proposed in the 1994 Congressional session.<sup>74</sup> Other property rights bills that have been proposed during the last two sessions include a bill by Senator Robert Dole, Republican from Kansas, that would require federal agencies to assess the impact of proposed regulations on property rights before issuing the regulations.<sup>75</sup>

At this juncture "you don't have to be a weatherman to know which way the wind is blowing." The claims that environmental regulations are abrogating property rights already have reached gale force, and the storm system is gathering strength. Property owners and their spokespeople see infringed a right as firmly protected by the Constitution as freedom of speech and freedom of religion. They are moving on all legal fronts to protect it. Whether traditional property rights actually sweep as broadly as their advocates claim is not as important as the existence of the widespread grassroots movement that supports the advocacy. That movement—whether we decry it or applaud it—is going to be with us into the next century.

### B. *Permanent Sovereignty over Natural Resources*

Domestic opposition to environmental regulation that intrudes upon property rights has an international parallel. Most commentators appear to analyze the issue as a collision between United States environmental legislation and the "free trade" movement, exemplified by multi-national treaties like the General Agreement on Tariffs and Trade (GATT) and regional agreements like the North American Free Trade Agreement (NAFTA).<sup>76</sup> NAFTA, for example, was widely opposed by environmentalists on the ground that it would cause a flight of American and Canadian businesses to Mexico, where there would be far more freedom to pollute. The most widely cited conflict between free trade and American environmental laws, however, is the dispute between the United States and

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74. See H.R. 925, 104th Cong., 1st Sess. § 2(a) (1995) (stating that "it is the policy of the federal government that no law or agency action should limit the use of privately owned property so as to diminish its value) and S. 145, 104th Cong., 1st Sess. § 29(a) (1995) (stating that a cause of action accrues if government regulation "restricts, limits, or otherwise takes a right to real property").

75. For a description of the property rights bills introduced in Congress in 1994, see generally Rod Smith, *Gramm Introduces 'Strongest' Bill to Protect Property*, FEEDSTUFFS: THE WKLY. NEWSPAPER FOR AGRIBUSINESS, Sept. 5, 1994, at 1, 4.

76. See, e.g., Peter Behr, *Environmentalists Find NAFTA Is No Easy Call; National Groups Remain Sharply Divided*, WASH. POST, Aug. 24, 1993, at C1; Jessica Mathews, *The Great Greenless GATT*, WASH. POST, Apr. 11, 1994, at A19.



Mexico over imported Mexican yellowfin tuna, banned by the United States as violating legislated import restrictions.

The tuna dispute centers on the Marine Mammal Protection Act,<sup>77</sup> which reflects United States opposition to the incidental killing of large numbers of dolphins in commercial tuna fishing. As originally enacted in 1972, the Act mandated regulations imposing a limit on the number of dolphins the United States tuna fishing fleet may kill.<sup>78</sup> The practical effect of the legislation was to discourage the use of purse-seine nets that encircle and ultimately trap and kill not only schools of tuna but also the dolphins that swim with them. Because of the Act, the American tuna fishing fleet turned primarily to long-line fishing, baited and directed specifically at tuna. Foreign fishing fleets, however, continued to use the purse-seine method. In 1988 the Marine Mammal Protection Act was amended,<sup>79</sup> this time imposing a ban on imports of tuna from foreign tuna fleets that took dolphins in excess of the standards imposed upon the United States fleet.

From the standpoint of traditional free trade analysis, the embargo provision was significant because it had nothing to do with the quality of tuna imported into the United States; rather, it was aimed entirely at the process by which the tuna was caught. If caught through means considered by United States standards to be environmentally unsound, wasteful, or inhumane, the tuna was banned, regardless of the quality of the product itself. The statutory goal, presumably, was to pressure foreign fisheries that wanted access to the profitable United States tuna market to follow the lead of the United States American tuna fishing fleet and abandon the use of purse-seine nets.

In 1990 the United States imposed the Marine Mammal Protection Act ban on Mexican yellowfin tuna.<sup>80</sup> Mexico responded by filing a complaint under GATT.<sup>81</sup> Several holdings by the GATT panel in its ruling were especially unsettling to environmentalists.

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77. 16 U.S.C. §§ 1361-1407 (1988 & Supp. III 1991).

78. 16 U.S.C. § 1381 (1988 & Supp. III 1991).

79. 16 U.S.C. § 1371(a)(2).

80. The ban was imposed pursuant to court order. *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964, 976 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991). In a later case, *Earth Island Inst. v. Mosbacher*, 785 F. Supp. 826 (N.D. Cal. 1992), *modified*, 28 F.3d 76 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 509 (1994), the government was ordered to identify all nations that import yellowfin tuna and also export yellowfin tuna to the United States and to require each such nation to provide certification and proof that it has acted to prohibit importation of tuna banned from direct importation into the United States. *Id.* at 836.

81. A history of the specific actions taken by the Secretary of Commerce and Customs Service to effectuate the ban ordered by the court can be found in *Restrictions on Imports of Tuna*, GATT Doc. DS21/R, *reprinted in*, GENERAL AGREEMENT ON TARIFFS AND TRADE BASIC INSTRUMENTS AND SELECTED DOCUMENTS, at §§ 2.7-2.8 (Supp. 39 1993) [hereinafter BIRD].

One was the conclusion that neither GATT Article XX(b), which permits measures "necessary to protect human, animal, or plant life or health," nor GATT Article XX(g), which permits a country to take measures "related to the conservation of an exhaustible natural resource," authorizes a country to impose trade restrictions in order to pressure other countries to change their health, sanitation, or environmental policies.<sup>82</sup> According to the panel, GATT permitted countries to implement trade measures protective of health, sanitation, safety, and environmental preservation only within their own jurisdiction.<sup>83</sup> The United States thus could ban tuna that did not meet the sanitary standards required of United States tuna. It presumably could ban a car that did not meet the emissions standards required of American cars. But it could not ban an acceptable product merely because it was produced by methods impermissible in the United States. It could not ban sanitary tuna merely because the tuna were caught by a process that ensnared dolphins.

To many environmentalists, the GATT panel decision in the yellowfin tuna dispute sounded the same warnings on the international level as *Lucas* did on the domestic level. Extrapolating from the GATT panel's reasoning, environmentalists along with human rights activists, trade unionists, and many others concluded that the United States could not, for example, ban textiles produced cheaply by foreign factories that employ primarily nine-year-old children and dump their excess dyes into rivers and territorial seas.<sup>84</sup> There is considerable validity in that equation of the yellowfin tuna decision with the *Lucas* case, not because the GATT panel decision opposes free trade to American environmentalism but because the GATT decision opposes *national sovereignty* to American environmentalism.

To an American property teacher looking at the international scene, national boundaries are the functional equivalent of lot lines. In fact territorial sovereignty sometimes is established through use of some of the same concepts that become familiar to first-year property students: prescription, accretion, and voluntary agreement.<sup>85</sup> Moreover, international boundaries frequently are drawn just as inappropriately from a geographic or ecological standpoint as are private lot lines. More to the point, the American property owners' reliance on Constitutional rights has a strong echo in the developing countries' reliance on the 1963 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Re-

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82. *Id.* at 197-201.

83. *Id.*

84. See, e.g., Mitchell Zuckoff, *Free Trade, Human Rights Clash over GATT*, BOSTON SUNDAY GLOBE, Oct. 30, 1994, at 77.

85. See, e.g., GERHARD VON GLAHN, *LAW AMONG NATIONS* 367-76 (6th rev. ed. 1992).

sources.<sup>86</sup> The Resolution, vigorously debated and finally overwhelmingly adopted, expressly recognizes "the inalienable right" of every country to take charge of and dispose of its own natural resources in accordance with its own perception of what is best for its own national interest.<sup>87</sup> The Resolution on Permanent Sovereignty is certainly one of the most important of the successive UN resolutions<sup>88</sup> establishing the right at international law of each sovereign nation to be free of foreign meddling in their internal affairs.

In that context, one can examine the reasoning of the GATT panel. The United States ban on Mexican-caught tuna was improper not only because it interfered with free trade (after all the United States was not trying to require the Mexican fishing fleet to do anything the United States American fishing fleet is not required to do), but also because it infringed upon Mexican national sovereignty.<sup>89</sup> A repeatedly expressed concern of Mexico and some interested third parties was that the United States should not be allowed to use its trade policies to pressure other countries to adopt its social or environmental goals.<sup>90</sup> Such trade requirements intruded too deeply upon Mexico's national sovereignty and Mexico's right to decide whether to preserve dolphins or let them drown in Mexican fishermen's nets.

In a sense the GATT panel decision transforms dolphins into the international equivalent of the golden-cheeked warbler. The Texas rancher firmly believes he has a constitutional right to clear all the juniper trees from his land, without interference from U.S. Fish and

86. U.N.G.A. Res. 1803 (XVII), *reprinted in* 2 Int'l Legal Material 223 (1963).

87. The Resolution was adopted in the General Assembly by a vote of 87 to 2, with twelve countries abstaining.

88. United Nations Declaration on the Establishment of a New International Order, U.N.G.A. Res. 3201 (1974), *reprinted in* 13 Int'l Legal Material 715 (1974); United Nations Charter of Economic Rights and Duties of States, U.N.G.A. Res. 3281 (1975), *reprinted in* 14 Int'l Legal Material 251 (1975).

89. The extent to which § 1371(a)(2) of the Marine Mammal Protection Act (16 U.S.C. §§ 1361-1407 (1988-1992)), was explicitly designed to pressure other countries to adopt dolphin-protective regulations similar to those of the United States is clear from the language of § 1371(a)(2)(B):

[I]n the case of yellowfin tuna harvested with purse seines in the eastern tropical Pacific Ocean, and products therefrom, to be exported to the United States, [the Secretary] shall require that the government of the exporting nation provide documentary evidence that —

(i) the government of the harvesting nation has adopted a regulatory program governing the incidental taking of marine mammals in the course of such harvesting that is comparable to that of the United States; and

(ii) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of marine mammals by United States vessels in the course of such harvesting

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90. See, e.g., *BISD*, *supra* note 81, §§ 3.31, 3.35, 3.48, 4.27. The GATT panel's decision reflected a similar concern. *Id.* §§ 5.27, 5.32.

Wildlife Service bureaucrats who see the warbler threatened with extinction by elimination of its habitat. Mexico—and other developing nations—believe just as firmly that they have an inalienable right under international law to establish their own environmental and social goals, without interference from America or American environmentalists.

### III. CONCLUSION

Whereas the increased centrality of environmental law raises eminently practical issues for the practitioner, especially the practitioner who is concerned with developing, using, or facilitating transactions in domestic or international real estate, the opposition to environmental regulation raises questions not only of practical concern but also eminently theoretical. On the international level, what is the effect of Principle Twenty-One of the Stockholm Declaration, which recognizes the sovereign right of each nation to pursue its own environmental policies but also imposes the responsibility not to cause damage to the environment of other states or areas beyond the limits of national jurisdiction? To what extent is there a developing customary law of the environment that is or will be as binding on nations as any other doctrine of public international law doctrine?

The domestic property rights movement raises equally serious questions. The constitutional concept of regulatory taking is still far from clear, but there is an even more fundamental question of the meaning of property rights. Is Professor Eric Freyfogle of Illinois Law School correct in suggesting it is time to re-think the concept of land ownership?<sup>91</sup> Is it time to think of property rights in terms of the ecosystem of which a tract is by nature an inextricable part and to recognize that in terms of real estate development a wetland is not the same as a dry field or that trees growing on a steep slope, where they are essential to prevent erosion, are not the same as trees growing on flat land? Would it be desirable, or even feasible, to develop property concepts that take into account the natural differences among tracts of land? Or are the advocates of expanded property rights correct? Are such rights as sweepingly absolute as freedom of speech and as fully protected by the Constitution? If they are not that absolute, what are their limits, and how far may an agency intrude on them in formulating and enforcing regulations? These are issues that will be with us to the end of the decade—and well beyond.

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91. See Eric T. Freyfogle, *Owning the Wolf Green Politics: Property Rights, Ecology Rights*, *DISSENT* 481, 487 (1994).

