Why the Takings Issue Matters

How, if at all, does the "taking," or "property rights," issue matter to Americans who care about conservation of natural resources and healthy, sustainable communities? Is the taking issue merely an abstract philosophical debate about lofty legal principles? Does the taking issue have a practical impact on conservationists' ability to achieve their goals? At the end of the day, what really is the connection between the taking issue and the quality of the environment?

This memorandum seeks to provide at least a partial answer to these fundamental questions. Using 11 representative illustrations, it documents the adverse effects of the taking agenda on different aspects of conservation work, and describes how the taking agenda threatens even greater harm to conservation efforts in the future. The goal, in short, is to help document the point, recently articulated by Peter Douglas, Executive Director of the California Coastal Commission, that "the outcome of the property rights debate will determine the environmental future of this country."

The 11 illustrations laid out in this paper, although they hardly cover the universe of implications of the taking agenda, are intended to demonstrate the breadth and depth of the taking agenda:

- The taking issue undermines growth management efforts because they depend in part on the public's authority to regulate where development should — and should not — go. The taking issue threatens this authority, including the use of such innovative tools as Transferable Development Rights.

- Measures to protect wildlife habitat and threatened and endangered species are increasingly under attack as takings, in the courts and in Congress. Despite the long public tradition of wildlife management for broad public benefit, the courts appear to be increasingly receptive to the idea that wildlife protection laws impose an unconstitutional burden on private land owners.

- Wetlands protection is another focus of the taking issue, again both in the courts and in Congress. No other type of environmental regulation has been the subject of so much litigation. The federal courts have established important new precedents expanding taking doctrine in wetlands cases, while the state courts appear more willing to uphold public authority to define permissible uses of these critical areas.

- While land acquisition programs are sometimes viewed as a way of skirting the property rights debate, that is not the case. The taking argument is being used to demand higher than fair market value for land, a trend that would undermine the success of the land trust movement and dilute the value of limited public funding for land acquisition.

- The taking issue is being asserted by private users of federal public lands in order to obtain greater opportunities to exploit public lands with minimal public controls. This version of the taking agenda is exemplified by the public lands grazing debate.

- Development in the heavily populated coastal zone has long been understood as a threat to public access to the ocean beach. The taking issue stands as a major barrier to public efforts to preserve and reclaim public access to the ocean beach as well as other lands and waters.

- The taking issue is assuming a new and potentially virulent form in the international arena. Inspired in part by the domestic property rights movement, some international trade negotiators, in the name of protecting against "expropriations," are seeking a new

kind of property rights protection beyond U.S. constitutional standards. The legal panels making this new law generally lack understanding of local environmental problems, the proceedings are not readily accessible to the public, and there is no right of appeal to U.S. courts.

- A recent taking decision by a federal appeals court could undermine much of the promise of the Rails to Trails program as a way of providing valuable walking and biking trails in communities. In the wake of this adverse decision, a property rights bill has been introduced in Congress to effectively gut the program.

- Assigning responsibility to polluters to help clean up superfund sites has traditionally been viewed as reasonable government action immune from any taking challenge. In light of the Supreme Court's recent decision to examine the extent to which Congress can impose retroactive liability for health care costs on mining companies, this settled rule in superfund cases may be up for grabs again in at least some contexts.

- Historic preservation measures have long been at the center of the taking issue, starting with the Supreme Court precedent upholding the landmark designation of Grand Central Station in New York City. Unfortunately, the Grand Central precedent is under increasing attack in the courts, as are all manner of historic district and landmark designations.

- Billboard removal and other scenic preservation efforts have run up against the taking issue with a uniquely destructive twist. While the courts have generally upheld against taking challenges reasonable measures designed to restore and preserve scenic vistas, the federal Highway Beautification Act, an early and little noted form of taking legislation, has preempted local authorities to control billboards and actually undermines progressive scenic preservation efforts across the country.

Before laying out these illustrations in detail, it is useful to provide a brief overview of the taking issue, examine the ideological and political arguments driving the debate, and highlight the central importance of the courts to the ultimate resolution of this debate.

I. Overview of the "Taking" Issue.

The "taking" agenda derives its rhetorical inspiration -- though not its substantive content -- from the taking clause of the Fifth Amendment to the Bill of Rights: "private property [shall not] be taken for public use, without just compensation." As demonstrated by the history of the Bill of Rights as well as actual practice in 18th century America, the drafters of the Bill of Rights had a narrow conception of the taking clause: government should not physically appropriate property, such as for a road or a post office, without paying financial compensation. Contrary to the claims of modern property rights advocates, the drafters of the Bill of Rights did not intend for the taking clause to restrict public regulation of the uses of private property.

The original, narrow understanding of the taking clause did not ignore that public actions can sometimes impose heavy, even unreasonable burdens on certain property owners. However, the drafters of the taking clause believed that property issues are, by and large, political questions, and therefore democratically elected representatives, rather than unelected federal judges, should generally decide how serious a threat is to the common welfare, how far government should go to address the problem, and whether there should be flexibility or compensation for those adversely affected. In other words, the traditionally limited scope of the taking clause was based on a profound confidence in the ability of "we the people," acting through our elected representatives, to regulate the use of property in a generally fair and effective manner.

The current, extreme version of the taking argument in American political discourse was forcefully articulated for the first time by Professor Richard Epstein in his influential 1985 book Takings. Starting from the premise that essentially any public control over free market decisions was suspect, Epstein argued that the taking clause should be read to require compensation for any limitation on the use of private property. Professor Epstein recognized an exception to this proposed principle only if the government limitation was designed, consistent with ancient common law principles, to prevent one property owner from inflicting some specific harm on her neighbors. This libertarian vision of property rights contradicts the essentially communitarian values of the founding fathers, and would make it virtually impossible for government to address long-term, cumulative effects which are at the core of so many of our nation's environmental ills.

Since the mid-1980's, in both the political arena and in the courts, the taking agenda has had a sweeping influence. In 1988, political appointees in the Department of Justice latched onto this new libertarian vision of property rights to craft a presidential Executive Order on takings. As frankly summarized by former Solicitor General Charles Fried, they had "a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Taking Clause as a severe brake upon federal regulation of business and property." Since 1990, bills to legislate the taking agenda have been introduced and debated every year in Congress. A radical property "compensation" proposal was included in the Contract with America, and passed the House of Representatives before dying in the Senate. In 1997, Congress is considering a variety of property-related proposals, including, among others, a bill to provide developers quick and easy access to federal court to sue cities and towns for alleged takings, and the "American Land Sovereignty Protection Act," a bill to limit the authority of the Secretary of Interior to designate World Heritage sites. In the states, taking proposals have been debated in virtually every legislature or at the polls. Over twenty states have adopted some version of taking legislation, and several other states are considering such proposals today.

In the courts, the taking issue was for many decades a relative backwater in the law. Since 1987, however, the U.S. Supreme Court has issued a series of decisions producing modest but cumulatively significant steps toward a libertarian vision of property rights. Most of these decisions focus on state and local governments, limit public authority to protect critical natural areas and impose reasonable conditions on new development, and question the use of innovative land protection tools such as Transferable Development Rights. In addition, on October 20, the U.S. Supreme Court agreed to hear a taking case involving governmental regulation of health benefit programs for retired workers which will have profound implications for regulatory authority generally. The increase in activity in the Supreme Court, and the new precedents favoring challenges to land use and environmental regulations, have spawned a growing volume of litigation in the lower federal and state courts as well. While federal, state, and local governments continue to win most of these cases, there are some striking recent losses and some ominous changes in legal doctrine underway. The threat of costly taking litigation has already had a profound deterrent effect on state and local government officials across the country.

II. The Political Context of the Taking Issue.

The taking issue reflects the erosion, in the environmental arena and other realms as well, of political consensus supporting an activist role for government in protecting common resources and promoting common values. It also represents the revival of a late 19th/early 20th century political philosophy which celebrated the sanctity of contract and property. In legal terms, the rise of the taking issue represents a re-run of the widely vilified era of "substantive due process," in which the courts struck down minimum wage and maximum hour laws as unconstitutional interferences with private enterprise. In part to avoid the appearance of reviving this widely discredited social agenda, the issue today has reemerged under the banner of the taking clause rather than the due process clause of the Fifth Amendment.

The rise of the property issue also reflects the powerful influence of libertarian and free- market thinking on public policy discussions. Led by organizations such as the Cato Institute and the Competitive Enterprise Institute, those who repudiate virtually any positive role for government have helped shape the national political debate, in environmental policy and in other areas. Reflecting the breadth of their ambitions, advocates of a libertarian ideology point to the collapse of the Soviet Union and most of the rest of the communist block as evidence of a historical tide turning in their direction. As succinctly stated in a recent work by David Boaz of the Cato Institute: "It's obvious now that total statism is a total disaster, leading more and more people to wonder why a society would want to implement some socialism if full socialism is so catastrophic."

Finally, the rise of the property issue reflects the fact that we live in an era in which property norms are changing at a relatively rapid rate. Under the weight of an exploding population, rapidly developing scientific knowledge, and changing social values, our conceptions of appropriate uses of land and other natural resources have undergone dramatic change. It is hardly surprising that the resulting dislocations and frustrations have made this an era of property conflict. In many respects, modern ”property rights” activists are latter-day Luddites violently resisting the inexorable implications of current and emerging social conditions.

While these broad intellectual and social currents help explain the rise of the property issue, they do not directly explain why taking has became the focus of political, and not merely judicial debate. After all, the taking clause, like other provisions of the Bill of Rights, was appended to the Constitution to provide a judicial safeguard for minority interests. The taking clause was included in the Bill of Rights, at least in part, because the majoritarian branches were regarded as potential threats to certain property rights. Therefore, at least at first blush, it is surprising that taking has become such a significant political issue.

The answer lies in part in the fact that property advocates may represent a minority interest, but they represent a particularly cohesive and well-financed political interest group capable of exerting significant political influence. Organizations such as the American Forest and Paper Association, the National Realtors Association, and the National Association of Homebuilders have invested great energy and resources in the property issue. More specifically, heavy investment in political campaign financing by property groups helps explain the political prominence of the property agenda. Over the last several months, for example, the National Association of Homebuilders has poured literally millions of dollars into House and Senate races in order to build support for the most recent version of federal taking legislation.

The rise of the taking issue also can be explained in part by the successful effort to create a public mythology which distorts the true identity of the potential winners and losers in the property debate. According to this mythology, the overwhelming majority of those who would benefit from taking legislation are middle class individuals and families seeking to make modest uses of small parcels of land. This mythology has been generated by numerous anecdotes designed to illustrate how ordinary citizens sometimes suffer economic loss as a result of regulatory programs. The goal of this effort has been to portray conflicts between land owners and government as an ordinary feature of daily life in America and to suggest that many, if not a majority, of citizens would benefit from the success of the taking agenda. In reality, major resource industries and developers have the greatest direct interest in taking legislation because they stand to gain the greatest financial reward from its success.

Without disputing the reality of some hardship cases, it is telling that many of the most common "horror stories" retailed in legislative debates over the taking issue cannot withstand detailed analysis. The Wilderness Society, a major national conservation group, conducted a systematic review of all of the anecdotes during the House debate on the Contract with America taking provision. This analysis found that nearly all of the anecdotes grossly misstated the true facts, and some appeared to be pure urban legends.

Finally, the courts themselves, and the U.S. Supreme in particular, have played a significant role in the rise of taking as a political issue. The U.S. Supreme Court's frequent showcasing of the taking issue since 1987 has helped give the issue new visibility and importance. And particular Supreme Court cases, such as Lucas v. South Carolina Coastal Council and Suitum v. Tahoe Regional Planning Agency, have provided powerful anecdotal evidence in support of sweeping legislative proposals. The Supreme Court has unlimited authority to pick and choose among the cases it hears, and therefore Justices who support the taking agenda have carefully exercised their discretion to pick cases which put the taking issue in the most favorable light from their perspective. Not coincidentally, the cases selected have had a powerful influence on the political debate.

III. The Central Role of the Courts.

While every policy issue in America is perhaps in some ultimate sense political, the courts will play the most important and definitive role in determining the direction of the taking issue.

First, and most importantly, the U.S. Supreme Court is the final arbiter of the meaning of the taking clause. By definition, a Supreme Court ruling on a constitutional issue is final and Congress is powerless to overturn it. Moreover, the Supreme Court rarely and only reluctantly revisits its constitutional precedents. Just as it has taken a number of small steps over a fairly long period of time for the Supreme Court to begin the task of developing a broader reading of the taking clause, it would take an equally lengthy and difficult effort to reverse adverse precedents once established.

Furthermore, the courts are inherently anti-democratic in nature and therefore are institutionally predisposed to protect and advance individual rights at the expense of the public as a whole. As illustrated by the defeat of the Contract with America taking proposal, and the success of the voters in repealing taking laws at the polls in Arizona and Washington State, the general public, once sufficiently organized and mobilized, can probably defeat most destructive taking proposals in the political arena. On the other hand, popular sentiment has no direct influence on unelected federal judges. Indeed, the very function of the courts is to protect individual rights regardless of, and sometimes in defiance of, popular opinion.

Finally, the courts represent the most serious long-term threat on the taking issue because many judges are increasingly predisposed to be sympathetic to taking claims. Over the last several decades, the composition of the U.S. Supreme Court has changed dramatically. Justices Rehnquist and Scalia, appointed by President Ronald Reagan, have built a new bloc on the Court favoring an expanded view of property rights. Lower courts, particularly the U.S. Court of Federal Claims, are also increasingly sympathetic to taking claims.

To date, the U.S. Supreme Court has taken a number of modest but important steps in the direction of expanding the taking clause as a constraint on the public's ability to adopt legislation to address environmental problems and other pressing public policy issues. In particular:

- In the First English case, the Court ruled that even if a community rescinds a regulation judged to effect a taking, it cannot escape the obligation to pay financial compensation for the interim period that the offending regulation was in place. By enormously expanding local communities' financial exposure in taking suits, this decision raises the stakes in taking litigation and has acted as a strong deterrent against local protection efforts.

- In Lucas v. South Carolina Coastal Council, the Supreme Court struck down a coastal protection act designed to control new development along the state's rapidly eroding ocean shore. The Court established a virtually automatic rule that a taking will be found

when a regulation blocks development of hazardous or environmentally sensitive sites, regardless of the importance of the problem being addressed.

- In Nollan v. California Coastal Commission and Dolan v. City of Tigard, the Supreme Court established new strictures on the kinds of conditions which may be attached to development approvals to ensure that the public costs of new development are fully mitigated. As a result, these decisions limit the ability of local authorities to require developers to fund necessary infrastructure investments as a condition of development approval.

In mid-October the U.S. Supreme Court granted review in a taking case, Eastern Enterprises v. Appel, which arises out of a federal law dealing with health benefits for retired mine workers, but which has potentially very important implications for environmental and land use regulations. The specific issue in the case is whether Congress could properly impose retroactive liability on a company formerly engaged in coal mining to help pay for the health care of its retired employees. The Court's decision could well have broad ramifications for the ability of Federal, State, and local governments to impose new restrictions on the use of property to address emerging or newly discovered environmental problems.

The activity at the Supreme Court level is matched by a significant rise in the volume of taking litigation in the lower courts. The U.S. Court of Federal Claims, led by Chief Judge Loren Smith, has in a number of cases aggressively sought to expand the taking doctrine. Our systematic monitoring of state taking cases indicates that the state courts are literally being flooded with new taking suits. While the government still generally prevails in these cases, a small but growing number of cases appear to be going against the public. For example, both the California and Michigan Supreme Courts are now weighing whether to overturn two important decisions by lower courts in those states finding a taking and providing major compensation awards.

IV. Current Implications of the Taking Issue.

What then are the specific effects and implications of the taking issue for different arenas of environmental policy? The discussion below highlights how the taking agenda already has effected, and could in the future effect, 11 representative areas of environmental concern: sprawl and growth management, endangered species and biodiversity protection, wetlands conservation, land acquisition programs, public lands conservation, public access to lands and waters, international trade and protection of the environment, trail and greenway programs, superfund clean up, historic preservation, and scenic preservation. These examples by no means cover the universe, but are intended to make this sometimes abstract issue more concrete and understandable.

A. Sprawl and Growth Management.

Efforts to control sprawl and to manage growth depend in large part upon greater community control over the extent and timing of development activity. Urban growth boundaries, such as those adopted statewide in Oregon and in communities in California and other states, seek to use regulation (and other tools) to direct development towards preferred locations and away from other locations. The taking issue represents a fundamental threat to the ability of communities to direct future development patterns

One familiar technique for managing growth is very large lot zoning or resource-use only (agriculture or forestry) land use regulations. On the understanding that there can be no taking when the owner retains some reasonable economic use of the property, challenges to this type of land use regulation have generally been rejected. See, for example, Thorp v. Town of Lebanon, (rejecting taking challenge to new agricultural zoning classification because zoning did not deny

owner all or substantially all practical use of the property) and Caspersen v. Town of Lyme, (upholding 50-acre minimum lot size in town's mountain and forest districts). However, taking advocates now frequently contend that even partial reductions in the value of property can constitute a taking, a view apparently endorsed by a federal court of appeals in Florida Rock v. United States. Under that view, regulations sharply restricting the density of development, even if they allow certain viable economic uses to continue, could be deemed a taking. See, for example Steel v. Cape Corp., (finding that "open space" zoning provision effected a taking); Reahard v. Lee County, reversed on procedural grounds (limitation of 1 house per 40 acres in resource protection zone held to be a taking). In short, the taking issue presents a direct threat to one of the most elementary and common growth management tools available to American communities.

Taking also is a threat to more sophisticated growth management programs utilizing Transferable Development Rights. The U.S. Supreme Court's 1997 case Suitum v. Lake Tahoe Regional Planning Agency, illustrates the point. The Lake Tahoe planning agency adopted a TDR program to restrict development in certain sensitive areas around the lake. The program helped mitigate economic burdens on restricted landowners by allowing them to sell their development rights to owners of less sensitive lands who could then use the rights to develop their property at a higher density than otherwise allowed. In concept, this TDR program is comparable to numerous other programs designed, for example, to preserve farmland and control sprawl in Montgomery County, Maryland, or to preserve the New Jersey Pine Barrens. This type of TDR program also is comparable in concept to the Natural Communities Conservation Plan process underway in southern California.

The fundamental legal issue raised in Suitum was how to analyze a TDR program under the taking clause. According to the planning agency, the value of a TDR to a restricted landowner mitigates the adverse economic impact of the restriction on the landowner and therefore should be considered in deciding whether or not there is a taking. On the other hand, Suitum contended that the value (if any) of a TDR should be ignored in deciding whether a taking actually occurred, and that this value should only be counted as part of the "just compensation" due the landowner, if a taking actually occurred. Under the former view, the taking clause would serve as no particular obstacle to the use of TDR programs to distribute growth and achieve greater fairness among different landowners. Under the latter view, the viability of TDR programs would be severely undermined, in particular where a TDR program is designed to provide relief from stringent controls to safeguard sensitive natural areas.

Because Suitum was ultimately resolved on relatively narrow procedural grounds, the case promises to be a focus of taking litigation across the country in coming years. See, for example, Good v. United States, appeal pending to Court of Appeals for the Federal Circuit (trial court concluded that value of TDR's could be counted in determining whether a restriction effected a taking).

B. Endangered Species and Biodiversity Protection.

The taking issue also threatens regulatory programs designed to protect biodiversity, and threatened and endangered species in particular. In Congress, debates over the "taking" issue have reached a high pitch in the context of proposals to reauthorize the Endangered Species Act. Senator Kempthorne, one of the leaders of the most recent effort in Congress to craft a viable ESA reauthorization bill, is a strong supporter of a sweeping "compensation" requirement for endangered species regulations. In recent months he has repeatedly threatened to attempt to attach a taking amendment to the bill. More generally, the "property rights" issue is the major ideological driving force behind efforts to weaken the act as a whole. Similarly, the taking issue is largely responsible for the elimination of the National Biological Survey as an independent office within the Department of Interior, and motivated the recent vote in Congress approving the "American Land Sovereignty Protection Act," a bill requiring prior congressional approval for the designation of World Heritage sites in the U.S.

Likewise, taking has rapidly become an important weapon in the courts for challenging wildlife conservation efforts. For example, in Del Monte Dunes v. City of Monterey, a developer obtained a $1.45 million taking judgment against a California city because the city rejected a large development based in part on concerns about the project's potential impact on wildlife habitat. The award was affirmed by the U.S. Court of Appeals for the Ninth Circuit.

Taking challenges against the Federal government under the Endangered Species Act were once fairly rare, but a number of major suits have been filed in recent years. For example, in Pacific Lumber v. United States, the owners of the Headwaters Forest in northern California have filed a $500,000,000 claim against the United States, challenging restrictions on timber harvesting mandated by the U.S. Fish and Wildlife Service to protect various endangered species. To pick another example, in 1994 a landowner filed a $2,500,000 taking suit based on the denial of a wetlands dredge and fill permit in part because of concerns about the project's impact on the endangered marsh rabbit. While the claim was rejected by the trial court, the landowner has now filed an appeal in the U.S. Court of Appeals for the Federal Circuit. See Good v. United States, appeal pending.

C. Wetlands Conservation.

The Clean Water Act wetlands program has been a particular focus of taking litigation. In fact, wetlands regulations have produced the largest volume of taking suits before the U.S. Court of Federal Claims of any federal environmental program.

Loveladies Harbor, Inc. v United States, produced a multi-million dollar judgment for a landowner complaining about federal restrictions limiting his ability to develop wetlands along the New Jersey shore. The developer had acquired a large tract of land, most of which had been developed by the time the developer turned to the last and most environmentally sensitive portion of the property. Despite the principle that taking claims should generally be analyzed in relation to the owner's "property as a whole," the Court of Federal Claims found a taking by focusing exclusively on the restricted portion of the property and a federal appeals court upheld the trial court. The Loveladies Harbor precedent is widely cited by litigants claiming a taking in federal and state courts.

In Florida Rock Industries, Inc. v. United States, the U.S. Court of Appeals for the Federal Circuit articulated for the first time the idea of "partial takings," the notion that a regulation which merely reduces a property's value without eliminating all viable economic uses can be a taking. The case is scheduled to go to trial in the near future and may ultimately become a major test case before the U.S. Supreme Court.

Similarly, taking suits challenging wetlands regulations have been a focus of recent state court litigation. For example, in Zealy v. City of Waukesha, a Wisconsin trial court found that a city wetlands ordinance limiting development of 8 acres of wetlands on a 10 acre parcel constituted a taking, citing, among other things, the Loveladies Harbor precedent. On appeal, the City of Waukesha, supported by the Wisconsin public interest community and the State Attorney General's office, succeeded in convincing the Wisconsin Supreme Court to overturn the lower court decision. In Michigan, in K&K Construction Co. v. DNR, a trial court awarded compensation because the state refused to grant a permit to fill wetlands on a site slated for development as a sports facility. The Michigan Supreme Court has agreed to review the lower court's ruling, and a decision is expected in several months.

Like federal endangered species regulations, federal wetlands regulations have been a focus of the "property rights" challenge in Congress. In the 104th Congress, the U.S. House of Representatives passed a Clean Water Act reauthorization bill popularly dubbed the "dirty water bill" which included a broad taking "compensation" provision; this bill died when the Senate failed

to take it up. In this Congress, legislative activity on wetlands is rather muted, but a number of different proposals have again been advanced which would weaken wetlands protections in the name of protecting property rights.

D. Land Acquisition Programs.

Because government regulation is the normal focus of the taking debate, conservation programs emphasizing purchase of rights in land are sometimes viewed as outside the scope of this debate. Indeed, land acquisition strategies are sometimes viewed as a way of meeting, at least part way, the concerns of taking advocates. In fact, the taking issue threatens to make it far more expensive and difficult for private groups and public agencies to acquire public lands. Ultimately, the taking issue presents nearly as grave a threat to the land acquisition tool as it does to regulatory programs.

The reason is simple. The price paid for private lands for conservation or other public purposes is traditionally based on the property's "fair market" value. Fair market value is determined by, among other things, factoring in the effects of existing regulatory restrictions on the value of property. Just as direct restrictions on the use of private property are sometimes challenged as a taking, appraisals of the value of private property slated for public purchase which reflect the effect of these restrictions also have been alleged to be a taking. If this argument prevailed, significantly more money would be required to purchase conservation lands and/or fewer lands could be acquired with available funds.

The point is illustrated by the recent New York Court of Appeals case Basile v. Town of Southampton. An investor purchased an 11.5 acre lot in 1980 for $88,500, knowing that a prior owner had obtained authorization to subdivide this and surrounding property with the understanding that this particular lot, which contained extensive wetlands, would not be developed. When several years later the town proceeded to purchase the property for $117,500, the investor claimed that, absent the regulations, the 11.5 acres could be divided into 9 lots and sought $1,000,000 in payment for the "lost" development potential. In short, the investor claimed, as a matter of constitutional right, not merely a small return on his investment, but a greater than ten-fold increase. While the court ultimately rejected the argument, similar claims might prevail under different circumstances, especially if the idea of regulatory takings is accepted broadly.

A provision of the California Desert Protection Act also demonstrates how the taking issue can undermine land conservation efforts. Passage of this Act designating new wilderness and national park lands in southern California is properly viewed as one of the greatest environmental achievements of the 103rd Congress. However, taking advocates extracted a price for this victory by inserting in the final bill a destructive and potentially sweeping precedent on the price the government must pay to acquire public lands. Specifically, section 710 of the Act provides: "Lands and interests in lands acquired [under the act] shall be appraised without regard to the presence of a species listed as threatened or endangered pursuant to the Endangered Species Act of 1973." In practical terms, this provision means that, when threatened or endangered species are present on lands slated for acquisition, the federal government must pay above fair market value for the land. Viewed differently, this provision says, in effect, that reductions in the value of property resulting from development conflicts with wildlife needs cannot legitimately be counted in fixing fair market value. The net effect is that the public will have to spend more money than it otherwise would, or purchase fewer lands than it otherwise would, as a result of this provision.

Finally, the implications of the taking issue for land conservation efforts are also being played out in the halls of Congress in dramatic fashion in the context of a debate over funding levels for the Land and Water Conservation Fund, the most prominent source of federal funding for land acquisition for conservation purposes. As part of the recent bipartisan budget agreement, negotiators agreed to the addition of $700 million to the Land and Water Conservation Fund, in

large part to finance the purchase the old growth Headwaters Forest in northern California and to resolve the dispute over the proposed New World Mine north of Yellowstone Park. While the infusion of such a large sum into the LWCF is valuable on its face, this funding is being used in part to satisfy actual or potential taking claims that might well not have been asserted prior to the rise of the property rights movement. In particular, the funding for the purchase of the Headwaters Forest property, if finally approved, will be used to dispose of the pending $500,000,000 taking claim which has been asserted by the owners of the forest. In short, the proposed infusion of new money into the LWCF may partly amount to simply running in place.

E. Public Land Conservation.

Like the land acquisition tool, public land conservation also is sometimes viewed as outside the scope of and unaffected by the taking agenda. After all, public lands are owned by the public. If one takes property rights seriously, shouldn't the public's claim on public lands be entitled to at least as much respect as private claims on private lands? Common sense notwithstanding, property rights arguments are being used, with some success, to expand or create new private rights in public lands. To the extent such rights are recognized, they will subtract from the public's right to determine the uses of public lands.

While this argument is being played out on a number of different fronts, for purposes of illustration it is useful to focus on private grazing leases on public lands. Traditionally, permission to graze cattle on federal public lands has been understood to be a privilege which the public has the right to condition or revoke at virtually any time for sound public purposes. On a number of different fronts, grazing interests and allied "taking" advocates are working hard to erode this principle.

Two litigation and one legislative examples make the point in this context. In Hage v. United States, Wayne Hage, a Nevada rancher and wise use activist, filed suit in the Court of Federal Claims alleging that his grazing rights had been taken because, among other things, the state wildlife agency was permitted to release elk in the vicinity of his ranch and the Bureau of Land Management, after a series of disputes with Hage, terminated his grazing permit. Judge Loren Smith, bowing to overwhelming precedent, rejected the taking claim to the extent it was premised on the cancellation of the grazing permit itself. However, the judge is still considering, whether, even if a direct taking claim based on revocation of the grazing permit is barred, Hage can still assert a taking claim on the theory that BLM took his state water rights by denying him the access to the federal lands he needs to use his water rights. If this novel bootstrap argument succeeds, it could create new private rights in public lands across much of the West.

Similarly, in Public Lands Commission v. Babbitt, now pending before the U.S. Court of Appeals for the Tenth Circuit, grazing interests are trying to establish new private rights in public lands. This suit arises from new regulations governing grazing on public lands recently issued by Interior Secretary Bruce Babbitt. These regulations seek, among other things, to grant federal land managers more authority to control the number of cattle on federal lands. In challenging these regulations, the Public Land Commission, which represents grazing interests, is arguing that determinations made many years ago about the allowable number of cattle on specific tracts should be viewed, in effect, as property rights which are beyond the power of the Secretary to alter through regulation.

Finally, in a companion legislative effort, advocates of grazing interests are actively pursuing in Congress H.R. 2493, the "Forage Improvement Act of 1997." This legislation would limit public income from private use of public lands, and limit the public's ability to protect public lands in a variety of ways. Among other things, the bill could potentially convert the existing privilege to graze on public lands into a private property right, allowing grazing permittees to claim ownership of public resources and demand "compensation" from the taxpayers whenever agencies limit grazing to protect public resources. The House of Representatives recently passed an amended version of this legislation, and the Senate may take it up next year.

F. Public Access to Public Lands and Waters.

The taking issue also constitutes a threat to public access to public waters and lands. For example, the taking issue has had the effect of making it far more difficult to retain public access to beaches and public trust tidelands. The California Coastal Commission, in particular, has made it a priority to try to preserve public access to the coastline. However, in Nollan v. California Coastal Commission, the U.S. Supreme Court struck down as a taking a commission decision designed to preserve public access to the shore. According to the commission staff, this decision has effectively derailed the commission's policy on beach access.

Likewise, the property issue has been a barrier to efforts to maintain and expand public access to public rivers and streams. In 1985, the Montana legislature passed a "Stream Access Bill," which, among other things, was designed to protect the public's right to use public waterways in a "convenient, productive, and comfortable" way, including, for example, by requiring landowners who erected artificial barriers on a stream to provide convenient portage routes around the barriers. In Galt v. State Department of Fish, Wildlife & Parks, the State Supreme Court declared the statute an unconstitutional taking of private property. This decision has slowed efforts to expand access for anglers and others trying to participate in outdoor recreation on Montana's rivers and streams.

To pick a final example, the pending legislation in Congress dealing with grazing on public lands would also limit public access to federal public lands. In some cases, as a condition of the privilege of using federal public lands to graze cattle, and to remove obstacles to public access to public lands, federal land managers require grazing permittees to allow the public to pass over private property to reach the public lands. Section 103 of the pending grazing bill would eliminate this tool for maintaining public access to public lands by prohibiting federal agencies from "impos[ing] as a condition for the issuance or renewal of a grazing permit or lease that the permittee or lessee provide access to private property unless the condition is limited to access for federal personnel engaged in authorized land management."

G. International Trade and Protection of the Environment.

Over the last several years, conservationists have raised major concerns about whether the implementation of North American Free Trade Agreement and other projected international trade agreements would cause an environmentally destructive "race to the bottom" on an international scale. While it has received relatively little attention, the provision of NAFTA requiring member countries to "compensate" investors when their property is "expropriated," or when governments take measures "tantamount to expropriation," presents a particularly serious threat to the environment, as illustrated by the recent filing of several international "taking" lawsuits under NAFTA.

In Ethyl Corporation v. Government of Canada, the Ethyl Corporation filed a claim for $251,000,000 based on the Canadian Parliament's decision to ban the import and interprovincial transport of the gasoline additive MMT, which Canada considers to be a dangerous toxin. The company contends that the ban represents an "expropriation" of both its MMT production plant and its "good reputation." In a similar action, in Metalclad Corporation v. United Mexican States, a firm is seeking more than $50,000,000 in compensation based on a decision by the Mexican State of San Luis Potosi to reject an application by a U.S. company to reopen a contaminated waste treatment site. (These litigations are described in detail in excellent background materials prepared by The Preamble Center for Public Policy.) If either suit succeeds, it would create a major, novel tool for attacking environmental regulations across national boundaries.

In fact, the taking issue on the international front is in some respects even more threatening to the environment and other aspects of the public interest than efforts to expand upon the taking clause

in the U.S. Constitution. The NAFTA cases will be heard, not by domestic courts, but by international panels consisting of three members, one chosen by the company, one chosen by the government, and one chosen by the first two panel members. The panels will likely focus on the international trade aspects of the cases and may well lack any particular knowledge or sympathy for domestic environmental problems. In addition, in comparison with U.S. court proceedings, the records of international panels are not readily accessible to the public, and the losing party has no right to appeal to domestic courts. Finally, in interpreting the newly adopted language of NAFTA, the panels will be writing on a relatively clean slate. Thus, the panels may conclude that they are freer than U.S. domestic courts to move away from established definitions of property rights under the taking clause.

The threat on the international front stretches beyond NAFTA, because the substantive content of the anti-expropriations provisions and the procedures for enforcing such provisions are currently being debated in other ongoing trade negotiations. In particular, this issue is central to the ongoing negotiations over the proposed Multilateral Agreement on Investment and what type of "fast track" authority Congress may grant to carry out these and other trade negotiations.

H. Trail and Greenway Programs.

One of the most successful and popular recent initiatives in the conservation field has been the creation of extensive new public and private programs to promote trail development and other types of greenways. Here, too, taking is emerging as a major new obstacle.

Most importantly, a recent taking decision, Preseault v. United States, threatens to severely undermine the Federal Rails-to-Trails program, which has successfully converted thousands of miles of abandoned railroad rights-of-way to public walking and biking trails. The case dealt with a landowner who bought land subject to an existing railroad right of way, after the enactment of the federal law authorizing rails-to-trails conversions. Despite being on notice that the existing right-of-way might be converted to trail use, the owner nonetheless claimed a taking when the railroad right of way across his property was converted to trail use. The court of appeals recognized that an owner typically cannot challenge regulatory restrictions in place on the date of purchase, but concluded that this general rule did not apply here because a recreational trail involves actual "physical invasion," as opposed to simple regulation, of private property. Accordingly, the court of appeals found that this trail conversion effected a taking.

The implications of the Preseault decision for rails-to-trails conversions are somewhat uncertain but potentially sweeping. Depending in part on the facts of each case and the variations in property law from state to state, Preseault could mean that many rail-to-trail conversions across the country will be found to effect a taking. At a minimum, the decision will make it more expensive and difficult to complete trail conversions, and encourage landowner opposition to trail conversions as violations of "private property rights."

In the aftermath of Preseault, taking advocates have introduced legislation to amend the rails-to-trails law. On the theory that most rail-to-trail conversions after Preseault will result in takings, but that it will be difficult for most landowners to recover just compensation, H.R. 2438 would eliminate the provision of the rails-to-trails legislation which forestalls "abandonment" of unused railroad rights of way and makes them available for interim trail use. This proposal would severely weaken, if not gut, the rail-to-trail program. The bill has some 54 co-sponsors in the House of Representatives, has been the subject of one congressional hearing, and may become the focus of legislative debate next year.

I. Superfund Clean Up.

The ability of the government to clean up superfund sites and deal with other toxic chemicals also is threatened by an exaggerated conception of takings. Following the passage of the superfund law, the Comprehensive Environmental Response, Compensation & Liability Act, industries subject to this new law raised a variety of legal objections to its enforcement, by no means limited to but including takings. Industry challenged, in particular, the "joint and several liability" aspect of the superfund scheme on the theory that it forced certain companies to pay more than their "fair share" of the clean up costs, and therefore effected a taking of private property. In United States v. Conservation Chemical Co., for example, the court stated that "[t]here is no precedent in law or in fact for application of the ?taking' doctrine to joint and several liability; nor is there any support for the premise that ?fair share' is the applicable test for a ?taking' claim."

While this conclusion appears to reflect settled law for the time being, the U.S. Supreme Court's decision to grant review in the case of Eastern Enterprises, Inc v. Appel raises a concern that this conclusion may change in the future. Eastern Enterprises raises the question of whether, and to what extent, consistent with the taking clause of the Fifth Amendment, Congress can impose retroactive liability on a company that left the coal mining business several decades earlier to help pay for the health care costs of some its former employees. An adverse result in this case might well draw back into question the extent of Congress' power, consistent with the taking clause, to impose retroactive liability on companies to clean up toxic materials years or even decades after they have wrapped up their business operations.

The taking issue also has arisen in the context of efforts by the Environmental Protection Agency to identify and monitor the spread of toxic chemicals from a superfund site. For example, in Hendler v. United States, the EPA sought to install monitoring wells on property adjacent to the Springfellow Acid Pits in order to determine whether chemicals were migrating through the underlying soil. When the land owner refused EPA access to its land, the EPA issued an order requiring the landowner to allow the wells to be installed. The owner subsequently sued for a taking. The court ultimately concluded that this "physical occupation" did indeed result in a taking, but that the owner was entitled to only minimal compensation on the theory he benefited at least as much as he was burdened by installation of the wells.

J. Historic Preservation.

The preservation of historic landmarks and historic districts is an issue at the center of the "taking" debate. One of the most celebrated and most important U.S. Supreme Court "taking" decisions, Penn Central Transp. Co v. New York City, involved a taking challenge to the designation of Grand Central Station as a historic landmark. The Court rejected the taking claim, establishing a vitally important precedent not only for historic preservation efforts but for all manner of community protection measures. Taking advocates consistently cite the Penn Central decision as the U.S. Supreme Court precedent which they most fervently wish to see eroded and ultimately overturned.

In the view of many, historic preservation issues are among the most difficult to deal with in the context of the taking issue because the benefits of preservation measures often appear to be largely intangible and aesthetic in nature. The defense of historic district regulations is aided by the fact that a large number of property owners are generally subject to these measures, and there is widespread evidence that historic designations have tended to raise the value of property in the district as a whole. On the other hand, landmark designations of particular buildings, such as in the Penn Central case, are more easily prone to the characterization that they involve unfair singling out of a particular owner to bear a disproportionate burden.

In recent years, a significant number of taking cases have been filed against local historic measures. In general, while some of these cases have been lost at the trial level, advocates of historic preservation have succeeded on appeal. Thus, for example, in Pittsburgh v. Weinberg, a trial court in Pennsylvania concluded that denial of a permit to demolish a historic structure

effected a taking, but the Pennsylvania Supreme Court reversed the decision. See also United Artists Theater Circuit, Inc. v. City of Philadelphia, in which the Pennsylvania Supreme Court issued a decision concluding that designation of a historic theater without the owner's consent did not effect a taking, reversing the Court's earlier decision concluding that there was a taking. However, in one recent case in Maryland, a Federal District Court found that a city's denial of permit to demolish a historic monastery and chapel did effect a taking, and the city was forced to allow the demolition to proceed. See Keeler v. City of Cumberland.

K. Scenic Preservation.

Finally, the taking issue has long been a central feature of the fight to control billboards and other forms of visual pollution. The billboard industry, which is particularly aggressive and well organized, has brought a large number of taking suits against local communities over billboard regulations. Using a strategy that appears to be unique to billboard regulation, many communities have adopted an "amortization" approach under which the community requires the elimination of billboards from certain locations, with the proviso that the owner can maintain the billboards for a sufficient period of time (such as 5 to 10 years) to recoup his initial investment and gain a reasonable rate of return. This regulatory approach has consistently been upheld against taking challenges and provides, on its face, a more than adequate legal rule to address billboard proliferation and treat billboard owners fairly.

Unfortunately and ironically, Congress has passed legislation, ostensibly for the purpose of controlling billboards, which preempts local land use authority and actually makes it harder for local communities to remove billboards. The Highway Beautification Act, which represents an early but little noted form of "compensation" taking legislation, requires both states and local governments, when removing billboards along federal-aid highways, to pay billboard owners "just compensation," and preempts use of the amortization approach. This requirement applies not only to billboards removed under the Highway Beautification Act, but also to billboards removed under local ordinances and state laws. The net effect of this requirement is to make the cost of removing billboards so high that it is virtually impossible to accomplish. According to a recent report by the group Scenic America, this "compensation" requirement, "coupled with the termination of federal funding for [highway] beautification several years later, meant the near end of nonconforming billboard removal."

John D. Echeverria
Environmental Policy Project
Georgetown University Law Center
November, 1997