

# BATTLING OVER LEOPOLD'S LEGACY

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## About the Author:

**Eric T. Freyfogle** is the Max L. Rowe Professor at the University of Illinois College of Law. He received his J.D. degree summa cum laude from the University of Michigan Law School, where he was Managing Editor of the Michigan Law Review. He is the author or editor of several books, including *The Land We Share: Private Property and the Common Good* (2003); *The New Agrarianism* (2001); *Bounded People, Boundless Lands* (1998); and *Justice and the Earth* (1993). A native of central Illinois, Professor Freyfogle has long been active in local, state, and

national conservation efforts. The Aldo Leopold Foundation recently appointed Professor Freyfogle as Editor of the Aldo Leopold Conservation Papers Project, which will produce a four-volume set of annotated Leopold writings on conservation subjects.

This talk was presented at the Sixth Annual Georgetown Conference on Litigating Regulatory Takings Claims, held at Fordham University School of Law, New York, New York, October 30-31, 2003.

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It is a distinct pleasure to be here to talk about Aldo Leopold, whose works I've long studied and expect to keep studying for years. I want to talk today about an ongoing battle over a dead person - or, more aptly perhaps, about a skirmish taking place over his legacy. Aldo Leopold, as I assume you know, was a prominent American conservationist until his death in 1948. He is best remembered for his lyrical, complex book *A Sand County Almanac and Sketches Here and There*. Less known are the other 300 published writings he left behind, along with dozens of unpublished manuscripts. In these many works, one finds some of Leopold's most provocative and advanced thoughts. They add greatly to the Leopold whom we know from simply reading his *Almanac*.

Leopold had hardly been dead when people started grabbing on to his substantial intellectual legacy. During his lifetime he had filled many professional roles. He was the first professor of wildlife management in the United States and author of the field's first textbook, *Game Management*. He was the first vocal proponent of wilderness preservation around 1920. He was a talented forester, and equally skilled in grazing management, watershed restoration, and other land-related tasks. After he died, a number of professional associations wanted to claim him as leader. Wildlife ecologists today look to him as their founder, as do wilderness preservation people. He's the patron saint of both restoration ecologists and conservation biologists. A national wilderness area is named after him, and so is

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a sustainable agriculture center. There is an Aldo Leopold Environmental Education Center, along with a memorial to him and to his land ethic, at an interstate rest stop in Wisconsin. His name has gotten around.

These early struggles over Leopold's legacy were friendly fights, undertaken by people who meant to honor Leopold and acknowledge his role in founding their fields of work. Today's fight over Leopold has a different tenor to it. The battle is less friendly. The stakes are higher.

I suppose today's fight provides a sign that Leopold is rising in the ranks of major figures of American history. Most of us, after all, will merit at most a small footnote in the annals of history. It takes a great figure to have people wrestle over your name. Years ago I read a doctoral

dissertation exploring the ways that Abraham Lincoln's legacy was put to use during the Progressive Era. Thomas Jefferson's legacy has been even more controversial. Perhaps, then, this fight over Leopold is a step on his road to canonization among America's greats.

The debate going on today, as I say, does have a different tenor to it. One person

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who has used Leopold has been a lawyer for the conservation group Environmental Defense, Michael Bean. In talks around the country he has regularly invoked Leopold's legacy to support his own belief that we can best protect habitats of endangered species

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by paying the landowners involved. Economic incentives are a good thing, Bean contends. They're the most useful tool for getting private landowners to practice conservation. Vivid Leopold quotes are offered by way of support.

More recently, Interior Secretary Gale Norton has used Leopold in op-ed pieces appearing in newspapers around the country. One ran this past summer in *The New York Times*. A different one ran in *The Washington Post*, and was widely reprinted. Norton invokes Aldo Leopold in support of her claim that we should use available money to promote conservation on private lands, rather than bring more land into public ownership. And the best way to get landowners to act right is to offer money. Private land conservation ought to be

voluntary, she contends, with landowners offered incentives to cooperate. Leopold, Norton argues, held the same view.

I suppose we might ask ourselves: Who really cares about all this, this public use of someone who's been dead 50 years? Well, we lawyers should have a quick answer. Precedents are important, in the courtrooms of law and in public opinion. And to some extent, that's just what this is, an argument about whose policy brief gets to cite Aldo Leopold as support.

My sense, though, is that there's something else going on here, something more deep rooted. When Americans get together and debate history, they're often arguing about competing explanations of the causes of things happening around them. What has caused the good things that have

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happened, and why have the bad ones taken place? In the United States, a fair number of good things have happened in the environmental area in recent decades, notably in controlling industrial pollution. This record of success, particularly when matched with recent failures, poses an important question as we look ahead: What has accounted for our environmental successes? What brought them about, and what can we do to extend them?

At my own university, a number of visiting speakers seem to know the answers to these questions. A common answer goes something like this. We've made a lot of environmental progress in recent decades; the Soviet Union, in contrast, was an environmental disaster before it fell apart. All of which goes to show, we're told, that

capitalism brings good things to land and collective planning brings bad ones. It is capitalism, then, that accounts for our success.

A variant on this argument goes like this. In the United States we had private property, while the Soviet Union didn't have private property. We produced a better environmental record than the Soviet Union, which shows that private property is at the heart of it all.

It should go without saying that speakers who embrace such reasoning are not particularly interested in attributing environmental successes to government regulation, much less to the labors of environmental groups. To cite such causes would suggest that maybe we need more regulation, or to strengthen the environ-

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mental lobby. Because that's not the policy prescription they want, that's not the story they have to tell. History is written with an eye to the future. The history they tell, predictably, supports the policy paths that they would have us follow today: Be vigilant in protecting private property and, whenever possible, put more parts of nature into private hands. Give free rein to capitalism, so that the invisible hand of the market can protect the environment to just the right degree.

This line of reasoning about private property, of course, links directly to Garrett Hardin's famous article from 30-some years ago, "The Tragedy of the Commons." Hardin suggested that the tragedy of the open-access commons could be solved by dividing it into private property. Private

landowners take care of what they own, so Garrett Hardin seemed to say. If we'd just divide nature into parts and assign each to a private owner, our environmental problems would be solved. Hardly any message has

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***Environmental degradation over the past few centuries has largely been due to our tendency to fragment nature into pieces - to think of nature as commodities, to value the commodities chiefly through market processes, and then to use them in whatever way makes the most money.***

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been more welcome to defenders of private property rights.

Now, the speakers espousing these views about our environmental record are not historians. Indeed, no legitimate environmental historian, I think, would see much merit in their simplistic claims. That isn't to say that private property has no

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environmental benefits when compared with the free-for-all of the open-access commons. In that comparison, private property usually does perform better. Realistically, however, the incentives owners have to take care of what they own are not nearly strong enough to get them always to use land well.

We could cite as perhaps the most spectacular American example of this deficiency the Dust Bowl of the 1930s, a land-use disaster that took place pretty much entirely on private lands. It's a useful illustration to consider, both because it is so clear and because it is so similar to the privatization hypothetical that Garrett Hardin used in his article. In the Dust Bowl of the 1930s, just as in Hardin's fictional tale, we started off with a grazing commons that was overused. The commons was

divided into private property shares - into individual farms. The real-life result by the late 1930s, however - in stark contrast to Hardin's story - was that the land went from relatively poor condition as a commons to disastrous condition under private management. Lands that should have remained in grass were put to the plow. Recurring droughts and strong winds took things from there.

When we turn to our serious environmental historians today, scholars such as Donald Worster, Ted Steinberg, and William Cronon, what we find echoing through their works is an entirely different interpretation of our environmental saga. Environmental degradation over the past few centuries, they tell us, has largely been due to the ethos that undergirds our

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capitalist system. It's been due to our tendency to fragment nature into pieces – to think of nature as commodities, to value the commodities chiefly through market processes, and then to use them in whatever way makes the most money. It is that ethos which has largely given rise to our environmental degradation. Privatization,

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***It was, Leopold believed, the most important conservation challenge of the era: motivating private landowners to take better care.***

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whatever its virtues, is not a full solution, as Aldo Leopold among others knew perfectly well.

After working in the Southwest early in his career, Leopold in the mid 1920s moved to Wisconsin, to a landscape dominated by private owners. From that point on - for the final quarter century of his

life - Leopold labored to find ways to get private owners to take better care of their lands; to use their lands conservatively, as he put it. It was, he believed, the most important conservation challenge of the era: motivating private landowners to take better care. Secretary Norton is certainly right in citing Leopold's conviction that private landowners simply had to be part of the conservation solution. Government alone could not do the job. As Leopold put it in one of his writings, our conservation challenge is "coextensive with the map of the United States."

But it wasn't so easy, in Aldo Leopold's mind, to find ways to accomplish this task. It was a serious challenge, worthy of careful research. As he worked on the task, Leopold explored pretty much all of

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the alternatives that people have identified even to this day. He talked about conservation education, government purchase, land-use regulation, and economic incentives. He speculated on social norms and how we might manipulate them. He proposed product labeling and boycotting products from lands that were being ill-used. All of these ideas appear in his writings. And as best he could, Leopold tried to test them out in the real world, to learn the pros and cons of each. In the long run, Leopold concluded ultimately, conservation education grounded in public morality was the best hope. Unless and until landowners saw the land differently, until they embraced different visions of successful land use, true conservation could not come about. But such a cultural transformation, Leopold

knew, wouldn't happen very soon. In the meantime, lands were sliding down in terms of biological health. Action was needed to slow that slide.

Sound land use was a particularly knotty challenge, Leopold decided, because the economics of conservation were simply not favorable to the individual landowner. In a good many writings he explored in detail the issue of land-use economics. The reality, he concluded, was that good land use often benefited the community more than it did the individual. If all landowners practiced conservation they all would benefit. But when only a few did so, the benefits often went to neighbors or the community at large, rather than to the individual owner alone. A great deal of conservation simply made no economic

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sense for an owner in isolation. This harsh reality was what conservation policy somehow had to address.

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What, then, did Aldo Leopold really say about economic incentives for private landowners? As I've related, Secretary Norton, Michael Bean, and others have contended that Leopold was a firm supporter of economic payments.

The truth, I think, is this. Leopold did say favorable things about incentives late in the 1920s and early in the 1930s, largely in the context of promoting a new national policy toward wild game. The 1930 Game Policy - written largely by Leopold - called for a new approach to wild game management, one that tried to harness the landowner's innate desire to make money.

To the landowner, the new policy said this: We realize that you're likely to use your land in ways that provide good habitat only if you can control or capture the economic benefits from the game itself. If the public can enter your land, harvesting for free the

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***If all landowners practiced conservation they all would benefit. But when only a few did so, the benefits often went to neighbors or the community at large, rather than to the individual owner alone.***

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game that you've promoted through sound land use, you're not likely to do it. You are likely to switch to other crops that you can harvest alone.

Bowing to this economic reality, albeit reluctantly, Leopold proposed that the nation abandon its longstanding commitment to free public hunting and shift to a policy where landowners controlled

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hunting on their lands. Indeed, he encouraged states to sweeten matters further by giving landowners who took extra conservation steps the added incentive of additional hunting rights under state game laws. A landowner with plenty of game could then charge hunters for entry, gaining economically from the higher game populations. In that way and in a few

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***By late in life Leopold was distinctly critical of economic incentives.***

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others, Leopold did talk positively about economic incentives.

It wasn't long, however - by 1934 or 1935 at the latest - before Leopold's views had largely swung around. They did so because the incentive idea had been tried out, by him and others, and found to have defects. Two key deficiencies quickly

emerged.

The main problem was that incentives weren't doing what he expected them to do. What he had hoped was that incentives would instill in landowners a new sense of right and wrong land use. He hoped that, if landowners could be induced economically to practice conservation on their lands, they'd quickly see the propriety of their new ways. They'd realize that this was the way they should be using their lands, and when, a few years later, incentives would end, landowners would nonetheless continue using their lands the right way. Payments, that is, would initiate new land-use norms that would become self-perpetuating. What Leopold soon realized, though, was that payment programs weren't having this good result. The moment

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payments ended, landowners reverted to old practices. The programs were not working.

The other problem that came up with incentive programs, particularly in the wildlife arena, was that landowners who used their lands to promote populations of a few game species could nonetheless misuse their lands over all. That is, in promoting a few species, an owner could undercut the land's value for a lot of other species.

Recognizing the problem, Leopold largely backed off. By the end of his life he had significantly changed his recommendation for conservation-minded owners. Better than to manage for a few game species, he said, was to manage for the health of the entire land community.

What I would say, then, about Michael Bean and Secretary Norton, is that

the quotes they use from Leopold are accurate, but as precedents they've been taken out of context and, in any event, were overruled by Leopold himself just a few years later. By late in life Leopold was distinctly critical of economic incentives. Perhaps paying a landowner for a year or two would be okay. And a program that reimbursed landowners for out-of-pocket cash expenditures might be not just acceptable but essential. But a program that stretched incentive payments out for ten years was manifestly out of the question.

Aldo Leopold himself was not a lawyer. There were many things about private property as a legal institution he didn't understand. Yet maybe because he wasn't focused on legal details he could see the big picture of private property in a way

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that's hard for us to do today.

One of the things he saw clearly was that private property was both a cultural and a legal institution. It was linked to our identity as a people. It was a symbol of our liberty as well as a tool we used to protect that liberty. Private property carried vital cultural connotations. And as between the legal and the cultural sides of property, it was property as cultural institution, Leopold seemed to think, that was the more important. If we were going to change what it meant to own land at law, then we first had to bring about a new *cultural* understanding of property rights.

Another thing Leopold recognized was that the chief issue in his day - as, I think, in ours - was about what it should mean to own land, to own soil, water, and

trees. That question, in turn, was necessarily linked to another: How should the landowner fit into the community of which he or she was a part?

Today we're prone to talk about the issue of regulatory takings and whether or not private property in a given case has been unfairly controlled. If Leopold were here, he'd likely tell us that our focus is miscast. What we ought to dwell on instead is the foundational question of what it means to own land in our era of growing populations, changing technology, and widespread land degradation. As a cultural institution at least, private property could evolve over time to entail higher levels of responsibility and community health - that much, Leopold knew. Ownership as an institution could evolve, in the literal, Darwinian sense of

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evolution. Ownership ideas that promoted health, he hoped, would gradually take control by a form of natural selection, driving out the more selfish ideas that were dragging communities down.

Those of you familiar with Leopold's book, *A Sand County Almanac*, may know the classic essay that concludes the work "The Land Ethic." Leopold starts this essay with a gripping tale of Odysseus hanging his slave girls on a single rope. What the tale illustrates, Leopold relates, is how ethics have evolved over time, from a world in which slaves were disposable property to one in which slavery has ended. Leopold's hope, rooted in evolution, was that the forces that brought about this ethical change might still be active in the human world, pushing us toward modes of

interaction that promote better communal living, pushing us to - among other things - understandings of ownership that require owners to respect nature's ways.

If such an evolution were to take place, Leopold sensed, it would occur first in the cultural realm. The *law* of

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landownership simply couldn't get far ahead of our *cultural* ideas about owning. Leopold wasn't opposed to laws that enforced conservation duties. He shied away from regulation mostly because he sensed that, in the 1930s and 1940s, we simply weren't ready for it. Cultural change had to occur first. Only when public sentiment had

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shifted could the law enforce new ideas of right and wrong land use.

These comments about evolution bring me finally to the chief reason why Leopold turned against economic incentives for landowners. He opposed them because when we paid owners to practice conservation, we were sending them a message, loud and clear. We were telling them that, as landowners, they had no responsibility to practice conservation on their own. Payments told the owner he had no duty to the community to conserve. Conservation instead was a voluntary act. A landowner who undertook it was surpassing what the community expected.

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In my own writing about property, I've found it helpful to draw upon Leopold's

thoughts, especially his many calls for a new understanding of what private property is about and for new cultural ideas on how the owner fits into the community. If I might, I'd like to offer a few observations on this subject, going beyond what Leopold had to say.

When we talk about takings cases, we ought to be more emphatic, I believe, in recognizing that two distinct legal issues are involved. There is the initial question of what property interest the landowner has. And there is the second question: has that property interest been taken? In too many U.S. Supreme Court decisions, the Court jumps over the first question. It assumes without comment that we all know what ownership is about. This omission, I think, is a huge mistake. We need to keep the

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issues separate. We need to be clear in asking, and answering: What is it that the landowner has rights to do under state law at the time of the alleged taking?

When we do slow down and ask this first question, we immediately encounter

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another, yet earlier question: What law are we to look to when trying to figure out what rights the landowner has? Too often, almost unthinkingly, we assume that landownership is determined by the common law, the old common law, circa 1890 or 1900, as if all statutes and regulations adopted since then really don't alter what it

means to own land. The dating here, of course, is significant. If we instead pick some time like 1790 and look at the common law of landownership then, what we find is something dramatically different than the common law in 1890.

But putting dates to one side, the more important point here is for us to recognize - as we do, of course, in other areas of law - that the common law is subject to legislative change. And it has been changed, significantly. Legislatures have the power to alter the common law of property, and they've exercised that power. Pure and simple, it's a jurisprudential mistake to act like the laws of the past century don't help define what it means to own land today.

On this issue, we academics might usefully get to work. How does the

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common law fit together with statutes and regulations? Which statutes and regulations ought to be considered as changes to the body of law itself, to the core meaning of what it means to own land, and which ones might better be put into a different category, perhaps as modifications or tailorings of what it means to own land in particular settings? The questions have hardly been asked.

Related to these questions is the whole matter of how property law legitimately changes over time, to keep up to date. There *is* such a thing as a legitimate change, just as there are forms of illegitimate change that affect landowners unfairly. One of the assumptions we sometimes make - aided by the Supreme Court's takings jurisprudence - is that the

meaning of ownership is static. That's just historical nonsense, as surely we know. Even a quick glance in history shows that landowner rights were vastly different in 1900 than in 1800, and vastly different in 1800 than in 1500. In fact, when we look back at the history of property law in search of its background principles, what we might conclude is this: Property law changes over time.

The 19<sup>th</sup> century illustrates this principle vividly. A huge change took place in the meaning of ownership over the course of that century, and for an obvious reason: Industrialization. As a people we decided we wanted more intensive land uses. We wanted things like water mills, railroads, factories, and mining operations. But to favor these intensive land uses necessarily

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meant we had to sacrifice the prior sanctity of more sensitive land uses. And so the law shifted to keep up with the times. This, I suggest, is property law's leading background principle: private property is an evolving, socially determined, organic institution, which has changed and needs to change to retain its legitimacy.

One of the main ways that property law changes over time is in the definition of land use harm. Landowners have no right to use their lands in ways that cause harm. But what does harm mean? A good question. The answer, I think, is this: Harm means whatever the present generation of lawmakers wants it to mean, drawing upon the culture of the day. Indeed, no other definition makes sense. Communities have constantly revisited the whole idea of land-

use harm. Much of the turmoil over property today might be summed up as just the latest installment of this endless story: Slowly, painfully, we're crafting new definitions of land-use harm.

To recap, we need to think, jurisprudentially, how the common law of property fits together with statutes and regulations. We need to think more clearly about how property norms legitimately change over time. To these two tasks let me now add a third one – to consider the question of why we have a takings clause in the first place. What's the purpose of this constitutional provision?

Much of this conference has addressed the tactics and means of implementing the takings clause. Too little attention has been paid, I suggest, to the

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underlying reason for the clause. By way of looking for an answer we could go back to Oliver Wendell Holmes's famous line about laws that "go too far." But as we know full well, that phrase itself doesn't go very far in explaining what the takings clause is all about. If we look at the *Penn Central* decision, what we're told is to give thought to fundamental questions of fairness and justice. And of course we should. So let's ask ourselves: As a matter of fairness and justice, what sort of burdens should landowners be expected to bear? As a matter of fairness and justice, when is it that government should be compensating landowners?

These key questions, I want to propose, were almost precisely the questions that Aldo Leopold was asking more than a

half century ago. Leopold merely phrased things a bit differently. How does the land owner fit into the community? What sort of obligations should we expect the landowner

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***Leopold's mature position, I believe, was the right one. We need to expect landowners to do a better job of confining their activities to those uses that are consistent with the health of the larger landscape.***

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to fulfill? And when has a landowner been asked to go beyond these legitimate expectations so that compensation is due?

Having raised these questions, Leopold developed his own answers. He based his conclusions on years of thinking and scratching and writing and trying things out and watching the successes and failures of New Deal programs. His ultimate conclusion was that, if we're really going to promote the health of landscapes, it is

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essential that we raise the bar of ownership in terms of what we expect of owners. We need to raise the requirements for a landowner to be deemed a decent citizen.

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This brings us, I think, to the bottom of things. It gets us, finally, to what today's Leopold-related battle is really about. What burdens of ownership should landowners bear, simply as the obligations of ownership, and what burdens should they bear only when paid to do so? Should landowners be obligated without payment to leave their wetlands unfilled, or to leave their critical habitats unaltered, or to refrain from plowing their sloping hillsides? This is what the debate is about.

Leopold's mature position, I believe, was the right one. We need to expect

landowners to do a better job of confining their activities to those uses that are consistent with the health of the larger landscape. The bar of ownership needs to be set that high.

Secretary Norton, it's fair to say, and perhaps Michael Bean to an extent - certainly the libertarian speakers who've

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been making the circuit - all have a quite different view on this issue. Their view is that we ought to keep the bar low, if not lower it to the bottom, so that we expect little or nothing of landowners. One organization that's taken the extreme view here is the American Farm Bureau Federation, the voice of industrial agri-

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business. In its view, a landowner has the right to kill every living thing on his land, plant or animal. He can erode the soil, pollute waterways, and otherwise derange ecological processes, free of all responsibilities. If told to change his ways, he has a right to demand cash.

This extreme view of property has roots in our nation's past, particularly the late nineteenth century. But it would be less strong and popular today were it not for our generous farm-payment programs. Just as Leopold feared, incentive programs have told farmers loud and clear that we expect virtually nothing of them. Joined with this message is another one, just as pernicious: You're foolish to practice conservation on your land voluntarily when your neighbors are getting paid. If you're exercising

restraint, then stop doing so, rip up the land for a few years, and then ask for money to return to your old, good practices. It happens every day.

Leopold's particular fear was that payment programs would keep the bar of ownership from rising. Today, 50 years later, it is clear that he was right. Indeed, Leopold might even have understated the danger. Incentive payments have not only kept the bar from going up, they've pushed it further down.

The meaning of landownership has changed consistently since the days of 1776 and 1789. It can change, it needs to change, in our day as well, taking into account our current predicament and current ecological understandings. The present generation has just as much right as preceding ones to

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define for itself what land-use harm is all about. It can decide for itself how property rights might vary based on the land's natural features. It can decide how private rights fit together with the public's ownership of water and wildlife. And we can do this, we can overtly recognize the powers of lawmakers to make major changes in the laws of ownership, without undercutting the

***For the land community to regain health, landowners needed to shoulder their fair duties. Payments were not the answer.***

many benefits that private property provides in terms of stimulating enterprise, protecting privacy, and promoting civic stability.

By the end of his life, Leopold had become convinced that America needed a new understanding of private property in land. The old idea, that land was merely a

commodity, needed to give way to a more enlightened view of land as a community of life, a community to which people belonged and on which their long-term welfare depended. In the fall of 1946, less than two years before his death, Leopold was approached by a group of political activists and asked to draft a conservation platform that they could use in the new political party that they were forming. At this point, Leopold was expert in nearly every major aspect of land conservation. He could have responded - almost anyone else would have responded - with a lengthy platform cataloging all of the areas in which conservation work was needed.

Leopold, however, took a different tack. The better approach, he believed, was to hit the basic points and leave it at that, to

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avoid diluting their effect. The platform he wrote had merely two elements to it and took up only one-half of a sheet of paper.

The second platform element took issue with the widely held view that conservation was about the protection and wise management of natural resources. Not so, Leopold countered. Not the flow of natural resources but the health of the entire land community - land health - was what conservation should seek to achieve. As for his first platform element, Leopold identified what he viewed as the most important conservation challenge of his day. He put it this way:

The average citizen, especially the landowner, has an obligation to manage his land in the interest of the community, as well as in his own interest. The fallacious doctrine that the government must subsidize all conservation not immediately profitable for the private landowner will ultimately bankrupt either the

treasury, the land, or both. The nation needs, and has a right to expect, the private landowner to use his land with foresight, skill, and regard for the future.

This, then, was the bottom line. It was time for America to get beyond the “bogus individualism” of its inherited culture, the culture in which individuals could act irresponsibly, and come up with a new, more community-minded understanding of citizenship. For the land community to regain health, landowners needed to shoulder their fair duties. Payments were not the answer. To instill this civic, ecological understanding was, in Leopold’s view, America’s top conservation priority. Without it, conservation simply could not succeed.

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