

## Rethinking Property Rights and Wildlife Protection

By John D. Echeverria

In the early 19th century, British textile workers wrecked newly introduced machines out of fear that technological advances threatened their employment. Ever since, these so-called "luddites" have been a symbol of misguided opposition to human progress.

Modern "takings" - or "property rights" - advocates are best understood as latter day luddites. In the face of overwhelming scientific proof of growing environmental stresses, and of the necessity of a new system of property rights and responsibilities in order to protect our environment, takings advocates tenaciously cling to an outmoded, environmentally destructive conception of property rights.

The central contribution of 20th century environmental science has been a new recognition that, in a literal sense, everything *is* connected to everything else. We now know that wetlands destruction, the promotion of which was once government policy, increases flooding and pollution levels scores if not hundreds of miles downstream. And we know now that traditional logging practices, unless modified, threaten to wipe certain species out of existence.

Until only a few decades ago, it was hardly farfetched to think that a property owner's rights - as well as an owner's responsibilities - ended at the boundary of her property. Today we know better, that the security of the environment, and the long-term value of property itself, depends upon careful attention to the effects of an owner's activities on the surrounding neighborhood and society as a whole.

Takings advocates dispute the idea that society can and should evolve to reflect this new scientific understanding. They reject the idea of new responsibilities to protect the environment as both unwanted and unfair. They assert that if society as a whole insists on these changes, the public should pay property owners for shouldering the new responsibilities. There is simply no legitimate support for this position.

Takings advocates seek to ground their argument in the Constitution of the United States, but it is a myth that anyone has a constitutional right not to follow public regulations designed to protect the environment. The Takings Clause of the Fifth Amendment provides that the public must pay "just compensation" when it seizes private property for use in building a road or a school, for example. But, as the U.S. Supreme Court has affirmed, this provision of the Constitution was never intended to prevent regulation of uses of private property to protect society as a whole.

There is nothing surprising nor unprecedented about the idea that society's thinking about private property changes over time. In colonial Massachusetts, a law prohibited the building of a home more than easy walking distance from the meeting house; while this restriction probably strikes most modern American citizens as onerous, the rule apparently suited the society of that time and place. Likewise, in the early twentieth century, the idea that government can set the minimum wage or fix maximum hours seemed an affront to private property rights, but the practice is well accepted now.

Also, in demanding public payment as a condition of refraining from harming our environment, takings advocates seek unfair windfalls at public expense. After all, reasonable environmental standards benefit everyone, including private property owners. In addition, much of the value of private property is created by nearby public investments, and it is hardly fair for owners to demand payments from the public based on speculative value created in part by the public in the first place.

This argument for the legitimacy of public regulation of the uses of private property suggests no disrespect for private property as an institution or its importance to the proper functioning of our economy. One of the key purposes of government is to safeguard property owners against theft and fraud. But the public's role in safeguarding private property rights goes hand in hand with the public's authority to ensure that those rights are exercised responsibly.

Nor does this viewpoint disparage the value of our market economy in producing an efficient mix of products and services. Quite the opposite. The familiar principle of "polluter pays" reflects a recognition that, in order for the market economy to function efficiently, firms whose activities produce external costs must be required to internalize these costs. In a competitive market, competing timber firms, for example are driven to seek to maximize the return from the trees on their land, without regard to the negative costs of logging in terms of degraded fisheries, wildlife, or public drinking supplies. In the absence of regulation, these external costs would go unaddressed, and the companies would operate at less than an optimal level of efficiency from the standpoint of society as a whole.

Takings advocates would, in effect, exacerbate the problem of "market failure" by encouraging firms and individuals to ignore the external costs of their actions or, what amounts to the same thing, by forcing the public to pay them not to produce these external costs. In either case, the ultimate result is inefficient from an economic standpoint.

Fortunately, the passage of time solves many problems, and this will likely be the case with the takings issue. At bottom, the controversy over property rights reflects the painful process of change as we adapt our property concepts to reflect our new scientific knowledge. There is ground for hope that, as environmental education advances, firms and individuals will make investment decisions in harmony with the new environmental realities rather than in opposition to them. If so, today's takings luddites can be expected to pass into history along with their 19th century counterparts.