Sword & Scales

WINTER 2018

How environmental protection and individual liberty can work together

Property rights are our best tool for protecting the environment

Supreme Court win for property rights and government accountability

PACIFIC LEGAL FOUNDATION

WINTER 2018

COVER PHOTO
PLF client Joe Robertson. Read his story on page 6.

PACIFIC LEGAL FOUNDATION

Pacific Legal Foundation has spent its four-plus decades building a legacy. Yet this legacy is not just one of philosophy or ideology or Supreme Court victories. We're also working to build a legacy around something more tangible—the natural world.

Ideas are important. Our organization exists to vindicate them. But without an actual physical place to engage these ideas, they're worth little. And because of that, we want to ensure that the world in which we live is one where everyone can thrive and prosper.

That's why we've dedicated this issue to environmental law. It's something we've litigated consistently throughout our history. However, we haven't succinctly communicated why we take the cases we do and what we hope to achieve in doing so. What you'll read is the beginning of that discussion.

Regardless of the motive of environmental legislation, it's clear that these laws, along with their attendant regulations, have consequences, whether intentional or not. We describe for you those consequences typically encountered by our clients.

However, addressing the consequence is not enough. More importantly, we provide what we believe is the proper constitutional solution to many of the issues that may ail our environment—adherence to a rule of law that respects the rights and liberty of individuals.

That solution can take many forms, among them: respecting the rights of property owners to steward their land; separating those that pass the law from those that enforce the law from those that adjudicate the law; and requiring regulators to work within the confines of the law as written and not drift—regardless of how well meaning—beyond it.

Simply put, at PLF, we believe a freer world ultimately results in a better world. We relish the challenge of providing both.

Steven D. Anderson
PRESIDENT & CEO

Today's environmental laws: Outdated and politicized

Damien Schiff
SENIOR ATTORNEY

PLF attorney Reed Hopper (right) argued at the Supreme Court on behalf of John Rapanos (left) in 2006.

A HEALTHY ENVIRONMENT is critical to human flourishing. Without clean water, air, and soil, people cannot achieve their full potential. But too often, overzealous government bureaucrats and misguided activists have twisted well-meaning environmental laws. The result has been the violation of property rights and other liberties. Two related aspects of modern-day environmental law make this situation worse: it's politicized, and it's out of date.

Take the Endangered Species Act (ESA)—the premier federal wildlife protection statute. The ESA establishes a two-tiered framework for the protection of wildlife: "endangered" status for the most imperiled species and "threatened" status for those less in danger of extinction. The law prohibits—on pain of significant civil and criminal penalties—the injuring or harming of any endangered species, but it gives federal agencies the discretion to decide how much to protect threatened species.

Yet, despite significant developments in conservation science, the law's basic regulatory structure hasn't changed in four decades. Why? Because the heavy regulatory burdens it imposes have become a very effective tool for government officials and special interest groups to limit productive use of public and private lands.

Whether that actually hurts rather than helps the ESA's conservation goals doesn't seem to matter. In fact, one study of ESA litigation between 1990 and 2000 revealed that certain green groups brought three times as many suits to protect threatened species as to protect endangered species. You would expect these organizations to focus their legal efforts first toward saving the more at-risk endangered, not threatened, species. That they haven't suggests that wildlife protection is not always their top priority. Of course, the government itself is largely to thank for this upside-down prioritization. A Carter-era ESA regulation from the U.S. Fish and Wildlife Service—the chief federal agency in charge of administering the ESA—automatically applies the ESA's full land-use restrictions to threatened species. That's contrary to Congress's intent that such protections be applied more judiciously for less-endangered wildlife.

Such agency misuse of the ESA also can be seen in how the Service takes advantage of the commonsense notion that the fewer individuals within a population, the more likely the population will be considered in danger of extinction. Hence, the agency will seek to carve out of an otherwise healthy population a mini-set of individual animals. The small group is then conveniently defined as its own "species" or "subspecies" separately protected by the ESA.

The coastal California gnatcatcher shows this numbers game at work. Here is a bird that is found by the millions in Baja California. But according to the Service, the gnatcatcher in Southern California is considered a separate "subspecies" under the ESA.

For that reason, the agency only looked to the bird's numbers north of the border when determining to protect it, a decision that by the government's own estimate will cost nearly $1 billion in economic losses. Never mind that repeated studies have shown no important genetic difference among so-called gnatcatcher subspecies.

Commenting on the gnatcatcher and related controversies, prominent environmentalist academic Holly Doremus acknowledged that the government's approach to species and subspecies designations "invites the charge that caprice or political pressure, rather than objective, value-neutral standards, drive [the] decisions."

Largely because of such arbitrary and politicized agency action, Congress has failed to pass any significant update or improvement to the ESA. Naturally, this failure injures landowners and others who have been ensnared in the law's regulatory net. But it also hurts the very wildlife the law was meant to protect, because the threats endangered animals face today differ from those they faced many years ago. For instance, whatever one's views on global warming or its human causation, the 45-year-old ESA is not designed to deal with harms related to climate change. As Professor J.B. Ruhl, also a leading environmentalist academic, explained, the statute is very poorly adapted to addressing threats when their "causal mechanisms are indirect (as in greenhouse gas emissions)."

Of course, it's not just the threats that have changed—so too has the science. But here as well the ESA lags. Preserving many different types of animals and plants can be a sensible policy, but trying to save each and every species isn't. A better way to conserve wildlife and habitat is to protect ecosystems, not individual species. That approach maximizes the benefits of conservation while minimizing costs. It also avoids government acting at cross-purposes—trying to protect one species while indirectly hurting another. Yet the ESA's old-fashioned species-by-species approach to conservation is oblivious to ecosystems.

> **There has been an "immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations."**
>
> *—Justice Antonin Scalia*

Similarly, the ESA's focus on conserving species reflects a static way of looking at the environment. The ESA tries to keep everything in place, whatever the cost. The natural world, however, is not static. Ecosystems and the species that comprise them are always changing. Part of that dynamism is extinction itself. In fact, as Professor J.C. Kunich, a prominent ESA commentator, explained, extinction can be ecologically helpful as a "natural method of weeding the garden . . . to maximize the evolutionary fitness of the gene pool at any point in time." But the ESA's politicization hampers efforts to bring the statute, here as elsewhere, into line with current conservation theory.

Other environmental legislation has been politicized, too. The Clean Water Act was originally aimed at maintaining the health of the nation's navigable waters. It instead has become an onerous federal land-use law. As the late Justice Antonin Scalia sharply put it in *Rapanos v. United States*, there has been an "immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations." That expansion, in turn, has enabled the federal government, when "deciding whether to grant or deny a permit, [to] exercise the discretion of an enlightened despot."

The same phenomenon is playing out with the Clean Air Act. Many environmental groups hope to use the statute to dictate the country's response to climate change. But the Environmental Protection Agency (EPA) itself

BALD EAGLES: Although the bald eagle is often touted as proof that the Endangered Species Act works, its recovery had little to do with the Endangered Species Act. Shortly before the Act was enacted, the United States banned the use of DDT, a once-common insecticide. Because DDT reduces shell thickness and increases chick mortality, that ban, rather than the Endangered Species Act, was the primary cause of the eagle's recovery.

President Richard Nixon signed the Endangered Species Act December 28, 1973.

acknowledges that applying the nearly 50-year-old Act to regulate all greenhouse gas emissions would be an "unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land," yet still be "relatively ineffective at reducing greenhouse gas concentrations."

Such an "enormous and transformative expansion in EPA's regulatory authority" should, according to Justice Scalia in *Utility Air Regulatory Group v. EPA*, be greeted with "a measure of skepticism," especially when it is to be newly discovered in a statute that's been around for decades. But these cautionary notes have not prevented big government advocates from demanding economy-altering greenhouse gas regulation by means of a statute never designed for the task of averting catastrophic climate change.

The inability of the Clean Air Act, and environmental law generally, to respond to today's needs is the product of these statutes' misuse by government agencies and green activists alike. This abuse of well-intentioned but now out-of-date enactments has come at the expense of home and business owners, as well as environmental protection. But saving the environment is not inconsistent with the preservation of liberty. In fact, the former depends on the latter. What's needed now is an updated set of environmental laws that recognizes this critical connection. And PLF will be there to continue the strategic litigation necessary to rein in abuses of existing law. ♦

Meet our heroes

We are inspired by every client who allows us to be part of their fight. We want everyone who hears about them to feel the same.

Watch our heroes share their stories at: pacificlegal.org/theater.

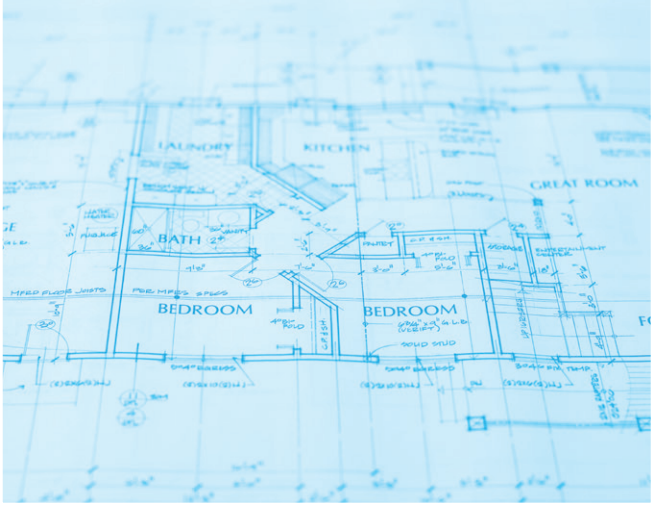
Clean Water Act abuses demonstrate the need for our Constitution's protection of property rights

Tony Francois
SENIOR ATTORNEY

FEDERAL LAWS CAN be valuable tools for protecting the environment. But as a result, environmental laws also limit the ability of property owners to protect public resources.

To take one prominent example, since Congress passed the Clean Water Act in 1972, industrial pollution and municipal sewage in our navigable rivers, lakes, and oceans has been dramatically reduced.

Yet federal agency bureaucrats have routinely abused the Clean Water Act, enforcing its provisions beyond what's necessary to protect public resources, to micromanage or even prohibit ordinary activities like farming, home building, and road maintenance. The law can even halt environmental restoration on private property containing no navigable waters at all.



How the Constitution protects property rights

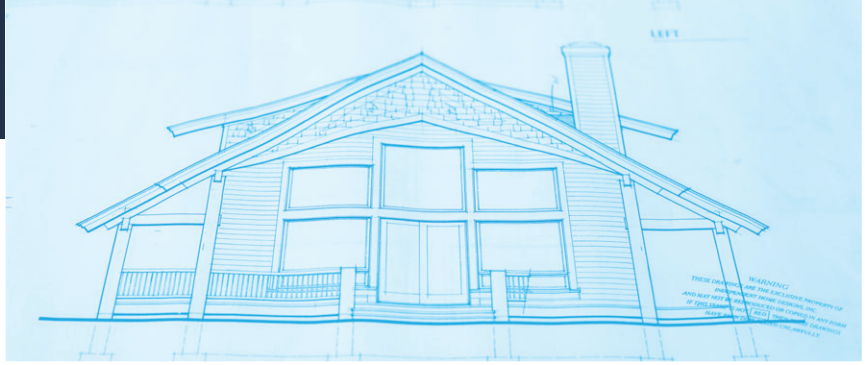
Our Constitution protects property of all kinds so that individuals can provide for themselves and their families, contribute productively to society in their communities and the marketplace, and enjoy personal security and privacy.

The Constitution protects private property rights through the Fourth and Fifth Amendment prohibitions on unreasonable searches and seizures, deprivations of property without due process, government takings of property for other-than-public purposes, and uncompensated takings for public purposes.

The Eighth Amendment forbids government from imposing excessive fines, and it also protects property rights. For example, the Environmental Protection Agency ordered Mike and Chantell Sackett of Idaho to halt work on their home, despite their lot being surrounded by previously built homes. The Sacketts were threatened with daily fines of up to $75,000 per day if they did not comply with the EPA's order to restore their home site.

The Constitution's separation of powers also protects individual rights in property. Separation of powers means distributing the three government roles of lawmaking, law enforcement, and the adjudication of legal disputes into separate and independent branches that check and balance each other. Our Constitution reserves lawmaking to the elected members of Congress, who are accountable to the electorate for the rules they make through regular elections.

Joe Robertson was sentenced to 18 months in federal prison for building ponds to protect his property in the event of a catastrophic forest fire.



These constitutional protections of property rights are breaking down, because regulatory agencies have assumed all three powers: creating new regulations, enforcing them, and adjudicating disputes over their enforcement.

However, these constitutional protections of property rights are breaking down, because regulatory agencies have assumed all three powers: creating new regulations, enforcing them, and adjudicating disputes over their enforcement. Here's one way this breakdown occurs in practice:

Lawmaking: The Clean Water Act regulates "navigable waters," but agency bureaucrats have issued regulations (taking over the lawmaking power from Congress) that have expanded the Act's coverage—and bureaucrats' authority—over vast areas, which now include farmland, one-foot-wide channels in forest clearings, and dry-sand gullies. For the Sacketts, EPA regulators decided that anything in the country that had ever been on a map as a peat bog was a federally protected wetland. The EPA follows this rule even though it is not printed in regulations.

Enforcement: Congress gives enforcement agencies wide latitude to enforce federal laws. This includes the authority to order you to stop using your property, to order you to restore or modify your property, to impose significant fines, to sue you for monetary penalties, and even to criminally prosecute and imprison you.

CLEAN WATER ACT overreach poses grave threats to private property rights. Consider a few examples from PLF clients:

Federal officials sued John Duarte, a California nursery owner, under the Clean Water Act for farming his land, despite the Act's protections for normal farming activities and the fact that the shallow seasonal ponds where he had planted wheat are not navigable. The Justice Department sought more than $40 million from John Duarte, leveraging him into a $1.1 million settlement to protect his family and employees.

The EPA accused Andy Johnson of Wyoming of polluting a small creek on his property. What he actually did was build a stock pond that was beneficial for the environment with the necessary state permits and within a clear exemption of the Clean Water Act. With PLF's help, Andy Johnson convinced the EPA to back off its demand for fines and leave the pond in place.

John and Frankie Smith bought a retirement home in the New Mexico hills and cleaned up garbage, including old refrigerators the prior owners had left in a sandy arroyo on their land. The Army Corps of Engineers said cleaning garbage from a dry-sand gulley was polluting navigable waters and threatened the Smiths with steep fines. With PLF's help, the Smiths sued the Army Corps, which then conceded that their dry-sand gully is not "navigable waters."

Navy veteran Joe Robertson was imprisoned for 18 months for digging firefighting ponds in a so-called navigable water that was a foot wide and a foot deep. His case is pending before the U.S. Supreme Court.

Andy Johnson

Chantell Sackett

In the case of the Sacketts, EPA staff ordered the couple to cease work on their home and decided that their home site could not be used at all, while denying the Sacketts a chance to challenge them. EPA staff decided the Sacketts' home site is a federally protected peat bog without ever sharing their evidence with the Sacketts. Without this evidence, the Sacketts never had a fair chance to convince the EPA that their land is not a peat bog.

Court Review: When agency officials accuse a landowner of breaking the law, the accused is entitled to have independent judges and juries decide the facts and even-handedly apply the law before agencies can deprive them of the use or possession of their property. Fair and impartial judicial processes serve as a necessary bulwark for property rights against arbitrary, privately motivated, or corrupt law enforcement.

> "Agency bureaucrats should not unilaterally grant themselves the unchecked power to make and adjudicate the laws they enforce."

But EPA staff don't have to take you to court to prove you violated the law. They can investigate you, charge you, *and* judge you themselves, threatening you with tens of thousands in daily fines if you don't accept their role as prosecutor-judge-and-jury. The EPA argued that the Sacketts could not even challenge their compliance order in federal court. As PLF clients, the Sacketts ultimately convinced the U.S. Supreme Court that they had the right to an independent judicial review of EPA actions under the Clean Water Act.

Environmental laws and regulations have helped to reduce pollution, clean up waterways, protect endangered species and other natural resources, and improve public health; they can and often do protect the environment without violating the Constitution. But those same laws and regulations can't override constitutional protections for individual liberty, including the proper separation of powers. Agency bureaucrats should not unilaterally grant themselves the unchecked power to make and adjudicate the laws they enforce. Rather, their authority must be limited to that which Congress provides them and exercised in the manner prescribed by Congress. Without this constitutional separation, the temptations and opportunities to misuse law enforcement power to pursue personal agendas, corrupt schemes, and controversial policies (i.e., those that lack sufficient public support for Congress to adopt them) are far too great. ♦

TRAINING THE NEXT GENERATION OF PROPERTY RIGHTS CHAMPIONS

Litigating for individual liberty is the core of PLF's mission. But it's also critically important to train the next generation of public interest litigators committed to freedom. That's why PLF has developed a new program aimed at constitutional legal education.

PLF's newest educational effort at Berkeley Law School, a program called Strategic Constitutional Litigation in Property Rights and Economic Liberty, launched in August 2018. This pilot program consists of two related courses—a weekly seminar and a field placement—each utilizing PLF litigators.

Taught by PLF Executive Vice President and General Counsel John Groen, the seminar focuses on strategic constitutional litigation to defend rights to property and economic liberty. Topics include an overview of public interest law and the history of key legal principles, such as the regulatory takings doctrine, that uniquely affect property rights and economic liberty litigation. It emphasizes the teaching of substantive areas of law through focusing on PLF cases, particularly those at the U.S. Supreme Court.

Seminar enrollment exceeded expectations. The 15 planned seats filled up quickly, so Berkeley Law expanded enrollment to 24 students—with 15 more on a waiting list.

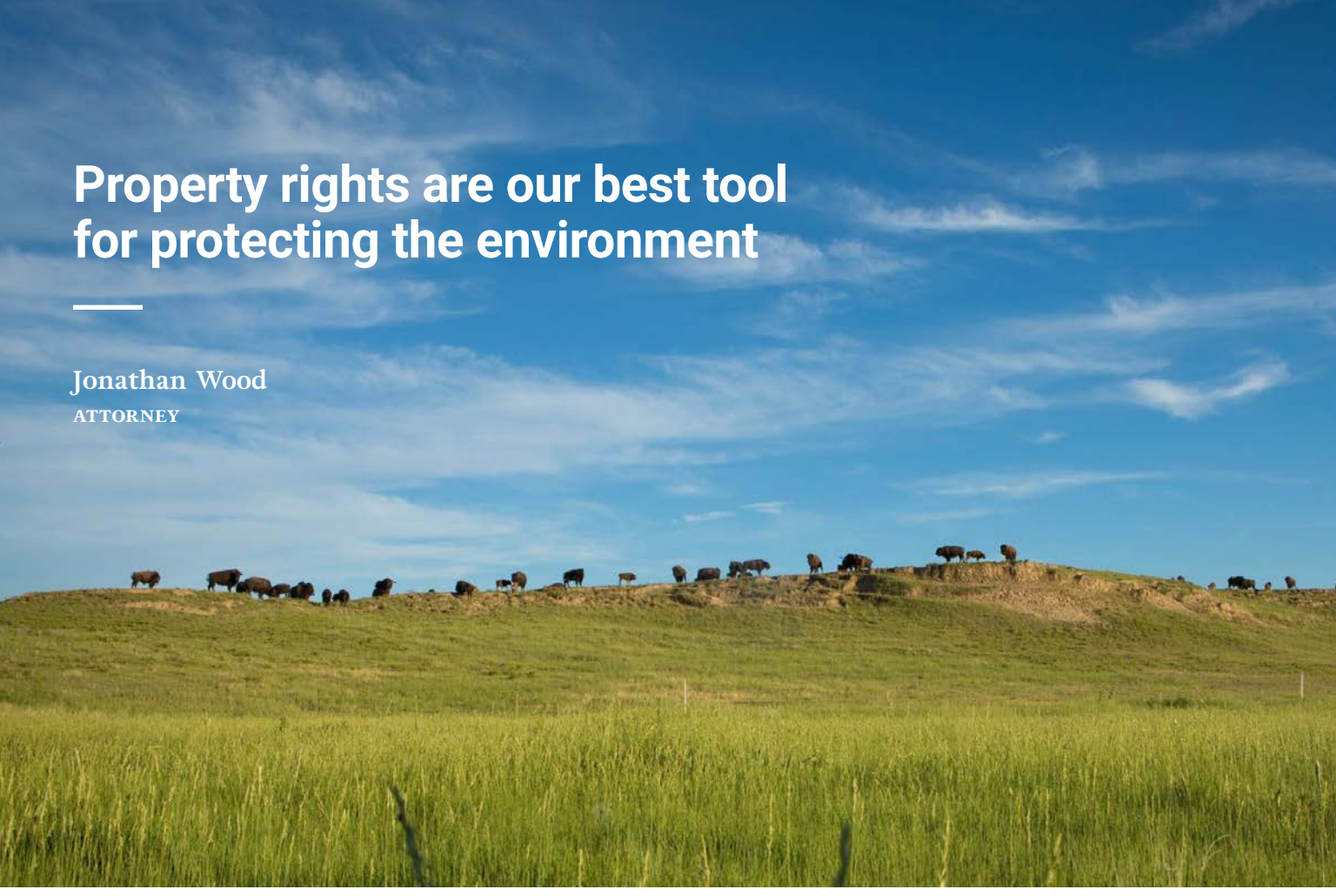
In the second course, the field placement, participating students join an active PLF litigation team to gain firsthand experience in pro-liberty public interest law. Seven students enrolled in this year's course.

The Berkeley seminar is a unique opportunity to reach students at one of the country's most prestigious law schools—where students are not typically exposed to discussions about the importance of individual liberty.

To support this project and others like it, contact Sarah Muse at 916.503.9027 or *SMuse@pacificlegal.org*.

Property rights are our best tool for protecting the environment

Jonathan Wood
ATTORNEY



WHOEVER COINED THE saying "you can't beat something with nothing" understood why it isn't enough to highlight where environmental regulation falls short, whether by failing to achieve environmental goals or failing to honor fundamental fairness. We also need to identify solutions that do better.

At PLF, we believe that starts by recognizing that property rights and environmental protection need not be in tension. Property rights are the best—but often overlooked—tool to promote environmental values.

As our wealth grows, so does the value people assign to the environment. Ten thousand years ago, human environmental concern was pretty much limited to our next meal. Today, many of us think carefully about what the temperature will be in more than a century. That's made possible by the prosperity created by property rights and free markets.

Property owners have a right to conserve environmental resources on their land

PLF defends this vision of property rights as a tool for environmental protection. Last year, we partnered with the Property and Environment Research Center (PERC), the leading free-market environmentalist thinktank, to defend Maine coastal property owners' right to protect the rockweed growing on their property.

In the last several decades, increased exploitation of this seaweed has raised concerns that it may be unsustainable. Because it plays an important role in the tidal ecosystem, property owners joined together to prohibit or limit rockweed harvesting on their property. (In Maine, unlike many states, the tidal area is private, not public, property.) The Maine Supreme Judicial Court is considering a challenge by a commercial rockweed harvester who claims the right to harvest from private property without the owner's consent.

In our brief supporting the property owners, we explained that this attempt to erode property rights is not only unconstitutional but a significant threat to the environment. When people own a resource, they have a strong incentive to protect it from overuse. Where resources are unowned and open to anyone, as harvesters urge for rockweed, they can be overused as everyone races to use the resource before someone else does. In the rockweed case, PLF's property rights argument was echoed by prominent environmental groups that recognized protecting property rights can be essential to protecting environmental resources.

Rockweed is harvested for use in fertilizer, animal feed, and human health supplements.

Property owners should be rewarded—not punished—for their role in recovering endangered species

Even where environment regulation is necessary, it is often more effective when it utilizes property rights instead of eroding them. Heavy-handed bureaucratic environmental regulations, by contrast, achieve mixed results, at best. In the 45 years since the Endangered Species Act was enacted, for instance, the law has succeeded at preventing species extinction (99% of species protected by it remain around today). But it has an abysmal record of recovering rare species—only 2% have achieved this goal.

Most endangered species depend on private land for most of their habitat. Thus, the incentives landowners face determine, to a large extent, whether species improve or decline. Improving the rate at which we recover rare species means aligning the incentives of landowners with the interests of rare species.

Unfortunately, a U.S. Fish and Wildlife Service regulation undermines the incentives for private landowners to restore habitat or accommodate species by imposing overly punitive regulations on them regardless of the risk to the species. In 2016, we filed petitions on behalf of the National Federation of Independent Business and the Washington Cattlemen's Association urging the repeal of this regulation.

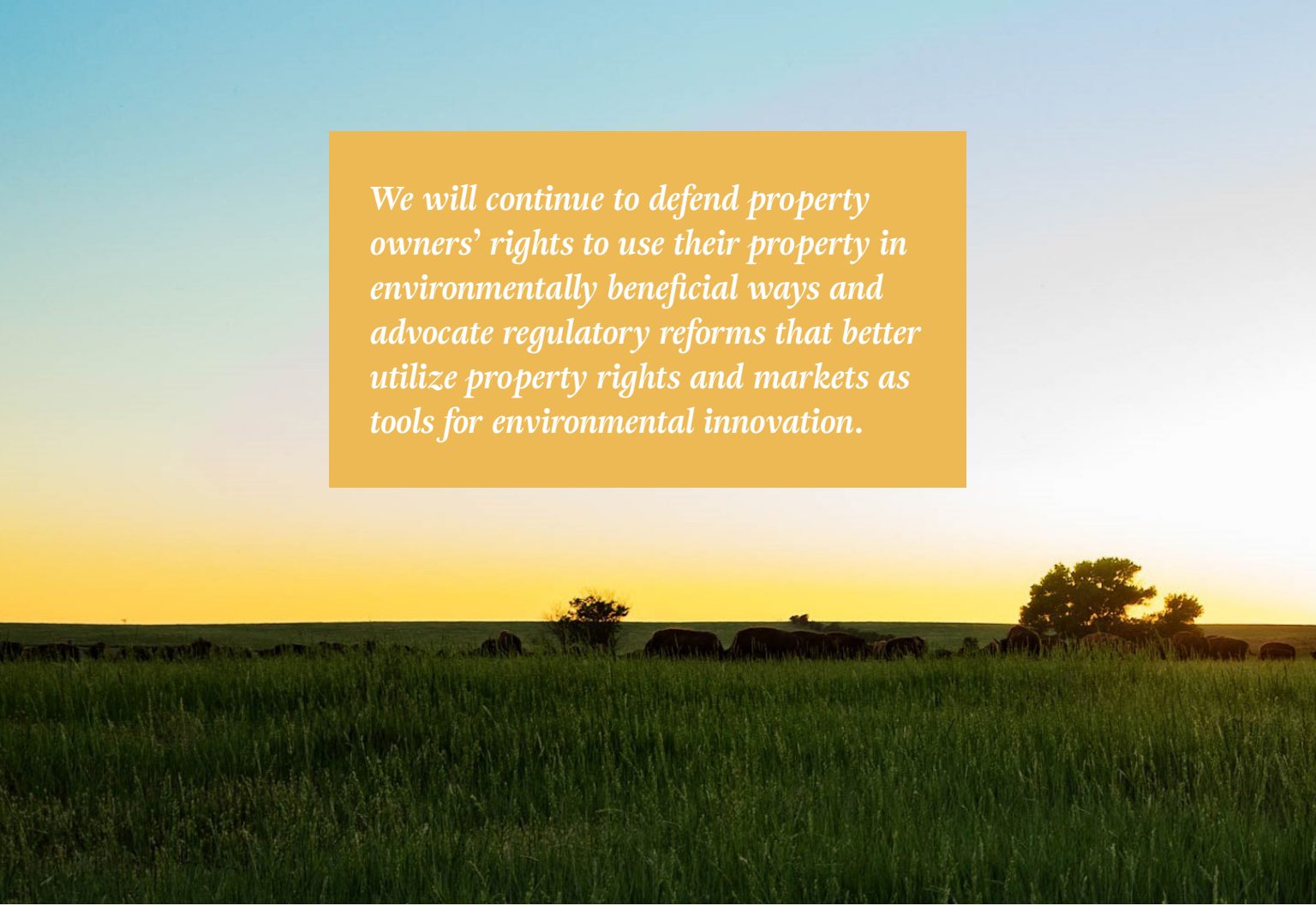
We proposed that the Service return to Congress's original design, according to which the most burdensome restrictions are reserved for the most at-risk species. Reducing regulatory burdens as species recover, we explained, would reward property owners for their role in that recovery, which would encourage them to use their property in ways beneficial to species.

In April, the Department of the Interior proposed to enact this reform. If finalized, the reform would benefit recent efforts by environmental groups to recover species without regulation, litigation, or other sources of conflict, including a voluntary habitat exchange program developed for the monarch butterfly. In other words, this reform will make it easier for conservationists and property owners to recover species.

States should have more flexibility to work with property owners to restore habitat

Federal regulation can also obstruct state efforts to recover species. For instance, it is a federal crime, punishable with imprisonment and a large fine, for a state biologist to move protected rodents from residential areas to state conservation lands. That was the problem faced by PLF's clients in *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service.*

Decades of inflexible federal regulation generated conflict over the Utah prairie dog, as the species overtook



We will continue to defend property owners' rights to use their property in environmentally beneficial ways and advocate regulatory reforms that better utilize property rights and markets as tools for environmental innovation.

residential areas, playgrounds, and the local airport. Fed up with this situation, property owners and local governments formed People for the Ethical Treatment of Property Owners (PETPO). They advocate restoring habitat on state conservation lands where state biologists can relocate prairie dogs from residential areas. But federal regulation stood in the way. That's when PLF came to their aid.

After an early district court win, the state had two years to make PETPO's vision a reality by developing and implementing a better way to recover the Utah prairie dog. Utah spent hundreds of thousands of dollars and worked with local property owners to improve prairie dog habitat on public conservation lands and successfully relocated prairie dogs. In doing so, Utah disproved the claim by some environmental groups that states would not protect species without the federal government.

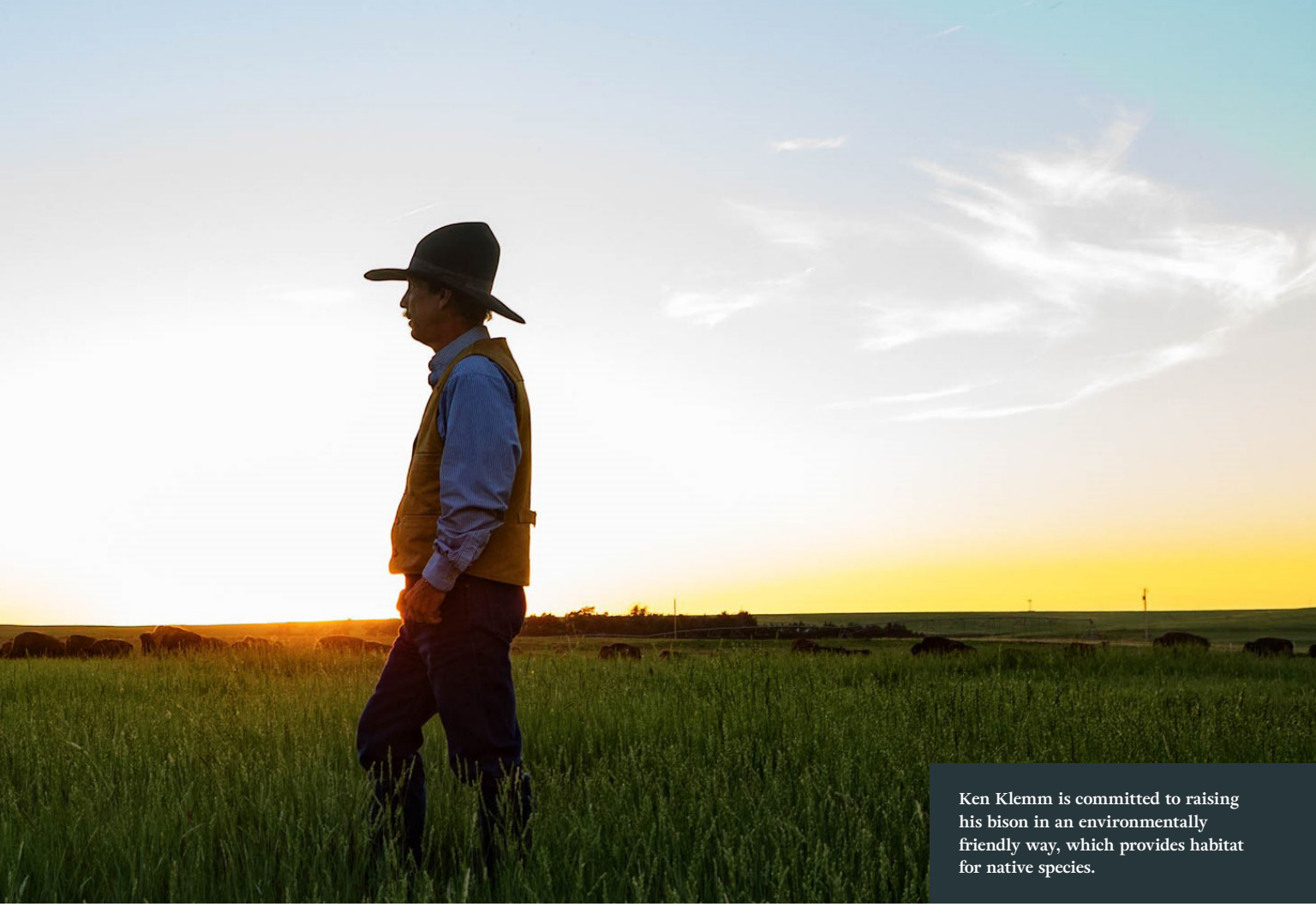
The plan benefited both people and prairie dogs. Until the federal regulation was reinstated last year by the Tenth U.S. Circuit Court of Appeals, the state plan had grown the Utah prairie dog population to exceed 80,000, doubling the population from 2010. The conservation success story was so compelling that even after the Tenth Circuit restored the federal regulation, the Service reversed course and allowed the state's recovery plan to resume.

Innovative recovery efforts like Utah's are made much more difficult by heavy-handed federal regulations. It took PETPO's lawsuit striking them down to give the state the flexibility to pursue its plan. When the Service follows through on its proposal to adopt PLF's reform idea, such success stories will become more common, eliminating this counterproductive regulation as an obstacle to species-recovery efforts.

Even where regulation is well-meaning, bureaucratic red tape can be an obstacle to conservation

Misguided regulation is not the only way the government erects obstacles to achieving environmental goals. Sometimes, even where regulation is well-meaning, the bureaucratic process itself gets in the way.

In 2014, the EPA threatened Andy Johnson with tens of millions of dollars in fines for building a pond on his property. Never mind that the pond restored wetlands, created habitat, and filtered the water that passed through; the bureaucrats could only see red when they decided he should have



Ken Klemm is committed to raising his bison in an environmentally friendly way, which provides habitat for native species.

sought their permission first (though they were mistaken and quickly settled the case).

Our most recent case highlighting how bureaucracy can undermine good conservation is *Kansas Natural Resources Coalition v. Department of Interior.* The Kansas Natural Resources Coalition has a plan to voluntarily restore habitat for the lesser prairie chicken, a species under consideration for the endangered species list. That plan depends on a federal rule that rewards property owners for such voluntary efforts by allowing them to avoid the listing of the species and the controversial regulations that would entail.

Unfortunately, the agency that issued the rule did not submit it to Congress as required by the Congressional Review Act. Rather than acknowledging its mistake and fixing it, the agency has dug in its heels—even though failing to submit the rule means it cannot be given effect and cannot incentivize conservation.

That's a shame, because the species could benefit tremendously from the plan, as shown by rancher Ken Klemm. He raises buffalo on his property, helping to restore this native species to the prairie it once roamed free. A strong believer in environmental stewardship, Ken manages his 4,000-acre property to benefit other native species, including restoring habitat for the lesser prairie chicken. If bureaucrats weren't so stubborn, perhaps more landowners would follow Ken's example.

In PLF's effort to move environmental law in the right direction, it's as important to focus on solutions as it is to raise problems with current regulations. The key to any solution is recognizing the vital role property rights play in encouraging responsible stewardship and enabling environmentally conscious individuals to give effect to their values. At PLF, we will continue to defend property owners' rights to use their property in environmentally beneficial ways and advocate regulatory reforms that better utilize property rights and markets as tools for environmental innovation. ♦

Combating the abuse and misuse of environmental laws

Larry Salzman
SENIOR ATTORNEY

WHEN MOST PEOPLE think about environmental laws, they think about holding bad actors responsible for polluting air or water or destroying public lands. This makes sense: the government has a legitimate role in prohibiting noxious activities that infringe on the rights of others.

Frequently, however, environmental laws are co-opted by government agencies and activist groups to promote agendas having nothing to do with protecting people from environmental harm. PLF has taken on many cases defending individuals and small businesses from this kind of abuse.

For example, activist groups leverage environmental laws to frustrate land uses they don't like, even as typical as plowing fields or building roads. This type of misuse is plainly seen in an Alaska case in which PLF represents Tin Cup, LLC, a family business that fabricates large pipes used in oil pipelines.

The company needed a new gravel pad, construction of several buildings, and a railroad spur on 455 acres it owns in North Pole, Alaska. Because gravel is considered a "pollutant," the company had to seek permission from the Army Corps of Engineers. The Corps tied up the project for more than seven years, then demanded control over 200 acres of Tin Cup's property as a condition of a building permit. It based these demands on its own theory that permafrost (soil that remains frozen through the year, common in polar regions) is a kind of "wetland," authorizing it to take control of the development. There is no claim that the buildings or the fabricating business do any harm to the environment. But many environmental groups and bureaucrats oppose oil pipelines. It's likely the Clean Water Act is simply being abused to frustrate the family's unpopular but legal business activities. Lower courts upheld the Corps' position, and PLF is asking the Supreme Court to review the case.

> About 87% of the lawsuits in recent years targeted "infill" construction projects—housing, office buildings, and road building—in urban population centers, not rural areas or natural preserves.

Perhaps the most tragic examples of environmental law being co-opted involve California's Environmental Quality

Act (CEQA). A CEQA lawsuit can be filed by anyone, even anonymously, to cancel a development permit granted by a government agency if there is the slightest inadequacy in even one of the more than 100 issues that must be studied and reported under the law. Far from remedying environmental damage, the CEQA enables corruption. CEQA lawsuits have been used as a bludgeon by activists, from labor unions to tenants' rights groups, to block development and advance agendas having nothing to do with the environment.

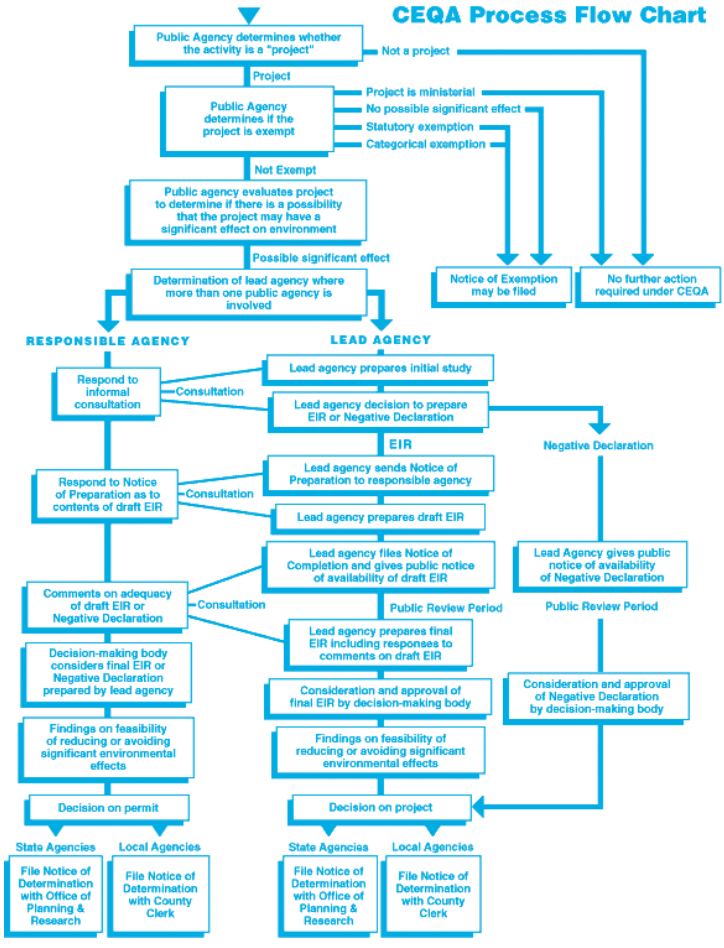
One outrageous example comes from San Francisco. Anti-development activists there have used a CEQA lawsuit to prevent a property owner from converting an aging laundromat into a 75-unit housing development. They claimed the government should have required more environmental studies. The project was then halted when a study showed that the proposed building would cast a shadow on one quarter of the playground of a nearby school for two hours per day. The result: a delay of more than four years so far, not to protect the environment, but to block much-needed housing.

The most comprehensive study ever done of CEQA, analyzing every lawsuit filed since 1970, showed that they are rarely, if ever, focused on protecting forests or fighting pollution sources as intended. In fact, about 87% of the lawsuits in recent years targeted "infill" construction projects—housing, office buildings, and road building—in urban population centers, not rural areas or natural preserves.

Often, CEQA lawsuits are used by opportunistic lawyers and activists to gain control over worthwhile projects that pose no actual environmental harm for the purpose of extorting benefits for themselves and their allies.

For instance, the study documents lawsuits brought by labor unions to slow down government or private development projects. The suits are quickly settled when union workers are hired to complete the projects. Lawsuits are frequently brought by individual suburban homeowners, or a small group of them to drive up the cost of perfectly legal development in their neighborhoods with a cry of "not in my backyard."

Environmental laws can be used to secure individual rights, providing protection from others who would engage in harmful activities or uses of property. But when those laws are bent to thwart rather than protect the responsible use of property, PLF does not hesitate to defend the principles of liberty and limited government. ♦



Edward Poitevent's victory at Supreme Court is a win for property rights and government accountability

Mark Miller
SENIOR ATTORNEY

PLF Senior Attorney Mark Miller and Edward Poitevent

THE U.S. SUPREME COURT delivered a major victory for PLF client Edward Poitevent on November 27 in the case of *Weyerhaeuser v. U.S. Fish and Wildlife Service*, the infamous "phantom frog" case, involving the feds' abuse of the Endangered Species Act through critical habitat designations. But the decision is more than just a win for one client; it's a big win for private property rights and government accountability.

The Poitevent family has owned timber-rich land in Louisiana since the 19th century. In the 1990s, Weyerhaeuser Company acquired a lease of the Poitevent property for its timber operations and also purchased a small piece of the land.

However, in 2012, under cover of the Endangered Species Act, the U.S. Fish and Wildlife Service designated more than 1,500 acres of the Poitevent property as a "critical habitat" for the endangered dusky gopher frog. This designation jeopardized development plans for the property that had been in place for years; it amounted to a de facto uncompensated taking of the family's property for the sake of the frog.

To add insult to injury, no one had spotted the frog in Louisiana within the last 50 years and the species would not even survive on the family's property if it were moved there. The only place the frog is found today is nearly 70 miles away from the property—in Mississippi.

By locking down land on behalf of a frog that does not and cannot live there because the conditions of the property do not support the frog, the federal government—by its own admission—took an estimated $34 million in economic activity away from the Poitevents and from Weyerhaeuser.

If ever there was a case for PLF representation, this was it. Our longtime environmental group leader Reed Hopper took the case on at the administrative level and saw the case up to the Supreme Court. Upon Reed's passing last Christmas, a team of PLF attorneys worked together to ensure that the Court delivered justice to the Poitevent family.

The Court unanimously ruled that the Service must show that a "critical habitat" for an endangered species must in fact be a habitat for a species before it can be designated as such. But the importance of this Supreme Court decision extends beyond environmental law. It also contains an important defense of judicial review of decisions made by executive branch agencies, a critical step in holding those agencies accountable. Ultimately, this defense of judicial review may end up being the most important part of this ruling.

The case is now remanded to the Fifth Circuit to be considered anew in light of the Supreme Court's unanimous decision. ♦

In the room where it happens: PLF client reflects on Supreme Court argument

Kathy Hoekstra
DEVELOPMENT
COMMUNICATIONS OFFICER

Rose Knick and PLF Senior Attorney David Breemer

ON OCTOBER 2, 2018, Rose Knick called PLF with an important question: How many quarters should she bring for the coin-operated lockers at the U.S. Supreme Court building?

"The Supreme Court website says you can't bring things like cell phones or purses into the courtroom," Rose explained. "It also says they have lockers to store our belongings, and they take quarters, but it doesn't say how many. So I thought I'd just call and ask." (Answer: one quarter.)

Rose hadn't been to Washington, DC, since high school, and she'd never been to the Supreme Court.

That all changed when the Court granted review in *Knick v. Scott Township, Pennsylvania*—Rose's fight over a local graveyard law that could undo a precedent that's slammed federal courtroom doors shut on takings cases for 33 years.

Quarter in hand, Rose left her Pennsylvania farm at 2 a.m. the next morning with her nephew and a hired driver to handle the weekday morning DC traffic. They were hustled into the Supreme Court building upon arrival and into their reserved seats in the chamber. Their seats were just behind PLF's lead counsel, Dave Breemer, and co-counsel, Christina Martin.

"We were a lot closer to the action than I expected, and we could see and hear everything," Rose recalled. "We were on the side across from Justices [Samuel] Alito and [Elena] Kagan."

Once argument started, Rose was fascinated. She had read all the briefs and court filings, including 18 amicus briefs supporting her case. She took particular interest in one rather tense exchange between Justice Alito and the defense attorney discussing what triggers a "taking" and how much the township owes Rose:

"Does the township owe her any money? Yes or no?" Alito asked. "I don't see how you cannot have an answer to that question."

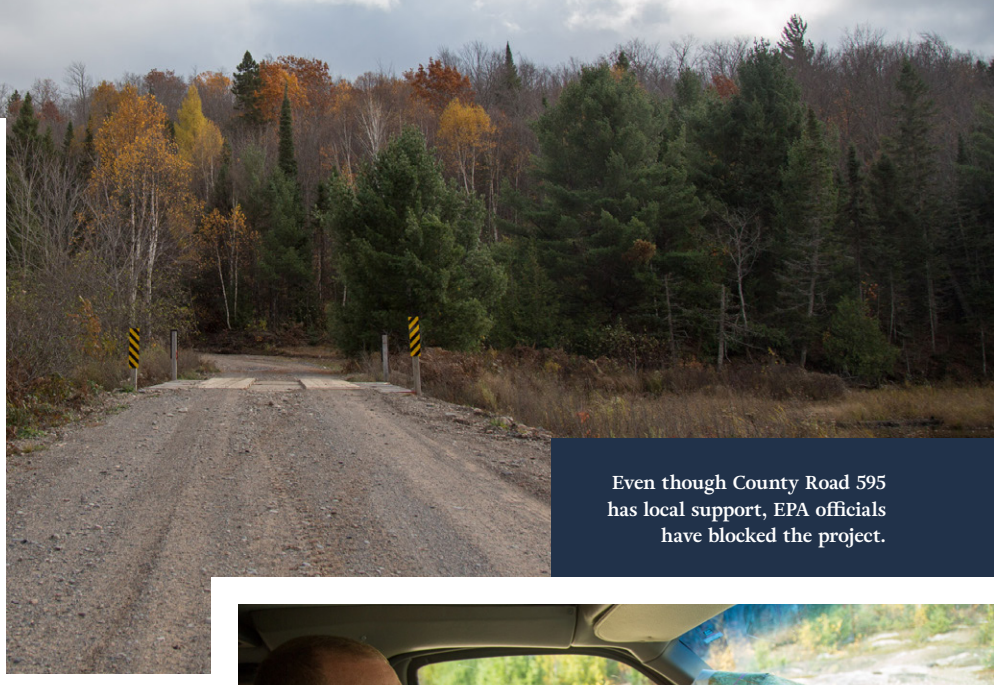
The attorney never gave a direct answer.

"I wanted to stand up and shout, 'Yeah! Answer the question!'" Rose laughed.

It turns out the justices want to find out as well, and on November 2, they ordered the case be reargued—this time with Justice Brett Kavanaugh, who was confirmed to the Court the week following the first argument.

"I'm very glad we get to argue the case with nine justices this time," said Rose. "I was a little worried about a 4-4 split. I didn't want to have to go back to the drawing board." ♦

PLF asks the Supreme Court to protect the right to judicial review



Even though County Road 595 has local support, EPA officials have blocked the project.

Christina Martin
ATTORNEY

SEVERAL YEARS AGO, local officials in the small town of Marquette, Michigan, planned to build a road so that large industrial mining trucks would bypass busy city streets and schools. By providing a shorter, more efficient route, the new road would assist local industry, make city streets safer, and decrease pollution by saving more than 450,000 gallons of fuel yearly.

The plan also would affect some wetlands, which meant the officials needed a permit under the Clean Water Act. The Marquette County Road Commission applied for that permit from the state of Michigan, one of only two states with authority to issue such permits.

After a lengthy and expensive application process, the Road Commission obtained the necessary permit approval from Michigan. But the Environmental Protection Agency then arbitrarily vetoed that permit—killing the project.

To appease the feds, local officials offered to dedicate to conservation 26 acres of wetlands for every one acre affected by the project, but the EPA was not satisfied. The EPA's veto left the Road Commission with two bad choices: either give up on the road or start over and apply for a permit from the Army Corps of Engineers—a process that costs the average applicant more than $250,000 and can take more than two years to complete.

Left with no good options, the Road Commission sued, because the EPA's arbitrary veto of the permit violated the law. The trial court dismissed the case and, on appeal, the U.S. Court of Appeals for the Sixth Circuit held that the EPA's veto could not be challenged at all. Instead, the Road Commission would have to start over and apply for a permit from the Corps before it could challenge a permit denial.

As we explain in our petition to the U.S. Supreme Court, that decision does not square with PLF's previous Supreme Court victories in *Sackett v. EPA* and *U.S. Army Corps of Engineers v. Hawkes Company*. In both cases, the feds similarly argued that federal courts could not review their actions until the property owners either applied for Clean Water Act permits or were fined. The Supreme Court disagreed—unanimously—because property owners suffered severe consequences from each agency's respective decision.

Recognizing that federal courts can review the permit veto in this case would further Congress's intent that states accept primary responsibility for the development and use of land and water resources. Only Michigan and New Jersey have thus far accepted the responsibility to issue Clean Water Act permits, but more states are considering it—including Florida. But why would any state spend the time and money that this responsibility entails if the EPA can arbitrarily veto the state's carefully determined plan without fear of judicial review? We hope the Supreme Court will cement the legacy of both of its earlier decisions by granting review and reversing the lower court. ♦

"A win-win for all of us": A doctor's support for PLF will support property rights fight

Jim Katzinski
GIFT PLANNING OFFICER

HERB BARTHELS is a lifelong Californian who has the distinction of having bought the last parcel of beachfront property in Santa Barbara in 1976—a vacant bluff-top lot that was an ideal spot to build a new family home.

In 1989, Herb started the building application process with the city. Nearly 30 years later, Herb's land is still vacant. In fact, the possibility that the site will ever see a home built on it is further away now than it was in 1989.

"With each passing year, city bureaucrats and the California Coastal Commission placed more and more requirements to build," Herb said. "Every time I turned around there was another bureaucratic roadblock—additional applications, permits, and meetings, or they'd increase setbacks and restrictions.

"Even when the city planning department and engineers were satisfied with everything, the Coastal Commission kept sending letters asking for more," Herb added. "To date, I've had to produce 23 full geological studies, five biology reports, three environmental impact reports—all at my expense."

Despite the staggering amount of money and time the process demanded, Herb never stopped fighting for the right to build a family home on his own property. And he drew inspiration from Pacific Legal Foundation.

"Our family became aware of PLF more than 30 years ago when we began to experience the draconian treatment of government firsthand," Herb recalled. "And PLF has never backed down from defending the constitutional rights on behalf of citizens who otherwise couldn't afford to go it alone."

Herb said the property rights victory in *Nollan v. California Coastal Commission* in 1987 motivated him to include PLF in his estate planning.

"The *Nollan* case and the national attention it received marked a turning point for my family. We decided to sell another piece of property and use the proceeds to set up a charitable remainder trust with PLF as a primary beneficiary," explained Herb. "This gives us a generous tax deduction, and one day when the trust matures, PLF will get the trust's assets.

"Being a PLF Legacy Partner is a win-win for all of us." ♦

For more information on including PLF in your will or trust, please contact Jim Katzinski at 425.576.0484 or *JKatzinski@pacificlegal.org*.

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