The “Posterity Amendment”: Twenty Years
The Campaign to Nullify Private Property Rights

The right to own private property is the ordinary person’s defense against tyranny and his principal means by which to acquire status irrespective of the favoritism of elites.

In 1995 the Sierra Club launched a campaign to nullify the protections for private property in the Fifth Amendment to the Constitution.

The Sierra club, well-funded with elite money, began a campaign for the ratification of a constitutional amendment to eliminate Fifth Amendment protections for resources "determined by Congress" by Earth Day 2000.

Relying on the historical malarkey that the environmentally disruptive American Indians were somehow uncivilized but legally advanced peoples living romantically in a primeval state of harmony with nature and that Benjamin Franklin relied on them for legal inspiration, the Sierra Club has called for passage of its "Posterity Amendment" to convert private property to "common property."

Announced early in 1995, the Sierra Club "Posterity Amendment" appears to be phrased to confuse the unsuspecting:

"The right of the people to use and enjoy air, water, sunlight, and other renewable resources determined by Congress to be common property, shall not be impaired, nor shall such use impair their availability for the future generations."(1)

Unlike any clause of the Constitution, Bill of Rights and other amendments, the Sierra Club’s proposed amendment leaves human rights dependent on the vote of Congress. In this case, Congress may declare "common property" the property held by any person.

"Common property" is, of course, not property. "Common property," the doublespeak of the Sierra Club, is that, which, like the air, is owned by no-one, or government-owned property, like the National Parks.

Referring to the problem of the "Fifth Amendment Protections for Private Property," the Sierra Club admitted in its announcement of the constitutional amendment campaign that, "The above language is clear and it would be difficult to argue against its intent."(2)

The idea of the Sierra Club amendment is that Congress will be able to vote away private ownership in land and resources or uses of these, to vote away the rights of property owners to compensation for "takings."

They look for what they call the "post-takings" days.

The Sierra Club amendment would move vague environmental and aesthetic considerations to the same constitutional level as private property so that only the whims of judges will decide whether government must compensate private property owners when property is taken.

The idea of the amendment is not new. Jay Hair, the former president of the National Wildlife Federation, had launched an earlier constitutional amendment campaign in 1987, using this wording:

"The people have a right to clean air, pure water, productive soils, and to the conservation of the natural, scenic, historic, recreational, esthetic, and economic values of the environment. America’s natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the United States Government shall conserve and maintain them for the benefit of all people." (emphasis added)(3)

The National Wildlife Federation’s alternate wording ended with words making clear the ultimate direction of the ‘public trust doctrine’ and the background for the balderdash invoking the American “posterity” or “seventh generation” rationale:

"...There shall be no entitlement, public or private, competent to impair these rights. It is the responsibility of the United States and of the several States as public trustees to safeguard them for the present and for the benefit of posterity."(5)

At that time, the amendment became an embarrassment and the campaign was allowed to die.

The goal of eliminating the constitutional protection for

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private property goes back at least as far as the 1974 Udall-Jackson national land-use planning bill which was defeated by a surprise coalition of observers at the time, including attorney Bill Moshofsky, who later headed the Oregonians In Action Legal Center in Tigard, Oregon. This organization bears responsibility for the successful Dolan v. Tigard litigation, one of the most successful legal cases thus far dealing with regulatory takings.

Excerpts from "A Green Constitution"
A Commentary by John McIaughry
Proposed U.S. Constitutional Amendment - October 1997:

"The natural resources of the nation are the heritage of present and future generations. The right of each person to clean and healthful air and water, and to the protection of the other natural resources of the nation, shall not be infringed upon by any person."

In plain language, and at a minimum, the sponsors want to allow any person or environmental group to go to federal court to successfully sue any government agency for failing to stop any use of private land that they don’t like. At most, they want to be able to enjoin any private landowner directly from making some use of his or her land that the enviros think infringes upon their expansive view of their rights under the (amended) Constitution.

"The adoption of such a U.S. constitutional amendment would mean, plain and simple, that all decision making power over land would come to reside in the government, and a single plaintiff alleging harm to the global ecosystem or even an alteration of a favorite view could force even a reluctant government to stop any sort of change in land use or the environment.

"The Green Amendment would of course be an inexhaustible gold mine for the environmental plaintiff’s bar... Such an amendment would be the death sentence for a great human right upon which our individual liberties and our competitive enterprise economy have been erected."(7)

At the First Annual New York Conference on Private Property rights, held by the Property Rights Foundation of America, R.J. Smith, Senior Environmental Scholar at the Competitive Enterprise Institute in Washington, DC, recounted some of the history of the 25-year effort to weaken private property rights, beginning with the Nixon Council on Environmental Quality in 1970.

Bill Reilly, a young lawyer at the time, headed the research effort of the Council. Reilly, who later headed the National Wildlife Federation and was Environmental Protection Agency commissioner under President George Bush, presided over studies, which, according to R.J. Smith, yielded these ominous vignettes:

"A changed attitude toward land, a separation of ownership of land itself from ownership or urbanization or development rights, is essential."

"It’s time that the U.S. Supreme Court reexamined its earlier precedents that seemed to require a balancing of public benefit against land value loss in every case and declare that when the protection of natural, aesthetic or cultural resources, or the assurance of orderly development are involved, a mere loss of land value can never be justification for invalidation of the regulation of land use."(6)

If the right of private property is compromised, the rest of the American system of freedom would be fragile indeed. ❖

The Counterattack by the Environmentalists

"Not surprisingly, this movement [to protect private property rights] in the courts and in the legislatures has produced a tremendous counterattack from environmentalists...

"[E]ither of these constitutional amendments would afford tremendous opportunities for creating litigation to stop any person — any landowner, any corporation, any business — from doing virtually anything that could in any way be construed to affect the environment…"

"Interestingly, you might compare those two amendments, as proposed, with Article I, Section 6 of the late Soviet Constitution, which says,

"The land is State property. That is, it belongs to the whole people."

Ret. Vermont State Senator John McIaughry, president, Ethan Allen Institute (8)

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