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**Property Rights Victories: Knick v. Township of Scott,
President Trump's Repeal of the "Waters of the United States" Rule,
and the Trump Administration's Reforms of the Endangered Species Act**

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Well, thank you very much, Carol. It's always a pleasure to be here. This morning I'm going to talk about three developments that have unfolded over the past several months. One dealing with, as Carol said, a recent Supreme Court decision bearing directly on plaintiffs' abilities to seek just compensations under the Fifth Amendment to the Constitution for a taking of their property for public use. The other two issues I will address concern two regulatory initiatives undertaken by the Trump Administration. One, dealing with the Endangered Species Act and the other dealing with a subject we have talked about here before, Waters of the United States, or WOTUS, under the Clean Water Act. We have a lot to cover, so let's get started.

On June the 21st this year, the Supreme Court, by a 5-4 margin, determined that plaintiffs bringing a takings case to receive just compensation for the loss of their property rights for public use now do not have to go through state courts. If they are stymied in state courts, they would still have the ability to get to federal courts. In reaching this decision the Supreme Court overturned a 1985 precedent commonly known as *Williamson County* [*Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*]. Under the *Williamson County* ruling plaintiffs would first have to go through a state court and if they lost there they had no way of getting to federal court. In other words, you couldn't get there from here. That Supreme Court ruling was actually buttressed by a subsequent Supreme Court decision that also funneled private takings cases to state courts without giving people the opportunity to appeal those decisions to the federal court.

You can imagine the situation of a landowner losing use of his property through a local ordinance suddenly finding that he really doesn't have the ability to take this case to the federal court. Well, this is what the Supreme Court overturned earlier this year. In the decision, as Carol pointed out, it's *Knick v. Township of Scott*. That's Scott as in Pennsylvania. We'll get to the details of the case in just a moment but I think it's important to understand exactly what happened here.

We have all had our problems with Chief Justice John Roberts before and we will, no doubt, have in time to do that again. However, in this particular instance he said something in rendering his decision on *Knick*, which I think bears listening to and if I could read my penmanship — always a challenge — I will quote from him directly. "The takings plaintiff was thus caught up in a Catch-22: He cannot go to federal court without going through state court first; but if he lost in state court he would be barred from going to federal court. The takings claim thus dies aborning." He went on to say, "We now

conclude that the state-litigation requirement imposes an unjustifiable burden on the plaintiff, conflicts with existing takings jurisprudence, and thus must be overturned. " And overturned it was.

The case involves a woman by the name of Rose Mary Knick, who had a ninety-eight-acre property in northeastern Pennsylvania, not far from Allentown. A local County inspector had determined that there *might* be a graveyard on her property and under a 2011 ordinance graveyards, cemeteries, must be accessible to the public during daylight hours. Meaning, of course, that people could come onto her property to visit a cemetery that may or may not exist on her property because it was never determined that there was one there to begin with. So, what did Rose Mary Knick do? She brought a takings case. But what happened? She lost that case in the Pennsylvania court system and the people in the Pennsylvania court system made specific reference to the 1985 so-called *Williamson County* decision that said that once you lose in the state courts you cannot get to federal court.

This is what has been now overturned. What it does is it now gives the property owner his or her day in federal court, allows these people to take their claims to federal court, thereby restoring the Fifth Amendment to the Constitution to the proper meaning that it was supposed to have from the very beginning as opposed to what has happened to it over the ensuing years. Obviously the environmentalists were very upset that a landowner won a decision in court that overturned a precedent. There was a hue and cry put out about this. Also, outside the environmental movement there was widespread unhappiness. I think, although they rarely ever said this, I think the real reason was the whole notion of overturning precedent. I think in the back of their minds it was obviously, *Roe v. Wade*.

Be that as it may, I think we, as property rights advocates, can indeed welcome this decision. This, I might add, is a long overdue decision. There are some very interesting implications in this. I read a comment by an attorney who works for a Washington, D.C. law firm by the name of Alston & Bird. He said that the ruling had interesting implications for oil and gas, mineral use, and mineral rights around the country. He didn't really elaborate on that but I think I know what he meant. As you know, the United States is very unique in that we have mineral rights in this country. If you're a landowner you not only own what's on the surface, you also own what is below the surface. That has enabled fracking to take place on private land throughout the country in those areas where there are shale formations; Pennsylvania, North Dakota, west Texas, Colorado, West Virginia, and so on. But not here in New York. Here you have, in the Southern Tier, which is nothing but the northern extension of the Marcellus shale and the Utica Shale. But owing to a decree by your distinguished governor, Mr. Cuomo, he banned fracking in Upstate New York thereby condemning the residents of the otherwise quite poverty-stricken Southern Tier from the economic prosperity across the state line in Pennsylvania that has resulted from the fracking that had been going on there for years.

The implication of the attorney's remark was that perhaps a case could be brought here that people being denied their mineral rights for a public use. Cuomo justified his move by saying that it posed a threat to blah, blah, blah, but also public health so that could be construed as a public use. But a case could be brought against this. To my knowledge no such case has been brought, yet. But it is intriguing to think that something like that could happen. To summarize that, however, again we can welcome what the Supreme Court has done on this. It was long overdue. And it does open the window to, as I said, restoring the Takings Clause of the Constitution to what it originally had been and overturns a very bad precedent that had been on the books for thirty-four years.

Now let me move on to two regulatory decisions that the Trump Administration has taken this year. The first we'll look at is the Endangered Species Act — ESA. The Endangered Species Act was enacted in 1973. The people who voted on it no doubt thought that they were taking measures to save charismatic

species such as the California condor or golden eagles, creatures like that. Over the years, however, the ESA has morphed into something quite different. By the way, that was no coincidence that did this because the people who actually drew up the ESA knew exactly what they were doing. They simply didn't bother to tell the public at large what they were up to. What the ESA now is, is a scheme for land use control. It has been used very adroitly by the environmental movement to shut off any and all commercial activity, whether on private or public land of which they disapprove. If you are a landowner somewhere in rural America and you have an endangered species on your property, you're in a world of hurt. Why? Because you will then be subject to the Kafkaesque world of ESA enforcement. Essentially you're being punished for the very environmental stewardship that attracted the endangered species on your property to begin with. This entails years and years of costly litigation and owing to the way the Endangered Species Act is written with the necessity of setting aside critical habitat for the recovery of the species, you can very easily lose the economic use of your property. This can pertain to farming, ranching, fruit growing, logging, and mining. It can also include extraction of fossil fuels, oil, gas, mining, what-have-you. But it's not just your property that is affected by this but surrounding properties and surrounding communities. It has been a very effective land-use mechanism used by the environmental movement. We as a country, you could say, in enacting the Endangered Species Act forty-six years ago, made a commitment to recovering at-risk species. But that burden has fallen disproportionately on rural landowners and rural communities. Some guy living in Brooklyn sees absolutely nothing wrong with the ESA. But he's not the one paying the price for it. What we have had then are example after example of regulatory abuse of the ESA undertaken by the two agencies that are responsible for it. That's the Department of Interior's Fish and Wildlife Service and the U.S. Department of Commerce National Fisheries Service. The result of all of that has been that the ESA has been used in such a way as to place an enormous burden on rural communities.

Let me just cite one example here. I'm sure it will be familiar to most of you. Turn back the clock to the early 1990s. We were in the midst of the "spotted owl crisis." We were told that the spotted owl desperately needed old growth forest in order to survive, that the numbers of the spotted owls had decreased in such a way that the spotted owl was going to have to be put on the endangered species list. Well, there was actually something that was convened by the Clinton Administration called the owl summit at which people were able to express their opinions about what should be done about the spotted owl. The long and short of it is, the ESA was applied in such a way to timber-dependent communities in the Pacific Northwest, which is where the spotted owl is located, that some of the larger timber companies came out of this relatively unscathed but smaller operations in one community after another were absolutely destroyed owing to the restrictions on logging that resulted from the spotted owl ruling. There was only one problem with that. The decline in numbers of the spotted owl had absolutely nothing to do with old growth forests but rather was a result of another species of owl called the barred owl, which had moved into the territory of the spotted owl. Being bigger and stronger than the spotted owl they were able to out-compete the spotted owl for the prey of the spotted owl thereby contributing to its decline in numbers. This was well known at the time. But it was systematically ignored by the Clinton Administration and by the environmentalists who insisted on taking measures they had to know would lead to the destruction of timber-dependent communities of the Northwest. Those timber-dependent communities have never recovered from the devastation that ensued.

The Trump Administration is undertaking a revision of this. Ideally this would be something that Congress would do. Congress passed a law that does not work for species. It does not work for landowners. It does not work for rural communities. It does not work for taxpayers, but works very well for environmentalists. Ideally, this was something that Congress would fix. Given the current composition of Congress, that simply isn't going to happen. Democrats represent disproportionate

urban areas. They have no stake in this. They are highly financed by generous donations from the green movement and they aren't about to do anything other than attempt try to make a bad situation even worse. So, the Trump Administration really had no alternative but to seek changes through the regulatory process. I'm going to focus on four very briefly here this morning.

One. The criteria by which species are added to the list, taken off of the list, or changed in classification from threatened to endangered or vice versa. The Trump rule says that the decision to change the classification of a species that has been listed must be the same that applied when that species was put on the list. That means that bureaucrats cannot suddenly come up with their own brand spanking new criteria to keep a species on the list.

Speaking of keeping species on the list, according to the latest figures 1,661 species have been put on the endangered species list. A grand total of three percent have been removed. Three percent over forty-six years. That's a paltry result even by the standards of government programs. No small amount of those removals were due to what is delicately referred to as "data error" meaning a: the species was already extinct; or b: the species was actually never endangered in the first place. The recovery of species, which is essentially the purpose of the whole exercise had been subordinated to the land-use control mechanisms that the Endangered Species Act brought about for biological diversity. The Sierra Club, the usual suspects, will bring a suit to the Fish and Wildlife Service saying that species X — it can be a plant or an animal, one that inhabits both public and private land — is at risk and we want to see that species put on the list. It's worked very well for them. This one step by the Trump Administration will bring a certain element of honesty at least to the criteria process changing the classifications of species.

A second thing goes directly to the situation in which the landowner finds himself. This concerns "critical habitat." Under the Endangered Species Act if it is determined that you have an endangered species on your land you are subject to the very draconian rules that govern this and there will be severe land-use restrictions imposed on you. If you are a farmer, a rancher, a fruit grower, or whatever it is that you do on your property, you are going to find out that you either have to greatly reduce that and in some cases you can't do it at all because that land must be set aside for the recovery of the species. It has even reached the point where it's not just the land that is currently occupied by the species, but land that at some point in the future *could* be occupied by the species. In fact, there was an interesting case on this decided by the Supreme Court in November 2018. It focused very narrowly but very interestingly on a creature in Louisiana or actually, as it turns out, not in Louisiana. The creature in question is the dusky gopher frog. Under the Fish and Wildlife rule from a few years ago 1,544 acres — that's about two and a half square miles — of property in St. Tammany Parish in Louisiana was set aside as critical habitat for the dusky gopher frog. Couple of problems. There isn't a single dusky gopher frog in that habitat. There isn't a single dusky gopher frog in St. Tammany's Parish, Louisiana. And there isn't a single dusky gopher frog that anybody has seen anywhere in the State of Louisiana. The only place where it has been determined that dusky gopher frogs are still hanging on is in one county across the river in Mississippi. This case finally made its way to the Supreme Court and the court decided by an 8-0 margin that there were certain restrictions on unoccupied areas. In other words, the Fish and Wildlife Service didn't really have carte blanche to declare acres and acres of critical habitat where the species does not currently occupy that habitat. The Trump Administration rule on critical habitat was able to build on that decision.

The third thing that the Trump Administration did was downgrade, to a certain extent anyway, the use of climate models in determining how endangered species are to be dealt with. Climate models are notoriously unreliable for predicting the weather in one location one week in advance, much less

predicting the climate of a larger area, a much larger area, fifty or one hundred years in advance. The truth of the matter is, by modeling it in a certain way, you can pretty well get whatever you want. The Fish and Wildlife Service had become accustomed to using the amorphous term "climate change" as a criterion to use in the listing and recovery of a species. It was never said what actually was understood by climate change — whether getting warmer, getting cooler, more rain or less rain, or what-have-you — just climate change. What the Trump people here did is they downgraded the use of models to a certain extent saying they can still apply but only in the vague term of "in the foreseeable future."

The final thing that I want to talk about this morning with respect to the Endangered Species Act goes also directly to the predicament in which the rural landowner finds himself. Under the ESA, as originally written, there were two categories. There is "threatened species" and we have "endangered species." Endangered species being more at peril than threatened species. It is originally intended under the endangered species that this is where a truly severe land use restrictions took hold. Over the years, however, the Fish and Wildlife Service more or less did away with that distinction. They adopted something called the blanket rule. They treated threatened species the same way as endangered species, thereby multiplying tremendously the number of acres that can be set aside as critical habitat for the species adding additional regulatory burdens on rural landowners. Interestingly, the National Marine Fishery Service, which shares jurisdiction over the ESA with the Fish and Wildlife Service never adopted that policy. So, we actually had two different policies from two agencies of jurisdiction over the Endangered Species Act. So, what the Trump Administration has done, it has brought those two in alignment. It has restored the original intent of the Endangered Species Act, which did differentiate between threatened and endangered species. The purpose of the exercise here is to provide an incentive for landowners to cooperate in the recovery of a species as opposed to metaphorically speaking putting a Magnum 357 at the landowners head and said, "Thou shalt not use your land for X, whether it's farming, ranching, or whatever because we need to recover a snake, a snail, a bird, a plant, or whatever."

What the Trump people are actually trying to do here is give the rural landowners within a law that should be, in my view and I think in the view of everybody in this room, should be rewritten. It isn't going to be. So, to the extent possible, a regulatory framework that allows these people to work cooperatively with the federal government so that when a species is threatened it never actually receives a classification of endangered which does involve much more severe land use restrictions.

In an extremely imperfect world, and we are constantly reminded that's where we live, I think these are steps that were long overdue. I would point out that during eight years of the George W. Bush Administration none of this happened even though they had plenty of time to do it. They never did it. The Trump Administration, I think, is to be applauded for taking this step. We are still stuck with a very flawed law. But at least within the context of that flawed law steps have been undertaken to lessen the burden on the rural landowners and on rural communities and re-empathize the importance of recovering species.

Let's go to the third thing I want to talk about this morning, and that involves WOTUS, the Waters of the United States. Under the guise of clarifying the federal government's jurisdiction over bodies of water throughout the United States, the Obama Administration in 2015 proposed a regulation dealing with waters of the United States. What they actually came up with was a scheme for federal zoning of millions upon millions of acres of land on private property throughout the United States. I'll also add that WOTUS touched on public property of which, by the way, is way too much. But that's another subject.

What the Obama Administration did — and I'm not exaggerating a bit when I say that it was federal zoning — it set up a scheme that enabled the federal government to force landowners who wanted to make some modification to their property — a farm, a ranch, whatever rural property — that in the view of the relevant federal bureaucrat, touched upon the Clean Water Act's protections of bodies of water that that landowner would have to go to EPA to get a permit. There are many things you don't want to do in life and going to EPA for a permit is one of them. It takes a month of Sundays. It costs thousands and thousands of dollars in legal fees and the bureaucrat deciding on whether or not you get a permit or not will be someone who has never seen your property, never set foot on your property. But, nevertheless, holds the fate of you and your property in his or her hand. And if you don't like the decision that is reached, what could you do about it? Answer: Absolutely nothing.

How did we get to this mess? Under the Clean Water Act the federal government through EPA, Environmental Protection Agency, and U.S. Army Corps of Engineers, has jurisdiction over discharges with the Clean Water Act. The first thing you will run across when you get to the relevant section is "navigable waters of the United States." I think we can all understand and have a pretty good idea of what that means: the Hudson River, the Mississippi River, the Ohio River, the Missouri River, The Great Lakes, the Chesapeake Bay, the Delaware Bay, San Francisco Bay — we get that — and their tributaries. Other sections of the Clean Water Act simply refer to waters of the United States. I think the original implication was that it also referred to navigable waters of the United States. But there are phrases within the Clean Water Act that simply say, "Waters of the United States." What all of that led to was a tremendous amount of confusion over which bodies of water the federal government has jurisdiction. Over time that enabled federal bureaucrats, always eager to extend their empire, and environmentalists, every bit eager to bring lawsuits to gain control over the use of land via their interpretation, their very self-serving interpretation, of waters of the United States.

Two Supreme Court decisions in the early 2000's really didn't clear things up very much. One of which had a notorious phrase that Justice Kennedy came up with. He said, "The jurisdiction extended to areas that had a significant nexus to navigable waters of the United States." What is a significant nexus? Anybody's guess.

The environmentalists also were not happy with this state of affairs because they wanted to expand their control. Their first attempt at this was legislatively. There was a senator from Minnesota by the name of James Oberstar that represented a northeastern Minnesota district, who, in the early 2000's took a couple of efforts to enact legislation that would have greatly strengthened the federal government's hands in regulating all sorts of bodies of water. What are we talking about here? Not just the aforementioned rivers and bays and estuaries and what have you but also such things as wetlands, including wetlands that are only wet certain times of the year or what is known as potholes, which exist in the upper Midwest and elsewhere. These are indentations on the surface of the land that fill up with water when it rains or when the snow melts and then are otherwise dry. Or it can be extended to drainage ditches, stock ponds, what have you.

Oberstar's bill, however, never was approved by Congress and mercifully he was voted out of office in the year 2010. But the Obama Administration, engaging in a pattern that we would see again and again, if it couldn't get something done legislatively it was going to try to use the administrative regulatory state to accomplish more or less the same thing. So, after Obama was safely reelected in 2012, they went ahead with their WOTUS regulation, which, as I said, was ultimately a scheme not really governing waters of the United States per se but rather the land because that's really what they were after. If you gain control of the land, if you force a landowner to go to EPA directly to get a permit, you have real control over land use, which is what this was all about.

So, what happened is a lot of lawsuits were brought against the Obama rule and many of those lawsuits were quite successful. Five federal court decisions struck down sections of the WOTUS rule of the Obama Administration. Two, by the way, are in the last four months. One in Texas and the other in Georgia. The one in Georgia was intriguing because it pointed out that the Obama rule violated the Clean Water Act, the Administrative Procedures Act, and the U.S. Constitution. If nothing else the Obama Administration was thorough. That being the case, the Trump Administration recognized the atrocity for what it was and has gone about in a two-step process to strike it down.

Step Number One: The Obama WOTUS rule was repealed *in toto*. It is gone. The rule actually never went into effect nationwide because there were stays on it that pertained to certain states that had brought suit against the government on this. But now the rule is gone completely. We all applaud that. That's great news except what that really does is that takes us back to the *status quo ante* prior to 2015 when the rule went into effect. All of the atrocities that took place under our nationwide wetlands regulations and other regulations pertaining to bodies of water all took place before the Obama rule ever went into effect because nationwide it never did. We still have huge problems on our hands.

Just a couple of examples. I'm sure most of you have heard of the Sackett family in northern Idaho. This is a husband and wife team who purchased their retirement property on a lakefront property in northern Idaho and went about building a house until the EPA came along and said, "No, you can't do that because that's in violation of the Clean Water Act. You are doing something that will ultimately lead to a discharge into a body of water." There's only one problem. Their property contains zero, no water at all. The only water is the lakefront. It is, after all, lakefront property. There's supposed to be a lake there otherwise they wouldn't have bought the property to begin with. The Sacketts were subject to threats of fines of up to \$37,500 per day by EPA. Thanks to the intervention of the Pacific Legal Foundation the case eventually made its way to the Supreme Court which ruled that at least the Sacketts would have the legal authority to challenge this in court because EPA said, "No, you can't do this. We have the authority here. You will do as we say."

Instances like this occurred in one scale or another throughout the United States. This is rather odd if you think about it because a lot of times we've heard of this as regulating wetlands. The word wetlands appears nowhere in the Clean Water Act. Or wetland appears nowhere in the Clean Water Act. We were, in many respects, regulating things that don't even appear in statutes.

What the Trump Administration in its initial step did is do away with Obama's very far-reaching federal zoning scheme. But in a second step to be undertaken either later this year or early next year the administration is going to go back — it's been rather vague in its wording on this — and provide definitions as to what exactly the authority of EPA and the Army Corps of Engineers is to regulate these bodies of water around the country. The wording of this is going to be crucial because just going back to the pre-2015 regulatory scheme that just takes us back to a very dark world. We don't want to go back there. What we need is clarification ideally provided by Congress. That isn't going to happen, so the best you can hope for is the regulations and the new language that the Trump Administration is devising to govern this, to give rural landowners, to give communities some clarification as to what exactly the jurisdiction of the federal government is over all of this.

Some of you may have read when the Trump rule came out that this was all about endangering protections for bodies of water around the country. It did nothing of the sort. Those restrictions against discharging pollutants into bodies of water — rivers, streams, bays, what-have-you — are not affected by this at all. What the Trump Administration did is it focused right, in my view, on the abuses that the

Obama WOTUS rule would have imposed on landowners restricting the amount of harm that a, still in some respects vague statute, imposes on them. They will try to deal with that by devising regulations that provide some clarity, some much needed clarity, to landowners and surrounding communities. We will eagerly await the wording of this.

It can be safely assumed that once it comes out most of the environmentalists will sue. They have plenty of money. They have plenty of lawyers. They don't mind doing this. We have a somewhat more favorable federal judiciary now than we had three years ago. I think our position on all of this is somewhat stronger than it used to be. And it is to be hoped that the Trump Administration's policies will more or less be upheld. It has been asked, "Well, couldn't a future administration go back because the Trump Administration used the administrative regulatory state to undo something that the Obama Administration using the self-same administrative regulatory state had tried to impose. Couldn't a future Democratic Administration — sadly there will be such — go about it. I don't think they can replicate what the Obama WOTUS rule was simply because substantial sections of that have been struck down in federal court. But try they will in any event. This is why this particular issue is not going to go away. There's going to be a lot of litigation in this. The environmental movement is fabulously funded through Silicon Valley, Hollywood, Wall Street, hedge funds, and corporate America, you can go down the list. Bringing a lawsuit for them is a piece of cake because they have the lawyers and what-have-you to do that. We, on the other hand, are largely dependent upon our own resources unless we are lucky enough to enlist the services of groups such as the Pacific Legal Foundation, Institute for Justice and others to take up the cases where landowners simply don't have the financial wherewithal to defend themselves both against the environmental movement and the administrative regulatory state.

These three developments: the Supreme Court decision, the efforts by the Trump Administration to bring administrative reforms to the Endangered Species Act, and the efforts of the Trump Administration to bring a degree of sanity to the entire WOTUS process have and will turn out to be beneficial. We are in a stronger position today than we were three years ago. The battle is by no means over because the greens knew the Trump Administration is something of an aberration. It's a bump in the road, even a rather substantial bump in the road for them but they are convinced that the traffic will continue to flow in their direction. They will act accordingly. Which means it is incumbent upon us to recognize that, to marshal what resources we have to combat them because combat them we must.

What these people are trying to do and Paul's [Driessen] presentation went to the core of this. These people are seeking power and I think they're ultimately seeking the de-industrialization of the United States to destroy our entire manufacturing base to the extent possible, to transform the other forty-nine states into what California has sadly already become. You look at California and you look at the devastation that has occurred there, the complete mismanagement of natural resources, the shutdown of manufacturing facilities in California. These were not the unintended consequences of regulatory decisions made in California. This is exactly the world they sought to create with results, I think, speak for themselves. They would like that to spread to other states. Efforts such as the Obama Administration's WOTUS rule and other regulatory initiatives that the left would love to impose on the rest of us will move exactly in that direction. That in turn will completely transform the United States into a kind of gigantic Venezuela, if you will, with very, very wealthy well-connected people at the top, a complete absence of anything resembling a middle class and at the very bottom as many people as humanly possible dependent upon government handouts of one form or another. People who then, when elections come along, can be safely relied upon — at least they think it's safely relied upon — to go to the voting booth to elect people who are actually, ironically, keeping them exactly where they are. The idea of social mobility within this particular world has disappeared altogether. What you're looking

at here are efforts to erase the United States as we have known it and replace it with quite something else. It's incumbent upon us to do everything we can to keep them from doing so.

Thank you very much.