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GET OFF YOUR LAND!

Lake Erie's revival started a land grab that's killing fish and wildlife and chasing the public from its own beaches. It's just one more mess brought to you by property-rights radicals.

By Ted Williams

Audubon, November/December 2007

All the press about the ongoing contamination of Lake Erie with alien species and chemicals draws attention from its astonishing resurrection. I knew Lake Erie when no one wanted it. Houses and office buildings along Ohio's 262-mile shore—including Cleveland's city hall—had been constructed facing away from the water. Not a single otter survived in the state. Garbage littered beaches. Decaying alewives clogged water intakes. The lake was a bubbling, deoxygenated witches' brew of *E. coli* and petroleum by-products. In 1969 a major tributary, the Cuyahoga River, caught fire, inspiring Randy Newman's song "Burn On, Big River" and galvanizing Congress into passing the Clean Water Act.

But in late July 2007, as I walked the shore west of Cleveland, I saw a lake transformed. Purple martins swarmed over the clean surface, feasting on emerging insects. Herons and egrets stalked vast carpets of yellow lotus blooms. Glistening carapaces of midland painted turtles adorned floating logs. Boats loaded with anglers bobbed over offshore reefs, where—under the right light conditions—you can see perch, walleyes, sheepsheads, and bass 40 feet down. At Sheldon Marsh in Sandusky, now a state nature preserve, killdeer, semipalmated plovers, lesser yellowlegs, and assorted sandpipers patrolled mudflats while Caspian, Forster's, and common terns wheeled and dipped over shallows that now provide spawning and nursery habitat to at least 20 fish species.

The only thing blazing in the Cuyahoga River these days are the flanks of steelhead trout in scarlet spawning garb. Otters, reintroduced by the Ohio Division of Wildlife in 1986, now breed in 52 of the state's counties and 44 watersheds. Today Lake Erie is the most ecologically diverse and productive of the Great Lakes, supplying more fish to commercial and recreational fishermen than the others combined.

But all this has brought new ugliness in the form of loud, in-your-face property-rights privatizers who covet what they never owned, what they can't legally own, and what they scorned 20 years ago—the land below Lake Erie's ordinary high-water mark. They spew invective, stomp, shout, interrupt, and march around in shirts that say "ODNR [Ohio Department of Natural Resources] Off My Land." Now, with their attempted land grab of the occasionally exposed and always publicly owned lake bottom, they are trying to cash in on arguably the most impressive and costly pollution-control project in history. If they get their way, they'll destroy what the rest of the nation sacrificed so much for—the restored fish, wildlife, and natural beauty of the 11th-largest lake in the world.

The Public Trust Doctrine—a federal and state law long tested by the courts—guarantees ownership of Lake Erie's sometimes submerged lands to all people of the state. As the ODNR explains: "The states have the never-ending obligation to allow the public to conduct certain activities upon the waters and shores of their Great Lakes and oceans. The right of public use of Lake Erie for commerce, navigation and recreation is a fundamental element of the public interest in the great bodies of water that border the United States." The Ohio Supreme Court has ruled that the state "cannot by acquiescence abandon the trust property or enable a diversion of it to

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private ends.” Says Jerry Tinianow, executive director of Audubon Ohio and a former trial lawyer, “No case law has been more impregnable.”

But property-rights radicals in Ohio and elsewhere attempt to apply case law as if it were Silly Putty. My guides—Marnie Urso, grassroots coordinator for Audubon Ohio, and her husband, David Kriska, the Cleveland Museum of Natural History’s biodiversity coordinator—took me to the popular kayak-launching beach at Bradstreets Landing in Rocky River, where a sign that had obviously been up a long time ordered the people of Ohio to vacate their own property: “Keep Out. Private beach beyond this point.” When Urso called the town Department of Parks and Recreation to inquire about the sign, it professed ignorance, then did nothing.

At Huntington Beach in Bay Village we were confronted by a chain-link fence extending well below the ordinary high-water mark and, fastened to it, a sign that read: “Beach ends here. No trespassing.” The sign had been erected by Cleveland Metroparks. Even the city buys in to the property-rights BS.

In Huron I met with Firelands Audubon member Pat Krebs, a lakefront owner of a different sort and a key player in the successful fight to save Sheldon Marsh when, in 2000, the U.S. Army Corps of Engineers issued an improper wetlands permit that would have opened it to development. Along East Sandusky Bay she showed me former lake bottom that, because of reduced precipitation in recent years, now extends more than 100 yards to water’s edge. Instead of a natural succession of wetland plants vital to wildlife, it’s clad in alien grasses planted and manicured by the lakefront residents who claim it for their own. Across the street, on the lake side, other residents have erected seawalls that have eroded the beach by bouncing waves and sand straight out. “Twenty years ago the beach here was 100 feet wide,” said Krebs. Now it doesn’t exist.

The best perspective I’ve seen on the property-rights phenomenon privatizing land across our nation is offered by a self-described “crass, unrepentant, capitalist, real-estate, Republican type”—one Donovan Rypkema of Place Economics, a Washington, D.C.-based real estate and economic development consulting firm: “The property rights movement is the most selectively aggrieved political force in America. Those who loudly proclaim, ‘It’s my land and you can’t tell me what to do with it’ are quick to appear before City Council when a homeless shelter is moving in next door or a sanitary landfill is proposed next to their cottage. And their argument won’t be ‘I’m against the homeless’ or ‘Waste shouldn’t be disposed of’ but rather, ‘That action will have an adverse effect on my property value. . . .’ This surreal concept that the right to own real estate somehow exempts one from having to balance rights with responsibilities, this Larry Flint attitude of ‘I can do what the hell I please and the rest of you be damned’ is . . . alien to 300 years of American political history.”

Certainly there are no property-rights radicals in America more “selectively aggrieved” than those who populate Lake Erie’s Ohio shore. Along with the privilege of living next to this now beautiful water body and along with the soaring value of their properties (a gift from the rest of us), they have the legal right to develop public trust lands in front of their houses with sundry fill and structures such as docks, marinas, piers, boat ramps, and even beach-destroying seawalls, groins, and jetties.

All they have to do is get a state lease, and they get one by asking. (“I don’t think we’ve ever denied a lease,” Brenda Culler-Gautschi, public information officer for the ODNR’s Office of Coastal Management, told me.) Leases give lakefront residents the legal right to kick the public off structures. For instance, if you want to keep walking on your beach, you may have to wade or swim around a dock in order to avoid trespassing. That’s the way it’s always been. No one’s complaining.

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"We don't like leases," remarks Audubon Ohio's Tinianow. "They confuse everything. Give them a permit, not a lease. That's clear-cut. Leases get into the issues of property rights."

What Tinianow dislikes most about leases is that they remind property-rights radicals that the land they like to imagine is theirs really isn't. Marching under the banner of the Ohio Lakefront Group, they've filed suit against the ODNR in an effort to end public ownership up to the ordinary high-water mark or get compensation for what they allege is a "taking" of "their" beaches.

Intervening on the state's behalf are the National Wildlife Federation along with its affiliate, the League of Ohio Sportsmen, and the Ohio Environmental Council (which includes Audubon Ohio). These groups are committed to preserving beach access for a number of reasons, not the least of which is that public support for fish and wildlife doesn't happen without public encounters with fish and wildlife. An even greater concern is protecting wetlands, estuaries, naturally vegetated shorelines, and other fish and wildlife breeding, feeding, and nursery areas that the plaintiffs have designs on. Lake Erie now offers what the hook-and-bullet press consistently describes as the finest smallmouth bass and walleye fishing in the world. But walleyes spawn in cool, relatively unmolested tributaries; and smallmouth bass construct successful nests only in the shallows and only on natural gravel and sand substrates. What's more, the fry of both species (and of most fish, for that matter) require "forests" of aquatic plants for cover. When developers hack up these habitats or replace them with, say, beach sand or other fill, these fish don't just "go somewhere else." They die out. The same holds for all birds, mammals, reptiles, and amphibians inhabiting or otherwise dependent on the alternately exposed and submerged lake bottom.

The Ohio Lakefront Group was cloned from a Michigan outfit called Save Our Shoreline—largely a front for the real estate industry but also including individual privatizers—which slipped a "beach-grooming" law through the Michigan legislature in 2003. The "grooming" was a euphemism for gouging out native vegetation with heavy machinery, the better to create white-sand beaches. In 2005 the National Wildlife Federation and its allies had to bring in U.S. Fish and Wildlife Service biologists to tell state legislators that while converting diverse wetland flora to sand might attract sunbathers, it wipes out the fish and wildlife that use it for food and shelter.

"This property-rights thing is absolutely contagious," says Brian Preston, the National Wildlife Federation's regional representative for Ohio, Michigan, Kentucky, and Indiana. "After more than a year of habitat destruction, the Michigan legislature overwhelmingly undid the beach-grooming law. So the lakeshore residents in Ohio said: 'Hell, if we own that submerged land, the state can't say anything about grooming.' Now we can bring in dump trucks and build ourselves nice little peninsulas and \$3 million houses.' Just follow the money. The money that started this whole thing came from the Ohio Home Builders Association and the Ohio Association of Realtors. The Lakefront Group took these sponsors off their website because it made them look ridiculous."

The greed feeds on itself, consuming all sense of reality. Some privatizers seriously claim they own not just to the low-water mark but halfway across the lake—to the international boundary. "I expect they'll be wearing shirts that say 'Anchors Off My Land,' " comments Jack Shaner, director of public affairs for the Ohio Environmental Council.

Despite their unique privileges to build structures to and in navigable water and despite the property-value windfalls society has showered on them by healing the lake, members of the Lakefront Group profess to be sorely tried. Testifying before the Ohio Senate in 2004, James O'Connor of Sheffield Lake declared: "I was extorted into signing a lease and with that action I relinquished my property rights. And I was subject to extreme regulations. Deceit, lies and intimidation will get you to sign almost anything. . . . I stand before you as a victim, a victim of the renegade ODNR Coastal Managers. A victim of an absurd policy that steals property. . . ."

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In 2003 lakefront resident Cherry Pierce of Port Clinton laid the following sob story on the Ohio House: "I've already lost the sale on one property, and that property's value has plummeted. I'll soon lose another along with my house. Both are casualties of the policies of the current coastal management program." But less than a month later she sold one of her properties for \$2 million. It had just been appraised at \$657,140.

Some of the plaintiffs in the suit against the ODNR have produced deeds suggesting they own to the low-water mark, but in every case the property line descriptions in their deeds had been changed by previous owners (usually between 1880 and about 1910) who replaced vague language such as "to the lake shore" with "the low-water mark."

The property-rights lawsuit appears to have little chance of success. For instance, a nearly identical action in Michigan failed in 2005 when the state Supreme Court ruled that "the state has an obligation to protect the public trust. The state cannot take what it already owns."

Perhaps the Ohio plaintiffs sense the weakness of their case, for they've repeatedly prevailed on State Senator Timothy Grendell (R-Chesterland), a noted property-rights advocate, to file legislation that would cede them the dry beach along virtually the entire Ohio shore. So even as the Lakefront Group argues in court that the law says shoreline residents own the beaches, it pushes legislation to *change* the law because it plainly says they *don't* own the beaches.

Grendell's bill doesn't appear to have much chance either, because similar legislation has gone belly-up in each of the past three sessions.

So why would any politician pay attention to the gas and wind venting from a tiny minority of property-rights barkers in Ohio? Well, for one thing, people who can afford a house beside Lake Erie can afford to give campaign contributions.

On August 11, 2006, Democratic gubernatorial candidate Ted Strickland sought favor with the ever louder, ever angrier Lakefront Group by serving up a rash, ill-researched campaign pledge: "I have concluded that the lakefront owners rightfully own the land as specified in their deeds. Our country was founded on a profound respect for private property rights, and a Strickland/ Fisher Administration will ensure the State of Ohio continues to value the rights of property owners."

A day earlier, when Ohio's environmental organizations asked Strickland how he intended to deal with the outlandish claims of the Lakefront Group, he told them he hadn't made up his mind. Naturally, they were dismayed and appalled when, less than 24 hours later, he announced his decision. But Strickland's campaign staff promised them the whole mess would be cleaned up after the election and instructed them not to say anything. So they didn't.

The Lakefront Group, however, continued shouting. And on July 13, 2007—a Friday at the end of the workday, the hour when politicians make pronouncements they'd like the media to ignore—Governor Strickland's office issued a radical new policy for shoreline management: "The state will honor the valid deeds of local property owners along the coast of Lake Erie. . . . As he has consistently stated for more than a year, Governor Strickland believes that apparently valid real property deeds must be honored unless a court of law determines that the deeds are limited by or subject to the public's interest in those lands or are otherwise defective and/or unenforceable."

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"Note the mushy language," observes Tinianow. "'Apparently valid real property deeds' is very interesting. So is 'unless a court of law determines' otherwise. I see this as a plea to the legal system to bail him out."

The governor declined an interview with me, passing me off to his new ODNR director, Sean Logan, whom he had just divested of meaningful coastal-management authority. Logan struck me as a decent, competent man who wanted to accomplish the now-impossible tasks of doing and saying the right things. Prior to the governor's declaration, Logan's own agency had issued this one: "Public ownership of the lands of Lake Erie extends up to the ordinary high-water mark. The issue has been consistently addressed in the law of the United States and the State of Ohio."

When I asked Logan if he didn't think this about-face was a bit bizarre, he said: "Not bizarre. We're actually being consistent because we're going to administer the policy in this new way. In terms of protecting the actual resource, nothing's going to change. We're not going to permit chain-link fences. We're not going to permit anything that would negatively impact shoreline habitat." That's easily said. But ODNR enforcement was lacking even before the governor surrendered the public trust. When I told Logan about the patently illegal signs and chain-link fencing Marnie Urso, David Kriska, and I had encountered, he said, "That's news to us."

Here's Tinianow's take on Logan's statements: "What he's saying is that of course you need a permit to put a structure into the water. They're still going to regulate that. I think the question is going to be, though, if someone owns land below the high-water mark, can they now lay down fill and develop it to the water's edge without getting a lease from ODNR."

The new policy threatens much more than habitat behind shoreline houses. The governor's abandonment of the public trust may abrogate Ohio's legal authority to protect Lake Erie from polluters as well as out-of-state interests bent on pumping water from it. "The public trust isn't some esoteric legal theory," says the Ohio Environmental Council's Jack Shaner. "It may seem incredible that the public's rights to air, water, fish, and wildlife could ever be at risk, but here is prima facie evidence that this is a possibility."

The National Wildlife Federation's Brian Preston offers this: "We're pursuing a \$20 billion Great Lakes Restoration Act in Congress. This is the northern equivalent of the Everglades restoration. Then we go to the Hill and get asked, 'How are you going to manage something you don't own?' If I produced some deed that said I owned part of Yellowstone National Park, would anybody honor it? That's the insanity of this."

Currently the ODNR's Office of Coastal Management gets about \$2 million a year from NOAA, money that is matched one to one with non-federal funds. The office then awards grants for all manner of important habitat restoration. Now that money may dry up. "We don't know how the new policy is going to affect our grants," says the Office of Coastal Management's public information officer, Brenda Culler-Gautschi. "If there's a change in the coastal management program—legislative or otherwise—the federal government has to look at our program and reauthorize it. At any time they can say, 'Sorry, you don't meet the conditions for approval.' Then we don't get the \$2 million and we can't issue grants."

Under the governor's new policy, coastal residents don't need to get leases for beach development if they produce deeds (all of them invalid under state and federal law) that say they own to low water. Culler-Gautschi declined to share her opinion of the new policy, but she did say this about what she perceived to be the value of the lease system: "If a community is looking to develop, they might not realize the project is in one of the tributaries in which walleyes spawn. Considering how much money comes from recreational fishing, they might want to change their plans. We're trying to give local decision makers the tools for good management."

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Messes created by property-rights radicals, weak politicians who two-step for them, and gullible electorates who imbibe their snake oil invariably get cleaned up. But the remarkable thing about these messes is the damage they do. For example, in 2004 Oregon voters overwhelmingly approved Measure 37, which compels the state to waive land-use regulations or cough up cash to property owners who contend that the regulations reduce their property values. Measure 37, written by and for the timber industry, has vaporized the nation's strongest anti-sprawl laws. So far contributors to the campaign have filed \$600 million worth of takings claims against the state, and since there's scant money to pay them, the state is letting them hack away. Damage to farmland and forestland has been horrendous, so now the legislature has passed a partial fix, Measure 49, that will be on the ballot this November. "It doesn't get Oregon back to where it was," says John Echeverria, director of the Georgetown University Environmental Law & Policy Institute. "But it undoes a great deal of the damage."

If the Ohio mess gets fixed, it will be largely the doing of the state's new attorney general, Marc Dann—a champion of fish and wildlife who, in his first six months in office, served notice to polluters and habitat destroyers by filing 57 environmental enforcement actions. Dann, who was glad to meet with an *Audubon* columnist on short notice, finds the position of the governor (a fellow Democrat) "inconsistent with Ohio law" and has therefore refused to represent the ODNR in its legal battle with the Lakefront Group.

"I believe my role is to represent my institutional clients as well as the people those institutions were created to serve," Dann declared. "In this lawsuit the state and the ODNR are separate defendants. The only person who can represent the State of Ohio is me. ODNR is a client; they changed their position against my advice. I had no alternative but to hire them outside lawyers. And I continue to represent the people of the state. The case law and the history of the creation of Ohio and the Northwest Territory and the Western Reserve all lead to the same conclusion—that if anybody had a deed showing their land went to the low-water mark, that deed couldn't be valid because nobody ever had the authority to give away submerged land. These folks may have been defrauded by someone, but it wasn't the State of Ohio. You can't give what you don't have."

The more I talked with Dann the clearer it became to me that the Lakefront Group has no long-term future in Ohio. But I've dealt with and written about the property-rights movement long enough to have learned that neutralizing it is like clipping Asian bittersweet. It always comes back (albeit in new places and under new names such as the "Wise-Use Movement," the "Sagebrush Rebellion," and "County Supremacy"). It always flimflams the public and politicians. It always disrupts. And it always destroys fish and wildlife.

Ted Williams's opinion column has been a leading independent voice of environmental journalism for 20 years.

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WHAT YOU CAN DO

In late November, as *Audubon* was going to press, the Arkansas Public Service Commission approved SWEPCO's plans. Audubon Arkansas and other groups will continue to fight the plant. If you would like to help, send checks, endorsed to the Little River Bottoms Defense Fund, to [Audubon Arkansas](#), 201 East Markham Street, Suite 450, Little Rock, AR 72201.