Property Rights and Wrongs

Why anglers should worry about the property-rights movement

By Ted Williams

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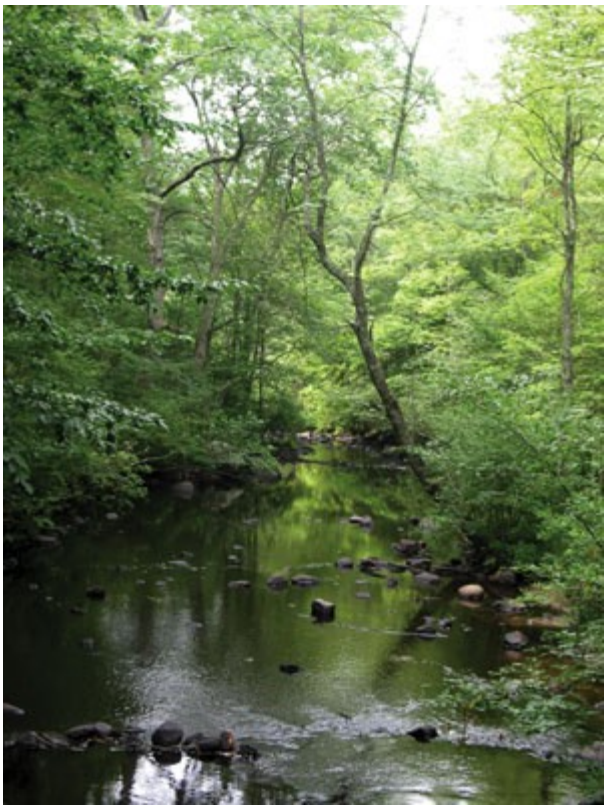

Property-rights groups have opposed wild and scenic designations for rivers across the country, to the detriment of fish, wildlife and anglers. Connecticut's Eightmile River (above), spawning ground for Atlantic salmon and home to brook and brown trout, is one of their current targets.

Like the meteors of a troubled heaven, property-rights groups explode, then trail into blackness. But others keep appearing under new, often Orwellian names: "the Wise Use Agenda," "the Sagebrush Rebellion," "County Supremacy," "the Lakefront Group," "Save our Shoreline," "Property Rights Alliance," "Liberty Matters," "Friends of the River," "People for America," "Alliance for America," "National Inholders Association," and on and on. The movement has always been hard to neatly define because even those involved aren't exactly sure why they are so angry or how they have allegedly been aggrieved.

All property-rights zealots, however, share obvious diagnostic features. They are incited, financed and used by developers and extractive industry. They have a fundamental misunderstanding of constitutional law, believing that state and federal regulations that prevent them from doing things like filling wetlands or diverting trout streams constitute "takings," requiring "just compensation" under the Fifth

Amendment. They resent people who are financially more secure (in their minds, most of society), especially fish and wildlife advocates from the East. They are supremely ignorant of the basic philosophical foundations of their own (Republican) party, whose patron saint, Teddy Roosevelt, declared: "Every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it." They detest government and government regulations but demand government protection and government services. Many hunt and fish, but all seek to undermine protections for habitat.

Sierra Club director Carl Pope--an ardent defender of hunting and fishing, and grandson of iconic outdoor writer Ben East--offers this assessment of the property-rights movement: "In the name of conservatism, it is radical. In the name of traditional values, it rejects both American traditions and values. In the name of private property, it destroys the public trust. It is the politics of the frontier, not of the neighborhood. It confuses a community with a sack of tomatoes. It would abandon the entire web of public obligations undertaken by those who own land, obligations that we call the 'public trust.' It substitutes for that traditional idea the concept that each landowner is a sovereign state, immune from regulation and obligation to his neighbors. This new politics would allow every landowner virtually to secede from the union."

But in our society if you lie long and loud enough, you often get your way. Consider, for example, the influence of the property-rights movement on protection of our best rivers under the Wild and Scenic Rivers Act of 1968. Wild and scenic status preserves and promotes rivers by giving them national attention, prohibiting new dams and other fish-killing projects, limiting inappropriate streamside development, and mandating comprehensive management plans. It also brings in federal funds for water-quality monitoring, outreach and education, and the purchase of watershed property from willing sellers.

Currently, 3,400 American rivers meet criteria for wild and scenic status; but, thanks in part to property-rights zealots and the special interests that fund them, only 168 have been designated. The antipathy is hard to figure (at least by rational standards) because wild and scenic designation specifically prohibits the state and feds from licensing dams and other projects that would degrade a river, thereby protecting private property by virtually eliminating the threat of eminent domain.

The West Branch of the Farmington River in western Massachusetts and Connecticut is one of the prettiest and most productive wild trout streams in the East. An attempted heist of the flow by the State of Connecticut in 1981 to "accommodate" (read "promote") streamside development kicked off an interstate, eight-town study to see if the river met wild and scenic criteria. It did.

Then, a decade later, all eight watershed towns (four in each state) voted by overwhelming margins for wild and scenic status for the 11-mile stretch in Massachusetts and the 14-mile stretch in Connecticut. After all, even for people who genuinely wanted to defend their property and the real rights guaranteed to them by the Fifth Amendment, there was nothing to lose and much to gain. The ever-present, if remote, threat of eminent domain would take wing. There would be no federal land management and no federal land acquisition. All control and use of watershed land would remain the responsibility of local governments. Certain types of wetland plants would be protected, and a setback of 100 feet would be required for new septic tanks, but there would be no new impediments to development.

Still, the proposal offered property-rights groups an opportunity to preen, posture and promote. Descending on the little Massachusetts towns of Otis, Sandisfield and Tolland and whipping up paranoia

like the Music Man were the Upper Delaware Citizen's Alliance (an outfit dedicated to repealing wild and scenic status for New York State's upper Delaware River) and the Alliance for America (sired by a tax-fraud felon named Alan Gottlieb and funded by electric utilities, and mining, timber and oil companies).

In short order these two outfits spawned a shell organization called "Friends of the River," which festooned the watershed with paranoid and brazenly untruthful signs and "newsletters" warning that: "YOUR LAND HAS BEEN STOLEN!! Learn how our government has come like a thief in the night" and "I can't plant daffodils on my property" and "Becoming designated wild and scenic automatically makes us a National Wildlife Refuge" and "Unless we are sure we want Congress and the National Parks System [sic] to control our every move, and unless we want national conservation groups to tell us what is best for our country way of living, we best reconsider [wild and scenic designation]."

Thus disquieted and disinformed, Otis, Sandisfield and Tolland voted overwhelmingly to rescind their endorsement of wild and scenic designation, thereby rendering pointless the continued support of Becket (the fourth town). So, today only the Connecticut stretch of the West Branch of the Farmington is protected under the Wild and Scenic Rivers Act. (See "The Humbug Hatch," FR&R Nov/Dec 1993.)

Pumped from this successful sabotage, the property-rights crowd moved to New Hampshire where, the same year, they derailed wild and scenic designation of the Pemigewasset River--a pristine White Mountain stream that, in addition to offering exceptional wild brook trout and trophy brown trout fishing, provides most of the Atlantic salmon spawning habitat in the Merrimack River system. When The Bristol Enterprise ran a questionnaire designed by the wild and scenic study committee, members of the New Hampshire Landowners Alliance turned out in force and bought up all the copies from local stores.

Now the property-rights movement has mobilized against impending wild and scenic status for Connecticut's Eightmile River, named for the distance from the point at which it is collected by the Connecticut River to where Long Island Sound collects the Connecticut.

Along the heavily developed Eastern Seaboard the Eightmile is an anachronism. Its 150 miles of feeder streams and essentially free-flowing mainstem drain 40,000 acres of mostly unfragmented forest. The river is one of only three in the state that provide spawning and nursery habitat for Atlantic salmon. Wild brookies abound in the cold headwaters, and lower sections sustain American shad and sea-run brown trout.

In 2001, when Congress authorized the study for the Eightmile's wild and scenic status, river advocates were determined to avoid another Farmington/ Pemigewasset debacle. While land condemnation under eminent domain has never occurred on any of America's 168 wild and scenic rivers, it is not quite impossible. The act does contain a safeguard (Section 6) by which the National Park Service can rescue watershed habitat from a grossly delinquent municipality that refuses to enforce pre-existing state or federal regulations, such as the Clean Water Act's prohibition against discharge of raw sewage.

Obviously, such violations weren't going to happen in 21st Century Connecticut, especially with all five watershed communities passionately committed to wild and scenic status. So the Eightmile River Wild and Scenic Study Committee wrote specific language that negated Section 6. "We were paranoid about the Farmington problem," committee chair Tony Irving told me. "So we decided to nip any possible property-rights issue in the bud. We actually wrote into our management plan's language that the National Park Service recognizes that regulations already in place at the municipal level satisfy Section 6 and that there shall be no condemnation of private land in the Eightmile watershed. We really went the

extra mile."

The bill for Eightmile wild and scenic status, sponsored by Rep. Joe Courtney (D-CT) and supported by the governor and the state's entire congressional delegation, specifies in three separate places that under no circumstances will there ever be any federal land condemnation. It is not possible for rational human beings to read the bill and believe that eminent domain in the Eightmile watershed could happen.

But that category excludes property-rights zealots. It's not clear if the Property Rights Alliance called in Rep. John Boehner (R-Ohio)-House Minority Leader and ranking Republican on the Natural Resources Committee--or if Boehner called in the Property Rights Alliance. But both were in full cry when the bill came to the House floor in early July 2007.

"Private property will cease to exist under H.R. 986," dissembled alliance director Christopher Butler in a letter to congressmen. "Using legislation to strong-arm land under federal control prohibits any private citizen from exercising their fundamental right to land ownership."

Boehner and Butler were able to beat fellow Republicans into a froth of fear and loathing. In what she called a "news release" Rep. Cathy McMorris Rodgers (R-WA) misinformed constituents that the bill "weakens private property rights" and that "the designation requires a freeze on any physical alteration to the land and allows the National Park Service to prohibit projects on federal land and tighten zoning restrictions on private land. Private ownership of property is a fundamental constitutional right and it is deeply concerning to see this right trampled on by politicians and judges in Washington D.C."

"If you've got time for this bill that's about a river, you have time to protect this country," Rep. Pete Sessions (R-Texas) told his fellow congressmen. "We've got time to pick on private landowners and to take their land."

The shrill disinformation campaign worked--at least temporarily--and on July 11, 2007 the House defeated the bill. "Last week, House Republicans scored another victory for the American people by defeating misguided legislation that would damage private-property rights by leaving the door open for federal condemnation of land and placing restrictions on private property," crowed Rep. Bob Goodlatte (R-VA) in a property-rights rag called The New Dominion. "This legislation would have severely restricted property rights along 25 miles of the Eightmile River.... I am pleased that this legislation, which would allow Washington politicians to condemn or restrict the use of private property at will, with or without just compensation, was defeated on the House floor."

Aping for his constituents, Boehner wrote this in a newspaper op-ed: "Just when you thought it was safe to enjoy your backyard, the government launched another ill-fated assault on private property rights.... The Eightmile Wild and Scenic River Act would have locked land under government control--preventing private use--and thrown away the key.... In recent years, local governments have tried to broaden their power of eminent domain to allow municipalities to take land from one party and give it to another to improve the local economy. That's not what the Founding Fathers had in mind when they wrote the 'Takings Clause' in the Fifth Amendment stating that 'private property [shall not] be taken for public use, without just compensation.'"

It never ceases to amaze me how elected officials can prevaricate like this and continue to be believed by their colleagues and the public. Still, even the dullest minds eventually tune out when those who

address them shout every word. And when Courtney reintroduced his Eightmile bill on July 31, 2007 there were enough Republicans on board for the required two-thirds majority. At this writing, the bill's prospects in the Senate appear bright.

It isn't just moving water that is threatened. Now that the Great Lakes have been cleaned up, developers and the property-rights groups that front for them lust after the land below the ordinary high-water mark. But this land, alternately inundated and exposed depending on precipitation, has always belonged to the public. For fish and wildlife it is far and away the most productive habitat anywhere in or near the lakes. Hunters, anglers, swimmers, birdwatchers and hikers depend on it. When it's flooded, vessels navigate over it. Public ownership is guaranteed by the Public Trust Doctrine, a state and federal law long tested by the courts and older than the union. But by sleight of hand and volume of voice the developer/property-rights axis has convinced politicians otherwise.

For example, certain Michigan resort owners and lakefront residents wanted white sand beaches; so, in the name of property rights and under the banner of "Save Our Shoreline," they flimflammed state legislators into passing a "beach grooming" law in 2003. Who isn't for good "grooming?" The word has an appealing, hygienic ring to it. But "grooming" turned out to be a euphemism for the mechanized gouging out of wetland vegetation, including plants that provide nursery habitat to juvenile gamefish.

"We killed it but only after more than a year's worth of habitat destruction," says Brian Preston, the National Wildlife Federation's regional representative for Ohio, Michigan, Kentucky and Indiana. "They went in with plows, dug down two and a half feet to remove root systems. We had to come back the next year with the Fish and Wildlife Service to explain that these weren't 'beaches' but wetlands with a 30-year-cycle."

Titillated by the spectacular, if temporary, success of Save Our Shoreline and engorged with funding from the Ohio Homebuilders Association and the Ohio Association of Realtors, property-rights zealots in Ohio organized under the "Ohio Lakefront Group." They blitzed the media with claims that they had been bullied and abused by Big Government, that they--not the public--owned to the low water mark; and they sued the Ohio Department of Natural Resources (ODNR) in an effort to end public ownership up to the ordinary high-water mark or be compensated for what they allege is a "taking" of "their" beaches. Members are blocking angler and hiker access with illegal fences and illegal signs. At least one property owner has built an impassable wall of zebra mussel shells on each side of what he fantasizes is "his" beach. Meanwhile, the state sits on its hands.

At the same time the Lakefront Group has also prevailed on state Sen. Timothy Grendell (R-Chesterland) to file what appears to be unconstitutional legislation that would cede members the dry beach along virtually the entire 262-mile Ohio shore. And they've intimidated Ohio Governor Ted Strickland into implementing an apparently illegal policy by which property owners can be excused from leasing public-trust land from the state (usually at an annual cost of two cents per square foot) for such development as jetties, seawalls, groins and wharfs merely by producing deeds that claim they own to the low water mark. The deeds--containing language inserted by previous sellers to replace such vague references as "to the lake shore"--are, by definition, bogus because it is impossible for any previous owner to sell or give away something he never owned.

Ohio's attorney general, Marc Dann finds the governor's policy "inconsistent with Ohio law," and because of that policy he has refused to defend ODNR in its legal tiff with the Lakefront Group. "ODNR is a client; they changed their position against my advice," he told me. "I had no alternative but to hire them

outside lawyers."

In June 2005 the US Supreme Court ruled that New London, Connecticut, could lawfully condemn private property for redevelopment (Kelo v. City of New London), a decision that provided property-rights propagandists with a rich guano deposit they're still mining. Immediately, anti-environmental-regulation bills in the guise of "anti-Kelo" legislation popped up in about two-thirds of the states. Only in Arizona did such legislation succeed.

A year before the Kelo decision, Oregon developers and extractive industries funded a property-rights campaign for "Measure 37." The ballot initiative, which won in a landslide, did away with what had been the nation's most progressive and effective regulations for protecting terrestrial and aquatic habitat, requires the state or community either to compensate people and industries who claim that environmental regulations have "devalued" their property or wave the regulations. Since there's no money to cover the outlandish claims (at least 7,500 so far), the regs get waived. People thought they were voting to protect private property and prevent "takings," but now private property is being damaged and devalued by massive development happening all around it. So distressed and incensed are Oregon voters at the ongoing rape of their state that they've prevailed on their lawmakers to pass a partial fix--Measure 49 for the November 2007 ballot.

"The so-called 'property-rights' movement is the singularly most misguided, historically inaccurate, fiscally irresponsible political movement of the last half century," writes Donovan Rypkema, who describes himself as "a crass, unrepentant, capitalist, real-estate, Republican type" and who works out of Washington, D.C. as an economic/development consultant. "Let me ask you, when was the last time you heard an owner say, 'Because of rezoning my land went from being worth $10,000 to being worth $100,000. But since it was the action of the Planning Commission and not some investment I made that increased the value, I'm writing a check to the city for $90,000?'"

It's an excellent question, one I'll now put to Ms. Cherry Pierce of Port Clinton, Ohio, who, like all lakefront owners, has benefited enormously from the sacrifices made by the rest of society in cleaning up the Great Lakes. Herewith, Pierce's complaint to the Ohio House about ODNR's insistence that she lease the public trust land she's developed along the Lake Erie shore: "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."

Scenting vintage property-rights BS, the Ohio Environmental Council did some digging. It found that less than a month after Pierce's testimony she sold one of her properties for $2 million. It had just been appraised at $657,140.