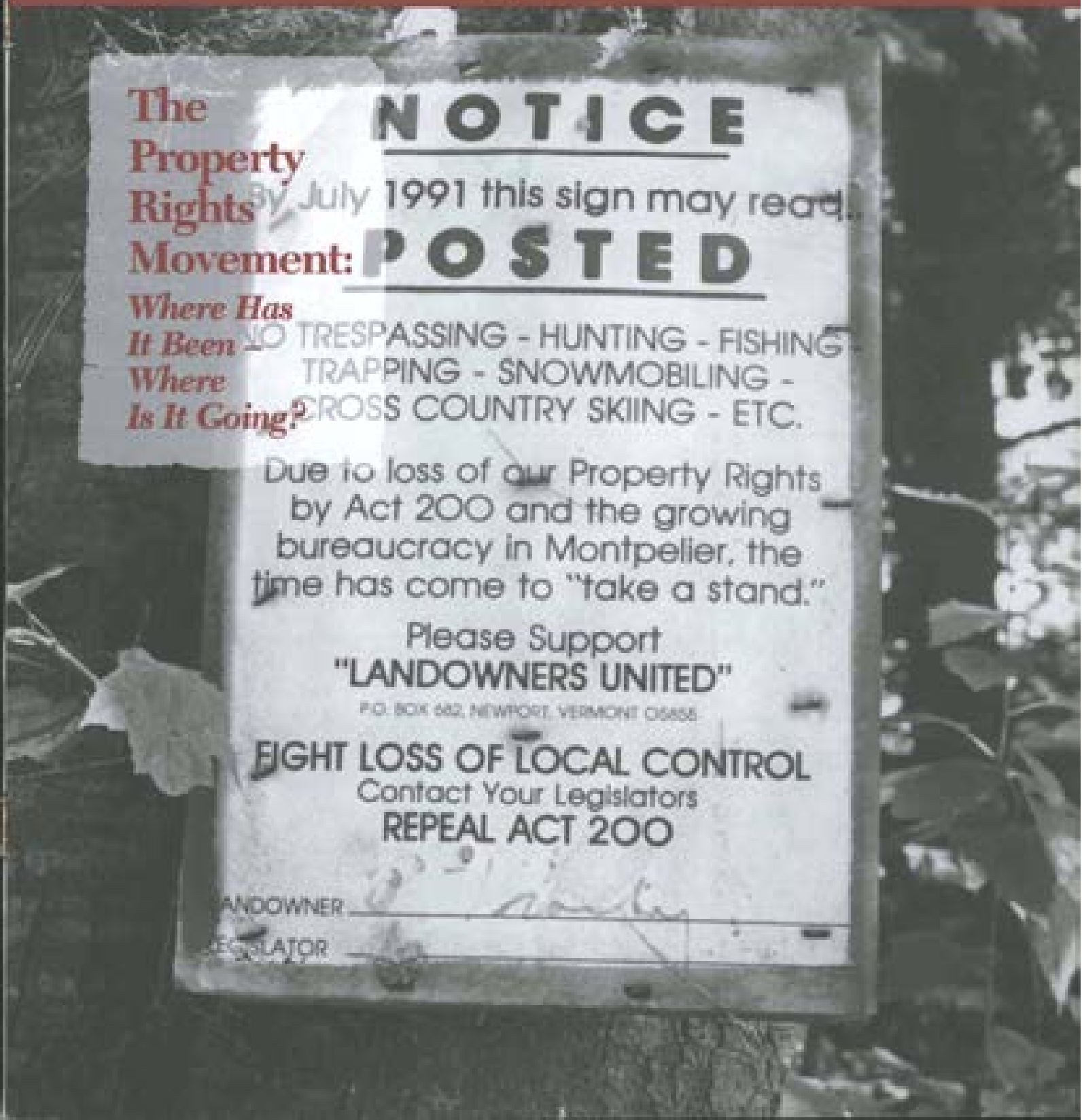
VERMONT Environmental Report

Published by the Vermont Natural Resources Council
- FALL 1992 -

The Property Rights Movement: *Where Has It Been Where Is It Going?*



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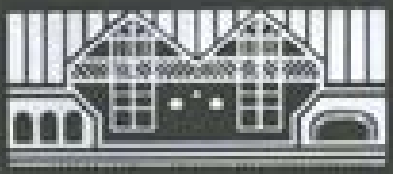

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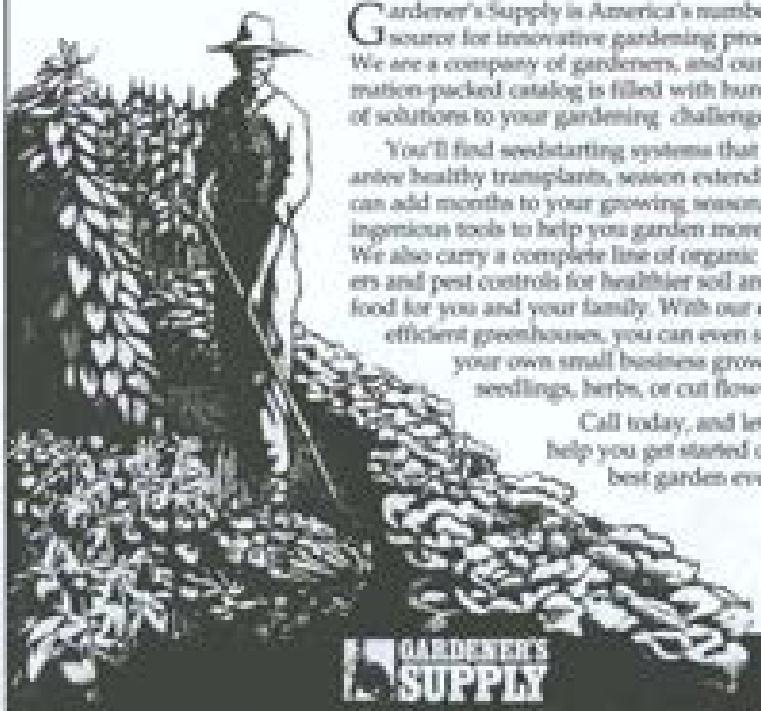

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Fall 1992

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The Vermont Natural Resources Council is a non-profit environmental organization founded in 1963 to promote the wise use of Vermont's natural resources. VNRC does research, legislative lobbying, advocacy, and educational work on issues including land use, forestry, agriculture, water, energy, wastes, and growth management.

VNRC is the Vermont affiliate of the National Wildlife Federation.

The Property Rights Movement

The Evolution of the Property Rights Movement 15
Have the Green Mountain Boys Been Supplanted by Regulars in Suits?
The property rights movement was born at an angry meeting in Morrisville in 1989. Its strength has seemed to wane since then, but a new form of the movement may be evolving. By Matthew Witten.

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Developing a Sense of the Common Good
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THE · INSIDE · WORD

PROPERTY RIGHTS AND RESPONSIBILITIES

Cutting Through The Misunderstanding And Misinformation

Ned Farquhar, Executive Director

The issue is property rights. Vermont and the rest of the nation have been shaken by a new property rights movement that demands the repeal of laws and plans alleged to eliminate or reduce land value. A recent U.S. Supreme Court decision has intensified the debate — and the misinformation surrounding environmental protection and property rights.

It is important for our readers to know that the U.S. Supreme Court has again strongly upheld public rights to plan, zone, and regulate. Unquestionably, language in the decision may result in narrowing of planning and regulation in the future. But in the *Lucas* decision earlier this summer, the Supreme Court did not find that a "taking" had occurred nor that South Carolina's coastal protection laws were unconstitutional.

Reading the property rights press, you'd think the opposite.

For instance, the president of the Vermont Farm Bureau (an honorable organization that VNRC has proudly worked with in the past) issued a statement that was just plain wrong, saying that the Supreme Court had found an unconstitutional taking. Similar inaccuracies appeared in many other property rights groups' statements around the country.

It seems clear that the ideologically-driven superstructure of the national property rights movement was behind a nationwide "spin control" campaign on the Supreme Court decision this summer. Thus VNRC's members and others who generally support fair, farsighted environmental regulation and planning are facing not only the property rights issue itself, but also an orchestrated information program that sometimes steps into the misinformation business.

In Vermont this is hard to take. We are accustomed to working in a familiar yet professional fashion even with our adversaries. We aren't used to the misunderstanding and misinformation that have characterized the property rights issue.

But it's clear that people who want to protect the environment and their communities for the future must take the time to understand the property rights issue — and the property rights movement. Despite our natural inclination to listen and reach out when others question our motives, "we" are not the sheriff of Nottingham, and "they" are most certainly not Robin Hood.

There's a great deal at stake. Vermont's environmental quality, economy, community character, and future depend on the full, fair implementation of laws, including Act 250 and the new town planning law, Act 200. Allowing misinformation — much of it generated by people who have a personal investment or a personal crusade — to control this debate will be deadly to Vermont's environmental future.

Steve Holmes ably served as acting VNRC Executive Director for seven weeks in August and September while my wife Janis and I prepared for and then reacted to the birth of our first child, **Norman Ross Farquhar.** The terms "family values" and "spin control" have taken on new meaning for us! And VNRC's work of encouraging better long-term resource management and use has become all the more important to us. As Janis said to me shortly before Norman's birth, we can hope that he will be around to see the results of VNRC's work in the latter 21st century!

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CURRENT USE

I grew up in Vermont, and, though I no longer reside here, still feel Vermont to be, in many ways, home. I have seen too many people in my area of Massachusetts, which is rural turning to suburban, forced to give up part of their land because of tax problems. I agree with you in applauding the Current Use concept and feel that any serious watering-down of the act would threaten the quality of life for future generations of Vermonters.

Lynn Shay
Hampden, Mass

WATER

Your article, "How Much Water," in the recent issue of *Vermont [Environmental Report]* is pertinent and enlightening. It is encouraging to know that the Environmental Board is on top of the situation — which is becoming more serious and not helped by our lack of sufficient rainfall. I am sure that the ski industry is important financially to Vermont and the owners of the slopes. However, the health of the Vermont eco-system — and Vermonters — should take precedence over skiers. (Obviously I'm an 82-year-old non-skier!)

Keep up the good work and let's hope that nature does its part.

Flora B. Cadwallader
(Mrs. W.L., Jr.)
West Rutland

MISLEADING THE PUBLIC

Last year's VNRC booklet titled "Annual Meeting" (or was it an annual report?) was exceptional in every way.

The writing was clear, pictures great and I am glad you included an annual financial statement.

I am writing a letter to the *Herald* of Randolph in regard to their report of Sen. McClaughry's address at the Republican dinner in Fairlee. He is misleading the public about VNRC.

Is C&S. wholesalers going to receive clearance from Act 250 after all? Their only purpose is profit.

Katherine Hodges
Randolph

Dear Ms. Hodges,

Many thanks for your renewal and your thoughtful note with it.

I am really happy to hear when a VER reader is so satisfied. We try to stimulate and inform, and sometimes we wonder if it is working!

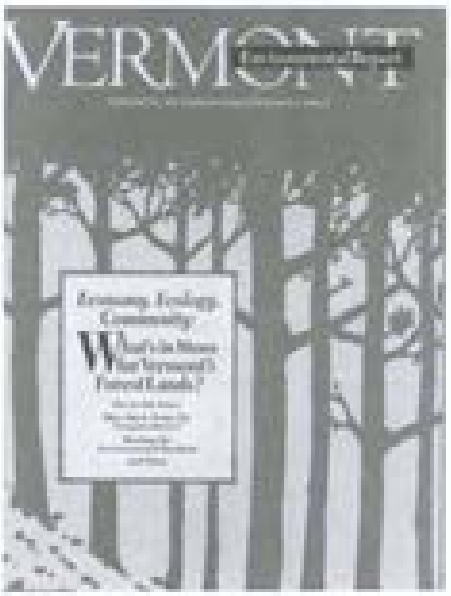
Glad to hear you are writing a letter to the editor of the Herald. I agree that the environment is not a party issue — despite what "some" candidates say. Hope you can also call Sen. Steve Webster with the same message. We've worked with him on Current Use, and I want to be sure he doesn't think of the environment as a party issue.

C & S will probably be opposed by a local citizens' group whom we have worked with.

Hope to meet you soon.

Thank you for writing.

Ned Farquhar
VNRC Executive Director



THE HEART OF THE CHALLENGE

Mollie Beattie's fantastic essay "Thinking Like a Forest" got right to the heart of the land conservation challenge. Wetlands and forests, remote ridges and shorelines — we search for the centering principle she refers to. Land conservation doesn't end with preventing development or other misuse. Responsible stewardship considers ecological values and finds the appropriate scale.

We are pleased to have your permission to reprint excerpts from it in UVLT's fall newsletter, which will focus on resource stewardship. Thank you for an excellent and thought-provoking edition of the *Vermont Environmental Report*.

Jeanne McIntyre
Associate Director,
Upper Valley Land Trust, Norwich

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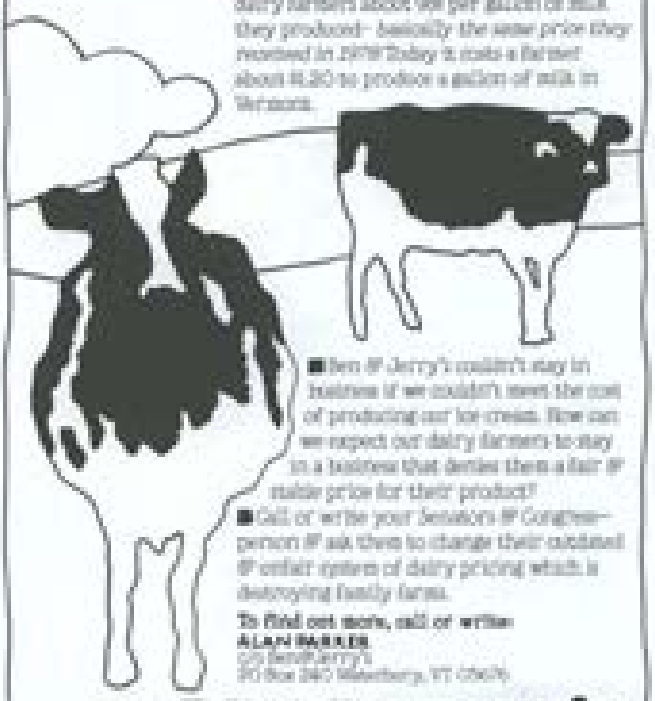
CAN YOU IMAGINE VERMONT WITHOUT IT'S DAIRY FARMS? WE CAN'T.

In the last 20 years, Vermont has lost nearly half of its dairy farms. We will continue to lose our family farms unless the federal dairy pricing problems are changed.

■ Earlier this year, federal policy allowed dairy farmers about 9¢ per gallon of milk they produced – basically the same price they received in 1978! Today it costs a farmer about $1.20 to produce a gallon of milk in Vermont.



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POWER DAMS UP FOR RELICENSING

Review Offers Important Ecological Opportunities

The current federal relicensing review of power dams on the Clyde, Deerfield, Winooski, and Passumpsic rivers has created excitement among advocates for river conservation. They now have a unique opportunity to argue for improved preservation of the ecology of these natural resources.

Matt Huntington, Director of Hydropower Program for the National Principle Rivers Organization, explained the excitement. "1992-93 is the great opportunity to make real strides. It is our first opportunity ever to evaluate how these rivers are managed and the first time since we have learned so much about the environment."

VNRC continues to be extensively involved in this advocacy. (See, *Dam Relicensing Provides Opportunity*, VNRC Bulletin, Summer 1992). VNRC's Water Program Director, Chris Kilian, echoed Huntington's excitement. "These relicenses span 30 to 50 years. It's a once-in-a-lifetime opportunity to upgrade river protection. Many of the rivers involved have been significantly damaged by the existing hydro projects."

Under the Federal Clean Water Act, the Vermont Agency of Natural Resources must certify that a project conforms with state water quality standards before the licensing decision is handed over to the Federal Energy Regulatory Commission. ANR has been holding hearings on the dam relicensing this fall. Kilian has provided extensive comments to the agency concerning the question of the power companies' compliance with water quality standards.

In the past, the dams have been operated in a manner that damages the rivers, according to Kilian. Ponding and release of water for generation of peak power is one of the causes of damage, he explained. Drastic fluctuations in stream flow, including periodic dewatering or "drying up" of river sections, affects the entire aquatic ecosystem. Often, impacts are most severe in bypasses, where water has been diverted out of the natural course of the river for power generation. Power dams, and bypasses, are usually located in gorges or river sections with steep gradients. As a result, bypass sections often contain critical aquatic habitat with deep, aerated pools, cascades, and rapids. Here, in its natural state, high quality river habitat provides a refuge from the heat of summer or from the immobilizing effects of winter ice for species such as trout and salmon.

In many cases, Kilian has recommended a "run of the river" mode of operation for the dams. This means that none of the river is held back for generation of power during peak periods of usage. However, run-of-river operation does not solve the problem of adequate

Continued next page

RAILROADING, VERMONT STYLE

Is This The Little Council That Could?

Early this winter Vermont's Rail Council will be holding public meetings in several towns around Vermont in its effort to investigate ways that Vermont could expand its railroad network. Created by Gov. Howard Dean early last spring, the council includes about 20 Vermonters who work in the rail business or are interested in rail issues.

VNRC's Executive Director Ned Farquhar, who is a member of the council, explained his hopes for the group. "Gov. Dean understands that the state's growing dependence on highways is not good for the environment, communities, and many peoples' lifestyles. The Rail Council might be able to lay out some positive alternatives for state investment in rails instead of roads."

New federal legislation authorizing Interstate highway funding for the next five years also included broadly expanded language for funding highway alternatives (see *Transportation Efficiency*, Vermont Environmental Report, Spring 1992). Farquhar hopes that the Rail Council will help the Vermont Agency of Transportation and the Dean administration identify sensible investments in the railroads that would reflect changing federal funding priorities.

"The council has approved vast amounts of expensive research into rail alternatives, but we have not yet met with the governor and we have only begun to identify priority areas for expansion," noted Farquhar. Initial priorities include freight network enhancement, possibly in combination with economic development investment near rail centers; out-of-state tourism by rail; and commuter rail development, particularly serving Burlington from satellite communities. ***PE/SR***

Continued from previous page

flows in river bypasses. As a result, Kilian also has advocated for adequate "base flows" to be maintained in the bypasses, a water level sufficient to provide natural habitat to support a functioning aquatic ecosystem. VNRC will be pushing, along with local, regional, and national groups, for overall improvements in protection of rivers.

In some cases the utilities using Vermont's rivers have already agreed to make improvements for recreation and natural values. However, VNRC hopes for further improvements in river protection, particularly on the Deerfield, Clyde, and Passumpsic rivers.

On the Clyde, Citizens Utilities, a Connecticut-based utility that operates nationally, has refused to undertake critical flow studies for the bypasses as requested by the state and environmentalists. This refusal could result in denial of the utility's certification. Citizens has also refused to alter the operation of the Newport No. 11 and Newport Nos. 1,2,3 projects from a peaking power mode. Both of these projects have been linked to destruction of the blue ribbon salmon run into the Clyde from Lake Memphremagog.

On the Passumpsic, Central Vermont Public Service (CVPS) has agreed to operate its dams in run-of-river mode. But, the utility has refused to undertake necessary flow studies and to provide adequate flows in the critically important bypasses. On the Passumpsic, bypasses provide some of the only remaining high-quality habitat. VNRC remains concerned that unless bypass flows are increased critical habitat will not be restored.

In southern Vermont, the Deerfield River is of great importance to fishermen and recreationists alike. The New England Power Corp. operates several projects that are currently undergoing relicensing, including one which bypasses 5 miles of natural river. VNRC hopes for substantial improvements in bypass flows and in reservoir management so that, in Kilian's words, "the river ecosystems will be restored for future generations of Vermonters." ***SR/CK***

New Transportation Coalition Forms

Must Only Roads Connect Points A and B?

Transportation needs link all of New England, as any Vermonter who has negotiated Boston traffic to get to crowded Logan Airport understands. Reflecting this common concern, a fledgling advocacy group supporting environmentally-conscious public transportation throughout New England has formed.

Peg Elmer, VNRC's Land Use Program Director, describes the advocacy as "marking a real turning point for transportation engineers in government. Departments of transportation are learning that they need to consult with the environmental and business communities in their planning."

Reinforcing the process is federal transportation legislation passed last year requiring much greater public input in planning. As a result of this legislation, the New England Governors' Conference took on transportation as a major issue and is applying for federal funding to create a "regional program of cooperation" in transportation planning among New England states. When it happens, "VNRC will be there as members of the NETCoal (New England Transportation Coalition)," promised Elmer.

The planning of major transportation improvements around Boston was the catalyst for this advocacy. Explained Elmer, "Boston's 'Central Artery,' the chunk of I-93 meant to whisk traffic through the center of the city, is one of the most congested pieces of this

country's Interstate highway system. Mass-transportation engineers' response to this problem was to design an enlarged and complex underground highway system to accommodate ever-larger numbers of automobiles. A coalition of environmental, business, and social interests in the Boston area negotiated a redesign of the plans, however. The plans now aim to reduce reliance on single-occupancy automobile use. One outcome of this approach has been vigorous support for re-instituting rail service between Boston and Portland, Maine."

The New England Regional Transportation coalition held a meeting in Boston in August to broaden the membership to include interests from all the New England states. Elmer outlined the goals of the Coalition. "We want to make sure the New England Governors' Conference does not move ahead without us. We want to build recognition within the transportation bureaucracy that public participation means more than just permitting public comment after the program is set. We don't want to just eat the cake —we need to be involved in developing the recipe."

Jeff Squires, Director of Planning for the Vermont Agency of Transportation, agreed with the need to involve advocates in transportation planning. He explained, "Both within the state and throughout the region it is important that a wide range of perspectives are brought to bear in making transportation investment decisions. The agency has established a working group of which VNRC is a part, and we will continue to look to that working group to guide our participation in the New England study as well as in our planning efforts within Vermont." **SR/PE**

Stratton Decision Due Soon

Size, Water Quality, Are At Issue

After nearly a year, the Stratton Sunbowl Act 250 hearings ended and are now in recess. VNRC has filed findings of fact and conclusions of law recommending that the project be denied. This testimony has been based on the Stratton Corp.'s failure to demonstrate sufficient water supply for the entire project, on the adverse impacts on the water quality of Kidder Brook as a Class A watershed, and on the project's lack of conformance with the Stratton and Winhall town plans and the Windham regional plan.

The Agency of Natural Resources has granted a draft StormWater Discharge Permit for only the golf course and about 60 percent of the 408 units that Stratton had requested. The agency claimed that the project as proposed would not meet the rigid standards of a Class A watershed.

However, VNRC has maintained that even the golf course section located in the Class A watershed pose unnecessary risks of pollution and should not be permitted. Key witnesses Steve Revell, Jeff Parsons, and Kerry Woods demonstrated how, in a fragile upland environment, fertilizers and pesticides could enter the surface and ground water and adversely affect aquatic biota.

Steve Holmes, VNRC's Deputy Director for Policy and Administration, explained the urgency behind VNRC's position. "Throughout the proceedings we have raised concerns about this project's potential impact on Kidder Brook. This is the first project of this magnitude to be contemplated in a pristine, Class A watershed, and the risks are simply too high. This would be a big experiment, and, if it were to fail, I'm afraid the safeguards which have been proposed would be too little and too late to stop the potential for long-term damage to the watershed," said Holmes.

The final decision on the Sunbowl now lies in the hands of the District Environmental Commission, which is expected to make a decision soon. **SR/SB**

ANCIENT FORESTS LEGISLATION SUPPORTED

Management Of An Irreplaceable Resource At Stake

VNRC has joined with other Vermont environmental groups to support legislation introduced by Sens. Patrick Leahy, D-Vt., and Brock Adams, D-Wash., to conserve the last remaining stands of ancient forests in the Pacific Northwest. The bill, titled the Rural Development and Ancient Forest Conservation Act, culminates years of national debate. VNRC has been involved in this debate, working with other environmental groups to urge Leahy to help find a solution to the cutting of these forests.

Explained Jim Shallow, Wildlife and Public Lands Program Director, "The loss of these forests is equivalent to losing the Grand Canyon. Yet one reason a solution has not been found is that senators outside the region have been unwilling to get involved in what is often seen as a regional issue impacting local timber economies."

This bill addresses both the conservation of the forest and the need to help the timber-dependent communities adapt to a changing economy. "The beauty of this bill is that through creating old-growth timber reserves the resource is conserved, and at the same time programs will be created which will retrain workers or employ them to help restore the ecosystem. The current system of cutting is a short-term package that will not exist when the jobs run out as the region's timber reserve is depleted," said National Audubon's Vermont State Director, Steve Young.

While the ancient forests of the Pacific Northwest may seem remote, Shallow predicted the bill's passage would benefit Vermont. "This bill will help restore balance to the management of public land. Its redirection in philosophy will no doubt help the Forest Service in Vermont apply an ecosystems approach to the management of the Green Mountain National Forest." In addition, Shallow pointed out that the jobs package could yield some useful approaches for strengthening Vermont's timber economy in conjunction with conserving the forest.

Janice Miano of Pittsford, grassroots coordinator for the National Audubon Society International, brings this issue of benefit down to a very personal level. She described a friend's remission from ovarian cancer after the taking of taxol, a drug refined from the bark of the Pacific Yew, one of the endangered trees. Writes Miano, "The fight to protect America's last remaining ancient forests in the Pacific Northwest is the most important health-related issue facing Congress. It will profoundly affect women and the health care options available to them." **SRJS**

NORTHERN FORESTS UPDATE

Environmental Commitment In A "New" Area

Vermont's "on-site" presence in the Northern Forest Protection Project was launched May 1 with Brendan J. Whittaker joining VNRC full-time as Northern Forest Project Coordinator. Based for now in a home office, Whittaker has been on the road making contacts throughout the northern forests areas in Essex, Caledonia, Orleans, Franklin, and Lamoille counties.

Whittaker has lived in Essex County for 32 years, where his wife, Dorothy, has a vegetable farm. He is currently chairman of the Brunswick Board of Selectmen. He has also been on the boards of the Northeastern Vermont Development Association and The Society for the Protection of New Hampshire Forests and has been a Tree Farm Re-inspection volunteer. A former Agency of Natural Resources secretary, he is one of Vermont's four appointees on the Northern Forest Council.

"The Northeast Kingdom is relatively new territory for VNRC and for conservation organizations generally," said Whittaker. "There are few active members." He hopes to "establish a network of folk who really care about the future of the area, economically as well as environmentally and who understand how these issues are linked."

Whittaker is also currently acting as staff support to a gathering of Vermont natural resource and land conservation groups. Members are discussing how best to communicate the conservation message to the wider public. Whittaker notes that "during a time of recession such as we've been undergoing, there are a few strident calls blaming the high environmental standards of Vermont for the economic slowdown. But most people do not agree and understand that part of Vermont's real wealth is our well-protected resources put to wise and intelligent use. That has been the Vermont tradition, mainly, and we are seeking to support the majority out there who feel that way." **SR/BW**

WORCESTER STUDY APPLAUDED

Follow-Up Includes Community Meetings

The Worcester Range Study, published last year by VNRC, has generated much positive feedback from landowners and people in industry, according to VNRC's Forests, Wildlife, and Public Lands Program Director, Jim Shallow. The report, explained Shallow, will be very useful in talking about the future of the Worcester Range area, helping people focus on why this resource is important in providing jobs, recreation, and wildlife habitat.

As a follow-up to the study, Shallow is organizing neighborhood meetings with people in the Worcester Mountains area. The purposes of these meetings will be to introduce people to management opportunities, build support for the Forest Legacy Program, and "make people generally more aware of the forest, its economy, and their relationship to it," Shallow said. He hopes also to build grassroots support for the recommendations in the study.

Shallow will also be meeting with state agencies and others to implement strategies for following up on the study's recommendations. Among the recommendations are the following:

- The Department of Development and Community Affairs work with the Department of Forests, Parks, and Recreation to identify markets and build the forest sector of the economy.
- Vermonters look into use of wood more as an energy source.
- Vermonters look to property tax reform as a solution for problems that arise when forest land is taxed at a rate higher than its ability to produce income.

According to the Worcester Range Study, a primary obstacle to the forest industry is the rising cost of providing workers with health care, a cost which threatens to drive some companies out of business. Shallow hopes that by bringing this problem to the attention of health care authorities solutions can ultimately be found that benefit industries. **SR/JS**

Commission Views Property Tax Reform

It's Got A Lot To Do With The Environment

VNRC has been tracking the progress of the Governor's Commission on Educational and Municipal Financing Reform. "Given the title of this commission one may not think it has much to do with the environment, but its mission is to fix the inherently flawed property tax system, which has been one of the biggest factors leading to fragmentation of forests and open spaces," said Jim Shallow, Forests, Wildlife, and Public Lands Director.

The negative effects of the property tax system have been recognized for years. In order to mitigate those effects Vermont has tinkered with the prevailing system by creating programs of property tax relief such as current use. However, Vermont has reached the point where the state cannot afford the cost of these programs. Many feel that what is needed is a fundamental change in the property tax system.

One of those people is Deb Brighton, a tax expert and author of the VNRC study "The Tax Base and the Tax Bill." As a member of the blue ribbon commission, Brighton has argued for structural changes in the way education is funded. In order to make these changes she believes society has to agree on principles on which to build a tax system. It is important to recognize that we are taxing people, not land, she said, and that we are raising taxes to pay for serving people, not land. The basic principles of a fair taxation system are, according to Brighton:

1. Those with the greatest ability to pay should pay the most. 2. People in equal situations should be taxed equally. 3. The tax system should not encourage behavior which conflicts with state goals.

The Committee has begun taking testimony on various alternative systems, and the next step will be, in Shallow's words, to "mix and match" principles with the proposals and "see what they come up with." Shallow supports Brighton's three principles.

Gov. Howard Dean charged the commission to come up with something the Legislature could act on in January. "Given its charge, the commission seems to be working in the right direction: first formulating the principles and then building on them," Shallow said.

"Reform of this magnitude will take time, however," he cautioned. He urged, in the interim, continued support for funding for the current use program. "This is particularly important at a time when budget deficits suggest that attempts will be made to cut funding for current use. This funding is vital in providing some measure of tax equity for owners of productive undeveloped land." **SRJS**

Wither The Trail?

Decision Due Soon On Appalachian's Path

Late in the year the National Park Service will make its final decision on the location of an 8-mile stretch of the Appalachian Trail through the Killington/Pico area.

The National Park Service's favoring of a plan to move the existing corridor has been challenged by several environmental groups. Under this plan, Alternative 5 of the eight alternatives considered by the NPS, the Pico section of the trail would be relocated about 1 mile west of the existing trail. All permitted ski development in the area would be avoided and the existing route would still be open for hiking under an easement from Pico.

VNRC is advocating for another plan, however, Alternative 3, and has been joined by the Conservation Law Foundation, The Sierra Club, The Audubon Council, and the regional U.S. Environmental Protection Agency office.

Under Alternative 3, the NPS would acquire all interest in lands along the existing trail, would remove all ski developments within the established trail corridor, and would not allow any new developments across the trail or within the corridor.

The Sierra Club supports Alternative 3 as preserving the "highest quality hiking experience" while also providing "the highest protection for wildlife and the environment." This alternative "doesn't disrupt any other land, as would all of the other alternatives," explained Steve Holmes, VNRC's Deputy Director for Policy. Alternative 3 "would have the fewest impacts on biological and physical resources within the trail corridor. No lift crossings or runs would affect streams, wetlands, or springs or disturb soils or vegetation," wrote Emily Bateson and Jeanne Sole of the Conservation Law Foundation.

Alternative 5, however, remains the choice of the Appalachian Trail Conference and the Green Mountain Club. Holmes said that VNRC could support the relocation under Alternative 5 if certain conditions were met:

- Permanent control of the 1,000-foot-wide corridor through the entire Pico/Killington study area.
- Preservation of access to the existing "historic" trail between Sherburne Pass and Pico.
- No wetlands lost nor their functions compromised as a result of construction.
- Avoidance of use of roads, jeep trails, etc., in order to create as wild and natural a hiking experience as can be achieved.
- No adverse environmental impacts associated with development scenarios not identified in the Draft Environmental Impact Statement.

VNRC has urged the NPS, in making its final decision on the environmental impact statement later this year, to evaluate the impacts of new development proposals that have evolved. **SRMF**

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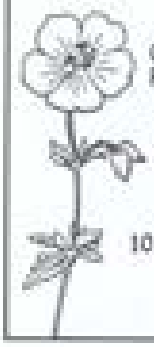

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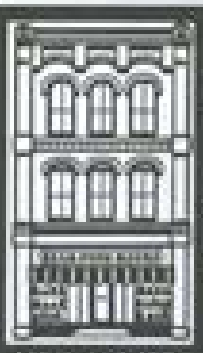

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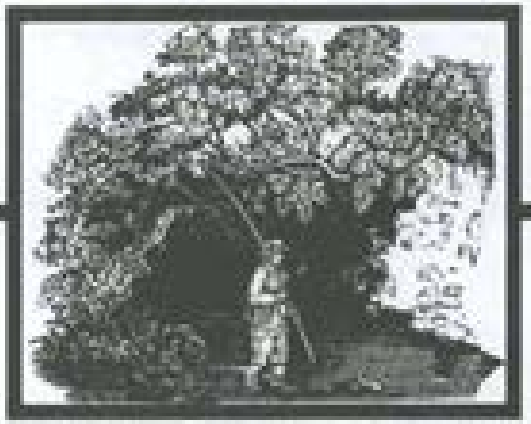

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The Evolution of the Property Rights Movement

Have The Green Mountain Boys Been Supplanted By Regulars In Suits?

by Matthew Witten

When developer and Citizens for Property Rights board member J. Paul Preseault needed assistance in a long-fought battle with the city of Burlington over ownership of an abandoned railroad bed that ran through his property, the New England Legal Foundation of Boston stepped in.

When a network of Vermont banks and industrial parks sought to intervene in a state Environmental Board ruling denying a permit to a proposed Wal-Mart development in Williston, the NELF popped up again — this time filing a friend-of-the-court brief with the Vermont Supreme Court, where an appeal of the board decision will be heard. NELF argues the "property rights" of the developer are being "revoked."

That the notion of "property rights" protection has arisen in both cases is not surprising. The Vermont press has run many stories recently on the effort, based largely in the Northeast Kingdom, to repeal planning law Act 200 and alter development control law Act 250. At least two groups — Citizens for Property

Continued next page

Rights and Landowners United — have formed around the banner of securing individual property owners' rights from encroaching public regulation.

What is perhaps surprising, though, is the surfacing of a Boston-based legal group in Vermont property affairs. Reports have generally portrayed the Vermont "property rights" movement as a down-home affair, with gatherings in well-known Vermont meeting places and activities based around Vermont legislative or gubernatorial politics. Strength has been portrayed as coming from the same stock that filled the ranks of the 18th-century Green Mountain Boys — sturdy farmers from Vermont's hills.

Research by VNRC has shown the reality may not match the image. The property rights movement has not reached the level of public support it has sought since an organizational meeting in November 1989 in Morrisville. Indeed, any grassroots movement seems to be fizzling: a former Citizens for Property Rights president, Jack Simons, came in third in the September Republican primary in a field of three candidates vying for an Orleans County House seat. And the individual who many believe has used the property rights issue to further his own political career — John McClaughry — faced stiff opposition this fall in his race against incumbent Gov. Howard Dean.

However, the movement's leaders may have attracted the intervention in Vermont of at least one conservative out-of-state player, NELF, which has ties through its board members to major regional insurance, utility, and defense interests. And, just as some individual Vermont politicians may have sought to gain from the movement, some individual Vermont businessmen seem poised to profit privately from the groups' credo of exploitation rather than stewardship of the land.

Roots of the Property Rights Movement

The evolution of the property rights message in Vermont does not seem to have followed that of philosophically related groups in the West. There, the so-called "wise use" movement has developed from timber, mineral, and recreation interests who want public land opened for greater development and relaxed government regulation. Often, powerful national corporations spearhead the movement.

In Vermont, the property rights movement seems hit-or-miss. Opposition to public regulation and development control is nothing new to the state; it was present when Act 250 was passed in 1970, and helped kill the land-use planning component of that law. The opposition was not sustained as the regulatory aspects of Act 250 took hold, however, and slowly the law became an accepted — and, largely, appreciated — part of doing business in Vermont.

Not surprisingly, the opposition surfaced again with the passage of Act 200 in 1988. The Morrisville meeting in 1989 was to be the kickoff for doing to Act 200 what had been done previously to statewide land-use planning. Ignoring the control given to communities and regions through the Act 200 planning process, the property rights groups tried moving town-by-town to show opposition to the law, and to convince individual landholders to restrict access to their land. Their most public feud — and biggest victory — came with the Vermont Association of Snow Travelers, when they convinced the snowmobilers to join in their crusade by threatening to close their trails.

Then the momentum slowed. Although some compliance deadlines were delayed in response to concern about the pace of Act 200's implementation, an effort to gut the law failed in the 1992 Legislature. The groups have had little impact on the fall elections, and "Repeal Act 200" signs are yellowing on fence posts. An attempted alliance with the Vermont Timber Truckers Association (now called the Vermont Forest Products Association), the Vermont Republican Assembly, and VAST has fallen apart, according to a source who was involved in the coalition.

Even former Citizens for Property Rights president Jack Simons admits his group has achieved no "clear-cut victory." He says, "We've helped overcome a lot of inertia out there," claiming his group and Landowners United "have got businesses and industries thinking along our lines. It's not a clear-cut victory but we've changed the agenda."

The reference encompasses the informal relationship NELF has begun developing with businesses and large property owners in the state. Simons reasons a group such as NELF can fight the property rights battle better and with more resources than grassroots organizations. The ultimate direction of the property rights advocates may be assistance from groups beyond Vermont's borders.

"The main thing to think about," Simons says, "is that the people making a pitch for individual property rights are not going to go away. They are becoming more sophisticated and better financed."

The message: The fight will go on, with or without us. Vermont's future may be charted by those with few direct ties to the state, other than general business ties with those who stand to profit most from less rigorous oversight of development plans.

Property Rights for Private Profit?

Presault of Burlington and Doug Nelson of Derby are two examples of individuals active in the property rights movement who stand to gain personally if they can rally others to the property rights standard.

Presault is a well-known landowner and developer. In the 1970s, he pushed one of his projects, an apartment building off North Avenue in Burlington, before the Vermont Supreme Court four times to win the permits he

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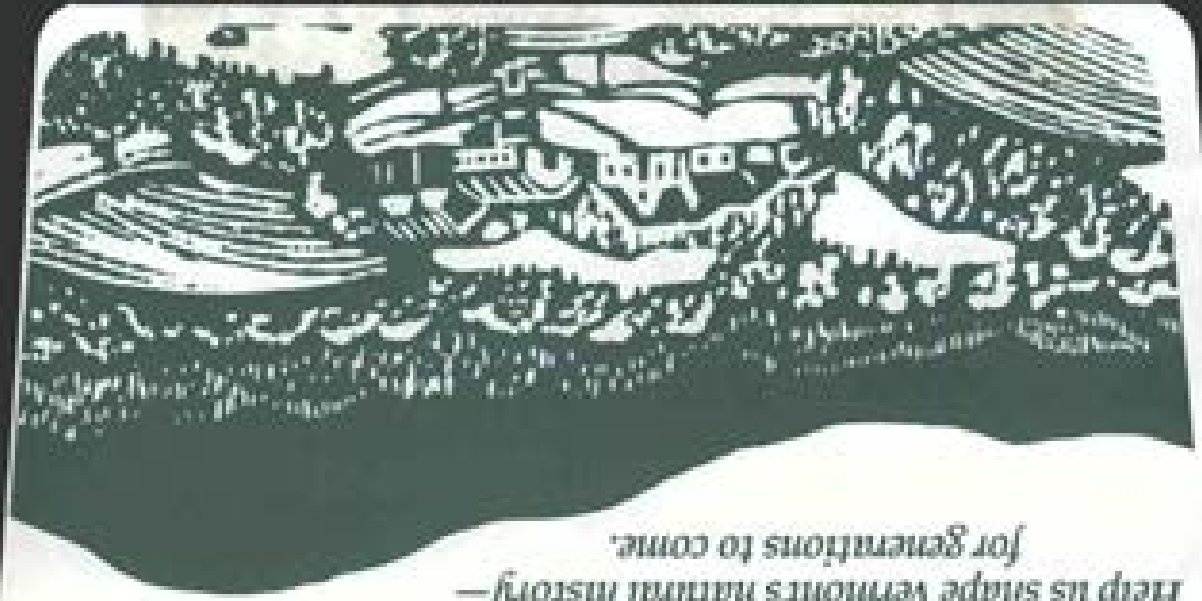

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needed. Neighbors were "appalled at the density of residential use" Presault proposed, said Joe Frank, the attorney who unsuccessfully represented the neighbors.

The railroad bed case might require the same staying power, but the stakes are higher, according to NELF attorney Patrick Hanlin. "There appear to be thousands of people in the U.S. affected by old right-of-ways," he said. The case has already made it to the U.S. Supreme Court, which upheld the land's continued public use as a bike path; but the U.S. Claims Court has ruled Presault owned the land, and therefore might be entitled to compensation. Should the court rule he is, the financial consequences would be significant.

Landowners United member Nelson has, in the last four years, purchased six farms in four Orleans County towns for a total of $1.7 million. A dairy farmer, he owns nearly 5,000 head of cattle. "I hope [my purchases] were not out of speculation," he says. But he notes the price for the land was high, and says that "if milk prices recede, I'll have alternatives" for developing the land.

What might those alternatives be? Some of Nelson's land is along Route 5 near I-91 in Derby, where a 100,000-square foot complex with a department store and a supermarket, plus a freestanding bank and restaurant, has been proposed.

"A lot of farmers didn't buy their land just for agriculture," he says. "A farmer is strapped when milk prices go down; if you can only finance your land for prime ag[riculture], you're sunk." The reference is to the protection Act 250 awards "primary agricultural soils," Nelson's chief gripe with Vermont land-use laws.

Citizens for Property Rights' Simons admits self-interest may be a motivating factor for specific individuals in the movement. "In every emotional cause there are people who take advantage of it for their own purposes," he says.

A New Theme: Property Rights Are Economic Rights

General business interests, rather than self-interests, seem to be the reason the network of state banks and industrial parks has turned to NELF to fight the state Environmental Board's overturning of an "umbrella permit" for the Tafts Corners Commercial Park. The commercial park developers wanted to use the permit to build a large Wal-Mart department store, a use opponents said was not allowed by the original permit. The local District Environmental Commission must now review the application.

Bankers say the ruling puts into jeopardy any investment in an industrial park. "We could get money into a project only to have a permit revoked. We'd have a partially completed development in a bayfield," Merchants Bank President Dudley Davis told the *Burlington Free Press* in September. Sixty-two percent of Vermont's industrial parks have umbrella permits.

Greater Burlington Industrial Corp. President C. Harry Behney told the *Free Press* he is mainly concerned about job creation. "We worry someone may use . . . (the board's ruling) as an example to throw out our permit. Our job is providing jobs for people. We have to have the resources, the tools, to do that. It's a detriment to job creation and development."

NELF's legal director, Stephen Ostrach, claims his group helped to form the coalition of banks and development interests fighting the Environmental Board ruling. He told the *Free Press* the case might be the most significant land-use case since Act 250's passage.

Behney says GBIC sought the help of NELF because the Boston organization provides free, qualified counsel. "I don't see it as much different from the Conservation Law Foundation," he added.

The CLF is a national conservation organization providing nonprofit groups with legal assistance during public review of issues affecting the environment. There is a Vermont office based in Montpelier.

NELF's 1991 annual report shows it receives 68 percent of its funds from corporations. Board members represent major firms such as Beebok, Polaroid, New England Electric, John Hancock Insurance, and Raytheon.

Even Bigger Money May Be Ahead

VNRC Executive Director Ned Farquhar tries to put the evolution of the property rights movement into perspective: "The movement started with a constitutional theme that has exhausted itself," he says. "Now the movement is focused on jobs and the economy, and these themes work well for the business community."

OPINIO
Don't gut Act 200
W

Stephen Holmes, VNRC Deputy Director for Policy who filled in as Executive Director when Farquhar was on leave this summer and fall, noted ominously the announcement in late September of the formation of the "Vermont Environmental Council." The goal of its 100 business members and 5,000 non-business members is to streamline Act 250; it hopes to have a lobbying war chest of one-quarter million dollars when the Legislature convenes in January.

"Traditionally, money doesn't buy votes at the Statehouse," says Holmes. "But money does buy access to politicians, and access can influence votes. It would be hard to downplay the significance of that amount of money rolling around Montpelier. Vermont's environment might be in for a rough winter."

Matthew Witten of Huntington is a freelance writer specializing in environmental issues.

The Rights & Responsibilities Of Land Ownership

Developing A Sense Of The Common Good

Brendan J. Whittaker

This article on rights and responsibilities of owning land begins with a disclaimer: by definition, free, private landowners do not need directives on what to do with property. That is our own business. We are free to use our property as we wish, subject to the pertinent laws and regulations governing property use for our region and area.

But what of these laws and regulations and their foisting of, not only "responsibilities," but mandates on us? In a time of recession, are they not a luxury impeding economic development? Why should an individual, simply by virtue of owning land, be responsible for the common good?

This answer lies in human society's deepest intuition: ultimately we all depend on a healthy earth for life. By virtue of owning a piece of this earth, we all find ourselves in the position of being, whether we chose to or not, in a sense custodians of the common good. Beyond laws, beyond regulations, this role of stewardship and the "rights and responsibilities" that go with it simply is ours. It goes with the land.

Like many basic truths, this one has ancient documentation:

> *. . . Your land must not be sold on a permanent basis because you do not own it; it belongs to God, and you are like foreigners who are allowed to make use of it.*
>
> – Leviticus 25:23, *Good News Bible*

It might seem to a biblical literalist that we ought to do away with warranty deeds for our land. (Indeed, Native Americans have been reminding us for a long time that their tradition is not to "own" land.) But the overriding idea of the passage is this: we are not here forever. We all die eventually, and the land remains. This thought leads directly to the first tenet of ownership, a rural community standard, which happens to be very old, very simple, and very Vermont: "A piece of land ought to be turned over to the next generation in as good, or better, condition than when it was acquired."

Many times in our American history this responsibility of stewardship was ignored. "Move in, use it up, move on" (usually further West) was the practice. There was always more land out ahead. But some did practice stewardship: the Amish of Pennsylvania and the Midwest are a well-known example. Right here in New England there are operating farms that have been in existence, some of them owned by the same family, since well before the American Revolution. Still productive and well-managed, these places are outstanding visible signs of an unbroken chain of excellent land stewardship down through generations.

Just imagine if this "turn it over in as good or better condition," a standard quite common in Vermont, had been universally applied in our country since European settlement. Imagine soil erosion at a minimum, the soil capital deeper and healthier than ever, and forests productive and well-managed everywhere. Imagine strip mines, where they were necessary, swiftly and completely restored with trees or grasses, and water and air used for human purposes and returned undegraded.

"Good or better condition" is, of course, subject to interpretation in its specifics; but there is, especially among rural folk, a general consensus of what is right land use and what is wanton exploitation. I won't easily forget a rural woman resident of a nearby state who was forced to watch a neighbor strip good river bottom loam from his fields to sell to suburban landscapers downstate. As she saw the gravelly waste left behind in desolate strips, she mourned the 10,000 years or so of loam deposits put there by a deliberate nature, soils fertile, capable of good crops forever with reasonable care and husbandry. Though it wasn't her land and, as she said, "really none of my business," she grieved. "I checked," she said. "The state and our town have no laws governing this. I know it's my neighbor's right to be stripping off the soil, but somehow it just doesn't seem right."

> *A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.*
>
> – Aldo Leopold, *A Sand County Almanac*

Leopold, the famous ecologist and conservationist, introduced those ideas with still more of a challenge to landowners: "We need," he wrote, "to quit thinking about decent land-use as solely an economic problem. Examine each question in terms of what is ethically and aesthetically right,

as well as what is economically expedient."

The next logical step then, if we determine to use our land "rightly," is to do the right things.

How do we know how to "preserve . . . the biotic community?" Here, a modification of the Hippocratic Oath of graduate physicians is helpful. "First, do no harm." With land stewardship, as with human healing, a thorough knowledge of the subject is needed. Pope's dictum to "Know thyself" turns to "Know your land." The earth is tough and resilient. After all, it has suffered untold abuse for centuries yet still feeds and clothes most of us. How much more it would prosper with intelligent care and management! "Know your land" parallels the Chinese peasant proverb: "The best manure for the soil is the footprints of the farmer." The walking about, observing, studying, always learning from the land, is what benefits the land the most.

This leads to one of the great rewards of land ownership — the growing knowledge of and bonding with a piece of land, sometimes over a lifetime. Geology, soil science, agronomy, water resource science, climatology, forestry, entomology, crop science, all these and many other disciplines provide deep insights to the owner of even the smallest plot of land. We have Extension Service networks in all rural areas, foresters, and other consultants to help chart the best uses according to our desires as owners. Beyond all this help from the "outside," however, there is no substitute for the owner, over time, growing to simply love her, or his, land. And beyond this deep bonding with the land over a lifetime is another satisfaction: the knowledge that, as we plan our estates and the final disposition of our properties, we have been good stewards, that our small gift to posterity is a parcel of productive, healthy land.

> *But in this world nothing can be said to be certain except death and taxes.*
>
> — Benjamin Franklin, letter to Jean Baptiste Le Roy, November 1790

Besides the privileges of land ownership, there are some problems. Leading the list of these for Vermonters at present is taxes. John Hennessy, current chair of the Vermont Timberland Owners' Association, the statewide forest landowner group whose membership ranges from the largest paper companies in the Northeast Kingdom to small-lot owners all over the state, has said, "Forest land taxes are the biggest obstacle we have, not only to good management of forests, but to the very retention of the land." Put simply, all over Vermont at the present time, the value of timber grown on a given forested acre, plus other amenities such as view, recreation, even the joy of simply owning some land, all these values are outstripped, year by year, by the dollars demanded by towns from those same areas in property tax payments. The problem is skyrocketing.

The present land tax system originated back when most Americans were farmers, and when land was then a truer measure by far of a family's wealth than it is today. Now, in places such as Vermont, the truth is stark. The property tax system has broken down. It doesn't work. It must be changed.

A clear consensus on this has already emerged from the Four-State Northern Forest Council brought into being through the leadership of Sen. Patrick Leahy (D-Vt.) and New Hampshire's Warren Rudman. Across the north country, in New York state, Vermont, New Hampshire, and Maine, forest land taxes are seen as one of the major issues facing the council for recommendation of action to the four governors and to Congress. Peter Meyer, representing Vermont landowners on the council, heads the Land Taxation Subcommittee. He has been diligent and persistent in pressing the tax issue in the council's deliberations.

Similar to the problems forest owners face are the problems of dairy farm owners at tax time. When milk prices are low, high land taxes are an almost overwhelming obstacle against, not just making a profit, but surviving.

The question presents itself starkly: Why should an acre of forest or farmland bear the major share of the cost of educating our children? Is this a logical connection between revenue source and the universally agreed-upon goal of "the best we can do" for all Vermont kids in their schooling?

Vermont, in common with several other states, does have in place two statutory attempts at relief. A tax "circuit-breaker" gives rebates to those who pay more than 5 percent of their income for their primary dwelling, plus two acres of homestead. And there is a "current use" forest and farmland tax subsidy plan from the state. Many thousands of landowners have taken advantage of this plan. Undoubtedly this has helped immensely; but, sadly, due to current severe fiscal restraints, Montpelier, last spring, placed a moratorium on new sign-ups to the current use program and also lowered the payment ratio to towns. In the face of all this, the burden on landowners continues to grow.

Two blue ribbon study commissions are addressing the questions of Vermont's fiscal future, one concerned with funding for education and the other with property taxes. The tax group is scheduled to report to Gov. Howard Dean in December of this year. Let us all hope, landowner and non-landowner, hiker and snowmobiler, farmer and woodsman, businessman and teacher, and all concerned with quality education of the next generation, that they find a solution. It will be most important for landowners to take the responsibility for making their voices heard as the public policy debate begins to sharpen in the months to come. Deb Brighton of Salisbury, a member of the Tax Study Commission and well-experienced in the tax issue, puts the challenge to all of us succinctly: "We are now taxing land, acres," she says. "We need to figure out how to change that to fairly tax *people*, for, after all, it is people for whom governments at all levels need to raise the money!"

> *. . . every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proper-*

tion toward the expense of that protection . . . but no part of any person's property can be justly taken from him, or applied to public uses without his own consent or that of the representative body of the freemen . . . and previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the Legislature to be of more service to community than the money would be if not collected.

– Vermont Constitution, Article 9

It appears today in Vermont that few would argue with one of the purposes of taxes, education of our children; rather, it is the source of the tax in our rural areas that many think unfair, with forest and agricultural land made to bear so heavy a burden. Not only landowners but all who enjoy and find solace in Vermont's open spaces should be concerned about this tax burden and press for a fair and equitable solution. This solution must include major changes and reforms in the way Vermonters tax their land.

No man is an island, entire of itself; every man is a piece of the Continent, a part of the main; if a clod be washed away in the Sea, Europe is less . . . .

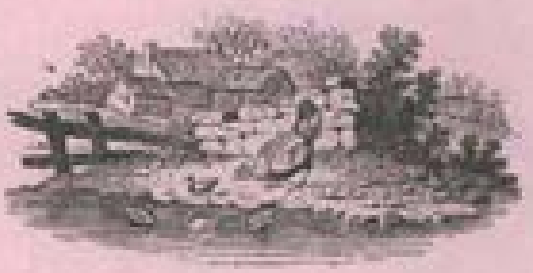
– John Donne, 1624, *Devotions*

Despite the sometimes overwhelming burdens, managing land well can be a joy.

For those of us who see land as something more than just a commodity to be bought and sold, who see it as a trust, it can also be an opportunity to shape the future. Some full-time farmers, approaching retirement age and without family interested in taking over, have been linking up with younger people eager to get into farming. Woods owners have sold or donated their holdings to public agencies or private conservation groups as well as passing them on to their own families. The use of easements, the sale or retention of certain of the rights that go with property ownership, is increasing. This promises to become a major conservation strategy of the future, helping to solve the problems perceived when it is believed that the "government owns too much land."

The above developments suggest a growing awareness of the old truth that the lands we own are not held in isolation even though they may be in the deep forest. To paraphrase Donne, "No parcel of land is an entity unto itself" (even if it is an island). "Everything is connected to everything else," as the popular conservation aphorism puts it, and every parcel of land "fits" into a community.

Our ownership and management of our lands is the sign of how we wish to fit into that community, the whole of which makes up, in the words of the Anglican *Book of Common Prayer*, "This fragile earth, our Island Home."



A Family Covenant For Conservation

The following is an example of a family covenant, or agreement, drawn up to guide the future of a not-too-large Vermont parcel of forest and agricultural land currently held by a wife and husband. Their will, drawn up by an attorney and filed at their county probate court, simply specifies that their land holdings will go to their three children. The family as a whole does not wish to see the farm broken up, and so a separate document, this "family land covenant," is made to accomplish that goal. This is just one example. There would be an infinite number of variations and degrees of sophistication to such agreements.

The lands herein, in this ownership, are held for the following objectives:

1. To secure the rewards of land ownership and stewardship. To strive continually to improve land productivity. To, at the appropriate time, transfer ownership with lands and forest in better, more productive condition than at the time of acquisition. To also, at the time of any future transfer of ownership, cause these policies and objectives to run in perpetuity with the deed.
2. To provide forest-based outdoor recreation and human renewal opportunities while not degrading land productivity. The most important feature of this objective is the provision of pleasing views and aesthetically rewarding surroundings.
3. To provide a sustained yield of wood. "Sustained yield" is defined on this property as "periodic harvests in quantity sufficient at each harvest to allow the commercial sale of wood from off of the forest."
4. To provide a teaching/learning model experimental small woodland in the Northern New England Bio-Region. As part of this, an area of not less than ___ percent of the total forested area shall be held as a natural area, with the least human disturbance possible. (The exact location is then described.)
5. All streams and other waters, and all wetlands, will be treated as provided under appropriate state and federal laws.

THE *LUCAS* DECISION: LION OR MOUSE?

Christopher Kilian

In June, the United States Supreme Court decided a case that self-described "private property rights" advocates had hoped would have an important impact: to alter the ability of federal, state, and local governments to regulate private activities deemed to damage or threaten the environment by requiring compensation be paid by the government when a regulation diminishes the value of property. The case, *Lucas v. South Carolina Coastal Council*, dealt with the relationships between important constitutional powers: the "commerce clause," "police power," and the "takings clause." The court's decision does not immediately undermine the ability of the government to pass and implement regulations to protect the environment. However, *Lucas* does depart radically from traditional constitutional interpretations and underscores a continuing effort by conservative members of the Rehnquist court to create a new, more expansive definition of private property rights at the expense of environmental laws. The decision will undoubtedly result in increased litigation challenging environmental laws and may have a chilling effect on ongoing and future efforts to protect the environment.

Continued next page

Property Rights: A Historical Perspective

To understand the impacts of the *Lucas* decision, a historical overview of property rights and buy-and-sell environmental regulation is necessary.

Property law professors describe the ownership interest in real property such as land as a bundle of sticks. Each stick in the bundle represents a right of the owner. The exact nature of all of the sticks has never been precisely defined. Some of the sticks have been clearly enumerated: the right to exclude others and the right to "alienate" (transfer) property, for example. However, others have not been defined.

Today, the "property rights" movement, with the support of the conservative justices on the Supreme Court, is seeking to redefine and expand the definition of the sticks in the bundle in a way that does not reflect a historic view of property rights in America.

What did property rights mean at the time of the framing and ratification of the Constitution? The common agrarian conception of property limited owners to "natural" uses of their land prior to and during much of the 18th century. This is still reflected in recent court decisions from many states, including New Hampshire. For example, a property owner could build nothing on his lands that would alter the natural flow of water or destroy the natural land characteristics. In fact, prior to the adoption of the Bill of Rights, America was replete with land-use regulations describing which activities were considered noxious and forbidden. Justice Blackmun's dissent in *Lucas* cites, in part, a 17th-century case, The *Case of the King's Prerogative in Saltpetre*, which points out that:

> The colonists inherited a concept of property which permitted extensive regulation of the use of that property for public benefit — regulation that could even go so far as to deny all productive use of the property to the owner if, as Coke [a highly respected 17th-century property law jurist] himself stated, the regulation 'extends to the public benefit . . . for this is for the public, and every one hath benefit by it'.

In 1902, one court declared that citizens "were bound to contribute as much of [land], as by the laws of the country, were deemed necessary for the public convenience." The Fifth Amendment's "taking clause" did not extend to regulations of property, whatever the effect.

However, in the 19th century, traditional concepts of "property rights" were shifting and a movement arose supporting the concept of compensation in cases of actual physical takings of value. But, well into the century, there continued to be a strong current in American legal thought that regarded compensation simply as a bounty given by the state out of "kindness" and not out of justice.

As populations continued to grow and the industrial revolution hit full stride, competition between uses of property and the public interest became more intense. Legislation at both the federal and state levels promoted industrialization and development but also began to recognize public health, safety, and welfare and commerce interests in environmental values. The courts, including the U.S. Supreme Court, began to analyze both the authority of Congress and state legislatures to regulate the use of property to protect the environment and to analyze limits on regulatory authority. In 1887, in the seminal case *Mugler v. Kansas*, the U.S. Supreme Court explicitly upheld the right of states to prohibit uses of property injurious to the public health, safety, or welfare without paying compensation. In *Mugler* the court wrote: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to health, morals, or safety of the community, cannot, in any sense, be deemed a taking or an appropriation of property" even though "the establishments will become of no value as property."

According to Vermont Law School Professor Norman Williams, a Vermont native and renowned expert on land use law, "Conflicts between adjacent land uses became an acute problem in the first decades of the 20th century, and in a series of cases in the 1920s the court upheld the principle of public control over the use of land, subject to judicial review — and then let it go at that." Williams adds that "in the succeeding decades, the problem was left entirely up to the states. In 46 years the Court handled only one such case."

Development interests responded to the Supreme Court's interpretations and to efforts to protect the environment with a changing view of "what I can do with my property." Property rights advocates now claim that historical notions of private property require that land users be compensated for any loss of value resulting from regulation. This view would allow any use of property for private gain whatever the consequences to the public.

At the time of ratification of the Constitution, women and children of a man's family were considered to be the man's property. Moreover, the framers, including Thomas Jefferson, considered persons of other races to be subject to ownership as personal property. These notions of private property have been usually rejected by all of modern society, narrowing the definition of private property — and rightly so. No person should be subject to control and ownership by another.

Today, in the face of this progressive change, we see an effort by the so-called "property rights" movement to expand notions of property rights for private gain at the expense of society. To date, the radical "right to do what I will with my property" has never been embraced by any court or legislature.

The Basis of Environmental Regulation

Environmental regulation is founded on several sources of authority: the commerce clause of the U.S. Constitution exercised by the United States Congress, the police power reserved for and exercised by the states, and common law concepts inherited by U.S. society and developed by the courts.

Exercise of the commerce power to regulate activities affecting the environment has been broadly upheld as a valid constitutional power. Congress can pass laws to regulate activities that affect interstate commerce. Even the most local of activities may be regulated if, cumulatively, their impacts are large.

The states regulate environmentally harmful activities through the police power, the powers reserved to the state at the time of adoption of the Constitution to protect public health, safety, and the general welfare. This power is inherent in states, and is delegated by the states to the local governments they create. For example, under the police power in Vermont, the state regulates land use under Act 250 and has delegated broad planning and land-use regulation authority to municipalities. Act 200 is an expansion of municipal authority.

Additionally, some environmental oversight remains with the courts, which interpret the constitutional limits of environmental protection under police and common powers. The courts also apply common law concepts limiting property usage. For example, the public trust doctrine, which recognizes the transient nature of water resources, protects the public's rights of navigation and fishing from harmful private activities. And, the traditional property law concept of nuisance prohibits landowners from using property in a manner that will impair the use and enjoyment of a neighbor (private nuisance) or threaten the public interest (public nuisance). Both of these concepts predate the adoption of the U.S. Constitution and represent a historical awareness of the adverse impacts of private activities on the public's interest in a healthy environment.

Modern society has caused a massive intensification of land use and development, an expansion of industrial development, industry and transportation dependent on fossil fuels and chemicals, and an unprecedented population explosion. In response to all of these factors, environmental regulation has developed. Environmental regulation has not cut back on traditional concepts of property rights; rather, it has sought to preserve and return to a traditional concept of private property sensitive to the needs of the community. To self-styled property rights advocates, environmental regulations represent lost profit, a waste of money and a limit on their changing view of private property — a view that will only be embraced in the future, if at all.

The "Takings Clause:" What Does It Require?

Much discussion regarding the limits of the government's authority to regulate property owners revolves around the "takings clause" of the Constitution as a limit on environmental regulations. The "takings clause" provides that private property shall not be taken for public use without "just compensation." James Madison, the author of the clause, intended it apply only to direct, physical takings of property by the federal government. However, through the 14th Amendment, the Supreme Court has also applied the "takings clause" as a limit on state regulatory authority under the police power. There is no question that when private property is physically taken by the government, as for highway construction, a landowner must be compensated for the physical loss of property. In the 20th century, the Supreme Court has recognized that regulation of land uses may cause lessening of property values to the degree that compensation is required.

In the past, both the Vermont Supreme Court and the U.S. Supreme Court have consistently held that a taking does not necessarily occur merely as a result of the diminishing of property value resulting from regulation — even when well over 50 percent of the value of the property is lost. If some reasonable economic use is left to the landowner, a taking has not occurred. Never has "the right to do what I will with my property regardless of the attendant ecological impacts" been recognized in constitutional law. Neither has "the right to be compensated for investment-backed expectations." Both "the right to be compensated for a proportional loss of property value" and "the right to continue a particular use on my property" have been emphatically rejected by the courts as never having existed. All of these rights have been articulated only recently and do not reflect traditional concepts of property rights or interpretations of the "takings clause."

Legislative Action: Changing the "Takings" Equation

Recent sessions of the Vermont Legislature have seen anti-environment and anti-planning forces join to promote bills that would change the constitutional "takings" analysis. Introduced and promoted by legislators such as Rep. Ruth Towne (R-Berlin) in the House, and by Sen. John McClaughry (R-Caledonia) in the Senate, these efforts may gain new vigor from the *Lucas* decision.

Past bills have sought to develop a specific test to determine whether a taking has occurred. For example, the statement of purpose in a bill introduced by McClaughry

stated "this bill proposes to provide that when certain governmental regulatory programs reduce the value of real property to less than 50% of its value . . . the owner of that property shall be entitled to just compensation." The bill is targeted at environmental regulations and planning law at the state and local levels. Government entities would be given the "option" to compensate the landowner for the lost value, or relax the regulation. If compensation were required, the landowner's legal costs would also be absorbed by the public.

"This bill should be titled the 'lawyers' and appraisers' employment act'," remarked VNRC Executive Director Ned Farquhar. "It would result in endless litigation to determine the fair market value of property before and after regulation, whether the diminution was greater than 50 percent, and so forth. The real effect, and probably what was intended, would be to chill environmental protection. Many municipalities do not have zoning or a plan. This bill would probably assure that zoning and planning would not be implemented." The bill was debated and tabled in the Senate Judiciary Committee after several hearings but will probably be reintroduced in the 1993 session.

In the House, Rep. Towne among others, sought to amend an Act 200 repeal bill to include a provision requiring compensation in cases where regulation reduced the fair market value of property. The amendment was tabled after it was ruled out of order.

Property rights extremists are claiming victory in the wake of *Lucas*, and initiatives such as these will probably be strengthened after the decision. While the reasoning of the decision does not support the radical view of private property espoused by supporters of the bills introduced in the Vermont Legislature, the majority opinion in *Lucas* embraces the vision behind these bills.

The Lucas Decision: Lion or Mouse?

The U.S. Supreme Court's recent decision in *Lucas* has little immediate effect on traditional takings analysis. *Lucas* reaffirmed that " . . . the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in a legitimate exercise of its police powers . . . ." The court did not determine that Mr. Lucas was entitled to compensation and did not overrule any precedent regarding takings. Instead, the court overruled the reasoning of the South Carolina Supreme Court and remanded the decision for further consideration.

In *Lucas* the court's analysis was limited to "total takings" — those cases where the value of private property is diminished by 100 per cent as a result of government regulation. This is a very rare occurrence. Even when a total taking has occurred, the court recognized that a state can still justify a regulation if it is based upon " . . . the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." The court made clear that cases less than "total takings" are not affected by the Lucas decision. In fact, the court expressly recognized that under the Lucas analysis a landowner who suffers a 95-percent lessening of property value will get nothing. A state may always pass environmental and land-use laws and regulations to protect public health, safety, and welfare as long as a total taking does not occur; and even then, the regulation may still be justified.

As narrow as the immediate effects of *Lucas* are, the decision creates serious cause for concern for environmentalists. The decision signals that a group of activist justices led by Chief Justice Rehnquist is very interested in limiting the authority of the government to regulate environmentally harmful activities. Justice Scalia, writing for the majority, provided ample fodder for developers interested in relaxing environmental protections and receiving compensation for lost value. The opinion's footnote 7, which is rapidly becoming infamous, alludes to the ability of landowners to separate the portion of a parcel of land affected by regulation from the rest of the parcel for the purpose of determining whether a taking has occurred. Another footnote suggests that there are cases where even a partial taking of value may have to be compensated in "some cases." The court also carefully defines the "essential use" of land as " . . . the erection of . . . habitable or productive improvements . . . ." This completely ignores uses that would be more suited to the natural and truly essential characteristics of land. Additionally, the *Lucas* case cites several state court precedents to support an expanded definition of "property rights" that has subsequently been expressly overruled. The result may be that a massive body of state court precedent could be constructively overruled by the decision.

Professor Williams has predicted that *Lucas* may have one of two effects: either the state courts will "simply ignore or circumvent Supreme Court law in this field" due to the impracticality of the recent decisions, or the emerging group of "new centrist justices" — including Justices Souter, Kennedy, and O'Connor — will not feel compelled to take the next steps after *Lucas*. For now, a majority of the court has struck off on a new path to adopt a radical and greatly expanded definition of property rights, a definition that has never before been recognized. If the chief justice can hold together a majority, the court may strike off on a path creating a constitutional right to pollute. Changing notions of property rights could be on the brink of undercutting important regulations to the extraordinary detriment of the environment.

Chris Kilian is a lawyer who also holds a master's degree in environmental law and policy from Vermont Law School. He is VNRC's Legislative Director.

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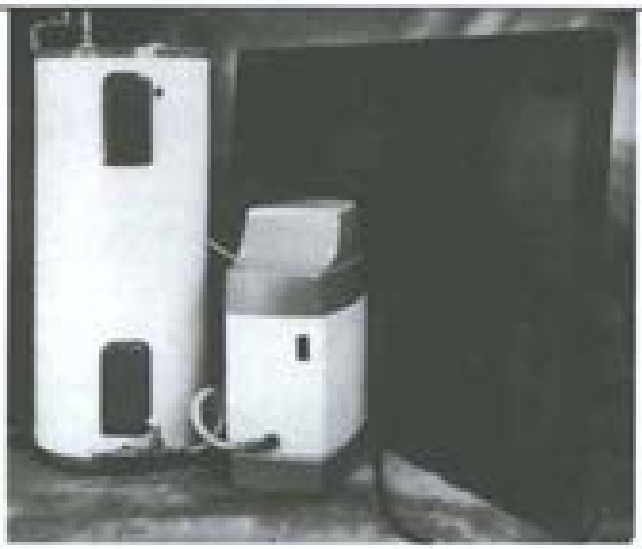

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SATISFACTION, FUN, FIRM BELIEFS

Susan Clark Reflects On Her Years At VNRC

Editor's Note: Editor and Communication Director Susan Clark recently left the VNRC staff after seven-and-a-half years to take a position as Coordinator of the Environmental Programs in Communities project at the University of Vermont. She looks back on her work at VNRC in this interview by Justin Brande — who is also a long-time VNRC veteran. Brande has been a VNRC member since the Council began in 1963 and served as one of the early directors. He currently devotes much of his time to his productive homestead in Cornwall.

Justin: What do you think it is about your background that has led you to have such a strong concern for Vermont's environment?

Susan: I think most Vermonters care deeply about the environment. I just think that we all have different ways of articulating our concerns and of prioritizing them. Some people might want clean water for clean water's sake, others for wildlife, others for aesthetics, others for their children's health, and others for the tourism industry — but we all want it, and we all care.

I was born in Vermont and my family roots go back here, unbroken, for generations. I'm sure that hearing my father's stories about growing up in the Northeast Kingdom, hunting with his dad, working summers on a small farm, all kindled my passion for the state. When we were little we always wanted to take family trips like they do in stories, you know, where they all get in the family station wagon and drive to Yosemite — but my parents always said, no, we already are in the best place there is. Now that I have travelled in different parts of the world, I have to admit that I have never been to a place I liked better.

I was lucky enough as a kid to get plenty of free, unstructured time to play outdoors — you know, to hike, swim, build little forts — and I think that is really important to inspire a connection and sense of creativity in the natural world. But no one can live in Vermont and not adore the place, can they? Is there anyone who lives in Vermont who doesn't, when they drive over that Connecticut River bridge on I-89, let out a little sigh of relief to be back?

Justin: What do you see VNRC's role or contribution as having been in building or maintaining protection of our environment? Why do we need private nonprofit environmental groups?

Susan: Everyone has an axe to grind, and often it seems like there's a cynical, self-preservation instinct behind that axe. We say that developers just want to make a buck, and that environmentalists, when they're put in the Not-In-My-Back-Yard role, are just protecting their own personal investments.

But it's a wonderful thing when people can come together and give of themselves, really pretty selflessly, for a cause that's bigger than we are. We see people volunteering for nonprofits, or they testify at a hearing or they contribute their hard-earned dollars — for the real but very far-away, long-term, intangible goal of environmental protection. No matter how much we care, it is very hard for us, individually, to think that we can make a difference. But when we come together, it's amazing — it's almost embarrassing how effective we can be.

Justin: Vermont encourages this. In contrast, [University of Vermont professors] Jean Richardson and Carl Reidel, during their trip to Russia last summer, noticed the diffidence people had about actually speaking out to protect Lake Baikal.

Susan: This is definitely one of the beauties of Vermont, but one that is in jeopardy. People are increasingly encouraged by our society not to place faith in their own judgments, but to turn to experts.

Justin: What do you see as the most critical environmental issue now facing Vermont?

Susan: Lack of involvement, and an increasing sense of powerlessness and apathy, is the most threatening thing to environmental protection. I believe that most of the citizen impetus for the "property rights" movement is the desire of people to get back that feeling of power and involvement. This isn't unique to Vermont — all across the nation people are feeling more and more disenfranchised from the government. The leaders of the property

rights movement are taking advantage of this sentiment.

Justin: Do you see a "native vs. flatlander" division here?

Susan: I think that people perceive that division, and it's easy to feed that perception. But I think that when you actually look at people's arguments, there is not a very profound difference in beliefs of what we want Vermont to be like.

Justin: What could VNRC do to help shape a future that resolves those more critical and controversial issues in favor of the environment?

Susan: I think that VNRC's three-pronged mission of research, advocacy, and education is a good mix, but I have to say that education gets my vote as the tool to create any real, long-term social change.

Justin: It has to be a special kind of education, doesn't it?

Susan: Yes, it's not just educating, say, on the the value of wetlands, but building the understanding that your beliefs and actions are going to make a difference. There's a need for people to learn how to resolve conflicts in public — to gain decision-making skills that will put each of us in the driver's seat while learning not to drive each other off the road.

In addition, I think that it is critical that VNRC continue to set an example — really an absolutely flawless example — of integrity. VNRC has a remarkable, near-30-year track record of listening, and then going for what's right, no matter what the popular image is at the time. It's of paramount importance that VNRC remain a staunch, thoughtful, advocate staying the course for environmental protection steadily, honestly, predictably, even in these crazy economic and political times.

Setting an example of integrity is important because it inspires people's faith in their ability to believe their eyes, to discern the truth for themselves. It respects people's intelligence, and helps them to believe that they can take an action that will have an effect. An empowered citizenry with this belief is worth more than any number of legal advocates and court victories.

Justin: If you could dream up your ideal world, what would your vision of Vermont in the future be?

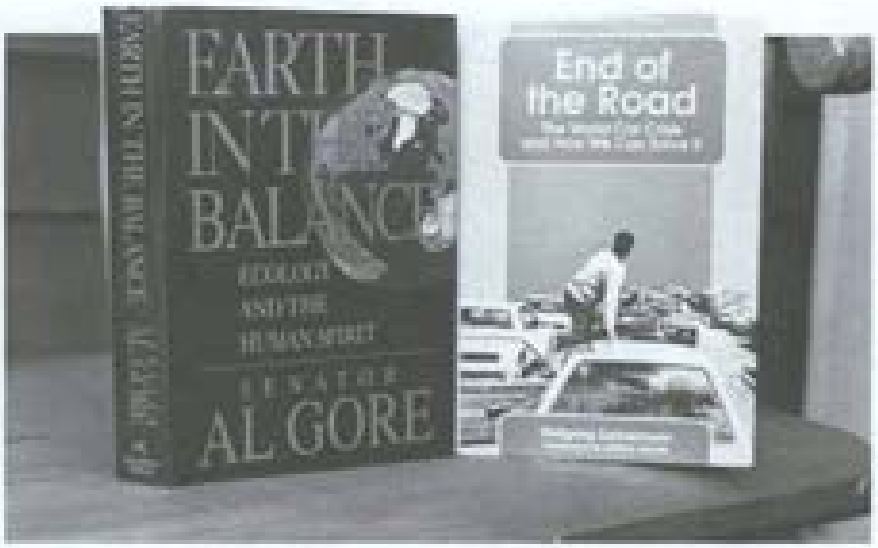
Susan: I imagine an environmentally and economically sustainable Vermont that integrates natural resource use and appreciation into the economy. I really think it's possible, too. Vermont's culture and value system is very tied to the working rural landscape. People want to see and live that lifestyle. Many of those who choose to live here willingly give up an expensive, flashy lifestyle for a little more calmness.

There are plenty of examples of how to make a living here that is sustainable, but one thing we cannot sustain is unlimited growth. As we're pinpointing techniques for sustainability, we also need to emphasize not encouraging people to move to Vermont because we have such a good thing here, but instead, figuring out how to export this "technology" we're working on — the policies we create, the social systems like community-supported agriculture and sustainable forestry techniques — that make it work. Because there's no reason why communities in Maryland or Connecticut or even, God forbid, New Jersey, can't be as wonderful as Vermont, if people want to make them that way.

I must say, though, as long as we're creating a utopia, that I would imagine a Vermont that is connected to a planet that is also predicting its resource use realistically, and this means one where people are not having so many babies.

Justin: With your love of language, what do you think can be done with the tools of expression to further the environmental movement?

Susan: My passion is playing with words, editing, and reading; writing, for me, is an invaluable tool for thinking through things. But I think you can be a baker, a ballerina, or any profession, and effect social change. The trick is to find the thing that you get the most satisfaction and fun out of, then combine it with working towards the things you believe in.



The End of the Road: The World Car Crisis and How We Can Solve It

By Wolfgang Zuckermann
(Post Mills, Vermont: Chelsea Green Publishing Co., 1992. 250 pp., $21.95)

At a time when interest in shifting transportation is at an all-time high, Wolfgang Zuckermann, a planner-writer with the Paris think-tank Eco-Plan International, has provided a thoughtful examination of our current transportation system and strategies to move us in new directions. This is a superb one-stop resource for anyone interested in the issues.

Using the best — and very broadest — sources of technical information available, the book is written from an international perspective drawing from the best, and the worst, examples worldwide. The book clearly and humorously shows the outcome of policy aimed to meet the needs of the automobile, rather than the needs of people.

Beginning with a quote from Walt Whitman, this book presents the alarming background in very readable terms — that the U.S. is not alone in allowing the domination of the automobile over our lives and landscape, but the problem is most extreme here. The home of free enterprise has gone the furthest in ignoring the effect of pricing on consumption — and the resulting impacts.

The book advocates positive directions that can be taken to create changes in our communities that will make our country more livable, socially and environmentally, and more competitive. Now, when our regional planning commissions need to hear from us for input in developing regional transportation plans, is the best time for us all to read and pass on the lessons from this book.

– Peg Elmer

Earth in the Balance, Ecology and the Human Spirit

By Sen. Al Gore (D.-Tenn.)
(New York: Houghton Mifflin Co., 1992. 408 pp., $22.95)

Early in August of this year, before the Republican National Convention convened, the Washington, D.C., bureau chief of the *Houston Post* was interviewed on the Canadian Radio Broadcasting System. She was asked by the CBC interviewer her view on Democratic vice-presidential candidate Sen. Al Gore. She immediately made reference to *Earth in the Balance*, Gore's new book on the environment. "It's a gutsy book!" she said, "and it remains to be seen how much he'll be attacked for it from the Right." The Canadian reporter agreed: "Yes, there is that chapter in it called 'Environmentalism of the Spirit,' sort of far out, even gets into theology. I wonder how far Gore will be seen to be off in the clouds by his opposition because of this book."

That was a succinct review! This is a gutsy book for a U.S. senator, and a good one, really superb. First, Gore wrote it himself; nothing ghost-written here. He did it after the traumatic accident in which his 6-year-old son Albert was struck by a vehicle and severely injured. During the son's long, slow recovery, Gore conceived of, and began, this book. It emerged as a bold, new look at the environmental crises facing our world (in the "New World Order"). In order to fend off global environmental catastrophe, it calls for a radical restructuring of the way we understand ourselves and our society, worldwide.

Much of what is in the book is not new; we have been getting it in bits, snatches, TV clips, and sound bites all along. But Gore has pulled it all together: air, topsoil, water, over-population, forests, government recalcitrance, and third-world reluctance to give up the quest for the good life of a U.S.-style GNP. Gore explores new territory, too. A chapter on theology from Gore, himself a Southern Baptist, brings out some of the exciting new contributions that main-line religious bodies, worldwide, are just beginning to make on the environment as they deal with their adherents on the deepest spiritual levels.

To anyone concerned with the earth's future, I highly recommend Gore's book.

– Brendan J. Whittaker

Vermont's Scenic Landscapes: A Guide for Growth & Protection

by Elizabeth Courtney

The staff at VNRC recommends this new book published by the Agency of Natural Resources. The Guide is intended to assist the public in understanding some of the issues surrounding the protection of the Vermont landscape by furnishing a system for identifying scenic resources and offering ways to protect them. Questions? Call 244-1137.

Elise Holland
Dinsmore Fulton
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Bulletin Board

Through early December

A second round of home meetings around Vermont's North Country continue, usually two per week. Discussions of the Northern Forests in Vermont feature VNRC's brand-new LANDSAT pictures of the area. All are welcome. For a schedule call Brendan J. Whittaker at 862-5180 or Farley Brown at 586-9973.

November 10

"Water, Land and the People" is the theme for the Annual Governor's Conference on Recreation at the Lake Morey Inn in Fairlee. The emphasis is on water-based recreation. The morning will feature 10 workshops, including public access, citizen initiatives, resolving conflicts, travel and tourism, and water, plus resources to help local groups. During the afternoon people will meet in groups to discuss water issues in their part of the state. The conference should be of interest to anyone who is concerned about the quality of their recreational experiences on Vermont's waters. For more information write the Recreation Section, Department of Forests, Parks, and Recreation, 103 S. Main St., Waterbury, telephone 244-8713.

Comings and Goings

Welcome

The Montpelier office welcomes **Dinsmore Fulton** as its new Deputy Director for Development.

Dinsmore joined us on Aug. 17 from Connecticut College, where she was acting Director of Capital Gifts.

VNRC welcomes Program Assistant **Alison Trowbridge** to the Southern Vermont office. Alison started managing the day-to-day operations of the Manchester office on July 1, after three months of combining one day a week at VNRC with her previous job at the Windham Regional Commission. Alison is a University of Vermont graduate and holds a master's degree in landscape architecture. She and her husband, Colin, are building a house in Windham.

Alison has been assisted this fall by intern **Elise Holland**, who is also a UVM graduate and is finishing her thesis for a master's in resource management and administration from Antioch College.

Congratulations

"It's a boy!" Norman Ross Farquhar, 6 lbs. 10 ozs., was born to Ned Farquhar, VNRC's Executive Director, and his wife, Janis Fiorelli, on Aug. 25, 1992. Mother, son, and father are doing fine.

Alumni

Former VNRC Operations Director **Don Hooper** is back on the campaign trail. After eight years of service in the Vermont Legislature as representative from Orange County, Don has decided to run for Secretary of State.

Monty Fischer, VNRC's Executive Director from 1985-1988, is enjoying his job as Director of the Northeast Natural Resource Center for the National Wildlife Federation in his office attached to the Vermont Land Trust headquarters, right across the street from VNRC in Montpelier. Monty has also been appointed Chairman of the Governor's Council of Environmental Advisors.

Andrea Colnes, former VNRC Policy Director, has taken a new position with the Appalachian Mountain Club. Andi will be based in Montpelier and responsible for coordinating AMC's Northern Forest-related work.

Sen. Doug Racine and Sen. Patrick Leahy

Gov. Madeleine Kunin, Sarah Mapelsen, and Ned Farquhar

Annual Meeting

VNRC celebrated four prominent Vermonters with awards for outstanding environmental commitment and leadership at its Annual Meeting on September 12th.

Patsy and Paul Highberg were presented with VNRC's Environmental Merit Award for their stewardship as Vermont citizens.

Senator Patrick Leahy was on hand to present State Senator and Senate President Pro Tem Douglas Racine, with the Environmental Achievement Award for his leadership in policy-setting at the legislative level.

Governor Madeleine M. Kunin received VNRC's Once-In-A-Lifetime Award for her years of precedent setting environmental leadership in state government.

Patsy Highberg, Ned Farquhar, Sarah Mapelsen, and Paul Highberg

Thank you

VNRC thanks Dr. Kenneth Kimball and Dr. Richard Conjak for providing high-quality expert analysis in the Sugarbush case. Dr. Kimball, Research Director for the Appalachian Mountain Club, has put in many hours in support of VNRC's case on the hydrology of the Mad River. Dr. Conjak, Research Scientist for the Canada Department of Fisheries and Oceans, has provided testimony on winter stream conditions that may change the way projects are considered throughout New England. VNRC thanks them for their dedication and expertise.

Bear Necessities

Second Bear Forum a Repeat Success

"Fragmentation of habitat from development is the biggest threat to our bear population," said Nancy Bell at the July 15 Bear Forum in Dorset. Approximately 70 people turned out at the Dorset Congregational Church to watch breathtaking slides of black bears and to hear Bell, of the Shrewsbury Land Trust and Friends of Parker's Gore, describe the life history and habitat needs of black bears.

Bell has done considerable research on black bears, including following a bear and her two cubs for two weeks in Minnesota. Her presentation, "Bear Necessities," was a unique look into the day-to-day events in black bears' lives and featured stunning photography of these elusive creatures. The event was an encore of Bell's presentation at VNRC's Bear Forum in March at the Equinox in Manchester. This repeat performance was a joint effort of VNRC and The Dorset Citizens for Responsible Growth (DCRG). The event was a great success, thanks in part to the hard work of DCRG. We hope this joint venture marks the beginning of continued cooperation between the two organizations to bring future educational events to southwestern Vermont.

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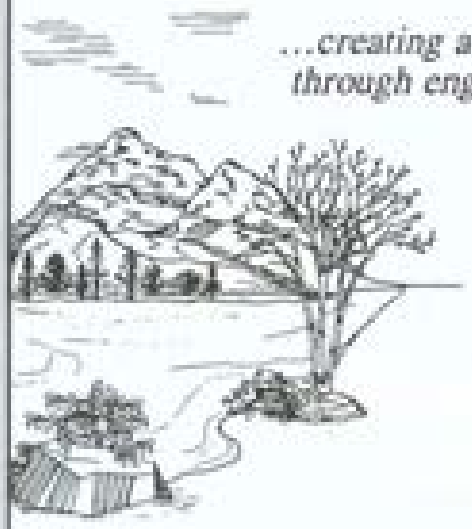

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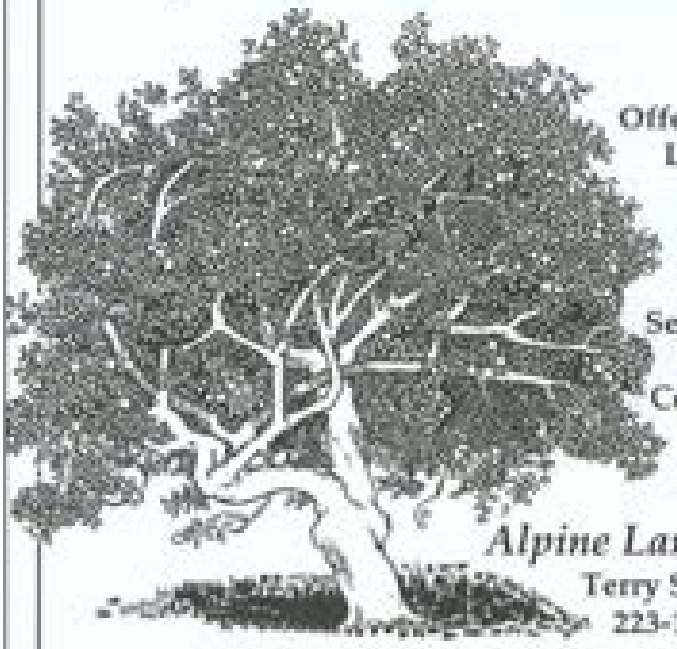

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