BIG BROTHER'S WATER

IF YOU THINK THE "DELTA SMELT" SCANDAL SMELLS, YOU AIN'T SMELT NOTHIN' YET. BY HENRY LAMB

Since the beginning of this nation, the federal government has regulated the use of navigable water under the authority of the U.S. Constitution, which says Congress has the power to: "Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

This authority is pretty clear, straightforward, and reasonable. For commerce to flow through our ports and on our rivers, it makes perfectly good sense for the federal government, directed by Congress, to regulate the use of *navigable* water.

Wisconsin's Sen. Russ Feingold and 24 of his colleagues have introduced the Clean Water Restoration Act (S787), which will expand the power of Congress beyond the enumerated powers set forth in the Constitution, and authorize the regulation of virtually all water everywhere, as well as activities that may affect water wherever it may be.

Feingold's bill says: "The term 'waters of the United States' means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution."

UNDER FEINGOLD'S BILL, WATER RIGHTS WOULD JUST DISAPPEAR.

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This stream originates from a spring on private property and provides clear water, wildlife habitat, and great pleasure for the current owner. With the passage of S787, this becomes "waters of the United States" and gives the federal government authority to dictate any and all activity on the land the deed holder bought, and on which he is still required to pay taxes.

Reread this definition very carefully: "activities affecting these waters, are subject to the legislative power of Congress under the Constitution." We asked Sen. Feingold's office: "Where, exactly, is the constitutional authority to empower Congress to regulate wetlands, prairie potholes, intermittent streams, natural and man-made ponds, and all the other areas specified in the bill's definition that may be on private property?"

After an e-mail inquiry and several phone calls, Sen. Feingold's press spokesman, Zach Lowe, said...nothing. That's right, the senator's office flatly refused to answer the question and refused to provide a reason for not answering the question.

The purpose of Feingold's bill is to remove all doubt about who holds the authority to control water, as well as any and all activity that may affect water. This authority, should this bill become law, is the federal government. Until now, states have had the responsibility and authority to regulate nonnavigable waters within their borders. In recent years, however, federal law has incrementally usurped state authority to the extent that the state governments have become little more than administrative units of the federal government. Feingold's bill will make state employees involved with water regulation functionaries for the feds while remaining paid by the state.

Perhaps more important is the phrase, "activity affecting these waters." This phrase would give the federal government the excuse to intervene in virtually any activity anywhere rain falls. The federal government extended its reach over private property when it claimed jurisdiction over nearly 200 million acres of wetlands on private property. Feingold's bill will extend federal-government jurisdiction over virtually every square inch of land in the United States.

People who live in communist countries know full well what it feels like for government to have complete control over the use of land. Americans have been learning this les-

son case by case. Ocie Mills, for example, who put 19 loads of building sand on his own land for a home foundation, was convicted of polluting the "waters of the United States." The feds didn't care that the state of Florida had approved the building site or that the county had issued a building permit. Both Ocie and his son spent nearly two years in a federal prison for putting clean sand on dry land which the feds arbitrarily defined to be waters of the United States. Ocie is only one of thousands of people who have been prosecuted by the feds for the heinous crime of moving dirt around on their own private property.

Michigan farmer John Rapanos also spent time in federal prison because he too moved some dirt on his own cornfield in preparation for building a home. But the Pacific Legal Foundation took John's case to the Supreme Court, and on June 19, 2006—after nearly 20 years of litigation—the Supreme Court ruled in his favor. The decision declared that the feds have to prove that land which they declare to be a wetland is, indeed, "navigable" waters as required by law. (*RANGE*, Winter 2005.)

This decision infuriated the environmental community. Apparently, it also offended Russ Feingold and his 24 co-sponsors, because his bill makes the Rapanos decision and all previous wetland decisions irrelevant by defining everything that is wet—or that may get wet—to be within the regulatory jurisdiction of the federal government.

This bill puts farmers and ranchers in great jeopardy. Until now, it has been necessary to find some endangered critter to justify shutting off irrigation pumps. No more. If the water in the irrigation system is, by legal definition, the waters of the United States, the feds do not have to have a reason for denying farmers the use of it.

Until now, ranchers have had access to pasture by virtue of the beneficial use of water assigned under the doctrine of prior appropriation. This bill will assign the water to the United States and can leave ranchers without access to water or to pasture—at the whim of the federal government. While promoters of this bill may claim that the feds will not change the water-use policies, there is absolutely no reason to suspect the government will honor such claims. If the government claims effective "ownership" of the water by declaring all water to be the waters of the United States, there is every reason to suspect that the government intends to regulate its use.

The water in this drainage ditch in the middle of a privately owned cornfield will become "waters of the United States," and by definition in the law, any activity on the adjacent land that affects the water of the United States becomes subject to the control of the federal government. The entity that has legal control over the use of land is the effective "owner" of the land, while the person whose name appears on the deed must pay the taxes. Nothing in the bill acknowledges the Fifth Amendment's requirement that when private property is taken for public use, just compensation must be paid.

People who live in urban areas may welcome federal ownership of water—at first. Drought in the Southeast had Atlanta residents quite concerned last year. Local and state officials, who live in the area and were elected by local residents, developed the rules that governed water use. The Feingold bill would give federal agencies the authority to dictate the distribution of water and the regulations regarding water use, without regard to what the local officials or local people may want.

WILL WE PAY THE FEDS A GALLON-PER-MINUTE TAX ON OUR OWN WELL WATER? A FEDERAL FEE TO SWIM IN OUR LAKES?

There is neither constitutional nor rational justification for this enormous power grab by the federal government. The feds should continue to regulate navigable or commercial waterways. But the federal government has no business interfering with state water regulations, nor does it have any business involving itself in how ranchers, farmers, and other private property owners use the water that nature provides to them. There are already a multitude of laws on the books to prevent and correct instances of water pollution. This bill has nothing to do with improving water quality. It has everything to do with a bald-faced expansion of Big Government which wants to contol every facet of human life.

Resist! ■

When beavers dam a stream and cause water to accumulate and kill standing timber, the beaver-created wetland becomes the "waters of the United States," and all activity within the area is subject to federal permits, approval, monitoring, mitigation, enforcement and fines or prison. The deed holder can do nothing to change the condition caused by beavers but continue to say "Yes, Sir" to the government.

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