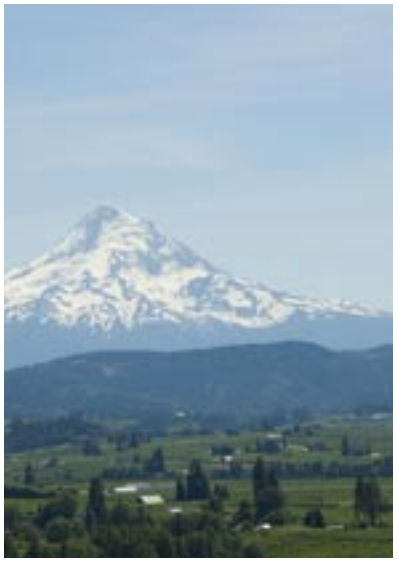
OCTOBER 2006

PROPERTY WRONGS:

Lessons from Oregon for states considering property ballot measures in 2006



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THE EARLY HISTORY OF PROPERTY WRONGS

G.W. Wells was among the first northwesterners to worry that his property value was being hurt by his neighbors.

Wells lived in the burgeoning frontier town of Seattle at the opening of the 20th century. Uphill from his home, seven municipal sewer outflows discharged directly into a neighborhood brook. A foul mixture of creek water and untreated sewage flowed past Wells' property—a problem that worsened over the years as the city's population grew. In the February 6, 1901, edition of the *Seattle Star*, Wells complained of the "death-dealing odor," charging that the stench and mess was "depreciat[ing] the value of property in the locality."[1]

By 1901, when Wells expressed dismay about his property value, existing residents were connecting to the sewer system at an astonishing rate, while newcomers were moving to Seattle in droves. But the young city's sanitation laws and sewage infrastructure hadn't kept pace. The result was a steadily worsening sewage crisis that affected the whole city, but hit a few property owners particularly hard.

Luckily for Wells and many others like him in the Northwest, the region's new communities soon built better sewer systems and required residents to use them, alleviating the sewage crisis. In time, the city also regulated garbage disposal, forbidding backyard trash burial or burning, as well as dumping waste into Puget Sound.

Such restrictions undoubtedly irked a few property owners—some people surely viewed the costs of sewer hookups and trash disposal as unnecessary and burdensome expenses. But ultimately, sanitation laws created neighborhoods that were healthier and more livable, and everyone benefited. The basic principle—that community members can act together to address threats to their quality of life—guided the Northwest's development for more than a century.

"The smell last summer was horrible in the extreme, and next summer it will be infinitely worse."
— G.W. Wells

Fast forward to the fall of 2006.

The basic principles of community planning are being questioned by a rash of so-called "property rights" ballot measures in six western states. Voters in Arizona, California, Idaho, Montana, Nevada, and Washington will decide whether to pass initiatives that would substantially weaken community protections by introducing a scheme referred to as "pay-or-waive." (See "Initiatives at a Glance," page 14, for specifics on each measure.)

The measures dictate that when a rule, such as farmland protection or residential-only zoning, reduces a property owner's potential for making a profit, then the community should pay the owner for any lost value resulting from the rule. If the community does not pay, or cannot afford to, then the property owner would get a waiver from the rule. Thus, "pay-or-waive."

The "pay-or-waive" scheme is not an accident. In fact, its appearance on the ballot in six western states is part of a well-orchestrated national strategy. (See "The Trojan Horse of Eminent Domain," page 17, for a fuller discussion.)

Here's how one Montana writer described pay-or-waive:

> If you could fit 20 houses on your land, plus a junkyard, a gravel mine, and a lemonade stand, and the government limits you to six houses and lemonade, then the government would have to pay you whatever profit you would have made on the unbuilt 14 houses, junkyard, and mine. Generally, if the government can't or won't pay you, it would have to drop the regulations.[2]

What will happen if the pay-or-waive measures become law? It's impossible to say for certain because the ballot measures are unclear on many points. But they're likely to affect issues as basic as a community's ability to protect local farmland and water quality, and a property owner's right to protect his land value. Inevitably, lawsuits in each state will be required to determine the precise scope of the property measures.

Nevertheless, there is one real-life case study of the effects of pay-or-waive laws: Oregon. When voters approved Measure 37 in 2004, Oregon became the only state in the country to have a pay-or-waive law on the books.

Two years into life under Measure 37, Oregon's experience can be a lesson to residents of the six states who are considering similar initiatives in 2006. So far, Oregon residents are finding that:

- **Pay-or-waive schemes provide less choice than they appear to.** Few communities are inclined to pay every property owner who wants compensation for obeying the law. So the laws simply get waived instead. In Oregon, cash-strapped communities don't have the resources to contest the Measure 37 claims that have been filed—numbering more than 2,200 as of August 2006, totaling $5 billion in claims—and certainly not the cash to pay the claims.[3] So communities are waiving the laws.
- **Measure 37 may be undermining the very rights it claimed to protect.** Many Oregonians—part of a growing backlash against the measure—are worried about their ability to protect their property from bad neighbors; and people are asking a new set of questions. Is it fair that communities be forced to pay property owners to abide by common-sense rules? What about compensation for neighbors whose property values are affected by obnoxious land uses next door? And how do we balance the rights of individual property owners with the rights of community members to chart a future together?

To help inform the discussion about the pay-or-waive ballot measures, Sightline collected stories from six communities in Oregon that are affected by Measure 37. In their own words, Oregon's ordinary residents—farmers and anglers, foresters and next-door neighbors—will tell you how they feel about living under the law of paying your neighbor to behave.

A GRAVEL MINE MOVES IN NEXT DOOR

"Heeeere boys! Heeeere boys!" calls Susie Kunzman to a group of her male alpacas, grazing on a pine-covered hillside near her home in rural Clackamas County, Oregon, about 30 miles east of Portland. She moves them to a safer area, then directs a group of day-laborers felling dead trees and clearing brush on the 22-acre property.

The calendar reads Saturday, but it's a workday for Kunzman; such is farm life. But she wouldn't have it any other way.

Susie Kunzman and her husband Wayne love their quiet rural life. They bought the property two years ago to grow their alpaca farm, now with 35 animals which by themselves have an estimated worth of $350,000. But all that could change if a proposed 80-acre gravel mine goes in just over the Kunzman's fence line. Her neighbors, Charles and Wanda Daugherty, now hold an approved Measure 37 claim that allows the quarry and makes it easier to obtain permits. The county could not pay the Daughertys for loss of use, so under Measure 37 it was forced to approve their claim.

Susie Kunzman points out her boundary line.

"We've never figured out how anybody bases their claim," Kunzman says. "I think Measure 37 is a feel-good measure with no substance."

Kunzman, who voted against Measure 37, thinks the law was couched as a way to help the rural landowner, but had too-few details about how government would pay compensation in exchange for denying claims. Now she and about 40 of her neighbors are worried about the constant noise of rock crushing, truck traffic, and blasting. They're also concerned about potential harm done to the underground aquifers that feed Teasel Creek, the water source for Kunzman's animals and her neighbor's well. Kunzman and several neighbors protested at the county hearing that ultimately approved the claim. Several commissioners understood their fears, but without the funds to pay the Daughertys compensation, officials had little choice but to approve the quarry.

"It's perfect for alpacas," she says of the high ground of her farm.

But as she nears the fence line, Kunzman's mood turns sour. She stops, looks over the fence. Blasting and noise from crushing, she says, could stress the alpacas, animals that are easily spooked. She explains that stress to an alpaca is reflected in the strength and quality of their hair, which for her equates to lost revenue. She wonders who will pay *her* for lost value from the effects of the mine, especially when it comes time to sell her property.

"What is government but your own self?" she says. "Who do you think was going to compensate for this—the Queen of England?"

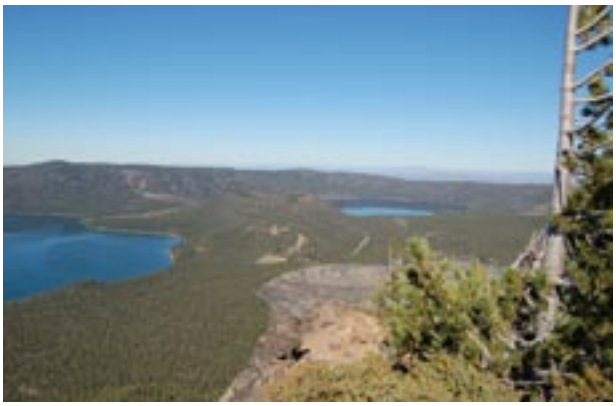
She keeps a copy of a land appraisal that shows the Daugherty property's "highest and best use" as "a ranch estate with rental and timber income." The appraisal was commissioned by the Daughertys themselves. Kunzman also holds a copy of a document that shows the Daugherty property classified as a Century Farm, a historical designation that she feels was overlooked. The Daugherty property has been in the family since 1864, and Charles Daugherty says that generating income from the quarry ensures that future generations of the family will be able to afford to keep it so. He assured the county that all regulations would be followed.

Kunzman's advice to other states considering similar property measures: take time developing it.

But perhaps her neighbor, Renee Ross, summed up the community's sentiment best when she recently told a reporter, "I hope other states don't do this."[4]

MINING IN A NATIONAL MONUMENT

The southern side of East Lake fizzes, as if a thousand tiny fish were blowing bubbles below the surface: *pip-pip-pip-pip-pip*. It's the sound of sulfuric gases rising from deep beneath the lake—a sign of powerful underground forces.



Looking over the pine forests and high lakes of the monument.

East Lake is tucked behind an ancient cinder cone in the Newberry Crater National Volcanic Monument, amid Central Oregon's pine forests and high desert. At 6,400 feet above sea level, it's one of the highest lakes in Oregon, and it's a quiet place, with few sounds besides the occasional splash of a trout or kokanee salmon. Many a visitor has soothed aching muscles where the volcanic hot water mixes with the colder water from the lake.

The area has other attractions as well. Wild ducks, bald eagles, osprey, elk, black bear, mule deer, and even the elusive pine marten call the area home. To maintain the area's tranquility, boats are required to stay below 10 miles per hour; on a warm autumn day, just three or four bob in more than a thousand acres of water.

Newberry Crater has always been a peaceful place, with just a few campsites, plus the small summer-only East Lake resort that's been around since 1915. True, the area is known for its great fishing, and has attracted anglers from as far away as Maine, Florida, Germany, and even Zimbabwe. And its unique geological features and rich natural beauty earned it national monument status in 1990. But until recently the place has seemed like a well-kept secret.

Until Measure 37.

East Lake is now the focal point of one of Oregon's biggest Measure 37 claims. A private landowner, James Miller, who holds 157 forested acres inside the national monument (which includes shoreline along the west side of East Lake) filed a $203 million claim for loss of use under the measure. Because the government couldn't pay up, the landowner now has approval to build a pumice mine, a geothermal plant, and as many as 150 vacation homes on the property. Geologists hired by the landowner will soon begin looking at where to tap the geothermal energy.

Locals and fishermen fear the big developments. So does David Jones, who owns East Lake Resort. He voted for Measure 37 back in 2004 and now its ramifications are staring directly back at him. The private land slated for development is in plain view directly across the lake from his small resort.

"I *thought* it was a good measure," Jones says. "I was one of the many people who voted for Measure 37 and thought it would be a good deal for Oregon."

East Lake Resort owner David Jones voted for Measure 37.

Like Jones, many who come to fish here don't understand how Measure 37 could have helped cause the proposed development.

Old-timer Kermit Huck is among them. The fishing is so good here, Huck and his wife, who live in Glendale, California, have been coming to the lake for 35 years. Huck keeps his boat docked just below the resort. The couple arrives at the end of June every year and stays until October. Huck wasn't aware of Measure 37 or why the private landowner wants to develop the plant, mine, or vacation homes. But he doesn't think a big development has any place in the national monument.

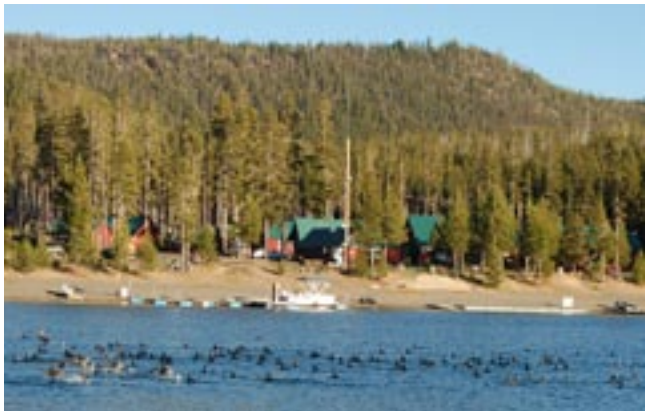
"This investment that we have in these wild areas can't be replaced," he says. "Once it's gone, it's gone."

Fisherman Barry Wood just learned to fly fish four years ago on East Lake. Every year since then, he's come back to spend the summer. One year, he brought his grandchildren to the lake to fish, and his youngest granddaughter caught a brown trout nearly three feet long. The fish was so heavy it broke the line and got away underneath the boat.

"That's the biggest fish I've seen in here—and the 3-year-old got it. We call it the East Lake Monster."

A California resident, Wood knows nothing about Measure 37, but does know a lot about natural resource prospecting. Before he retired, he worked in the Middle East as an oil and gas engineer.

"I'm all for developing our own resources to get our own energy," he says. "We've got to do something. However, I'd hate to see a big electric generating plant over there across the lake. It seems a shame to ruin a beautiful spot."



Ducks flock to the clean water of East Lake.

Indeed, it was the setting that drew Bend residents Kathy and David Jones here. For years, the couple had dreamed of owning a lakeside resort in Central Oregon. In April 2006, the opportunity presented itself, and they purchased East Lake Resort—a collection of 16 rental cabins, RV park, tackle shop, and café—from its previous owners. They employ about a dozen people and enjoyed such good business this summer that they're thinking of putting in some yurts next year to handle more overnight guests. But both believe that a pumice mine and a geothermal plant would be bad for business.

"My bottom line is that I don't want anything that's going to interfere with the wildlife and the pristine look up here," says Kathy Jones. "I would hate the vacation homes."

David first came to the lake when he was eight years old and he connects with the natural features of the place. He especially dislikes the idea of the pumice mine since it could disrupt water runoff and change the ecology of the lake. The area along the privately owned shoreline is prime kokanee spawning area. Jones is also concerned that the prevailing winds could blow impact from the mines right into East Lake Resort.

"This is a unique piece of property," he says. "It's un-replaceable."

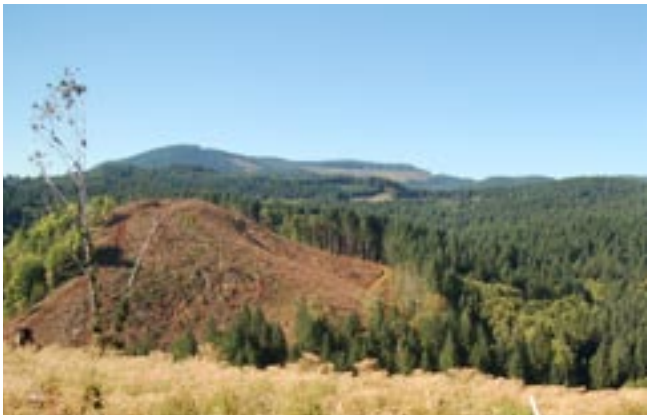
SUBURBS IN A WORKING FOREST

As third- and fourth-generation Oregonians, Jim and Sandy LeTourneux love forests and wildlife. But don't call them tree-huggers. They're loggers.

The couple loves what some might see as a tough business: running a 460-acre timber farm in the forested Coast Range of rural Yamhill County.

In 1964, Jim's father began planting trees; and in 1976, he passed the business down to Jim and Sandy. With their two sons grown and moved away, Jim is the entire labor force these days. He plants and fells the fir, alder, and maple and Sandy keeps the books. The two don't take traditional vacations. Health insurance is on their dime. Retirement? Not an option, at least not anytime soon.

But after 30 years in the business, the couple still cherishes the independence of being their own bosses. And for the LeTourneuxs, that means helping to protect wildlife and fish-bearing streams on their property. They keep pockets of the forest wild for the bears, bobcats, wild turkey, elk, deer, raccoons, woodpeckers, salmon, and other creatures. And they make sure the steelhead stream running through their property isn't damaged. That ethic helped their tree farm win state awards in 1993 and 1998 for conservation and wildlife stewardship.



The Letourneuxs' timberland in Oregon's Coast Range.

"We value wildlife and wildlife habitat," says Jim LeTourneux.

But their livelihood, along with their stewardship, could slip away with a Measure 37 claim bordering their property on three sides. The LeTourneux tree farm is nearly surrounded by some 850 acres of forest owned by a Measure 37 claimant. The owner, a developer named Bob Hemstreet, filed a claim for $35 million for loss of use, and if the county doesn't pay, he may be able to subdivide the property and build as many as 848 homes on 1-acre home sites.

The LeTourneuxs' number-one concern is the possibility of fire from the development. They believe that big housing developments and forestry are incompatible land uses—for good reason, that separation has long been enshrined in Oregon's land use laws. Jim wonders how the county will extend fire protection to a housing development so far away from a populated area. It's the unforeseen issues of mixing widely different land uses that frustrate him about Measure 37.

"I've put a lifetime of work into putting in a timber resource," says Jim. "Sandy and I could lose everything from a fire."

Jim LeTourneux believes that economic development in forests is essential to protecting them. That's why he's been involved in the Yamhill County Soil and Water Conservation District for 15 years, and believes strongly in sustainable forestry. But he doesn't believe that suburban-style housing is the right kind of development.

He didn't vote for the measure, but now it's right next door.

"Measure 37 here in Oregon is pretty much water under the bridge," says Jim. "Some Measure 37 claims have been warranted and fair. Some have been so egregious that voters didn't know what they were voting in."

LOSING FARMLAND AND GAINING LAWSUITS

Crystal Vanderzanden drives her car up to the edge of a flat field that borders her rye grass farm. She wants to take a closer look where the proposed 48-home subdivision might sit. But she's careful not to let her tires touch the neighbor's field, even though she's angry that the landowner filed a Measure 37 claim. Unable to pay the $9.5 million claim that landowner Louise Bernards wanted for lost value, Washington County, which encompasses Portland's western suburbs along with prime farmland, must now allow a subdivision in the middle of an area zoned exclusively for farming.

Washington County farmland on its way to becoming a subdivision.

"I don't want to drive on their field," Crystal explains. "We drive on our own, but not someone else's."

Yet in a sense, Crystal Vanderzanden and her husband Bob feel their way of life is being driven over by Measure 37. The couple is so frustrated that they filed a lawsuit against the State of Oregon. They contend that the state is unlawfully applying the new law by allowing Measure 37 claimants to value the land at today's prices rather than the price at the time of purchase.

"We don't like the law," says Bob. "We didn't vote for it."

Most of Oregon's land use laws changed in the 1970s, in part to protect farmland, and the Vanderzandens strongly believe that if Measure 37 required that their neighbor's farmland be valued at those rates, they wouldn't be filing a claim or seeking a housing development in the first place.

The Vanderzandens aren't alone. The state recently notified the couple that their case could be combined with two other Measure 37-related lawsuits based on similar grounds.

Crystal Vanderzanden is on the road again, driving away from the contentious 54-acre parcel of land. She expertly navigates a labyrinth of country roads, passing nurseries, strawberry, and corn fields. Mt. Hood looms large to the East.

"Isn't it peaceful out here?" Crystal asks. "I just can't imagine 48 houses. I just think it's wrong."

The Vanderzandens fear complaints from subdivision residents about normal agricultural operations that involve spraying, lights, dust, and noise. They've had a taste of the urban-rural divide over the years, from city folks who rent houses next to their grass farms and then complain about routine farming activities. The couple anticipates that the number of such complaints could skyrocket with a big housing development.

Bob and Crystal Vanderzanden live near Hillsboro, just beyond the western edge of the Portland metro area. The couple met in high school. They were country kids then and in many ways they still are; both grew up near Hillsboro and don't like the city much. With the help of a grown son, they farm 1,700 acres within an 8-mile radius of their home. The couple owns less than 15 percent of the acreage they farm; they lease the rest from other family farms in the area.

The Vanderzandens figure their willingness to farm allows older landowners to stay on rural properties longer. Their involvement with the US Farm Service Agency has helped them appreciate and fight for a rural way of life. That's the main reason that they dislike Measure 37—it jeopardizes their way of life.

Crystal Vanderzanden sums it up: "You come out here and just try to earn a living and you have all these . . . hassles."

NEIGHBORS WORRY ABOUT THEIR WATER SUPPLY AND LOCAL FARMLAND

Neighbors at Spring Lake Estates, five miles outside the city limits of Salem, have new reason to be concerned about their community's future. The 85 families in the neighborhood jointly own a small lake that adds value, as well as scenic beauty, to their neighborhood. And each home draws its water from a common aquifer.

Spring Lake, jointly owned by neighbors in Marion County.

The community depends on its water supply. If the water level drops in the aquifer, they may face big expenses for new wells, or a new water system; and if the springs and streams that feed the lake dry up, their property values could take a hit.

Enter Measure 37. Adjacent to the neighborhood is a new Measure 37 claim for 82 new homes on 215 acres. The land slated for development is currently zoned for farming; the landowner wanted $18 million from Marion County for potential loss in value if his development couldn't proceed. Because the local government cannot pay, plans for the homes are moving forward.

Each new house would have its own water well, and homeowners at Spring Lake Estates worry that 82 new wells so nearby could severely draw down the streams, Spring Lake, and even their own wells.

Don Dean, who sits on the Spring Lake Estates Neighborhood Association board, explains, "We're not initiating any kind of a no-build policy or trying to stop the development. What we'd like to do is just have them be sensitive to our source of the water that feeds our lake."

Once Spring Lake neighbors knew the development was on its way, the homeowners association authorized spending $5,000 on a hydrogeology report of the area. It's due any day now, and they intend to give it immediately to Marion County planning officials. They hope the report's findings will help the county justify requiring more sensitive development that will minimize impacts on the area's water supply.

Don Dean is particularly concerned about the new project because his property abuts the land slated for development. "Unfortunately, I believe I voted for Measure 37," Dean admits. "I was probably like a lot of other people that either didn't take as much time as I should have to review the measure or didn't possibly understand it as much."


Don Dean looking out from his home toward Spring Lake.

Laurel Hines is another resident concerned about the new development's effects on her property. She says she moved to Oregon in 1979 from the Midwest partially because she respected the state's land use laws. Laurel says that in contrast to the shared sense of community at Spring Lake Estates, the adjacent landowner so far appears unconcerned about the impact of the proposed development on the community.

"We expected things to be the way they were and that the land use laws would protect us, and now we can't depend on them," Hines says.

"There really isn't any land use planning in the state right now with Measure 37. There isn't a local jurisdiction that's got an extra $500, let alone $500 million," Dean explains. "I'm not an activist. I don't campaign on issues . . . but there needs to be some kind of regulation to help control growth in certain areas."

NOT ABLE TO SELL THE FARM

Cattle graze under the shade of alder, oak, and fir. Hawks soar overhead. It's autumn in rural Clackamas County. It's tranquil enough to be a park, but it's a working family farm.

The Lay family has farmed these 100 acres of rolling hills in Clackamas County, near Susie Kunzman, for more than half a century. Over the decades, they have raised beef cattle, pigs, hay, wheat, and other grains. Today part of their land grows Christmas trees and they maintain the rest for cattle grazing. The farm's owners are an elderly couple, 87-year-old Roy Lay and 86-year-old Lois.

Scott Lay, their grown son, remembers, "This was my playground as a kid. I had the whole Cascades as my backyard."

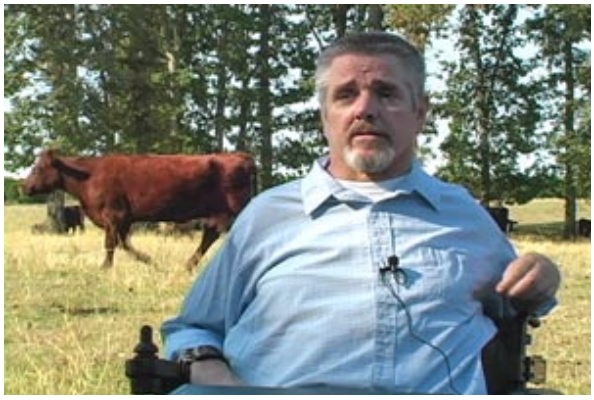
Scott cannot work the farm himself because of a disability.

But his father, Roy, still makes a daily trip from his home in the small town of Molalla to do farm chores. Despite his age, Roy is still proud of the farm and won't stop working to keep it up.

That worries Scott. The other day, he recalls, he discovered that his father had been alone on the property pulling stumps. Scott dreads receiving a phone call that his elderly father has collapsed on the property from overwork.

Now, both father and son realize the time has come to sell the farm. So the Lays put the property on the market. They received a good offer this summer, but it fell through when the buyer found out that the neighboring property had won a Measure 37 claim to operate a gravel mine, the same mine that borders Susie Kunzman's property (see page 4).

The neighboring property owners, Charles and Wanda Daugherty, filed a Measure 37 claim for their 80 acres, which is restricted from certain types of development. The county could not pay the claim, so it was forced to grant a waiver allowing the Daughertys to open a gravel mine.


Scott Lay on the Molalla farm.

Getting a decent offer for the farm now seems unlikely thanks to the spectre of a mine next door.

Scott says that the buyers "immediately pulled their offer" when they discovered that the farm borders a Measure 37 claim. Now the Lays have heard that the buyer bought land elsewhere in the area—and no new buyers have shown interest.

The situation frustrates Scott. He sees how his family's wishes for the property—and even their well-being—are being thwarted by the law. He believes that Measure 37 is helping the Daughertys run roughshod over the Lays' property rights.

The situation is putting stress on everyone. In rural communities like Molalla, neighbors have a history of supporting one another, says Scott. They count on each other to borrow tools and even tractors. So emotion runs raw when there's a rift between neighbors. For his parents, the topic of the mine is extremely sensitive.

"It certainly is causing tension between my family and the neighbors," Scott says. "[The neighbors] didn't intentionally come out and do a rock pit to hurt us. They're just trying to make a few bucks on their property."

He fears that his family will eventually be forced to drop the asking price so low that only buyers looking for a quick investment will consider the land. That, he worries, could mean the end of the farm's tranquility that the Lays have nurtured for so long.

"I did vote for Measure 37," Scott says. "But like a lot of people, I was not voting for what it has seemed to become."

LESSONS FROM MEASURE 37

As the preceding stories show, any property's value—as a farm, a working forest, or as a place for a home or business—is affected by what neighbors are allowed to do on their property. As Susie Kunzman will tell you, your neighbor may make a bundle on gravel mining, but you may lose your shirt.

As of August, more than 2,200 claims had been filed in Oregon under Measure 37, totaling well in excess of $5 billion in demands for compensation. Not surprisingly, there has been a growing backlash to the law of pay-or-waive. There are many more anecdotes around Oregon—stories of rural landowners claiming they "got suckered" by Measure 37, and of city neighborhoods watching months of painstaking planning unravel in the face of claims to build at high densities.

In each case profiled here, Measure 37 has allowed one property owner to harm the interests, and sometimes the property value, of neighbors. Susie Kunzman, for example, faces economic losses for her farm and reduced property value because of a gravel mine next door. Jim and Sandy LeTourneux face higher wildfire risks from new development adjacent to their family forest. David Jones could lose business at his mountain resort because of a neighbor's pumice mine and geothermal plant. And so on.

The copycat ballot measures in other states could have consequences every bit as profound as Measure 37's have been in Oregon. In some cases, they might be more aggressive. (See "Initiatives at a Glance," page 15.)

If they pass, communities will lose much of their right to plan for the future. In some cases, property owners will lose the ability to protect themselves from what goes on next door, as the Letourneuxs and Kunzmans have. Unscrupulous property owners may be able to demand cash payments from taxpayers to prevent them from going forward with obnoxious activities. And if communities cannot pay, then property owners could be exempted from common-sense laws that protect groundwater quality, or ban heavy industry near residences, or protect property owners from public nuisances.

In short, if the property ballot measures pass, residents of Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington, won't be able to protect their homes, businesses, and communities from new threats. Local governments will be hamstrung, unable to exercise responsible stewardship for the community's future. Even the West's unique natural heritage—such as East Lake in Newberry Crater National Monument—may be endangered.

Community planning is a balancing act. It can be tough and contentious and not everyone always gets what they want. Even the best laws may be open to allegations of unfairness. But true fairness requires that communities listen carefully to property owners' concerns about how plans and rules will affect their property—and respond when concerns are justified.

As Oregon shows, pay-or-waive schemes are simply too inflexible, allowing communities almost no ability to respond to emerging threats to their quality of life. As a result—and in the name of a few landowners who feel they have been harmed by overzealous rules—the property ballot measures would create new varieties of harm. According to University of Washington researchers studying the impacts of Washington's Initiative 933:

> [B]y using a sweeping and overly general approach to help one set of aggrieved people, the Initiative would have the unintended consequence of creating another, larger set of aggrieved people. If land use laws cannot be waived, there would be a newly aggrieved group of non-benefited taxpayers responsible for paying I-933's costs of compensation.
>
> If land use laws were waived, the list of aggrieved people would include property owners suffering a loss of value as undesirable development arrives on neighboring property. It would include communities that see their character and quality of life damaged by unrestricted development.[5]

It's easy to take the advances since G.W. Wells' time for granted. Most of us have never had to worry about raw sewage in our vegetable gardens, plague-carrying rats on backyard garbage piles, or industrial smoke in our neighborhoods. But all were once features of everyday life.

Had a pay-or-waive law had been on the books when Wells complained of the "death-dealing odor" in 1901, however, Seattle might never have been able to compel property owners to hook up their homes to sewer systems. Taxpayers might have been forced to pay both for the new sewer lines, and then to compensate property owners who claimed that the hook-up requirement imposed an economic burden. As compensation costs rose, the sewer hook-up requirement might have been selectively waived. And Seattle's sewage crisis might have continued, perhaps indefinitely.

Today, few westerners wish that community planning had been frozen in time in Wells' era. Like other Americans, westerners have long cherished the right of communities to act together to protect the common good and to plan for the future.

The generations before us preserved our rights to protect property from abuses. What would our kids and grandkids think about inheriting a West where communities must pay a ransom for the right to plan for the future? Can we trust that they will not face new challenges that will require adaptation and flexibility?

As descendants of Wells' generation we are grateful that our great-grandparents had the foresight, and the tools, to address the emerging problems of their day. That spirit of responsible stewardship is a legacy that we would be wise to pass on to the generations yet to come.

2006 PROPERTY MEASURES - AT A GLANCE

Most of the 2006 ballot measures have two distinct components:

1) They outlaw "***Kelo*-style eminent domain**," a specific way in which a government condemns private property and hands it over to a private party;

2) they introduce a **"pay-or-waive" scheme**: when new laws or regulations reduce the value of private property, the government must either compensate landowners or waive the law.

WASHINGTON_____INITIATIVE 933

Introduces a pay-or-waive scheme affecting both real and personal property, retroactive to at least 1996; and creates extensive new requirements for property impact assessments. 933 mentions eminent domain, but includes no language that would change current eminent domain policy. (*Kelo*-style eminent domain is already outlawed under the Washington State Constitution.)

Status: 933 contains few safeguards for health and safety, public nuisances, or applying federal law. The measure's retroactive clause will almost certainly clog the state's courts with lawsuits—a danger worsened by a provision that taxpayers pay legal fees for both sides, win or lose. Unique among the 2006 measures, 933 applies to both real estate and personal property (which includes stocks and bonds, contracts, vehicles, livestock, and much more). Two independent analyses from the state's Office of Financial Management and the University of Washington estimate that 933 would cost taxpayers approximately $8 billion in compensation in the first several years after it became law.[7] Opposed by a broad cross-section of Washington organizations, including many farm groups.

CALIFORNIA_____PROPOSITION 90

Outlaws *Kelo*-style eminent domain; and introduces a pay-or-waive scheme for new laws.

Status: Opposed by a large and diverse array of California organizations, including the state's Farm Bureau, Chamber of Commerce, NAACP, and police, fire, labor, conservation, and homeowner groups. If enacted, Proposition 90 is estimated to cost California taxpayers tens of billions of dollars.[6]

IDAHO_____PROPOSITION 2

Outlaws *Kelo*-style eminent domain; and introduces a pay-or-waive scheme for new laws.

Status: *Kelo*-style eminent domain is already outlawed in Idaho. Local opponents warn that under Proposition 2's pay-or-waive scheme recent community victories—such as a proposed coal-fired power plant near Burley, Idaho, which was turned away with broad populist support—could be overturned, with few rules or regulations remaining to protect local residents.

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2006 PROPERTY MEASURES - AT A GLANCE

MONTANA_____INITIATIVE 154

Outlaws *Kelo*-style eminent domain; and introduces a pay-or-waive scheme for new laws.

Status: Struck down by the Montana courts in September, along with two companion measures, because signature-gatherers engaged in what the judge termed a "pervasive and general pattern and practice of deceit, fraud and procedural non-compliance." The Montana decision may have a ripple effect in other states because many of the tactics used by signature-gatherers in Montana were used to put property measures on the ballot in the other Western states. As of early October 2006, the Montana Supreme Court had not yet ruled in the case.

OREGON_____MEASURE 37

Introduced the nation's first pay-or-waive scheme, retroactive for landowners who owned their property prior to the enactment of a regulation affecting their property's value.

Status: Passed by voters in 2004. Key elements are still being litigated, but counties are actively granting waivers from land-use laws for Measure 37 claimants. There's growing concern among Oregon's residents that the measure goes too far in reducing protections for communities. As of August 2006, property owners had filed more than 2,200 claims totaling more than $5 billion.

NEVADA_____PISTOL

Outlaws *Kelo*-style eminent domain; and introduces a pay-or-waive scheme for new laws.

Status: The People's Initiative to Stop the Taking of Our Land (PISTOL) was partially invalidated by the Nevada Supreme Court because it violates Nevada's rule that initiatives may contain only a single subject. Only the *Kelo*-related portion will go before voters. Like Montana's court decision, Nevada's ruling may echo in the four other states where the property ballot measures contain both eminent domain reform and a pay-or-waive scheme.

ARIZONA_____PROPOSITION 207

Outlaws *Kelo*-style eminent domain; and introduces a pay-or-waive scheme for new laws.

Status: Opposed by the state's conservation community, including the Grand Canyon chapter of the Sierra Club and other groups.

THE TROJAN HORSE OF EMINENT DOMAIN

The basic argument behind pay-or-waive measures is intuitively appealing. When a rule or regulation reduces the value of property, the thinking goes, the owner should be compensated for the diminished value. Supporters argue that such regulations amount to a "taking," a legal standard that implies a very substantial loss of use of property and that requires compensation.

On the legal merits, supporters are simply incorrect. The US Supreme Court has ruled consistently that communities can regulate their land uses. And according to the courts, ordinary regulations do not constitute a "taking," even when the laws prohibit some forms of economic activity.

The 2006 generation of pay-or-waive ballot measures seeks to drastically expand the definition of "takings." Under these initiatives, most restrictions on property—even ordinary rules like zoning codes—can be considered a "taking," which entitles property owners to financial compensation for any lost profit potential. If communities do not want to pay, or cannot afford to, then they must waive the restriction. Thus, communities must choose: pay the price or let a few property owners do exactly what they want—regardless of whether they're infringing on the rights of others.

There is a legitimate debate over regulation and property, and about the scope of takings. But in 2006, the supporters of the six property measures in western states have mostly tried to avoid that debate. Instead, they have tried to confuse voters by talking about eminent domain—an entirely different subject. The confusion strategy was laid out in a Reason Foundation paper that offered guidance on replicating Measure 37 in other states.[8] And the guidance was heeded: five of the six states have ballot measures that address both eminent domain and takings. (In the sixth state, Washington, eminent domain is mentioned in the initiative's preamble, though the measure does nothing to change eminent domain law.)

In most states, however, it is unconstitutional for a ballot measure to address more than a single subject. In September 2006, the Nevada Supreme Court invalidated part of that state's property initiative—the part dealing with takings—because it violated the single-subject rule. And the Nevada high court's decision is likely relevant to other states, where the 2006 ballot measures also employ the two-issue confusion.[9]

But why all the attention to eminent domain in the first place?

In 2005, a closely divided US Supreme Court ruled that governments can use the power of eminent domain to seize property and turn it over to a private party for economic development. The case, *Kelo v. City of New London*, affirmed the role of eminent domain beyond its traditional use as a tool for building infrastructure, such as roads, that sometimes requires cutting across private property provided that governments first compensate the property owners for seized property.

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THE TROJAN HORSE OF EMINENT DOMAIN

The court's ruling in *Kelo* upset people, especially people in low-income communities, who worried that governments would abuse their power to enrich private developers. A number of states quickly passed legislation to prevent *Kelo*-style eminent domain. Washington, however, was not among these states because it is already prohibited by the state constitution.

Kelo **also provided a political smokescreen** for developers and speculators to pass legislation that they had longed for. If passing a law like Oregon's Measure 37—a pay-or-waive scheme that we've studied in this report—was politically infeasible, then *Kelo* was the perfect Trojan horse to sneak it in.

Both eminent domain and regulatory takings are contentious subjects, worthy of sincere debate. But using outrage over eminent domain to disguise a completely different issue—one that could be a poison pill for local communities, property owners, and taxpayers—is simply dishonest.

The dishonest electoral strategy has been amplified by other questionable tactics. Paid out-of-state signature gatherers hyped misleading claims about the ballot measures they were endorsing. An investigation of funding has shown that the sponsoring organizations were funded by a tangled web of shell organizations, many of whom refused to disclose their donors.[10]

In September, a district court judge in Montana tossed out that state's measure, Initiative 154, on the grounds that backers had persistently engaged in deceptive and fraudulent tactics, in violation of Montana election law. The Montana Supreme Court promised to take up the question, but as of early October 2006, the state's highest court had not handed down a ruling.[11]

As with the Nevada decision, the court's ruling in Montana may have repercussions in other states, because signature-gatherers and initiative supporters engaged in similar tactics in most states.

ACKNOWLEDGMENTS

Property Wrongs was researched and written by Sightline Institute staff Eric de Place, Elisa Murray, Clark Williams-Derry, and Leigh Sims; and by Colleen Kaleda, who conducted the interviews and wrote the stories from Oregon. Sightline thanks others who contributed their expertise and resources, especially Eric Stachon at 1,000 Friends of Oregon and everyone in Oregon who shared their stories. All photos (except cover image of Mt. Hood) are by Colleen Kaleda and Eric Stachon. Design by Laurie Kellogg.

Sightline Institute is supported by the generosity of families, individuals and foundations in its work to foster strong communities, fair markets and responsible stewardship. Our gratitude extends to each, and all, for making this timely report possible.

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COVER PHOTOS

1. Oregon orchards, with Mt. Hood in the background.
2. Kathy Jones of East Lake Resort at Newberry Crater.
3. Alpacas at Susie Kunzman's farm in Clackamas County.