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Brian E. Gray

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Foreword: Some Thoughts on International Environmental Law from the Perspective of a Domestic Practitioner

By BRIAN E. GRAY*

In considering these introductory remarks for the symposium, I was struck by a realization of how much international law affects the work of a domestic environmental attorney and academic observer. I am a water lawyer by trade, and the courses I teach at this law school focus exclusively on U.S. pollution control and natural resources management. Yet, the problems of the global environment subtly permeate my studies, my classes, and my practice.

Our relations with the other nations of North America provide vivid examples. Canada, along with much of New England, has suffered from air pollution and acid rain generated by old, little-regulated coal burning power plants in the Ohio River Valley.¹ Canada's long-standing complaints, its unsuccessful efforts to persuade the U.S. Environmental Protection Agency (EPA) to regulate these sources, and its persistent diplomatic pressure² significantly contributed to the coalition to amend the Clean Air Act in 1990 to reduce acid rain precursors by fifty percent over the next decade.³ Conversely, the existence of inefficient, coal-fired Mexican power plants along the U.S. border helped to convince Congress that acid rain and transboundary air pollution were not solely northeastern phenomena.⁴ While we neglected or excused our industry's spolia-

* Professor of Law, University of California, Hastings College of the Law; J.D. 1979, Boalt Hall, University of California, Berkeley; B.A. 1976, Pomona College.

1. See OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, ACID RAIN AND TRANSPORTED AIR POLLUTANTS (1984); Mohnen, *The Challenge of Acid Rain*, SCI. AM., Aug. 1988, at 30.

2. *New York v. Thomas*, 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). For a concise summary of Canada's efforts to persuade the United States to control transboundary acid deposition, see F. ANDERSON, D. MANDELKER & A.D. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 315-16 (2d ed. 1990).

3. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 401(b), 404, 104 Stat. 2399, 2585, 2592-2605.

4. Marston, *The West Cleans Up Its Act*, High Country News, Feb. 27, 1987, at 1, col. 1.

tion of Canada's lakes and streams, Mexico has impeded our own efforts to maintain the pristine air quality and breathtaking vistas of the American southwest.

In a sense, the Mexican contribution to air pollution in the United States may be seen as retribution for our misuse of another shared resource, the Colorado River. Accurately described as the most overworked river in America, the Colorado irrigates over two million acres of farmland in seven states⁵ and supplies drinking water to more than twenty-five million customers. Although the United States agreed in a 1944 treaty with Mexico to deliver a minimum of 1.5 million acre feet per year at the international border,⁶ we have honored that pledge more in breach than in full compliance. In most years the great Colorado River ends in a puddle ten miles short of the Sea of Cortez in Mexicali,⁷ and the water that reaches Mexico is of poor quality. Salt concentrations at the Mexican border have exceeded 2500 parts per million, caused by return flow from irrigation of highly saline lands along the Green, Gunnison, Dirty Devil, and Gila River tributaries in the United States.⁸ To allay Mexico's concerns, the United States has agreed to supply farmers in the Mexicali Valley with water of the same general quality as that delivered to users in the Imperial Valley of California.⁹ These international agreements to maintain minimum flows of minimal quality may or may not provide Mexico with its just share of the waters of the international drainage basin. What is certain, however, is that the international apportionment of the Colorado River exacerbates the continuing controversies over the domestic allocation of the Colorado's scarce supplies.

Although Canada and Mexico feature prominently in the work of domestic environmental attorneys, the influence of international environmental law is not confined to relations with our North American neighbors. For example, the Migratory Bird Treaty with the other nations of the Western Hemisphere¹⁰ played an important role in convincing the federal government to address the tragic effects of selenium poisoning at the Kesterson National Wildlife Refuge in California's San Joaquin Val-

5. WESTERN WATER MADE SIMPLE 156 (E. Marston ed. 1987).

6. Utilization of Waters of Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, United States-Mexico, 59 Stat. 1219, T.S. No. 994. For an analysis of the treaty, see Meyers & Noble, *The Colorado River: The Treaty With Mexico*, 19 STAN. L. REV. 367 (1967).

7. Houk, *With Reckless Impetuosity*, in WESTERN WATER MADE SIMPLE, *supra* note 5, at 169.

8. *Id.* at 177-78, 202-04.

9. Hundley, *The West Against Itself: The Colorado River—An Institutional History*, in NEW COURSES FOR THE COLORADO RIVER 37-39 (G. Weatherford & F.L. Brown eds. 1986).

10. 16 U.S.C. §§ 703-712 (1988).

ley.¹¹ The Bureau of Reclamation ultimately closed the San Luis Drain, which carried agricultural waste water to Kesterson, and is now studying ways to reduce the amount of irrigation return flow generated by the Central Valley Project in the western San Joaquin Valley.¹²

International law on a more global scale also is shaping U.S. domestic environmental policy. The worldwide consensus that the manufacture and use of chlorofluorocarbons have depleted the ozone layer above the north and south poles has forged a domestic majority to eliminate the production of CFCs by the year 2000.¹³ Similarly, the increasingly persuasive evidence that there has been a significant warming of global temperatures in the past decade is likely to lead to dramatic changes in the Clean Air Act to regulate and to reduce the production of carbon dioxide.¹⁴ The specter of a "greenhouse effect" causes particular concern in California. Some climatologists have speculated that the current sustained drought is the result of long-term changes in weather patterns linked to global temperature change.¹⁵ In a state where water resources are already strained to their limit, global warming could have catastrophic economic, environmental, and social consequences.

The international environment also influences U.S. law in less direct ways. For example, in response to State Department criticism of Brazil's failure to regulate deforestation of the Amazon, the President of Brazil observed that below-cost timber leases have led to severe overcutting in the Tongass National Forest in Alaska.¹⁶ This reciprocal international pressure to incorporate long-term environmental considerations into resource management responsibilities may prove decisive in the effort to preserve the world's largest tropical and temperate rain forests. Indeed, last December Congress enacted the Tongass Timber Reform Act, which eliminates the previous requirement that a minimum number of board

11. See R. WAHL, *MARKETS FOR FEDERAL WATER: SUBSIDIES, PROPERTY RIGHTS, AND THE BUREAU OF RECLAMATION 197-202* (1989); Kosloff, *Tragedy at Kesterson Reservoir: Death of a Wildlife Refuge Illustrates Failings of Water Law*, 15 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,386 (1985).

12. U.S. Dep't of the Interior & California Resources Agency, *San Joaquin Valley Drainage Program*, Draft Final Report (1990).

13. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 601-618, 104 Stat. 2399, 2648-2670.

14. See Schneider, *Changing Our Ways or Changing the Earth's Climate*, 19 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,208 (1989).

15. Stevens, *Governments Start Preparing for Global Warming Disasters*, N.Y. Times, Nov. 14, 1989, at C1, col. 3, C13, col. 2.

16. Note, *Comparison of Forestry Laws in the United States and Brazil as They Promote Deforestation in Southeastern Alaska and the Amazon Basin*, 14 *HASTINGS INT'L & COMP. L. REV.* 1017 (1991).

feet be cut each year, reduces federal subsidies of timber harvesting, sets aside over one million acres as wilderness, and restricts logging along rivers and streams to protect water quality and riparian habitat.¹⁷

Comparative international law also affords a sobering perspective on domestic environmental issues. In teaching the Clean Air Act each year, I tend to be rather critical of federal policy, citing delayed compliance, extensions of deadlines, and widespread underenforcement of standards. Yet, in fairness, U.S. air pollution achievements over the past twenty years have been remarkable in comparison with other industrialized countries that turned a blind eye to the environment in the quest for economic growth. The most vivid contrast to U.S. clean air policy is the experience of Eastern and Central Europe. We have all read with horror the accounts of the thousands of Romanian children born severely retarded or physically disabled by lead and other chemical poisoning. News reports from Czechoslovakia describe the destruction of the rivers and forests of the area that encompasses the Czech, German, and Polish borders from mining, industrial pollution, and chemical production. They also painfully report the establishment of respiratory clinics in deep caverns of salt mines, the only place in the area where the air is fit to breathe.¹⁸ In an article published last fall, the Los Angeles Times described the Silesia region of Poland, which is home to twenty steel mills, fifteen coal-fired power plants, eight coking plants, four lead and zinc processing mills, eighteen other metallurgical plants, three oil refineries, and six chemical plants, none of which is subject to any emissions controls:

The population of this area lives tucked between the mines and mills, one town scarcely recognizable from the next, along snaking roads choked with heavy truck traffic. No one here hangs washing outdoors. The houses and playgrounds are gray with the dust. Home, for these people is a nightmare landscape of smokestacks and cooling towers, slag heaps and mesas of coal tailings, of subsiding earth and pits filled with a chemical broth masquerading as water. . . .

Two women speak together, a dozen children play nearby. The daughter of one of the women runs up.

She is 5 years old, blonde, with a face as delicate as bone china. She is covered with a fine black dust, like graphite. It is all over her face, and her hands are black with it. The women shrug. Its the

17. Tongass Timber Reform Act, Pub. L. No. 101-626, 104 Stat. 4426 (1990).

18. Kratochvil & Simons, *Eastern Europe: The Polluted Lands*, N.Y. Times, Apr. 29, 1990, § 6 (Magazine), at 30, col. 2, 35, col. 2.

“sandpile,” one indicates. That’s the way it is here, says the other.¹⁹

In the next decade, Europe’s efforts to solve these staggering air and water pollution problems while simultaneously attempting to build a modern, competitive economy may offer valuable lessons to the United States, which also must strike a precarious and evolving balance between environmental protection and economic growth. Reciprocally, as the European Community (and, perhaps, Europe as a whole) begins to formulate a unified set of environmental laws, it surely will look to the United States for lessons. The United States has already grappled (sometimes effectively, sometimes not) with the problem of establishing national pollution standards while accommodating the frequently conflicting interests of individual sovereign states.²⁰ The Clean Air Act, with its complex blend of federal standards and state enforcement, may not be a model that the Community will choose to follow, but neither is it a model that can be ignored. The U.S. failure to achieve compliance with most of the air quality standards promulgated by the EPA over the past twenty years should persuade the European nations to follow some strategy other than ambient air quality management. The Community’s success or failure with alternative strategies such as centralized direct emissions limitations and economic incentives will better enable us to refine, and if necessary to reformulate, the Clean Air Act in the decade to come.

At several critical junctures in this century, the United States has gained a better understanding of its relationship to the rest of the world community. In the 1940s we learned that it is impossible to remain politically and militarily isolated. Following twenty years of economic and military expansion, by the mid-1960s we faced up to the fact that there are profound and inexorable limits to the free export of American interests and American values. In the 1970s the environmental costs of our economic success had become apparent, and we began to address the domestic problems of air and water pollution, waste management, and resource preservation. The 1980s taught us that the vitality of our domestic economy is in large measure dependent on our standing within the international economy. Perhaps the “New World Order” of the 1990s will bring us a better appreciation of our place in the global environment as well.

19. Powers, *For Children of Poland, A Legacy of Pain, Pollution*, L.A. Times, Oct. 30, 1990, at H1, col. 2, H4, col. 1.

20. See, e.g., Clean Air Act §§ 109-110, 42 U.S.C. §§ 7409-7410 (1988).

