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CHALLENGES TO ENVIRONMENTAL LAW

By
JOHN D. LESHY*

It is altogether fitting to be extolling the distinguished record of the Northwestern School of Law of Lewis & Clark College in the development and application of law related to natural resources and the environment. I am familiar with the field and Lewis & Clark's record in it because I am a recovering natural resources law professor. It would be fair to say that I am temporarily in detox because I am still on leave from the law faculty at Arizona State University.

Opinion polls consistently report that most lawyers practicing today are unhappy, making comfortable incomes but lacking psychic reward. By and large, this is not true of those practicing in the environmental and natural resources field. I am fortunate to be able to say, "I love my job." Indeed, I am fired with enthusiasm about my work. Clark Kerr, as Chancellor of the University of California system back in the days when people were occupying buildings, said that he too came to work fired with enthusiasm—and left that job the same way.

The most succinct description of my job is that I am supposed to keep the Secretary of the Interior out of jail. As some of you know, oil portraits of past Secretaries line the central hall of the sixth floor of the main Interior building in Washington, D.C. The first thing I did when I became Solicitor was to get the Secretary's permission to move one of the portraits into my office. Students of Interior lore will, of course, guess which one—Albert Bacon Fall, a former Senator from New Mexico and President Harding's Secretary of the Interior from 1921 to 1923. Fall was aptly named; he was the fall guy in the Teapot Dome Scandal and did hard time for bribery, so I figure it is appropriately sobering that the Solicitor's most notable failure is on the wall scowling down at me. By the way, Secretary Fall's fate holds another lesson for the importance of good legal representation: Fall was convicted of taking the bribe that the oil company executive was acquitted of giving.¹

Speaking of quality lawyering and the importance of good training brings me back to tonight's occasion—Lewis & Clark's Environmental and

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¹ Mammoth Oil Co. v. United States, 275 U.S. 13 (1927).

Natural Resources Law Program. It trains outstanding attorneys. Several attorneys now in the Solicitor's office have graduated from the program and a number of other graduates have worked in our office at one time or another. Many other agencies in the federal establishment, such as the Environmental Protection Agency and the Department of Agriculture, have likewise benefitted. But the program produces much more than top-notch students. It is one of the two law schools in the country which regularly train federal judges in environmental law, and its faculty produces much valuable scholarship and public service.

The program's law journal, *Environmental Law*, is a bible in this field. I can speak of its very high standards from personal experience, because after twenty years of trying, I have an article in an upcoming issue, a little piece defending the Clinton Administration's natural resources policy.² A list of articles and authors over the last five years provides a flavor of this journal's importance. Consider some of the people who have published articles in this journal just since 1989. There are the usual suspects, like Joe Sax³ and Charles Wilkinson,⁴ but also people like Senator Mark Hatfield,⁵ former Senate Majority Leader George Mitchell,⁶ Senator Joe Biden,⁷ former EPA Administrator Bill Reilly,⁸ and Congressman Henry Waxman.⁹ You'll find luminaries like Fritjof Capra¹⁰ and Stephen Jay Gould,¹¹ not ordinarily found in law publications. Also, Bill Clinton¹² and some guy named Bruce Babbitt¹³ have published pieces.

What I find most interesting, though, is the titles of some of these articles. Now you all know that law journal articles do not usually have the pizzazz of the collected, unexpurgated correspondence of Marcia Clark and Johnnie Cochran. This journal does publish, occasionally, pieces like *A New Form of Subject Matter Jurisdiction Under Section 505 of the Clean*

² John D. Leshy, *Natural Resources Policy in the Clinton Administration: A Mid-Course Evaluation from Inside*, 25 ENVTL. L. 679 (1995).

³ Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473 (1989).

⁴ Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrines*, 19 ENVTL. L. 425 (1989).

⁵ Mark O. Hatfield, *The Long's Peak Working Group and River Basin Trusts*, 24 ENVTL. L. 145 (1994).

⁶ George J. Mitchell, *Preservation of State and Federal Authority Under the Oil Pollution Act of 1990*, 21 ENVTL. L. 237 (1991).

⁷ Joseph R. Biden, *Afterword, The Environment and World Trade*, 23 ENVTL. L. 687 (1993).

⁸ William Reilly, *Taking Aim Toward 2000: Rethinking the Nation's Environmental Agenda*, 21 ENVTL. L. 1359 (1991).

⁹ Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721 (1991).

¹⁰ Fritjof Capra, *Biologically Conscious Management*, 22 ENVTL. L. 529 (1992).

¹¹ Stephen Jay Gould, *Prophet for the Earth: A Review of Edward O. Wilson's The Diversity of Life*, 24 ENVTL. L. 815 (1994).

¹² Bill Clinton, *Expanding Trade and Creating American Jobs*, 23 ENVTL. L. 683 (1993).

¹³ Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation Within the Terms of the Act*, 24 ENVTL. L. 355 (1994); Bruce Babbitt, *The Public Interest in Western Water*, 23 ENVTL. L. 933 (1993); Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982).

Water Act,¹⁴ but consider these: *The Regulation of Genetically Engineered Plants: Is Peter Rabbit Safe in Mr. McGregor's Transgenic Vegetable Patch?*,¹⁵ or *Amending the Endangered Species Act: The Ransom of Red Chief, and Other Related Topics*,¹⁶ or *What Chief Seattle Said*,¹⁷ or (as Dave Barry would say, "I'm not making these up") *The Environmental Policy of Saint Thomas Aquinas*,¹⁸ *A Superfund Trivia Test*,¹⁹ *NEPAWOCKY: A Panegyric Verse*,²⁰ *Everything You Need to Know About Environmental Law You Learned in Kindergarten*,²¹ and my personal favorite, *What Outrages Me About the Endangered Species Act*.²² These titles invite attention, and that is what this journal gets.

A few minutes ago, I described working in Washington as being in some sort of detox. That may be an inappropriate metaphor, because many find politics in the nation's capital these days quite toxic and getting worse. The country is increasingly polarized, short-tempered, and angry. Modern conveniences like talk radio seem to be driving us apart, and environmental and natural resources issues are not immune from this debasement of public discourse. Last fall's election seemed to signal an even greater loss of patience. The House Republicans' Contract With America does not mention the word "environment," but it contains regulatory reform and property rights provisions that could, if enacted, make far-reaching, fundamental changes in environmental law and policy, the likes of which we have not seen before.

Environmental law is complex. In part, this is because the environment is highly complex, and the ways human beings interact with it and perturb it are complex. Jack Ward Thomas, Chief of the Forest Service, has said, "Not only are ecosystems more complex than we think; they are more complex than we *can* think."²³ Whether the approach of the law is through the more traditional command-and-control regulation or whether it is to facilitate the operations of private markets in environmentally sen-

¹⁴ Patrice Scatena, Note, *Gwaltney of Smithfield v. Chesapeake Bay Foundation: A New Form of Subject Matter Jurisdiction Under Section 505 of the Clean Water Act?*, 19 ENVTL. L. 119 (1988).

¹⁵ David J. Earp, Comment, *The Regulation of Genetically Engineered Plants: Is Peter Rabbit Safe in Mr. McGregor's Transgenic Vegetable Patch?*, 24 ENVTL. L. 1633 (1994).

¹⁶ Donald J. Barry, *Amending the Endangered Species Act, The Ransom of Red Chief, and Other Related Topics*, 21 ENVTL. L. 587 (1991).

¹⁷ Paul S. Wilson, Historical Perspective, *What Chief Seattle Said*, 22 ENVTL. L. 1451 (1992).

¹⁸ Patrick Halligan, *The Environmental Policy of Saint Thomas Aquinas*, 19 ENVTL. L. 767 (1989).

¹⁹ William H. Rodgers, Jr., *A Superfund Trivia Test: A Comment on the Complexity of Environmental Laws*, 22 ENVTL. L. 417 (1992).

²⁰ Brian Blum, Letter, 22 ENVTL. L. 791 (1992) (containing original verse NEPAWOCKY).

²¹ Patrick A. Parenteau, *Everything You Need to Know About Environmental Law You Learned in Kindergarten*, 23 ENVTL. L. 223 (1993).

²² Stuart L. Stomach, *What Outrages Me About the Endangered Species Act*, 24 ENVTL. L. 801 (1994).

²³ Barbara Lloyd McMichael, *Taming the River: Three New Books Explore the Columbia's Fate*, SEATTLE TIMES, Apr. 16, 1995, at M2 (quoting Jack Ward Thomas) (emphasis added).

sitive ways, the challenge is the same. The law has to draw lines where nature does not. It has to fit a legal process that is more or less rational on a vast array of natural circumstances. This complexity poses daunting challenges to lawyers working in the area, and that is why programs like Lewis & Clark's, which foster an appreciation of this complexity and of the variety of ways one can devise for dealing with it, are particularly important.

In the early days of the modern environmental movement, when Lewis & Clark's program was just getting started, there was a strong dose of idealism—a hardy band of visionaries agitated to awaken society to the need to pay more attention to the environment. The message was powerful and resonant: The political system responded and passed measures assigning to the legal system the task of channeling and translating the movement's core idealism into a system that guided behavior toward the ends of pollution control, rational natural resources management, and the preservation of irreplaceable features of the landscape. Practical considerations like jobs, costs, and economic growth, and mundane things like agency budgets and federalism, all tempered this channeling and translating process. Some tension between idealism and pragmatism is inescapable. Somebody once said, "An ideologist thinks that what is right works; a pragmatist thinks that what works is right." Neither is completely correct. And the tension makes working in the field exciting and challenging.

This whole effort has been palpably effective. The environmental movement and the laws it has generated have done an enormous amount to improve the quality of life for most Americans. It is a genuine, modern success story for law and government at all levels. Until recently, there seemed to be a strong, indeed impregnable, consensus for these programs. Many people relaxed with the notion that the struggle to make environmental concerns a central part of organized society had been won. Of course, these laws, being so complex and so challenging to design and implement in an intelligent way, are never perfect; they are always a work in progress. Every major environmental law—the Clean Air Act,²⁴ Clean Water Act,²⁵ and Endangered Species Act²⁶—has gone through a periodic congressional revisiting. Congress has reexamined, modified, and fine-tuned. The laws have moved in effect from infancy through childhood and well into adolescence. Adolescence is a period of considerable turmoil. They say there is nothing wrong with an adolescent that reasoning with him or her won't aggravate.

In recent months, something qualitatively very different from normal adolescent turmoil has been happening. Most of the seventy-three new House Republicans, and a sizeable number of other members of Congress, are calling for much more than fine-tuning our approach. Instead, they are saying, "Be revolutionary." The result is a serious effort in Congress to roll

²⁴ 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993).

²⁵ 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

²⁶ 16 U.S.C. §§ 1531-1544 (1994).

back and, in some areas, virtually eliminate important environmental protection programs. This radical approach is finding expression in many different kinds of proposals, including regulatory moratoria, repeals, exemptions, property rights legislation, and budgetary attacks on science agencies like the U.S. Geological Survey and the National Biological Service.

It is not totally clear whether this new approach signals a loss of national consensus on the fundamental goal of environmental protection, or whether it is instead merely an expression of the antipathy that many Americans feel toward government regulation and the political system in general, in which environmental protection is another innocent victim. Frankly, I am not sure the answer makes that much difference. Even if this new radicalism reflects only a deep distrust of government rather than a dissatisfaction of the goal of environmental protection, it is not a healthy sign. Environmental protection is unquestionably one of those areas in which governmental activism and leadership has worked. It has improved the environment and our quality of life without sacrificing and, in many cases, while enhancing economic growth. President Clinton went to Chesapeake Bay on the twenty-fifth anniversary of the first Earth Day and pointed this out. As he put it, "[T]here is a right way and a wrong way to reform our approach to preserving the environment It would be crazy to throw the gains we have made in health and safety away or to forget the lessons of the last 25 years" ²⁷

My boss, Secretary Babbitt, recently described the challenge before us this way:

[W]e're are going to have to urgently reawaken all of our neighbors in our community about our responsibilities to each other. There is a need for all of us to look across this American landscape, and to flourish in the God-given beauty and productivity and resonance of the mountains and water and landscapes and think about how it is that we can live a little more lightly on this land, [and] how it is we find a balance in which we live in harmony with this extraordinary resource and recognize our obligation and pass it on to generations that come. ²⁸

The environment ought to be an issue that brings us together, not drives us apart. We all care about the air we and our children breathe, the water we drink, and our natural heritage. We ought to be able to find common ground. Indeed, it is essential that we find common ground on these issues.

Given the current turmoil and the threatened destruction of what many once thought was a hard-won national consensus on these issues, the Lewis & Clark Environmental and Natural Resources Law Program has a particularly important role to play. The task now is once again to nurture

²⁷ President Bill Clinton, Remarks at Earth Day Ceremony, Concord Point Lighthouse Maritime Museum, Apr. 21, 1995, *available in* LEXIS, Executive Branch Library, Federal News Service File.

²⁸ Bruce Babbitt, Keynote Speech Before the New England Environmental Conference, Tufts University (Mar. 18, 1995) (transcript on file with author).

the ideal without ignoring the pragmatic, to separate facts from propaganda, to separate good ideas from bad, to sift through the challenges being made to environmental protection orthodoxy—and there are many—and be willing to experiment when the answers are not clear. Among other things, it is particularly important not to let the perfect be the enemy of the good. As the participants in the Constitutional Convention in 1787 were wrapping up the proceedings, Benjamin Franklin said, “I cannot help expressing a wish that every member of the Convention . . . doubt a little of his infallibility.”²⁹

The program we are honoring tonight does these things in the best traditions of the academic enterprise. It does them by the seasoned tools of legal education, fostering the skills of reason, unblinking analysis, and careful expression, all in an atmosphere of intellectual curiosity and honesty. The program is more important now than ever. I am honored to be part of tonight’s celebration.

²⁹ CARL VAN DOREN, *BENJAMIN FRANKLIN* 754 (Viking Press 1952) (1938).