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Private Public Interest Environmental Law: History, Hard Work, and Hope

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Private Public Interest Environmental Law: History, Hard Work, and Hope*

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Introduction 463
I. A Short Pre-History of Public Interest Environmental Law 464
A. Environmental Law, Eastern Mountains, and Lloyd Garrison 464
B. From New York to California, with Stops in Between 466
II. A Typology of Environmental Law Practice 470
A. Business Environmental Law 470
B. The Non-Profit Alternative 475
C. Private Public Interest Law 476
III. Shaping a Career 481
A. A Story of Persistence 481
B. An Activist Finds Her Dream Job 484
C. Some Views from Other Countries 486
Conclusion 487

INTRODUCTION

Public interest environmental law in the United States did not originate because some lawyers wanted to shape policy for the whole nation, or because they had a steady job at a non-profit organization. It started with a passion to save some fish in a local river, with a yearning for the continued

* Note: This is a much expanded version of a talk delivered at Pace Law School on March 19, 2007 as part of the Lloyd K. Garrison Lecture Series on Environmental Law. Some of these issues were also explored on March 17, 2007, in an address at the National Association of Environmental Law Societies annual conference at George Washington University. However, the video interviews, dramatic charts, and sounds of howling wolves are omitted here.

** Professor Bonine's career of nearly forty years has taken him from practicing domestic environmental law with the U.S. Environmental Protection Agency to international diplomatic negotiations. Always an advocate of public interest law, he co-founded: the world's first environmental law clinic (now the Western Environmental Law Center, http://www.westernlaw.org); the public interest environmental law conferences that have taken place for nearly thirty years in Oregon (http://www.pielc.org); and an international network of environmental lawyers (the Environmental Law Alliance Worldwide, http://www.elaw.org). His primary focus now is assisting in the development of Oregon's LL.M. Program in Environmental and Natural Resources Law, http://www.llm.uoregon.edu.

peace of a river valley, with a love for the springtime songs of birds. Environmental litigation also did not start in Washington, D.C. It started in a remote canyon in southern Utah, along unspoiled trails in a mountain valley in California, in neighborhoods of Memphis, in small towns of Long Island, and in villages of the Hudson River Valley. Lawsuits to save the environment did not start in national non-profit groups. They started with private lawyers who wanted to devote some of their time to causes larger than the interests of their private clients.

It is worth looking back at our origins, thinking about what the public interest environmental law movement is today, and speculating on how the next generation of law students will attack problems even larger than the ones faced by those who have gone before. For the environmental law student, the choices often seem to be limited to just three: try to join a corporate firm and convince yourself that the work is not overly harmful (or that you will change the culture of the firm or the business views of its clients); apply to a government agency, where your salary may be acceptable, although never spectacular, and try to maintain your ideals while representing the bureaucracy; or try to get one of the scarce jobs with a national, non-profit environmental law firm, where you can feel good about your work and earn an income that is satisfactory, if modest. But the field of public interest environmental law is far broader and richer than these limited options. Probably the most overlooked opportunity is to join the non-profit law movement outside the national law firms, or to join the *private* public interest environmental law movement.

I. A SHORT PRE-HISTORY OF PUBLIC INTEREST ENVIRONMENTAL LAW

A. Environmental Law, Eastern Mountains, and Lloyd Garrison

Although various claims are made about the origins of public interest environmental law in the United States, there has been relatively little work done to unearth its history. That history has a lot to teach us. The early history of environmental law begins with private public interest work. The *Storm King Mountain* case was the talk of Yale Law School students concerned with the environment in the late 1960s.[1] We devoured each

1. *See* Comment, *Of Birds, Bees, and the FPC*, 77 YALE L.J. 117 (1967). The current author began attending Sierra Club meetings at Yale in the same period, saved press clippings on the *Storm King* case, and first read Rachel Carson's *Silent Spring* when he should have been studying.

article on the case that appeared in the *New York Times*. There were no classes in environmental law, but here were private lawyers going to court to protect the environment and then fighting in an administrative hearing to preserve the beauty of the Hudson River Valley. The excitement was palpable.

The case had begun several years earlier, while most of us were in college and not paying much attention to law – or even the environment. In 1962, Consolidated Edison of New York (ConEd) announced its intentions to build a reservoir at the top of Storm King Mountain on the Hudson River, pumping water up at night and letting it flow down through electrical turbines during the day. After ConEd filed an application with the Federal Power Commission (FPC) for a license to construct the plant, six concerned citizens gathered in November 1963 in Octagon House, the home of Carl Carmer.[2] They formed a citizens group that they called the Scenic Hudson Preservation Conference to fight against the plan.[3] Soon thereafter, Stephen Duggan, a Wall Street lawyer, and his wife "Smokey," became involved.[4] They intervened in the administrative licensing proceedings and argued that the FPC must consider environmental values, not only electrical energy, in making its decisions. When the FPC refused to do so,[5] lawyer Lloyd Garrison took the case to the U.S. Court of Appeals for the Second Circuit, winning a ruling that the FPC must, indeed, take account of environmental values.[6]

The ruling and the proceedings that followed electrified a generation of law students who had gone to law school hoping for something more out of

2. *See Scenic Hudson Marks 40th Anniversary*, HALF MOON PRESS, Jan. 2004, *available at* http://www.hudsonriver.com/halfmoonpress/stories/0104scen.htm.

3. Alexander Saunders Papers: Records Relating to the Storm King Case, 1962-1966, http://library.marist.edu/archives/saunders_Aid.html (last visited Mar. 26, 2009); *See also* Press Release, Scenic Hudson, Scenic Hudson Celebrates Franny Reese (July 7, 2003), *available at* http://www.scenichudson3.org/press/announcements/details.cfm?ID=83&topic=all&type=REL; *see* http://library.marist.edu/archives/ScenicHudson_Aid.html (last visited Mar. 26, 2009). File archives are maintained at Marist College in New York.

4. Natural Resources Defense Council, http://www.nrdc.org/legislation/helaw.asp (last visited Feb. 17, 2009).

5. In Re Consolidated Edison Co. of New York, Inc. (Initial Decision), 33 F.P.C. 428 (1965).

6. Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The court uttered words that became the famous "balls and strikes" doctrine, saying that the role of the Commission was not "to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection," *id*. at 620. Discussions of the project and the court opinion include that in David R. Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 WIDENER L. SYMP. J. 1 (1998).

life than dollars and mortgages. In 1968, a group of my classmates journeyed down to New York City to talk with the Ford Foundation and with Stephen Duggan.[7] In 1970, with a $400,000 grant for their salaries and other expenses from the Ford Foundation, they opened the doors of the Natural Resources Defense Council.[8]

B. From New York to California, with Stops in Between

Storm King was not the only litigation taking place during that era – nor even the first. Contemporaneously with the *Storm King* litigation, other environmental cases had been brewing in New York. In fact, the origins of the environmental litigation movement can perhaps be dated first to a case filed in the late 1950s on Long Island, NY. Private lawyers representing residents asked a court to block the spraying of DDT for control of the gypsy moth. They failed.[9] Although the U.S. Supreme Court in 1960 rebuffed the homeowners' attempt to obtain review of the spraying, Justice

7. John H. Adams, *Responsible Militancy – Anatomy of a Public Interest Law Firm*, 29 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 631 (Nov. 1974); *see generally* BURTON A. WEISBROD, JOEL F. HANDLER & NEIL K. KOMESAR, PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 165 (1978).

8. "The Natural Resources Defense Council (NRDC) started in 1970 as the result of a partnership between a group of young, idealistic Yale Law School students and the older New York 'establishment' attorneys of the Scenic Hudson Preservation Conference, led by Stephen Duggan, who had already incorporated under the NRDC name." The National Resources Defense Council (NRDC), http://www.nrdc.org/legislation/helaw.asp (last visited Feb. 19, 2009). The Yale students – John Bryson, Gus Speth, Richard Ayres, and Ed Strohben – met with John Adams, who at the time was working in the U.S. Attorney's Office in New York. Duggan worked in the New York law firm, Simpson, Thatcher & Bartlett. In February 1970, NRDC opened its first three-room office. The National Resources Defense Council, http://www.savebiogems.org/about/execs.asp. The Ford Foundation made a $400,000 grant to get the organization off the ground, just as the previous year it had given a major grant to the Environmental Defense Fund. *See* WEISBROD, *supra* note 7, at 47, *citing* GORDON HARRISON & SANFORD M. JAFFE, THE PUBLIC INTEREST LAW FIRM: NEW VOICES FOR NEW CONSTITUENCIES 5 (1973).

9. Murphy v. Benson, 151 F. Supp. 786, 789 (E.D.N.Y. 1957). A description of the early DDT litigation can be found at Andrew P. Morriss & Roger E. Meiners, *Market Principles for Pesticides*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 35, 52-57 (2003); THOMAS R. DUNLAP, DDT: SCIENTISTS, CITIZENS, AND PUBLIC POLICY 87 (1982). The present author later participated in extensive litigation against the spraying of chemicals on the gypsy moth, blocking the national spray program on the ground that the environmental impact statement was not written in "plain language" understandable by the ordinary citizen. Oregon Envtl. Council v. Kunzman (II), 817 F.2d 484 (9th Cir. 1987); 636 F. Supp. 632 (D. Or. 1986) (plain language environmental impact statements under NEPA); 614 F. Supp. 657 (D. Or. 1985); OEC v. Kunzman (I), 714 F.2d 901 (9th Cir. 1983) (adequacy of EIS); *See* John E. Bonine & Michael D. Axline, *Plain Talk: Making NEPA Work*, 25 LAND & WATER L. REV. 61 (1990).

William O. Douglas dissented in an opinion that would presage the still nascent public interest law movement: "The public interest in this controversy is not confined to a community in New York. Respondents' spraying program is aimed at millions of acres of land throughout the Eastern United States."[10] He quoted at length an article in the *Washington Post* by biologist Rachel Carson that referenced the "sudden silencing of the song of birds" from pesticides.[11] Rachel Carson next published her concerns about pesticides in the *New Yorker*[12] and, in 1962, in a book, SILENT SPRING.[13] Soon thereafter, Secretary of Interior, Morris Udall, prohibited the use of chlorinated hydrocarbons on Interior Department lands unless there was no substitute available.[14]

Around the same time, private lawyers representing community groups had intervened in proceedings involving the Indian Point nuclear power plant on the Hudson River.[15] When the idea arose to create a non-profit environmental advocacy organization, it was first implemented, not in a national law firm, but by the locally based Conservation Law Foundation of New England, founded in 1966 to protect Mount Greylock in northwest Massachusetts from a ski resort.[16] Other litigation during the 1960s in New York led to the formation of another public interest law firm. In 1966,

10. Murphy v. Butler, 362 U.S. 929, 932 (1960).

11. Rachel Carson's book, *Silent Spring* (1962) was still three years away from publication at that point.

12. Rachel Carson, *Silent Spring*, THE NEW YORKER, June 16, 1962, at 35; Rachel Carson, *II-Silent Spring*, THE NEW YORKER, June 23, 1962, at 31; Rachel Carson, *III-Silent Spring*, THE NEW YORKER, June 30, 1962, at 35.

13. RACHEL L. CARSON, SILENT SPRING (Houghton Mifflin 2002) (1962).

14. EPA, DDT REGULATORY HISTORY: A BRIEF SURVEY (TO 1975), http://www.epa.gov/history/topics/ddt/02.htm. (The U.S. Department of Agriculture had begun to reduce use of DDT in control programs a few years earlier as well).

15. A coalition of commercial and sport fishers, through an organization called the Hempstead Town Land Resources Council, attempted to intervene in 1964 in a licensing proceeding before the Atomic Energy Commission to increase the operating level of the Indian Point nuclear power plant. The fishers were concerned by fish kills caused by high-temperature cooling water. Their arguments were rebutted by the Commission, which decided that it no legal authority to consider environmental matters. *In the Matter of Consolidated Edison Co. of New York, Inc. (Proposed License Amendment no. 2)*, 3 A.E.C. 60 (1965); 3 A.E.C. 61 (1965); 3 A.E.C. 62 (1965).

16. Conservation Law Foundation, http://www.clf.org/general/index.asp?id=33 (last visited Feb. 25, 2009). CLF was established in 1966 to stop a ski development on Massachusetts' highest peak, Mount Greylock. Conservation Law Foundation, http://www.clf.org/general/internal.asp?id=59 (last visited Feb. 25, 2009). Several New England conservationists led by Ben Nason decided to take the matter to court in 1965. Dan Levin, *Happy Anniversary, CLF!* 9 CONSERVATION MATTERS, Winter 2002-2003 (on file with author).

scientists at Brookhaven National Laboratory led by Dennis Puleston[17] banded together and had attorney Victor Yannacone file a class action suit to ban the use of DDT in Suffolk County.[18] The lawyers and scientists decided in late 1966 and 1967 to incorporate as the Environmental Defense Fund (EDF), initially operating largely as a regional organization.[19] EDF petitioned the federal government to cancel DDT registrations.[20] EDF funded itself through memberships, contributions from the public, and foundation support.[21]

Out West, the mid-1960s saw similar attempts to take environmental issues to court. A group of citizens on the San Francisco Peninsula in California were upset that the Atomic Energy Commission had given a permit to run overhead, high-voltage, electrical power lines through a scenic mountainside area with stands of redwood trees. They asked a private lawyer to file suit and, a few months before the *Storm King* decision in 1965, won a decision from the U.S. Court of Appeals for the Ninth Circuit that the AEC must consider values that are "spiritual as well as physical, aesthetic as well as monetary."[22]

Also in 1965, the U.S. Forest Service suggested a ski resort in a remote valley that had been left out of Sequoia National Park when it was first created. Walt Disney had quietly been buying up private property in holdings for a ski resort.[23] Volunteers, private lawyers, working across the street in San Francisco from the Sierra Club, filed suit to block the development. The suit ultimately reached the Supreme Court in 1971, where the Club's standing was rejected in *Sierra Club v. Morton*, but Justice William O. Douglas's dissent, arguing that "trees have standing,"[24] became a rallying cry for a new generation of lawyers and the Sierra Club Legal Defense Fund was founded as an independent organization.[25]

17. Gerry Rising, *Dennis Puleston*, BUFFALO NEWS, June 25, 2001, *available at* http://www.acsu.buffalo.edu/~insrisg/nature/nw01/0625puleston.htm.

18. *See* Special Collections and University Archives, Stony Brook University Libraries, http://www.sunysb.edu/libspecial/collections/manuscripts/ed/rg1/puleston.html.

19. *Id; See also* Dennis Puleston, *Birth and Early Days*, *in* ACORN DAYS: THE ENVIRONMENTAL DEFENSE FUND AND HOW IT GREW (Marion Lane Rogers ed., 1990).

20. EPA, DDT Regulatory History; A Brief Survey (to 1975), http://www.epa.gov/history/topics/ddt/02.htm.

21. *See* Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

22. Maun v. United States, 347 F.2d 970, 978 (9th Cir. 1965).

23. Tom Turner, Mineral King, http://225design.com/SierraClub/history.html (last visited Mar. 8, 2009).

24. Sierra Club v. Morton, 405 U.S. 727, 742 (1972).

25. Earthjustice, http://www.earthjustice.org/about/history.html (last visited Feb. 25, 2009).

Mineral King Valley was ultimately saved. Today a new generation of those lawyers continues the work under the name Earthjustice.[26]

Another river was under threat – the Snake, which runs from Wyoming through Idaho to and along the Oregon border. Lawyers challenged proposals for dams in Hells Canyon on the Oregon-Idaho border. In 1967, the U.S. Supreme Court refereed a dispute between advocates for private power and public power in the Northwest over who would get the right to build dams in Hells Canyon, the deepest gorge (7,000 feet deep) on the North American continent. In the process of remanding a decision by the Federal Power Commission in favor of a license application by a consortium of private utilities, Justice William O. Douglas ruled that, in addition to reconsidering which interest group should be allowed to build a dam, the FPC should consider also whether any dam at all should be built.[27]

> The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.[28]

Just as private lawyers living in the Hudson Valley or nearby took the Storm King, DDT, California redwoods, and Mineral King issues to the courts, other private lawyers were starting in other venues in the 1960s to file lawsuits. Suits against highway construction were filed in the 1960s by a raft of local, private lawyers in Boston, Chicago, Memphis,[29] Nashville,[30]

26. *Id.*

27. *See* William H. Rodgers, Jr., *The Fox and the Chickens: Mr. Justice Douglas and Environmental Law*, *in* HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS (S.L. Wasby ed., 1991). Acting on behalf of the Sierra Club, Brock Evans intervened in the proceedings before the FPC. *See* Hells Canyon Preservtion Council, Brock Evans, How we Saved Hells Canyon PARTS I-IV, http://www.hellscanyon.org/whoweare/index.php (last visited Mar. 26, 2009). In the end the dam was stopped through a combination of legal and political action. *See also* Sara E. Dant Ewart, *Evolution of an Environmentalist: Senator Frank Church and the Hells Canyon Controversy*, 51 MONTANA: THE MAGAZINE OF WESTERN HISTORY, Spring 2001, at 36, 49-50.

28. Udall v. Fed. Power Comm'n., 387 U.S. 428, 450 (1967).

29. Citizens to Pres. Overton Park v. Volpe, 309 F. Supp. 1189 (W.D. Tenn. 1970). The organization itself was formed in the late 1950s when the plan to build an interstate highway through the city's historic park was first announced. *See generally* Oliver A. Houck, *Unfinished Stories*, 73 U. COLO. L. REV. 867, 893-910 (2002).

New Orleans, New York,[31] San Francisco, San Antonio, and Washington, D.C.[32] Occasionally the pattern was broken and a lawyer went to distant territories. For example, Victor Yannacone of New York brought suit to protect the Florissant Fossil Beds in Colorado in 1969, armed with little more as a legal argument than that the court would surely grant an injunction against the destruction of one of the original copies of the U.S. Constitution, so why not also this ancient landscape?[33]

None of the private lawyers described above had good environmental legislation to enforce. Instead, they had to work with the few, limited tools that they could lay their hands on, and be willing to stretch their minds and those of the courts. Some unearthed 100 year old statutes and put them to new uses. One group of lawyers blocked the building of the Trans-Alaska Pipeline by arguing that the 19th century law for road rights-of-way did not permit a road as big as the one needed to carry the equipment for the pipeline.[34] Another group stopped clear-cutting in national forests by pointing out that a 19th century law required each tree to be marked individually before it could be cut.[35] This requirement made it uneconomical to clear-cut. The court injunction led to the adoption of the National Forest Management Act.[36] In every instance, these private lawyers unleashed their creativity and imaginations instead of simply applying the law being taught in law schools. That history forms a powerful message for those who may be thinking about devoting their careers to the public interest today.

30. Nashville I-40 Steering Comm. v. Eillington, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

31. Rd. Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967).

32. Houck, *supra* note 29, at 867.

33. Defenders of Florissant, Inc. v. Park Land Co., No. 403-69 (10th Cir. July 29, 1969); Victor J. Yannacone *et al.*, ENVIRONMENTAL RIGHTS & REMEDIES, § 2.9, at 39 (1972). In the end, Yanaconne settled on the notion that the public trust doctrine should give him his victory. *Id*; *see also* Zygmunt J.B. Plater, *Statutory Violations And Equitable Discretion*, 70 CAL. L. REV. 524, 534 (1982); DANIEL BOTKIN & EDWARD KELLER, EARTH AS A LIVING PLANET (1997), *available at* http://www.wiley.com/college/environet/CHAP_29.HTM (last visited Mar. 8, 2009).

34. Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).

35. W. Va. Div. of Izaak Walton League of America, Inc. v. Butz, 367 F. Supp. 422 (D.W.Va. 1973).

36. *See* Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. 385, 394 (2006).

II. A TYPOLOGY OF ENVIRONMENTAL LAW PRACTICE

Stories of innovative private lawyers from the 1960s and early 1970s can be invigorating. But how much relevance do they have to environmental law practice today? Is it best to gain experience in a corporate law firm before going into public interest work? Can a lawyer stay at the corporate firm while fighting for environmental protection – paying off debts, earning a high income, and doing good while doing well? If the lawyer wants to work on the public interest side from the beginning, can he or she survive? And where are the jobs anyway? All these questions are worth exploring.

A. Business Environmental Law

Some would argue that upon graduation from law school, a young lawyer interested in protecting the environment should go into a business law firm and serve as an apprentice to senior lawyers, carefully acquiring the skills needed. But does a corporate law firm build litigation skills rapidly? One public interest environmental lawyer has argued this:

> [T]here is the distinct lack of direct exposure to real, meaningful, casework. Generally, young associates function as legal Sherpas, performing the tedious grunt work necessary to support litigation without getting into the day-to-day litigation management work necessary to be a successful attorney. If lucky, and well tutored, after 3 or 4 years an associate might be trusted with one of the less challenging/important cases on the firm's docket. Although well compensated, the big firm associate is not on an accelerated path to being a practicing lawyer.[37]

In such firms, lawyers are normally not allowed anywhere near a judge for years. Young lawyers are often given tasks that are only small pieces of a complete court case or business transaction. In the meantime, their contemporaries may have already become seasoned litigators. The same lawyer continued with his own experiences:

> I did a lot of criminal defense – both court appointed and retained – when I started out. Being a "courtroom-intensive" area of practice (anything over 5 pages is considered a long-brief), it is completely different from other areas. . . . However, it is precisely this disjunct –

37. E-mail from Eugene, Attorney, Dave Bahr, to John Bonine (Mar. 17, 2007) (on file with author).

> the exposure to the "thinking on my feet" trench fighting and opportunity to select and address juries – that provided a form of "cross-pollination" that I think made me a better advocate overall.[38]

Going to work directly for government or a non-profit organization also provides a useful range of experiences and responsibility, as well as the opportunity for rapid growth and almost immediate application of creativity. The very lack of resources means that when a new person comes on board, he or she is usually given substantial responsibility and authority over cases from the very beginning. By the end of my first year of working at the U.S. Environmental Protection Agency, I was defending and writing briefs for two-hundred lawsuits in the courts of appeals, grouped into a half-dozen major combined litigations. By the end of my second year, I had argued in front of judges in four U.S. Courts of Appeals as well as U.S. district courts.

Although the experience one can gain is important in deciding what type of environmental law he or she wants to practice; a hydraulic force sucks environmental law graduates into careers serving business and industry. Here is a detailed estimate of the numbers of environmental lawyers in the United States:[39]

- *Business* environmental lawyers: 20-30,000[40]

38. *Id.*

39. Several years ago I estimated proportions, rather than numbers, coming to the conclusion that only two percent or fewer of environmental lawyers in the United States are "public interest" environmental lawyers, with probably ninety-five percent of the environmental lawyers representing business and industry, and perhaps three percent working for governments. This was based on simply counting pages in PERCY R. LUNEY, CAREERS IN NATURAL RESOURCES AND ENVIRONMENTAL LAW (William D. Henslee, Gary A. Munneke & Theodore P. Orenstein eds., 1987). My newer method, detailed in the following three footnotes, suggests the proportions might be 88%-92% for business and industry, 6%-9% with government, and 2%-3% doing public interest work.

40. The author's estimates are based on the following calculations. There are 7,000 members of the American Bar Association's Section on Natural Resources, Energy, and Environmental Law. Most of them work for private law firms that service business and industry. The Section's Chair estimates that about one-third of American lawyers are members of the ABA. There was personal communication to the author from New York, attorney Michael Gerrard. This might suggest an estimate of up to 20,000 environmental lawyers. A search of Martindale-Hubbell's Legal Directory reveals that in the State of California alone nearly 3,600 law firms or lawyers list "environmental law" as a specialty or part of a lawyer's education. One out of every eight U.S. residents is in California. CALIFORNIA DEPARTMENT OF FINANCE, E-4 POPULATION ESTIMATES FOR CITIES, COUNTIES AND THE STATE, 2001-2006, *available at* http://www.dof.ca.gov/HTML/DEMOGRAP/ReportsPapers/Estimates/E4/E4-01-06/HistE-4.asp. Multiplying the 3,600 figure for California by eight times could suggest a figure up to 29,000 for the nation as a whole.

- *Government* environmental lawyers: about 2,000[41]
- *Citizens'* environmental lawyers: about 750[42]

A young law graduate should consider what kind of environmental law she or he will be practicing alongside twenty- to thirty-thousand other business environmental lawyers. It is not likely to be the protection of mountains in New York or California, the stopping of dangerous pesticide spraying, or the saving of natural areas. The companies that are the clients of business environmental lawyers are not asking for a priest or moral counselor to tell them how to protect the environment. They are asking for advice on how they can protect the profits of businesses while navigating the complexities of environmental law.[43] They are more likely to be asking their lawyers how to strip-mine mountains, register new chemicals, or plan a development adjacent to a wetland. Some lawyers in such firms will deny that they have compromised. One wrote to me recently:

Since these estimate are little more than "back-of-the-envelope" calculations, a guess of 20,000 to 30,000 seems as good as any other.

41. The author has compiled estimates of the numbers of government environmental lawyers through various methods and contacts. The estimate includes 415 lawyers in the Environment and Natural Resources Division of the U.S. Department of Justice. E-mail from Marcia Burke, to John E. Bonine (July 13, 2006) (on file with author); *See also* http://www.usdoj.gov/enrd/components.htm. Fifty environmental lawyers in Offices of U.S. Attorney throughout the country (author's guess); two-hundred and forty lawyers in the U.S. Environmental Protection Agency (author's guess of about one-hundred in the Office of General Counsel, about one-hundred in the Office of Compliance Assurance and Enforcement, and about forty in the Regional Offices); perhaps fifty in the U.S. Forest Service (author's guess); ninety-five in the National Oceanic and Atmospheric Administration (listed at http://www.gc.noaa.gov/offices.html); three-hundred and twenty in the U.S. Department of the Interior (http://www.doi.gov/sol/sohonpgm.html); and about one-hundred in the U.S. Army Corps of Engineers. In addition, environmental lawyers work in such diverse Federal Government agencies and departments as the Tennessee Valley Authority, Bonneville Power Administration, and Department of Defense – and in some counties as cities as well. A rough guess of 2,000 seems reasonable for now.

42. The author has been engaged in a census of public interest environmental lawyers in the United States, based on review of websites, contacts with members of networks, and personal surveys (on file with author). The data appear to indicate about 250 litigators funded by non-profit organizations, another 250 environmental lawyers who have regular, funded employment for the purpose of advancing environmental concerns but do not litigate, and a few hundred "private public interest lawyers" who litigate *without* steady funding but who work for reduced rates or volunteer from time to time, hoping for court-ordered attorney fee awards if they win. These figures also do not count personal injury lawyers (lawyers who litigate for injured persons and typically keep one-third of any financial recovery).

43. Corporate environmental lawyers can be broken down into the "regulatory-litigation bar, the CERCLA bar, and the due diligence bar." Donald Stever, *Experience and Lessons of Twenty-five Years of Environmental Law: Where We Have Been and Where We are Going*, 27 LOY. L.A. L. REV. 1105, 1115 (1994).

> I am very proud of the environmental compliance, counseling and litigation work I have done for my clients . . . like many other private attorneys, I am also active in several non-profit organizations and have undertaken numerous pro bono projects in my career.[44]

Of course, "pro bono" projects that a paying client finds offensive are ones that the firm is not likely to approve. Another lawyer recently wrote that he could help improve corporate performance in some situations – but not so much in others:

> As an in-house lawyer for 10 years I moved my companies towards better environmental and health practices practically every day. As a law firm attorney for the rest of my 34 years in practice I have done so less frequently but it still happens.[45]

I asked this lawyer to elaborate. He replied:

> As outside counsel, every minute you spend working for a client is directly chargeable to that client. So bringing you in for regular audits, informal consultations, or simply brainstorming sessions becomes much more difficult. As an in-house counsel, I would often go out to visit plants for no particular reason, spend the day with environmental managers, and identify and correct issues before they became issues. I can't do that now [as a law firm attorney]. And I miss it.[46]

Lawyers have a great ability to believe in, or rationalize, what they are doing. They can become quite comfortable from the incomes that business environmental law work earns. But will they ever get into public interest work if they don't start in it? My public interest colleague quoted earlier continues:

> Don't believe that you can "put in some time" at the big firm and then follow your heart afterward into public interest work: As tempting as it might be, unless you absolutely must go after big bucks for debt-servicing reasons, avoid this Siren Song. This is because in the environment of the large firm, associate attorneys' debt loads have a way of transforming; student debt becomes

44. E-mail from business environmental lawyer in major law firm with offices in numerous countries, to John E. Bonine (Mar. 2009). Note: I prefer to keep the sender anonymous.

45. E-mail from second business environmental lawyer in major law firm, to John E. Bonine (Mar. 2009). Note: I prefer to keep the sender anonymous.

46. *Id.*

> mortgage debt (on that big house, bigger than you'd have been tempted to buy if not for [the] fact that all your associate friends have similarly big houses), into big car payments (same), into orthodontia for junior, college savings for junior, *etc*. And don't forget the fact that after 5 to 7 years, there is the big pot of gold called partner compensation looming out there, 401k vesting, *etc*. Once obtained, it is very, very hard to leave the comfort zone of this level of economic security. There are certain noteworthy exceptions to this . . . but generally, once you're in, you're in for good.[47]

The stories of those who managed to leave business environmental law practices can be disturbing. One place that such refugees have landed is in university environmental law clinics.[48] A lawyer who left business environmental law work to direct an environmental law clinic commented to me in an e-mail discussion of this issue:

> There are many good people on the dark side who compartmentalize their work from the rest of their lives to save their humanity. It is probably not a very healthy thing to be in a situation where your work is hurting people, but you isolate that from your sense of who you are so you remain human and wonderful.[49]

That is not the only view, of course. One clinical professor who also started in private practice looked back on his experience and wrote in response to the first, "I enjoyed private practice and did not give up (or compartmentalize) any part of my soul to do it."[50] But a third clinic director agreed with the first:

> During my last few years of private practice, the internal dissonance was so loud it caused pain to my family as well as myself. Also, none of my students who took the firm track and promised that they would only stay a "few" years have left private practice.[51]

A fourth found a way to thread the needle before bailing out to become a clinic director. "I could not bring a pro bono environmental case at my big general practice firm because of conflicts, but could do so at the antitrust boutique that I joined shortly afterwards."[52]

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47. Bahr, *supra* note 37.

48. Email from clinical law professors, to John E. Bonine (Mar. 2007). Note: I prefer to keep the senders anonymous.

49. *Id*.

50. *Id*.

51. *Id*.

52. *Id*.

Whomever one chooses to believe, law graduates should ask tough questions and go into their careers with their eyes wide open. Not all legal work for business and industry is affirmatively harmful. This, however, does not make it "public interest" work.

A number of private lawyers are listed on the volunteer rosters of land use protection groups and the like. The collective impact of their work can be important, but again, few of them would adopt the mantle "public interest lawyer." Often their public interest work is only occasional. The important work done on a daily basis by plaintiffs' tort lawyers also can serve as a force for environmental and health protection. Some of these lawyers can logically be considered private public interest lawyers as well, but the correlation is not automatic. For true public interest work we must look elsewhere.

B. The Non-Profit Alternative

From its beginnings with just a few lawyers in the mid-1960s,[53] the public interest environmental law movement in the United States has grown to include hundreds of practitioners.[54] Public interest environmental lawyers work in six types of organizations: non-profit environmental law firms that litigate at the regional or national level, the same at state or local level, general public interest law firms that are not confined to environmental matters, environmental law clinics, legal staff in environmental groups (some of whom litigate), and "private public interest" law firms. Let us look at those on the non-profit side first.

If one's field of vision only sees Earthjustice, the Natural Resources Defense Council, the Environmental Defense Fund, or the National Wildlife

53. *See* Edward Berlin, Anthony Z. Roisman & Gladys Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 675 (1970) (founding partners of an early private public interest law firm describe the need for public interest lawyers, and the emergence in the late 1960's of a public interest movement). In 1965, a small coalition of non-profit groups expanded the scope of standing in environmental cases. *See* Scenic Hudson Pres. Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). Environmental Defense Fund was founded in 1967. *See* Environmental Defense Fund, http://www.edf.org/page.cfm?tagID=382 (last visited Mar. 8, 2009). NRDC was founded in 1970. *See* NRDC, *supra* note 8. The Sierra Club Legal Defense Fund (now Earthjustice) was formed in 1971. *See* Earthjustice, *supra* note 27.

54. There are also a smaller but substantial number of public interest environmental lawyers in other countries around the world. *See* John E. Bonine, *Public Interest Environmental Lawyers – Global Examples and Personal Reflections*, 10 WIDENER L. REV. 451 (2004); *see also* Bern Johnson & Jen Gleason, *Environmental Law Across Borders*, 10 J. ENVTL. L. & LITIG. 67 (1995).

Federation, that person is blinded from much of the picture. Another approach is to find, or even create, non-profit public interest environmental law firms operating at the local or regional level. This is how a great deal of public interest law is being practiced today. Public interest law is thriving in a small non-profit law office in southwest Colorado and a student law clinic near the bayous of southern Louisiana. Important precedents come from non-profit lawyers who go to work in boats in Alaska, as much as they do from those in suits and ties in New York or Washington.

Non-profit environmental law firms are found all over this country. How many know about the Conservation Law Foundation of New England, the Northwest Environmental Defense Center, the Natural Heritage Institute – all of which are active public interest law firms? How about Greenlaw in Georgia[55] or California's Center for Biological Diversity?[56] Have you heard about the New Mexico Environmental Law Center in Santa Fe,[57] the Western Environmental Law Center offices in Durango, Helena, Taos, and Eugene,[58] the Midwest Environmental Advocates in Madison,[59] WildLaw in Alabama, Florida, and North Carolina,[60] or the Southern Utah Wilderness Alliance in Utah?[61] What about Western Resource Advocates,[62] Advocates for the West,[63] or the Southern Environmental Law Center?[64] This is only the tip of the iceberg. But the universe of public interest law is not exhausted even by finding state and local non-profit law firms as shown in the next section.

55. Formerly the Georgia Center for Law in the Public Interest, http://green-law.org (last visited July 7, 2009).

56. Center for Biological Diversity, http://www.biologicaldiversity.org (last visited Mar. 8, 2009).

57. New Mexico Environmental Law Center, http://www.nmenvirolaw.org (last visited Mar. 8, 2009).

58. Western Environmental Law Center, http://westernlaw.org (last visited July 7, 2009).

59. Midwest Environmental Advocates, http://www.midwestadvocates.org (last visited Mar. 8, 2009).

60. WildLaw, http://www.wildlaw.org (last visited July 7, 2009).

61. Southern Utah Wilderness Alliance, http://www.suwa.org (last visited Mar. 8, 2009).

62. Western Resource Advocates, http://www.westernresourceadvocates.org (last visited Mar. 23, 2009).

63. Advocates for the West, http://www.advocateswest.org/ (last visited Mar. 23, 2009).

64. Southern Environmental Law Center, http://www.southernenvironment.org (last visited Mar. 23, 2009).

C. Private Public Interest Law

Finding a way to integrate public interest law into private practice is crucial to expanding the overall quantity of public interest work. For such work to constitute an important fraction of one's law practice, it is necessary to establish a law practice whose paying clients' interests are not in conflict with clients in pro-environmental cases. This has been successfully accomplished by the couple of hundred "private public interest lawyers"[65] – nearly one-third of those who are doing such public interest environmental law work and more than half of those doing public interest environmental litigation. These are lawyers whose main professional identity, at least to themselves, is as public interest lawyers, but who do so from a private law firm, not a non-profit law firm. To be successful in this work requires attention to conflicts of interest, a steady revenue stream from paying clients, the strategic use of attorney fee recoveries (not depending wholly on the vicissitudes of such awards).

How does one combine an income-generating law practice with a life devoted to the public interest? There is a type of private practice where a public interest life is possible. I wrote about it more than twenty years ago in an essay in Oregon's *Journal of Environmental Law and Litigation* titled *The New Private Public Interest Bar*.[66] My intention then was to put a name on the type of practice exemplified by Lloyd Garrison. Since that time, the "private public interest" environmental bar has grown and grown to the point where its numbers probably exceed the numbers of environmental litigators working in non-profit law firms.

Although my census of private public interest environmental lawyers is not yet complete, I have found 250 of them[67] – more than the numbers

65. *See supra* note 42.

66. John E. Bonine, *The New Private 'Public Interest' Bar*, 1 J. ENVTL. L. & LITIG. 1 (1986). If the term "private public interest" law existed before then, he at least was unaware of it. In the ensuing two decades, the movement has blossomed and hundreds of private public interest environmental lawyers have created careers in this alternative part of the public interest community. Many of them come together each year at the Public Interest Environmental Law Conferences in Eugene, Oregon. *See* Public Interest Environmental Law Conference, http://www.pielc.org.

67. Census of private public interest lawyers (on file with author). The first example in the environmental field was the Berlin, Roisman, and Kessler law firm in Washington, D.C., in 1969. *See, e.g.*, TOM TURNER, WILD BY LAW: THE SIERRA CLUB LEGAL DEFENSE FUND AND THE PLACES IT HAS SAVED (1990); *see also* Edward Berlin, Anthony Z. Roisman & Gladys Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 675 (1970). Another early private public interest environmental lawyer was Bruce Terris, who established his firm as the Law Offices of Bruce Terris in 1970 and continues his practice today as Terris, Pravlik, and Millian, LLP. *See* Terris, Pravlik, and Millian, LLP, http://www.tpmlaw.com/attorney_

working at national and even regional non-profit public interest environmental law firms.[68] The career counseling offices at Harvard and Columbia Law Schools are notable for trying to map this new private public interest law movement, although the firms that they list are only a fraction of the ones that actually exist. A guide produced jointly by the two schools tries to explain the difference between an ordinary private, business-oriented law firm and a private *public interest* firm:

> One [private] public interest firm lawyer describes the difference this way: "Subject matter of the cases is the key to defining a firm as a private public interest law firm. The lawyers at my firm have 'religion'; they really care about what they do. They are committed to their beliefs." A second important distinction, offers another attorney, is the kind of clients public interest firms represent: "I represent people who are disenfranchised and powerless."[69]

That last sentence is perhaps the key to understanding how the private *public interest* bar differs from the private bar. The private bar typically represents clients who have power and money. Those clients, in turn, prefer lawyers who exhibit loyalty to their outlook. If a lawyer in a business-oriented law firm starts to take on environmental groups as clients, the law firm's business clients soon start to raise questions about just how "loyal" that attorney (or the entire law firm) can really be to their interests. This is sometimes dressed up as a true "conflict of interest" by giving it the name "positional conflict of interest" – the idea being that a lawyer who argues both for the business community and against the business community has a conflict of interest. While such conflicts may occasionally exist, far more often, the conflict is simply with the marketing plans and image of the law firm with regard to its business clients. However, whether the conflicts are legal- or market-oriented, they are enough to prevent a young lawyer from bringing a steady stream of cases, whether *pro bono public* or paid, that appear offensive to the values of the firm's main client base. In addition, the lawyer who himself or herself tries to represent "both sides of the street" is likely to soon feel torn. Those who pursue a public interest path often

profiles.asp?e=terris (last visited Apr. 19, 2009). The number of private public interest lawyers has truly blossomed in the ensuing forty years.

68. Census of nonprofit lawyers (on file with author).

69. Center for Public Interest Law at Columbia Law School (CPIL) & Bernard Koteen Office of Public Interest Advising at Harvard Law School (OPIA), *Private Public Interest and Plaintiff's Firm Guide* (Harvard, 2008), *available at* http://www.law.harvard.edu/current/careers/opia/planning/career-resources/docs/2008private_pi_guide.pdf (last visited July 7, 2009).

identify strongly with their clients or causes. If this happens, they are likely to be quite unhappy in a business-oriented law practice.

Pursuing one's dreams takes some careful planning. At my request, public interest environmental lawyer Dave Bahr, who spent a number of years in his own private public interest practice before joining the Western Environmental Law Center in Eugene, Oregon, drew up a list of points for a young lawyer, just starting out on her own, to consider. The following are Dave's words of advice: Set up a practice in which you feel comfortable with the cases and clients you will represent.

Dave comments that he has never taken on a client whose cause he did not believe in. Even in criminal defense where, especially when court-appointed, you don't really get to pick your clients, he focused on the constitutional principles he was defending. He reports that his special education and civil rights work provided him with some of the most direct and long-lasting personal satisfaction of his legal career because he was able to make a meaningful *and tangible* difference in the lives of specific individuals, a quality of feedback that is even more rare when doing environmental work.

Recognize that you will not likely be able to do 100% environmental law right away, if ever. If you do not have a large inheritance or trust fund from which to draw, and are not employed as staff attorney for an NGO, you will almost certainly need to take on cases outside of the narrow scope of "environmental law." However, many areas of practice require skill sets similar to those called into play in environmental litigation. Land use, special education, public records, and civil rights are examples that worked for Dave. All except civil rights law are manifestations of administrative law and all include attorney fee-shifting provisions.[70] Although civil rights plaintiffs almost never have money to pay for legal time, the land use and special education clients could almost always afford his (sometimes discounted) hourly rates while his freedom of information clients

70. Over 200 federal statutes and 2,000 state statutes provide for "fee-shifting" of one kind or another. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1588 (1993). Under such statutes, the party prevailing in litigation can be awarded compensation for the value of his or her attorney's time. The most useful of these for a public interest lawyer are statutes that, explicitly or by judicial precedent, allow a person in litigation with the government to recover fees but do not ordinarily give the same rights to the government if it wins. If a specific statute does not provide for fee-shifting in federal cases, the Equal Access to Justice Act does so nevertheless. *See generally* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217 (1994).

(particularly commercial requesters) could sometimes pay at the full market rate.

Choose an area of law that interests you and develop an expertise. Find things that interest you and get good at doing them. The better you understand an area of law, the easier and less stressful it becomes. This is true both because you "know" the substance and because you know what you don't know. It is ignorance of the unknown that causes the most stress for a lawyer: "Even though I think I have an answer, should I keep researching because there is some commonly known doctrine that I'm not aware of?" Or: "I don't have an answer, but I'm not sure if that's because this issue is unresolved or because I've just missed something obvious." After a while, it will become easy and almost enjoyable to keep current in a particular area of law and you will become much more efficient with your time. Additionally, once you become an "expert" in an area, you will get more case referrals, have a larger pool of good cases to work from, more cases to refer to other attorneys (thereby cementing your reputation as an expert in that field), and the ability to price your time at a higher level.

Read the local paper and volunteer your time. Dave had a lot of good cases come his way because he was knowledgeable about local issues and actors and able to impress potential clients with his ability to jump right in and make things happen. Spend time with various "Friends of" groups in your area. Attend meetings, do volunteer work (even non-legal), and become a "known commodity." When the time comes for legal action, it is almost assured that the group will first ask you for help. Additionally, pitch yourself to make presentations at relevant law conferences and write papers for law reviews and bar journals.

Find a mentor. Talk to lawyers in your city or region and find some who are willing to help you learn the ropes. Most lawyers are flattered to be asked for their opinion and for the price of a cup of coffee (or beer) will freely oblige you with advice. Sit in on local court proceedings, both to learn from other attorneys and also to introduce yourself, even to attorneys not working in your areas of law. Dave received many referrals from attorneys who remembered that he was working in somewhat unique legal practice areas and who had clients with legal needs that they could not satisfy.

Locate far away from other private public interest attorneys. Dave explains that this is why Eugene, Oregon, is one of the most spectacularly bad places to set up a private public interest environmental law practice; there is so much competition for the same work, mostly from graduates of the University of Oregon. Conversely, he says, environmental lawyers Matt

Kenna and Geoff Hickcox were extremely successful setting up in Durango, Colorado, far from any environmental attorney competition.

Do not pay others to do what you can do yourself. Modern accounting and billing (and to a certain extent, tax preparation) software is so easy to use that it is very hard to justify paying a "service" to perform these tasks. Keep your overhead low and do these tasks yourself.

Always be ruthlessly objective in your case evaluations and don't be afraid to say "no," particularly where the client can't afford to pay your market rate. The temptation is almost overpowering – especially when you are starting out and are not burdened with an overflowing docket – to take on "there ought'a be a law" clients. These are people that present you with *exactly* the kind of case (frequently with what they describe as "slam-dunk" facts and almost always needing you to file for a temporary restraining order (TRO) – yesterday), in preparation of which you have been laboring in law school for three years. Unfortunately, they are a struggling grass-roots group that can barely afford the court filing fee and you will have to defer receiving compensation for your legal skills until the inevitable victory is obtained and you then can collect a court-ordered "market rate." Such elevated, almost unimaginably so, hourly rates almost make your head swim in guilty anticipation (because you did not assume this line of employment seeking filthy lucre). Alas, notwithstanding the overpowering equitable arguments you muster in support of your cause, so urgent was the need to file the suit, to file the TRO and the subsequent emergency appeal to the circuit court that now, eighteen months later as you prepare for appellate argument, in a moment of dispiriting candor, you recognize that early in the case you glossed over the application of some foundational legal principles and you are very unlikely to convince the court to exempt your clients from them. If only Congress had more explicitly stated what it so clearly intended in drafting that stupid statute; "There ought'a be a law."

Keep student loan debt to a minimum or "marry well," Dave says. He worked part-time during law school and throughout his undergraduate years. Accordingly, he did not have a huge student debt load that limited his options. If you cannot limit your debt, Dave advices, it helps a lot to have a "significant other" with a steady paycheck.[71] Dave is an amusing guy.

71. Material in previous paragraphs adapted or paraphrased from Bahr, *supra* note 37.

III. SHAPING A CAREER

A. A Story of Persistence

Perhaps the most important advice one can offer law students whose hearts are green is this: don't find a job, create one. This sounds like a difficult path and is not for everyone. But when the alternative is giving up one's dreams or perhaps unemployment, it is what an increasing number of environmental law graduates are doing. Perhaps the story of one such lawyer, who started out alone nearly three decades ago, will illustrate the possibilities.

Neil Kagan is a hero, but his is not an unreachable heroism. It is heroism within the reach of any public interest lawyer, young or old. It is the steady work of a public interest lawyer who follows the advice of environmental activist (himself a lawyer) Brock Evans: "Endless pressure, endlessly applied."[72] A fine example of that kind of persistence is found in Neil's own essay, published in this volume.[73] As for Neil himself, he is modest. He wrote to me recently:

> I don't think of myself as a hero. In my mind, the heroes are the ones around the world who put their lives in jeopardy to protect the environment, not just their lifestyles. Also, I don't know that I would have accomplished anything without Betty's belief in me or her financial support.[74]

Neil met his future wife, Betty Reed, in the 1L registration line in law school. (This was before registration became computerized.) He had already volunteered for Oregon's new Environmental Law Clinic in the summer before his first year. His devotion to protecting the environment was deep and broad. After they were married and as Graduation Day approached, Neil and Betty had a conversation about how to combine two professional lives. They decided that they would move wherever one of them landed a paying job and the other would figure out what to do. Betty got a job in Roseburg, Oregon, the heart of Oregon "timber country." Neil opened up his own, one-person law practice and initially survived by doing hourly research for other lawyers in town. He took out a bank loan to buy office furniture and pay the rent and handled wills, divorces, and contracts.

72. *See* David Foreman, *Endless Pressure, Endlessly Applied*, HIGH COUNTRY NEWS (May 16, 1994) (quoting Brock Evans).

73. Neil Kagan, *The Elk Creek Dam Story*, 26 PACE ENVTL. L. REV. 493 (2009).

74. E-mail from Neil Kagan, Attorney, National Wildlife Federation, to John Bonine (Feb. 9, 2009, 12:54 EST) (on file with author).

One day in late April 1983, the present author had a conversation with the Conservation Director of a state environmental citizens group, the Oregon Natural Resources Council (ONRC, now Oregon Wild), that helped launch Neil's career as an environmental litigator. Activists in southern Oregon were desperately trying to stop the U.S. Forest Service from constructing a logging road into the North Kalmiopsis Roadless Area, a *de facto* wilderness area adjacent to the Kalmiopsis Wilderness. Several protesters were engaging in nonviolent civil disobedience to block a bulldozer that was cutting into the side of Bald Mountain, a campaign that ultimately involved seven blockades and the arrest of forty-four protesters over several weeks.[75] Environmentalists needed a lawyer to stop the construction, but had no funds to pay for one. As a consequence of our conversation, Oregon Wild called Neil and asked whether he would take the case. He had graduated from law school less than two years earlier, but he did not hesitate. He obtained a TRO and then an injunction against continuation of the road-building, on the ground that the environmental impact statement that "released" roadless areas to timber cutting was inadequate.[76]

A similar conversation took place in 1984, when the Conservation Director of ONRC wondered whether the precedent established in the 1983 North Kalmiopsis might be extended to all of the timber sale plans in Oregon that involved roadless areas. Neil returned to court and the mere filing of the lawsuit prompted the Forest Service to voluntarily stop logging in roadless areas in all the National Forests in the state. As a result, Oregon's senior United States Senator, Mark Hatfield, was forced to stop blocking wilderness legislation for Oregon and instead to sponsor a million-acre wilderness bill to moot the lawsuit. Neil's only payment from the environmental groups was a small bottle of water from Boulder Creek, which would be kept forever wild under the new law as part of the Boulder Creek Wilderness Area.[77] However, lest future private public interest

75. Dave Foreman, *The Plowboy Interview*, MOTHER EARTH NEWS (Jan. 1, 1985), *available at* http://www.motherearthnews.com/print-article.aspx?id=77104. Keeping vigil in a camp on Bald Mountain during the summers was former political science professor Lou Gold, who became a founding member of the Siskiyou Regional Education Project. *See* Lou Gold, *Bald Mountain Vigil*, *available at* http://www.lightmind.com/Impermanence/Library/texts/files/LouGold-01.txt; Lou Gold, *Bald Mountain Vigil* in THE SOUL UNEARTHED: CELEBRATING WILDNESS AND SPIRITUAL RENEWAL THROUGH NATURE 163 (Cass Adams ed., 2002) (1996).

76. Earth First v. Block, 569 F. Supp. 415 (D. Or. 1983).

77. *See* Oregon Wilderness Act of 1984, Pub. L. No. 98-328, 98 Stat. 272 (1984); Bonine, *supra* note 66.

lawyers conclude that they must be economic monks, it should be pointed out that Neil was able to obtain an attorney fee award against the Forest Service under the Equal Access to Justice Act for his work on the North Kalmiopsis case.

Neil continued his public interest work on a largely volunteer basis, combining public interest attorney fee recoveries with private work. His most significant case, started while he was in Roseburg, has taken twists and turns over nearly two decades before finally resulting in the removal of a partly completed dam that blocks critical salmon migration. But the litigation began with a defeat. On October 8, 1985, Neil filed a lawsuit to enjoin further construction work on a dam that had already been on the drawing board for more than twenty years, after being first authorized by Congress in 1962. Environmental impact statements (EISs), supplements, and related documents were prepared in 1971, 1975, 1980, and 1983, and Congress appropriated money for the dam in 1985. Arrayed against Neil in court was the entire United State Government, including the U.S. Army Corps of Engineers, the U.S. Attorney's Office for Oregon, and the Land and Natural Resources Division of the U.S. Department of Justice.[78] Neil had been out of law school for just four years. The U.S. district court ruled that "none of the ONRC's alleged NEPA violations . . . [were] substantiated."[79]

More than a year later, the U.S. Court of Appeals for the Ninth Circuit reversed the district court, holding the EIS to be inadequate. By that time, Neil and Betty had moved up to the northern part of the state. When his wife Betty got a job as Assistant City Attorney for Gresham, Oregon, Neil initially took a position with the non-profit group, 1000 Friends of Oregon. While at 1000 Friends, he made arrangements to continue on the Elk Creek Dam case. However, in 1989 – despite now having the support from the Attorneys General of twenty-nine states – Neil's Ninth Circuit victory in the Elk Creek Dam case was taken away from him. The U.S. Supreme Court unanimously overruled the Ninth Circuit, holding that the U.S. Army Corps of Engineers had adequately considered environmental information, including that from the most recent environmental assessments. That might have ended the involvement of a less persistent lawyer. After all, what can you do after the Supreme Court has eviscerated your case? You can continue to be persistent.

78. Oregon Natural Res. Council v. Marsh, 628 F. Supp. 1557 (D. Or. 1986).
79. *Id.* at 1568.

Eventually resigning as a matter of principle when the organization's board of directors took a position involving the timber industry that he could not support, Neil struck an unusual deal with his former client, ONRC. In exchange for his providing internal legal work that this growing organization needed (non-profit reports, tax forms, rental agreements for its offices, and the like) Neil received office space, from which he could resume his practice as a private public interest lawyer. He also obtained the right to represent ONRC in any environmental litigation that it might choose to bring – again financing that part of his work with court-awarded attorney fees. A few years later, Neil moved to his current position, as Director of the Environmental Law Clinic at the University of Michigan Law School, on the staff of the National Wildlife Federation.

Throughout his career, Neil Kagan has shown flexibility in making the best arrangements he could to pursue his dreams. In Michigan, in addition to new cases, Neil kept his finger on what was happening with the Elk Creek Dam. Finally, the Corps of Engineers recommended "notching" the structure blocking the natural flow of Elk Creek, and proceeded to do just that in late summer 2008 after the local Congressman dropped his objection to funding the notching. Now the dam has been breached and the natural contours of the creek have been restored, allowing the salmon to swim upstream to spawn in their ancestral habitat.

B. An Activist Finds Her Dream Job

Young people can do the same. Whether abroad or in the U.S., perhaps the best advice are words (purportedly from Johann Wolfgang von Goethe) that the late American environmentalist David Brower (long-time Executive Director of the Sierra Club, advocate of the first Wilderness Act, foe of dams in the Grand Canyon, and founder of Friends of the Earth and Earth Island Institute) would often quote to young people:

> Whatever you can do, or dream you can, begin it.
> Boldness has genius, power, and magic in it.[80]

80. Brower, a longtime mountain climber, inserted the quote on the cover page of a book he edited, THOMAS F. HORNBEIN, EVEREST: THE WEST RIDGE (David Brower, ed., 1965). He acknowledged that he had gotten the quote from Scottish mountaineer W.H. Murray, who had used it in his book, THE SCOTTISH HIMALAYAN EXPEDITION (1951). Of course, Goethe, the "German Shakespeare," wrote in German, not English. Murray took the words from a very loose translation of Goethe's *Faust* by a British barrister more than a century earlier. JOHANN WOLFGANG VON GOETHE, FAUSTUS: A DRAMATIC MYSTERY; THE BRIDE OF CORINTH; THE FIRST WALPURGIS NIGHT 15 (John Anster, trans., 1835). The quotation, as written by Anster, continues:

But, how to begin it? One of our recent graduates elbowed her way into a small, non-profit law firm in Georgia through the power of her dream and her own boldness. Ela Orenstein hails from the Deep South. She came west to Oregon for her legal education, but resolved to return to her roots upon graduation. Her success in doing so was not an accident and did not depend on a law school placement office. In an e-mail, she described how she started her legal career:

> I applied at the Georgia Center for Law in the Public Interest (the Center) as a summer intern for the summer after my second year of law school. The Executive Director, Justine Thompson, told me that they had already hired one intern and were not sure that they had room for another. That was not the answer that I wanted. So, basically, I begged!
>
> I told her that if space was the issue - it shouldn't be. I had a laptop and was willing to work anywhere that both me and my laptop could fit – be it a nearby coffee shop, local library, university law library, from home . . . or in a closet!
>
> I think the fact that I was willing to work under any conditions conveyed my deep and sincere interest in making a space for myself in the public interest community. I think my tenacity impressed her!
>
> After working at the Center for the summer, I decided to look into getting funding from Equal Justice Works to do a fellowship with the Center. Well, I made it to the final round of interviews but ultimately did not get the fellowship funding!
>
> However, after doing all this work to design a program and make a space for myself . . . I had further impressed Justine and proven my commitment to a career in the public interest sector!
>
> So, when one of the attorneys at the Center left (shortly after I found out that I would not get the fellowship), Justine asked me to send in my resume for the position. Despite the fact that they were looking for an experienced attorney, they offered me the job!!!
>
> Justine later told me that it was my passion for, and commitment to, this work that sold her. While I didn't have much experience, I had the drive and tenacity to make up for it. So, in short, it can be done!

> Only engage, and then the mind grows heated –
> Begin it, and the work will be completed!

Id.

> I would like to note that Justine (my boss) has no idea what my grades were in law school. She has never seen my transcripts. We have discussed which courses I took, but never the grades I made. She saw my work (during my summer internship) and my energy, and apparently that was all she needed to decide that I was capable of doing the job.
>
> If you want it bad enough, and you are willing to show others how bad you want it, people will go out of their way to help you find what it is you are looking for. I also think that having mentors like you make all the difference! . . . Thanks for always motivating us to stick to our guns and go after what we want . . . Thanks for always telling us that we can have the job we want, even if we have to make it ourselves . . . oh, and a little bit of luck never hurts!! I am definitely one lucky girl.[81]

C. Some Views from Other Countries

If you want to think more about whether such a life is possible, and how to live it, you might consult public interest lawyers from countries where the challenges can be much greater than what we have in the United States. After one of our Public Interest Environmental Law Conferences in Oregon, I sat down with several lawyers who are members of the Environmental Law Alliance Worldwide (ELAW) and asked them to talk.[82] Some of the members of ELAW work in non-profit groups while others carry on private public interest practices. Their attitudes are, in any event, a lesson for the rest of us.

Annie Kajir of Papua New Guinea asked, "If you don't do it, then who is going to take on the challenge? You've got to have the heart to do it. And if you care about how these people's lives will be affected and the environment they live in, then what more could you want in life to do?"[83]

Ipat Luna from the Philippines looked back at the decisions she made in law school. "For me, there was no other choice. I didn't want to be cock-fighting for the corporations. When we started this work we were getting about one-third of what our contemporaries were getting – and we were better than them! It was a challenge, especially with the parents. You

81. E-mail from Ela Orenstein, to John E. Bonine (Mar. 15, 2007) (on file with author).
82. These quotations are taken from my interviews (on file with author).
83. *Id.*

had to defend your course of career to your parents, if you are getting only one-third of the salaries of your contemporaries."

However, she doesn't regret the choices that she has made. "I hate to be smug about being an environmental lawyer, but talking with my classmates who are earning maybe four or five times what I make, I sleep very well at night. I don't win all the time. I lose sometimes. But I know that I'm doing the right thing and I would never even think of having it any other way."

"Environmental law is one of the best professions," she summed up. "You can experience nature deeply; experience nature through people, through communities that are protecting it . . . It is very, very satisfying."[84]

Danielle Andrade of Jamaica also addressed the choices that people make. She said, "We are not the ones who are making the sacrifices. The ones who are making the sacrifices are the ones who are working for those corporations, and are cutting deals and helping to slowly destroy our natural resources. Those are the ones that are sacrificing. They are sacrificing their own moral ethics; they are sacrificing their children; sacrificing their environment, their children's environment, *our* children's environment. And above all, I think that is probably the greatest sacrifice they are making."[85]

CONCLUSION

Pursuing a public interest career in law is not easy. From its earliest history it has involved hard work with minimal financial compensation. But for those who conclude their lives would be poor without such work, the possibility is within the reach of any intelligent graduate of Pace, Oregon or any of the other fine law schools where environmental law is taught today. What may characterize all those who came before and those who are just setting out on their life's work is a common attitude of hope. As David Brower used to advise young people:

> Whatever you can do, or dream you can, begin it.
> Boldness has genius, power, and magic in it.[86]

84. *Id.*

85. *Id.*

86. David Brower, quoting Murray, quoting Anster's 1835 translation of Goethe, made reality by environmental lawyers like Lloyd Garrison in the past and Neil Kagan, Dave Bahr, Ela Orenstein, Annie Kajir,Ipat Luna, and Danielle Andrade today. *Supra* note 80.