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The Future of Environmental "Rule of Law" Litigation and There Is One

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United States environmental law is founded on three fundamental premises, all of which are now partially unraveling. Simply put, the three principal and related objectives of the early environmental movement were to open the courts to NGO suits to challenge the failure of federal and state agencies to consider adequately the environmental consequences of their actions, to federalize environmental protection to the maximum extent possible, and to solve most problems by the application of state-of-the-art-plus technology. All three objectives succeeded beyond the wildest expectations of the pioneering architects of environmental protection, and these objectives remain the foundation of modern environmental law. These objectives, however, are insufficient to sustain environmental law in the twenty-first century.

Since its meteoric rise in the late 1960s and early 1970s, environmentalism has become a mature political movement. In addition, environmental law has become a discrete area of law and legal practice. Compared to many other social movements of the now mythic "60s", the sustained success of environmentalism is astounding. Large segments of society have accepted the basic premise that we should conserve biodiversity and minimize the risks of media exposure to harmful pollutants, especially toxic substances. A complex but unintegrated web of regulatory programs has been put in place by Congress and the states to advance these objectives. So complete has been the rhetorical triumph of environmentalism that the socially acceptable debate is confined to second order issues such as the definition of protection objectives with greater scientific rationality and the search for more efficient, effective and fairer means to achieve them.[1] The tone of the debate is, however, deceiving.

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1. Environmentalists have been able to draw on the progressive conservation tradition that conservation issues are above politics, see EDMUND MORRIS, THEODORE REX 514-518 (2001), that resource use issues are above politics to help frame the envi-

The relatively narrow, but fierce, band of political environmental protection debate masks the deeper, more profound stresses in environmentalism and environmental law as it continues to evolve. In 2000, I was privileged to deliver the Lloyd K. Garrison lecture at Pace University School of Law. Using this opportunity to examine the stresses that are eroding the utility of "rule of law" litigation, I argued that the sustainability of this foundational strategy is open to question for two primary reasons.[2] First, the strategy was always a fiction because courts were creating, not "finding" law. All fictions break down over time as the need for them decreases and the fiction becomes more transparent. Second, the future evolution of environmental law suggests that the "rule of law" litigation strategy will be less effective in the future because environmental protection is evolving as it enters its second generation.[3] Several non-legal changes are converging which weaken the effectiveness of uniform, centralized, technology-forcing command and control regulation.

My argument rests on three premises, one normative and two positive. The normative one is that organized environmentalism is still driven by the idea that effective environmental protection will result from stopping or delaying bad activities. This is a powerful idea, but it is ultimately self-limiting because it makes it difficult to move to a positive vision of good environmental protection. NEPA litigation has its uses but it does not directly lead to effective, long-term environmental protection.[4] In short, environmental law is long on process and short on substance, especially with respect to biodiversity conservation. We lack an affirmative vision of the right balance between humans and natural systems and thus much environmentalism remains reactive rather than pro-active. The long-term future of environmental law will depend on more individual participation in sustainable resource use choices and in the long-term adaptive management of complex large and small ecosystems.

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ronmental agenda as a debate about means not ends. There are always dissenting voices. *E.g.*, Bjorn Lomberg, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD (2001).

2. A. Dan Tarlock, *The Future of Environmental Law "Rule of Law" Litigation*, 17 PACE ENVTL. L. REV. 237 (2000).

3. DANIEL C. ESTY & MARIAN R. CHERTOW, THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 1 (1997).

4. *See* Bradley C. Karkkainen, *Toward A Smarter NEPA: Monitoring and Managing Government's Environmental Compliance*, 102 COLUM. L. REV. 93 (2002.)

The second premise is the positive observation that the classic model of the centralized, expert administrative state is now buffeted by powerful centrifugal forces. This is not a new or original observation, but in recent years many observers have noted with varying levels of enthusiasm that there is considerable collaborative vertical and horizontal power sharing.[5] The two trends are closely connected. Collaborative power sharing is seen as a way to supply the creativity, vision and implementation resources that the federal government no longer seems able to provide.[6] The second positive premise is that as we move more and more toward biodiversity conservation, the regulation of land becomes equally, if not more, important than the regulation of water bodies and airsheds. The rub is that the federal government's leverage is the weakest at this point and common law property expectations are harder compared to those connected to the use of airsheds and watercourses as sinks. The net result is that many foresee more "deals" among the principal stakeholders interested in a specific resource or geographical area and fewer top down regulatory solutions.

The downward devolution or the "decentering" of government engenders deep passions, and positions which cut across traditional political boundaries. Many on the right support it in the name of an arid, abstract federalism often divorced from how power is actually exercised, shared and constrained, and many environmentalists fiercely oppose it as a disguised effort to roll back thirty plus years of environmental protection. To them, devolution is yet another sordid chapter in the long history of appeals to states rights to justify the abdication of national responsibility.[7] The debate is much more complex. Many in the environmental community embrace the idea of place-specific stakeholder negotiated management solutions, for reasons of necessity. Local, consensus-based "deals" are the only alternative to the rollback of federal environmental mandates. This is why Secretary of the In-

5. *See, e.g.*, Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) and Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411 (2000).

6. The pros and cons of collaborative decision-making as well as the implications that it holds for environmental lawyers are perceptively discussed in Bradley Karkkanien, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555 (2002).

7. *See* Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223 (2001).

terior Bruce Babbitt promoted Habitat Conservation Plans in the 1990s as a way of reforming the Endangered Species Act from within.[8] Positive cases do, however, exist.[9]

My 2000 Garrison lecture set out the rise of deal making and briefly addressed some of the legal questions that a decentered government raises. I focused primarily on the limitations of the classic "rule of law" lawsuit in an era of collaborative deal making. At the end of the lecture, I suggested a role for future "rule of law" lawsuits in deal making, but I did not offer a detailed alternative to the classic lawsuit. Historically, NGO suits have been used to gain a tactical advantage in a multi-front campaign. For example, in his celebrated book, *Defending the Environment*[10], Joseph Sax justified such suits as legislative remands. Courts were to invalidate agency actions to give the legislature a chance to make a more informed resource allocation choice.

In this brief addendum, I discuss a recent case partially invalidating an Endangered Species Act[11] (ESA) Section 10 Habitat Conservation Plan (HCP) deal as an example of the different function that "rule of law" suits may play in the future. I argue that deals have both a high upside, long term sustained management, and an equally high downside, the gradual erosion of biodiversity. Thus, there is a need for courts to play a role in promoting responsible deal making.

One of the central questions that collaborative government raises is when is a deal really a deal? For private parties, the incentive to enter a deal is to obtain some form of immunity from subsequent government enforcement and litigation. For governments, the primary incentive is to obtain what litigation cannot directly produce, land, money and a commitment to some form of long-term, adaptive management. At the present time, the immunity consists of the ability to shape the compliance standard to allow more activity than the pre-deal regulatory structure would allow and the ability to shift the costs of unforeseen compliance problems to the government. To be effective over the long run, the deal must establish sufficient compliance duties to maximize the

8. *See* Joseph L. Sax, *Using Property Rights to Attack Environmental Protection*, 14 PACE ENVTL. L. REV. 1 (1999).

9. *See* Joseph L. Sax, *Environmental Law at the Turn of the Century: A Repartorial Fragment of Contemporary History*, 88 CAL. L. REV. 2377 (2000).

10. *See generally*, JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1970).

11. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1973).

possibility of achieving the desired environmental results. Thus, there is an important role for judicial policing of the initial deal as well as its subsequent implementation.

It is too early to definitely identify the full contours of the judicial role because we do not have enough experience with successful deals to develop the necessary criteria. The judicial role must proceed from two inconsistent premises. First, the court must assume the parties negotiated in good faith to comply with the basic objectives of the applicable laws. Therefore, a deal to save species must be structured to achieve that end, and a deal to enhance the hydrologic and biological integrity of a watershed must be similarly structured. Second, the court must recognize that existing laws are not well designed to address issues such as biodiversity conservation and thus must be adapted to this end, at least until Congress takes up the issue of creating the next generation of environmental laws. The adaptation will require a relatively high level of ambiguity because of the inevitable scientific uncertainty about the efficacy of the conservation instruments adopted and the need to leave some crucial issues, such as future funding and the consequences of unforeseen conditions, such as species decline unresolved.

The court will have to decide if there is a sufficient "core deal" to address effectively the environmental problems that gave rise to the negotiation. Often, it will not be prudent to invalidate the entire deal and require the parties to start over, but rather it will be useful to spotlight the issues that need to be resolved. *National Wildlife Federation v. Babbitt*[12] is a possible bell weather of the new judicial review. In *Babbitt*, a well-respected federal district judge, David Levi, with extensive experience in environmental law, demonstrated great sensitivity to the dynamics of modern deal making by spotlighting where the parties papered over too much in the rush to get a deal.

The Fish and Wildlife Service and various governmental units negotiated an ambitious regional HCP for a 53,000-acre, largely undeveloped, flood plain near Sacramento, California. Development will occur because local and perhaps federal flood control protection will trigger the usual moral hazard cycle: Flood protection will increase development, which in turn will increase the amount of flood damage when the inevitable "extraordinary" flood

12. *See* National Wildlife Federation v. Bruce Babbitt, 128 F. Supp. 2d 1274 (E.D. Ca. 2000).

occurs. Both humans and non-humans love California. California is one of the world's endangered species hot spots and several listed species live in the basin. Unlike HCPs, which start with the assembly of a large block of public and private land, the Natomas Basin plan obligated a multi-jurisdictional agency, the Natomas Basin Conservancy, to assemble several connected blocks of land funded by future land development fees. The pay off for the plan was the Fish and Wildlife Service's issuance of a Biological Opinion that authorized umbrella incidental take permits to several local governments and water districts.

To induce sufficient developer and local community support, HCPs have to balance front-end development opportunities, which are immunized from a taking suit under Section 9, with the implementation of a multi-species conservation plan over a long period of time. The trick is to find a level of habitat destruction and consequent species decline consistent with the maintenance of the ecosystem's functions. This would include the support of endangered species over time. To do this, the plan has to make crucial risk assumptions in the face of multiple levels of scientific and institutional uncertainty. The Natomas Basin Plan's crucial assumptions were: (1) only about a third of the basin would in fact be developed and (2) future threats to the species continued survival as development took place around the reserve system could be minimized through aggressive adaptive management.

The National Wildlife Federation challenged the basic theory that Incidental Take Permits could precede a complete plan based on extensive scientific research. Specifically, it argued that the Plan must estimate the number of species and the number that will be taken. Since this is extremely difficult to do, the plan would most likely never go forward. The court brushed this aside by holding that the HCP met the minimum statutory requirements under the *Chevron* deference standard. Plaintiffs also challenged the Service's projection (speculation) that only 17,500 acres of the basin would be developed and the consequent conclusion that a combination of reserve and retention of agricultural land would be sufficient to protect the covered species. These were found to be within the Service's expert discretion because they concerned "the uncertainties inherent in the market-based mitigation mechanism employed by an HCP" and an inevitable part of the complicated decision making that led to the HCP.

Instead of invalidating the key risk assumptions behind the plan, the court zeroed in on the weakest deals, the disconnect be-

tween a regional plan and the lack of regional responsibility, and the Department of Interior's inability to nail down adequate funding.[13] First, the court invalidated the Service's conclusion that the amount of the mitigation fee would be sufficient to acquire the necessary habitat because it was unsupported by substantial evidence and therefore arbitrary. Administrative law purists may object to combining an adjudicative and rule making or informal decision standard but the court in effect enforced the Supreme Court's *Nollan-Dolan*[14] standard. *Nollan-Dolan* require that land exactions be based on a reasonable showing of need and that the exaction is proportionate to need generated by the land use activity. By failing to demonstrate compliance with the standard, the Department of Interior may have equally over or underestimated the necessary level of exaction. Likewise, the court held that the Department could not issue a permit after the city refused to assume financial liability for the implementation of the plan.

The Service's willingness to go ahead without an adequate funding mechanism also extended to its willingness to approve a regional HCP premised on the participation of only one public actor, the City of Sacramento, when in fact the success ultimately depended on multi-jurisdictional cooperation. This was fatal for several reasons including the failure to discuss the effect on the reserve and corridor design, if only the city participated in the plan. In short, the Service's failure to consider whether the survival of the species will be put at risk by the City's permit, if the regional mitigation approach of the HCP is not available, is arbitrary and capricious. *National Wildlife Federation's* primary virtue is that it both warns the parties to a deal about the dangers of excessive compromise and provides a road map for lawyers in future negotiations.

13. *See* John Kostyack, *NWF v. Babbitt: Victory for Smart Growth and Imperiled Wildlife*, 31 ENVTL. L. REP. 10712 (2001). *See generally* William Rodgers, *The Myth of Win-Win: Misdiagnosis in the Business of Reassembling Nature,* 42 ARIZ. L. REV. 297 (2000).

14. *See* Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).