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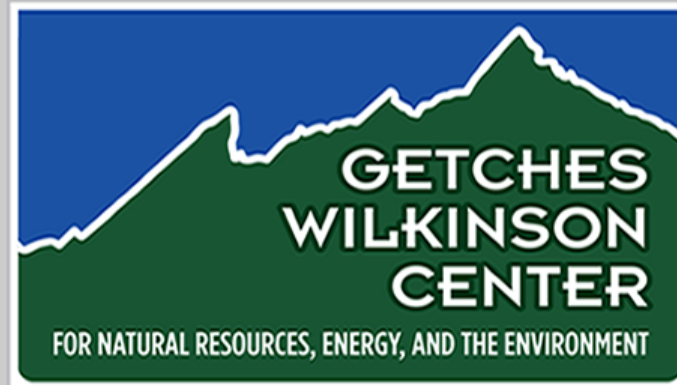
Resource Law Notes Newsletter, no. 10, Jan. 1987

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RESOURCE LAW NOTES: THE NEWSLETTER OF THE NATURAL RESOURCES LAW CENTER, no. 10, Jan. 1987 (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).

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Resource Law Notes

The Newsletter of the Natural Resources Law Center
University of Colorado at Boulder • School of Law

Number 10, January 1987

Conference on National Parks Issues Sparks Lively Debate

Katherine S. Taylor

Noted author and conservationist Wallace Stegner called our national park system "the best idea we ever had." Certainly images of Yosemite, Yellowstone, and the Grand Canyon are a source of pride even to Americans who may never have visited these parks. The national parks are important to our national psyche.

When most of the national parks were founded, they were surrounded by undeveloped wilderness and generally considered "worthless lands," valuable only for their unique vistas and ability to attract tourists. Frederick Billings, when president of the Northern Pacific Railroad, told his railroad engineers, "Do not damage the resources; the day will come when we'll make far more money taking people to the west than we'll ever make taking out the minerals."

However, the parks no longer exist in splendid isolation. For example, development around Everglades National Park so lowered the water table that its swamp ecology was threatened. An aggressive alliance of conservationists and the government of Florida, recognizing the importance of the park to that state's tourist industry, responded with a successful "Save Our Everglades" campaign.

In September, the Natural Resources Law Center examined the effects of development near park boundaries at a conference held near Estes Park, Colorado, right at the border of Rocky Mountain National Park. Discussion among approximately 100 participants and speakers occasionally became heated over just what constituted a threat and what should be done to preserve



Professor Robin Winks gives keynote presentation.

the parks. Though no firm consensus for specific action was reached, it became clear that avenues are available for those who wish to protect the parks and that perhaps the most important thing is to increase public awareness of park issues.

Some threats to the national parks caused by development along their borders--such as geothermal projects near Yellowstone and a proposed nuclear waste dump outside Canyonlands--have been averted for the moment. But the national parks in many places are under seige, sometimes by forces far away from their borders. Air pollution from Los Angeles can impair visibility in western parks many hundreds of miles away.

Part of the problem is that the "threats" lamented by some are seen as legitimate and even desirable activities by others. Industrial development may mean jobs and economic prosperity to local communities. Curtailing perceived threats such as building or hunting near park boundaries may interfere with American concepts of property rights and freedom.

This ambiguity about what should be done to protect the parks runs deep. From the beginning, park policy has been politically motivated. Early administrations wanted to encourage tourism and did not want visitors worried by fears of Indians. Therefore superintendents of Yellowstone were told to promulgate a myth that Indians were afraid of geysers and never came into the area. Never mind that this was not true.

A universal theme of the conference was that park management should be based on good scientific information, not on politically dictated policy. Science and research were not part of the National Park Service's Organic Act. Laws to regulate park management were passed whenever threats were perceived. There were



Jim Thompson, Superintendent of Rocky Mountain National Park, discusses park management issues.

I was there. I took a course in water law in 1938 and got an A in it. I then went to work for L. Ward Bannister, one of the negotiators of the Colorado River Compact and lecturer in water law at Denver University and Harvard University. I helped to bring his notes up to date. I listened in on discourses he had with Ralph Carr, Jean Breitenstein, John Reid, and other "irrigation lawyers" of the old school. I started to teach in 1946, and I was general counsel for the Missouri River Basin Survey Commission in 1952.

Trelease, Federal Reserved Water Rights Since PLLRC, 54 Denver L. J. 473 (1977).

After his early practice years, Frank returned briefly to the University of Colorado as an instructor, launching an illustrious academic career in the law. He then went to the University of Wyoming where he spent most of his years as a law teacher, becoming Dean in 1960. After he retired from Wyoming in 1977, he became Professor of Law at McGeorge School of Law at the University of the Pacific in Sacramento, California.

Dean Trelease's vast and enduring contributions to water law are his monument. Nearly every state that added a water code or revised their water laws consulted with Frank; much of the water law in the country came from his pen. He was more responsible than any other individual for the materials on water rights in the American Law Institute's Restatement (Second) of Torts, and he was an important contributor to the National Water Commission's 1973 Report. He served as a consultant, advising on water law for many nations, including Jamaica, the Phillipines, and Swaziland.

Those of us who worked with Frank remember his soft-spoken manner, ready laugh, and easy smile. He asked much of himself and delivered well. He is one of those rare people in the law who came into a field and not only gave it a few ideas, but gave it shape and direction. His goodness as a person will remain with those who knew him; his handiwork as an architect of a field will endure.

Frank leaves his wife Mary in Peoria, Arizona and his son Frank, Jr. in Cheyenne, Wyoming.

Eighth Annual Summer Program

The dates for the Center's annual summer programs have been set. A three-day program, tentatively called "Water as a Public Resource: Emerging Rights and Obligations," will be held **June 1-3, 1987**. A three-day conference, tentatively entitled, "The Public Lands During the Remainder of the 20th Century: Planning, Law, and Policy in the Federal Land Agencies," will be held **June 8-10, 1987**.

In addition, the Center will be cosponsoring a one-day program with the Environmental and Natural Resources Section of the Boulder County Bar Association on **April 11, 1987**. The program title is "Finding Water for the Front Range: Legal and Institutional Issues."

The Chinese Approach to Legal Management of the Environment

Professor Cheng Zheng-Kang



Cheng Zheng-Kang is an associate professor of law at Peking University School of Law in Beijing, China. In addition to his teaching responsibilities, he is a Legal Advisor to the State Environmental Protection Bureau, the Chinese equivalent of the U.S. Environmental Protection Agency. Between 1981 and 1985 he organized and led special groups charged with the responsibility of

drafting many of the major environmental laws being adopted in China. He has published books and articles on Chinese environmental law and has translated U.S. environmental legal materials into Chinese. Professor Cheng was a Visiting Fellow at the Natural Resources Law Center from June to December, 1986.

Introduction

Environmental Law is a comparatively new field in China's legal system, but it is developing very rapidly. In the few years since China passed its first environmental protection law in 1979, China has established its environmental legal and management systems.

It is useful to have a brief idea of some basic differences between the political, economic, and legal systems in China and the United States, which affect some specific characteristics of environmental policy.

	U.S.A.	China
Political system	Federal system	Centralized system
Legal system	English law system	Chinese legal system plus civil law system
Economic system	Free-market economy	Planned free-market economy
Economic condition	Developed country	Developing country

In spite of these factors which dictate that there will be differences between the environmental law of China and that of the United States, environmental law is in fact the legal field with the most similarities between the two countries, i.e. each country can accept many elements from the other country's law.

For instance, the Chinese environmental legal system accepts the environmental impact statement system and some methods of protecting wilderness areas and wildlife

from the United States; meanwhile, some Chinese rules are also accepted by the U.S. environmental legal system, such as the comprehensive utilization of solid wastes.

The major differences are:

1. The Chinese environmental legal system is comparatively simpler than that of the U.S. Whereas the U.S. federal government has limited power, the Chinese central government has very extensive political power. It enjoys overall privileges in each province and autonomous region. The local laws are void if they are in conflict with the national laws in any way. Therefore there are no law suits in China regarding the distribution of power between the central and local governments.

2. Because the Chinese economic system is a planned free-market economy, the Chinese government can use economic and social development plans to manage and control environmental protection. Of course, it also uses various economic incentives, but they are supplemental to the planning method.

3. Under the Chinese legal system, judges in China have either no power to make law or no authority to interpret the law at their own will. The interpretation of law is the responsibility of the National Congress and the State Supreme Court. In most administrative laws including environmental law, there are specific provisions which state that the National Congress has delegated its power to interpret law to the executive organizations in charge of enforcement.

4. Like most developing countries, China must be very careful in dealing with the relationship between economic development and environmental protection. Poverty is a serious kind of pollution. If a developing country cannot solve its economic problems, its environmental problems surely cannot be solved. China cannot use methods to solve environmental problems which are counter-productive to the economy. China cannot stop its economic development merely for a "nice" and "clean" environment, but of course China cannot completely sacrifice the environment for the economy either. The best course for China will be to solve its environmental problems in the course of economic development. So it is a very narrow way which China must walk.

The Major Environmental Problems in China and the Corresponding Policies

China has two types of environmental problems, both serious: environmental pollution and environmental degradation. The causes of these problems are: a large population, many of whom are not well educated; comparatively poor natural resources; backward technology and old, inefficient equipment; and some political mistakes of the Chinese government in the past 30 years.

1. The large population and relatively limited natural resources per person give China a poor environment. China has a population of one billion, four times that of the United States. The farmland for each person is one eighth that of the U.S., so feeding its population is a major problem for the Chinese government. Total available water resources are about 2,600 - 2,700 cubic meters per person, which equals the water consumption per person in the U.S. in 1975, so if the Chinese people used water like people in the U.S., not a drop of water would flow into the Sea of China! In order to feed its large population, China had to increase its cultivated lands and the number of times that crops are harvested each year, so much forested land was destroyed. Lakes dried up and the grasslands were overgrazed. As a result, forest areas and surface water both decreased. Soil erosion and water losses caused the deserts to expand quickly. All these things prevented both environmental improvement and economic development in China.

2. China lacks energy resources, especially oil. Oil production in China is one fifth of the consumption in the U.S. Coal is the main energy resource in China, but coal is a dirty fuel and much of the coal produced in China is high-sulphur coal, so in certain areas, especially in cities and industrial areas, air pollution is very serious. There are three main acid rain belts in China, similar to those in the eastern part of the U.S. According to Chinese governmental records, rainfall with a pH of 3.0 was monitored in southwest China.

3. Backward technology and out-of-date equipment contribute to more pollutants being discharged each day. Because 90% (72 million tons/day) of China's waste water is discharged directly into inland water bodies without any



Carol Dinkins, former Deputy Attorney General of the United States, came to the University of Colorado School of Law as the NRLC Distinguished Visitor in September 1986.



Carol Dinkins talks with Professor Chuck Howe and Dean Betsy Levin.

treatment, many rivers and lakes are polluted. There have been accidents where the river surface caught fire and bridges were burned. Fish and shellfish have disappeared from some rivers. Some rivers and lakes are crying.

4. Toxic substance pollution, mainly from pesticides, is also serious. Some high-residual pesticides were used by peasants for a long time. Because of unsuitable management, usage, storage, and disposal, a lot of pesticides and other toxic substances are entering the environment and are imperilling people's health and polluting air, water, and all elements of the environment. It is estimated that each year about 10,000 deaths are directly or indirectly related to pesticide and other toxic substance pollution.

5. Noise pollution is also serious because most vehicles are very old and have ineffective noise preventing devices. In big cities, the noise level along main streets usually exceeds the state standards. According to records, in Beijing about one-third of the residents are living in over-standard noise during the day time.

6. Wildlife, especially some rare and endangered species, are not well protected. The number of natural reservation areas is too small and without proper management. Some were destroyed by land-claims.

7. In addition to the objective problems mentioned above, policy mistakes have made Chinese environmental problems worse. Before and during the "Cultural Revolution" the Chinese government was busy with the "class-struggle." Some people believed that environmental pollution was a unique phenomenon of capitalism and that environmental pollution would be solved automatically by a socialist system. In those years when the Chinese government was not paying attention to its economic development, it also did not pay attention to environmental pollution. Incorrect industrial and agricultural policy caused more environmental pollution and degradation. There were no provisions for environmental protection in the first five "five-year economic development plans" and there was no governmental agency responsible for environmental protection. Inflexible economic planning tied people's hands. Nobody could do anything for environmental protection. "You cannot use the money for soy sauce to buy vinegar," said the plan. So if somebody wanted to use some money for environmental protection, he would violate the provisions of the plan. Those self-deceiving policies and self-defeating actions caused environmental pollution and degradation to become more serious.

Fortunately this situation changed in 1976. Now the Chinese government and the Chinese people pay great attention to environmental problems and take an active part in solving them. There have been many new policies formulated in recent years, as follows:

1. Requiring birth control to reduce the rate of population growth, and therefore to relieve the pressures on the environment.

2. Introducing environmental protection into "the economic and social development plans." In the two new economic and social development plans, there are chapters about environmental protection. Along with a target for economic development, there should also be a target for environmental protection. Each year the state

has increased the investment for environmental protection; the growth rate for environmental protection investment is now more than the growth rate of investment in economic projects.

3. Establishing good land use planning as the base of environmental protection. In the past few years, the Chinese government made a "territory plan" (a land use plan for the whole country) as well as urban-county development plans, agricultural land-use plans, and some specific land-use plans, such as for scenic locations and for natural conservation areas.

4. Strengthening the modernization of industry, requiring strict control of new pollution sources to prevent pollution levels from increasing, and replacing old equipment and backward technologies to improve production and reduce discharges of some pollutants.

5. Strengthening control on resource development actions, including mineral resources exploitation, farmland reclamation, timber development and grazing actions, in order to improve impaired ecosystems, and encouraging farm workers and grazers to create ecological agricultural and grazing systems.

6. Developing science and technology.

7. Improving environmental education and bringing a better understanding of environmental protection to the whole nation. Now environmental protection is taught at all levels from primary schools through colleges and universities.

8. Creating a powerful environmental management system.

9. Promulgating a systematic environmental legal system.

10. Encouraging people to take part in environmental issues.

In December 1984, the State Council held the "Second National Environmental Protection Conference" in Beijing. This conference confirmed China's goal to control environmental degradation and to reduce environmental pollution. The urban and rural living environment is to be improved and in harmony with improved living standards of the people by the year 2000.

Basic Guiding Ideologies Used in Law-Making Procedures of the Chinese Environmental Laws and Regulations

Environmental legislation in China is based on the following guiding ideologies:

1. People are the products and the component element of human environment. To protect the environment is to protect humanity itself as well as the existence, development, and the future of the nation. Therefore, environmental protection should be taken as the basic state policy of a civilized country.

2. Human beings are both in contradiction and in unity with the environment in which they live. Environmental pollution and degradation are the results of wrong human action in environmental and economic development. Human beings are masters of their environment and can create a better living condition through wise and correct efforts. Wilderness is not the best environment for living. As the population grows, some wilderness areas should be

developed, but human beings have to protect some wilderness for future generations, for scientific research, for educational purposes, and for recreation. In other words, wilderness should be developed reasonably and protected and conserved reasonably.

3. Environmental protection requires a lot of money, so economic growth is the basis of environmental protection. No economic growth, no environmental protection. So environmental protection must benefit economic growth, especially in a developing country. But, at the same time, the environment is the base of human production. No good condition of environment, no economic growth. So we have to oppose the mistaken practice of allowing economic development only at the sacrifice of the environment, and we have to oppose the ideology which wants to stop economic growth for a "nice and clean" environment. We think that the only correct way to solve the conflict between environmental protection and economic growth may be to build environmental protection into economic development, to assure that economic development is in harmony with environmental protection. We call it: to solve environmental problems in the cause of economic development.

4. Environmental pollution and degradation result from modern production methods which do not adequately control pollution. In China, there is an old saying: "let the man who tied the bell on the tiger take it off." So, in order to solve environmental problems, we have to encourage the development of improved means of production, utilizing advanced science and technology. Environmental legislation must encourage this development, not prevent it.

5. The laws of nature exist independently of human activity. An important way to solve environmental problems is for human beings to plan economic productivity in compliance with natural law, to develop ecological-agriculture and grazing, and to increase the utilization of all natural resources.

6. It is impossible to completely forbid any pollution of the environment. The self-purging qualities of air and water are a valuable natural resource. In fact some plant nutrients entering into a body of water may be helpful to the living and breeding of fish. "No fish live in pure water." So we need not have a "zero-discharge policy." But we have to forbid irretrievable pollution and degradation.

7. Because irretrievable pollution and degradation threaten the future of human beings, it should be forbidden strictly regardless of economic benefits.

8. Environmental protection and economic development must follow this principle: take the economic benefit, the environmental benefit, and social benefit in unity. Economic benefit means economic development and producing more products to meet the needs of people; environmental benefit means improving environmental quality through reducing pollution and controlling degradation; social benefit means solving unemployment problems, enhancing the education level of people, protecting people's health, and improving the welfare system. In the decisionmaking process, sponsors are responsible for paying attention to those three aspects equally. For example, if creating a new enterprise will bring substantial economic benefits it is good in the aspect of

economic benefit. However, if it will also cause serious environmental pollution or degradation, and therefore will imperil people's health or it will cause some people to lose their livelihood, thus causing social disruption, then the enterprise is not beneficial in these aspects. We have to forbid creating this new enterprise. Thus, planning for economic growth involves a weighing process in which the economic, environmental, and social effects are considered simultaneously. In this decisionmaking proceeding, when people estimate and calculate the value of environmental benefits, the "Labor Value theory" cannot be used alone--that is, these values do not derive solely from added labor. The environment has its own value which can be calculated and is equal to the money which is necessary for its reclamation or restoration.

9. Externalities created by a polluter should be borne by himself and not moved to society. In environmental protection, the principle of "polluter pays" is very useful.

10. Economic incentive methods are very useful where there is a free-market economic system. We can use them to encourage competition and to eliminate environmental pollution and degradation.

11. In order to protect the environment, we have to adjust and restrict the usage of "private property" according to the natural laws. The damage or loss which may result from this adjustment and restriction should be compensated reasonably. It is different from tort remedies because a person who suffers the loss will also enjoy the benefit of the improved environment.

Existing Problems in the Chinese Environmental Legal System

1. The environmental legal system is not completed yet. Some environmental fields which need to be regulated by legislation remain unregulated. Examples include wildlife and wilderness areas, and coastal zones.

2. There are many gaps in the environmental legal system of China. Because the legal structure in China is still in the course of development and the basis of the legal system, the economic system, is being reformed now, so China needs additional laws and regulations to fill these gaps.

3. Some environmental laws, for example, the forestry law, mineral resources law, grazing law, etc., are too simple to enforce properly.

4. Each law normally places emphasis on just one aspect. Not enough consideration has been given to relationships among environmental laws and regulations.

5. The enforcement system is not very powerful and China lacks experts and lawyers to enforce its own environmental laws and regulations.

Although there are some problems or drawbacks in the Chinese environmental legal system, China has had to build its own environmental legal system within a very short time. I believe that in the next ten years or so the Chinese environmental legal system will become more perfect and complete.

(A much more detailed treatment of the Chinese environmental legal system is set out in a new Center Occasional Paper prepared by Professor Cheng, "A Brief Introduction to Environmental Law in China.")

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New Members Join Advisory Board

Three new members have joined the Advisory Board for the Natural Resources Law Center. These new members are **Ralph W. Johnson**, Professor of Law at the University of Washington School of Law in Seattle; **William H. Nelson**, an attorney with Nelson, Hoskin, Groves & Prinster in Grand Junction, Colorado and an alumnus of the University of Colorado School of Law; and **James C. Wilson**, President of Rocky Mountain Energy in Broomfield, Colorado.

Two Board members who have been with the Center from its early days complete their terms in January 1987. These members are **Guy R. Martin**, an attorney with Perkins, Coie, Stone, Olsen & Williams in Washington, D.C. and **Ernest E. Smith**, Professor of Law at the University of Texas School of Law.

The Natural Resources Law Center

The Natural Resources Law Center was established at the University of Colorado School of Law in the fall of 1981. Building on the strong academic base in natural resources already existing in the Law School and the University, the Center's purpose is to facilitate research, publication, and education related to natural resources law.

For information about the Natural Resources Law Center and its programs, contact:

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