

2010

The Evolution of Natural Resources Law and Policy

Lawrence J. MacDonnell

Sarah F. Bates



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The Evolution of Natural Resources Law and Policy

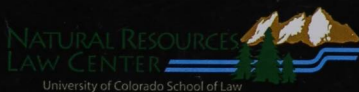
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Natural resources law is a dynamic field of practice, with a rich history that reaches back several centuries. The authors look at current challenges and offer ideas about the future while demonstrating that the federal government's role continues to be a complex one as markets and private actors become more visible participants in the current policy arena. Part I provides foundational analyses of the law, while the second part reviews thematic issues in the area.



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About the Editors

Lawrence J. MacDonnell is Professor of Law at the University of Wyoming College of Law. His substantive areas of work include water resources, energy and minerals, endangered species, and sustainable development of natural resources. Much of his work involves the interconnection between development and conservation—promoting environmentally beneficial development and use of land and natural resources.

Between 1983 and 1994 he served as the initial Director of the Natural Resources Law Center at the University of Colorado School of Law. Under his direction, the Center established nationally and internationally recognized programs of research, publication, and legal education and sponsored a visiting fellows program.

MacDonnell has worked in nonprofits, in private law practice, and as a consultant. His clients have included nonprofits, states, and private industry. MacDonnell has published extensively, primarily in the area of water law and policy. His publications include books, law review articles, and publications in other journals. Much of his writing has emphasized opportunities for changes in existing laws and policies to better meet contemporary needs.

Sarah F. Bates has written and spoken extensively on western water law and policy reform over the past two decades through research appointments with University of Montana and the University of Colorado, in her advocacy positions with Western Progress, the Grand Canyon Trust, and the Sierra Club Legal Defense Fund, and through her consulting work with groups such as the congressionally chartered Western Water Policy Review Advisory Commission.

Bates coauthored the book *Overtapped Oasis* with Marc Reisner in 1990, and has published four additional books (including *Natural Resources Policy and Law*, which she coedited with Lawrence MacDonnell),

and numerous reports and articles. Her recent writings have focused on the nexus between land use planning and water law.

Bates is a graduate of the University of Colorado Law School (1988), where she subsequently returned to serve as the associate director of the Natural Resources Law Center from 1991 to 1993. She serves on the board of directors of the Montana-based Clark Fork Coalition and is a member of the advisory board of the Ruckelshaus Institute of Environment and Natural Resources at the University of Wyoming.

About the Contributors

Bruce Babbitt served as Attorney General of Arizona from 1975 to 1978, as Governor of Arizona from 1978 to 1987, and as Secretary of the Interior from 1993 to 2001. With degrees in geology, geophysics, and law, Babbitt was elected to statewide office as Attorney General on his first foray into elective politics at age 36. He subsequently served as Governor for nine years. As Governor, Babbitt brought environmental and resource management to the forefront in Arizona. He personally negotiated and steered to passage the Arizona Groundwater Management Act of 1980, which remains the most comprehensive water regulatory system in the nation. In addition, he was responsible for creation of the Arizona Department of Water Resources and the Arizona Department of Environmental Quality as well as a major expansion of the state park system.

Appointed Secretary of the Interior by President Clinton in 1993, Babbitt served for eight years, during which he led in the creation of the forest plan in the Pacific Northwest, restoration of the Florida Everglades, passage of the California Desert Protection Act, and legislation for the National Wildlife Refuge system. As a certified fire fighter, Babbitt brought his frontline experience to creating a new federal wild-land fire policy that emphasizes the role of fire in maintenance and restoration of natural ecosystems. He pioneered the use of habitat conservation plans under the Endangered Species Act and worked with President Clinton to create 22 new national moments, including the Grand Staircase–Escalante National Monument in Utah. Babbitt is perhaps best remembered by American school children as the Secretary who brought the wolves back to Yellowstone.

Babbitt is the author of *Cities in the Wilderness*, recently issued by Island Press, in which he lays out a new vision of land use in America. He currently serves as a Chairman of the World Wildlife Fund.

Babbitt resides in Washington, D.C., with his wife, Hattie, a former Ambassador to the Organization of American States. They have two children: Christopher, a lawyer residing in Washington, D.C., and T.J., a teacher in the Los Angeles public school system.

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Sally Fairfax is the Henry J. Vaux Distinguished Professor Emerita at the College of Natural Resources, University of California, Berkeley. She studied land conservation and management issues for almost 40 years prior to her retirement in 2008. She began her career as a close student of federal land agencies and soon turned to assessing alternative administrative regimes for managing resources in which the government shares management authority and power with diverse private groups. She is author or coauthor of numerous articles and books, including *Forest and Range Policy: Its Development in the United States* (with Samuel Trask Dana); *State Trust Lands: Their History, Management and Use* (with Jon A. Souder); *Conservation Trusts* (with Darla Guenzler); and *Buying Nature* (with Lauren Gwin, Mary Ann King,

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Robert L. Fischman is a professor at both the Maurer School of Law and the school of public and environmental affairs at Indiana University–Bloomington. Before joining the Indiana faculty in 1992, he taught at the University of Wyoming College of Law and served as Natural Resources Program Director and Staff Attorney at the Environmental Law Institute in Washington, D.C. He has taught in the environmental law programs at both Vermont Law School and Lewis and Clark School of Law. Professor Fischman has also been a senior research scholar at Yale Law School. He has written on public land management, endangered species recovery, environmental impact analysis, and global climate change. Fischman's books include *The National Wildlife Refuges: Coordinating a Conservation System through Law* (2003) and *Federal Public Land and Resources Law* (2007). Professor Fischman received his JD and MS from the University of Michigan in 1987 and his AB from Princeton in 1984.

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Rights and Collective Governance, was published by Thomson/West in 2007, and he is coauthor (with Dale D. Goble) of *Wildlife Law: Cases and Materials* (Foundation Press, 2nd ed. 2009) and *Wildlife Law: A Primer* (Island Press, 2009).

David H. Getches is Dean of the University of Colorado School of Law. In his more than three decades at Colorado Law, teaching before becoming Dean in 2003, Getches has become a national authority on natural resources and American Indian law issues. Prior to joining the faculty in 1979, he was the founding Executive Director of the Native American Rights Fund and spent several years in private practice. Professor Getches has had a prolific academic career. He has written casebooks, as well as books intended for a more general audience, and has published numerous articles and book chapters, including some written in Spanish and French. He served as the Executive Director of the Colorado Department of Natural Resources from 1983 to 1987, and was special consultant to the Secretary of the Interior in 1996. His current research focuses on the U.S. Supreme Court's Indian law decision-making, changing patterns of governance in water law, the law of the Colorado River, and indigenous water rights issues in Latin America.

Lisa Heinzerling is Professor of Law at the Georgetown University Law Center. She received an AB from Princeton University and a JD from the University of Chicago Law School, where she was editor-in-chief of the Law Review. She clerked for Judge Richard A. Posner on the United States Court of Appeals for the Seventh Circuit and for Justice William J. Brennan, Jr. on the United States Supreme Court. She served as an assistant attorney general in Massachusetts, specializing in environmental law. She has been a visiting professor at the Yale and Harvard law schools. She is the author, with Frank Ackerman, of *Priceless: On Knowing the Price of Everything and the Value of Nothing* (The New Press, 2004). She is currently on a leave of absence from Georgetown, serving as Senior Climate Policy Counsel to EPA Administrator Lisa P. Jackson.

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Robert B. Keiter is the Wallace Stegner Distinguished Professor of Law and Director of the Wallace Stegner Center for Land, Resources, and the Environment at the University of Utah S. J. Quinney College of Law. He holds a JD degree with honors from Northwestern University and a BA with honors from Washington University. He has taught at the University of Wyoming, Boston College, and Southwestern University, and served as a Senior Fulbright Scholar at Tribhuvan University in Kathmandu, Nepal. Professor Keiter teaches natural resources law, constitutional law, administrative law, and federal courts. His books include *Keeping Faith with Nature: Ecosystems, Democracy, and America's Public Lands* (2003); *Reclaiming the Native Home of Hope: Community, Ecology, and the West* (1998); *Visions of the Grand Staircase-Escalante: Examining Utah's Newest National Monument* (1998); and *The Greater Yellowstone Ecosystem: Redefining America's Wilderness Heritage* (1991). He has also written numerous book chapters and journal articles on the public lands and natural resource law, many addressing ecological management topics. Professor Keiter's board service includes the National Parks Conservation Association, Sonoran Institute, Greater Yellowstone Coalition, Rocky Mountain Mineral

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Alexandra B. Klass is an Associate Professor of Law at the University of Minnesota Law School. She teaches and writes in the areas of natural resources law, environmental law, tort law, and property law. Her scholarly work includes publications in *William and Mary Law Review*, *Minnesota Law Review*, *Iowa Law Review*, *University of Colorado Law Review*, *Notre Dame Law Review*, *Wake Forest Law Review*, and *Ecology Law Quarterly*. Her recent scholarship includes a focus on the continuing role of state common law in today's federal regulatory state and an analysis of property rights and tort liability associated with the use of carbon capture and sequestration technology as a means to combat climate change. Prior to her teaching career, Professor Klass was a Partner at Dorsey and Whitney LLP in Minneapolis, where she specialized in litigating environmental law, natural resources law, and land use cases. She continues to represent clients *pro bono* in cases involving environmental law and land use matters. Professor Klass received her BA degree from the University of Michigan in 1988, and her JD from the University of Wisconsin Law School in 1992, where she was an articles editor for the *Wisconsin Law Review* and a member of the Order of the Coif. She clerked for the Honorable Barbara B. Crabb, Chief Judge of the U.S. District Court for the Western District of Wisconsin from 1992 to 1993. Professor Klass is a Member Scholar at the Center for Progressive Reform, <http://www.progressivereform.org/>.

Sarah Krakoff, of the University of Colorado Law School, is the co-author of *American Indian Law: Cases and Commentary* (2008) (with Bob Anderson, Bethany Berger, and Phil Frickey) and is widely published in the areas of American Indian law and natural resources law. Her article examining the effects of federal law on the Navajo Nation's exercise of sovereignty, "A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation" (*Oregon Law Review*) received the Jules Millstein Faculty Writing Award at the University of Colorado Law School in 2006. Professor Krakoff has also written

about environmental ethics, public lands, and global warming. When Professor Krakoff first came to the Law School, she was the Director of the American Indian Law Clinic, supervising students in a range of federal Indian and tribal law matters. She succeeded in securing permanent University funding for the Clinic before moving to nonclinical teaching in 1999. Before coming to Colorado, Professor Krakoff was awarded an Equal Justice Works Fellowship to work on the Navajo Nation as Director of the Youth Law Project for DNA-People's Legal Services. Professor Krakoff clerked on the Ninth Circuit Court of Appeals for Judge Warren J. Ferguson from 1992 to 1993. She received her JD from Boalt Hall, University of California–Berkeley in 1991 and her BA from Yale University in 1986.

John D. Leshy is the Harry D. Sunderland Distinguished Professor of Real Property Law at the University of California, Hastings College of the Law in San Francisco, where he teaches property, constitutional law, various natural resources courses, and American Indian law. Previously he was Solicitor (General Counsel) of the Department of the Interior throughout the Clinton administration, special counsel to the Chair of the House Natural Resources Committee, a law professor at Arizona State University, Associate Solicitor of the Department of the Interior for Energy and Resources in the Carter administration, with the Natural Resources Defense Council (NRDC) in California, and a litigator in the Civil Rights Division of the Department of Justice in Washington, D.C. He chaired and co-chaired, respectively, the Interior Department transition team for the Clinton-Gore and Obama-Biden administrations. Leshy has published widely on public lands, water, and other natural resources issues, and on constitutional and comparative law, including books on the Mining Law of 1872 and the Arizona Constitution. He is coauthor of *Federal Public Land and Resources Law* (2007), currently in its sixth edition, and of *Legal Control of Water Resources* (2006), now in its fourth edition. He has litigated cases in state and federal courts, served on numerous commissions and boards, and since 2002 has been President and then Vice-Chair of the board of the Wyss Foundation, which supports land conservation in the intermountain West. He is currently on the Board of the Grand Canyon Trust and the Natural Heritage Institute,

and has thrice been a visiting professor at Harvard Law School, from which he graduated in 1969 after earning an AB at Harvard College in 1966.

James R. May is a Professor of Law and Adjunct Professor of Graduate Engineering at the Widener University School of Law. Professor May teaches and publishes in constitutional, environmental, natural resources, hazardous substances, administrative, civil procedure, international environmental, environmental justice, hazardous wastes and substances, and engineering law. He directed the law school's Environmental and Natural Resources Law Clinic from 1992 to 2004. Professor May is also the founder and codirector of the law school's Master's of Marine Policy program, a joint program with the University of Delaware. Prior to law, he served as a Q clearance engineer on national defense projects. Professor May is the founder, past Executive Director, and President of the Mid-Atlantic Environmental Law Center, and cofounder and past codirector of the Eastern Environmental Law Center. Professor May was the founding chair of the ABA Section of Environment, Energy, and Resources Task Force on Constitutional Law, and was the Chair of the section's 38th Annual Conference on Environmental Law in March 2009. He has served as the Director of the Widener Institute at the MacQuarie University Environmental Law Centre in Sydney, Australia; Visiting Associate Director of the Institute for Public Representation and Visiting Professor at Georgetown University Law Center; summer faculty at Vermont Law School; and Visiting Fellow at the Environmental Law Institute. He has taught International Environmental Law in Sydney (four times) and Nairobi, Kenya. He earned his BS in Mechanical Engineering and his JD from the University of Kansas and his LLM from Pace University School of Law, where he was the Feldshuh Environmental Fellow.

James Rasband is Hugh W. Colton Professor of Law at Brigham Young University. Rasband teaches courses in public lands and natural resources law, water law, torts, and international environmental law. Prior to entering law teaching, he served as a law clerk to Judge J. Clifford Wallace of the U.S. Court of Appeals for the Ninth Circuit

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Leigh Raymond is an Associate Professor of Political Science at Purdue University and is Associate Director of the Purdue Climate Change Research Center. Raymond's research and teaching focuses on the role of normative ideas in environmental policy, including work on market-based policies and endangered species protection on private lands. He is the author of *Private Rights in Public Resources* (RFF Press, 2003) and coauthor of *Buying Nature* (MIT Press, 2005). He has also published scholarly articles in a wide range of disciplinary journals including *Polity*, *Natural Resources Journal*, *Society and Natural Resources*, and *Science*.

William H. Rodgers, Jr. began teaching at the University of Washington School of Law in 1967, then spent seven years at Georgetown University Law School. In 1979, he returned to the University of Washington where he continues to teach today. Professor Rodgers specializes in natural resource law and is recognized as a founder of environmental law. He teaches environmental law and oceans and coastal law. Professor Rodgers is actively involved in the Berman Environmental Law Clinic. He has produced the first volume of his two-volume treatise entitled *Environmental Law in Indian Country* (Thomson West, 2005) and coauthored the recently published *The Si'lailo Way: Salmon, Indians and Law on the Columbia River* (Carolina Academic Press, 2006). He has been actively involved in the Exxon Valdez "reopener," including publishing "The Exxon Valdez Reopener: Natural Resource Damage Settlements, and Roads Not Taken" in the *Alaska Law Review*. The topics of his seminars have included Puget Sound, the

Duwamish River, Hanford, sacred Native American sites, and forest practices. Professor Rodgers was selected as the UW recipient of the Bloedel Professorship of Law from 1987 to 1992. In 1999, he was selected as the first University of Washington Stimson Bullitt Professor of Environmental Law and is serving his second five-year appointment.

J. B. Ruhl is the Matthews and Hawkins Professor of Property at Florida State University College of Law, where he teaches courses on environmental law, land use, and property. Professor Ruhl is a nationally regarded expert in the fields of endangered species protection, regulation of wetlands, ecosystem management, environmental impact analysis, and related environmental and natural resources fields. His extensive publications in these fields include recent articles in the *Stanford Law Review*, *Georgetown Law Review*, *Minnesota Law Review*, *Washington University Law Review*, and *Ecology Law Quarterly*. He is also coauthor of the recently published casebook, *The Law of Biodiversity and Ecosystem Management* (Foundation Press, 2nd ed. 2006), which is the first casebook to organize environmental law under these emerging themes, and *The Law and Policy of Ecosystem Services* (Island Press 2007), the first book-length treatment exploring the integration of ecosystem services into law and policy. Prior to entering full-time law teaching, Professor Ruhl was a partner in the law firm of Fulbright and Jaworski, LLP, practicing environmental and natural resources law in the firm's Austin, Texas office. He has also been a visiting professor at Harvard Law School and George Washington University Law School. Professor Ruhl received his BA (1979) and JD (1982) degrees from the University of Virginia, his LLM (1986) in environmental law from George Washington University, and his PhD (2006) in Geography from Southern Illinois University.

Mark Squillace is the Director of the Natural Resources Law Center and Professor at the University of Colorado Law School, teaching environmental law, water law, and advanced natural resources law. Before coming to Colorado, Professor Squillace taught at the University of Toledo College of Law where he was the Charles Fornoff Professor of Law and Values, and at the University of Wyoming College of Law where he served a three-year term as the Winston S. Howard

Professor of Law. In 2000, Professor Squillace took a leave from law teaching to serve as Special Assistant to the Solicitor at the U.S. Department of the Interior. In that capacity he worked directly with the Secretary of the Interior, Bruce Babbitt, on a variety of legal and policy issues. Professor Squillace also was former Director of Litigation for the Environmental Policy Institute in Washington, D.C., and for three years was Attorney Advisor for the Office of the Solicitor, U.S. Department of the Interior. He is a former Fulbright scholar and the author or coauthor of numerous articles and books on natural resources and environmental law including (with J. Rasband and J. Salzman), *Natural Resources Law and Policy* (2nd ed. 2008).

A. *Dan Tarlock* is a Distinguished Professor of Law at the Chicago-Kent College of Law and an Honorary Professor of Law at the UNESCO Centre for Water Law, Policy, and Science at the University of Dundee, Scotland. His teaching and research interests include land use controls, natural resources, international environmental law, and water law. He holds an AB and LLB from Stanford University and has previously been a permanent member of the faculties of the University of Kentucky and Indiana University, Bloomington. He has also visited at several law schools including the universities of Chicago, Pennsylvania, Hawaii, Kansas, Michigan, and Utah. He is the author of numerous articles and books on environmental law, land use controls and water law including *Environmental Protection: Law and Policy* (Aspen Publishing, 3rd ed. 2007) with W. Buzbee, R. Glicksman, D. Markell, and D. R. Mandelker; *Water Resources Management* (6th ed. 2009) with J. Corbridge, D. Getches, and R. Benson; and *Law of Water Rights and Resources* (1988 with annual updates). Professor Tarlock is a National Associate of the National Academies of Science and Engineering and has served on several National Research Council/National Academy of Sciences committees studying the protection and recovery of stressed aquatic ecosystems, including a ten-year review of the operation of the Glen Canyon Dam on the Colorado River and a study of the restoration of the Missouri River ecosystem, published as *The Missouri River Ecosystem: Exploring the Prospects for Recovery* (2002). From 2001 to 2004 he was a member of an NRC/NAS committee to assess the future of the U.S. Army

Corps of Engineers and contributor to the synthesis report, *U.S. Army Corps of Engineers Water Resources Planning: A New Opportunity for Service* (2004). In 1998, he was the chief writer for the Western Water Policy Review Advisory Commission report, *Water in the West*, which was one of the first major federal publications to examine the relationship between urban growth and water use. He is a special legal advisor to the Submissions Unit of the Commission on Environmental Cooperation in Montreal, Canada, which administers the NAFTA Environmental Side Agreement. He has lectured on the problems of ecosystem, natural resources, and river basin management in Austria, Australia, Brazil, Canada, China, Germany, Israel, Italy, Kazakhstan, Kyrgyzstan, the Netherlands, and Scotland as well as throughout the United States.