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Preface

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PREFACE

CHARLES F. WILKINSON*

Traditionally, scholarship in natural resources law focused mainly on questions, often narrow ones, of private law. This perspective mirrored the dominant concerns of the statutes and the court opinions, most of which dealt with private rights to develop natural resources. Principal concerns involved how best to resolve disputes between private parties, often neighbors, over water diversion, mining, or other forms of resource development that caused interference with private property rights. In addition, the literature dealt extensively with questions of how, and on what terms, private parties could obtain rights to public property—land, minerals, timber, forage, and water.

Natural resources law began to take on a more public cast after World War II. Congress enacted new waves of legislation during the 1960s, with the Multiple-Use, Sustained-Yield Act, the Wilderness Act, and the Wild and Scenic Rivers Act, and during the 1970s when, for the first time, the nation adopted comprehensive environmental and pollution laws. This legal reformation was accelerated by the work of the Warren Court, which opened the doors of the courthouses to a much broader range of public issues.

The scholarship gradually began to give increased attention to public law and to theoretical issues. The trend perhaps became most evident through the work of Joseph Sax, one of the contributors to this issue. In 1970, Sax published *The Public Trust Doctrine in Natural Resources Law*,¹ a seminal² piece that gives in-depth treatment both to broad economic and societal concerns and to institutional issues in-

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1. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

2. Sax's article on the public trust is so preeminent that it has become almost obligatory to refer to

volving the legislative and judicial branches. He also has completed trailblazing work in the areas of takings law³ and economic analysis of reclamation subsidies.⁴

This issue of the *University of Colorado Law Review* is devoted to natural resources theory. The articles are written by several of the leading scholars in the field. The pieces are diverse, representing many of the varying kinds of theoretical approaches that have been brought to bear on natural resources law.

The use of economic analysis has been one of the main currents in natural resources and environmental law. The article by noted economist Charles Howe, joined by co-authors Carolyn Boggs and Peter Butler, creates a framework for evaluating water transfers by examining the motivations and market forces behind transfers and the benefits gained and losses suffered by the transferors.⁵ Economic analysis is also evident in the work of other authors in the issue. In an expansive piece, Joseph Tomain surveys the development of energy policy in highly conceptual terms and argues that United States energy policy is driven by an underlying faith in the market. Because of this, Tomain concludes that "no comprehensive national energy policy of any detail is likely to develop despite executive, legislative, or administrative desires to do so."⁶

The article by George Cameron Coggins, who has just completed a major treatise on public land law,⁷ explores planning by the major federal land agencies.⁸ In addition to surveying the processes of the agencies in federal land planning, which have become such a major part of public land law during the last fifteen years, Coggins evaluates the impact of planning in the past and looks toward the role of planning in the making of public land policy in the future. Although he sees numerous weaknesses in planning theory and its implementation, Coggins seems to believe in planning. He makes a strong case that planning should "reduce the impact of transient political preference

it as "seminal." One may expect future editors of some Blue Book or White Book to develop yet another citation signal, perhaps *see seminally*.

3. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

4. Sax, *Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy*, 64 MICH. L. REV. 13 (1965).

5. Howe, Boggs & Butler, *Transaction Costs as Determinants of Water Transfers*, 61 U. COLO. L. REV. 393 (1990).

6. Tomain, *The Dominant Model of United States Energy Policy*, 61 U. COLO. L. REV. 355, 391 (1990).

7. G. COGGINS, *PUBLIC NATURAL RESOURCES LAW* (1990).

8. Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. 307 (1990).

on federal land management—although it will never be eliminated altogether” and eventually “improve environmental quality on the federal lands.”⁹

The Tomain and Coggins pieces make good reading in juxtaposition. The free market and federal planning both loom large in natural resources law today. Tomain is generally friendly toward the market, while Coggins generally favors planning. Although the contexts for the two articles are in some ways dissimilar—the market and planning plainly raise very different issues when applied to energy policy, on the one hand, or to public lands management, on the other—these two authors’ theoretical constructs and predispositions make for nice comparisons.

Joseph Sax’s article, which is sure to receive wide attention, brings his deep background on takings law to bear on the question of western water rights.¹⁰ Sax’s thesis is that the Constitution is not likely to be a barrier to the growing reform movement in the western states toward goals such as water conservation, reduction of water pollution, and protection of instream flows. Sax goes further, arguing that the nature of water rights is such that they actually have less constitutional protection than other property rights because they are restricted from the beginning by limits deriving from the doctrine of beneficial use, by laws protecting the commons, and by restrictions in water rights permits that make water use subject to subsequent adjustment.

The issue also deals with broad and compelling themes of environmental ethics. Holmes Rolston, the author of the acclaimed book, *Environmental Ethics*,¹¹ views the question of property rights and nature through the ethicist’s eyes. Looking at the takings question, Rolston finds that the notion of property ownership must be limited by respect for other species and concludes that property owners are best understood as trustees, especially in the context of the Endangered Species Act.¹²

Eric Freyfogle, who has already made a number of important contributions to the jurisprudence of natural resources, digs deep into the fertile soil of the life and thinking of Aldo Leopold.¹³ Freyfogle believes that Leopold is right in his insistence on good science and the need to respect abstract values, such as beauty. But Freyfogle teaches

9. *Id.* at 351.

10. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257 (1990).

11. H. ROLSTON, *ENVIRONMENTAL ETHICS* (1988).

12. Rolston, *Property Rights and Endangered Species*, 61 U. COLO. L. REV. 283 (1990).

13. Freyfogle, *The Land Ethic and Pilgrim Leopold*, 61 U. COLO. L. REV. 217 (1990).

us that we must listen to Leopold for still additional reasons. Leopold's language is different, and carries with it a tone and tenor that the law lacks and needs: "Leopold and his land ethic so grab the reader because they speak to us in ways that lawmakers and laws typically do not."¹⁴ Further, Leopold's life was a life extraordinarily well lived, "a type of pilgrim's progress" that adds profound dignity to Leopold's substantive messages: "Leopold's example stretches far beyond his land ethic, for he captured a vision of right living and, in his life and his writing, showed us how to share it."¹⁵

Natural resources law has steadily become broader and more diversified over the past many years. One aspect of this is the enriching influence of legal theory. This issue ought to contribute to the mix through its presentation of informed, diverse, and provocative thinking.

14. *Id.* at 220.

15. *Id.*