SYMPOSIUM ON TRANSBORDARY PROBLEMS IN NATURAL RESOURCES LAW

GRIZZLY BEARS DON’T STOP AT CUSTOMS: A PREFACE TO TRANSBORDARY PROBLEMS IN NATURAL RESOURCES LAW

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The articles in this Symposium are adapted from papers presented to the Institute for Natural Resources Law Teachers in Boulder, Colorado during May 25-27, 1983. The Institute was the second of its kind sponsored by the Rocky Mountain Mineral Law Foundation. 1 The earlier Institute also resulted in a Symposium on Environmental and Natural Resources Law, published in the University of Colorado Law Review. 2 Tracing the recent evolution of natural resources law, Professor David Getches, in his Preface to that Symposium, 3 described the burgeoning lawyer’s activities in natural resources regulation, the growth of nonprofit public interest organizations active in the area, the changes in law school natural resources curricula and teaching materials, and the rapidly increasing scholarly attention now paid to the subject. His contribution is a tough act to follow. This modest Preface offers some general comments on the scope of natural resources law and the study of transboundary problems. The concluding paragraphs of the Preface summarize the Symposium contributions.

The planning committee for the second Institute chose Transboundary Problems in Natural Resources Law as a main theme because of its interest, difficulty, and pervasiveness. Although at least an intensive semester’s study would be needed to grasp its inherent permutations and penumbra, the topic deserves treatment as an entity. This Symposium features articles on several major subjects within the general heading of Transboundary Problems: interjurisdictional management of anadromous fish; 4 constitutional limits on state resource regula-

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1 The recently-formed Eastern Mineral Law Foundation also provided support.

2 The published contributions were Rodgers, Building Theories of Judicial Review in Natural Resources Law, 53 U. Colo. L. Rev. 213 (1982); Coggins, Of Suscolash Syndromes and Vague Platitude: The Meaning of “Multiple Use, Sustained Yield” for Public Land Management, id. at 229; Williams, Severance Taxes and Federalism: The Role of the Supreme Court in Preserving a National Common Market for Energy Supplies, id. at 281; Tarlock, Western Coal in Context, id. at 315.


tion; federalism in energy development; international friction over acid rain; and interstate air pollution litigation. The authors all are acknowledged masters of their subject matters.

Natural resources law as a separate entity is a fairly recent phenomenon in America. Europeans often argue that the material success of the United States is due less to its economic system or the ingenuity of its people than to the wealth of natural resources the country embraces. Whatever the merits of their argument, it must be conceded that our ancestors settled a land of unparalleled natural riches. No other nation on earth can boast of the abundance and diversity of American cropland, timber, rivers, minerals, wildlife, grassland, and scenic vistas. But that very profusion of exploitable wealth probably retarded and delayed the development of legal rules for allocating and conserving domestic natural resources. For more than a century after Independence, the crude, limited federal and state legal systems were concerned more with granting and defining private property rights in resources than with long-term conservation for public benefit. Resource developers were free to do as they chose, legally bound only by property notions governing disputes between rival developers. The natural result was incredible waste and unnecessary resource depletion.

Legal control of resource exploitation becomes more significant in times of scarcity. When the government intervenes to control the rate, method, and availability of resource exploitation, the legal process then becomes the focal point in resource allocation. Slowly, over the course of this century, American natural resources law has shifted emphasis from private to public controversies. Often the important question is not, “Who is entitled to benefits of resource development?” but rather, “Under what conditions will the government permit development of this resource (if at all)?”

In any event, natural resources law has long been a neglected stepchild in the law school curriculum. Until recently, it was a series of narrow specialties, notably water law, mining law, and oil and gas law. Law schools, like Congress, courts, management agencies, and resource developers, seldom took seriously val-

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8 Kramer, *Transboundary Air Pollution and the Clean Air Act: An Historical Perspective*, infra at p. 181.
9 This view is at least a century and a half old. See A. DeToqueville, *I DEMOCRACY IN AMERICA* 294-303 (1832, H. Reeve rev. ed. 1900).
10 Until the end of the 19th century, United States policy was aimed almost exclusively at allowing private individuals, corporations, and states to appropriate the public domain and its various resources. Congress altered its resource disposition aims only by reserving lands as national parks and forests. See generally G. Coggins & C. Wilkinson, *FEDERAL PUBLIC LAND AND RESOURCES LAW* ch. 2 (1981). States often structured their legal rules to accord with the rough practices at the time. Thus much of natural resources law (e.g., the prior appropriation doctrine, the essence of mining law, the rule of capture) was little more than an unsophisticated “first come” regime. In other cases, state law aimed more at keeping the peace between resource claimants. See, e.g., Omaechevarria v. Idaho, 246 U.S. 343 (1918).
11 For instance, “timber law” was nonexistent in most of the 19th century; the federal government was interested only in divesting itself of the vast virgin stands, and the states refused to restrict the timber harvest. The ensuing waste and depletion of timber resources led Congress in 1891 to authorize reservation of some federal tracts to protect future supply before all timber disappeared. See, e.g., P. Gates, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 531-66 (1968); Huffman, *A History of Forest Policy in the United States*, 8 ENVT. L. 239, 244-61 (1978).
ues other than those readily measurable in dollars. Instead of leading and shaping the growth of natural resources law, law schools usually just added a course or two when it was evident that new developments could no longer be ignored.

The elements that contribute to the development of a body of law largely were created elsewhere. One main source was a dramatic change in public attitudes. In the continuous conflicts between exploitation of resources and protection of natural amenities, vocal segments of the public more often came down on the side of protection. More and more people argued that the "noneconomic" resources such as wildlife, watershed protection, air and water quality, recreational opportunities, and wilderness values should be given more real weight in legal balancing. That change in attitude and perception has been given concrete form by the public interest organizations that regularly lobby and litigate questions of resource allocation. Events have also focused legal attention on international resource interdependence: the need for reform has been brought home in stark fashion by the decade-long escalation of oil, gas, and electricity prices.

Responding to heightened popular concern, Congress has enacted volumes of natural resources legislation since the 1950s, most of which has been fleshed out by even more extensive regulations. The new statutes and regulations inevitably engender new controversies, ultimately resolved by courts; those judicial decisions in turn sometimes lead to statutory revisions. All of these and other developments ensure that natural resources law in the United States will be challenging and difficult, but not dull. Natural resources law has grown and evolved considerably in just two decades; as a body of law, however, it has not achieved maturity, coherence, balance, or integration.

The proliferation of statutes and interpretations has highlighted two major problems with the organization of natural resources law as now conceived: it lacks boundaries in theory, and its boundaries in practice are too narrow. In theory, natural resources law amounts to reams of law in search of definition. No one to my knowledge has ever satisfactorily defined the subject matter of natural resources law or, more importantly, its limits. The mainstream of interpretation apparently assumes an eye-of-the-beholder theory: "natural resources law is whatever I say it is." At various times in various places, virtually everything under the sun (except most first year law courses) has been included: air pollu-

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13 Technically, all resources have economic value and can be measured in money, but the distinction from popular usage is still helpful.

14 LEXIS lists eight lawsuits decided by the Supreme Court alone since 1970 in which the Sierra Club was a plaintiff.

15 Just a list of the pollution, energy, wildlife, land management, environmental, water resources, and similar statutes enacted over the past several decades would fill a fair-sized volume.


17 This is a variant of the Lewis Carroll/Lewis Powell theory of statutory interpretation as described by Chief Justice Burger. See TVA v. Hill, 437 U.S. 153, 173 n.18 (1978).

18 With the advent of increasing solar power devices, the sun's light must also be included. See Prah v. Maretti, 108 Wis. 2d 223, 321 N.W.2d 182 (1982).
tion regulation, constitutional theory, water allocation, water pollution regulation, coastal zone management, some international law, water resource development, hardrock minerals, public mineral leasing, ocean law, toxics regulation, hazardous waste disposal, wildlife protection, timber sales, oil and gas law, solid waste disposal, resource taxation, recreational development, wilderness designation, river preservation, Taylor Act permitting, power plant siting, and atomic energy law do not exhaust the catalogue. And that is only the substantive side; procedure, especially the National Environmental Policy Act procedure, has been central to recent natural resources law development.

In practice, some law schools still look upon natural resources law as a group of narrow specialities independent of any overall context, compartmentalizing the law into neat little boxes labeled “Wyoming water law,” or “Texas oil and gas law” or whatever. Some members of the bar still cling to these little boxes, and some judges still mistake historic viewpoints for contemporary law. Most lawyers and jurists, however, now acknowledge that simple property concepts no longer alone suffice to resolve large resource development problems.

Law teachers and law teaching materials are gradually recognizing the inevitability of interrelatedness and the need to expand traditional course boxes, but the legal curriculum and much legal thinking have yet to catch up with the real world. The natural resources law teaching profession in coming years is faced with defining its subject matter, and the result should be alteration of our categories to better reflect real world problems. Coping with transboundary problems will be a chief difficulty in any revised curriculum.

Except for exotic, unknown seminars, no law school offers a course on Transboundary Problems in Natural Resources Law. This lack is curious, at least in retrospect, because the topic cuts across the entire law school curriculum, and it has been a prominent focal point in legal development. Before summarizing some of the litigation and legal commentary inspired by the subject, transboundary problems should be defined and placed in context.

Americans (and, one supposes, most people) are obsessed by boundaries. As a private matter, we erect fences for reasons other than privacy or retention of

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19 Law school curricula and courses are either in flux or in chaos. For example, casebooks labeled “Environmental Law” can cover just about anything. Compare the books with that title by T. Schoenbaum (1981); R. Findley & D. Farrer (1980); F. Grad (2d ed. 1978); E. Hanks, A. Tarlock & J. Hanks (1974); and O. Gray (2d ed. 1973).


22 Cf. G. Coggins & C. Wilkinson, supra note 10, at xxi:

But the central place of private rights, private disputes, and private law as components of overall public land law has been partly superseded by overriding public considerations. Whether viewed as a new direction in traditional public land management, or as another instance of counter-productive federal over-regulation, modern federal and land resources law encompasses far more than questions of property rights. The natural resources lawyer now must be conversant with such subjects as zoning, pollution control, land use planning, reclamation requirements, environmental impact statements, public trust duties, competing recreational and preservational values, wildlife protection, pesticide restrictions, and other limitations on economic activity which in the aggregate have come to be as important to public land users as questions of prior appropriation or oil lease interpretation.
livestock, perhaps as a vestige of a primordial territorial imperative.\textsuperscript{23} Politically, we erect intricate and overlapping fences, not always symbolic, that we call boundaries. Political boundaries define our political and legal relationships, even though these are merely lines on a map depicting cities, townships, counties, states, and nations. It matters little that the lines are usually artificial; we act as though they are real. In many areas of human endeavor regulated by law, boundaries make little difference because the subject is as artificial or intangible as the map depiction. Thus, the artificial person of the corporation and the intangible property of its shares might as well be created and regulated by the political entity called Delaware.\textsuperscript{24}

But natural resources are tangible and—by themselves or with human assistance—migratory. Air, water, fugacious minerals, and wildlife move around as gravity, currents, pressure, or spirit moves them; grizzly bears don’t stop at customs. Commerce in otherwise stationary resources such as timber and minerals adds a similar problematic dimension. Resource movement generates conflicts that our international and domestic legal systems sometimes seem ill-equipped to resolve. Except in rare instances, resource decisions in one jurisdiction inevitably affect people or things in other jurisdictions. Ohio’s air pollution regulation determines in part the quality of air breathed by Pennsylvania’s citizens. Alaska’s regulation of migratory birds determines the health of bird populations in points south. The mining of the Ogallala aquifer by Kansas farmers will ultimately be felt in Nebraska and Oklahoma. Louisiana resource taxation affects natural gas prices in Massachusetts.\textsuperscript{25}

The contending jurisdictions may occupy the same physical space: thus, the Interior Department decision to sell coal leases in New Mexico in the face of New Mexico’s opposition\textsuperscript{26} creates “federalistic” transboundary problems. Regulation of national interstate resources such as Lake Tahoe or the Colorado River by interstate compact will redound to the benefit or detriment of all United States citizens and to some foreign nationals. Nationalization of energy companies in Canada has strong transboundary implications for the United States. The biological or geophysical nature of all these instances, and many more, demand interjurisdictional or superjurisdictional regulations for effective conservation. But this is precisely where obsession with artificial boundaries detracts from the effectiveness of legal systems as currently constituted.

A major impetus for the United States Constitution was a contemporary crisis of commerce; the Framers saw the need to remove regulation of interstate commerce from state parochialism in order to weld a true nation.\textsuperscript{27} A somewhat similar parochialism still infects much thinking about natural resources allocation. In spite of the widely conceded need for broader approaches, personal, state

\textsuperscript{23} He is all pine and I am apple orchard.
My apple trees will never get across
And eat the cones under his pines, I tell him.
He only says, “Good fences make good neighbors.”


\textsuperscript{24} It is nonetheless curious that the notion of national registration of corporations doing interstate business has not received more political attention.


\textsuperscript{26} \textit{E.g.}, [13 Current Development] \textit{Env't Rep.} (BNA) 72, 107, 169 (1983).

\textsuperscript{27} See Justice Steven’s concurrence in EEOC v. Wyoming, 103 S. Ct. 1054, 1065 (1983).
and national self-interest continue to obstruct creation of rational mechanisms to resolve or avoid transboundary disputes. One form of this parochialism is our incessant jurisdictional controversy.

For instance, all concerned recognize the need for conservation of anadromous fish, an important but declining interstate/international resource. Yet the states dispute with each other and with Indian tribes; the federal government disputes with the states and negotiates with other nations; and all interest groups dispute with each other. Cooperation, consultation, and coordination, the three main guiding themes of recent environmental and resource legislation, are given great lip service and little effect. It should be self-evident that these interstate resource disputes cannot be solved by one-dimensional efforts.

Transboundary problems in natural resources law fall into five categories. First, Commerce Clause solutions are usually sought when the action of one state drastically affects people elsewhere, and the federal legislature has not acted. Second, when the Congress has legislated on the subject, the problem is called one of preemption under the Supremacy Clause. Third is competitive regionalism, in which resource allocation controversies align sections of the country against other sections. Fourth, when the resource or its exploitation transcends national boundaries, it is deemed a matter of international law (which, in our conventional domestic terms, is hardly law at all). Last, when the boundary is on an Indian reservation, the hybrid, voluminous, perplexing Indian jurisdiction statutes and cases are relevant. Natural resources law encompasses a wide list of resources and regulatory areas; transboundary problems in natural resources law thus cover much of the known world.

In sum, transboundary problems arise whenever a resource decision in one jurisdiction physically or practically affects someone or something in another jurisdiction. As a subject for legal study, it has few real limits. Perhaps that lack of definition has contributed to the recent public prominence of transboundary problems in natural resources law. Whatever the reason, that prominence has generated much litigation and vast commentary.

Supreme Court decisions over the past five years provide a good indication of the importance of transboundary problems in natural resources law. Occasionally the Court chooses to answer a question of natural resources law that does not implicate interjurisdictional conflict, such as the skewed mining law interpretation in Andrus v. Shell Oil Company. More often, however, the Court confronts jurisdictional disputes of the federal versus state variety. In virtually every recent case in which states claimed that federal resource legislation impermissibly intruded into state sovereignty, the Court has upheld the federal initiative, usually as a valid exercise of the commerce power. Virginia and Indiana lost their bids to overturn the land use restrictions imposed by the federal strip mining law, and Mississippi failed to convince the Court that Congress went too far in forcing


the states to use federal procedures to decide federally-dictated questions of energy regulation.\textsuperscript{31} These cases, together with \textit{EEOC v. Wyoming},\textsuperscript{32} all have distinguished \textit{National League of Cities v. Usery},\textsuperscript{33} the 1976 decision invalidating a federal wage statute as an impermissible trespass on state tenth amendment sovereignty. \textit{National League of Cities} must now be seen as an aberration limited to its facts until outright overruling occurs.\textsuperscript{34}

On the other side of the Commerce Clause coin—whether state regulation unduly burdens interstate commerce—recent results in the Supreme Court are mixed. New Jersey cannot embargo Pennsylvania trash,\textsuperscript{35} Oklahoma cannot hoard its natural minnows,\textsuperscript{36} Louisiana cannot tax the “first use” of natural gas brought into the state from offshore for out-of-state shipment,\textsuperscript{37} and Nebraska cannot restrain interstate transportation of its groundwater.\textsuperscript{38} On the other hand, the Court has taken a special liking to Montana law: Montana may discriminate severely against out-of-state hunters in setting license fees (the case, oddly enough, was not tried on a Commerce Clause theory);\textsuperscript{39} and the State may impose a severance tax of up to 30 percent on coal destined primarily for out-of-state markets.\textsuperscript{40} The Court has also held that the Contract Clause does not bar Kansas regulation of natural gas pricing.\textsuperscript{41}

Federal preemption of state law under the Supremacy Clause raises a similar question: was the federal enactment intended to override cognate state legislation? Again, the results are mixed and no common pattern is apparent. In \textit{California v. United States},\textsuperscript{42} the Court ruled that California could condition the appropriation and allocation of water behind a federal reclamation reservoir as it chose, excepting only matters definitely and specifically decreed by Congress.\textsuperscript{43} The Court did not even cite its decision of two years earlier, holding that congressional intent to allow state regulation of a federal facility must be clear beyond peradventure.\textsuperscript{44} Two years later, in 1980, neither case was cited when a unanimous Court summarily affirmed a ruling that the 1920 Mineral Leasing Act preempted local zoning regulation,\textsuperscript{45} even though the federal Act expressly sought conformity with state law in a number of areas,\textsuperscript{46} and the county board had not

\textsuperscript{31} FERC v. Mississippi, 456 U.S. 742 (1982).
\textsuperscript{32} 103 S. Ct. 1054 (1983).
\textsuperscript{33} 426 U.S. 833 (1976).
\textsuperscript{34} \textit{National League of Cities} was a unique 4-4-1 decision; it has been distinguished by the Court in every subsequent case, and Justice Stevens has called for it to be overruled de jure as well as de facto. “I think it so plain that \textit{National League of Cities} not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself, that it is not entitled to the deference that the doctrine of stare \textit{decisis} ordinarily commands for this Court’s precedents...I believe that the law would be well-served by a prompt rejection of \textit{National League of Cities’} modern embodiment of the spirit of the Articles of Confederation.” \textit{EEOC v. Wyoming}, 103 S. Ct. at 1067 (Stevens, J., concurring).
\textsuperscript{36} Hughes v. Oklahoma, 441 U.S. 322 (1979).
\textsuperscript{37} Maryland v. Louisiana, 451 U.S. 725 (1981).
\textsuperscript{40} Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981).
\textsuperscript{42} 438 U.S. 645 (1978).
\textsuperscript{43} \textit{Id.} at 679. On remand, most of California’s conditions were upheld. \textit{See United States v. California}, 509 F. Supp. 867 (E.D. Cal. 1981), aff’d in part, rev’d in part, 694 F.2d 1171 (9th Cir. 1982).
\textsuperscript{44} Hancock v. Train, 436 U.S. 167 (1976).
\textsuperscript{45} Ventura County v. Gulf Oil Co., 601 F.2d 1080 (9th Cir. 1979), aff’d mem., 445 U.S. 947 (1980).
yet applied its ordinance to the situation presented.\textsuperscript{47} In 1983, the Court—again unanimously—upheld a California law with the practical effect of barring all new nuclear power plants from the state,\textsuperscript{48} even though nuclear regulation has always been a primarily federal function.\textsuperscript{49} In two contemporary nuclear regulation cases,\textsuperscript{50} the Court accepted the industry’s arguments, leading the cynic to surmise that The Brethren\textsuperscript{51} contained more than idle gossip.

The Supreme Court has also seen fit to rule on even more basic federal versus state property rights questions. In \textit{United States v. New Mexico},\textsuperscript{52} a bitterly divided Court narrowly circumscribed federal implied reserved water rights in favor of state allocation. Justice Rehnquist, for a 5-4 majority, opined that the 1897 Congress could not have meant what it said because the statutory language did not square with his perception of proper contemporary congressional thinking.\textsuperscript{53} Justice Powell’s dissent argued that a forest is more than trees and that the majority decision slandered Congress.\textsuperscript{54} In land ownership matters, however, the Court has been far less deferential to states: in \textit{Andrus v. Utah},\textsuperscript{55} and \textit{Andrus v. Idaho},\textsuperscript{56} the Court refused to uphold state windfalls in “in lieu” land selections;\textsuperscript{57} in \textit{North Dakota v. United States},\textsuperscript{58} the Court held the State to its bargain with the United States concerning creation of federal conservation easements; and in \textit{Block v. North Dakota},\textsuperscript{59} the Court restricted the State’s right to bring a quiet title action against the federal government.\textsuperscript{60}

State versus state disputes over allocation of interstate resources have also received Supreme Court attention. Apportionment of interstate streams is prominent. In \textit{Colorado v. New Mexico},\textsuperscript{61} the Court emphasized water conservation and waste avoidance as critical elements in equitable apportionment. Certainly more original actions requiring apportionment of midwestern rivers will be filed.\textsuperscript{62} The Court apparently is loathe to countenance adjustments in prior decrees.\textsuperscript{63} Idaho has extended the reach of equitable apportionment. Although the State’s original action seeking a decree guaranteeing it an equitable share of

\begin{itemize}
\item \textsuperscript{47} \textit{Ventura County}, 601 F.2d at 1084-85.
\item \textsuperscript{49} See, e.g., Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff’d mem., 405 U.S. 1035 (1972).
\item \textsuperscript{50} See Metropolitan Edison Co. v. People Against Nuclear Energy, 103 S. Ct. 1556 (1983) (terms “environmental effect” or “environmental impact” do not include psychological health damage to nearby residents of nuclear power plant); Baltimore Gas & Elec. Co. v. NRDC, 103 S. Ct. 2246 (1983) (assumption that permanent storage of nuclear wastes would have no significant environmental impact met requirement of consideration of environmental impact in nuclear power plant licensing decision).
\item \textsuperscript{51} B. WOODWARD & S. ARMSTRONG, \textit{THE BRETHREN} (1979).
\item \textsuperscript{52} 438 U.S. 696 (1978).
\item \textsuperscript{53} Id. at 706-13, 707 n.14.
\item \textsuperscript{54} Id. at 719-24 (Powell, J., dissenting).
\item \textsuperscript{55} 446 U.S. 500 (1980).
\item \textsuperscript{56} 443 U.S. 715 (1980).
\item \textsuperscript{57} In \textit{Andrus v. Utah}, the State claimed an absolute right to very valuable mineral land as compensation for lands denied the State at statehood. The Court ruled that state “in lieu” selections were limited by a “not grossly disproportionate value” standard.
\item \textsuperscript{58} 103 S. Ct. 1095 (1983).
\item \textsuperscript{59} 103 S. Ct. 1811 (1983).
\item \textsuperscript{60} Id. at 1823. Whatever the merits of western Sagebrush Rebellion claims, this ruling effectively precludes judicial challenges by the states.
\item \textsuperscript{61} 103 S. Ct. 539 (1982).
\item \textsuperscript{62} See infra note 71 and accompanying text.
\item \textsuperscript{63} See Arizona v. California, 103 S. Ct. 1382 (1983).
\end{itemize}
anadromous fish that pass through Oregon and Washington failed on the merits.\(^{64}\) The Court recognized the right to equitable apportionment in that novel circumstance.\(^{65}\) The possibilities for equitable apportionment of air quality resources would appear boundless\(^{66}\) except for the existence of the presumably preemptive Clean Air Act.\(^{67}\) Three- and four-sided jurisdictional controversies between Indian tribes, non-Indian resource users, states, and the trustee federal government over natural resources regulation have also absorbed a considerable share of the Court's attention.\(^{68}\)

A variety of other transboundary problems are wending their way through lower courts and may eventually come to rest in the Supreme Court. In the east, interstate disputes over air pollution are heating up. Claims by New England states that emissions from midwestern states' power plants are killing their lakes with acid rain are not the only cause of controversy;\(^{69}\) in some cases, states claim that emissions from adjacent western neighbors frustrate their attempts to achieve national ambient air quality standards.\(^{70}\) In the Middle West, a suit by several states—with others watching closely—against South Dakota is the opening shot in what may become a full-blown battle over apportionment of the Missouri River.\(^{71}\) In Utah and Nevada, the initial skirmish over the Sagebrush Rebellion failed,\(^{72}\) and the states are looking at reinstituting litigation, although their ardor has perceptibly cooled.\(^{73}\) In the Northwest, the infamous "WHOOPS" fiasco has generated dozens of lawsuits which may pit state against state and jeopardize the financial stability of the entire region.\(^{74}\) From California, the question whether the Interior Department must give real deference to

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\(^{64}\) Idaho ex rel. Evans v. Oregon, 103 S. Ct. 2817 (1983).

\(^{65}\) The Court adopted the Special Master's recommendation, dismissing the action without prejudice because the evidence did not demonstrate that present overfishing and mismanagement in Washington and Oregon might injure Idaho. Id. at 2824-25. It disagreed, however, with the Special Master's determination that equitable apportionment was unworkable when dealing with anadromous fish. Id. at 2823.

\(^{66}\) Although the thrust of such an action would differ radically from the water cases—water claimants seek a property right to use the resource while air claimants would seek a right to receive the resource in a relatively pure state—the similarities between such claims appear to outweigh the obvious differences.


\(^{70}\) See, e.g., Connecticut Fund for Environment, Inc. v. EPA, 696 F.2d 179 (2d Cir. 1982); Connecticut v. EPA, 696 F.2d 147 (2d Cir. 1982).


the state's coastal zone management plan is now before the Supreme Court.\footnote{75} Indian fishing rights cases are blazing new legal trails that could invoke Supreme Court oversight.\footnote{76}

The attention focused on resource issues by Congress, the courts, and the public has galvanized the legal community into an outpouring of commentary. The quality of scholarship in natural resources law has traditionally been uneven, but the recent increase in quantity has generated an evolution in scope, depth, and quality. Although some commentators reflect the narrow view that their subject is a discrete specialty pigeonhole, many others see that natural resources law should become and is becoming an organic whole. They recognize that the commonality of issues from seemingly disparate areas is more significant than their disparate origins.\footnote{77} The bodies of law governing oil, gas, hard minerals, coal, geothermal resources, timber, wildlife, water, wilderness, fish, and so forth may never be precisely the same. The legal issues arising from disputes over their ownership, regulation, and allocation, however, become more similar as they are better defined. And, of course, all must be resolved in the same legal system.

Legal commentary on transboundary problems in natural resources law especially has exploded in recent years. The footnotes immediately following offer a sampling of recent articles on—or near—transboundary resource problems, but it is only a sampling; I make no pretense of bibliographical exhaustiveness.

Legal scholars are devoting considerable attention to international resource problems. Relations with Mexico over air,\footnote{78} water,\footnote{79} energy,\footnote{80} and other problems\footnote{81} have been the subjects of articles and symposia. Of particular interest are the international allocation of the Colorado River,\footnote{82} the Mexican oil spill

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\footnote{75}{California v. Watt, 683 F.2d 1253 (9th Cir. 1982), cert. granted, 103 S. Ct. 2083 (1982).}
\footnote{77}{Compare, e.g., Sierra Club v. Peterson, 12 ENVTL. L. REP. (ENVT'L L. INST.) 20454 (D.D.C. 1982) (onshore oil and gas lease); with North Slope Borough v. Andrus, 642 F.2d 589 (D.D.C. Cir. 1980) (offshore oil and gas lease); Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1979) (geothermal lease); National Resources Defense Council v. Berkland, 609 F.2d 553 (D.D.C. Cir. 1979) (coal lease).}
\footnote{81}{Symposium on Anticipating Transboundary Resource Needs and Issues in the U.S.-Mexico Border Region to the Year 2000, 22 NAT. RESOURCES J. 729-1174 (1982). People—especially illegal alien migrant workers—are arbitrarily excluded from this list of transboundary problems.}
\footnote{82}{See International Symposium on the Salinity of the Colorado River, 15 NAT. RESOURCES J. 1 (1975); Symposium on U.S.-Mexican Transboundary Resources (pts. 1 & 2), 17 NAT. RESOURCES J. 543 (1977), 18 NAT. RE-}
in the Gulf of Mexico,\textsuperscript{83} and the pricing of imported Mexican oil and gas.\textsuperscript{84} Many of the same problems affect relations with Canada,\textsuperscript{85} particular foci of legal analysis include Canadian nationalization of energy firms,\textsuperscript{86} transboundary acid rain,\textsuperscript{87} the Great Lakes,\textsuperscript{88} and offshore fishery resources.\textsuperscript{89} Authors generally are looking more closely at international natural resources law. The law of the sea,\textsuperscript{90} fisheries management,\textsuperscript{91} marine mammal protection,\textsuperscript{92} and deep see-


bed mining\textsuperscript{93} does not exhaust the catalogue.\textsuperscript{94} The international legal journals are also concentrating more on natural resources law.\textsuperscript{95}

In the state-versus-state arena, current areas of controversy include interstate air pollution,\textsuperscript{96} allocation of interstate waters,\textsuperscript{97} regulation of the anadromous
fish catch, interstate compacts (Lake Tahoe), interstate streams, and waste disposal, among others), resources taxation, and similar interstate resource
disputes.\textsuperscript{103} But competition between states is often subsumed under federalism in the guise of negative Commerce Clause applications.\textsuperscript{104}

Unquestionably, federalism in its many facets has provoked more learned commentary than any other transboundary problem in natural resources law. A part of the impetus for scholarship in this area is the political obsession of some litigants and writers with this complex, ill-defined subject. In some senses, federalism is a policy question: what is the proper relationship and relative distribution of power between federal and state governments? An enormous amount of self-serving nonsense on this question has seen print, some notable mostly for its lack of fundamental principle and emphasis on apparent short-term advantage. The constitutional key to federalism is the Supremacy Clause: under it, all valid federal legislation and actions pursuant to it override contrary state law;\textsuperscript{105} and, independent of federal initiative, the Supremacy Clause also voids state action inconsistent with other constitutional limitations.\textsuperscript{106} Both aspects, together with political philosophies, have been thoroughly aired in the legal journals.\textsuperscript{107}

Indian law, long regarded as a separate arcane specialty, is more often intersecting with general transboundary problems in natural resource law. Courts have found that treaty obligations, which have the dignity of supreme federal


\textsuperscript{105}E.g., Kleppe v. New Mexico, 426 U.S. 529 (1976).

\textsuperscript{106}E.g., McCulloch v. Maryland, 17 U.S. (4 Wheat. 316) 415 (1819).

law,\textsuperscript{108} limit state regulatory and developmental initiatives in a variety of novel ways. Commentators are gradually realizing that reservation boundaries are an important element in defining reciprocal conservation duties among political entities.\textsuperscript{109} The role of the United States as tribal trustee only slowly receives the attention it deserves.\textsuperscript{110}

Transboundary problems in natural resources law have occupied a great deal of judicial and scholarly attention in recent years. The articles in this symposium should contribute to the development of a more rational and coherent body of law.

Charles F. Wilkinson, Professor of Law at the University of Oregon and widely known authority in Indian and Public Land Law, attacks with characteristic vigor the allocation of the anadromous fish resource in the Pacific Northwest. His co-author, Daniel Keith Connor, is a student at the Oregon Law School. In their near-lyrical description of a salmon's life journey through different eras and jurisdictions, Wilkinson and Connor focus on the need for conservation-minded


controls at the various governmental levels if this valuable resource is to be saved from commercial extinction. Their case for interjurisdictional cooperation could not be clearer.

A. Dan Tarlock, Professor of Law at Chicago—Kent School of Law and author of a seemingly limitless number of books and articles on natural resources law, critically examines the Supreme Court's treatment of federalistic natural resources problems. Professor Tarlock carefully distinguishes the interests involved in modern resource controversies, arguing that the Court, by failing to recognize differences in kind and degree, has overstepped its proper role. He concludes that political solutions to federalistic power distribution questions should be preferred to judicial per se rules, and that the Court should "encourage more responsible legislative initiatives that strike a more realistic accommodation of federal and state interests.”

Patrick C. McGinley, Professor of Law at West Virginia University and moving spirit in the Eastern Mineral Law Foundation, contends that the sort of federalistic relationship between federal and state governments that the Framers of the United States Constitution intended is alive and well. Professor McGinley investigates the constitutional constructs in the context of Reagan Administration deregulation proposals. He points out that political life differs greatly from political theory, and that alteration of governmental responsibilities, always a fluid process, may not redound to the benefit of present deregulation advocates.

Alistair Lucas, Executive Director of the Canadian Institute of Resources Law and Professor of Law at the University of Calgary, comments on the acid rain issue as viewed from the Canadian side of the border. Americans should be better aware of the high degree of concern that Canadians exhibit toward this problem and of the poisoning of the political as well as the physical atmosphere between the countries as a result of the inadequate United States response under EPA Administrator Ann Gorsuch Burford. Professor Lucas provides as well intriguing insights into the differing nature of the political and legal systems in Canada, pointing out that "states' (provinces') rights" in Canada can be even more difficult and complex than in the United States.

Bruce M. Kramer, Professor of Law at Texas Tech Law School and frequent commentator on natural resources law problems, offers an interesting historical perspective on transboundary air pollution regulation other than acid rain regulation. His analysis shows that our limited efforts to date have not met with great success; because of perceived shortcomings in state cooperation and federal supervision, new and more stringent legislation is on the horizon. Professor Kramer's discussion of the litigation over transboundary air pollution highlights the complexity of the problem and the difficulty of creating appropriate interstate responses.

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