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The Future of Natural Resources Law

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are a dozen ways of saying no to an agency, no matter what the doctrines are.

If you want to say no to the agency, you'll come up with a way of saying no. Major questions is one of them, and I can give you a whole bunch of others. Any judge who wants to say no to an agency will find a way. It doesn't matter whether they use an unprincipled tool like whether it's a major question, or some other unprincipled tool.

Jody Freeman: But their job is to make that harder to do, isn't it?

Richard Pierce: I'm actually coming back to the argument that I had initially with then-Professor Breyer in 1984. I now confess, he was right, *Skidmore* is great. There's not a thing wrong with *Skidmore*. The only real difference between *Chevron* and *Skidmore* is that *Skidmore* takes into account how long the agency interpretation has been in effect, as you can see in the study by Barnett and Walker.

The most robust finding is that the most important factor in predicting whether an agency interpretation will be upheld is whether it's long-standing or new. If it's long-standing, it's almost certainly going to be upheld. If it's new, it probably won't be. That's *Skidmore*. That doesn't have a thing to do with *Chevron*. It's the opposite of *Chevron*.

Jody Freeman: This gets us back to the fundamental problem, which is, how do you have a workable government in which agencies can solve new problems, respond to new technology, new market trends, new innovation, new thinking about regulation, and deploy their experience and learning gained over the years? How do they solve

big problems, in a society that has big challenges, without a working partner in Congress?

The implication of what you're advocating when you say *Skidmore* is great and we don't need *Chevron* is that the courts should stop using it and just make a decision, and then the law will be locked in place by a one-time judicial interpretation. The problem with locking in ambiguous statutory meaning is that agencies need some flexibility. Lately, the branch driving policy forward in the regulatory domains of concern to this audience—environment, climate, energy, and public lands—is not Congress, but the executive branch and certain independent agencies like FERC. The court then decided what to tolerate. The essential partnership has been between the courts and the agencies, with Congress out of the action.

If you think deference makes no sense, there's no coherence to it, and you'd rather have the court decide in all instances, then you've chosen your favorite institution, and it is not the expert agencies, which Congress charged with policy implementation. I say the same thing to my students—what you think of these questions of deference forces you to recognize that you have a favorite institution. Your favorite institution could be the agencies, it could be the courts, or it could be Congress, but you have one, and it's informing your view of how these doctrines of deference should come out.

Richard Pierce: Actually, what I have as a favorite is the institutional relationship that is prescribed in the U. S. Constitution—the institutions have to work together. If they won't work together, our system of government won't work. No institution can solve it unilaterally.

The Future of Natural Resources Law

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Andy Mergen: This panel is focused on natural resources law, very broadly defined. I would like to start by quoting Chief Justice John Roberts, who said a few years ago, "Pick up a copy of any law review that you see and the first article is likely to be, you know, *The Influence of Immanuel*

Kant on Evidentiary Approaches in 18th-Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."⁶³

I think that the Chief Justice's comment there was a quip, as they say, and not intended to be taken seriously. All the members of the U.S. Supreme Court and the advocates before the Court take scholarship very seriously. But the great thing about the program that John Cruden and the folks at the Law and Policy Section have put together is that we have found people, as demonstrated by the prior excellent panel, whose work is profoundly relevant to the work that we do.

63. See Orin S. Kerr, Final Version of "*The Influence of Immanuel Kant . . .*"—and What the Chief Really Said, WASH. POST, June 25, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/25/final-version-of-the-influence-of-immanuel-kant-and-what-the-chief-really-said/>.

The three academics on the panel have lived incredibly engaged lives in terms of the practical impacts of their research making a difference in the real world. Holly Doremus from Berkeley Law has a Ph.D. in plant physiology and has done a lot of important interdisciplinary work, engaging ecologists and wildlife biologists in thinking about natural resources law.

Charles Wilkinson is a legend in public land law and federal Indian law. He has written multiple books that are accessible to a general audience and has profoundly informed people about the history of the West, the importance of public lands law, and federal Indian law. He has been committed to the development of these doctrines in very positive ways.

Dave Owen is doing incredibly exciting work on the Endangered Species Act (ESA),⁶⁴ and he's going to talk about the Clean Water Act (CWA),⁶⁵ which is profoundly important and relevant to the work of the Environment and Natural Resources Division of the U.S. Department of Justice (DOJ). With that, we will start with Holly.

Holly Doremus: Thank you, Andy, and all the folks here at DOJ who have been involved in putting this panel together. My good friend Dave Owen said to me a little bit earlier that he thinks this is the first time he's seen me in a suit, and it just goes to show what a profound honor it is to be here. I may not wear a suit again for the next 20 years, or at least until I get another opportunity like this one.

This panel is supposed to discuss the future of natural resource law. I want to touch on three themes, all of which fall under the general category of confronting uncomfortable realities. I think of this problem as similar to that depicted in a cartoon of a therapist listening to a patient, who is saying "I want you to put me in touch with reality, but be ready to break the connection fast." That's a great summation of the typical human reaction to confronting an uncomfortable reality: I at least think I want to know what reality is, but I don't really want to have deal with it if I don't like it.

Although that's a human reaction, it's not an adaptive one. If we don't see reality clearly, we are likely to run into serious trouble. My favorite illustration of this problem comes from a great project by photographer Miranda Brandon. She took the bodies of birds killed in collisions with buildings and posed them in ways that might represent their final moments. If resource managers don't face up to the uncomfortable reality that there's an impenetrable object in front of them, they may smash into it like a bird hitting a window it doesn't see.

The first theme I want to bring up in terms of a reality that we need to recognize is anything but new. It's long been true, but it's becoming more dominant and apparent: In order to do effective natural resource management, we have to be able to cross boundaries, because

the threats to our natural resources absolutely do and will cross boundaries.

For example, pollution from sources, such as power plants, outside the Grand Canyon National Park readily travels across the park boundary to cause haze, which is sometimes so severe that it's difficult to make out the Park's iconic geologic features. Artificial boundaries that resources don't recognize or respect complicate our attempts to build effective management institutions.

In addition to the obvious boundaries of protected lands, there are boundaries between federal or state agencies with different missions, and boundaries between federal jurisdiction and state jurisdiction. Both the resources we seek to protect and the threats to those resources are unaware of and do not obey any of those boundaries. As an example of the institutional complexity such boundaries bring, consider the Channel Islands, which lie just off the coast of southern California. Within a small geographic area, the Islands and surrounding waters host a national marine sanctuary, a national park, and a California state marine protected area, all with different goals, different managers, and different management standards.

Climate change is the ultimate boundary crosser. Photographs of the Sperry Glacier taken from the same point of view in Glacier National Park in 1913 and 2008 show there was a lot less ice in 2008. Things happening outside the boundaries of Glacier National Park are having obvious effects inside the park. These sorts of transboundary impacts can't be managed by a fortress institution that focuses solely on setting and fortifying boundaries, then managing within those boundaries. Instead, we need institutions that are as capable of crossing boundaries as threats are.

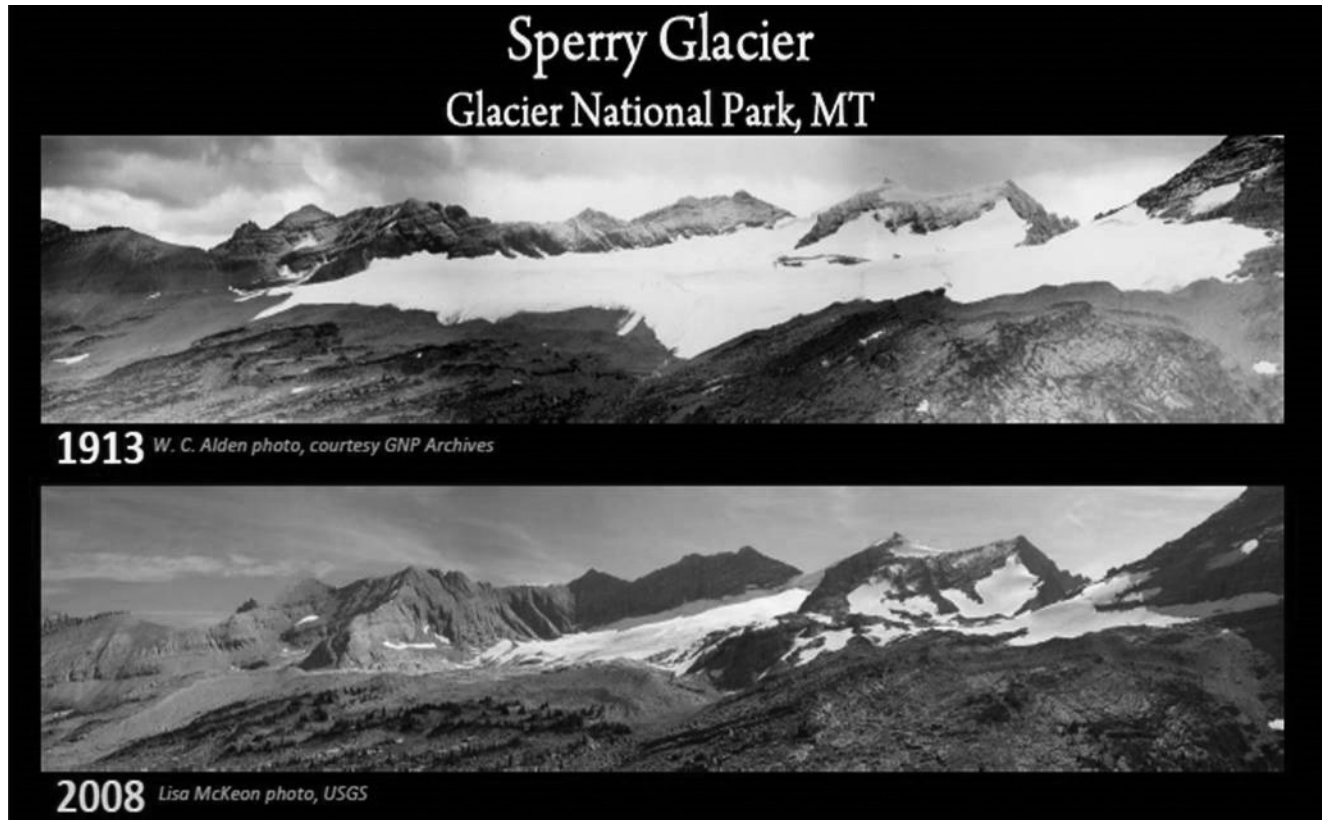
We do have such institutions today, although they are still not common. Boundary-straddling institutions include Landscape Conservation Cooperatives, which involve partnerships between federal agencies like the U.S. Fish and Wildlife Service, the U.S. Forest Service, the Bureau of Land Management, and the Bureau of Reclamation, as well as states, tribes, and private parties, in order to get a handle on key impacts affecting the system as a whole.

Another boundary-crossing institution is the Northeast Regional Planning Body for ocean planning, which engages the six New England states, a number of tribes, a number of federal agencies, and the New England Fishery Management Council. All of those entities deal with activities that affect the resources of the ocean in this area. None of them alone can manage the ocean's resources effectively, but together they are more effective than the sum of their parts.

We don't always need new institutions. We may just need new ways of engaging across institutional boundaries. For example, the Channel Islands National Marine Sanctuary is managed by the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Sanctuaries office. But the sanctuaries office consciously and

64. 42 U.S.C. §§7401-7671q; ELR STAT. CAA §§101-618.

65. 16 U.S.C. §§1531-1544; ELR STAT. ESA §§2-18.



deliberately works with the National Park Service, other parts of NOAA, California's Natural Resources Agency, California's Department of Fish and Wildlife, the State Lands Commission, The Nature Conservancy, the U.S. Coast Guard, and Sea Grant.

So, one thing we need in the modern world of natural resource management is the ability to work across boundaries in a way that didn't seem necessary when we created our resource management institutions.

The second uncomfortable reality we have to confront is that the U.S. Congress is not likely to provide much help as we move to the future of natural resource management.

I do want to note that natural resource law at the federal level has a very long history. Congress has been busy, from 150 years ago to about 40 years ago, creating natural resource programs and institutions. Since I live in California, I have to point out that the Yosemite Grant Act⁶⁶ preceded the setting aside of Yellowstone as a national park, representing perhaps the first congressional effort at landscape preservation. Yosemite Valley was conveyed to the state of California on the understanding that it would be permanently protected for public use and recreation. California later decided it didn't want to pay the costs of that protection, so it returned the valley to federal ownership.

Congressional engagement continued in the late 19th and early 20th century, producing numerous federal statutes protecting natural resources and wildlife. There was another wave of legislation in the 1970s, in parallel with the most active era for pollution legislation. We

haven't had much coming out of Congress since then other than a little tweaking around the edges. We did get the National Wildlife Refuge System Improvement Act in 1997.⁶⁷ Since then, we've had some important amendments to the Magnuson-Stevens Act,⁶⁸ and some small modifications to the Lacey Act.⁶⁹ But for decades now, Congress has been more or less out of the business of helping managers by creating new paradigms or programs for managing our natural resources.

The executive branch can take up some of the slack, filling some of the gaps left by Congress. President Barack Obama, for example, faced with a Congress that had failed to declare an ocean policy despite more than a decade of efforts by legislators, blue-ribbon commissions, and non-governmental organizations (NGOs), acted on his own. He signed an executive order that created the National Ocean Policy.⁷⁰ Among other things, that Executive Order laid the foundation for ocean planning in the Northeast and for the creation of the Northeast Regional Planning Body.

States can also fill some gaps, but they face real boundary-crossing difficulties. Consider, for example, California's network of marine protected areas, which was created

66. Yosemite Grant Act, Pub. L. No. 159, 13 Stat. 325 (1864).

67. National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57 (1997).

68. The Sustainable Fisheries Act of 1996, Pub. L. No. 104-297, and the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, both strengthened the conservation provisions of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§1801-1884.

69. The Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234 (2008), expanded the Lacey Act's import prohibitions to a broader range of plants and plant products.

70. Exec. Order No. 13547, 3 C.F.R. §121 (2010).

years before the federal government launched a formal ocean policy. Because California's boundaries only extend three miles seaward from its coast, state preserves can't be the only tool for managing ocean resources.

The third uncomfortable reality we're facing may be the most challenging. We are, with respect to natural resource management, facing the end of history—or as some have called it, the “no-analog” world.⁷¹ Most of our key conservation goals, both those dating to the 19th century and those that are more recent, are grounded in history. Our resource management laws tell us to restore, maintain, preserve, and conserve unimpaired our various resources. All of these phrases are directing managers to take a snapshot of history and make sure that's what we have for the future.

The principle that we should not change or should restore the world as we found it (at some designated point in time) is the principle behind a lot of our natural resource laws. Of course, history has always been an unreliable goal, one which has tended to hide the true dynamism of nature. The westslope cutthroat trout (WCT), a species that was rejected for listing under the ESA in 2000 and again in 2003, provides a good example of this concept. The WCT readily hybridizes with introduced, non-native trout. That hybridization is, in one sense, entirely natural; when the species co-exist, they can and do interbreed. But that interbreeding violates history, turning the fish into something they didn't used to be. It's not conceptually clear whether hybridized fish should be considered the same entity as “pure” or historic WCT for ESA purposes, or whether the ESA should be invoked to protect the historic species against hybridization.

As that example shows, there have always been problems with history as a conservation goal, but change used to be slow enough that we could deal with it. History was a workable goal in most contexts. It's also proved to be a politically useful goal, because it appears to offer an objective basis for deciding what and how much to save. Appeals to history obviate the need to argue about what we value or why. We just have to point to what was here when we arrived, or first decided to conserve. Today, however, we are faced with very rapid change. Saving historic nature is, if not actually impossible, at the very least far more problematic than we used to think.

If we can't use history as a viable goal, what do we do? Are there principles we can look to? If we try to cling to history in today's rapidly changing world, we may end up with some pretty crazy resource management ideas. For example, should we transport polar bears to Antarctica if they're not going to do well in the Arctic anymore? One obvious response to that suggestion is to worry about the penguins that the polar bears might learn to eat, or more generally, to worry about the impacts of moving species we want to save on the receiving ecosystems. But if we let history go, are there principles we might look to that produce

somewhat less dizzying goals? I think the answer is yes, but it's complicated and requires a lot of creative thinking.

One thing we need to think hard about is what we want from nature and why. There are at least a couple of visions of nature that appeal to us in different ways. One is the idea of garden nature, which imagines people as the architects of all of nature across the world. That's a vision articulated by Emma Marris in her book *Rambunctious Garden: Saving Nature in a Post-Wild World*.⁷² If the world around us cannot be kept like it was when we got here, perhaps we should explicitly take charge of all of nature. Indeed, we currently do take charge of nature in some pretty aggressive ways. For example, some wolves are collared so that managers can track them, and move them if they get into an area where we've decided they shouldn't be. Indeed, some collars allow remote injection of a tranquilizer, so if a wolf gets out of line, its managers can turn it off quickly, and from a distance.

A different version of nature is featured in Carolyn Merchant's book *Autonomous Nature: Problems of Prediction and Control From Ancient Times to the Scientific Revolution*.⁷³ I would call her vision “wild nature,” nature that is unpredictable, surprising, that we recognize we either cannot or should not control. The representation of that view is an uncollared wolf, one that is not managed by human beings directly and in real time. I think both of those visions of nature can and should be part of our natural resource goals in the future.

There are also different visions of humanity that we ought to incorporate more directly into resource conservation. One is that people are the stewards of the world. That goes along with garden nature. We are in charge, but we should be responsible about it. Another is that we're the stewards of ourselves, and we should limit the effects of our intervention. I think we're going to need a portfolio of strategies. Perhaps the most difficult to incorporate is wild autonomous nature, where we consciously let go, even at the cost of perhaps losing some things that we do in fact care about.

To sum up, if we look at the three challenges I've articulated together, the people who are implementing natural resource law today and in the future need three things. They need creativity, because they're going to have to come up with non-traditional ways of doing things. They need courage, because they likely will have to implement those new approaches without explicit congressional blessing. In our hyperpolarized world, that suggests they will face challenges, in both judicial and political fora. Finally, they will need persistence and patience, which the Chicago Cub's victory in the 2016 World Series reminded us, can sometimes pay off after a very long time.

In a world of two-year and four-year election cycles, though, we have to acknowledge that it can be incredibly

71. The future created by climate change has been called “no-analog” because many aspects of it, including many ecological communities, are expected to be novel or to fall well outside the historic range of variability.

72. EMMA MARRIS, *RAMBUNCTIOUS GARDEN: SAVING NATURE IN A POST-WILD WORLD* (2013).

73. CAROLYN MERCHANT, *NATURE: PROBLEMS OF PREDICTION AND CONTROL FROM ANCIENT TIMES TO THE SCIENTIFIC REVOLUTION* (2015).

difficult to exercise creativity, courage, or, perhaps especially, persistence. Our civil servants, and their political appointee bosses, will need the help of academics of many different stripes, and the encouragement of the public if they are to succeed.

Charles Wilkinson: I am honored to speak at this event, and it is particularly an honor because my son is an assistant U.S. attorney in the Western District of Washington. I am very proud of him. He reminds me that one of the greatest contributions of this department is to provide the purest and most vivid image of what being an officer of the court should be. That is what DOJ attorneys do in the field, day in and day out. I am uplifted by this image and feel inspired to be here in front of this audience.

My topic is the place of Indian tribes in the future of natural resources law and policy. To begin, and for comparison, two generations ago, Indian tribes essentially had no role at all in natural resources law and policy. From our perspective today, we can see that tribes have become leaders or co-leaders in many major events in this field. Tribes now manage, and manage well, large segments of land. They regularly participate, often with other governments and parties, in complex land and resource management, research, policymaking, litigation, and advocacy.

At the center of the modern tribal revival is the groundbreaking case *United States v. Washington*.⁷⁴ Although the Supreme Court affirmed the lower court opinion in 1979, the case is commonly referred to as the Boldt Decision, because of District Judge George Hugo Boldt, the judge who authored this great ruling. He handed down his remarkable decision on February 12, 1974, chosen because it was President Abraham Lincoln's birthday.

Leading up to the Boldt Decision, the so-called "Fish Wars" in the Pacific Northwest had become a major issue in northern California, Oregon, Washington, western Idaho, and western Montana. Those states had been cracking down on Indian fishers, claiming that the treaties were invalid and that the tribal fishermen were violating state law. There were arrests and beatings. The tribes responded with marches and fish-ins. The violence continued—it was ugly.

In the mid-1960s, Oregon tribes approached Sid Lezak, the U.S. attorney for Oregon, and asked him to bring a case on behalf of the tribes, since the United States is a trustee for the tribes. Lezak came back to this very same DOJ building and then went to the White House to obtain authority to file suit against Oregon. *United States v. Oregon* resulted in a district court holding that treaties of the 1850s granted the tribes the right to take a "fair share" of the salmon runs.⁷⁵ In the tribes' minds, this was progress, a very good start, but they wanted the term "fair share" expressed numerically.

So, the conflict shifted to Washington, where the fish wars were much more contentious than in neighboring

Oregon. The tribes in Washington approached Stan Pitkin, U.S. attorney for the state of Washington, an appointee of President Richard Nixon. He was a young man and an activist. Pitkin also made a visit to this building and the White House, and got approval to bring *United States v. Washington*. Individual tribes intervened in these cases, and, as remains tradition today, the tribes and DOJ worked arm-in-arm.

United States v. Washington went to trial. The trial lasted six weeks in front of Judge Boldt, a tough but fair judge. He immersed himself in a mountain of evidence and argument presented over those six weeks.

Judge Boldt handed down a comprehensive decision exhaustive in both facts and law. He ruled that treaty language saying that tribal fisherman had the right to take fish "in common with" the residents of the territory meant the tribes could take 50% of the harvestable runs. He also held that the treaties continued to be fully valid, and that the tribes were sovereign governments who could manage the harvesting practices of their own citizens. This extended even beyond reservation boundaries, because the treaties specifically provided for off-reservation fishing rights on historic fishing grounds.

The importance of this 50% share granted to tribal people—who previously harvested less than 5% of the runs in the face of state crackdowns—is obvious. But the decision is larger even than that, since it caused a massive relocation of a northwest Washington economy that at the time was commonly referred to as being based on "timber, salmon, and Boeing." Judge Boldt also provided for continuing jurisdiction over the case, which continues today. Now, 42 years after the decision, disputes over marine resources in the region are still heard by the same district court and decided based on Judge Boldt's precedent.

On an even larger scale, the Boldt Decision rekindled the tribes' passion to be sovereigns and run their own governments. Chief Justice John Marshall had long ago found tribes to be sovereigns: one of the three sources of sovereignty in our constitutional system. Yet, tribes had not historically been given a chance to exercise that sovereignty to manage Indian country.

Importantly for the birth and development of modern tribal governments, on-the-ground application of the Boldt Decision required codes, courts, enforcement capabilities, plans, and scientists. The tribes in the Northwest leapt on this opportunity to manage. Within a matter of three or four years, the tribes had their own scientific staffs. Federal money helped support these new tribal institutions by virtue of the trust relationship between the federal government and the tribes.

Buoyed by successes in this area of resource management, tribes expanded other areas of government and developed other administrative agencies and programs. Now, the majority of tribes have hundreds of tribal government employees—not including gaming or other enterprises, but strictly governmental. Indeed, many tribes have governments larger than the nearby counties.

74. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

75. *United States v. Oregon*, 302 F. Supp. 899 (D. Or. 1969).

The historic, cultural commitment of Indian people to the natural world is not some romantic construct, but a working philosophy and worldview that translates into persistent commitment of tribal resources to natural resources and environmental concerns.

Over the four decades of continuing jurisdiction in the Boldt Decision, the tribes have steadily increased the scope of their harvesting and management. Court rulings have expanded the reach of the original decision to extend beyond salmon, and it now includes essentially all marine resources and encompasses, for example, halibut, clams, oysters, and crabs. In fact, Dungeness crabs are now considered a more valuable commercial resource in the Northwest than salmon. Now, in both law and actual, ongoing management, tribes are considered co-managers of the marine resources of the Pacific Northwest along with the federal agencies and the states.

Tribes are also deeply involved in dam removal in the Pacific Northwest. The Lower Elwha Klallam Tribe started a movement to decommission two major dams on the Elwha River, which flows north out of Olympic National Park into the Strait of San Juan de Fuca. Historically, Chinook salmon runs with fish larger than 100 pounds charged up into that rich habitat. Then, in the early 1900s, the dams were constructed and choked off the runs. Those dams pained the Lower Elwha Klallam people, but their stories of the original runs stayed alive.

Both of those dams have since come out—the first major dam removals in the United States. The next big dam to come out was on the White Salmon River in Washington. The Yakama Nation was the leader in achieving this goal. Also, there is a major restoration effort on the Klamath River, a great salmon river that has its mouth in northern California, but that winds through Oregon to the Pacific Ocean.

But the Klamath is a complicated watershed. Four major dams on the river have had an enormous impact on the salmon. They used to get up into Oregon, but they don't anymore. Their numbers are way down in California. Those four dams are slated to come out, and there is an elaborate and excellent restoration plan, now pending in Congress, that will accompany the dam removal. This would be the largest dam removal project in global history.

There are many other instances where tribes have recorded notable achievements in the area of resource management. They have procured legislation in Congress. In most of the environmental statutes, tribes are treated as states, and so they have the same responsibilities as state agencies in terms of regulating pollution of air and water. And gradually, because this is a complicated process, tribes have taken over the regulation and management of their reservation lands and resources after more than a century of Bureau of Indian Affairs control.

Tribes are also accumulating land, so they are not only doing more to manage land, they are also managing more of it. In the early 1960s, the all-time low point for tribal sovereignty and land ownership, the tribes in the lower 48

states had 50 million acres. They have since added a net of 8 million acres. That is land almost twice the size of the state of Massachusetts that has been added to reservations. There is a perception that tribes are losing land, but they're not. They're gaining it. Today, Indian country is comprised of about 66 million acres, which is nearly the size of Oregon.

To conclude, DOJ has carefully developed an approach toward Indian natural resource matters that recognizes the legitimacy of tribal sovereignty and the trust relationship between the United States and the tribes. This is absolutely the right approach; the idea that tribes are sovereigns capable of managing their own resources and of participating in comprehensive, intergovernmental natural resources policy, is here to stay. And it will mean better health for the land, rivers, and air as well.

Dave Owen: For me, too, it's an honor to be here. It's also a daunting task to tell you all about the future of environmental law. The last time I gave a talk at DOJ, I realized partway through that basically every case cited in the paper I was presenting had been litigated by somebody in the room. At that point, I became very nervous.

I'm going to focus a little more narrowly than the whole future of environmental and natural resources law, and will instead talk about lessons drawn from some of my own recent research. The core conclusion that emerges from that research is that some of the old debates of environmental and natural resources law are leading us astray, and that it's important for you, as litigators, to do something about that.

Which classic debates am I referring to? You know them well. One is the classic debate between prescriptive regulatory approaches and market-based, or incentive-based, systems. This is a debate some people refer to as markets versus command-and-control. Then the other debate, which is arguably even more classic, involves federalism.

These debates have always been somewhat ideological. That's partly why we love them so much, and why we can't keep away from them. Lawyers love a good ideological fight. You all know that very well, of course, with federalism. Expressing a conventional view, Supreme Court Justice Lewis F. Powell Jr. once remarked that "federal overreaching . . . undermines the constitutionally mandated balance of power . . . , a balance designed to protect our fundamental liberties."⁷⁶ Clearly to Justice Powell, as to so many other legal thinkers, federalism is not just about ensuring competent governance.

The same is true with the debate about incentive-based regulation. This debate was never just about finding an efficient way to protect the environment. Instead, in the eyes of many academics, this debate has always been at least partly about liberty and freedom. Take, for example, this quote from a prominent academic advocate of incentive-based regulation: "The same problems that have plagued

76. *Garcia v. San Antonio Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting).

the Soviet effort at central management of the economy hamper American efforts to plan selected aspects of the economy through centralized regulations.⁷⁷ The ideologically loaded analogy is hardly accidental.

Those are the terms of the classic debates. But for the past several years, I have been researching streams, wetlands, and their regulatory protection by the U.S. Army Corps of Engineers (the Corps)—and, to a lesser extent, the U.S. Environmental Protection Agency (EPA)—under CWA §404. From that research, I've drawn lessons on many subjects, including where the cutting edges of these federalism and markets-versus-prescriptive regulation debates currently ought to lie.

I'll start with federalism. The §404 program, as many of you know, is not really a traditional cooperative federalism program. It does allow for states to assume some delegated authority, but only two states—Michigan and New Jersey—have done that, and only to a limited extent. For the most part, it is a program implemented by the federal government.

In many people's view, that conjures up images of Washington-centered, top-down, procrustean, one-size-fits-all solutions coming from Washington, D.C. After all, the conventional wisdom about federal employees is perhaps best summarized in another quote from Justice Powell: "These [federal] employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they are hardly as accessible and responsive as those who occupy analogous positions in state and local governments."⁷⁸ This is just one statement from one judge, but prominent judges, politicians, and law professors say things like this all the time.

The reality is quite different. The §404 program actually has only a very tiny number of staff who work here in Washington. Most of the program's staff work at division, district, and field offices, which are spread out across the country. This means that many Corps staff members are working in places where they live, where they're familiar with the local politics, and where they're embedded in their communities. Often, they are working in places where they grew up and have been living for years.

That matters in a number of different ways. For example, a staff member in the Pacific Northwest told me how much of a difference it made that she had grown up around the tribal issues that Charles spoke about, and that she understood them more than just professionally. Another staff member, a Corps district chief in the eastern United States, explained much of my research in a single paragraph. Describing the importance of working in an area where she had grown up, she said:

When you deal with the mom-and-pop applications, it certainly matters, because a lot of times we help them with site drawings and things like that. It allows a built-

in understanding and empathy, because you know the culture, you were raised there, and know the challenges that people are having. You want to help them as much as you can.

We routinely credit local, and sometimes state, officials with that level of understanding, but those are the words of a federal employee.

The geographic distribution of federal employees matters in ways that go beyond just understanding local conditions. I heard, over and over, about ways in which the §404 program is tailored to local needs, and in which states are actively involved in that tailoring. To provide one important example, state and federal staff routinely work together to develop consistent permitting requirements, and sometimes even to create joint permits. To provide another example, district and field staff from the Corps routinely work with their state counterparts (and with other federal agency staff) on interagency review teams, which routinely meet to review mitigation banking proposals. Often, that means putting on boots and getting out, together, to go walk around in the mud.

When you argue a case, I'm fairly confident that a group of people standing in their blue jeans next to a swamp is not what the judge pictures when he thinks about the present or future of federalism. But that is the real world. And it is a good real world, and one that we want to nurture and grow.

As that last example suggests, my research on the Corps also required attention to environmental trading systems. Compensatory mitigation is now a very big part of the §404 program. In a nutshell, the program allows developers to destroy wetlands, if they can't avoid or minimize that destruction, so long as you compensate for it by protecting, enhancing, constructing, or restoring wetlands someplace else.

In practice, much of this mitigation is done by mitigation banks, which are private, entrepreneurial, often for-profit companies that generally restore wetlands or streams and then sell credits on an open market. Despite a very rocky beginning, the system increasingly seems to be one that works. It's by no means perfect, but independent studies from entities I trust, like the Environmental Law Institute, have found that these mitigation banks tend to do a better job with mitigation than any of the other entities involved. It is also big business. Dozens of banks are operating in the state of Florida alone, and millions of dollars are changing hands.

One might look at this situation and think it's the triumph of markets over the bad, old, leftist, 1970s, centrist regulatory systems of the past. But part of the reason that mitigation banking works as well as it does is that banks are very heavily regulated—including regulation by entities like the interagency review team I mentioned earlier. Again, the old debate doesn't really describe what's going on. In the real world, we're dealing with hybrids.

These trends, it turns out, are highly intertwined. I'll give you two examples.

77. Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 343 (1990).

78. *Garcia*, 469 U.S. at 576-77 (Powell, J., dissenting).

The first example involves the emergence of compensatory mitigation for streams. About 20 years ago, mitigation for streams didn't really happen. Compensatory mitigation was all about wetlands. If your project involved impacting streams, you could get a permit for those fills. But no regulator was going to ask you to compensate for them. In the late 1990s, at a place called Hanes Mall Boulevard in Winston-Salem, North Carolina, all that began to change. At that time, North Carolina state environmental staff were worried about the ways in which development in the state was impacting streams, but they weren't quite sure what to do about it. They didn't have state-law levers to stop those impacts. They also didn't want to stop development. That wasn't politically palatable, and they wanted economic growth just like anybody else does.

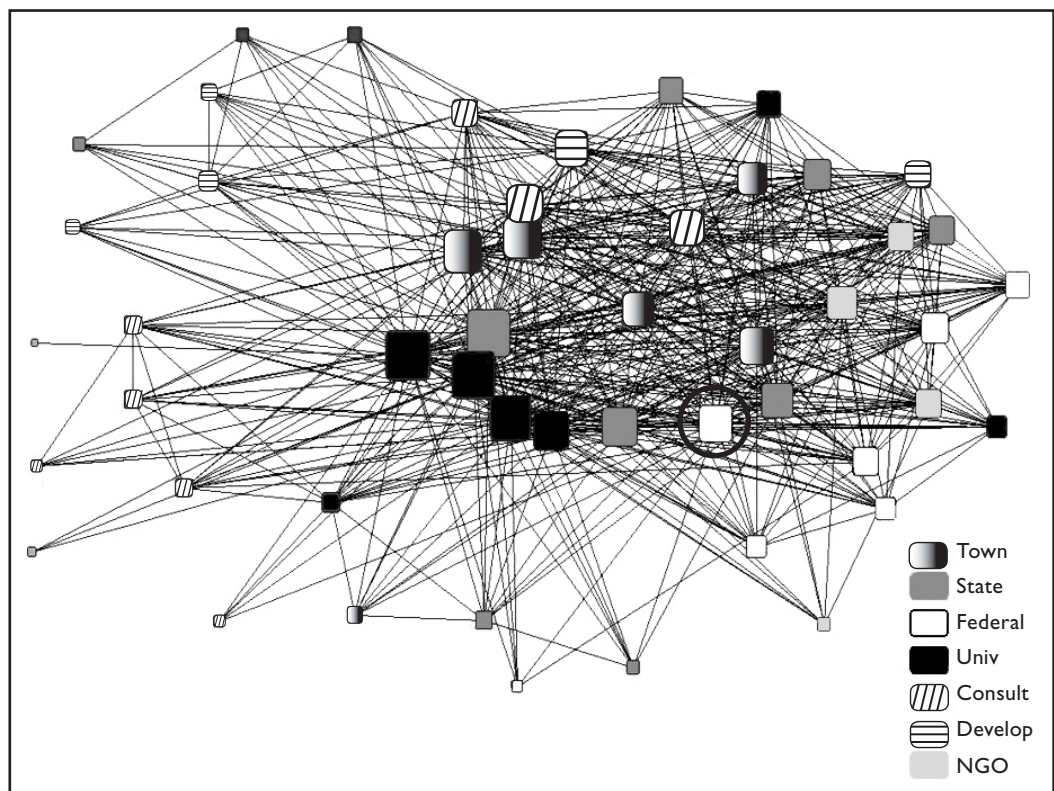
The solution they turned to was compensatory mitigation. Legally, they invoked CWA §401, which allows state agencies to impose conditions on actions subject to federal discharge permits. The state regulators used their §401 authority to require that any §404 permit for stream impacts in North Carolina include requirements for compensatory mitigation. Initially, as some state employees put it, the Corps was a little bit bemused, and EPA was a little bit puzzled. Eventually, both agencies came to support compensatory mitigation for streams and the practice has become increasingly prevalent nationwide.

The way in which this happened is interesting. The spread of stream mitigation was not driven by top-down dictates from Washington, D.C., even though the §404 program is a federal program implemented by federal agencies. Instead, the practice spread by a process of osmosis from regional federal office to regional federal office, and from state to state—or often, through both federal and state offices working together. In other words, complex federalism networks transformed an incentive-based, but heavily regulated, system of environmental protection, from a localized innovation into a national trend. And that is federalism and incentive-based environmental regulation in the real world.

The second example involves vernal pools in my former home state of Maine. Several years ago, researchers at the University of Maine helped launch an initiative to allow

local governments to oversee wetlands trading for vernal pools within their boundaries. The local governments wanted to allow increased filling of vernal pools in their core growth areas. These also happened to be areas where, because of surrounding development, the vernal pools often had very little biological value. In return for allowing streamlined development in these growth areas, local governments would increase protection of vernal pools in the less-developed areas, where the pools often had much more biological value.

The key legal mechanism for accomplishing this was something known as a special area management permit (SAMP), which delegates authority from the Corps and from the Maine Department of Environmental Protection to local governments. But it was very much a team process (and, I should say, a team process in which I was a very minor participant), as you can see from this figure.⁷⁹ The chart is busy, but the basic concepts are simple. Each square on the chart is a person. Each line on the chart is a connection; it indicates that two people have developed a professional relationship. The size of the squares indicates the number of other people within this network that each individual person knows.



I've circled one square, and that's Ruth. She's a district office staff member who played a very key role in this process. As you can see here, Ruth is not an isolated bureaucrat

79. This figure originally appeared in Vanessa R. Levesque et al., *Turning Contention Into Collaboration: Engaging Power, Trust, and Learning in Collaborative Networks*, 30 *SOC'Y & NAT. RESOURCES* 245, 251 (2016). I thank Vanessa Levesque for permission to reuse the figure.

in Washington. She is deeply embedded in a network of state and local government staff, private-sector employees, and university researchers, all working together to help a heavily-regulated, market-based, policy instrument succeed. This, again, is what real-world federalism and incentive-based regulation look like in the real world.

So, why does this matter to you? As promising as some of these initiatives are, they have their opponents, and their opponents have lawyers. And a classic lawyer's move is to take all of the messy complexity of the real world and shoe-horn it into an objectionable story, and then use that objectionable story to knock some promising initiative down. In other words, we cram a complex reality into a simplified ideological straitjacket, and then we complain about the way that straitjacket looks.

You all know this tactic. You often confront it. And you need to respond. Sometimes, an important part of the response is just to describe what is really going on, to let the judges before whom you appear, and the political staff to whom you talk, know that the world is much more interesting than our old rhetoric and our old debates would suggest. Sometimes, we need reminders that our ideological straitjackets just don't fit. This is one of those times. Beyond the caricatures with which legal debates often start and end, there are far more positive and functional versions of federalism, and of incentive-based regulation, at play in the world. If you can explain that effectively, then you, as litigators, can help secure a more positive future for environmental and natural resources law.

Andy Mergen: I'll start with a question for Holly on the distinction between the garden and the wild. Based on your experience as a natural resources teacher, how do you think our statutes break down in terms of whether we're dealing with a garden or the wild? I'll give you an example of what I mean. We frequently defend U.S. Forest Service (the Service) decisions to cut down trees because of the fire risk related to beetle infestation.

Sometimes, opponents will say, beetles are part of the natural landscape, too, and it's disrespecting the Service's mission in terms of honoring the wild. I wonder what you think about this, having suggested that we need a balance, that it's not an all-or-none paradigm. How do you think our laws break down in terms of honoring that balance?

Holly Doremus: That's a great question. I do think that we value both garden nature and wild nature. I would say the Service has a great deal of discretion in how it balances those things. It clearly is expected to garden, to some extent, to grow trees for harvest, and that's always been part of its mission. That's becoming quite complicated not just in terms of beetles, but in terms of species of trees, which are suitable in places now where they didn't used to be, and vice versa.

Other statutes, such as the ESA, lead us to think of wild nature. But they may now be seen as about gardening, as well. I think this is one of the things we're going to have to sort out, because things that are being proposed in order

to conserve endangered species include moving them to places where they've never been, or genetically modifying coral to encourage them to be more resistant to high temperatures. That's not autonomous nature. That's us gardening the wild, if you will.

And I think we don't have a clear sense either of where the boundary lies between wild and garden nature. Plants and animals can be domesticated to different extents. I think we don't yet have a clear sense of which aspects of wildness are most important, or why. I think if you consider a law like the ESA, we're trying to protect a range of values. Some of those might call for gardening in particular circumstances. Others might be offended by gardening. So, I think that's something that's going to take a while to work out.

The national parks are another place where we are doing gardening these days, although one might think that conserving wildlife unimpaired is all about the wild in these areas. Surely an issue that we will have to deal with over the next couple of decades is how we serve the different values provided by garden nature and wild nature, and where we focus on one or the other. Our current statutes don't provide much guidance on those questions, but may inhibit creativity.

Audience Member: This question is for Dave. With regard to compensatory mitigation and off-site mitigation, one of the stories we hear from our opponents now is that it's really just an attempt by big government to grab land that it wants by putting conditions on permits, right? And that it's a taking. I'm wondering if after the *Koontz* decision,⁸⁰ which said that it can be a taking if there's not a sufficient relation, it has become more difficult to do that from what you've seen. And what's a good counter-story that one can tell to rebut that?

Dave Owen: I haven't looked enough to know the impact of *Koontz* on the ground, but it seems to me like we're going to need some more decisions before any of us really understands *Koontz*. It's a hard decision to make much sense of, but, with that said, it hasn't come up in conversations that I've had.

I think if we look back to the impact of *Nollan*⁸¹ and *Dolan*,⁸² which are sort of the predecessors to *Koontz*, they didn't stop compensatory mitigation. All that they seemed to have done is convince people to look a little bit more carefully at the causal relationships between what you're compensating for and what the compensation actually is—the nexus and the proportionality.

In any good compensatory mitigation program, you would be looking at those things anyway. So, I guess I'm making a prediction here that what you're hearing is sort of ideological blustering that, in most cases, is not going to matter very much. But that's a very speculative answer.

80. *Koontz v. St. John's River Water Management*, 570 U.S. 2588, 43 ELR 20140 (2013).

81. *Nollan v. California Coastal Commission*, 483 U.S. 825, 17 ELR 20918 (1987).

82. *Dolan v. City of Tigard*, 512 U.S. 374, 24 ELR 21083 (1994).

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