

The Earth On Trial

**Environmental Law on
the International Stage**

Paul Stanton Kibel

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The Rockies may crumble

Gibraltar may tumble . . .

Contents



First Ink: Publication Credits	xi
Acknowledgments	xv
Acronym List	xvii
Introduction: Sharp Teeth	xix
Part I. The American Backyard	
Chapter 1: City Limits:	
Urban Ecology and Economic Justice	5
<i>Open Space and the City</i>	
<i>Brownfields under Superfund</i>	
<i>Who is Reclaimed?</i>	
<i>Metropolitan Vantage Point</i>	
<i>The City Frontier</i>	
Chapter 2: Roughshod:	
Northwest Forests and the Constitution	31
<i>The Independence of the Courts</i>	
<i>A Bad Decision Revisited</i>	
Chapter 3: Blaming Wildlife:	
The Endangered Endangered Species Act	41
<i>Scapegoating the Owl</i>	
<i>The Nature of Reform</i>	

Contents

Chapter 4	Words to Choke On:	
	Free Speech and Environmental Debate	49
	<i>Misinformation in the Market Place</i>	
	<i>Facts and Fair Comment</i>	
	<i>Controlling the Debate</i>	
Chapter 5:	Ignorance Abroad:	
	International Projects Under National Law	55
	<i>Relocating the Issue</i>	
	<i>Lack of Recourse</i>	
	<i>Information and Responsibility</i>	
Part II.	Foreign Soil	
Chapter 6:	Axe to the Myth:	
	Canadian Logging and International Law	65
	<i>Forests Under International Law</i>	
	<i>The Fiction of Compliance</i>	
	<i>Ottawa in the Woods</i>	
Chapter 7:	Ecology After the USSR:	
	Hard Times for Russian Environmental Law	81
	<i>The State of the Environment</i>	
	<i>The State of the Economy</i>	
	<i>A Difficult Legacy</i>	
	<i>On the Page On the Ground</i>	
	<i>Solutions Beneath the Surface</i>	
	<i>Experience and Expectations</i>	
Chapter 8:	United by Poison:	
	Relief for Bhopal's Victims	99
	<i>A Blanked Spread too Thin</i>	
	<i>Pooling Resources</i>	

Contents

Chapter 9: Refoliating Vietnam:	
A Second War for the Forests	105
<i>A Period of Reform</i>	
<i>The Pressures of Poverty</i>	
<i>The Fate of Vietnam's Forests</i>	
 Part III. Trade's Harvest	
Chapter 10: A Difficult Swim:	
The Sea Turtle Navigates GATT	117
<i>The Sea Turtle Litigation</i>	
<i>The Turtle–GATT Clash</i>	
<i>Swimming Beneath the Surface</i>	
 Chapter 11: Trees Falling:	
Forests and the Timber Trade	127
<i>The Pacific Rim Cut</i>	
<i>The Timber Trade Paradigm</i>	
<i>Reconstructing the Marketplace</i>	
 Chapter 12: The Depths of Europe:	
Lessons for North America	139
<i>Limits of NAFTA</i>	
<i>Deep Integration in Europe</i>	
<i>Rethinking North America</i>	
 Conclusion: Commonplace Ideas	149
Selected Resource Guide	153
Selected Bibliography	163
Suggested Further Reading	167
Notes	171
Index	187

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Acronym List



B.C.	British Columbia
CERCLA	Comprehensive Environmental Response, Compensation & Liability Act (U.S.)
CIT	Court of International Trade (U.S.)
CITES	Convention on the International Trade in Endangered Species
CSD	Commission on Sustainable Development
EEA	European Environmental Agency
ECJ	European Court of Justice
EPA	Environmental Protection Agency (U.S.)
ESA	Endangered Species Act (U.S.)
EU/EC	European Union/European Community
FAO	Food & Agricultural Organization (United Nations)
FWS	Fish & Wildlife Service (U.S.)
GATT	General Agreement on Tariffs & Trade
GEF	Global Environmental Facility
IMF	International Monetary Fund
IPS	Institute for Policy Studies
ITTA	International Tropical Timber Agreement
MOSTE	Ministry of Science, Technology & Environment (Vietnam)
NAAEC	North American Agreement on Environmental Cooperation
NACEC	North American Commission on Environmental

Acronym List

	Cooperation
NAFTA	North American Free Trade Agreement
NEJAC	National Environmental Justice Advisory Committee (U.S.)
NEPA	National Environmental Policy Act (U.S.)
NMFS	National Marine Fisheries Service (U.S.)
NPDES	National Plan for Environment & Sustainable Development (Vietnam)
NRDC	Natural Resources Defense Council
ODA	Overseas Development Agency (Japan)
OPIC	Overseas Private Investment Corporation (U.S. Agency)
SCCI	State Commission on Corporate Investment (Vietnam)
SCLDF	Sierra Club Legal Defense Fund
SDA	Swedish Development Agency
TED	Turtle Exclusion Device
TDA	Trade and Development Agency (U.S.)
UNEP	United Nations Environment Programme
USAID	United States Agency for International Development
USTR	United States Trade Representative
WWF	World Wildlife Fund
WTO	World Trade Organization

Introduction

Sharp Teeth



Writing, like all things, has its own headwaters, its own sources of origin. To deny these sources is to cut oneself off from the very elements that led one to think and write in the first place. In terms of this book, two particular headwaters are of great importance, for they helped determine both the direction and objectives of the work. To explain where I am headed, I must first reclaim these sources.

In 1987, Russell Jacoby published a book entitled *The Last Intellectuals*, in which he noted, and mourned, the withdrawal of the “public intellectual.” Jacoby’s central point was not that the modern mind had de-evolved, that it had become somehow less imaginative, less perceptive or less moral. Rather, his point was that the best modern minds had chosen to, or perhaps been forced to, retreat from the public stage. Instead of engaging in debate with society at large, they were instead engaged in debate among themselves.

This internal debate was draining the vitality of the external debate. Increasingly, the public space—where theory and reality are forced into close and often fertile proximity—was being abandoned. A disheartened Jacoby observed that “as intellectuals became academics, they have no need to write in a public prose; they did not, and finally they could not.” He warned that this retreat of language was the real danger and the threat, in that “the public relies on a dwindling band of older intellectuals who command the vernacular that is slipping out of the reach of their successors.”

Introduction

Jacoby's message was a condemnation and a lament, but it was also a call to arms. It was a challenge to look beyond our professional peers, beyond the page of scholarship, and to confront the larger public. In terms of the use of language, and the aims of writing, it proposed an important change of focus; to move from the technical to the essential, to employ a strategy of words that would widen and deepen the circle of debate.

This book represents an effort to move in the direction that Jacoby outlined. The debate over the relationship between law and the environment has become increasingly inward looking, with specialists talking more and more to each other. The writings in this book seek to redirect this discussion outward.

If Russell Jacoby is the first headwaters for this book, then the second is Charles Wilkinson. In the field of natural resources law, Wilkinson has played a key role in forging a new language to talk about how society and government interact with the natural environment. Through his writings, he has worked to create a language that rejects legal abstractions to discuss non-abstract phenomenon, yet recognizes the historical and philosophical in even the most legalistic issues.¹

At a 1991 lecture at Willamette Law School in Oregon, Wilkinson delivered a talk on the Colorado River entitled "Land of Fire and Water." Ostensibly, his topic was western water law. However, his legal discussion included Native American poetry, the geological history of the river canyon, and a survey of the impact of water projects on culture and values. At the close of his lecture, Wilkinson proclaimed: "The language of the law as we now know it is too small to talk about these issues. We need to create a new language for the law, one that is big enough to confront the resource issues that now face us."

Like Jacoby, Wilkinson's message was a condemnation and a lament, but it was also a challenge. It called for environmental and natural resource lawyers to talk plain and to talk deep. Don't say "intensive timber harvesting" when you mean "forest destruction".

Don't say "lawful taking" of animals when you mean "killing." Don't say "resettlement project" when you mean "gunpoint eviction." Don't say "adversely impacted" when you mean "poisoned."

Moreover, Wilkinson urged an open recognition of the moral, the sacred, and the wild. These are the underlying values that prompted the development of environmental law, yet somehow these values found themselves increasingly excluded from the legal vernacular. Wilkinson called for an end to this exclusion.

Taken together, Jacoby and Wilkinson left me with a task: to develop new writing strategies to bring the law-ecology debate into the public space. The writings in this book are an attempt to meet this task.

Therefore, although this book focuses on the law, I did not write this book for lawyers. Although this book focuses on protecting the environment, I did not write this book for environmentalists. The audience I am writing for includes lawyers and environmentalists, but it includes many others.

It includes all persons who understand that the law is fundamentally an expression of public values, and that public values are forged through public debate. It includes all persons who are troubled by the continuing ecological degradation of our world, and by the role our public institutions and private corporations play in this degradation. It includes all persons who believe we have a responsibility to assess the impacts of our actions. It includes all persons who suspect that our future depends not so much on our ability to alter nature to accommodate society, as on our ability to alter society to accommodate nature.

For nature has its own methods of showing us its teeth, of letting us know when we have transgressed limits. The very land, air and water on which we rely begins to turn sterile and toxic. The sum of our transgressions push ecosystems and species beyond the threshold of adaptation, and they begin to die and disappear. This sterility, toxicity and extinction, in turn, degrades not only our natural environment but our economic prospects. It is because of nature's