HOW LAW MATTERS TO ECOSYSTEM RESTORATION

A DISSERTATION
SUBMITTED TO THE FACULTY OF THE GRADUATE SCHOOL
OF THE UNIVERSITY OF MINNESOTA
BY

Sherry Anne Enzler

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

Dorothy H. Anderson, PhD

February 2012

Acknowledgements

There are many who supported me on this long and arduous journey to complete this dissertation and whom I owe a great debt of gratitude. First and foremost among them is my advisor Dr. Dorothy H. Anderson who spent countless hours advising, guiding, reading, listening, supporting, and inspiring while urging me forward, I owe you my unending gratitude. I also owe a deep debt of gratitude to my Committee Members, Dr. Kenneth N. Brooks, Professor Bradley C. Karkkainen, JD, and Dr. Kristen C. Nelson. Their doors, minds, and ears were always open to me. Dr. Nelson and Professor Karkkainen in particular were instrumental in helping me explore how to join the social science and legal theories that were at the heart of my research while Dr. Brooks' aide was fundamental to my understanding of the operation of complex natural hydrologic systems. I am indebted to the Consortium on Law and Values in Health, Environment, and the Like Sciences at the University of Minnesota, which provided funding for this research. I would also like to thank my family, particularly my sister-in-law Kathy who continually reminded me that it was about completion not perfection, my writing companion, Professor Christina Kunz, JD, the faculty and staff in the Department of Forest Resources, the Peterson family for the use of their lake cabin where I spent many hours writing, and my loyal and dear friends. Finally, I must thank Martha Brand and the "ladies of Victoria Street" you know who you are and I would not have reached the finish line but for you.

Dedication

I have been fortunate in my career to have many wonderful mentors who have been instrumental in developing my passion for law, public policy, and the environment. This dissertation is dedicated to them. I feel compelled, however, to single out two of my earliest mentors for special recognition, the late Larry E. Meierotto, former Assistant Secretary of Policy, Budget and Administration at the Department of Interior during the Carter Administration and the late William E. Warne, Assistant Secretary for Water and Power Development, Department of Interior during the Truman Administration and Director of the California Department of Water Resources during the Brown Administration. Both of your names kept appearing during the course of my research and it is only in retrospect that I truly appreciate both the depth of your influence and knowledge on national environmental policy issues and the influence you have had on the development of my career.

Table of Contents

List of Figures

CHAPTER 1: HOW LAW MIGHT MATTER TO THE PROTECTION OF ECOSYSTEMS

> Human activity is putting such strain on the natural functions of Earth that the ability of the planet's ecosystem to sustain future generations can no longer be taken for granted. . . . As human demands increase in coming decades, these systems will face even greater pressures – and the risk of further weakening the natural infrastructure on which all societies depend. Protecting and improving our future well-being requires wiser and less destructive use of natural assets. *This in turn involves major changes in the way we make and implement decisions.*[1]

I. INTRODUCTION

Science has enlightened our understanding of the environment as it has developed its understanding of ecosystems and the services they provide to human wellbeing. The 2005 Millennium Ecosystem Assessment reported unprecedented degradation of the world's ecosystems resulting in irreversible losses to the diversity of life on earth and the degradation of ecosystem services.[2] "These problems, unless addressed, will substantially diminish the benefits that future generations obtain from ecosystems."[3]

We have begun to address the scientific challenge of managing ecosystems, but a primary challenge as yet unresolved is how to infuse system based management strategies into the social and political institutions and mechanisms we use to protect and manage

---

[1] Millennium Ecosystem Assessment Board, *Living Beyond Our Means: Natural Assets and Human Well-Being*, 5 (Jose Sarukhan & Anne Whyte ed., 2005).

[2] Examples of ecosystem services include natural flood storage, water-cleansing functions provided by forest systems and the food source that native fish species provide to native tribes that do subsistence fishing. U.S. Envtl. Prot. Agency, Pub'n No. EPA/600/R-98/086, *Ecological Research Strategy,* E-1 (1998).

[3] Millennium Ecosystem Assessment Board, *Ecosystems and Human Well-Being: A Synthesis*, 1(Jose Sarukhan & Anne Whyte ed., Island Press, 2005).

our natural resources.[4] How do we change political and social structures to protect ecosystems and what is the role of law and litigation in this process? The three articles included in this dissertation analyze the role of law and litigation in promoting political and social changes necessary to sustain ecosystems and ecosystem services. By understanding the interrelationship between law, social change and ecosystem protection and restoration[5] we can more strategically use the law to generate the political change necessary to protect and restore ecosystems.

II. BARRIERS TO ECOSYSTEM PROTECTION

Ecology emerged as a branch of biological science at the turn of the 20th century.[6] The field of ecology explores organisms in the context of their physical surroundings and the interdependence of organisms forming ecological systems or ecosystems.[7] Soule explains that ecologically "the living components of nature are classified in 'biospatial' hierarchies: (i) whole systems at the landscape or ecosystem levels, (ii) assemblages (associations and communities), (iii) species, (iv) populations, and (v) genes".[8]

---

[4] C.S. Hollings, *What Barriers? What Bridges?* in *Barriers & Bridges to the Renewal of Ecosystems and Institutions* 6-12 (Lance H. Gunderson, C.S. Holling, & Stephen S. Light ed., Columbia University Press, 1995).

[5] Although it is unrealistic to expect that ecosystems can be "restored" to pre-development conditions, the term "ecosystem restoration" is widely used in the environmental literature. For purposes of this dissertation the term ecosystem restoration means "the process of assisting the recovery of an ecosystem that has been degraded, damaged or destroyed." Society for Ecological Restoration International Science & Policy Working Group, *The SER International Primer on Ecological Restoration,* § 2 (Oct. 2004) *available at* http://www.ser.org/content/ecological_restoration_primer.asp#3

[6] *See generally,* Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: an Introduction,* 69 Chic.-Kent L. Rev. 847, 850 (1994) (discussing generally the evolution of the field of ecology).

[7] *Id.* at 850-51; *see also,* A.G. Tansley, *The Use and Abuse of Vegetational Concepts and Terms,* 16 Ecology 284 (July 1935). Tansley defined an ecosystem as the biological community that occurs in some locale and the physical and chemical factors that make up the system's non-living or abiotic environment. *Id.*

[8] Michael E. Soule, *Conservation: Tactics for a Constant Crisis,* 253 Sci. 744 (Aug. 16, 1991).

Ecosystems, which are at the top of this biospatial hierarchy, are "landscapes and seascapes making up interacting ecosystems…including such topographical features as entire drainages."[9] An ecosystem generally consists of a number of interacting biotic assemblages across a landscape.[10]

Ecosystems exist in hierarchies, thus a pond may support a localized ecosystem that exists within the context of a larger ecosystem situated within a watershed system that supports numerous interacting ecosystems.[11] Watershed[12] systems can contain numerous interacting ecosystems as illustrated by the Mississippi River watershed extending from northern Minnesota to the delta region in the Gulf of Mexico; the Mono Lake watershed which includes Mono Lake and its four primary tributaries; and the Everglades watershed which extends over 100 miles from the Kissimmee chain of lakes in central Florida to the Gulf of Mexico. Watersheds and the ecosystems located in watersheds often cross numerous political boundaries.

Watershed management is "an integrated way of thinking about human activities on a given area of land (the watershed) that have effects on or are affected by water."[13] Land use is intimately connected to water and water quality as illustrated in Figure 1.1. A watershed approach to ecosystem management focuses on all interactions, human and

---

[9] *Id.*
[10] *Id.*
[11] Heinz Center for Science, Economics and the Environment, *The State of the Nation's Ecosystems: Measuring the Lands, Waters and Living Resources of the United State* 8-9 ((2002)
[12] A watershed is defined by Brooks et. al. as "[a] [t]opographical delineated area drained by a stream system; that is, the total land area above some point on a stream or river that drains past that point. The watershed is a hydrologic unit often used as a physical-biological unit and a socioeconomic-political unit for the planning and management of natural resources." Kenneth N. Brooks, Peter F. Ffolliot, Hans M. Gregersen, and Leonard F. DeBano, *Hydrology and the Management of Watersheds*, xiii (3rd ed., 2003).
[13] *Id.* at 14.

non-human, within the watershed.[14] A watershed approach also allows exploration of the interaction between human systems and ecosystems (natural systems) within the geographic area of the watershed.

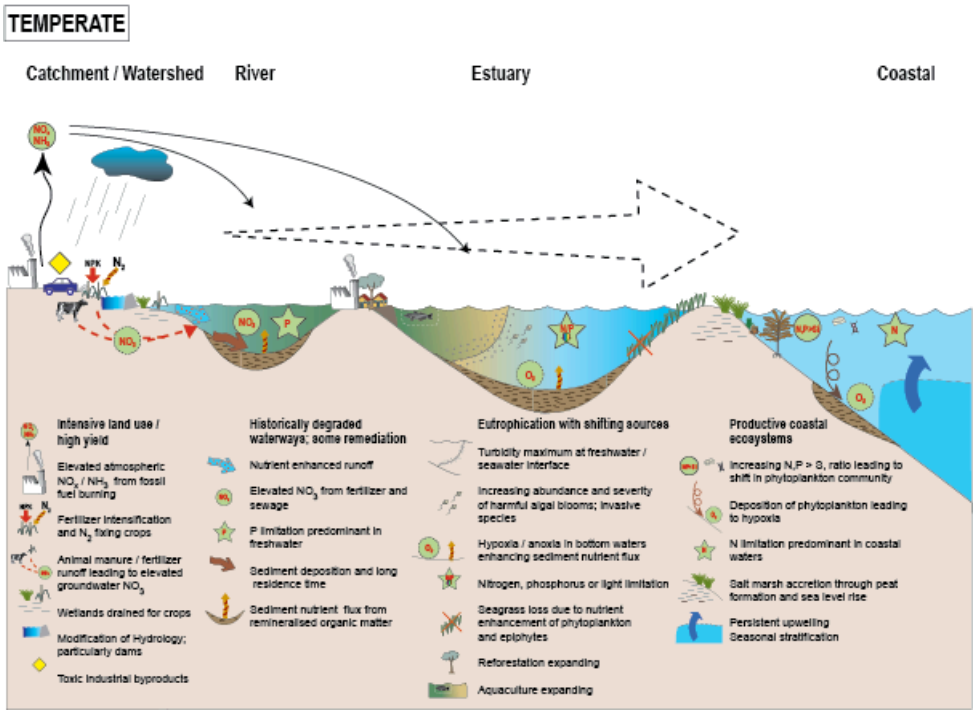

Figure 1.1: Temperate Water Ecosystem. Found at http://ian.umces.edu/loicz/temperate.png

Today we recognize that ecosystems situated in watersheds provide extensive services[15] to human wellbeing.[16] There are four categories of ecosystem services:

1. Provisioning Services: products obtained from ecosystems including food, fiber, fuel, genetic medicinal, fresh water, energy, and ornamental.
2. Regulating Services: including air quality, climate regulation, water regulation (i.e. timing of runoff, groundwater recharge, flooding), water purification and waste treatment, disease and pest regulation, pollination, and natural hazard regulation.

[14] Heinz Center, *supra* note 10, at 8-9.
[15] Ecosystem services are the benefits humans obtain from ecosystems. Millennium Ecosystem Assessment Board, *Millennium Ecosystem Assessment Ecosystems and Human Well-Being Wetlands and Water: A Synthesis* v (Jose Sarukhan & Anne Whyte ed., 2005).
[16] *See generally, Id.*

3. Cultural Services: including spiritual and religious value, knowledge systems, educational, inspirational, cultural heritage, sense of place, aesthetic and recreational; and
4. Supporting Services: including soil formation, photosynthesis, nutrient cycling, water cycling and primary production.[17]

The destruction of ecosystems and their services can adversely affect human health, security, and general human welfare. For example ecosystem degredation within watersheds may impact the ability of the ecosystem to purify water (a regulating function) that in turn may increase disease and decrease the amount of water available for human consumption, which in turn may decrease personal security and social cohesion.[18]

Although ecology is one of the foundations of modern environmental law, modern environmental law has not followed an ecosystem model.[19] Early environmental policy was influenced by ecologists Eugene and Howard Odum who argued there was a natural "equilibrium between organisms and environment" that would remain unchanged if not subject to human interference.[20] Nature could restore its own balance if human interference was eradicated.[21] This approach to ecosystem management was incorporated in the environmental legal systems developed in the 1970's, a series of media based laws, which had at their core the eradication of human degradation of the air, land and waters.[22] These statutes included the National Environmental Policy Act (NEPA) of 1969[23], the

[17] *Id.* at 40.
[18] *Id.* at 50: *see also,* Lynton K. Caldwell, *The Ecosystem as a Criterion for Public Land Policy,* 10 Nt. Resource J. 203, 207 (April 1970).
[19] *See generally,* Bosselman and Tarlock, *supra* note 5, at 863-65.
[20] *Id.* at 866-67.
[21] *Id.*
[22] *Id.* at 867-68.
[23] NEPA provides that any recommendation for any major federal action that significantly affects the environment shall be preceded by the preparation of an environmental impact statement. 42 U.S.C. § 4332 (2005).

Clean Air Act of 1970[24], the Clean Water Act of 1972[25], the Solid Waste Disposal Act of 1976[26], the Toxic Substance Control Act of 1976[27], and the Endangered Species Act of 1973[28] to name but a few. Each of these statutes attempted to set limits on environmental degradation through complex permitting and/or regulatory schemes managed by environmental agencies which were granted discretion to determine the scope of permitted resource use, protection or degradation. Generally each of these statutory schemes, with the exception of NEPA (which was essentially a procedural statue), was managed by independent divisions within federal agencies such as the U.S. Environmental Protection Agency (EPA), agencies that had little incentive to act across boundaries.[29] This resulted in a silo approach to environmental protection.

The scientific community has since moved away from the "hands off" view of ecosystems protection to one of "ecosystem management". Keiter defines ecosystem management as:

> a regional or resource system perspective; it regards natural phenomena such as watershed, airsheds, and wildlife habitats, as the appropriate focus

[24] The stated purpose of the Clean Air Act is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population". 42 U.S.C. § 7401 (b) (1) (2005).
[25] The stated purpose of the Clean Water Act is the "restoration and maintenance of the chemical, physical and biological integrity of the Nation's water". 33 U.S.C. § 1251 (2005).
[26] The Solid Waste Disposal Act was enacted to provide oversight and leadership to State's regarding the collection and disposal of solid wastes and to help states reduce, reuse and recycle wastes prior to disposal. 42 U.S.C. § 6901 (2005).
[27] The primary purpose of the Toxic Substance Control Act is to reduce human exposure to the effect of chemical substances and mixture that may harm human health. 15 U.S.C. § 2601 (2005).
[28] The primary purpose of the Endangered Species Act is to conserve endangered and threatened species and the ecosystem upon which they depend. 16 U.S.C. § 1531 (2005). Unlike the Clean Air Act, the Clean Water Act, or the Solid Waste Disposal Act the ESA at least recognizes that ecosystem protection is a necessary prerequisite to species preservation. *See generally,* Sherry A. Enzler and Jeremy T. Bruskotter, *Contested Definition of Endangered Species: The controversy regarding how to interpret the phrase "a significant portion of a species range",* 27 Va. Envtl. L. J. 1, 2-3 (2009).
[29] *See generally,* Robert V. Percival, *Checks without Balance: Executive Office Oversight of the Environmental Protection Agency,* 54 Law & Contemp. Probs. 127, 130-38. (generally discussing history of EPA during the Nixon Administration)

> for management decision-making . . . the resource manager's primary responsibility is to maintain the integrity of existing interdependent natural systems, both to insure sustainable resource development opportunities and to preserve unique, irreplaceable and valuable resources, In short, management priorities – set in accordance with ecological principles – should transcend jurisdictional boundaries…effective ecosystem management requires that land managers identify and analyze the full impact, both cumulatively and geographically, of management proposals on existing resource systems to minimize the disruption or fragmentation of ecosystem processes. . . [E]cosystem management is linked closely to modern conservation biology theories, and therefore encompasses a commitment to preserving biological diversity within the regional fauna and flora.[30]

Grumbine, in his 1994 overview of ecosystem management literature identified five goals of ecosystem management endorsed in the literature:

1. Maintain viable populations of all native species in situ,
2. Represent, within protected areas, all native ecosystem types across their natural range of variation,
3. Maintain evolutionary and ecological processes (i.e., disturbance regimes, hydrological processes, nutrient cycles, etc.),
4. Manage over period of time long enough to maintain the evolutionary potential of species and ecosystems, and
5. Accommodate human use and occupancy within these constraints.[31]

Each of these perspectives indicates a trend toward entire systems management a trend that is undermined by a media based approach to environmental protection.[32] Thus in 1994 senior managers in the Clinton Administration EPA observed:

> [b]ecause EPA has concentrated on issuing permits, establishing pollutant limits and setting national standards, the Agency has not paid enough attention to the overall environmental health of specific ecosystems. In short, EPA has been 'program driven' rather than 'place-driven' . . .

[30] Robert B. Keiter, *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands,* 25 Land & Water L.Rev. 43, 45-46 (1990).
[31] R. Edward Grumbine, *What is Ecosystem Management,* 8 Cons. Bio. 27, 31 (March 1994).
[32] James Salzman, Barton H. Thompson, Jr. & Gretchen C. Daily, *Protecting Ecosystem Services: Science, Economics & Law,* 20 Stan. Env'tl L. J. 309, 311-12 (2001)

> Recently we have realized that, even if we had perfect compliance with all our authorities we could not assure the reversal of disturbing environmental trends.[33]

A prime example of the dilemma of a silo-based approach to ecosystems is illustrated by watershed mercury contamination. For example, in Minnesota over 1,239 water bodies are mercury impaired.[34] Regulation of the mercury content of public waters is governed by the Clean Water Act (CWA), which controls water quality and direct pollution discharges into public waters.[35] However, ninety-nine percent of the mercury in Minnesota's waters comes not from water pollution discharges but from atmospheric emissions. [36] The Clean Air Act an act intended to protect the quality of our nation's air, not its waters, governs air pollution emissions. Thus even if there was perfect compliance with the CWA we could not begin to address mercury contamination in public waters using our current regulatory scheme. To address the mercury dilemma as well as the health of our nation's ecosystems we must change the way we make and implement decisions surrounding the management of ecosystems. Protecting the nation's ecosystems and the services they provide requires a shift from a "fragmented approach [to environmental management] to an approach that focuses on the ultimate goal of

---

[33] Ecosystem Protection Workgroup, U.S. Envt. Prot. Agency, *Toward a Place-driven Approach: The Edgewater Consensus on an EPA Strategy for Ecosystem Protection* at 1 (March 15, 1994) (Edgewater Consensus).

[34] Fact Sheet, Minnesota Pollution Control Agency, *Impaired Waters Fact Sheet 4-01: Draft Statewide Mercury TMDL Study*, 1 (2006) (MPCA Fact Sheet).

[35] 33 U.S.C. § 1313 (a) (2006) The Clean Water Act requires individual states to develop water quality standards for all surface water bodies. The state is required to set pollution limits for state water bodies based on a pollutant-loading study (the Total Maximum Daily Load or TMDL) and to manage water bodies to assure that the pollutant TMDL is not exceeded within a given water body.

[36] Minnesota Pollution Control Agency, Final Minnesota Statewide Mercury Total Maximum Daily Load vi (March 2007) (revised and approved by EPA April 3, 2008). Approximately 30 percent of the mercury deposited by air originates from natural sources. The remaining 70 percent comes from human activities most notably coal-fired power plants – 60% from out of state sources and 10% from in state sources. MPCA Fact Sheet, *supra* note 34, at 2.

healthy, sustainable ecosystems that provide us with food, shelter, clean air, clean water and a multitude of other goods and services. We [must] . . . move toward a goal of ecosystem protection." [37]

Grumbine, in his survey of ecosystem management literature identified ten changes that must occur to achieve effective ecosystem and integrated watershed management:

1. Hierarchical. A focus on any one level of the biodiversity hierarchy…is not sufficient…managers must seek the connection between all levels…often described as a "systems" perspective.
2. Ecological Boundaries. Management requires working across administrative/political boundaries…and defining ecological boundaries at appropriate scales. An example would be…[the]initial call for grizzly bear management based on the distribution and habitat requirements of the …population.
3. Ecological integrity. [M]anaging for ecological integrity as protecting total native diversity…and the ecological patterns and processes that maintain that diversity.
4. Data collection. [On topics such as] . . . habitat inventory/classification, disturbance regime dynamics . . . and better management and use of existing data.
5. Monitoring. [T]he result of [management] actions so that success or failure may be evaluated quantitatively.
6. Adaptive Management. Focusing on management as a learning process . . . where incorporating the results of previous actions allows managers to remain flexible and adapt to uncertainty.
7. Interagency Cooperation. Using ecological boundaries requires cooperation between federal, state and local management agencies as well as private parties. Managers must learn to work together and integrate conflicting legal mandates and management goals.
8. Organization Change. Implementing ecosystem management requires changes in the structure of land management agencies and the way they operate… (changing professional norms, altering power relationships).

---

[37] Edgewater Consensus, *supra* note 33, at 1; *see also,* Salzman et al., *supra* note 32, at 309-310; *see also,* Millennium Ecosystem Assessment Board, *Living Beyond Our Means: Natural Assets and Human Well-Being a Statement from the Board*, 12 (Jose Sarukhan & Anne Whyte ed., 2005).

9. Humans Embedded in Nature. People cannot be separated from nature. Humans are fundamental influences on ecological patterns and process and are in turn affected by them
10. Values. …Human values play a dominant role in ecosystem management goals.[38]

Of these criteria the second (managing across administrative and political boundaries) and the last six suggest that to protect ecosystems requires changes in human systems including political, legal and social systems – changes that encourage cooperative decision-making, modifications in power relationships, greater flexibility to modify environmental decisions to adapt to changing landscapes, and a greater understanding of human value systems, and their impact on ecosystems from a national, regional, and local perspective.

Several communities have attempted to move to an ecosystem approach to environmental management. By exploring and understanding their struggles to protect and restore ecosystems and the role litigation has played in that struggle, we have the opportunity to develop a framework to help guide stakeholders, local, state, and federal decision makers in transitioning from silo based program driven environmental protection schemes to a political construct that permits place driven systems designed to protect the biophysical and social attributes of entire ecosystems and how to use litigation as a tool in that process.

[38] Grumbine (1993), *supra* note 31, at 29-31. *See also,* R. Edward Grumbine, *Reflections on "What is Ecosystem Management?"* 11 Cons. Bio 41 (Feb. 1997)(elaborating on the criteria necessary to accomplish ecosystem management).

III. THEORETICAL FRAME – LAW AND ENVIRONMENTAL PROTECTION

It is commonly argued that environmental law emerged in the 1960's out of the common law[39] as a means to "discipline public agencies, through 'public interest' litigation."[40] Partially in response to this litigation Congress, in the late 60's and the 70's, developed an "un-integrated web of regulatory programs" to advance environmental protection.[41] This segmented approach initiated a call by the Edgewater Consensus for an ecosystem approach to environmental management to "protect, maintain, and restore the ecological integrity' of the nation's ecosystems and the economies founded upon them."[42] Environmental leaders called for a new generation of environmental policies, policies framed in a systems approach, an "*ecologicalism* that recognizes the inherent interdependence of all life systems." [43]

What is the role of law and public law litigation in moving us to a new generation of *ecologicalism*? In part, this depends on the effectiveness of public law litigation in stimulating political and social change. Both legal scholars and social scientists have explored the role of law and litigation in stimulating social and political change.

---

[39] The common law is that body of law that originated in England and was transferred to the United States. As distinguished from legislatively enacted law, the common law is the body of principles and rules relating to the government and security of persons and property that derive their authority solely from usage, custom, judgment and decrees of the courts recognizing and affirming and enforcing such usages and customs. Black's Law Dictionary, 345-36 (4th ed. 1951). Contract law is an example of a body of law that was developed through the common law system.

[40] A. Dan Tarlock, *The Future of 'Rule of Law' Litigation,* 17 Pace Envtl. L. Rev. 237, 241 (2000)

[41] A. Dan Tarlock, *Garrison Lection on Environmental Law: The Future of Environmental 'Rule of Law' Litigation and There is One,* 19 Pace Envtl L. Rev. 611 (2002)

[42] Edgewater Consensus, *supra* note 33, at 1-2.

[43] Daniel C. Esty & Marian R. Chertow, *Thinking Ecologically: an Introduction to Thinking Ecologically* in *The Next Generation of Environmental Policy*, 4 (Daniel C. Esty & Marian R. Chertow, ed. 1997).

A. The Role of Public Litigation in – Perspectives from the Legal Field

1. The development of public law litigation & its use to redress agency capture.

The twentieth century gave rise to a new breed of lawsuit, "public law litigation".[44] At common law the lawsuit was a mechanism for settling disputes between private individuals about private rights by apportioning legal liability between the litigants based on concepts of "intention" and "fault". A by-product of this litigation was the "clarification of the law to guide future private actions."[45] Through the litigation process the parties received relief for legal wrongs in the form of monetary damages. Courts at common law frowned on non-monetary damages in the form of prospective equitable relief.[46] It was only in the unusual circumstance, that a court would grant equitable relief compelling litigants to perform or refrain from performing court mandated actions[47]

Unlike private litigation, public law litigation provides a substantially different function; it seeks to balance competing interests in the implementation of broad public policy. The concept of public law litigation developed in the latter part of the nineteenth century and coincided with the increase of reform legislation.[48] The development of public law litigation was facilitated by the relaxation of rules governing pleadings,

---

[44] Chayes, Abram, *The Role of the Judge in Public Law Litigation,* 89 Harv. L. Rev. 1281, 1284 (1976).
[45] *Id.* at 1285.
[46] Equitable relief is generally a non-monetary remedy issued by a court to give equal and impartial justice to two persons whose rights are in conflict. *See generally,* Black's Law Dictionary, *supra* note 39, at 634-35.
[47] Chayes, *supra* note 44, at 1282-1288(outlining the characteristics of traditional litigation between private parties). A classic example of the court's preference for monetary damages over equitable remedies can be seen in the area of contract law where the general form of damages for breach of contract is monetary damages. Only rarely will the court invoke the equitable remedy of specific performance and then only when the subject of the contract is rare and unique such as a contract for the sale of real estate.
[48] *Id.* at 1288; *see also,* J. Hurst, *Law and the Condition of Freedom in Nineteenth Century United States*, 88-89 (1956).

standing, and class action litigation, which in turn permitted greater access to the courts by individuals or groups of individuals.[49] Equally important was the fading of "the old sense of equitable remedies as 'extraordinary'". [50] This relaxation of constraints on equitable remedies, most notably the injunction[51], permitted courts to examine controversies surrounding future probabilities such as the impacts of government policies.[52] The lifting of these procedural constraints also permitted litigants and courts to realize the potential policy function of litigation in the context of public issues. Public law litigation embodies both a constitutional or statutory right and the use of courts' equitable powers to enforce said rights. Professor Chayes in his analysis of public law litigation observed:

> Again, as in private litigation, the screw gets another turn when simple prohibitory orders are inadequate to provide relief. If a mental patient complains that he has been denied a right to treatment, it will not do to order the superintendent to "cease to deny" it. So with segregation in education… environmental management . . . If the judicial intervention is invoked on the basis of congressional enactment, the going assumption is that the statute embodies an affirmative regulatory objective [right]. Even when the suit is premised on constitutional provisions . . . there is an increasing tendency to treat them as embodying affirmative values, to be fostered and encouraged by judicial action. In either case, if litigation discloses that the relevant purposes or values [embodied in the constitution or statute] have been frustrated, the relief that seems to be called for is often an affirmative program to implement them. And courts, recognizing the undeniable presence of competing interests, many of them unrepresented by the litigants, are increasingly faced with the difficult

[49] *Id.* at 1283-89 (discussing the relaxation of pleading requirements, standing, and barriers to class action litigation).
[50] *Id.* at 1292.
[51] An injunction is a prohibitive writ issued by the court against a party, generally a defendant, prohibiting the defendant from doing some act that the defendant has threatened to undertake on the pretext that allowing the defendant to undertake the act would be unjust, inequitable, and injurious and cause irreparable harm to the plaintiff. Black's Law Dictionary, *supra* note 39, at 923.
[52] Chayes, *supra* note 44, at 1292-93.

> problem of shaping relief to give due weight to the concerns of the unrepresented.[53]

Thus the court in the case of Chayes' mental patient would look to the right to treatment embodied in statute and attempt to craft a remedy to assure the rights of the unrepresented mental patient.

a. Agency Capture –

To understand how public law litigation might facilitate social and political change it is necessary to understand the underlying purpose of public law litigation. While traditional litigation focused on the resolution of private disputes, public law litigation focused on "whether or how a government policy or program should be carried out."[54] Between 1940 and the 1970s there was a growth in the number of policy decisions made within bureaucratic agencies and there was a growing concern about the democratic accountability of bureaucratic decision makers. There was also a growing recognition that bureaucratic agencies charged by Congress with allocating public resources or regulating social programs were locked in a symbiotic relation with the very interests they sought to regulate. This theory came to be known as agency capture. [55]

---

[53] *Id.* at 1295.
[54] *Id.* at 1295.
[55] *See generally,* Robert Glicksman & Christopher H. Schroeder, *EPA and the Court: Twenty Years of Law and Politics*, 54 Law & Contemp. Probs. 249, 264-70 (1991); Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action*, 55-64, 82-85 (1970); *see also,* Louis M. Kohlmeir, Jr., *The Regulators and the Regulated* in *The Regulators: Watchdog Agencies and the Public Interest*, 69-82 (1969) (for a general discussion of the theory of agency capture within the context of the environment and the environmental movement of the 60's).

Nowhere was agency capture more apparent than in the environment and natural resource arena.[56] Professor Sax in his ground breaking book *Defending the Environment,* documented a number of cases in which the Department of Interior bowed to private interests in the allocation and development of public resources in a decision making process that took place outside the public view.[57] What was of particular interest to Sax was the mounting social discontent about the manner in which public agencies were making decisions about the use of the nation's natural resource. Citizen's he observed had been marginalized in the agency decision-making process. The administrative agency:

> "has supplanted the citizen as a participant [in the decision making process] to such an extent that its panoply of legal structures actually forbid members of the public from participating even in the complacent process whereby the regulators and the regulated work out the destiny of our air, water, and land resources . . . The implementation of the public interest, he [the citizen] is told, must be left 'to those who know best.'"[58]

And those who know best are the agency expert and those they regulate. Citizen's with an interest in resource management and preservation lacked the political power to be meaningful players in the agency – developer decision-making process and were relegated to the position of outsider.[59]

Both Chayes and Sax believed that public law litigation, could be used to provide disenfranchised citizens access to the decision making process. Senator McGovern in

---

[56] *See generally,* Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement,* 150 U.Pa.L.Rev. 85, 92-93 (2001-02) (discussing the rise of the environmental movement and the relationship between political power, law and social movements in the 1960's).
[57] *See generally,* Joseph Sax, *Defending the Environment: A Strategy for Citizen Action,* 3-42 (1970) (Sax 1970) (discussing a number of scenarios in which federal agencies made decisions regarding the allocation of public resources for the benefit of private interests without the benefit of public input in the decision making process).
[58] *Id.* at xvii.
[59] *Id.* at 82 – 88.

his 1970 introduction to Sax's book highlighted the importance of litigation's role in protecting the values espoused by the environmental movement:

> The powerlessness of people to participate effectively in the institutional decisions that affect their lives marks the end of a true democratic society. In the United States today frustration abounds in nearly ever area of human concern . . . [including] the reversing of an inexorable environmental tragedy, which began two centuries ago. . . [A]ccess to the courts of the United States is the most effective means for citizens to participate directly in environmental decisions and may be the only way to assure that democratic processes are brought to bear on environmental problems.[60]

Sax, like Chayes, believed the court offered citizens access to public policy development. Sax observed:

> [T]he traditional legal process is particularly responsive to this problem of citizen initiative. Not only is there no "political screening" of cases . . . [but the] elements of the judicial process strongly support the need … for citizen's to feel that they are not merely passive bystanders in making their government work. The opportunity for anyone to obtain at least a hearing and honest consideration of matters that he feels important must not be underestimated. The availability of a judicial forum means that access to government is a reality for the ordinary citizen – that he can be heard and that, in a setting of equality, he can *require* bureaucrats and even the biggest industries to respond to his questions and to justify themselves before a disinterested auditor who has the responsibility and the professional tradition of having to decide controversies upon the merits. The citizen asserts rights, which are entitled to enforcement: he is not a mere supplicant.[61]

b. Essential characteristics of public law litigation –

Three characteristics appear to be essential to effective public law litigation capable of undermining agency capture: (1) the nature of the common law, statute or constitutional provision under which relief is sought; (2) the role of the court in balancing

---

[60] McGovern, George, *Introduction* in *Defending the Environment: A Strategy for Citizen Action* at xi-xii (1970). McGovern's argument is not a new one but was espoused as early as the middle 19th century by DeTocquiville. Alexis DeTocquieville, *Democracy in America* 104 (Alfred A. Knoff 1994)(1835)

[61] Sax (1970), *supra* note 57 at 111-112. *See also,* Chayes, *supra* note 44, at 1313.

conflicting interests; and (3) the nature of the remedy. An examination of each of these elements provides insights into the operation of public law litigation.

Successful public law litigation Chayes posits requires a substantive constitutional or statutory provision which points the court in a general policy direction but which leaves room for a "wide measure of discretion" in applying underlying legislative policies.[62] Perhaps because Chayes associates the rise of public law litigation with the increase in social and economic legislation, Chayes does not explore the role if any that common law may play in public law litigation.

Sax, on the other hand, focuses on the role of the common law in the context of the public trust doctrine. He believed this common law principle could provide the legal standard necessary for successful environmental public law litigation. The public trust doctrine is derived from the Roman law principle that "perpetual use of common properties was 'dedicated to the public'" and that government should hold common properties in trust for the public. [63] This doctrine was incorporated in English common law and transported to the United States in *Pollard v. Hagan*[64] and *Illinois Central R.R. Co. v. Illinois.*[65] At common law trust lands carried with them particular duties that prohibited the state from transferring title to land under waters or the navigable waters

---

[62] Chayes, *supra* note 44, at 1295, 1314. Chayes notes that Congress is often unwilling or unable to express broad general policy objectives or orientation in social or economic legislation leaving a wide measure of discretion to the court in application of the statue. *Id.* at 1314. In a post *Chevron* world there is less latitude for the court to exercise discretion in the application of federal programs by federal agencies as changes in the American political model that "underlie the agency-judiciary-congressional relationship" have given less room discretion to courts to apply underlying legislative policy to agency actions. Glicksman & Schroeder, *supra* note 56, at 303-304. *See also,* Tarlock (2000), *supra* note 40, at 243.
[63] Sax (1970), *supra* note 57, at 163. *See also,* Joseph L. Sax, *The Public Trust Doctrine in Natural Resources law: Effective Judicial Intervention,* 68 Mich. L. Rev. 471, 475-89 (1969-70) (Sax 1969-70)) (outlining the history of the public trust doctrine in the United States.).
[64] *Pollard v. Hagan,* 44 U.S. 212 (1845)
[65] *Illinois Central R.R. Co. v. Illinois,* 146 U.S. 387 (1892)

themselves to a private party if the transfer would unduly interfere with the publics' rights to fishing, navigation, and commerce.[66] By the late 1960's this doctrine had been adopted by a number of states most notably Massachusetts, Wisconsin, and California. [67]

Sax argued that American jurisprudence should extend the concept of public trusteeship to all common pool natural resources. The philosophy of public trusteeship:

> [R]est upon three related principles. First, that certain interests – like the air and the sea – have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principle purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restrictive private benefit.[68]

When government agencies convey public resources to private individuals for private gain they violated the public trust doctrine and private litigates should be permitted to appeal to the courts to protect those resources for public benefit. The common law public trust doctrine then could provide the legal standard through which the court could compel litigants, the agencies, and ultimately the legislature to revisit public policy decisions regarding the allocation of public resources.

The second characteristic of public law litigation identified by Chayes and Sax is the courts' balancing function. The role of the court in public law litigation "is not to make public policy, but to help assure that public policy is made by the appropriate entity, rationally and in accord with the aspirations of the democratic process...to raise

---

[66] Sax 1969-70, *supra* note 63, at 477-78, 489-91.
[67] *Id.* at 491-546 (discussing the use of the public trust doctrine by courts in Massachusetts, Wisconsin and California).
[68] Sax (1970), *supra* note 57, at 165.

important policy questions in a context where they can be given the attention they deserve and to restrain essentially irrevocable decisions until those policy questions can be adequately resolved." [69] To accomplish this task public law litigation requires the trial court to apply broad public policy goals established by the legislature to situations of limited scope raised by the litigation.[70] Because the judge is insulated from narrow political pressures and bureaucratic constraints and biases[71] but must respond to the complaints of the "aggrieved parties" the court is "well situated to perform the task of balancing the importance of competing policy interests in specific situations."[72] This balancing function is facilitated by the participatory nature of the litigation process, which ensures that all with an interest in the application of a public policy to a particular situation will play an active role in the development of a remedy. In this sense the judge must become a mediator if public law litigation is to be successful.[73]

The third and final characteristic unique to public law litigation is the judicial decree, the remedy adopted by the court. Unlike private litigation where the remedy is retrospective – corrects past legal wrongs through monetary damages; the remedy in public law litigation is prospective and intended to "enjoin future or threatened action, or to modify a course of conduct presently in train or a condition presently existing."[74] The injunction is embodied in the decree, a legal order that sets out what the agency must do to lift the injunction. The goal of the decree is to modify the present and future actions of

---

[69] *Id*.
[70] Chayes, *supra* note 44, at 1307-09 (discussing the role of the court in public law litigation).
[71] Sax (1970), *supra* note 57, at 152.
[72] Chayes, *supra* note 44. at 1308; Sax (1970), *supra* note 57 at 153
[73] *Id.*
[74] *Id.* at 1296; *see also,* Sax (1970), *supra* note 57, at 193-211 (discussing the use of injunctive relief to "pause" resource development while the legislature reconsiders the policy implications of agency actions).

the agency – to require the agency implementing public policy to do so in a manner consistent with the decree as negotiated by the parties. There are four primary attributes of the judicial decree in public law litigation: (1) it is a remedy negotiated by the parties[75]; (2) it is tailored to the individual circumstances of the law suit[76]; (3) it is intended to modify the conduct of the agency[77]; and (4) it is ongoing and does not terminate until conditions negotiated by the parties and set out in the decree have been satisfied.[78]

Chayes and Sax both focus on the agency decision and the court's role in redressing the alleged failing of the agency. Democratic accountability was assured only within the context of the individual environmental decision raised in the litigation. The court would oversee the decree until it was assured of the agreed upon environmental outcome. Democratic accountability was, none-the-less an important outcome of public law litigation. Because public law litigation grew out the "failure of . . . agencies to respond to groups that have been able to mobilize considerable political resources and energy" but who have been unable to impact the decision making process because of agency capture,[79] litigation provided a means of access to the decision making process. Here the court used Congressional gaps in fundamental social legislation to find openings for greater public involvement in the decision making process:

> In enacting fundamental social and economic legislation, Congress is often unwilling or unable to do more than express a kind of general policy objective or orientation. Whether this be legislative abdication or not, the

[75] Chayes, *supra* note 44, at 1298-1308.
[76] *Id.* at 1308.
[77] *Id.* at 1296, 1298.
[78] *Id.* at 1297-98, 1302.
[79] *Id.* at 1313.

> result is to leave a wide measure of discretion to the judicial declaration. The corrective power of Congress is . . . stringently limited in practice. Only a very few judicial aberrations will cross the threshold of political urgency needed to precipitate congressional action. . . . Public law litigation is at once more and less intrusive: more, because it may command affirmative action of political officers; less because it is ordinarily limited to adjusting the manner in which state and federal policy . . . is carried forward. Its target is generally administrative rather than legislative action, action that is thus derivative rather than a direct expression of the legislative mandate. Moreover, one may ask whether democratic theory really requires deference to the majoritarian outcomes whose victims are prisoners, inmates of mental institutions, and ghetto dwellers. Unlike the numerical minorities the courts protect under the banner of economic due process, these have no alternative access to the levers of power in the system. [80]

Thus the ultimate goal of environmental public law litigation is to activate the democratic process – and not simply to obtain a legal precedent.[81] The courts could "pry open the democratic process and provoke consequences that are responsive to the merits of the controversy and [which are] more reflective of the variety of public constituencies which have an interest in the dispute."[82] Not only could the lawsuit force the agency to reconsider its decisions about resource use or allocation but it could serve provide a turning point in the conflict.[83] The litigation could attract public attention through the press[84] and ultimately could compel the legislature to reassess environmental decisions in a public forum.[85]

---

[80] *Id* at 1314.
[81] Sax (1970), *supra* note 57, at 189.
[82] *Id.* at 180-81.
[83] *Id* at 185.
[84] *Id.* at 189.
[85] Sax (1969-70), *supra* note 63, at 558-59.

2. Public Law Litigation and Destabilization Rights

The role of public law litigation in promoting political change was further explored by Sabel and Simon who, drawing upon the work of Chayes and Roberto Unger, argue that public law litigation can effectuate change in public institutions and the political decision making process.[86] Unger in his examination of democratic societies observed that politically powerful, privileged members of society (elites) exercise control over political resources, which in turn permits them to control public policy to their benefit.[87] To combat an elite's control of political processes in an empowered democracy requires a system of citizen's rights that includes destabilization rights. A destabilization right is the right of citizens to "break… open the large-scale organizations or the extended areas of social practice that remain closed to the destabilizing effects of ordinary conflict and thereby sustain insulated hierarchies of power and advantage."[88] It is "the citizen's right to prevent any faction of the society from gaining a privileged hold upon any of the means for creating the social future within the social present."[89] Citizens in democratic societies must not only have the right to correct policy decisions made for the benefit of the elite but must also have the right to create structural changes in social and political institutions to reduce the political power of elites or politically privilaged.[90]

---

[86] *See generally,* Charles F. Sabel and William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds,* 117 Harv. L. Rev. 1016 (2004).
[87] Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy from Politics a Work in Constructive Social Theory* 530-35(Verso, 2001). This is substantially similar to Sax and Chayes discussion of political blockage.
[88] *Id.* at 530.
[89] *Id.* at 531.
[90] *Id* at 532.

Sabel and Simon argue that public law litigation and courts could provide the venue for the exercise of destabilization rights.[91] To fully understand this perspective it is useful to re-examine the nature of private common law litigation. While Chayes views private litigation as a self-contained system that settled private claims[92] Sabel and Simon argue that all litigation performs a broader societal regulatory function inherent in the concept of "precedent".[93] To the extent that a case has precedential value it has effects that extend beyond the parties in the original litigation. The effect is not necessarily linear, that is it does not simply affect subsequent legal decisions but it may impact the market, it may establish industry standards, or it may affect the allocation of public and private resources.[94]

Take for example the influence of product liability cases on industry manufacturing standards.[95] Imposing liability on manufacturers of unsafe or defective products can create new industry norms such as the requirement that industry should not be permitted to sacrifice public safety for private profit, a norm derived from the infamous Ford Pinto case, *Grimshaw v. Ford Motor Co*.[96] *Grimshaw* involved the design of the Pinto fuel system, a design which Ford knew would result in an increased risk of

---

[91] Sabel & Simon, *supra* note 86, at 1020.
[92] Chayes, *supra* note 44, at 1282-83 (describing the characteristics of private litigation).
[93] The concept of precedence refers to the binding effect of a court's decision on subsequent legal actions covering similar issues and facts heard by subordinate courts or on the court itself in future cases and may also serve as persuasive authority in courts of other jurisdictions. The binding affect of presence is referred to as *stare decisis.* Sabel & Simon, *supra* note 86, at 1057.
[94] *Id.* at 1058.
[95] *See generally,* Michael J. Rusted, *How the Common Good is Served by the Remedy of Punitive Damages,* 64 Tenn. L. Rev. 793 (1997). Rusted engages in a detailed discussion of the beneficial impact of punitive damage awards on industry norms surrounding product safety.
[96] *Grimshaw v. Ford Motor Co.,* 174 Cal. Rept. 348 (Cal. Ct. Ap. 1981).

serious injury or death in collisions in excess of 20 or 30 miles per hour.[97] The fix was both simple and inexpensive, however, after conducting a cost benefit analysis Ford opted to forgo the correction reasoning the compensation it would pay for personal injuries was less than the cost of recall and correction.[98] The Grimshaw family sued Ford after a stalled Pinto was rear ended and exploded killing the Pinto driver and one of the Grimshaw children.[99] The court upheld an award of combined punitive and actual damages in excess of $3.5 million.[100] The reasoned, Ford could not trade public safety for profit. The outcome in the *Grimshaw* case was twofold. It provided a monetary remedy to the Grimshaws settling the dispute between the Grimshaws and Ford. The suite also had a secondary impact; the litigation gave rise to a change in the duty of care owed by the industry to the public. The rationale of the *Grimshaw* court was applied by courts across the nation in cases ranging from the safety of tires to breast implants. It resulted in a new industry norm – manufacturers could not compromise public safety for the bottom line.[101]

Grimshaw illustrates the "creative destruction" power of common law norms to reform institutions. Note that the new industry norm was a secondary outcome and was not forced upon industry by the court order. The court's judgment merely settled a dispute between two litigants. But the specific rule of the case and the damage award, including in the *Grimshaw* case punitive damages, reached across industry to change industry behavior. Industry was free to choose if and how to modify its behavior. But by

[97] *Id.* at 384.
[98] *Id.* at 397-99.
[99] *Id.* at 360-62.
[100] Rusted, *supra* note 95, at 825.
[101] *Id.* at 825-28.

holding Ford liable for the "consequences of socially unreasonable practices" the court "puts pressure on weaker, less adept firms. Some . . . improve[d] their practices; some . . . [would] go out of business. When a court raises standards for the industry it puts pressure on all firms. The reasonableness norm is continuously revisable; it is elaborated in the context of current social circumstances. So firms can rarely sit back… [t]hey are likely to experience some pressure to improve."[102] Through this creative destruction process the common law becomes both distributive and reflexive.[103]

In public law litigation this creative destruction process takes on an added dimension in the embodiment of destabilization rights – the right of citizens in a democratic society to "disentrench or unsettle a public institution when, first it … fail[s] to satisfy minimum standards of adequate performance and, second, it is substantially immune from conventional political mechanisms of correction."[104] Sabel and Simon argue that successful destabilization rights litigation[105] requires "first, the failure [of the government decision-maker] to satisfy minimum standards of adequate performance and second, political blockage."[106]

Sabel and Simon do not provide a great deal of insight into the elements of "minimum legal standard" other than to suggest that such standards are uncontested, uncontroversial or based on "industry standards" developed through custom and practice.

---

[102] Sabel & Simon, *supra* note 86, at 1060.
[103] *Id.* at 1060-62.
[104] *Id.* 1t 1062.
[105] Sabel and Simon suggest that not all public law litigation has destabilization potential. After examining a series of cases ranging from education reform to prison reform to mental health care they conclude that public law litigation which has a command and control orientation is less likely to give rise to destabilization. That is litigation that results in a set inflexible decree that dictate the means of implementation are less likely to result in destabilization. *Id.* at 1021-22.
[106] *Id.* at 1062.

As support for this claim they point to education standards or standards promulgated by the Federal Bureau of Prisons.[107] This vein of reasoning suggests to the environmental practitioner that the basis of destabilizing environmental litigation should be the violation of some established common law principle or environmental law or legal standard such as the provisions of the Endangered Species Act (ESA) or violation of discharge limits under the CWA. However, as the environmental practitioner knows violation of these standards is rarely clear or uncontroversial. Take for example the phrase "substantial portion of a species range" in the ESA. The ESA defines an endangered species as a species threatened with extinction throughout a significant portion of its range.[108] Prior to 1990 there was little debate over the meaning of the phrase "significant portion of a species range." Yet as illustrated in Chapter 2, the meaning of the phrase "significant portion of a species range" has lately been the topic of substantial debate both within the Fish and Wildlife Service and in the courts.[109]

The second requirement for destabilizing public law litigation is political blockage. Political blockage occurs when the public policy decision-making infrastructure "is substantially immune… [to] conventional political mechanisms of correction" and are therefore steeled to certain types of political pressures.[110] Sabel and Simon identify three types of political blockage:

1. Majoritarian political control occurs when the political system is unresponsive to the interest of a vulnerable, stigmatized minority. The minority may be a racial group or "a group socially stigmatized on the

[107] *Id.* at 1063-64.
[108] 16 U.S. C. § 1532 (6)(2000).
[109] *See generally,* Enzler & Bruskotter, *supra* note 28 (discussing generally the definition of the phase "substantial portion of a species range" and its implication for species and habitat preservation).
[110] Sabel & Simon, *supra.* note 86, at 1062, 1064.

basis of conduct or disposition, as with prisoners and mental health patients."[111]

2. The "'logic of collective action' – in which a concentrated group with large stakes exploits or disregards a more numerous but more diffuse group with collectively larger but individually smaller stakes."[112]
3. A hybrid of one and two.[113]

This second category of political blockage encompasses the concept of "agency capture" which Chayes, Sax, Sabel and Simon[114] suggest is the primary form of political blockage affecting environmental issues – where the relationship between the politically powerful or elites and government agencies result in the allocation of the use of public resources for the benefit of the politically powerful/elite. The role of destabilizing litigation is to destabilize or break open this political blockage.

How does public law litigation promote destabilization? Sabel and Simon suggest that the key to destabilization is found in the experimentalist remedy.[115] The experimentalist remedy has three general characteristics: (1) it involves deliberative negotiation by stakeholders; (2) it "takes the form of a rolling rule regime"; and (3) it is transparent.[116] To this we might add a fourth characteristic which seems evident in reviewing the litigation summary set out by Sabel and Simon that is the remedy is ongoing.

As noted previously, because the remedy in public law litigation does not resolve "legal disputes" but addresses policy decisions made by the public agency the legal issue is not easily resolved by the award of damages. Instead the remedy looks to modify the

---

[111] *Id.*
[112] *Id.* at 1064-65.
[113] *Id.*
[114] Sabel & Simon, *supra* note 86, at 1065.
[115] The purpose of litigation is twofold, to determine liability – resolve the legal dispute or declare legal rights or legal norms – and to develop a remedy that encompasses the refined legal norm. *Id* at 1054-55.
[116] Id. at 1067-72.

agency's policy decision. In the traditional command and control decree the court designs a remedy to correct the agency action and commands the agency to implement the remedy. When a court uses the experimental remedy the court calls upon the litigants and other stakeholders to negotiate a remedial plan in a deliberative process.[117] This deliberation is often overseen by a special master and goes beyond traditional negotiation requiring as it does, stakeholders to gather information, share information, set agendas and ground rules for discussions and decision-making, set goals, and reach consensus about a remedial regime that implements the remedial goals. Through this process the stakeholders build relationships that had, heretofore, been non-existent, these relationships facilitate the creation of trust which increases the capacity of the stakeholders to undertake future collective problem solving. [118]

Agreements made by the stakeholders in this deliberative process are often provisional in that an agreement in one area may be dependent upon unanticipated future contingencies not understood when deliberation commenced. Thus stakeholders continually reassess and reposition themselves as knowledge becomes deeper or as time reveals more information. Often the complexities and futuristic nature of the issues requires stakeholders to make decisions with incomplete knowledge. To address this issue the stakeholders focus on: (1) outcome norms and goals, (2) monitoring and assessment of the norms and goals through performance measures, and (3) reassessment of norms and goals based on information gleaned from attempts to realize agreed upon norms and goals and from the success or failure of the negotiated remedy to meet

[117] *Id.* at 1067.
[118] *Id.* at 1068.

performance measures. Sabel and Simon refer to this process as the "rolling rule regime".[119] This process requires parties to interact and reassess over time and requires the court to maintain ongoing oversight over the litigation until the goals set out in the decree developed through this deliberative process are accomplished.

The final essential element of the experimentalist remedy is transparency in both the process used to develop the decree and the ongoing assessment of compliance with the agreed upon goals and measures set out in the decree. The court, through the rolling rule regime, forces decisions that had previously been made in semi-public or non-public forums to be made publicly and subjects these decisions to ongoing public scrutiny as the parties work toward establishing, implementing, and revising implementation strategies to meet the goals or performance measures established by the stakeholders in the decree.[120]

Figure 1.2 illustrates the elements of the experimentalist remedy in the context of Sabel and Simon's destabilization theory as well as the outcomes of the litigation. In this framework the agency and the political elite make a decision that adversely affects the environment. The citizen is blocked from this decision-making process. To gain access to the decision making process and alter the environmental impact of the decision the citizen files a lawsuit against the agency at which point the elite may join the lawsuit as an indispensable party. Shortly after the commencement of the lawsuit the court issues a temporary injunction, temporarily halting the adverse agency decision and thus the environmental harm. The court then rules on the merits of the case but refrains from

[119] *Id.* at 10 69-70.
[120] Sabel and Simon, *supra* note 86, at 1071-72.

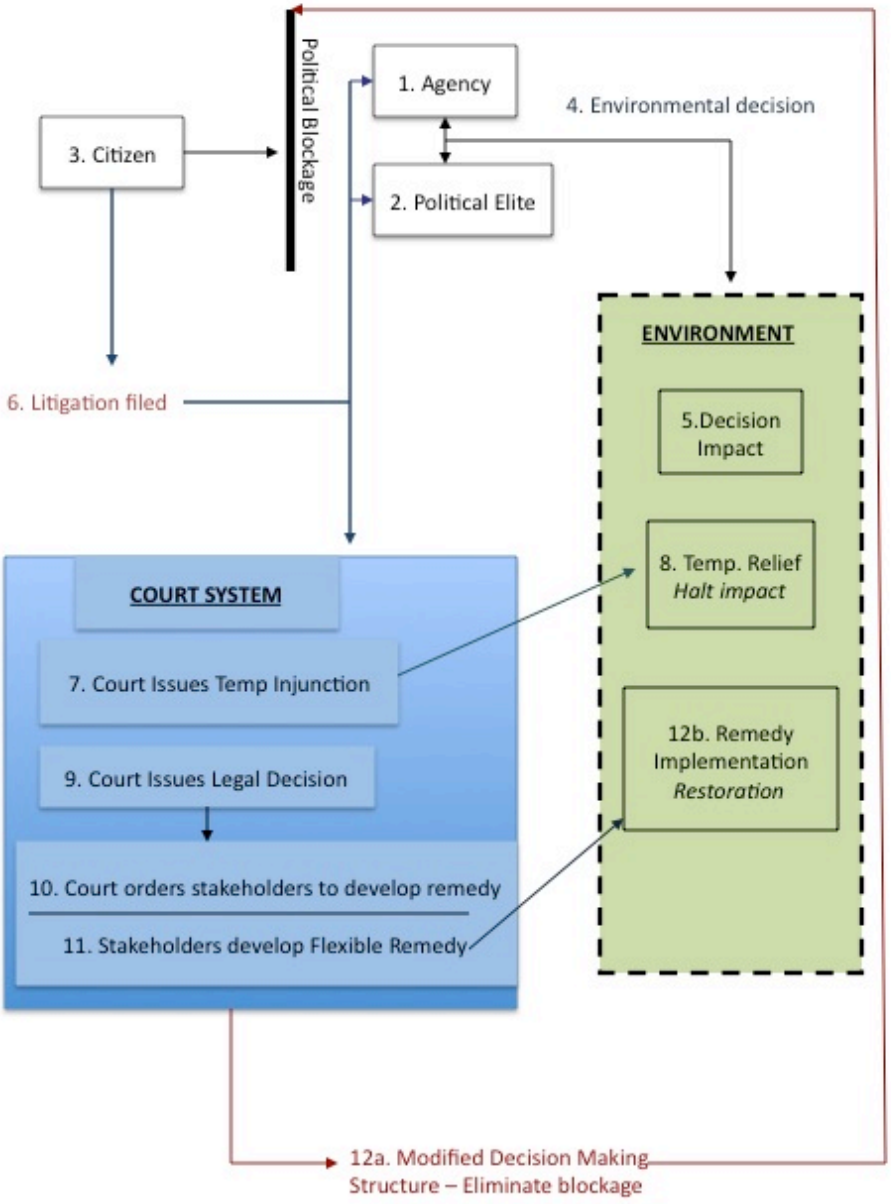

Figure 1.2: Sabel and Simon Destabilization Model

issuing a decree instead ordering the stakeholders (the citizens, agency, elites and other interested parties) to develop and implement a remedy through a deliberative negotiation

process. The court retains jurisdiction over the litigation until the parties develop and implement the remedy. The new remedy permanently alters the environmental decision and the ongoing deliberation between stakeholders breaks open the political blockage. In the context of environmental law litigation the mid-term outcome of the experimentalist remedy is the flexible remedy establishing environmental goals or outcomes. A secondary and longer-term outcome of the experimentalist remedy is the destabilizing effects of the litigation.[121]

Sabel and Simon identify six potential destabilizing effects of public law litigation on political blockage:

1. *The veil effect*. The deliberative process of negotiating the experimental remedy places the agency in a position of uncertainty. The agency can no longer rely on past predictable patterns and relationships with elites. The agency must submit to uncertain regimes designed by the stakeholders. This means that the agency must reorient its goals, partners and "understanding of fruitful problem-solving strategies."[122]
2. *The status quo effect*. Although the parties do not know what the outcome of the experimental remedy will be they know that it will be different than the status quo. The Court's liability determination stigmatizes the status quo, which in turn reduces the risk of change. Change becomes the foregone conclusion of the remedy as the parties are compelled to abandon the status quo.[123]
3. *The deliberative effect*. Because the status quo is no longer an option the parties are required to explore and persuade others of the merits of an alternative remedy. This exploration results in an outcome that is more fully explored and developed by ***all*** of the stakeholders.[124]
4. *The publicity effect.* The vindication of the plaintiff's claim brings public attention to the problem and public scrutiny increases.[125]
5. *Stakeholder effects*. Sabel and Simon identify a number of potential stakeholder effects. First the liability determination empowers the plaintiff/citizen and legitimizes their claim giving the plaintiff a viable

[121] *Id.* at 1073-074.
[122] *Id.* at 1074-75.
[123] *Id.* at 1075-76.
[124] *Id.* at 1075-76.
[125] *Id.* at 1077.

position at the table.[126] Second, the liability determination and remedy negotiation increases the influence of the plaintiff and thus decreases the influence of other traditional agency stakeholders or power elites.[127] As the remedy progresses new stakeholders are permitted to come forward.[128]

6. *The web effect.* Finally, Sabel and Simon suggest that the outcome of litigation may have impacts on other institutions and practices. Thus "[a] discrete disturbance causes pressures that ramify throughout other areas. In particular, pressures spill back and forth between public and private realms" in a process of "iterative disequilibriation and readjustment."[129] Thus, for example, a concern about discrimination may lead to a concern about quality of service to the disadvantaged.[130]

As illustrated in Figure 1.2, Sabel and Simon theorized that these destabilization effects not only alter the relationship between the public agency and its established constituency (the elites) but could, hypothetically alter the relationship between the agency and the plaintiffs and, more fundamentally, alter the manner in which the agency implements public policy and programs. In the context of environmental litigation this change could, hypothetical open the door to ecosystem protection.

B. The Role of Public Litigation – Perspectives from the Social Sciences

Social scientists too have explored the extent to which litigation can cause social change although they disagree about the extent to which law might matter to social change. [131] In his groundbreaking work *The Politics of Rights,* Stuart Scheingold posited that law and litigation in particular could alter public policy but only if players were

[126] *Id.* at 1077.
[127] *Id.* at 1077-78.
[128] *Id.* at 1079.
[129] *Id.* at 1081.
[130] *Id.*
[131] Michael McCann, *Law and Social Movements: Contemporary Perspectives,* Annu. Rev. Law. Soc. Sci. 17, 19 (2006).

willing to abandon conventional legal perspectives in favor of a political approach to law and change.[132]

According to Scheingold there are two views of law in American society – the "myth of rights" and the "politics of rights". The myth of rights has been the dominant American view. This view posits that rights imbedded in the Constitution and law provide American democracy and politics "symbolic legitimacy". These symbolic rights such as the right to own property, the right to contract freely "reflect [the] values which are the building blocks of [American] political ideology."[133] This political ideology is the basis for the "myth of rights" which has at its core a "legal paradigm – a social perspective which perceives and explains human interactions largely in terms of rules and of the rights and obligations inherent in rules".[134] Thus as a nation we believe that the business of developing public policy "is and should be conducted in accordance with patterns of rights and obligations established under law."[135] Reform lawyers, who are students of this view, tend to distrust political processes in favor of exclusively "legal" approaches to policy change including litigation and in so doing "grossly overestimate the political impact of court rulings."[136] This legal frame of reference Scheingold argues:

> tunnel[s] the vision of both activists and analysts leading to an oversimplified approach … that grossly exaggerates the role that lawyers and litigation can play in a strategy for change. The assumption is that

---

[132] Stuart A. Scheingold, The Politics of Rights: lawyers, public policy, and political change, 4-7 (Univ. of Mich. Press, 2nd ed. 2004). Scheingold was the "first to develop a systematic argument for the proposition that litigation and court decision could be used as part of a broader strategy to organize and mobilize political action." Michael Paris, *The Politics of Rights: Then and Now,* 31 Law & Soc. Inq. 999, 1006 (2006).
[133] Scheingold, *supra* note 132, at 13
[134] *Id.*
[135] *Id.*
[136] Robin Stryker, *Half Empty, Half Full or Neither: Law, Inequality and Social Change in Capitalist Democracies,* Annu. Rev. Law & Soc. Sci. 69, 77 (2007).

> litigation can evoke a declaration of rights from courts, that it can, further be used to assure the realization of these rights; and finally, that realization is tantamount to meaningful change. The myth of rights is, in other words premised on a direct linking of litigation, rights, and remedies with social change.[137]

In truth, Scheingold argues, the matter is much more complex. Litigation can only be successful in promoting social change if it is directed "to the redistribution of power"[138] that is if it is used "politically". Thus students of the "politics of rights" view take an inherently political approach to law and legal rights. Litigation is a *political resource* "of unknown value *in the hands of those who want to alter the course of public policy*" [139] no different then any other political resource. The value of law and litigation as a political resource is dependent upon the manner in which those seeking social change use it. There are two elements essential to the effective use of law and litigation to promote social change: (1) a pre-existing group of political activists promoting social change and (2) legal mobilization or the use of law or, in Scheingold's words, "rights" to develop political resources that can be used by activists in a larger context to promote social change.

---

[137] Scheingold, *supra* note 132, at 5.
[138] *Id.* at 6.
[139] *Id.* (emphasis added). By way of example of the complex relationship between litigation and social change Scheingold, in the Preface to the second edition of *The Politics of Right* notes: "The distinctive message of *The Politics of Rights* is, however, that constitutional litigation did, by way of politics of rights, contribute *indirectly* to the emergence and success of the civil right movement. On the other hand, the judicial validation of civil rights claims generated hopes that fed the organizing efforts of African Americans and their supporters. On the other hand, the "massive" legal resistance to judicial decrees – not to mention the television-documented spectacle of *extralegal* resistance – sparked the support of northern liberals. Taken together, these unintended consequences of constitutional litigation helped to destabilize the political stalemate that had protected segregation since the end of Reconstruction." *Id.* at xxx.

1. Preconditions of Successful Change Litigation

An organized social movement is viewed by social scientists as an essential precondition to successful legal mobilization.[140] The term social movement has been given a variety of definitions by social movement scholars. Tilly defines a social movement as:

> A sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation, in the course of which those persons make publicly visible demands for changes in the distribution or exercise of power, and back those demands with public demonstrations of support.[141]

And Tarrow defines a social movement as "sequences of contentious politics that are based on underlying social networks and resonant collective action frames, and which develop the capacity to maintain sustained challenges against powerful opponents…Collective action becomes contentious when it is used by people who lack regular access to institutions, who act in the name of new or unaccepted claims, and who behave in ways that fundamentally challenge others or authorities." [142] While legal theorists such as Sable, Simon and Sax might define a social movement as an organization of person's seeking to eliminate political blockage to gain meaningful access to public decision-making forums for purposes of this thesis I will use Tarrow's definition.

---

[140] *See generally,* Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts* in *Comparative Perspective*, 21 (1988) and Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, 279-80 (1994) McMann (1994). McCann defines legal mobilization as the translation of a want or desire into a demand which is framed as an assertion of a claim of legal right. McCann (1994) at 6.

[141] Charles Tilly, *Social Movements and National Politics* in Statemaking and Social Movements. 276, 306(C. Bright and S. Harding eds., Univ. of Mich. Press, 1984).

[142] Sidney Tarrow, Power in Movement: Social Movements and Contentious Politics, 2-3 (Cambridge Univ. Press, 2nd ed. 1998). Scheingold himself believed that social movements were the "most potent "force to bring about social and political change. Paris *supra* note 132 at 9.

McCann, in his overview of the use of litigation by social movement organizations (SMOs) in the context of social and political change has made the following observations about the unique importance of SMOs in the struggle for social change which influences how they approach litigation:

1. [S]ocial movements aim for a broader scope of social and political transformation than do other more conventional political activities. Although social movements may press for tangible short-term goals within the existing structure of relations, they are animated by more radical aspirational visions of a different, better society…
2. [S]ocial movements often employ a wide range of tactics, as do parties and interest groups, but they are far more prone to rely on communicative strategies of information disclosure and media campaigns as well as disruptive symbolic tactics such as protests, marches, strikes, and the like that halt or upset ongoing social practices…
3. [S]ocial movements tend to develop from core constituencies of non-elites whose social position reflects relatively low degrees of wealth, prestige, or political clout…the core indigenous population of social movements tend to be "the non-powerful, the non-wealthy and the non-famous.[143]

In other words, the SMO seeks ***both*** an immediate political decision to redress a past wrong, ***and*** structural social change, which, in the words of destabilization rights theorists, is the elimination of political blockage and a change in the policy decision-making structure. The SMO seeks access for the disenfranchised. In addition to these policy outcomes the SMO also seeks to build the movement itself, thereby increasing its power and the likelihood of change.[144] We might view the desired outcomes of the SMO as threefold: (1) short term political gains (policy outcome), (2) meaningful access to policy-making forums (policy structure outcome), and (3) movement building. In the

[143] Michael McCann, *Law and Social Movements: Contemporary Perspectives,* Annu. Rev. Law Soc. Sci. 17, 23-24 (2006)(McCann 2006).
[144] McCann (1994) *supra* note 140 at 282.

context of social movement theory law becomes a political resource that can be mobilized to accomplish some or all of these goals.[145]

SMOs matter to change litigation because, as McCann notes SMOs aim for broader social and political transformation than do traditional litigants and thus while SMOs may look to short-term gains their primary push is for structural change — changes that alter the manner in which decisions are made.[146] In addition, SMOs that use litigation as a regular strategy are more likely to have pre-existing networks that include activists and other organizations that can mobilize the resources necessary to bring the litigation and take advantage of litigation outcomes.[147] SMOs are more likely to be "repeat players" in the litigation game permitting them to approach litigation as a strategy thereby increasing the likelihood that litigation will result in "redistributive change."[148] Finally, as observed by Harris, if have nots are represented throughout the litigation the court is more likely to favor their perspective.[149] Thus social science scholars believe litigation is more likely to result in redistributive change if the litigation is brought by an SMO. If the latter is true then the destabilization framework can be modified to reflect

---

[145] *See generally,* Bob Edwards and John D. McCarthy, *Resources and Social Movement Mobilization,* in *The Blackwell Companion to Social Movements*, 116-152 (David A. Snow, Sarah A. Soule and Hanspeter Kriesi ed., 2004) (containing a discussion of resources and their use in social movement mobilization).
[146] McCann (2006) *supra* note 143, at 23-24.
[147] Stryker (2007), *supra* note 136 at 81.
[148] Joel B. Grossman, Stewart Macaulay and Herbert M. Kritzer, *Do the "Haves" Still Come Out Ahead?* 33 Law & Soc'y. Rev. 803 (1999); see *also,* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change,* 9 Law & Soc'y. Rev. 95 (1974). Galanter analyzed the impact of litigation based on the nature of the litigant. He posited that individuals or organizations that have only occasion recourse to the courts (one-shot players) were less successful in leveraging litigation to bring about social and political change then repeat players, litigants who were engaged in similar pieces of litigation over time. One shot players have higher cost, are more focused on the outcome of individual lawsuits then the long term picture and are more likely to settle without obtaining redistributive relief.
[149] *See generally,* B. Harris, *Representing homeless families: repeat player implementation strategies,* 33 Law Soc. Rev. 911 (1999)

that successful destabilization litigation requires more than a citizen lawsuit, it requires a lawsuit brought by an active SMO.

According to Scheingold, the second precondition to using law to promote social change is a litigant with a political frame of reference – a litigant willing to link litigation strategy to political mobilization. Litigation, Scheingold argued, can be a useful tool for redistributing power and influence in the political arena (political mobilization) and, in this way, affect the balance of forces.[150]

To understand the role of litigation in changing public policy it is important to understand the nature of political resources and their relationship to law.[151] Legal mobilization theory views law as a political resource which people seek to control to promote their own interests or ideas over those of another.[152] Political power is the control of political resources including law and the exercise of power is the mobilization of those resources to control the outcome of political conflicts[153] or conflicts over public policy outcomes. Thus law is a strategic resource in the context of social struggles. Turk suggests that there are five types of political resources represented in law:

---

[150] Scheingold, *supra* note 132, at 8. *See also,* Paris, *supra* note 132. at 8-10. (Paris' work contains an excellent synopsis of Scheingold's theory of the politics of right).

[151] What constitutes a resource in the context of a social movement somewhat depends upon the theory of social movements used by the scholar. Scholars of the rational choice or resource mobilization theory of social movements focus on the means available to collective actors to facilitate mobilization of social movements. Resources included money, time, and human capital, to name but a few. These resources were internal to the SMO. Tarrow, *supra* note 142, at 15. More recently, Tarrow, in his synthesis of social movement theory argued that people engage in contentious politics when political opportunities are presented to them, in this case a resource may be either internal to the SMO in the case of money or power and leveraged to create change, or it may be external to the SMO in the form of an external opportunity, an opening or access point. *Id.* at 19-20.

[152] Austin T. Turk, *Law as a Weapon in Social Conflict,* 23 Soc. Prob. 276, 280 (Feb., 1976). *See also,* McCann (2006), *supra* note 143, at 21.

[153] Turk, *supra* at note 149, at 280.

1. *War or police power.* Generally referred to as *enforcement power,* police power is the implied threat of physical coercion to enforce a legal decision to your benefit.[154]
2. *Economic/resource power*, Resource power is the use of law to allocate or reallocate natural resources or economic wealth[155] as illustrated by anti-trust laws or subsidies in the 2007 Farm Bill.[156]
3. *Political power*, Political power refers to access to the processes by which public policy decisions are made including access to those who make the decisions, controlling the manner in which the decision is made, and the criteria applied in the decision making process.[157]
4. *Ideological power.* Ideological power relates to the manner in which humans comprehend or manage problems of social interaction.[158]
5. *Diversionary power.* The power to use of the lurid aspects of law in the media "in the name of 'human interest' and "information" to divert public attention.[159]

The ideological power of law is most closely correlated with framing in the context of social movements. A "frame" is a "schemata of interpretation" that permits individuals "'to locate, perceive, identify, and label'" events and occurrences in their lives and, in the larger world, allows them to function, organize their experiences, and guide their actions.[160] Many types of frames can be defined but from the perspective of an SMO "collective action frames" are the most meaningful. Not only do collective action frames simplify and condense information but they are used by SMOs to mobilize "potential adherents and constituents" thereby building the SMO, to garner "bystander support", which in turn increases legitimacy of the SMO and its views and helps to

---

[154] *Id.*
[155] *Id.*
[156] *Farm Bill Feeds Greed,* Los Angeles Times (Mar. 21, 2008) *available at* http://www.latimes.com/news/opinion/la-ed-hunger21mar21,0,3937956.story last visted May 22, 2008.
[157] Turk, *supra* note 149, at 281.
[158] *Id.*
[159] *Id.*
[160] Robert D. Benford and David A. Snow, *Framing Processes and Social Movements: an Overview and Assessment,* Annu. Rev. Sociol. 611, 614 (2000) *citing* Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience,* at 21 (1974).

demobilize antagonists.[161] In this context the potential ideological and diversionary power of law can be used by the SMO in collective action framing to both build the SMO and to garner bystander support increasing the legitimacy of preferred policy outcomes.

It is generally conceded among sociologists that law is a political resource that supports prevailing social relationships.[162] If law is to matter in the struggle for social and political change then the power of law – the political resources it affords – must be made available to the SMO as a resource in the struggle for change. This process, known as legal mobilization is an attempt to translate the SMO's desire into an assertion of a lawful claim of right, to transform or to reconstitute the terms of the social and power relationships within polities.[163]

What role does litigation play in this process? Social scientists seem to agree that litigation can matter but only if it is used as part of a broader strategy to organize and mobilize political action resulting in the redistribution of political power.[164] It is the redistribution of political power and not litigation that brings about meaningful change. Thus Stryker in her overview of studies examining the relationship between SMOs and litigation concludes:

> Overall, maximizing real world inequality reduction through law requires combining a number of factors or conditions. Law interpretation and enforcement must be subject to sustained social movement pressure from below through a combination of litigation and mass political mobilization. Such pressure from below must be accompanied by political entrepreneurship among law enforcers within the state and/or by the participation of technically savvy and ideologically committed representatives of the have-nots in law implementation efforts. And

[161] *Id.*
[162] McCann (2006), *supra* note 143, at 23.
[163] *Id.* at 21-22.
[164] Stryker, *supra* note 140, at 76.

> within-the-state and within implementation entrepreneurship must be mobilized for effects-oriented interpretation and enforcement of welfare-oriented legislation.[165]

From the perspective of a destabilization framework, if litigation is to facilitate social change then litigation must alter the distribution of some or all of the political power associated with law. That is litigation should alter the manner in which rights are enforced, redistribute economic wealth or access to natural resources, break political blockage, and/or reframe the issue in a manner consistent with social and political change.

2. Elements of Successful Legal Mobilization

What then, from a sociological perspective are the requirements for successful legal mobilization and how do they inform the destabilization framework? Social science scholars do not spend a great deal of time looking at what goes on in the court room rather they focus on what comes out of the litigation process, that is the court order, legitimacy and bystander perceptions of the SMOs legal position. Social scientists are fairly uniform in their belief that it may not matter whether the SMO prevails in the litigation what is important is how the litigation is used. For example, McCann's work on pay equity shows that merely "parading lawyers" and threatening litigation "provided leverage for negotiations in official policy forums…. [L]itigation provided the movement one of its most consistently potent leveraging resources in negotiations… even though the courts were unreliable allies."[166]

---

[165] *Id.* at 88.
[166] McCann (1994), *supra* note140, at 280.

In the event that the court does issue an order that inures to the benefit of the SMO. Social Scientists who argue from a "constrained court" view are quick to point out that court orders are not self-enforcing and "the contested nature of issues of significant social reform makes it unlikely that the popular support necessary for implementation [of the court order] will be forthcoming."[167] Even proponents of a "dynamic court" view[168] note that court orders supporting strategic change are not in and of themselves self-executing and are likely to be opposed by elites, bureaucrats and special interests. Court orders are more likely to be enforced and result in social change if:

1. The order offers positive incentives to induce compliance – that is there is some benefit to compliance.[169]
2. Some or all of the parties are willing to impose costs to induce compliance. If the failure to implement the courts' decision results in legislative or administrative actions that impose costs the order has a greater chance of implementation.[170]
3. The court's order provides "leverage, or a shield, cover, or excuse" to persons in positions to implement the change who are willing to act but have been historically unable to do so.[171]
4. The court order can be implemented through market mechanisms.[172]
5. There is ongoing court oversight.[173] Ongoing judicial oversight is believed to create a space for those blocked from the decision making process to participate in the decision making process.
6. The members of the social movement are permitted to participate in the decision making process.[174]

---

[167] The Constrained Court view is premised on the belief that courts do not generally produce significant social reform because of the "limited nature of constitutional rights, the lack of judicial independence, and the judiciary's inability to develop appropriate policies and its lack of powers of implementation." Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*, at 10 (1991).
[168] Proponents of the Dynamic Court view argue that courts can produce social reform when used effectively my SMOs. *Id.* at 21-22.
[169] *Id.* at 32-33. (Rosenberg notes that the benefits need not be monetary.)
[170] *Id.* at 33.
[171] *Id.* at 35.
[172] *Id.* at 33. Stryker in her review of research on the politics of enforcement notes that corporate organizations are traditionally successful at defending against implementation of court orders where they are able to argue that enforcement interferes with economic viability. Stryker, *supra* note 136, at 84 (referencing studies by Melnick, Yeager, and Nelson and Bridges)
[173] Harris, *supra* note 148, at 933.
[174] *Id.*

7. The remedy fixes responsibility for and monitors the impact of organizational change and its outcome.[175]

C. The Role of Public Litigation – A Hypothetical Framework

The destabilization model offers some but not all of these features identified by social scientists. For example, the very nature of the flexible remedy identified by Sable and Simon is premised on ongoing court oversight of a negotiated remedy that is reflexive – subject to ongoing adjustment over time. The negotiated nature of the remedy offers an incentive to the haves (the elite) to participate in the negotiation process[176], it permits the have nots to participate in the design of the remedy through negotiation and it provides leverage or coverage to the administrative agency charged with implementation of the remedy. The fact that the negotiated remedy is ordered by the court helps give the have nots a voice in the negotiation process and ongoing court oversight increases the probability that their voice will be meaningful over time. In addition, the ongoing court oversight permits an outcome or goal based remedy that can be monitored by the parties over time. The model does not necessarily assure that the negotiated remedy will be premised on market mechanisms and does not address the outside pressures that the have nots might apply to assure compliance with the remedy.

The success or failure of litigation in bringing about social change will ultimately be measured by whether the litigation results in the reallocation of power – the creation of political resources available to the SMO and the ability of the SMO to leverage these

[175] Stryker, *supra* note 136, at 90.
[176] This incentive is developed through what Sabel and Simon have characterized as the "veil effect", "status quo effect" and the "deliberative effect" of destabilizing public law litigation. *See generally, supra* at 30.

resources to accomplish change in the nature of: (1) short term political gains (policy outcome), (2) meaningful access to policy-making forums (policy structure outcome), and (3) movement building. The success of litigation must be measured both by the extent to which the litigation increases the SMO's access to political power and the ability of the SMO to leverage that power into long term change. This involves not only the litigation itself, but also a reflexive relationship between the litigation (what happens in the court room) and how the litigation is used outside of the courtroom (often accomplished through framing).

Figure 1.3 illustrates how this combined frame might operate in the context of environmental litigation designed to restore ecosystems. In this instance the Agency and the elite make a decision to develop a resource based solely on input from a single power elite for example the California Water Resource Board decision to allocate all of the water from the Mono Lake tributaries to the City of Los Angeles at the request of the Los Angeles Department of Water and Power. The citizen and public interest groups are blocked from participating in the decision making process and the decision results in the near collapse of the ecosystem. In response an SMO is formed or an existing SMO picks up the cause and files a lawsuit against the agency to compel the agency to modify its decision. Elites participate in the litigation as indispensable parties. The Court upon motion of the SMO issues a temporary injunction temporarily halting the agency decision. The impact of the temporary injunction is two fold: (1) the environmental damage is stayed (short-term policy change) and (2) the court order provides legitimacy to the SMO. The SMO uses the temporary injunction to help reframe the issue for the

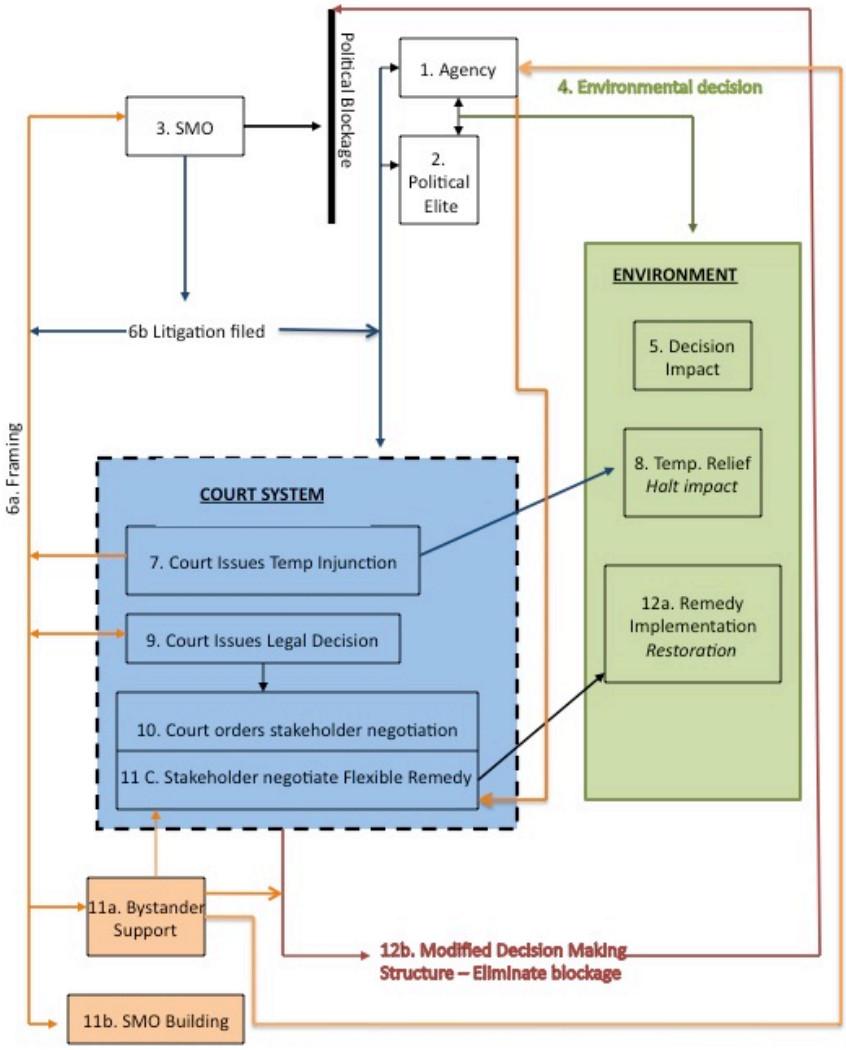

Figure 1.3: Modified Destabilization Model

media and the public that in turn increases SMO membership and bystander support. The SMO also uses increased legitimacy and bystander support to increase pressure on the agency. The framing power of the SMO is increased when the court issues its legal opinion and orders the stakeholders (the agency, the SMO, the elite, and other interested parties) to negotiate a remedy rather than issuing a command and control consent decree. The legal order is used by the SMO in its ongoing framing process to increase bystander

support. Bystanders increase political pressure on the agency and other stakeholders to create a new frame, to develop a remedy that preserves the ecosystem (short-term policy change). The development of the new frame, the ongoing court oversight to create a new remedy and the increased political pressure on the agency to abandon traditional alliances and to develop new environmental protection regimes results in new decision making models and the collapse of political blockage (long term change).

IV. RESEARCH METHODS & OBJECTIVES

The three research papers included in this dissertation explore the legitimacy of the modified destabilization frame in the context of litigation intended to protect and rehabilitate watershed-based ecosystems. These papers analyze whether litigation intended to protect and rehabilitate ecosystems resulted solely in short-term policy gains or whether the court's use of its enforcement power also resulted in the reallocation of political resources in a manner consistent with the goals of the SMO and if not under what conditions such reallocation occurs. They seek to discover under what conditions litigation results in modification of political power – eliminate political blockage. Does litigation create conditions where the SMO is granted access to the decision making process? Does litigation permanently alter the manner in which environmental decisions are made? To what extent did the SMO use the litigation for framing? And finally, to what degree is the success of the litigation strategy dependent upon the reflexive use of all of multiple resources?

A. Methods – The Historic Narrative

How do we determine what causes social change? Ragin argues that the role of the sociologist is to identify order in complex social phenomena.[177] However, the causal complexity of social phenomena is not easily unraveled.[178] In the context of historic events surrounding social change, historical sociologists use the tool of narrative to tell us both what happened and to explain why it happened the way it did.[179] Using the history of events to explain how social change occurs requires the marriage of both theory – the operating assumptions about how the world operates – and the method of investigation.[180] By comparing historical cases to "theoretically derived pure cases" or to other cases we can make statements about empirical regularities and evaluate and interpret cases relative to substantive and theoretical criteria.[181] The historic narrative provides a frame for constructing the history-theory relationship.[182] Conversely, the theory provides a frame to explore how and why change occurs.[183]

A narrative is a sequential account of events that tell a story about what happened – it is a chronological linkage of discrete parts that take on meaning in light of the story.[184] Griffin defines a narrative as an analytic construct that unifies "a number of past or contemporaneous actions and happenings, which might otherwise have been viewed as discrete or disparate, into a coherent relational whole that gives meaning to and explains

---

[177] Charles C. Ragin, *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies,* at 19-20 (University of Calif. 1989)
[178] *Id.* at 26.
[179] Robin Stryker, *Beyond History Versus Theory: Strategic Narrative and Sociological Explanation,* 24 Soc. Meth & Research 304, 305 (1996) (Stryker (1996)).
[180] Lee E. Teitelbaum, *An Overview of Law and Social Research,* 35 J. Legal Educ. 465, 472-73 (1985).
[181] Ragin, *supra* note 177, at 1.
[182] Stryker (1996), *supra* note 179, at 305.
[183] *Id.*
[184] *Id.*

each of its elements and is, at the same time constituted by them."[185] A narrative is how we describe, reconstitute and comprehend events.[186] Narrative approaches history from an eventful concept of time by focusing on the temporal sequencing and relationships that make up historical events as well as events that make up longer historic event sequences.[187]

An event is a "relatively rare subclass of happenings that significantly transforms structures" and an "eventful conception of temporality . . . is one that takes into account the transformation of structures by events."[188] In the context of destabilizing litigation Sabel and Simon would argue that the lawsuit could be such an event. The narrative permits the researcher to explore the ordered unfolding of unique events and event sequences, such as litigation and the activities surrounding the litigation, through the lens of time, pace and trajectory and perhaps most importantly through the "analytic construct of 'path dependency'" – the "contingent yet cumulative and constraining effects if past action on future possibilities". [189] This focus on eventful time highlights the actor's creative use of rules and resources to alter structure.[190] Constructing narratives permit the researcher to "get the history right" thereby permitting the researcher to generalize soundly.[191]

---

[185] Larry J. Griffin, *Narrative, Event-Structure Analysis, and Causal Interpretation in Historical Sociology,* 98 Am J. Soc. 1094, 1097 (1993).
[186] *Id.* at 1098.
[187] Stryker, *supra* note 179, at 306.
[188] William Sewell, *Three Temporalities: Toward an Eventful Sociology* in *Logics of History: Social Theory and Social Transformation* at 100 (2005).
[189] Stryker, *supra* note 179, at 307.
[190] *Id.*
[191] Jill Quadagno & Stan J. Knapp, *Have Historical Sociologists Forsaken Theory? Thoughts on the History/Theory Relationship,* 20 Soc. Meth & Research 481, 483-84 (1992).

Stryker and others posit that not only is historic narrative an effective tool to actually describe and explain historic events but narrative can also be used to develop and test theory and thereby gives us cognitive tools that give meaning to diverse stories.[192] These theories can be developed either deductively or inductively. The narrative provides a frame in which we can construct both theory and history by operationalizing both narrative and comparative research techniques.[193]

Theory building from case histories involves the use of one or more cases "to create theoretical constructs, propositions and/or midrange theory from case-based empirical evidence."[194] Identifying patterns of relationships among constructs is used to develop theory.[195] This is an iterative process – "theory building [i]s an *over-time process involving a continual interplay and mutual adjustment between theory and history.* Concrete and specific historic events and configurations are conceptualized in terms of abstract concepts and sensitizing frameworks. These concepts and frameworks are used to select, to order and to interpret . . . data."[196] From the narrative and its comparison to the theoretical frame and other cases we can begin to make preliminary

---

[192] Stryker, *supra* note 179, at 308. There has been a significant debate among social science scholars about the role of theory in historical sociology. *See generally,* Edgar Kiser & Michael Hechtner*, The Role of General Theory in Comparative-Historical Sociology,* 97 Am. J. of Soc. 1 (1991); Quadagno & Knapp, *supra* note 190; and James Mohoney, *Revisiting General Theory in Historical Sociology,* 83 Social Forces 459 (2004). Mahoney suggests that historical sociology has been grounded in one of three general theories "functionalist, rational choice and power". *Id.* at 460. The Destabilization theory and the legal mobilization theories upon which the research in this dissertation are based in nested in "power theory" which posits that the causal agent of social change are collective actors that engage in "relatively" coordinated action to cause social change. *Id.* at 473. These actors develop mobilize resources to overcome obstructions to structural change. *Id.* at 474.

[193] Stryker, *supra* note 179 at 309.

[194] Kathleen M. Eisenhardt and Melissa A. Graebner, *Theory Building from Cases: Opportunities and Challenges,* 50 Academy of Mgmt. J. 25 (2007).

[195] *Id.* (emphasis in original).

[196] Stryker, *supra* note 179, at 310-11 (emphasis in original).

causal generalizations – to deductively explore how and why a given action does or does not produce another action in a causal sequence.[197] Stryker explains:

> The mutual adjustment of history and theory envisioned by strategic narrative makes its practitioners like photographers who are continually shifting between two lenses while taking a picture. Researchers have a theoretical and historical lens and aggressively use each to refashion pictures provided by the other. By taking a series of pictures researchers can combine them to build a cumulative, more panoramic photograph. In addition, constructing strategic narrative extends the two-lens camera metaphor because a researcher's pictures do more than cumulate toward the panorama. They also feed back to clarify prior pictures and to modify the camera lenses that will be used to produce subsequent pictures.[198]

The theoretical lens used throughout this thesis is the modified destabilization frame (Figure 1.3.) This frame was developed from Sabel and Simon's destabilization theory built from a line of legal cases which, they argued, stimulated education reform, prison reform and reform in health care.[199] The Sabel and Simon frame was then modified to reflect the findings of social scientists such as Scheingold, McCann, Stryker et al. who examined the role of litigation in social movements to address race discrimination and wage equity, to name but a few. The intent of this research is to use this frame to explore the role of law and litigation in changing political and social structures in a manner that permits the protection or restoration of ecosystems.

Stryker notes that when using narrative to construct and refine theory not all stories are equal: "*some* stories about who did what, when, where, why, how, and with what consequences will be more necessary and useful to theory building and for the

[197] *Id.* at 311.
[198] *Id.* at 312
[199] *See generally,* Sabel and Simon, *supra* note 86.

mutual construction of history and theory than will others."[200] Thus Stryker cautions the researcher to be strategic in the selection of case histories – she encourages the researcher to search out the anomalies or puzzles. A case presents an anomaly when it presents a rare or unique "empirical instances of particular type of happening."[201] A narrative is then constructed for the anomaly against a theoretical and comparative historical backdrop permitting the research to refocus and improve the concepts embodied in the theory. This comparison permits the researcher to explore how and why the anomaly is different – it prompts the researcher to modify theories, to examine hypothesis.[202]

Environmental law is rift with cases brought by environmental interest groups seeking to compel government agencies to modify programmatic decisions to benefit the environment and indirectly ecosystems. As illustrated by the discussion of the Endangered Species Act (ESA) cases in chapter 2 most court decisions do not significantly alter the decision making structure of the agency.[203] The cases involving the flat tailed horned lizard, the Canada Lynx, and the gray wolf are such cases and are used to explore the traditional application of environmental litigation.

Chapters 3 and 4 explore environmental litigation anomalies. Across the United States there are a handful of communities struggling with ecosystem restoration. Some of these communities have even met with varying degrees of success most notably Mono Lake, the Florida Everglades, the San Francisco Bay – Sacramento River Basin, the Chesapeake Bay and the Great Lakes. In the case of Mono Lake, the Florida Everglades,

---

[200] Stryker, *supra* note 179 at 309.
[201] *Id.* at 314.
[202] *Id.* at 315,
[203] *See, infra* at ___ (Chapter 2).

and the San Francisco Bay – Sacramento River environmental interest groups have used litigation to assist them in their restoration efforts with varying degrees of success. In addition, preliminary investigation suggests that restoration of these ecosystems requires not only new environmental decisions but also revised decision making constructs. History also suggests, at least in the case of Mono Lake, that litigation can play a significant role in ecosystem restoration. It is these cases that are the anomalies explored in Chapters 3 and 4 and against which the modified destabilization frame may be tested.

The historic narrative tool provides the vehicle to test the modified destabilization frame in the context of litigation and ecosystem restoration. By exploring the historic narrative of the Mono Lake ecosystem we can refine the destabilization frame and use it to analyze the narrative of the attempts to restore the Everglades ecosystem. This is precisely the type of research program envisioned by the narrative method.

To fully develop strategic narratives for all ecosystem restorations that have successfully used litigation is beyond the scope of any individual project. However, the historic narrative method not only permits the researcher to contribute concurrently to both history and theory but it also permits the researcher to tackle insurmountable research projects in meaningful parts[204] – one ecosystem at a time.

The narrative method is grounded in the construction of the narrative. Narratives can and have been constructed using either or both primary and secondary data.[205] Secondary data might include written accounts of the event, newspaper articles, and

[204] Stryker, *supra* note 179 at 316.
[205] Sewell *Three Temporalities* cites numerous examples of narratives built on secondary data most notably Tilly's work on collective violence in France and Skopol's work on social revolutions. Sewell, *supra* note 188, at 88-93. This is in contrast to McCann's work on wage equity which involved extensive interview techniques. *See generally,* McCann, *supra* note 140.

official documentation. In the present research secondary data would also include written court decisions, prior court opinions, legal theories and documentation of agency decisions. This data may be supplemented with primary data, generally interviews of parties involved in the event. Once gathered Stryker suggests coding the data using both action and content coding.[206] Action coding is used to break down what really happened sequentially and in action units. It is designed to help the researcher build the narrative. Content coding looks to the context of the event – the richness or meat of the event. Content coding permits the researcher to more fully explore the context of the event and its link to theory.[207] From this the narrative of the event is built and examined through the lens of theory for fit. If there is not a precise fit the researcher then examines and weighs the importance of the deviations and adjusts the theory accordingly. Once two or more narratives are built the researcher can then explore how the events differ, how they are similar and the resulting impact of the theory.

B. Overview of Papers and Data Analysis

This thesis explores both the traditional historical backdrop of environmental litigation and two anomalies to develop and explore the modified destabilization frame and the ability of litigation to promote the political and social change necessary to protect and restore ecosystems. In chapter two we explore the traditional use of environmental litigation in the context of the ESA. Adopted in 1973, the ESA was intended "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered

[206] Stryker, *supra* note 179, at 316
[207] *Id.*

species and threatened species."[208] An endangered species is defined as "any species which is in danger of extinction throughout all or a significant portion of its range."[209] Prior to 1997 there was little debate about what constitutes a significant portion of a species range, however, since 1997, the question of what constitutes a significant portion of a species range has been at the heart of an extensive line of litigation as the U.S. Fish and Wildlife Service (FWS) has moved away from consideration of historic range in the listing process to a species current range as the primary benchmark for listing.[210] This has significant implications for both the listing of species and ecosystem preservation.

Using relevant congressional history, court decisions, FWS listing determinations, species restoration plans, GAO documentation, and the recent Solicitor Memorandum we examined the history of the FWS interpretation of the "significant portion of range" phrase since inception of the ESA and the attempts of environmental groups to counter the FWS attempts to narrow the definition beginning in the late 1990s. We examined a series of litigation brought by environmental groups commencing with a challenge to the FWS determination not to list the flat tailed horned lizard in which the court ruled that the FWS' narrowed interpretation of the phrase "significant portion of a species range" was an abuse of discretion. In each case the court ordered the FWS to re-evaluate the logic of its decisions regarding species and the application of the phrase "significant portion of a species range". This line of cases is interesting from a destabilization perspective because in each case in response to a court order to reconsider its decision the FWS reiterated the challenged decision rather then modify its decision and found itself back in

[208] 16 U.S.C. § 1531(b) (2000).
[209] 16 U.S.C. § 1532(6) (2000).
[210] *See, infra* Chapter 2 at 60.

court in ongoing disputes over the Canada lynx and gray wolf. The agency decision did not change as a result of the litigation, nor was the decision making process modified as a result of the litigation. I used the insights from this analysis to craft a model reflecting the traditional use of litigation in environmental cases. Our insights from the ESA raise the question "how could the litigants have been more successful in destabilization?"

To address this question I looked first to Mono Lake. Chapter 3 of this thesis examines the use of litigation in the Mono Lake restoration process. The demise of the Mono Lake ecosystem is a classic example of the adverse impacts of political blockage. In 1940 the California Water Resources Control Board issued a permit to the Los Angeles Department of Water and Power (LADWP) permitting the LADWP to appropriate all of the water from the Mono Lake tributaries for consumption in Los Angeles despite the fact that the LADWP only had the physical capacity to transmit half of the water volume to Los Angeles. The LADWP began extracting the full volume of water shortly thereafter. Mono Lake had no natural outflow and supported a unique and vibrant ecosystem. The extraction of all of the water flow into Mono Lake caused near ecosystem collapse. In 1979 the National Audubon Society and a small, newly minted environmental organization, the Mono Lake Committee, filed suit on behalf of the ecosystem, seeking to enjoin the LADWP from extracting the total volume of water from the Mono Lake tributaries. In what is know seen as a landmark decision, the California Supreme Court in 1983 ruled that the state had an ongoing public trust interest in the natural assets at Mono Lake that precluded the LADWP from acquiring a vested right to appropriate

water "in a manner harmful to the interests protected by the public trust."[211] This litigation is widely credited with turning the tide for the Mono Lake ecosystem.

Using the historic narrative technique I examine the narrative history of the efforts to restore the Mono Lake ecosystem and the role of the court in the restoration process using the modified destabilization frame. In constructing the historic narrative for Mono Lake I relied heavily on John Hart's detailed case history of Mono Lake restoration *Storm Over Mono Lake*[212], Craig Anthony (Tony) Arnold's[213] and Cynthia Koehler's[214] case history accounts of Mono Lake litigation and restoration, court documents, and legal decisions, the Mono Lake Draft and Final Environmental Impact Statement, Decisions of the California Water Resources Control Board, and experts from California State Media and National Media. I also used the modified destabilization frame to explore the data using core elements from the modified destabilization frame such as SMO involvement, SMO framing, media frames, bystander support, court oversight, legal theories etc. I then used the modified destabilization frame to examine the historic narrative for Mono Lake and develop conclusions about the effectiveness of litigation in modifying the agency decision, which had allowed the total appropriation of the Mono Lake tributaries and its effectiveness in breaking the power relationship between the LADWP and California

---

[211] *National Audubon Society v. Superior Court of Alpine County,* 658 P. 2d 709, 727 (Calif. 1983).
[212] *See generally,* John Hart, *Storm Over Mono Lake: the Mono Lake Battle and the California Water Future* (1996).
[213] Craig Anthony (Tony) Arnold, *Working Out an Environmental Ethic: Anniversary Lesons From Mono Lake,* 4 wyo. L. Rev. 1 (2004) and Craig Anthony (Tony) Arnold and Leigh A. Jewell, *Litigation's Bounded Effectiveness and the Real Public Trust Doctrine: the Aftermath of the Mono Lake Case,* 8 Hastings W.-Nw. J. Envt's L. & Pol'y 1 (2001-02)
[214] Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy,* 22 Ecology L.Q. 541 (1995).

Water Resources Control Board. I then made adjustments to the modified destabilization frame based on my analysis of the Mono Lake historic narrative.

In Chapter 4 I used the modified destabilization frame to explore recent attempts to restore the Florida Everglades ecosystem (Everglades). The Everglades is a unique ecosystem extending from a strand of lakes north of Lake Okeechobee south to the Gulf of Mexico.[215] A number of factors contribute to the unique nature of the Everglades ecosystem foremost of which is the fact that the Everglades was historically phosphorus starved, this caused the development of an ecosystem uniquely adapted to a low nutrient environment. Pressure to drain and develop the Everglades and the adjacent Atlantic coastal ridge for both agricultural and tourism purposes commenced in the late 1800s but did not truly reach fruition until the late 1940's when the coupled concern for ongoing flooding and the desire for cheap sugar caused Congress to authorize construction of the Central and Southern Florida Project for Flood Control (C&SF Project). By 1970 when the C&SF Project was ultimately completed the Everglades ecosystem was partitioned into disconnected segments designated for agriculture, water conservation and natural preservation. The flow of water through the historic Everglades ecosystem was entirely controlled by humans.

Today as a result of the success of the C&SF Project the Atlantic Coastal Ridge and extensive portions of the eastern Everglades and wetlands have been converted into urban area. Urban development amounts to approximately twelve percent of the original

---

[215] *See generally,* Stephen S. Light, Lance H. Gunderson & C.S. Holling, *The Everglades: Evolution of Management in a Turbulent Ecosystem* in *Barriers & Bridges: To the Renewal of Ecosystems and Institutions,* at 106-168 (Lance H. Gunderson, C.S. Hollings & Stephen S. Light eds. 1995)(containing an extensive discussion of the Everglades, its unique ecosystem and impact of development on the ecosystem).

Everglades. Agricultural uses have consumed another twenty-seven percent of the Everglades. Another one third of the Everglades have been converted into Water Conservation Areas. Less than one half of the Everglades remain in some semblance of its original state. The C&SF Project has also given rise to two ecosystem wide dilemmas: the allocation of water to meet increasing demands of the agricultural, urban and the ecosystem sectors and water quality. Water quality issues are predominantly related to the introduction of phosphorus into the lower reaches of the KOE Water Basin from agricultural sources.

There have been attempts to restore the Everglades ecosystem dating back to the early 1970's but did not reach a tipping point until the early 1980's when U.S. attorney Dexter Lehtinen in the waning hours of the Regan administration sued the South Florida Water Management District on behalf of the National Park System and FWS to compel the state to comply with state water quality standards by prohibiting Big Sugar from polluting the remaining Everglades with phosphorus containing field run off. Many attribute this litigation as instrumental to Everglades' restoration. Using the both secondary data including accounts of Everglades' restoration, accounts of events in national and local news media, court documents and decisions, legal agreements, and agency documentation I began to construct a historic narrative for Everglades restoration. I supplemented these secondary sources with primary data, which included personal interviews of persons involved in Everglades' restoration using a three-page interview guide (Appendix A). I then examined the narrative through the lens of the modified destabilization frame to explore the relationship between litigation and Everglades'

restoration. Using insights gathered from this analysis I made further modifications to the modified destabilization frame to reflect how the model worked in fact in the Everglades. A more detailed discussion of this analysis may be found in Chapter 4 of this thesis.

Finally, in Chapter 5, I explore, compare, and contrast the models of the modified destabilization frame developed in chapters 2 through 4 and draw conclusions about the role of litigation in stimulating political change, how litigation might be effectively used to protect and rehabilitate ecosystems, and outline future research that might be undertaken to further develop the modified destabilization frame and to understand the operation of the frame in the efforts to protect and restore ecosystems.

CHAPTER 2:

CONTESTED DEFINITIONS OF ENDANGERED SPECIES: THE CONTROVERSY REGARDING HOW TO INTERPRET THE PHRASE A SIGNIFICANT PORTION OF A SPECIES' RANGE*

Sherry A. Enzler, J.D. University of Minnesota
Jeremy T. Bruskotter, Ph.D. Ohio State University
A later version of this Chapter was published in 27 Virginia Environmental Law Journal 1 (2009)

I. INTRODUCTION

How should the U.S. Government define endangered species? To which species should the government extend protection? These questions have considerable implications for the continued conservation of threatened and endangered species as well as the ecosystems on which they depend. These questions are also at the heart of a controversy that is currently playing out in the Federal Courts, pitting the Secretary of Interior (Secretary) and Executive branch against a number of conservation organizations. The controversy is over how the Secretary should interpret the phrase "a significant portion of its range," part of the legal definition of an "endangered species" in the Endangered Species Act[1]. This issue came to a head in 1997, when the Secretary withdrew a proposed rule that would have listed the flat-tailed horned lizard for protection as a species threatened with extinction, despite an acknowledgement that it faced threats over large portions of its range.[2] Conservation groups sued to protect the

*The authors wish to thank Mike Soules of the Faegre and Benson law firm for his thoughtful review of early drafts of this article.
[1] Endangered Species Act of 1973, P.L. No. 93-205, 87 Stat. 884 (1973)(codified at 16 U.S.C. §§1531-1544 (2000).
[2] *Defenders of Wildlife v. Norton,* 258 F.3d 1136, 1145 (9th Cir, 2001) (*Defenders (Lizard))* (holding a species can be "extinct throughout . . . a significant portion of its range' if there are major geographical areas in which it is no longer viable but once was").

lizard, setting off an ongoing battle over what constitutes a "significant" portion of a species' range.[3]

In March of 2007, the Solicitor for the Department of Interior issued a memorandum[4] describing how the Bush Administration intends to interpret the phrase "a significant portion of its range." The Solicitor's Memorandum argued in favor of deference to the Secretary's definition of "significant" which the Secretary had defined to mean "important" and not necessarily "large." The Solicitor also argued that the Secretary need only examine the current range of a species when making listing determinations. Under this interpretation, the Secretary would not be obligated to consider areas, in which a species was once present, and has since been extirpated – that is, its historic range.

This paper examines the ongoing controversy over the Secretary's interpretation of the phrase and the effects of litigation on that controversy, with a detailed review of the relevant case history, and past actions of the Fish and Wildlife Service (FWS)[5] that provide insights into how their interpretation of the phrase has changed over time. Finally, we discuss the implications of the different interpretations of this phrase for the continued conservation of large mammals. We begin with an overview of the Endangered Species Act and the criteria for determining whether a species warrants listing as threatened or endangered.

---

[3] 16 U.S.C §1532(6)(2000).
[4] Department of Interior, Office of the Solicitor, Memorandum on the Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range" M-37013 (March 16, 2007).
[5] The other federal agency charged with implementing the Endangered Species Act is the National Marine Fisheries Service in the Department of Commerce. 16 U.S.C. § 1532 (15)(2000).

II. A BRIEF HISTORY AND OVERVIEW OF THE ENDANGERED SPECIES ACT

In 1973, the United States Congress enacted the Endangered Species Act (ESA) alarmed that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation."[6] Passage of the ESA was the culmination of a one hundred year history of attempts to protect species that commenced in the 1800s with the extermination of the Great Plains Bison.[7] However, the ESA, as we know it today did not begin to take shape until 1966 when Congress passed the Endangered Species Preservation Act (1966 Preservation Act).[8]

For several years prior to the passage of the 1966 Preservation Act the Department of Interior (Interior) had been compiling a list of species endangered with extinction referred to as the "Red Book". By 1964 the Red Book included 63 species.[9] As enacted, the 1966 Preservation Act directed the Secretary to "provide a program for the conservation, protection, restoration and propagation of selected species[10] of native fish and wildlife . . . that are threatened with extinction."[11] In addition to providing

---

[6] *See,* The Endangered Species Act of 1973, Pub. L. no. 93-205, 87 Stat. 884 (1973) codified at 16 U.S.C. §§ 1531-1544 (2000).

[7] *See generally,* Stanford Environmental Law Society, The Endangered Species Act (2001)(setting out a brief overview of the endangered species act); Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy,* 75 Wash. U. L. Q. 1029(1997)(outlining the role of science in attempts to protect species).

[8] Stanford Environmental Law Society, *Id.* at 14-19.

[9] Michael J. Bean, *Historical Background to the Endangered Species Act,* in Endangered Species Act: Law, Policy and Perspective 11, 14 (Donald C. Baur & William Robert Irvin, ed. 2002). By 1966 this number reached 277 mammals and 300 birds. George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973,* 51 N. D. L. Rev. 315 (1975).

[10] *See* Doremus, *supra.* note 7, at 1042. Doremus notes that although the 1966 Preservation Act used the term species to describe those life forms eligible for protection the Act itself did not define the term species. "Congress assumed science would supply the foundation for listings." *Id.*

[11] Pub. L. No. 89-699, 80 Stat. 926 (1966) (repealed in part 1973).

limited protection to certain species on the verge of extinction[12] the 1966 Preservation Act recognized the relationship between habitat destruction and species extinction.[13] The Senate Report provided:

> Within the next few decades the economic growth of this country, its expanding population and spreading urbanization, will require more working and living space, more highways, more lands under intensive agriculture, more rivers and streams harnessed, more forests cut than the nation has ever experienced.
>
> Within this same span of time, unless immediate and vigorous action is taken, as many as 30 to 40 types of birds and nearly an equal number of mammals will join the ghosts of the heath hen and the passenger pigeon.[14]

To preserve habitat Congress authorized the Secretary to expend funds to acquire federal lands to protect threatened species[15] and ordered federal agencies to "preserve the habitats of such threatened species on lands under their jurisdiction."[16] The 1966 Preservation Act also authorized the Secretary to make a formal list of "native endangered species." Shortly after passage of the 1966 Preservation Act, on March 11, 1967, the first official endangered species list was published. It totaled 78 native species.[17]

By 1969 it became apparent that there were several shortcomings in the 1966 Preservation Act, the most notable of which was the failure of the 1966 Preservation Act

---

[12] The 1966 Preservation Act only required that the Secretary protect endangered species "to the extent practicable" and only when threatened with worldwide extinction. Publ. L. No. 89-699, 80 Stat. 925 §2(d)(1966) (repealed 1973)

[13] *See generally,* Ronald H. Rosenberg, *Federal Protection of Unique Environmental Interests: Endangered and Threatened Species,* 58 N. C. L. Rev. 491, 499 (1980).

[14] *Id. (quoting* S.Rep. No. 1463, 89th Cong., 2nd Sess. 2 (1966) *reprinted in* (1966) U.S. Code Cong & Ad. News 3342, 3343).

[15] *Id.* at § 2(b)-(c) (incorporated in the ESA at 16 U.S.C. § 1534(a)(1)(2000)).

[16] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174-75 (1978) (TVA v. Hill).

[17] *See* Bean, *supra* note 9, at 15. It should be noted that the 1966 Preservation Act only provided for the "protection" of "selected species of native fish and wildlife" that "were threatened with extinction." Pub. L. No. 89-699 § 2 (a).

to protect invertebrates.[18] In part, to address this issue Congress enacted the Endangered Species Conservation Act of 1969 (1969 Conservation Act).[19] Not only did the 1969 Conservation Act grant protections to invertebrates,[20] it also required listing determinations to be made on the basis of "the best scientific and commercial data available".[21] Congress, in its deliberations again recognized the important relationship between species protection and available habitat:

> On a more philosophical plane, the gradual elimination of different forms of life reduces the richness and variety of our environment and may restrict our understanding and appreciation of natural processes. Moreover, in hastening the destruction of different forms of life merely because they cannot compete in our common environment upon man's terms, mankind, which has inadvertently arrogated to itself the determination of which species shall live and which shall die, is assuming an immense ethical burden.[22]

To increase the likelihood of species protection Congress authorized the Secretary to acquire privately owned property "for the purpose of conserving, protecting, restoring or propagating" species threatened with extinction.[23]

Unfortunately the 1969 Conservation Act had minimal impact on American endangered species preservation[24] and Congress once more went back to the drawing

---

[18] *Id.* A second shortcoming of the 1966 Preservation Act identified by Congress was that the Act did little to regulate the sale of products made from endangered species in American markets. These sales promoted the killing of endangered species. *Id.*
[19] *See* Rosenberg, *supra* note 13, at 501.
[20] *Id.*
[21] Pub. L. No. 91-135, § 3(a), 83 Stat. 275 (1969)(repealed 1973). Doremus notes that the role of commercial data under the 1969 Conservation Act was added at the request of the fur industry to insure consideration of data supplied by industry. The role of commercial data has generally been minor and is generally accepted to mean "objectively verifiable data concerning the impacts of commercial trade on species." Doremus, *supra* note 10, at 1043.
[22] Rosenberg, *supra* note 13, at 501 (quoting S. Rep. No. 526, 91st Cong. 1st Sess. 3, *reprinted in* (1969) U.S. Code Cong. & Ad. News 1413, 1415).
[23] Pub. L. No. 91-135, § 12 (c), 83 Stat. 275 (1969)(repealed 1973).

board, now at the urging of President Richard Nixon who in 1972 called for stronger law species' protection. Nixon observed that "even the most recent Act [1969 Conservation Act] to protect species . . . simply does not provide the kind of management tools needed to act quickly to save vanishing species."[25] Within days of Nixon's State of the Union Address bills to protect endangered species were introduced in both the House and the Senate. The final bill passed both houses of Congress with overwhelming bi-partisan support.[26] The 1973 ESA as adopted was intended to protect species before they reached the verge of extinction.[27]

During the 1972-73 ESA hearings it was widely recognized that the accelerated rate of extinction was attributable to "man and his technology [which] continued at an ever-increasing rate to disrupt the natural ecosystem. This has resulted in a dramatic rise in the number and severity of the threats faced by the world's wildlife."[28] And the Final House Report provided: "as we homogenize the habitats in which these plants and animals evolved and as we increase the pressure for products that they are in a position to supply (usually unwillingly)… we threaten their – and our own – genetic heritage."[29] Likewise the Senate Report found that "[t]he two major causes of extinction are hunting

---

[24] At the 1973 House hearing on the Endangered Species Act Congress was informed that species were being lost in the United States at the rate of about one a year. *TVA v Hill, 437* U.S. at 176 (quoting Statement of Stephen R. Seater, Defenders of Wildlife H.R. Rep. No. 93-412, 4 (1973)).
[25] *See* Stanford, *supra* note 7, at 20 (quoting *Richard* Nixon, Public Papers of the President of the United States, 1972 at 183 (1974)).
[26] *Id.* at 21.
[27] 16 U.S.C. § 1531 (b)(1973). The underlying policy of the ESA was the conservation of species both endangered and threatened. This duo level of species protection first evidenced in the 1973 ESA suggests Congress did not intend to wait until a species hovered on the verge of extinction before it provided protection for the species.
[28] *TVA v. Hill,* 437 U.S. at 178 (*quoting* statement of Assistant Secretary of Interior at 1973 House Hearing).
[29] *Id.* at 177-78 (quoting H.R. Rep. No. 93-412, pp. 4-5 (1973)).

and destruction of natural habitat. Of these twin threats the greatest was destruction of natural habitat."[30]

Legal commentators and jurists alike recognized the expansive nature of the ESA. Professor Coggins in his overview of the legislative history of the ESA observed:

> The dominant theme pervading all Congressional discussion of the proposed [Endangered Species Act of 1973] was the overriding *need to devote whatever effort and resources were necessary* to avoid further diminution of national and worldwide wildlife resources. . . . Senators and Congressmen uniformly deplored the irreplaceable loss to aesthetics, science, ecology, and the national heritage should more species disappear.[31]

And Justice Burger in *Tennessee Valley Authority v. Hill* characterized the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." [32]

The relationship between ecosystems, habitat and species protection is incorporated into the very core of the ESA which was adopted "to provide a means whereby the *ecosystems upon which endangered species and threatened species depend may be conserved,* [and] to provide a program for the conservation of such endangered species and threatened species."[33] Thus, Congress recognized that the preservation of species required conservation of ecosystems.

The ESA extended protections to listed endangered and threatened species.[34] The listing process requires both the identification of a species and a determination that the

---

[30] *Id.* at 179 (quoting S. Rep. No. 93-307, p. 2 (1973) U.S. Code Cong. & Admin. News 1973, pp 2989, 2990).
[31] Coggins, *supra* note 9, at 321(emphasis added).
[32] *TVA v. Hill,* 437 U.S. at 180 (1978).
[33] 16 U.S.C. § 1531(b)(2000)(emphasis added).
[34] The ESA requires federal agencies to limit actions that would "take" listed species and prohibited commercial or private takings of species or their habitat. 16 U.S.C. §§ 1536(b) &15389a)(1)(2000).

species is either endangered or threatened with extinction. The ESA defined an endangered species as: "any species which is in danger of extinction *throughout all or a significant portion of its range* other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man."[35] Likewise the term "threatened species was defined as "any species that is likely to become an endangered species within the foreseeable future *throughout all or a significant portion of its range*."[36] It is the "significant portion of [a species] range" phrase (SPR phrase) that has given rise to the recent controversy.

The concept of species adopted in the ESA was fairly broad. A species was defined as "any subspecies of fish or wildlife or plants."[37] The FWS, however, has applied a more scientific approach to the definition of species noting that "[a]ny species or taxonomic group of species (e.g. genus, subgenus) . . . is eligible for listing under the Act. . . .[and] In determining whether a particular taxon or population is a species for the purposes of the Act, the Secretary shall rely on standard taxonomic distinctions and the biological expertise of the Department and the scientific community concerning the relevant taxonomic group."[38] Congress did not intend, however, that the definition of species be based solely upon the evolutionary relationships of organisms (their taxonic ranks).[39] Indeed in 1972 when Congress adopted the Marine Mammals Protection Act

---

[35] 16 U.S.C. § 1532(6)(2000)(emphasis added).
[36] 16 U.S.C. § 1532(20)(2000)(emphasis added).
[37] 16 U.S.C. § 1532(16)(1973). *See,* Doremus, *supra* note 10, at 1087-1112 (containing an extensive discussion of the scientific under pinning of the concept of species in the ESA).
[38] 50 C.F.R. § 424.11(a)(2001)
[39] *A Guide to the Endangered Species Law, in* The Endangered Species Desk Book 5, 12 (Lawrence R. Liebesman & Rafe Peters. ed. 2003).

Congress expressed an interest in protecting "population stocks".[40] In using the concept of population stock in the ESA Congress evidenced intent to protect unique populations of organisms without regard to their evolutionary heritage.[41]

The terms "extinction" "significant portion" and "range" terms key to the SPR phrase were not defined in the ESA, although the House Report accompanying the bill recommended an expansive definition of the term species to include species in danger of extinction "in *any* portion of its range. [This represented] a significant shift in the definition in existing law which considers species to be endangered only when it is threatened with worldwide extinction."[42] While the concept of range is not defined in either the ESA or Federal Regulation, it would seem, given the extensive concern about the relationship between species and assaults on ecosystems and habitat, that the concept of range must at a minimum refer to the ecosystems that have provided habitat for the species in question. But as will be seen such a conclusion has been controversial.

The ESA also required the federal agencies to publish a list of endangered and threatened species.[43] The FWS has broad discretion in determining which species merit threatened or endangered status consistent with the following listing standards:

1. the present or threatened destruction, modification, or curtailment of its habitat or range;
2. over utilization for commercial, recreational, scientific, or educational purposes;
3. disease or predation

---

[40] *Id.* (citing H.R. Rep. No. 92-707, at 22 (1972)) (The concept of "population stock" was intended to protect polar bears. The concept was developed to overcome disagreement between scholars about whether Alaskan Bears belonged to a separate subspecies of Arctic bears. Congress had a strong desire to protect polar bears without regard to the evolutional relationship between polar bears).
[41] *Id.* Doremus notes that the marine mammal Protection Act was intended to "maintain the health and stability of Marine ecosystems." Doremus, *supra* note 10, at 1044-45.
[42] *Defenders (Lizard)*, 258 F.3d at 1144 (quoting H. R. Rep. No. 412, 93rd Cong., 1 Sess. (1973))(emphasis added).
[43] 16 U.S.C. § 1533(a)(2000).

4. the inadequacy of existing regulatory mechanisms; or
5. other natural or man-made factors affecting its continued existence.[44]

However, listing determinations were to be based "solely on the basis of the best scientific and commercial data available"[45]

Several attempts were made to significantly modify the ESA in 1978 and again in 1979 driven foremost by the U.S. Supreme Court decision to protect the snail darter at the expense of the Tellico Dam[46] and to a lesser degree by a 1979 GAO report.[47] The 1979 GAO report criticized the ESA's provisions which permitted the FWS to list geographically limited populations of vertebrate species as endangered or threatened "even though they may not be endangered or threatened throughout all or a significant portion of their *existing ranges*."[48] In addition, the GAO reported that FWS's draft guidelines on the concept defined significant portion of a species range as:

> (1) more than half of a species' range, which may include historical as well as recent and anticipated future loses or (2) loses of habitat totaling less then 50 percent for species of relatively small range, or in other circumstances where the loss may have an inordinately large negative impact on the species survival.[49]

---

[44] *Id.*
[45] 16 U.S.C. § 1533 (b)(1)(A)(2000).
[46] *TVA v. Hill,* 437 U.S. 153 (relying on section 7 of the ESA the Court enjoined final construction phases of the Tellico Dam on the Little Tennessee to protect the snail darter. Section 7 of the ESA required all federal agencies in consultation with the Secretary to "take such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected states, to be critical." 16 U.S.C. § 1536 (1976).Construction of the dam had commenced prior to the passage of the ESA and at the time of the litigation the dam was 80% complete).
[47] General Accounting Office, Comptroller General, Report to Congress: Endangered Species – A Controversial Issue Needing Resolution, Doc. B118370 (1978) (1978 GAO Report). The GAO Report was issued and delivered to Congress after the 1978 amendments but before the 1979 amendments to the ESA.
[48] *Id.* at 51. GAO was particularly critical of the FWS because it listed populations of species such as the grizzly bear in limited geographical areas when the species was not necessarily threatened throughout "all or a significant portion of [its] existing range". *Id.* at 52.
[49] *Id* at 59.

The GAO recommended that the term species be redefined in the ESA to limit listings to entire species. It further recommended that FWS be required to show that a protected population "constitute[s] a significant portion of the species' range, in terms of (1) total numbers, (2) biological importance, or (3) the need to maintain the species within the United States" prior to listing. [50] Interior rejected this proposal. In response to the suggestion that the FWS list species "only when threatened throughout their entire range" Assistant Secretary Meierotto wrote: "This recommendation does not account for the increased threat to a species of eliminating a portion of its range and associated populations."[51] Thus as early as 1979 it was Interior's position that to address species decline the agency must analyze the species decline in their historic range.

Despite recommendations from GAO to constrict the listing provisions and protections afforded in the ESA, Congress did not modify the listing criteria.[52] Congress did, however, adopt a number of provisions affecting the listing process to include an extensive public review and comment procedure.[53] Congress rejected GAO's proposal that the definition of species be limited to the species level but did redefine the term, substituting the phrase "distinct population segment of any species of vertebrate" (DPS) for the language "any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement."[54] By revising the ESA to provide protections for "distinct population segments" of species, Congress provided a mechanism for varying

---

[50] *Id.* at 55, 60.
[51] *Id.* at 119.
[52] *See,* Rosenberg, *supra* note 13, at 521-24, 525-27 (Rosenberg's article contains an excellent discussion of the impacts of the 1978 amendments on the Section 7 requirement).
[53] *Id.* at 527- 31 (as amended the agency was required to undergo a process analogous to formal rule making prior to listing a species. This process included compiling data to support the listing, publishing notice of the listing and holding public hearings and receiving public comments).
[54] Liebesman & Peters, *supra* note 39, at 13. *See also,* 16 U.S.C. § 1533 (4)(16)(1978).

the level of protection afforded a species based on the threats relevant to species populations in various geographical regions—that is, a species that was overabundant in some of its habitat and threatened in others could be listed in those areas where its population was most at risk.[55] However, Congress also instructed the Secretary to use DPS policy "…sparingly and only when the biological evidence indicates that such action is warranted."[56]

The DPS concept is not found in the biological literature.[57] It is perhaps for this reason that both the FWS and the National Marine Fisheries Service (NMFS) have struggled with developing criteria for DPS listings[58] it was not until the 90's, however, that the agencies attempted to formalize a DPS policy. There are two major policy documents that apply to the listing of DPS. In 1991, NMFS adopted a policy applying the DPS definition to pacific salmon (Salmon Policy)[59] and in 1996 the FWS and NMFS developed a joint policy on distinct vertebrate populations (Joint Vertebrae DPS Policy).[60]

---

[55] *Id.* Liebesman and Peters report that historically the ESA permitted listing of species without evidence of genetic variation or geographic isolation. *Id.* Take for example the plight of the alligator. The FWS listed the Florida alligator as endangered in South Florida while the Louisiana alligator was not listed despite the fact that the Florida alligator and the Louisiana alligator were "taxonomically and morphologically identical." This might make sense when one considers the fact that the Florida alligator is a keystone species in the Everglades Ecosystem. Frank Mazzotti, Ken Rice, & H. Franklin Percival, South Florida Science Restoration Forum, http://sofia.usgs.gov/sfrsf/roomswild_weteco/gator_croc (last visited Feb. 8, 2008). A keystone species is a species essential to an ecosystem's health and without which the entire ecosystem would be in peril of collapse. *Id.*

[56] S. Rep. No.96-151, at 6-7 (1970).

[57] Policy Regarding the Recognition of Distinct Population Segments under the Endangered Species Act, 61 Fed. Reg. 4,722 (Feb. 7, 1996) (DPS Policy).

[58] Liebesman & Peters, *supra* note 39, at 14. *See also,* Kate Geoggroy and Thomas Doyle, *Listing Distinct Population Segments of Endangered Species: Has it Gone Too Far?,* A.B.A. Nat. Resources & Env't, Fall 2001at 82, 84.

[59] Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58,612, 58,618 (Nov. 20, 1991)(Salmon DPS Policy).

[60] 61 Fed. Reg. 4,722.

The 1991 Salmon Policy provides that a population of salmon could qualify as a DPS only if the "population stock" at issue "represents an evolutionarily significant unit (ESU) of the biological species."[61] To qualify as an ESU a salmon species must satisfy two criteria: "(1) substantial reproductive isolation from other nonspecific population units and (2) representation as an important component in the evolutionary legacy of the species."[62] The salmon policy served as a template for development of the Joint Vertebrae DPS Policy.[63] The 1996 Joint Vertebrae DPS Policy, which applies to "any species of vertebrate fish or wildlife population", lists three guiding principles essential to the designation of a DPS: (1) discreteness of the species' population segment in relation to the remainder of the species which it belongs; (2) the significance of the population segment to the species to which it belongs; and (3) the population segment's conservation status (whether the DPS is threatened or endangered).[64]

Congress, in 1978, also amended the ESA to require the Secretary to include critical habitat for threatened and endangered species.[65] The critical habitat discussion in the House Report sheds light on Congress' understanding of the term range. The report notes that the amendment to the ESA requires the Secretary to first list species and then to designate critical habitat. In the context of listing the report observes that "[t]he term 'range' is used in the general sense and refers to the historical range of the species."[66] The Report then cautions the Secretary to apply a more restrictive approach to the

---

[61] 56 Fed. Reg. at 58,618.
[62] *Id.*
[63] 61 Fed. Reg. 4,722 . The 1996 policy references the 1991 NMFS policy an "a detailed extension" extension of the joint policy. The agencies consider both policies to be consistent. *Id.*
[64] *Id., See also,* Liebesman & Peters, *supra* note 39, at14 (containing a detailed discussion of how the three policy criteria are applied by the agencies).
[65] H. Rep. No. 95-1625, at 18 (1978).
[66] *Id.*

designation of critical habitat noting: "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species."[67] The House Report language suggests that Congress intended that the Secretary take a two-tiered approach to listing and designation of critical habitat. Listing was to be based on whether the species was in danger or threatened with extinction in a significant portion of its range, i.e. its historic range. Critical habitat designations were to be calculated on something less then the historic range.

That Congress intended this two-tiered approach is further buttressed by the standard applied in both listing and designation off critical habitat. The ESA, as passed in 1973, required both the listing of species and the designation of critical habitat be based on best scientific data.[68] In 1978 Congress amended the ESA to require the agency to "consider the economic impact and other relevant impacts" when designating critical habitat,[69] yet, listing decisions were still to be made solely on the basis of best scientific data without consideration of economic impacts. This amendment meant that non-biological factors could now be considered in designating critical habitat, a result which some critiques believed would result in "designation of an inadequate area for species preservation."[70] In effect the Secretary could now recognize fewer or smaller areas as critical habitat based on economic considerations, thereby increasing the risk to designated species.[71] More importantly, inclusion of economic considerations in designation of critical habitat had significant symbolic implications that are reflected in

---

[67] *Id.*
[68] 16 U.S.C. § 1533(b)(1)(A)(1973).
[69] 16 U.S.C. § 1533(b)(2)(2000).
[70] Rosenberg, *supra* note 13, at 537.
[71] *Id.*

the present Administration's interpretation of designation language as observed by Professor Rosenberg:

> The pre-1978 law focused upon the scientifically determined status of endangerment in plant and animal species. The decision to recognize a particular form of life as being worthy of federal protection was made without reference to particular political or economic interests. Under the legal regime created by the 1973 Act, protection of endangered species and their habitats was the singular purpose of the statute. . . Unlike other areas of environmental regulation, there was to be no balancing of costs, estimation of technological capabilities or dependence upon governmental subsidy. This was an area of federal wildlife policy to be guided by the findings of the professional biologist, beyond the political arena and the influence of special interest groups. . . . The new statutory provision [inclusion of economic considerations] . . . raised great concern that the objective, scientific nature of the habitat designation process would be jeopardized by the discretion given to the Secretary of Interior to consider economic effects. Once economic factors are used to limit the establishment of critical habitat, a future amendment [or statutory interpretation] might restrict the Act's coverage to limited segments of wildlife, to animals only, or solely to large federal construction projects . . . this would interject into the theory of federal endangered species law the notion that species preservation was a relative value, which would have to compete for priority on a case-by case basis.[72]

It is perhaps, the opening of this symbolic door that has led to the current debate over what it means for a species to be in danger of extinction in "a significant portion of its range."

III. DEFINING THE PHRASE "A SIGNIFICANT PORTION OF ITS RANGE": THE COURTS AND INTERIOR

Despite the fact that the ESA defines an endangered species as "any species in danger of extinction throughout all or a significant portion of its range"[73] neither the ESA nor its implementing regulations detail what constitutes a *significant* portion of a species

[72] *Id.* at 537-39.
[73] 16 U.S.C. § 1532 (6)(2000).

range, nor do they define the term range. Although FWS's past practices indicate the agency has considered a species historic range when making species determinations, neither conservation organizations or the Courts closely scrutinized the term until the Defender's of the Wildlife sued Interior to compel the listing of the flat tailed horned lizard in the late 1990's. *Defenders (Lizard)* has since become a central piece in the controversy over the definition of the phrase, "a significant portion of a species range".

A. Round One: The Tale of the Flat–tailed Horned Lizard

Like the infamous snail darter the flat-tailed horned lizard (FTHL) *(Phrynosoma mcallii)* is a relatively small creature that has caused a big stir. Averaging 3.2 inches in length, excluding its tail, the FTHL is found in the harsh climate of the Western Sonoran Desert in southern California and southwest Arizona.[74] Approximately a third to one half of the FTHL's "original habitat" has been lost to human development.[75]

In 1982 the FWS identified the FTHL as a category 2 candidate for listing.[76] The FTHL remained a category 2 listing until 1989 when it was elevated to category 1 status.[77] On November 29, 1993, the Secretary published a proposed rule listing the

[74] Proposed Rule to List the Flat Tailed Horned Lizard as Threatened, 59 Fed. Reg. 62,624, 62,625 (Nov. 29, 1993).
[75] *Defenders of Wildlife v. Babbitt,* No. 97-CV-2330 TW (LSP) 1999 WL 33537981 (S. D. Cal. 1999) *rev'd Defenders (Lizard),* 258 F.3d 1136 (9th Cir. 2001).
[76] *Id.* at *1. A category 2 species is a species for "which information in the possession of the [FWS] indicated that proposing to list as endangered or threatened was possibly appropriate, [but] for which sufficient data on biological vulnerability and threats were not currently available to support proposed rules." *Defenders (Lizard),* 258 F.3d 1136. 1138 (9th Cir. 2001) (quoting 61 Fed. Reg. 7596, 7597 (Feb. 28, 1996)).
[77] In 1989 the FWS concluded it had "sufficient information on [its] biological vulnerability and threat(s) to support issuance of a proposed rule." *Id.*

FTHL as threatened.[78] The proposed rule cited loss of historical habitat as a primary reason for the decline in the FTHL population:

> The precise extent of [the FTHL] historic habitat cannot be quantified because filling of the Salton Sea and much of the agricultural development predates most collections of [FTHL]. However, assuming that the [FTHL] was well distributed within the areas of the Imperial Valley that are now occupied by agriculture, urban development and the Salton Sea, about 40 percent of the [FTHL's] habitat in California has been converted to other uses and no longer supports this species. Approximately 23 to 27 percent of the historic habitat in Arizona has been lost due to human uses . . . ninety-five percent of the remaining optimal habitat in California is threatened by one or more impacts including agricultural and urban development, off-highway vehicle use, geothermal development, sand and gravel operations, military maneuvers, and construction of roads and utility corridors . . .. Of the remaining habitat in Arizona, 36 percent is threatened by various human impacts.[79]

Consistent with "historical practices" the FWS, in 1993, attempted to evaluate the decline of the FTHL's presence in its "historic habitat"[80] in determining whether to list.

Although the provisions of the ESA require the Secretary to take action (i.e. publish a Final Rule) on a proposed designation within one year[81] no further action was taken.[82] Then in 1995, all activity on the FTHL listing came to a halt when Congress attached a rider to the Military Readiness Act of 1995 which reduced funding for endangered species listing determinations and prohibited Interior from using existing

---

[78] 58 Fed. Reg. 62,624.
[79] *Id.* at 62,625-62,626.
[80] In *Defenders (Lizard)* the Ninth Circuit observes that the Secretary's historical practice had been to assess whether there were "major geographical areas in which…[the species] is no longer viable but once was." *Defenders (Lizard),* 258 F.3d at 1145.
[81] 16 U.S.C. § 1533(b)(5)(A)(i)(2000)(requiring the Secretary to take action on a proposed listing within one year of publication of the proposed rule).
[82] *Defenders (Lizard)* 258 F.3d at 1139. It is clear that the FTHL remained on Interior's Unified Agenda with final proposed action scheduled for November 1994 but no action was taken. Unified Agenda Department of Interior, U. S. Fish and Wildlife Service, 59 Fed. Reg. 57705 (Nov. 14, 1994).

funding "for making a final determination that a species is threatened or endangered . . ."[83] In effect the rider imposed a moratorium on all species listings.[84]

When in April 1996, President Clinton waived the listing moratorium and still no action was taken to list the FTHL[85] Defenders sued to compel the Secretary to list the FTHL. Despite the listing moratorium Interior had appointed a "Rangewide Strategy Working Group" to develop a plan to mitigate threats to the FTHL,[86] and in January of 1997 Interior announced the availability of a draft FTHL Rangewide Management Plan.[87] Meanwhile, over three years had passed without any official action with regard to the species listing. On May 16, 1997, the district court of Arizona ordered the Secretary to issue a final listing decision for the FTHL within 60 days.[88] But by this time Interior had developed a new approach to listing the FTHL.

In June 1997 a group of federal and state agencies signed a Conservation Agreement (CA) implementing the FTHL Rangewide Management Plan.[89] The CA was a voluntary agreement to "reduce threats" to the FTHL. Central to the CA concept was

---

[83] Public L. No. 104-6, Ch. IV, 109 Stat. 73 (1995). It should be noted that in 1993 Interior was wrestling with listing problems related to the California gnatcatcher. Designation of this species would have imposed a virtual land use moratorium on private property in Orange and San Diego Counties. Former Secretary Babbitt reported a "storm" of political backlash related to the proposed listing from private landowners. As a result the listing of the gnatcatcher was not completed until 1998. The listing was the result of extensive negotiations between Interior, the State of California, Orange and San Diego Counties and local developers. Bruce Babbitt, *Cities in the Wilderness: A new Vision of Land Use in America* 63-74 (2005). The listing of the gnatcatcher suggests that as early as 1993 Interior was considering both scientific and political issues in the listing process.

[84] *Defenders (Lizard),* 258 F.3d at 1139.

[85] *Defenders (Lizard)* 258 F.3d at 1139. Earlier in that same year Resolution, H.R. 3019 was passed authorizing the President discretion to waive the moratorium. *Id.*

[86] *Defenders of Wildlife v. Babbitt,* at * 2, *rev'd Defenders (Lizard),* 258 F.2d 1136.

[87] Notice of Department of Interior Bureau of Land Management Draft Rangewide Strategy for the Flat-tailed Horned Lizard 62 Fed. Reg. 3052-01 (Jan. 21, 1997).

[88] *Id.*

[89] *Id*. (the agencies participating in the plan included the FWS the Bureau of Land Management, the Bureau of Reclamation, the U.S. Marine Corp, the Navy, the Arizona Game and Fish Department, the California Department of Parks and Recreation.)

the designation of five "management areas" on public lands that would be managed to protect the FTHL. Protective measures included population monitoring, limitations on habitat disturbance, acquisition of private land within federal land holding to expand the management area and limits on ATV use within the management area.[90] In light of the CA the Secretary decided listing the FTHL was unnecessary and, on July 15, 1997, withdrew the proposed FTHL listing rule.[91] In its notice to withdraw Interior argued that population trend data for the FTHL "are inadequate to conclude that significant population declines have occurred in *extant* [FTHL] habitat since publication of the proposed [listing] rule."[92] Although Interior expected that agricultural, urban and recreational development of private lands would continue to reduce FTHL habitat on private lands, it argued that there would be few anticipated habitat impacts on public lands and, therefore, listing was unnecessary.[93]

A comparison between of the original listing notice and the withdrawal notice suggests that Interior had changed its listing philosophy between 1993 when the FTHL was first proposed for listing and 1997 when Interior issued its notice of withdrawal. While the original notice focused on the historic habitat of the FTHL, the withdrawal notice focused on the *"extant"* habitat or the remaining habitat. Thus the decision not to list was in part dependent not on declines in historic habitat or range, but on the potential for population decline on remaining current, publicly owned habitat. The withdrawal

---

[90] *Id.* at 1139-40. *See also,* Withdrawal of the Proposed Rule to List the Flat-Tailed Horned Lizard as Threatened, 62 Fed. Reg. 37,852, 37,860 (July 15, 1997).
[91] 62 Fed. Reg. 37,852.
[92] *Id.* at 37,659-60.
[93] *Id.* Of the existing 1.244 million areas or remaining FTHL habitat in the United States approximately 437,000 acres of designated by federal agencies as FTHL "management areas". *Id.* at 37,853.

notice did not, however, consider whether the FTHL was or would become extinct in "a significant portion of its range."[94] Shortly, thereafter, Defenders again sued to compel the Secretary to list the FTHL.[95]

On appeal, the court observed that the dispute between the parties was in large part a dispute about the extent to which the loss of habitat on private lands should be a factor in the listing analysis. Defenders argued that the FTHL met the four statutory listing criteria including the destruction, modification or curtailment of its habitat in its historic range. The Secretary did not dispute the loss of habitat on private land but instead claimed "adequate habitat exist[ed] on *public land* to insure species viability."[96] According to the court, this distinction between private and public lands also "explain[ed], in large part, the shift between the Secretary's initial finding that accompanied the proposed rule, recommending the . . . [FTHL] for protection based on concern about habitat loss on private land, and her findings that accompanied the withdrawal decision emphasizing that available public lands …[were] sufficient to support the species"[97] The court observed that in the Secretary's view:

> whether the lizard's potential survival in its public land habitat is sufficient to preclude ESA protection depends largely on the meaning of the phrase "in danger of extinction *throughout a significant portion of its range."* Assuming the lizard's population remains viable on public land, it is not in danger of extinction throughout *all* of its range. Defenders argue, however, that if the lizard's private land habitat constitutes "a

---

[94] *Defenders (Lizard),* 258 F.3d at 1140.
[95] The case was filed in Federal District Court in Southern California and decided on a motion for summary judgment in which the Federal District Court applying an arbitrary and capricious standard under the Administrative Procedures Act granted summary Judgment to Interior finding that the FWS had not abused its discretion in relying on the Conservation Agreement and habitat protection in the Rangewide Management Plans in reaching its decision not to list the FTHL. *Defenders v. Babbitt,* 1999 WL 33537981 . *rev'd Defenders (Lizard),* 258 F.3d 1136.
[96] *Defenders (Lizard)* 258 F.3d at 1140 (emphasis in original).
[97] *Id.* at 1141.

> significant portion of its range" and survival there, as Defenders allege is in jeopardy, the ESA requires the Secretary to designate the lizard for protection.[98]

Thus the court concluded the outcome of the case rested on the application of the phrase "in danger of extinction through . . . a significant portion of its range"—a phrase which the court described as "inherently ambiguous, as it appears to use language in a manner in . . . tension with ordinary usage."[99]

The Court in *Defender's (Lizard)* rejected the interpretation put forth by both the Secretary and Defenders[100] observing the Secretary's *present* interpretation of the phrase "significant portion of its range" was inconsistent with the plain meaning of the language in the ESA, the legislative history and the Secretary's past application of the phrase and, therefore, should be afforded no deference.[101] The court further noted that the Secretary's interpretation "assumes that a species is in danger of extinction 'in a significant portion of its range' only if it is in danger of extinction everywhere." *Id.* The court rejected this argument as nonsensical, as it would make the statutory requirement that a species be listed if it is danger of extinction throughout all *or* a significant portion of its range meaningless. "Or" is conjunctive giving the FWS a choice between two

---

[98] *Id.* (emphasis in original).

[99] *Id.* The court notes for example that the Oxford English dictionary defines extinct as "died out or come to an
end . . . of a . . . race of species of animals or plants." Thus to say a species is extinct throughout a significant portion or its range is "something of an oxymoron." *Id.*

[100] Defenders argued that the lizard is in danger of extinction throughout a significant portion of its range because the FWS anticipates a loss of 82% of lizard habitat. *Id.* This volume of habitat loss must, Defenders argues be a significant portion of the FTHL's range. The court rejects this argument as well noting that a species may have had a large historical range, which has been substantially reduced, but the species may continue to have a healthy population level. *Id.* Conversely, a species with a very large historic range may come under serious threat after a loss of a small amount of its historical habitat. *Id.*

[101] *Id.* at 1144 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)). Deference is not warranted where the agency fails to apply an important term of its governing statute and where the agency's litigation position is unsupported by regulation, rulings or past practice. *Id. (*citing *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 212 (1988)).

options in the listing process: (1) determining whether a species is extinct in all of its range *or* (2) determining whether a species is extinct in a significant portion of its range. The Secretary's reading ignored the conjunctive nature of the statutory mandate and imposed a higher bar for determining whether a species is threatened or endangered–that is, the Secretary's interpretation suggested a species must be in danger of extinction in *all* of its range before it may be afforded protection under the ESA.[102] Such a reading was inconsistent with the plain language of the ESA. In addition, the interpretation was inconsistent with the legislative history of the ESA. In contrast to the 1966 Preservation Act and the 1969 Conservation Act, the ESA substantially broadened the scope of species listings by including protection for species both threatened and endangered "throughout 'a significant portion of [their] range.'"[103] As evidence for this view, the court cited the House Report, which adopted an expansive definition of the concept of endangered species intended "to include species in danger of extinction 'in *any* portion of its range' [this] represented 'a significant shift in the definition in existing law [1966 Preservation Act and 1969 Conservation Act] which considers a species to be endangered only when it is threatened with worldwide extinction.'"[104]

Finally the Secretary's own historic application of the concept "a significant portion of its range" focused on the distribution of a species over its "historical range", as evidenced by the treatment of numerous species, such as the Florida alligator and the grizzly bear. In both of these cases the Secretary applied a historic concept of range. In

---

[102] *Id* .at 1141-42.
[103] *Id.* at 1144. *See also,* discussion *supra* p. 2-4 (discussing the 1969 Conservation Act and the 1966 Preservation Act).
[104] *Id. quoting* H.R. Rep. No. 412, 93rd Cong., 1 Sess. (1973) (emphasis added by the 9th Circuit).

the case of the alligator the Secretary recognized that the alligator's historic range extended from Louisiana to the Florida Everglades. While the Louisiana alligator enjoyed a healthy viable population, the Florida alligator did not. Although there were no genetic differences between the Florida alligator and the Louisiana Alligator, Interior afforded ESA protection to the Florida alligator.[105] Likewise, the grizzly bear is listed as threatened within the lower 48 states but not in Alaska where populations are relatively healthy.[106]

The court concluded:

> consistent . . . with the Secretary's historical practice that a species can be extinct "throughout a significant portion of its range" if there are major geographical areas in which it is no longer viable but once was. . . . The Secretary necessarily has a wide degree of discretion in delineating "a significant portion of its range," since the term is not defined in statute. But where, as here, it is on the record apparent that the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a "significant portion of its range."[107]

The court remanded the case to Interior to make a listing determination for the FTHL consistent with its order.

Thus, in *Defenders (Lizard)* the Court rejected the Secretary's interpretation that a significant portion of a species' range means species' present or current range. Although the Court did not go so far as to equate range under the ESA as historic range it is clear that the Court believed, consistent with Interior's own past practices, that a species' historic range is one factor that the Secretary should consider when determining whether a species may be extinct "throughout all or a significant portion" of its range. However,

---

[105] *Id.* at 1144.
[106] *Id*. at 1145.
[107] *Id*.

the court still left the Secretary a fair degree of discretion to define the term "significant portion" of a species "range." If, however, the Secretary decided to discount the species' historic range, the Secretary must at least explain her reasoning. How the Secretary would apply this ruling in future cases was unknown.

B. Round 2: the Cases of the Canada Lynx and the Gray Wolf:

Although the Ninth Circuit's decision in *Defenders (Lizard)* was the first decision to fully wrestle with the issue of what constitutes a significant portion of a species range, a number of court's were also dancing around the issue, as evidenced by the listing history of the Canada lynx and the delisting of the gray wolf. An examination of these cases provides further insight into the shift in philosophy at Interior.

1. The Canada Lynx

The Canadian lynx (lynx) (*Feliz lynz Canadensis)* is a medium cat similar in size to a bobcat but distinguishable by its longer legs and larger paws which are adapted for hunting in deep snows.[108] Unlike the bobcat or other midsize cats that consume a wide variety of prey, the lynx is a "specialized carnivore" whose primary prey is the snowshoe hare.[109] Because of the dependence of the lynx on the snowshoe hare the lynx's population cycle parallels the ten-year population cycle of the snowshoe hare.[110] Generally speaking good snowshoe hare habitat is good lynx habitat.[111] The historic

[108] Proposal to List the Contiguous United States Distinct Population Segment of the Canada Lynx; Proposed Rule, 63 Fed. Reg. 36,994 (July 8, 1998).
[109] *Id.* at 36,995.
[110] *Id.*
[111] *Id.*

range of the lynx extended throughout the boreal forest from Alaska, through Canada into the northern part of the contiguous United States.[112]

The lynx population in the lower 48 states has declined dramatically.[113] Historically the lynx inhabited a fairly large range including New England, the Great Lakes, the Rocky Mountains and the Pacific Northwest.[114] In 1977, when the FWS first reviewed the lynx for protection under the ESA the FWS concluded: "the lynx has been totally extirpated in 15 of the 30 states south of the Canada border, in which it originally is thought to have occurred and that in 14 of the remaining States the species is considered by at least some authorities to be 'rare,' 'endangered,' or in some other category of concern."[115] In 1982 the FWS formally designated the lynx as a candidate for listing pending further biological research.[116]

Despite the designation of the lynx as a potential candidate for listing, work on the lynx stalled until 1991 when a group of conservation organizations petitioned the FWS to list the lynx as endangered in the North Cascades ecosystem.[117] The then Acting

---

[112] 63 Fed. Reg. at 36,994-995.
[113] *Id*.
[114] *Id.*
[115] *Defenders of Wildlife v. Babbitt,* 958 F. Supp. 670, 674 (D.D.C. 1997) (quoting FWS, Office of Endangered Species, *The Lynx in the Lower 48 States* (1977))(*Defenders (Lynx I)*.
[116] Review of Vertebrate Wildlife for Listing as Endangered or Threatened Species, 47 Fed. Reg. 58,454 (Dec. 30, 1982)
[117] Publication of 90-Day Findings for Two Petitions to List the North American Lynx in North Cascades of Washington and Three Oaks from California as Endangered, 57 Fed. Reg. 46,007, 46,008 (Oct. 6, 1992) The Acting Director stated "although it may be assumed the same aforementioned threats [to the lynx] 9encroachment by logging, roads, trappers, hunters, etc) exist throughout the southern periphery of the lynx's range (Washington, Idaho, Montana, Utah, Colorado, Wyoming), there is no indication the lynx is in danger of extinction throughout all or a significant portion of its range. The current range of the lynx in the North Cascades of Washington does not constitute a significant portion of its entire range. British Columbia and Alaska constitute the majority of the lynx's range." *Id.* Elsewhere the Acting Director describes the lynx's "entire range" as Alaska, Colorado, Idaho, Maine, Michigan, Minnesota, Montana, North Dakota, New Hampshire, Nevada, New York, Oregon, Utah, Vermont, Washington, Wisconsin, Wyoming, and Canada. *Id.*

Director of the FWS denied the petition arguing that there was no indication that the lynx was in danger of extinction in Canada and Alaska and that the lynx in North Cascades was not a DPS and therefore, not a "species" under the ESA.[118] In reaching this conclusion the Acting Director relied on evidence that some lynx in the North Cascades regularly migrated between British Columbia and the north Cascades ecosystem of Washington thus, in the Acting Director's view, the North Cascades lynx population was not distinct from the larger lynx metapopulation.[119] Conservation organizations immediately sued.[120]

While this listing case was pending, the Director of FWS Region 6 sent the Acting Director a memo requesting a rescission and amendment to the FWS lynx listing petition denial.[121] The memo sheds light on the FWS's view of the "significant portion of a species range" concept. The Region 6 Director observed one of the major problems with the decision to reject the lynx listing petition was its focus on the "*present range* of the lynx and… [its failure to] properly consider *historical* range." [122] If "significant portion of a species range" meant "present range" then many species would not receive the protection they merited under the ESA.[123] In particular, the Region 6 Director was concerned that this line of reasoning was contrary to the line of reasoning used by the

---

[118] *Id.* at 46,008-009.
[119] *Id.* at 46,008.
[120] *Canada Lynx v. Babbitt,* Case No. C92-1269 (W. D. Wash. 1992)
[121] The Acting Director also received a memorandum from Region I. While Region I supported the decision not to list Region I asked for clarification regarding the emigration and immigration habits of the Lynx and the impact of these behaviors on the concept of distinct populations. Region I observed that immigration and emigration could impact a species listing as a distinct population then several species including the bald eagle, grizzly bear, gray wolf and woodland caribou would be in danger of delisting. *Defenders (Lynx I),* 958 F. Supp. at 675.
[122] *Id.* (quoting Memorandum from Deputy Regional Director, Region 6 to FWS Director Re: North Cascades Lynx Finding and Implication to Draft Vertebrae Population Policy (March 11,1993)) (emphasis in original).
[123] *Id.*

FWS to protect species such as the grizzly bear in the lower 48 states and if now applied by the FWS in listing decisions could eventually lead to the delisting of a number of species, species for which FWS had clearly considered the historic range in the listing determination. These species included the grizzly bear, the gray wolf, and the woodland caribou.[124]

The comments of the Region 6 Director is further evidence that, at least until the 1990's, the FWS had considered the concept *a significant portion of a species' range* to be something greater then a species present range. It is also clear from this discussion that in assessing the significant portion of a species range concept, the FWS gave some degree of weight to a species' historic range and the decline in a species' historic range when making listing determinations.

In April 1992 the parties settled their initial suit on condition that the FWS re-evaluate its decision not to list the lynx in the North Cascade.[125] On July 9, 1993 the FWS issued a finding on the original listing petition. Although the FWS now acknowledged that the concept of "distinct population segments" could include either "populations that are reproductively isolated from other members of the species" *or "*the entire conterminous United States population of a species" the FWS concluded that there was not "*substantial information* indicating" that listing was warranted because the lynx

[124] *Id.* at 674-75.
[125] Notice of Not Substantial Petition Findings of the North Cascades Lynx, 58 Fed. Reg. 36, 924 (July 9, 1993).

in the North Cascades Region was "not a distinct population segment."[126] The FWS did agree, however, to do a status review of the lynx.[127]

In the status review Region 6 biologists concluded that the lynx should be listed "throughout its range in the conterminous United States."[128] Not a single biologist or lynx expert employed by the FWS disagreed with the listing recommendation made by the Region 6 experts.[129] Despite this strong recommendation the FWS Director in 1994 issued a "notice of 12-month petition finding" which concluded that the listing of the Canada lynx was not warranted.[130] In particular the FWS Director concluded that the "lynx distribution has not significantly changed from historic range except for periodic peripheral shifts of distribution from cyclical changes of its chief prey, the snowshoe or varying hare."[131] While the Director acknowledged that the decline in the presence of the snowshoe hare and thus the lynx is as a direct result of habitat loss due to human settlement and forest clearing in the southern range of the lynx[132] the Director concluded

---

[126] *Id.* (emphasis added).
[127] *Id.*
[128] *Defenders (Lynx I)*, 958 F. Supp. at 676. Region 6 biologists concluded that the lynx population in the lower 48 states met at least four of the statutory criteria for listing and concluded that habitat destruction, desecration and fragmentation was a primary cause of the decline of the lynx population in the lower 48 states. Causes of habitat degradation included timber harvest, fire suppression, construction and clearing of forests for urbanization, ski areas and agriculture. *Id. (*quoting Draft Proposed Rule to List One Population Segment of the Canada Lynx as Endangered and One Population Segment as Threatened Within the Contiguous United States (October 17, 1994)).
[129] *Id.* at 676.
[130] 12-Month Finding for a Petition to List as Endangered or Threatened the Contiguous United States Population of the Canada Lynx, 59 Fed. Reg. 66,507 (Dec. 27, 1994)(12-Month Petition Finding).
[131] *Id.* at 66,509. It should be noted that the Directors "12-Month Petition Finding" is somewhat contradictory. For example at one point the Director, without citation to biological authority, concludes that the lower 48 states represents the "fringe of population occurring in its historic range" and concludes that the lynx does not occur within the lower 48 states due to lack of favorable habitat. Yet further on the Director recognizes that the historic range of the lynx in the lower 48 includes "New England (Maine, New Hampshire, Vermont and New York), the Great Lakes (Michigan, Wisconsin and Minnesota), the Rocky Mountains (Idaho, Montana, Wyoming, Utah and Colorado) and the Northwest Region (Washington and Oregon). *Id.* at 66,507-08.
[132] *Id.* at 66,508.

that there was not "substantial information" in the petition to support the listing of the southern Rocky Mountain population as a species under the ESA.[133] Once again the conservation groups sued.[134]

In the Director's 1994 determination one can detect a shift in the FWS approach to the SPR phrase. The Director "dances" around the concept of the lynx's historic range – he acknowledges that the historic range likely extended into the lower 48 states but he argues that the habitat in the lower 48 states is unsuitable or marginal because it has been developed, the boreal forest has been harvested and forest fires have been suppressed since the turn of the century. Yet, such modifications and curtailments of habitat are the very factors that should prompt listing under the ESA.

The Court in *Defenders (Lynx I)* overruled the Director's determination on two grounds. The Court first noted that the Director had applied an incorrect standard when he required that the listing determination be supported by "substantial evidence" in the petition. The ESA requires, said the Court, that listing determinations be made on the "best scientific and commercial data available" a standard which the Director ignored.[135]

---

[133] *Id.* at 66,509.
[134] *Defenders (Lynx I)*, 958 F. Supp. 670.
[135] The District Court sharply criticized the Director's decision to ignore FWS biologists stating: "[w]ithout mentioning the detailed study and proposal by Region 6 biologists, the agency announced that, having conducted a status review, and upon 'careful evaluation of the best available scientific and commercial information', it concluded that listing the species was not warranted. Without citing any scientific or commercial information, the agency set forth conclusions directly opposite to each conclusion reached by Region 6 biologists on each statutory factor, Without supporting citations, the FWS concluded that the species was not over utilized, that the lynx 'currently occupies much of its original historic range', that existing regulatory mechanisms were adequate to protect the species, and that the 'Service is unable to substantiate that trapping, hunting, poaching and, and present habitat destruction threaten the continued existence of the lynx in the wild in the contagious United States'" *Id*. at 676-77.

Absolute scientific certainty was not required.[136] Requiring scientific certainty would undermine the precautionary nature of the ESA. The court, quoting the ESA's extensive legislative history observed:

> The ESA contains ample expressions of Congressional intent that preventative action to protect species be taken sooner rather than later "[I]n the past, little action was taken until the situation became critical and species was dangerously close to total extinction. This legislation provides us with the means of preventive action" (remarks of Rep. Clausen); "[I]n approving this legislation, we will be giving authority for the inclusion of those species which… might be threatened by extinction in the near future. Such foresight will help avoid the regrettable policy plight of repairing damages already incurred. (remarks of Rep. Gilman) . . . [s]heer self interest impels us to be cautious, and the 'institutionalization of that caution lies at the heart of the [ESA]"[137]

In applying a substantial evidence standard rather then a "best available data standard" the agency was acting contrary to the Congressional intent that the FWS give the "benefit of doubt to the species." As such the Court concluded the Director's determination should not be afforded judicial deference.[138]

Secondly, the court, citing the extensive contrary conclusions of the Region 6 biologists, concluded that the Director's determination was arbitrary and capricious because the conclusion that the lynx is a "mere 'remnant population' of a species that once occupied an extensive range" is inconsistent with FWS's past listing practices as evidenced by the listing record for the grizzly bear and the eastern timber wolf.[139] The court observed in listing the grizzly and the wolf that "the FWS compared the existing contiguous United States range of each species to the far more abundant populations in

---

[136] *Id.* at 679.
[137] *Id.* at 680.
[138] *Id.*
[139] *Id.* at 685.

Canada and Alaska and concluded that the United State portion of each species should be listed. In listing these species, the agency recognized that the fact that an animal population consisted of a mere 'remnant' of a larger historical population argued for, rather than against protecting the species from further depletion."[140] Thus to focus the SPR analysis on present range ignoring historic range undermines the very precautionary nature of the ESA, to protect species before they reach the verge of extinction.[141] The court sent the matter back to the FWS for reconsideration.

It was not until March 2000, nine years after the initial listing petition, three years after the court's decision in *Defenders (Lynx I)* and eighteen years after the lynx was first considered a candidate species, that the FWS published the Lynx Final Rule.[142] While Region 6 biologists had previously recommended that the lynx be classified as threatened in the Northern Cascades and endangered in the Northeast, Great Lakes and Southern Rockies the FWS now concluded:

> Within the contiguous United States, the relative importance of each region to the persistence of the DPS [of the lynx] varies. The Northern Rockies/Cascades Region supports the largest amount of lynx habitat and has the strongest evidence of persistent occurrence of resident lynx populations, both historically and currently. In the Northeast (where resident lynx populations continue to persist) and Southern Rockies regions, the amount of lynx habitat is naturally limited and does not contribute substantially to the persistence of the contiguous United States DPS. Much of the habitat in the Great Lakes Region is naturally marginal and may not support prey densities sufficient to sustain lynx populations. As such, the Great Lakes Region does not currently contribute

---

[140] *Id.*

[141] In response to the Court's order the FWS on May 27, 1997, issued yet another "12-Month Petition finding" essentially stating that the agency was too busy with other matters to reconsider the Lynx' listing status and assigning it a listing priority of 3 due in part to habitat loss, low populations and inadequate regulatory controls. 12-Month Finding for a Petition to List the Contiguous U.S. Population of the Canada Lynx, 62 Fed.Reg. 28,653, 28,657 (May 27, 1997).

[142] *See generally,* Determination of Threatened Status for the Contiguous U.S. Distinct Population Segment of the Canada Lynx Final Rule, 65 Fed. Reg. 16,052 (March 24, 2000).

> substantially to the persistence of the contiguous United States DPS. Collectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of the DPS. We conclude the Northern Rockies/Cascades Region is the primary region necessary to support the continued long-term existence of the contiguous United States DPS.[143]

Thus, the Lynx Final Rule created a single DPS for all populations of lynx found in the contiguous 48 states, and listed the lynx in this DPS as a threatened species based primarily upon existing habitat in the Northern Cascades. The FWS further announced that while designation of critical habitat—a statutory requirement under the ESA—was prudent, it would defer critical habitat designation for the lynx in order to "concentrate our limited resources on higher priority critical habitat."[144] Defenders once again sued the FWS alleging that the FWS designation of the lynx as threatened as opposed to endangered was "arbitrary, capricious, and an abuse of discretion".[145]

FWS's analysis indicated that it recognized populations of the lynx had extended into four separate historic regions across which threats to the lynx varied.[146] Yet, FWS characterized areas outside of the Northern Cascades as not significant, as they believed any lynx in these areas were not critical to the long-term persistence of the species within the DPS. Thus, rather than create separate DPS's for the lynx and list the species according to the threats faced in each of these regions, FWS "lumped" the lynx's entire U.S. range into one single DPS. The Court characterized the FWS's conclusion that the

---

[143] *Id.* at 16,061.
[144] *Id.* at 16,083.
[145] *Defenders of Wildlife v. Norton,* 239 F. Supp. 2d 9 (D.D. C. 2002)(*Defenders (Lynx II)*. Defenders also challenged the FWS failure to list critical habitat in accordance with statute. *Id.* at 10.
[146] *Id.* at 18 (*citing* 65 Fed. Reg. at 16054-55). In fact the FWS acknowledged the lynx was in imperiled status in "at least two of its historical regions." In the Northeast the FWS noted that the lynx was "extirpated" in New York, and Vermont and that it historically occurred in New Hampshire. 65 Fed. Reg. at 10655-56. The FWS also found that resident lynx populations "historically occurred" in Colorado and portions of Wyoming but that this population may now be extirpated. *Id*. at 16059.

Northeast, Great Lakes and Southern Rockies did not constitute a significant portion of the lynx's range as:

> counter intuitive and contrary to the plain meaning of the ESA phrase "significant portion of its range." While the ESA does not define this important phrase the word "significant" is defined in the dictionary as "a "a noticeably or measurably large amount." It is difficult to discern the logic in the Service's conclusion that three large geographical areas, which comprise three quarters of the lynx's historical region, are not a "noticeably or measurably large amount" of the species range. At a minimum the Service must explain such an interpretation that appears to conflict with the plain meaning of the phrase "significant portion."[147]

Refusing to list the lynx in portions of its historic range simply because it was now rare in these areas was contrary to the very purpose of the ESA. The FWS argument that a species not be afforded protection because its occurrence in what was once its historic range is rare would be tantamount to affording the "*most* fragile, at risk species…the *least* protection under the law."[148] The Court concluded, applying the test established in *Defenders (Lizard)*, that the FWS's "own Final Rule makes clear that 'there are major geographical areas in which [the lynx] is no longer viable but once was."[149] Once again the FWS was sent back to explain its conclusion that the area in which the lynx no longer lived is not a "significant portion of its range."

Evidently believing the old adage "the third time is a charm" the FWS, on July 3, 2003, published yet another determination[150] in support of its initial conclusion—that is,

---

[147] *Defenders (Lynx II)*, 239 F. Supp. 2d at 19 (quoting Webster's Ninth Collegiate Dictionary at 1096 (Merriam-Webster Inc. 1990)).
[148] *Id.*
[149] *Id.* at 20, (citing *Defenders of Wildlife (Lizard),* 258 F.3d at 1145).
[150] In the notice for public comment issued July 3, 2003, FWS solicited comments on the "quality and quantity" of lynx habitat in the Northeast, Great Lakes and Southern Rockies. *Defenders of Wildlife v. Kempthorne,* No. 04-1230 2006 WL2844232 (D.D.C. Sept. 26, 2006)(*Defenders (Lynx III)*)(citing e-mail of Randal Bowman dated March 3, 2003). The scope of the solicitation for public comment suggests that in

FWS contended that the lynx was "not in danger of extinction throughout a significant portion of its range within the Northeast, Great Lakes, or Southern Rockies and therefore [did] not warrant reclassification to 'endangered status'…within these areas."[151] The FWS analysis provides insight into the shift of thinking within Interior. After an extensive discussion of the boreal forest habitat necessary to support snowshoe hare/lynx populations the FWS concludes: "[w]e consider both the *historic and current range* [of the lynx] to consist of Colorado, Idaho, Maine, Michigan, Minnesota, Montana, New Hampshire, New York, Oregon, Utah, Vermont, Washington, Wisconsin, and Wyoming because these States support some boreal forest and have more frequent records of lynx".[152] The FWS then concludes that these portions of the lynx range were not significant. The FWS reasoned that the significant portion of a species' range analysis required the agency to first determine areas in which the lynx might be in danger and then determine whether those portions of the lynx range constituted a significant portion of its range.[153] The agency rejected the court's definition of significant as a "noticeably or measurably large amount" and now concluded that significant means "important". The agency did not, however, define the term "important" noting simply that it believed its interpretation of the word significant to mean important was more consistent with the intent of the ESA than a geographic interpretation. Furthermore it argued the habitat in the contiguous United States was not "important" habitat to the lynx because the boreal

---

analyzing the concept of a "significant portion" of the lynx's range the FWS intended to limit its analysis to existing suitable habitat as opposed to its historic range.

[151] *See generally,* Notice of Remanded Determination of Status for Contiguous United States Distinct Population Segment for the Canada Lynx, 68 Fed. Reg. 40,076 (July 3, 2003)

[152] *Id.* at 40,080 (emphasis added).

[153] *Id.* at 40,076.

forests in the contiguous lower 48 states was at the southern range of the boreal forests. Because this habitat was not important to the lynx the lynx did not merit protection outside of the Northern Cascade region. [154]

Once again the parties found themselves back in court[155] where an exasperated court admonished the FWS:

> [t]he Court's instructions in its December 2002 Memorandum Opinion were clear and unambiguous. Because it found FWS's determination that collectively, the Northeast, Great Lakes and Southern Rockies do not constitute a significant portion of the range of the [United States] DPS to be arbitrary and capricious, it ordered the agency [a]t a minimum, [to] explain such an interpretation that appears in conflict with the plain meaning of the phrase 'significant portion.' Asking the same question in a slightly different way the Court further instructed FWS to, explain [its] conclusion that the area in which the [lynx] can no longer live is not a significant portion of its range . . .
>
> There can be no question that the agency's primary duty on remand was to explain its earlier finding that the Court held to be inconsistent with the ESA: that the Northeast, Great Lakes, and Southern Rockies, three of the four regions that the lynx has historically populated, do not 'collectively' constitute a 'significant portion' of the animal's total range within the contiguous United States.[156]

While the Court noted that the FWS did provide some discussion of the term "significant" in its 2003 determination, it described this discussion as "wholly unsatisfactory," noting that the definition FWS of significant (i.e. important) had previously been rejected by the Court as in conflict with the underlying purpose of the ESA and the Ninth Circuit's holding in *Defenders (Lizard*). The court remanded the issue to the FWS's to clearly and specifically address the question "how three-fourths of what [the FWS] had previously identified as the lynx's total range in the contiguous United

---

[154] *Id.* at 40,076-80.
[155] *Defenders (Lynx III)* No. 04-1230 2006 WL 2844232. This time the American Forest and Paper Association intervened in support of the Secretary.
[156] *Id.* at *12 (quotations omitted*).

State could not be 'significant'" or, to use the FWS's own characterization, "important".[157]

FWS provided its justification in a statement published in the Federal Register on January 10, 2007[158]—roughly a quarter century after the lynx was first designated as a candidate species. It suggested that FWS had not established any policy regarding the application of the SPR phrase noting:

> Apart from the statutory and regulatory definitions of 'threatened' and 'endangered,' no formal guidance shaped the Service's analysis in the 2000 final listing rule of what was to be considered when evaluating the 'significance' of any particular area of a species' range. Furthermore, at the time there was no case law concerning what should be considered in a determination of a "significant portion" of a species "range."[159]

This claim is particularly interesting in light of FWS's history in applying the SPR Phrase and the Ninth Circuit's *Defenders (Lizard)* decision of July 2001 a decision that the FWS now choose to ignore in its discussion of what constituted a significant portion of the lynx's range. The FWS acknowledged that it has had an evolving view of the meaning of the "endangered" and 'threatened" species:

> [t]he conclusions reached in 2000, and the basis for these conclusions do not necessarily represent the Service's current views, given new information regarding the lynx as well as the evolving views of the courts and Service regarding the meaning of the definitions of "endangered species" and "threatened species". In fact, when the Service completed the first remand decision, it did not reiterate its conclusion from 2000 on this issue; instead, it based its new conclusion on a different line of reasoning. The Service recently requested that the Office of the Solicitor examine the definition of "endangered species." As a result, the explanation of the Service's rational for its decision in 2000 provided here

---

[157] *Id*.
[158] Clarification of Significant Portion of Range for the Distinct Population Segment of Canada Lynx, 72 Fed. Reg. 1186 (Jan. 10, 2007).
[159] *Id.* at 1187.

> may not reflect how the Service will apply the definition of "endangered species" in the future.[160]

The FWS then proceeded to analyze its 2000 denial of protective status to lynx populations in the Northeast, Great Lakes and Southern Rockies. FWS now argued that in reaching its determination it followed DPS policy established in 1996 expressly for the purpose of recognizing distinct population segments of species. Under this policy, a population must meet two criteria to be considered a distinct population:

> (1) The population in question must be discrete, or markedly separate, either physically, physiologically, ecologically, or behaviorally, from the rest of its taxon; and
> (2) The population must be biologically or ecologically significant.[161]

In the case of the Canada lynx, the FWS had in 2000 determined that the U.S. population, as a whole, met both the discreteness and significance criteria.[162] It now considered each of the four geographic regions that constitute "the current range of the lynx within the contiguous United States" and found that three of the four regions were collectively not significant.[163] The arguments presented in favor of this finding focused almost entirely on the FWS' interpretation of the word "significant." FWS argued that in determining what habitat was significant to the lynx, it focused on the "biological importance" of each area to the species as a whole:

> In the 2000 final listing rule, we evaluated 'significance' primarily in this biological context. In that rule, we expressed the belief (which we still maintain) that significance should not be determined based on the size of an area alone. We considered the ability of the area to support populations needed for recovery to be the primary consideration. We did not consider sizable area with poor-quality

---

[160] *Id.*
[161] *Id.* (citing 61 Fed. Reg. 4722).
[162] *Id.*
[163] *Id.*

> habitat for the species or prey limitations to be significant from a biological perspective.[164]

Thus, they concluded, "…the Northern Rockies/Cascades Region was the primary region necessary to support the long-term existence of the contiguous U.S. DPS." [165] In effect, this decision rendered all other areas of the lynx's current and former range "insignificant" in so far as FWS was concerned. The FWS expressed the view that its 2000 determination:

> was based on an assessment of the biological context of the habitat conditions and the lynx status within its contiguous U.S. range. The 2000 final listing rule found that habitat for the lynx in the contiguous United States is of varying quality, and much of it is naturally incapable of supporting adequate densities of snowshoe hare sufficient to sustain resident lynx populations. Quality of habitat is an important factor in determining "significance" because marginal habitat, no matter how large, cannot support stable or expanding populations of lynx, except by migration of individual lynx from high quality "significant" habitat; and in fact, may serve as a population sink where lynx mortality is greater than recruitment and lynx are lost from the overall population.[166]

In many respects this conclusion appears to be antithetical to the Congressional intent underlying the ESA. If one of the primary purposes of the ESA is to protect species which are in danger of extinction because their habitat is threatened,[167] then to argue that the term significant portion of a species range is equivalent to existing quality habitat is to ignore any and all habitat destruction that occurred in the past—the same destruction that had so concerned Congress when the ESA was passed. It would mean that the ESA affords the least protection to those species whose habitat is in the greatest threat of destruction.

---

[164] *Id.* at 1188.
[165] *Id.*
[166] *Id.* at 1189
[167] *See generally, supra* at p. 3-4.

2. The Gray Wolf

Although the Court addressed the SPR phrase in both the FTHL and lynx cases FWS still considered the issue unresolved in 2003 when it issued its Final Rule to downlist the gray wolf to threatened.[168] The listing history of the gray wolf (*Canis Lupus)* is virtually as old as the ESA. First listed in 1974[169] the gray wolf is the largest of wild dogs ranging in weight from 62 to 175 pounds. Wolves are distinguished from dogs and coyotes by their long legs, large feet, straight tail and wide head and snout. Their primary prey is medium to large mammals including deer, elk, caribou, mountain goats and, in agricultural areas, domestic animals. The gray wolf plays an essential role in maintaining healthy deer, elk and caribou populations.[170]

The gray wolf lives in packs/family groupings in territories ranging from 24 to 200 square miles. The gray wolf's historic range extended across most of the conterminous United States but by 1970 the gray wolf was extirpated from nearly all of its historic range in the contiguous United States.[171] The extirpation of the gray wolf across its historic range is largely attributed to habitat destruction, hunting and trapping, and a bounty system designed to eliminate the gray wolf, which was viewed as a pest.[172]

---

[168] Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Coterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves Final and Proposed Rules, 68 Fed. Reg. 15,804 (April 1, 2003).
[169] Reclassification of the Gray Wolf in the United States and Mexico, with Determinations of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9607 (March 9, 1978); Lists of Endangered and Threatened Fauna, 40 Fed. Reg. 17,590 (April 21, 1975); and Amendments to Lists of Endangered Fish and Wildlife, 28 Fed. Reg. 14,678 (June 4, 1973).
[170] 68 Fed. Reg. at 15,804-04.
[171] *Id.*
[172] L. David Mech, The Wolf: The Ecology and Behavior of an Endangered Species, at 325 (9th ed. 1994). The wolf was viewed as a nuisance in most agricultural communities across the United States.

By 1970 Minnesota had the only significant population of gray wolves.[173] In 1974 FWS recognized and listed four subspecies of the gray wolf even though the best available science indicated at least one of these subspecies – the Texas gray wolf (*Canis lupus monstrabilis*) was "probably extinct".[174] In 1978 the FWS reclassified the gray wolf as endangered at the species level throughout the coterminous United States except in Minnesota where the gray wolf was down listed to threatened.[175] Thus, it is clear that—at least through 1978—FWS interpreted the term range to include the historical range of the species.

By 2003 the gray wolf had increased in both population and range.[176] Minnesota wolves had dispersed and re-colonized in northern Wisconsin and Michigan.[177] Gray wolves had also been sited in Vermont and Maine. The FWS observed that Maine, New York, and New Hampshire still contained suitable habitat for the gray wolf although human development might hinder their dispersal in these states.[178] In the Western United States the FWS successfully reintroduced wolves in Yellowstone National Park. Gray wolves were also documented in eastern Oregon and Washington and the FWS observed,

---

[173] *Defenders of Wildlife v. Secretary of Interior,* 354 F. Supp.2d 1156, 1161 (D.Or. 2005) *(Defenders (Wolf))*.

[174] 43 Fed. Reg. at 9607. *See also,* Nicole M. Tadano, *Piecemeal Delisting: Designating Distinct Population Segments for the Purpose of Delisting Gray Wolf Populations is Arbitrary and Capricious,* 82 Wash. L. Rev. 795, 810 (August 2007)(citing Luigi Boitani, Wolf Conservation and Recovery, in Wolves: Behavior, Ecology, and Conservation, 317, 321 (L. David Mech & Luigi Boitani, eds., 2003)). Tadano notes that the FWS had historically listed species as threatened or endangered throughout their historic range even though the species occupied only a fraction of their range at the time of the listing. Most notable among these species was the grizzly bear, the American black bear and the gray wolf. *Id.*

[175] *Id.* at 797-98.

[176] *Defenders (Wolf)*, 354 F. Supp.2d at 1161.

[177] *Id., see also,* 68 Fed. Reg. at 15,814-15. The FWS reported that wolves had also dispersed to North Dakota, South Dakota, Illinois and Missouri but believed these dispersals were unlikely to contribute to wolf recovery unless the dispersed wolves returned to the core recovery population in Minnesota or started a new pack.

[178] *Defenders (Wolf)*, 354 F. Supp.2d at 1161.

"habitat that could support wolves certainly exists in several areas" in the West.[179] In fact, by 2003 wolf numbers had increased in the western Great Lakes states and the northern Rockies to the extent that the populations residing in these regions met the recovery goals established for the regions; however, the wolf was still missing from the vast majority of its historic range within the conterminous U.S.[180]

Nonetheless, the FWS believed the gray wolf had recovered to such a degree as to merit down listing and on April 1, 2003, issued a Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States (2003 Gray Wolf Rule).[181] The 2003 Gray Wolf Rule established three DPSs for the gray wolf: the Eastern DPS, which constituted all states east of the Rockies to the Atlantic Ocean, the Western DPS, which constituted all states west of and including the Rockies, and the Southwestern DPS which included Texas, Arizona and New Mexico. The 2003 Gray Wolf Delisting Rule proposed down listing gray wolves in the Western and Eastern DPSs from endangered to threatened.[182] In down listing the gray wolf in the newly created Eastern and Western DPSs the FWS observed:

> *[w]e recognize that large portions of the historic range, including potentially still-suitable habitat within the DPSs, are not currently occupied by gray wolves*. We emphasize that our determinations are based on the current status of, and threats faced by, the existing wolf population

[179] *Id. (quoting* 68 Fed. Reg. at 15,817).
[180] Tadona, *supra* note 174, at 798.
[181] 68 Fed Reg. at 15,804.
[182] *Id.* The Final Rule also delisted gray wolves in fourteen states in the southeastern United States because of listing error. That is, because wolves were not historically present in the southeastern U.S., the FWS argued that it was error to list them in that region. The southeastern region had originally been occupied by the Red Wolf (C. Rufus), a separate species. 68 Fed. Reg. 15,805. Wolves in the Southwestern DPS belong to a separate subspecies, the Mexican Gray Wolf (*Canis lupus baileyi*), which retained its endangered status under the Final Rule. *Id.*

> within these DPSs. . . . Similarly, *we believe that when an endangered species has recovered to the point where it is no longer in danger of extinction throughout all or a significant portion of its current range, it is appropriate to downlist* the listed species to threatened even if a substantial amount of the historical range remains unoccupied. When it is not likely to become endangered in the foreseeable future throughout all or a significant portion of its range, it should be delisted. The wolf's progress toward recovery in the Eastern DPS, together with the threats that remain to the wolf within the DPS, indicates that the gray wolf is not in danger of extinction in its entire range within the DPS.[183]

By basing its analysis on the threats faced by existing wolf populations, FWS essentially equates the "significant portion of a species range" concept with a "species current range." Moreover, by asserting that it is appropriate to downlist a species when "it is no longer in danger of extinction . . . [in] a significant portion of its current range"[184] FWS inverts the SPR standard established in the ESA. The ESA requires a species to be listed as "endangered" when it is in danger of extinction in either *all* or *a significant portion* of its range. Thus, whenever the portion of range in which a species is in danger of extinction is significant, that species should be listed. The 2003 Wolf Final Rule turns this standard on its head; in contrast to the standard set in the ESA, under FWS's logic a species could be down listed once it had recovered over *any* significant portion of its current range.

Further insight into the evolution of FWS's interpretation of "a significant portion of a species' range" can be gleaned from the proceedings of a meeting regarding the

---

[183] *Id.* at 15,857 (emphasis added). The FWS, ignoring the primary holding of *Defender (Lizard),* argues its rationale is consistent with the rule set forth by the 9th Circuit citing to the courts observation that there may be instances where a species historic range is large but the species continues to enjoy a healthy population despite the loss of a "substantial amount of suitable habitat." This argument ignores the FWS own finding that there were still extensive areas of suitable habitat within the wolf's historic range where the wolf had not re-established itself. It also ignores the fact that there were gray wolves living outside the "current range" in their historic range in Illinois, North Dakota, South Dakota, Vermont, Oregon and Washington.
[184] *Id.*

future status of the gray wolf held by FWS in 2000 at Marymount University. At that meeting the FWS defined "significant portion of the gray wolf's range" as:

> that area that is important or necessary for maintaining a viable, *self-sustaining, and evolving representative population or populations* in order for the taxon to persist into the foreseeable future . . . [the FWS applied this definition and concluded] the presence or absence of gray wolves outside of the core recovery areas is not likely to have a bearing on the long-term viability of the three wolf populations.[185]

Yet, the purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[186] The ESA makes it clear that distinct population segments of species threatened with extinction in a significant portion of their range are entitled to the aforementioned protections. Thus, the definition put forth in the Marymount meeting renders all areas outside of "core recovery" areas insignificant insofar as FWS is concerned.

Several conservation groups immediately challenged the 2003 Gray Wolf Rule in Oregon and Vermont Federal District Courts, alleging FWS failed to consider whether wolves were in danger of extinction in a "significant portion of their range", and challenging the proposed DPSs as a subterfuge for delisting.[187] Defenders argued that the FWS definition of "significant portion of a species range" as current range or "core recovery areas" was contrary to the intent of the ESA and both the Oregon and Vermont Federal District Court agreed. Citing *Defender (Lizard)* the Oregon Federal District Court held that where, as here, the Secretary proposed excluding from the definition of "significant portions of a species range" areas where the species had been historically

---

[185] *Defenders (Wolf)*, 354 F. Supp.2d at 1164 (emphasis added).
[186] 16 U.S.C. § 1531(b)(1973).
[187] *National Wildlife Federation v. Norton,* 386 F.Supp.2d 553 (D.Vt. 2005); *Defenders (Wolf),* 354 F.Supp.2d 1156.

viable but no longer was the Secretary must explain her rationale and that rationale must be consistent with Congressional intent.[188] Furthermore, the court noted that, by including in the concept of "significant portion of a species range" in the ESA Congress intended to provide expansive protections for species, not to limit protections. To hold otherwise would be to render "the phrase [significant portion of it range] superfluous."[189]

Nor was the Oregon Federal District Court persuaded by the FWS's DPS argument, which the court viewed as conflicting with Congressional intent and the FWS's own 1996 DPS Policy. The Court observed that the FWS itself recognized the underlying purpose of inclusion of the DPS concept in the ESA was to protect segments of a species that might be struggling while other segments of the species were doing well: "[t]he DPS Policy 'allows the Service to protect and conserve species . . . before large-scale decline occurs that would necessitate listing a species or subspecies throughout its entire range.'"[190] In effect the purpose of the DPS Policy was to "draw a line around a population whose conservation status differs from other populations within that species."[191]

In the case of the gray wolf the court reasoned, FWS turned DPS policy on its head. While the gray wolf had met recovery standards in small isolated segments of the Great Lakes DPS Region and Northern Rockies DPS Region it had not reached recovery levels across the eastern portion of the Great Lakes DPS Region, or the Northeast, or the Pacific Northwest portions of the Northern Rockies DPS Region. In these regions the

---

[188] *Defenders (Wolf),* 354 F. Supp. 2d at 1167-68.
[189] *Id.* at 1168.
[190] *Id.* at 1169, (citing 61 Fed. Reg. at 4725).
[191] *Id.* at 1170 (citations omitted).

gray wolf population remained tenuous. "Instead of drawing a line around the distinct populations in the Western Great Lakes and the Northern Rockies, FWS extended the boundaries from these core areas to encompass the wolf's entire historic range."[192] The FWS then examined the conservation status of the two discrete populations in each of the newly created DPSs to conclude that recovery had occurred even though the wolf only occupied a small fraction of its historic range.[193] The Court concluded that "this inversion of the DPS Policy" to support delisting the wolf was inconsistent with DPS Policy and permitted the FWS to down list vast areas of suitable wolf habitat without ever applying the ESA listing factors.[194] Such action was arbitrary, capricious and contrary to law and the best available science.[195] The Oregon Court enjoined and vacated the FWS delisting rule sending the matter back to the FWS.[196] Nine months later, the Vermont Federal District Court issued a similar decision, finding that the 2003 Gray Wolf Rule violated DPS policy and the ESA, and that the determination that gray wolves were not in danger of extinction in a significant portion of their range was arbitrary and capricious. [197]

The FWS was not, however, persuaded by either the Oregon or Vermont Federal District Court and on February 8, 2007, it published a Proposed Rules designating the Northern Rocky Mountain and Great Lakes populations of gray wolves as a DPS albeit in

[192] *Id.* at 1171.
[193] *Id.*
[194] *Id.* at 1171-72.
[195] *Id.*
[196] *Id.* at 1174
[197] *National Wildlife Federation*, 386 F. Supp.2d 553.

a narrower DPS and then proceeded to delist them within the DPS.[198] Although the boundaries of the DPS for both the Northern Rocky and Western Great Lakes DPSs are more narrowly drawn, the FWS continues to discount vast expanses of historic range, relying instead on "core populations" and the current ranges of the gray wolf.[199] For example, the Western Great Lakes population included the entire state of Michigan despite the fact that there were no wolves confirmed in the Lower Peninsula, an area of roughly 40,000 square miles. In both proposed rules the FWS affirmatively rejected the contention that the concept "significant portion of a species range" includes the historic range of the species, relying on the newly minted policy developed by the Office of the Solicitor.[200]

C. Round 3: The Solicitor Opines

By the fall of 2005 no fewer then eight court decisions had rejected the Secretary's determination that the concept significant portion of a species' range was the

---

[198] Proposed Rule Designating the Great Lakes Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment from the Federal List of Endangered and Threatened Wildlife, 72 Fed. Reg. 6052 (Feb. 8, 2007) and Proposed Rule designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment from the Federal list of Endangered and Threatened Wildlife.72 Fed. Reg. 6106 (Feb. 8, 2007).

[199] 72 Fed. Reg. 6106, 6116 (Feb. 8, 2007). In March 2005 the FWS met at Marymount University to discuss the future status of the wolf in the lower 48 states. Records from the national Gray Wolf Meeting indicate that in addition to considering the status of current gray wolf populations in the Great Lakes and Northern Rocky Mountain DPS the FWS also discussed the status of gray wolves outside the DPSs. This document indicates that gray wolves outside these DPS "may remain endangered forever." In this instance the FWS would have two options: (1) maintain the endangered status outside the DPS or (2) delist wolves outside the DPSs as extinct. This later option was identified by the FWS at the preferred option and is made possible by the Solicitor's interpretation. *See generally, The Humane Society of the United States v. Kempthorne,* No. 1:07-cv-00677 (D.C. Cir Nov. 14, 2007) (Exhibit B to Plaintiff's Motion for Summary Judgment Proceedings for National Gray Wolf Meeting – March 1-2, 2005, Marymount University).

[200] *Id.* The FWS decision to delist the Great Lakes DPS has subsequently been appealed and is scheduled for argument on cross motions for summary judgment. *See generally, The Humane Society of the United States v. Kempthorne,* No. 1:07-cv-00677 (D.C. Cir Nov. 14, 2007) (Plaintiff's Notice of Motion and Motion for Summary Judgment).

equivalent to a species' current or core range.[201] On each occasion the Secretary virtually ignored the court's order and went back to the agency in search of new rationale to support its unchanged interpretation of the SPR phrase. Then on December 16, 2005, the Federal District Court of New Mexico in *Center for Biological Diversity v. Norton* – the Secretary finally had a court that deferred to her definition of "a significant portion of a species range."[202]

1. The Rio Grande Cutthroat Trout

Center for Biological Diversity involved a petition to list the Rio Grande cutthroat trout *(Onocorhynchus clarki virginalis)* (Rio Grande trout) a trout species native to Colorado and New Mexico.[203] As species go, the Rio Grande trout was a latecomer to the ESA designation game. The petition to list the Rio Grande trout was first brought in February 1998.[204] After some initial legal wrangling, FWS agreed to conduct a status review of the Rio Grande trout. In June 2002 the FWS issued a Status Review for the Rio Grande trout finding listing was not warranted.[205] The Status Review relied on the same "core population" argument FWS was using with wolves. Based on its analysis of the Rio Grande trout, the FWS identified 13 "core" populations, out of 250 identified populations, with the greatest chance of survival based on existing threats to the

---

[201] *See, Center for Biological Diversity v. U.S. Fish and Wildlife Service,* 402 F.Supp.2d 1198 (D. Or. 2005) (coastal cutthroat trout); *National Wildlife Federation v. Norton,* 386 F. Supp.2d 553 (D. Vt. 2005)(gray wolf): *Defenders of Wildlife Federation v. Norton,* 386 F.Supp.2d 1156 (D. Or. 2005)(gray wolf)*; Defenders of Wildlife v. Norton*, 239 F. Supp.2d 9 (D.D.C. 2002) (Canada Lynx); *Environmental Protection Information Center v. National marine Fisheries Service,* No. C-02-5401 EDL (N.D. Cal March 1, 2004 (green sturgeon)*; Southwest Center for Biological Diversity v. Norton,* CA No. 98-934 2002 WL1733618 (D.D.C. July 29, 2002)(Queen Charlotte goshawk)*; Defenders of Wildlife v. Norton*, CA 99-02072 (D.D.C. Dec. 13, 2001) (Florida Black Bear).

[202] *Center for Biological Diversity v. Norton,* 411 F.Supp.2d 1271 (D.N.M. 2005)(*Biological Diversity)*

[203] *Id* at 1273.

[204] *Id.* at 1275.

[205] Candidate Status Review for Rio Grande Cutthroat Trout, 67 Fed. Reg. 39,936 (June 11, 2002)

species.[206] According to FWS, protection of these 13 viable core populations was all that was required by the ESA -- so long as these populations were healthy, there was no need to designate the species as either threatened or endangered. The FWS opined:

> [t]he term "*endangered species*" means any species that is in danger of extinction throughout all or a significant portion of its range. The Act does not indicate threshold levels of historic population size at which (as the population of a species declines) listing as either "threatened or endangered" becomes warranted. Instead, the principal considerations in the determination of whether or not a species warrants listing as a threatened or *endangered species* under the Act are the threats that currently confront the species and the likelihood that the species will persist in the "foreseeable future."[207]

Thus, in FWS's view, so long as some relatively healthy "core population" of the Rio Grande trout existed, the requirements of the ESA had been met as far as the Rio Grande trout was concerned.

The Center for Biological Diversity appealed the FWS decision to the Federal District Court of New Mexico.[208] In *Biological Diversity* the New Mexico Federal District Court, rejecting the analysis of the Ninth Circuit and its progeny, granted deference to FWS's interpretation of the SPR phrase.[209] For the Rio Grand trout the FWS defined significance as "biologically significant" which meant that portion of the species range that was "so important to the continued existence of a species that threats to the species in the area can have the effect of threatening the viability of the species as a whole."[210] This was nearly identical to the interpretation rejected by the Ninth Circuit four years prior. The Court elaborated on the issue of significance, asserting that, in

---

[206] 67 Fed. Reg. at 39947.
[207] *Id.* (emphasis in original).
[208] *Center for Biological Diversity,* 411 F.Supp.2d at 12371..
[209] *Biological Diversity*, 411 F. Supp. 2d at 1277-1283.
[210] *Id.* at 1279 (quotes omitted).

effect, the geographic amount or size of a species' lost range need not play *any* role in determining significance. Specifically, the Court contended, "…it is possible to conclude that 99% of a species historic' range may be lost, yet the species will still be thriving in the 1% that is left, in sufficient numbers and sufficient health…that no listing is necessary in order to preserve the species."[211] Moreover, in the Court's view, "…even with a reduction in range, and reduction in absolute numbers of fish or numbers of fish population, if the remaining core populations ensure the species' survival throughout its range *or a significant portion thereof*, then the species is not endangered." [212]

With regard to the concept of range within the SPR phrase, the court concluded that it would make no sense to "require a listing in each instance in which evidence exists that a particular species no longer occupies its historical range."[213] The Court elaborated in its argument rejecting the analysis of the Vermont District Court's gray wolf decision: [i]t appears the Vermont court would require the FWS to 'stringently protect' areas of land where the gray wolf once roamed and, in effect, to restore the wolf to all of its historical range, which is not the purpose of the ESA."[214] With respect to the issue of current versus historic range, the Court concluded that FWS "must take into account the species' historical range and reductions" when making determinations; however, the court argued that even when a species experiences a reduction in range, "…if the remaining core populations ensure the species' survival throughout its range or a

[211] *Id.* at 1280.
[212] *Id.* at 1282. Based on these analyses, the Court granted deference to FWS's view that because 13 "core populations" of trout were not in danger of extinction, the remaining 250+ populations were not biologically significant, and were therefore, not entitled to ESA protections. *Id.*
[213] *Id.* at 1278.
[214] *Id.* at 1283.

significant portion thereof, then the species is not endangered." After all, the court concluded "[t]he purpose of the ESA is not to assess generally how well the ecology is performing but rather to make the best prediction possible as to a species' chance of survival."[215] Interestingly the Court sites no legal authority to support this analysis. Instead the Court, admitting that the term 'significant portion of a species range" was so "puzzling and enigmatic" as to require special briefing, ignores all legal precedence and legislative history and relies solely on the analysis provided by the FWS.[216]

This analysis inverts the previous application of the SPR phrase. Prior to the mid 90's species were deemed listable if they were in danger in all of their range *or* if they were in danger in some portion of their range that was deemed significant. Under the interpretation applied in *Biological Diversity* the analysis is reversed, as long as a species is viable in some significant portion of its current range a species is not in danger of extinction. Under the court's interpretation, the SPR phrase would only provide protection to a species when its range was so constricted that it supported less than a viable population. If the Court's analysis is taken to this logical end, one might conclude that the purpose of the ESA is not to protect the long term viability of the species and the ecosystems upon which they depend, but to insure that some representative population of

[215] *Id* at 1283.

[216] *Id.* at 1277. The Court went on to specifically address the Ninth Circuit's decision, arguing that "if raw size of the range were the only determinative factor, virtually every non-domestic species of wildlife in North America would be listed." *Id.* at 1278-79. It is important to point out that the New Mexico Court misinterpreted the Ninth Circuit's opinion. The Ninth Circuit never suggested that size of the range should be the "only determinative factor"—in fact, the Ninth Circuit considered and dismissed this approach when it rejected the quantitative methodology proposed by conservation groups. Rather, the Court argues for a case by case analysis in which size must be *a* consideration. *Defenders (Lizard),* 258 F.3d at 1141-45. The Ninth Circuit Court concludes consistent "with the Secretary's historical practice that a species *can* be extinct throughout a significant portion of its range if there are major geographical areas in which it is no longer viable but once was." *Id.* at 1145. Where the Secretary abandons this past practice then the Secretary must "at least" explain her rationale presumably in a manner consistent with the legislative history of the ESA. *Id.*

a species exists somewhere in the country in some segment of what remains of their historic range. Instead of protecting species before they reach the threshold of extinction, the application of this standard would only require species to be listed when they reach the brink of extinction—as long as they existed in viable numbers in some significant portion of their range, they would not be entitled to ESA protections.

2. The 2007 Solicitor's Memorandum

With the *Biological Diversity* case the Secretary at last had "the disagreement" among the court's she needed to make a credible argument that the Solicitor needed to clarify the meaning of the phrase "in danger of extinction throughout all or a significant portion of its range".[217] On March 16, 2007 the Solicitor issued a memorandum to the Director of FWS detailing his opinion regarding the meaning of the SPR phrase.[218]

The focus of the Solicitor's memorandum is on the interpretation of the language: "significant portion of a species range" adopted in 2000 by the Bush administration. Beginning in 2000, the Interior's interpretation of the SPR phrase underwent a metamorphosis. At that time, Interior defined the SPR phrase to mean:

> [t]hat a species is an endangered species only when it is in danger of extinction throughout a portion of its *current range* that is "so important to the continued existence of a species that threats to the species in the area can have the effect o threatening the viability of the species as a whole." Under the Department's interpretation, *there is only one situation* in which the Secretary must find a species to be an endangered species – *when the Secretary finds that it is in danger of extinction throughout all of its range*. Under this interpretation, the Secretary need not demonstrate that there are threats so severe throughout the range that the species is in danger of

[217] To date only one court has adopted the decision in *Center for Biological Diversity* as precedence. *See, Center for Biological Diversity v. U.S., Fish and Wildlife Service,* CA No. 05-cv-00305-RPN , 2007 (D. Colo. Mar. 7, 2007)(Bonneville cutthroat trout).

[218] Department of Interior, Office of the Solicitor, Memorandum on the Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range" Doc. M-37013 (March 16, 2007).

> extinction in every portion of its range. Instead, if the *Secretary can demonstrate that the species faces threats in only a portion of its range* so severe as to threaten the viability of the species through out its range, a determination that a species is an endangered species would be justified. In other words, since approximately 2000 the Department has viewed the SPR phrase not as providing another 'substantive standard" for determining whether a species is an endangered species, but rather as "clarifying" the evidentiary burden the Secretary must satisfy when making the determination.[219]

The Solicitor's analysis of the SPR phrase focuses on the words "in danger of extinction" "or," "significant," and "range" in the statutory requirement that to be listed a species must be in danger of extinction "throughout all or a significant portion of its range."[220] The Solicitor concurs with the Ninth Circuit that the ESA intended to protect a species "even if it is facing extinction only in a significant portion of its range. In other words, a species does not need to be in danger of extinction everywhere" in order to qualify for ESA protections.[221] The Solicitor's analysis deviates from the Ninth Circuit's opinion, however, in the application of the concept of "range" and "significant".

The Solicitor acknowledges that there is general agreement among authorities that a species range is generally "the region throughout which a kind of organism or ecological community naturally lives or occurs,"[222] but he then concludes that the term range in the ESA refers only to the species' current range. The solicitor's conclusion is based on two premises. First he contends that the term "is in danger" denotes present tense, which precludes analysis of portions of a species range in which that species no

[219] *Id.* at 2 (*quoting Biological Diversity,* 411 F. Supp. at 1278 (emphasis added)).
[220] *Id.* at 4.
[221] *Id.* at 5-7.
[222] *Id.* at 7.

longer exists i.e. a species historic range[223]—here, he argues, a species is considered *extinct*, not in danger of extinction. Second, he argues that the listing criteria in section 1533 requiring an analysis of the "present or threatened destruction, modification or curtailment of a species habitat or range" are forward looking and preclude analysis of historic range.[224] The Solicitor rejects the Ninth Circuit's conclusion that a species could be considered endangered "if there are major geographical areas in which it is no longer viable but once was."[225] He argues that the Ninth Circuit's conclusion was based on an "inadvertent misquote of the statutory language." [226] He explains:

> [i]n addressing this issue, the Ninth Circuit states that the Secretary must determine whether a species is 'extinct throughout…a significant portion of its range.' If that were true, the Secretary would necessarily have to study the historical range. But that is not what the statute says… [rather] Under the ESA, the Secretary is to determine not if a species is 'extinct..." but if it 'is in danger of extinction throughout…a significant portion of its range'.[227]

In the Solicitor's opinion, although data regarding the historic range of species may help the Secretary determine if a species is in danger of extinction in its current range, the Secretary is not obligated to determine if a species is in danger of extinction in its historical range. Thus, the interpretation of range put forth by the Solicitor suggests a species cannot be listed in its historic range unless that range is part of its current range. This is because, under the Solicitor's interpretation, the only areas in which the Secretary could determine a species to be in danger of extinction would be (1) all of its *current* range, or (2) a significant portion of its *current* range.

---

[223] *Id.*
[224] *Id.* at 8. The Solicitor sights no legal authority supporting this interpretation of the ESA. In fact, this analysis is inconsistent with the FWS own past policies. *See supra* at 6-7 (discussing Interior's rejection of similar logic put forward by the GAO in 1979).
[225] *Defenders (Lizard),* 258 F.3d at 1136.
[226] Solicitor Memorandum, *supra* note 218, at 8.
[227] *Id.*

With reference to the term significant the Solicitor, citing *Chevron,* notes that the Secretary has great deference in determining what constitutes a significant portion of a species range.[228] The Solicitor observes that the term significant is ambiguous, he notes: "it is impossible to determine from the word itself…which meaning of 'significant' Congress intended. Even if it were clear which meaning was intended, 'significant' would still require interpretation. For example, if it were meant to refer to size, what size would be 'significant': 30%, 60%, or 90% of current range."[229] Arguing that the legislative history addressing the meaning of the word 'significant" is sparse, the Solicitor concludes that the legislative history gives the Secretary discretion to divide the range of species "along political boundaries and declare it endangered only in states where state authorities are not providing adequate protection of the species."[230] Furthermore, the Solicitor contends that while the Ninth Circuit employs a plain language definition of significant drawn from the dictionary, the Secretary was free to employ an alternative, "equally plausible definition of 'significant'," such as *important,* or *meaningful.*[231] He concludes that while the Secretary has the discretion to determine significance on a case-by-case basis, s/he "must take into account *not just the size* of the

---

[228] *Id.* at 10-11 referencing *Chevron* for the proposition that ambiguities in statutes within an agency jurisdiction are to be filled by the agency. The Court must defer to the agency interpretation unless the agency's reading differs from what the court believes is the best statutory construction. Beginning with *Defenders (Lizard)* the Secretary had argued that a species could only be considered endangered when it was faced with extinction in a portion of its range "so important…that threats to the species in that area can have the effect of threatening the viability of the species as a whole." This line of reasoning had been rejected by the Ninth Circuit and at least three other Federal District Court's as inconsistent with both the legislative history of the ESA and the FWS own historic practices. In so doing these courts failed to give the Secretary *Chevron* deference according to the Solicitor. *Id.*

[229] *Id.* at 9-10.

[230] *Id.* at 11. This argument seems inconsistent with the requirement that listing determination should be made "solely on the basis of the best scientific and commercial data available." 16. U.S.C. § 1533(b)(2000).

[231] *Id.* at 9

range *but also the biological importance* of the range to the species." [232] Despite this caveat the Solicitor, in the end concludes that the Secretary can look at a number of factors including both size and importance but is bound by no overarching standard.[233]

IV. DISCUSSUION OF THE IMPLICATIONS OF THE SOLICITOR'S OPINION

The Solicitor makes three fundamental claims that have substantial implications for the way that endangered species are defined, and therefore, are afforded protection. The Solicitor contends that: (1) protections for threatened and endangered species are limited to only those portions of a species range that the Secretary deems significant,[234] (2) the Secretary may interpret the term "significance" within the SPR phrase to refer to either the *size* or *importance* of a species' range,[235] and (3) the term "range" within the SPR phrase refers to a species' current range, not its historic range.[236] Each of these claims has significant implications for species designation.

A. The Analytical Framework

The Solicitor argues that when the Secretary determines a species to be in danger of extinction in a significant portion of its range, "he must specify the portion of its range where it is an endangered species and then apply the protections in the ESA to the members of the species in that portion of its range."[237] Thus, in the Solicitor's view, endangered species need only be protected in those portions of their range that the

[232] *Id.* at 13.
[233] *Id.* at 18.
[234] *Id.* at 16-17.
[235] *Id.* at 11.
[236] *Id.* at 3, 7-8.
[237] *Id.* at 7.

Secretary specifies as significant. This interpretation of the ESA has significant implications for species. An illustration of the application of this interpretation is evidenced in the Final Rule listing the Preble's meadow jumping mouse (PMJM) (*Zapus hudsonius preblei*).[238] Using this line of reasoning the FWS argued "[i]f we [FWS] identify any portions [of the PMJM range] as significant, we then determine whether in fact the subspecies is threatened or endangered in this significant portion of its range."[239] The FWS would then ignore the status of the PMJM in the remaining portions of its range. This seems to turn the ESA on its head.

The plain language of the ESA requires that the FWS first determine whether the animal or species as a whole meets the statutory definition of "species".[240] That is whether the animal is either: (1) a recognized *species* of fish, wildlife, or plant, or (2) a recognized *subspecies* of fish, wildlife, or plant. If a group of animals meets one of these criteria, then that species or subspecies is a "species" insofar as the ESA is concerned.[241] It is only after a species has been identified that the definition of endangered species requires that the Secretary determine if the species is "threatened" or "endangered"

---

[238] Proposed Rule to Amend the Listing for the Preble's Meadow Jumping Mouse and to Specify Over What Portion of Its Range the Subspecies is Threatened, 72 Fed. Reg. 62, 992, 63,019 (Nov. 7, 2007).
[239] *Id*.
[240] The ESA provides that "[t]he term of 'endangered species' means *any species* in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6)(2000)(emphasis added). The plain language of the statute presumes the identification of a species as a prerequisite to determination of endangerment. A species within the meaning of the ESA "includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532 (2000).
[241] Importantly, the ESA does not provide a mechanism for listing partial populations of species (i.e. "groups of animals") outside the DPS mechanism—if a population (segment of a species) does not meet the criteria of a DPS, then that population is not considered a "species," and therefore, the population cannot be listed as a separate entity. In fact, the need for a mechanism to list populations of species in lieu of listing whole species/subspecies was the very reason Congress amended the ESA to include protections for DPSs. *See* discussion *supra* pp. 10-12 (discussing the legislative history of DPSs).

throughout a significant portion of its range.[242] In addition the Secretary must also apply the five listing criteria.[243] Thus, to meet the definition of an "endangered species," a group of animals must first meet the definition of "species" and then the Secretary must determine if the species is endangered in all *or* a significant portion of its range and apply the five listing criteria. If the FWS determines that the species warrants listing throughout its range the inquiry ends, if however the FWS determines that there are segments of a population of a species that is not otherwise endangered across its entire range but is none the less endangered in isolate segments, the FWS may list the species as a DPS.[244]

By reversing this process – identifying that portion of a species range which is significant before identifying the species and considering the impacts to DPS without looking at the entire species – the Secretary is able to avoid protecting entire species and limits the geographical range across which the species is protected before it ever identifies the species. In effect the Secretary is able to use this reverse analysis to limit ESA protection to remnant population segments of species without ever assessing the condition of the population as a whole across its range. This analysis has the added "advantage" of limiting the geographical range of protection and thereby reduces political

[242] 16 U.S.C. § 1532 (2000).
[243] 16 U.S.C. § 1533(a)(1)(2000). *See* discussion *supra* p. 8 (discussing listing factors).
[244] *Friends of the Wild Swan v. U.S. Fish and Wildlife,* 12 F. Supp. 2d 1121, 1133-34 (D. Or. 19997). The court in *Friends of the Wild Swan* notes that the FWS's own population segment policy acknowledges that the DPS policy is "a proactive measure to *prevent* the need for listing a species over a larger range – *not* a tactic for subdividing a larger population that USFWS has already determined, on the same information, warrants listing throughout a larger range." *Id.* (emphasis in the original). Congress itself noted that the DPS policy should be used sparingly. 61 Fed. Reg. at 4722.

opposition by developers [245] but it does not provide the breadth of species protection required by the ESA.

1. Defining Significance

According to the Solicitor, the fundamental issue in defining significance is *whether geographic size or ecological importance should be used as the criteria* for determining what constitutes a significant portion of a species' range. Should a portion of a species' range be deemed significant if it is "noticeably or measurably large," or should significance be dependent upon that portion of the range's ecological importance to the species? The Solicitor points out that, depending on which dictionary one consults, "significance" may be defined as either "large" or "important"[246]. Because both definitions are equally valid, he contends that the Secretary should be entitled to *Chevron* deference to select from the range of definitions when interpreting significance.[247]

The Ninth Circuit in *Defender's (Lizard)* also recognized the complexity of the significance issue and acknowledged that overall size of a species' range was an inadequate measure of significance. The court concluded that a "purely quantitative" approach to the measurement of range could result in the failure to protect a species because it would not necessitate listing a species threatened in areas that are "vital to the

---

[245] *See generally,* Babbitt, *supra* note 83 at 63-74 (discussing impacts of the pressure from land developers on the listing of the gnatcatcher); Amy Whritenour Ando, *Waiting to be Protected Under the Endangered Species Act: The Politically Economy of Regulatory Delay,* 42 J. L. & Econ. 29 (1999) (discussing impacts of political pressures including pressures by land development interests on listings); and General Accounting Office, Comptroller General, Report to Chairman, Committee on Science, Space and Technology, House of Representatives: Endangered Species – Factors Associated with Delayed listing Decisions, Doc. GAO/RCED 93-152 (1993)(1993 GAO Report)(discussing impact of delays caused by political pressures on listing of individual species).

[246] Solicitor's Memorandum, *supra* note 218, at 9.

[247] *Id.* at 10.

species' survival" but not necessarily geographically large[248]. Thus, the court acknowledged that in determining significance, the Secretary must take into account a number of factors as illustrated by the ESA's legislative history and the FWS's own past practices. One of the factors that the FWS had consistently applied in the past was the size of the species historic range. Thus the Court concluded: "consistent with the Secretary's historical practice, that a species can be extinct 'throughout…a significant portion of its range' if there are major geographical areas in which it is no longer viable but once was."[249] If the Secretary wanted to deviate from this past practice "she must at least explain her conclusion that the area in which the species can no longer live is not a significant portion of its range."[250]

Avoiding, for the moment, the issue of historic versus current range, the *Defenders (Lizard)* holding can be read consistently with the Solicitor's opinion to mean that the Secretary must consider both the size *and* importance of an area when determining if it is significant. Indeed the Solicitor argued this very point—noting that the Secretary "must take into account *not just the size* of the range *but also the biological importance* of the range to the species."[251] However, the Solicitor would give the Secretary the latitude to pick and choose among a number of factors without justifying why these factors were applied.[252]

---

[248] *Defenders (Lizard),* 258 F.3d at 1143.
[249] *Id.* at 1145.
[250] *Id.*
[251] Solicitor's Memorandum, *supra* note 218, at 13 (emphasis added).
[252] *Id.* at 11. It should be noted that the Court too would allow the Secretary discretion in the application of factors but would also require the Secretary to explain her decision where that determination deviated from past agency practice. *Defenders (Lizard),* 258 F.3d at 1145.

While the Solicitor's interpretation of the term significant can be construed consistently with the holding in *Defenders (Lizard)* more recent applications of the term demonstrate a narrowing of the Secretary's interpretation of the word significant as illustrated by the case of the RGCT. In *Biological Diversity* the court agreed with the Secretary's definition of "biological significance" noting that the size of range lost need play no role at all when determining significance. The Court observed that using FWS reasoning: "it is possible to conclude that 99% of a species' historic range may be lost, yet the species will still be thriving in the 1% that is left, in sufficient numbers and sufficient health…that no listing is necessary in order to preserve the species."[253] In effect, the RGCT stands for the proposition that the Secretary without explanation could effectively ignore the geographic size of a species range. This interpretation is directly at odds with the court's holding in *Defenders (Lizard), Defenders (Lynx)* and *Defenders (Wolf)* all of which hold that, consistent with the Secretary's own past practices the agency must consider significance to include areas where a species is no longer viable in "a noticeably or measurably large amount" or at a minimum explain why these areas are no longer considered to be part of the species range.[254]

It should be noted; however, that reliance on "a noticeably or measurably large amount" as the exclusive measure of significance is not without problems, as the phrase does little to clarify the SPR phrase. Most reasonable people would define nearly any geographic area large enough to support a viable population of a species as "noticeably or measurably large." For example, most would likely conclude that 100 square miles of

[253] *Biological Diversity,* 411 F.Supp.2d at 1280.
[254] *Defenders (Lizard),* 258 F.3d at 1145*; Defenders (Wolf),* 354 F.Supp2d at 1167-69; *Defenders (Lynx II)* 239 F.Supp.2d at 19-20.

land is noticeably or measurably large. However, research suggests that, when prey densities are low, 100 square miles may not be sufficient to maintain a single pack of gray wolves—let alone a viable population.[255] Moreover, when one considers that gray wolves once were distributed across nearly all of North America,[256] 100 square miles no longer appears a "significant" portion of wolves' range, despite being noticeably or measurably large. Still, it is possible to imagine scenarios where even smaller proportions of range could be considered significant. For example, the communal nesting areas of migratory birds or fish may make up only a tiny portion of these species' ranges, but could be of considerable *import* to the species' long-term survival.[257] Thus, "noticeably or measurably large" alone is an inadequate standard for determining whether a portion of a species' range is significant.

The assertion that the size of range lost is irrelevant for determining significance is equally problematic. It suggests that it would be acceptable to let a species go "extinct" over large geographic areas, even whole regions of the United States, as long as FWS deemed these areas unimportant for the long-term viability of the species as a whole. In all four of the cases discussed in this review (i.e. FTHL, lynx, wolf, and RGCT), the Secretary argued that because "core populations" of the species/DPS were not threatened with extinction, the species/DPS was not in danger of extinction—no

[255] Studies of wolves in Denali National Park indicate it is not uncommon for pack territory to exceed 1,000 miles. L. David Mech, Layne G. Adams, Thomas J. Meier, John W. Burch & Bruce W. Dale, The Wolves of Denali, 78-80 (1998).

[257] For example the Pacific coast population of the Western Snowy Plover *chardis alexandrinus nivosus* breeds almost exclusively on coastal beaches in unstable soils influenced by wind, storms and wave actions along the Pacific. Snowy plovers often nest in colonies and return to the same breading site year after year often nesting in the exact locations as the previous year. Endangered and Threatened Wildlife and Plants; Proposed Threatened Status for the Pacific Coast Population of the Western Snowy Plover, 57 Fed. Reg. 1443, 1444 (Jan. 14, 1992).

matter the status of the species populations outside of these core areas. The RGCT is a case in point. Here the FWS argued that a geographic area could be considered significant only if it was "…so important to the continued existence of a species that threats to the species in that area can have the effect of threatening the viability of the species as a whole".[258] This approach permitted FWS to focus on 13 core RGCT populations—held up as *indicators* of the species' viability—to the exclusion of more than 250 other populations. Thus, rather than protect populations in areas where they were truly threatened, FWS's approach permits them to ignore total populations so long as some viable remnant (i.e. core population) of the species/DPS exists. Yet, judging the viability of a species/DPS distributed over a large geographic area based solely on the threats to a relatively healthy remnant population effectively inverts the very purpose of the ESA.

Perhaps the best example of this inverted logic is the attempt to downlist wolves across a region that stretched from South Dakota to Maine based solely on the viability of core gray wolf populations in parts of Minnesota, Wisconsin, and the upper peninsula of Michigan.[259] Here the Secretary identified healthy core populations of gray wolves in the vicinity of Lake Superior and found that so long as these core populations were healthy the species was no longer threatened or endangered. [260] This effectively rendered all wolf populations outside the "core" areas insignificant, a theory which was rejected by the courts.[261]

---

[258] *Biological Diversity*, 411 F. Supp.2d at 1279.
[259] 68 Fed. Reg. 15,809-811, 15,857-59. *See also Defenders (Wolf)*, 258 F.3d at 1160-62..
[260] *Id.*
[261] *Defenders (Wolf),* 354 F. Supp.2d at 1157.

More recently, FWS argued that both the "quality" (i.e. importance) and "quantity" (i.e. size) of a species' range could be considered when determining significance.[262] However, its actions suggest otherwise, and indicate the agency is still confused in is application of the term. Take for example the FWS' response to the *Defenders (Lynx)* court order where FWS proposed discounting three of the four regions of the lynx's historic range within the conterminous U.S. FWS argued that this portion of the lynx's range was "marginal," or biologically unimportant, and thus could not be considered significant.[263] The agency concluded: "we did not consider sizable area with poor-quality habitat for the species or prey limitation to be significant from a biological perspective."[264] The agency reached this conclusion despite the fact that lynx had been consistently sited in this "poor quality habitat" in Wisconsin and Minnesota. [265]

The tale of the lynx was replicated in FWS's reconsideration of the status the Western Great Lakes wolf population.[266] In its 2007 Final Gray Wolf Rule delisting the gray wolf population in the Western Great Lakes region the FWS argued its interpretation of significance was entitled to deference, but its rationale was rife with inconsistencies. In one portion of the rule FWS states that significance entails consideration of "the ecosystems on which the species that use that range depend as well as the values listed in

---

[262] Final Rule Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment; Removing the Western Great Lakes Distinct Population Segment of the Gray Wolf from the List of Endangered and Threatened Wildlife, 72 Fed. Reg. 6,051, 6,070 (Feb. 8, 2007).
[263] 72 Fed. Reg. at 1186-1189.
[264] *Id. at* 1188.
[265] *Id. at* 1189. FWS took pains to note that because of their ongoing consultation with the Solicitor, the "rational for [FWS's] decision in 2000…may not reflect how the Service [would] apply the definition of 'endangered species' in the future. *Id.*
[266] 72 Fed. Reg. at 6,070-6,071.

the [ESA] that would be impaired or lost if the species were to become extinct…"[267] Yet only a few paragraphs later FWS highlights an entirely different set of considerations for determining whether a portion of a species' range is significant, including:

> [The] quality, quantity, and distribution of habitat relative to the biological requirements of the species; the historic value of the habitat to the species; the frequency of use of the habitat; the uniqueness or importance of the habitat for other reasons, such as breeding, feeding, migration, wintering or suitability for population expansion; genetic diversity; and other biological factors.[268]

Which set of factors will FWS use for determining significance? What of the aforementioned "values" listed in the ESA[269] (i.e. a species esthetic, ecological, educational, historical, recreational and scientific value)? The Solicitor also pointed to these values as possible criteria for determining significance.[270] However, the Secretary could not have actually considered these "other" values in assessing significance in the case of the wolf or the lynx else, how would it be possible to justify that entire regions of the U.S. (as in the case of the wolf and lynx) hold little or no esthetic, ecological, educational, historical, recreational, or scientific value where those species are concerned? Indeed, the Secretary does not even attempt to make such a claim; in the final analysis the FWS rejects all of these assorted criteria "[d]etermining the SPR for the Western Great Lakes DPS of the gray wolf is based on the biological needs of the species

---

[267] *Id.* at 6070.
[268] *Id. at* 6070.
[269] In Section 2 of the ESA, Congress declares "[endangered] species…are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531
[270] While arguing for deference for the Secretary's interpretation of significant, the Solicitor contends, "For example, the Secretary could consider, among other things, the portion of the range in terms of the biological importance of that portion of the range to the species and in terms of the various values listed in the Act that would be impaired or lost if the species were to become extinct..." Solicitor's Memorandum, *supra* note 218, at 11.

in the DPS."[271] Thus, in the end it was solely biological importance/quality of range currently inhabited by the gray wolf, *not* the size of the range, nor the values listed in the ESA that might be impaired by the loss of the gray wolf, that were used to decide what constituted a significant portion of its range. The gray wolf would be considered recovered so long as there was a healthy remnant population albeit in an isolated fraction of its historic range. [272]

These examples serve to illustrate that FWS's interpretation of significance to mean important, as opposed to large, provides neither clarity nor predictability. Additionally, this definition has been used to exclude protections for species over vast expanses of their historic range (e.g. wolves, lynx). More importantly, interpreting significant to mean biologically important, allows Interior to shift the focus from protections for species, to protections of relatively healthy "core populations," which may occupy only a fraction of the species' current range.

2. Current vs. Historic Range

Both the Solicitor and FWS have recently advocated for a change in interpretation of the term "range" within the SPR phrase. Their analysis is premised on the Solicitor's claim that the use of "range" in the ESA is in the present tense: [273]

---

[271] *Id*. at 6071.

[272] More recently the Secretary applied a similar analysis in the case of the Preble Meadow Jumping Mouse (PMJM). In the case of the PMJM the Secretary concluded: "A portion of a subspecies' range is significant if it is *part of the current range* of the subspecies and is *important to the conservation* of the subspecies because it *contributes meaningfully to the representation, resiliency, or redundancy* of the subspecies." 72 Fed. Reg. at 63,071 (Nov. 7, 2007)(emphasis added).

[273] The term range is not defined in the ESA or the accompanying regulations. The term is defined by Webster's as "the region in which a plant or animal is native." Webster's New World Dictionary, 1176 (David G. Guralnik ed. 1968). No present or past tense form for the word range is listed in the dictionary. *Id.* The term itself is used twice in discussion of species listing. The term "range" is used in the definition of endangered species that is a species is endangered if it "is in danger of extinction throughout all or a

> The word 'range' in the phrase 'significant portion of its range' refers to the range in which a species currently exists, not to the historical range of the species where it once existed…Under the Act's definitions, a species is 'endangered' only if it 'is in danger of extinction' in the relevant portion of its range. The phrase 'is in danger' denotes a present-tense condition of being at risk of a future, undesired event. To say that a species 'is in danger' in an area that is currently unoccupied, such as unoccupied historical range, would be inconsistent with common usage. Thus, 'range' must mean 'currently occupied range,' not 'historical range'.[274]

This change in the definition of "range" is a significant departure from more than a quarter century of policy in which the FWS consistently defined range in terms of the *historical* distribution of a species. For example, when the FWS listed the gray wolf in 1974 it clearly interpreted range to include historical range. At the time of the gray wolf's listing, four subspecies of the gray wolf were recognized and listed despite the fact that FWS's best available science indicated that at least one of these subspecies (the Texas gray wolf; *Canis lupus monstrabilis*) was "probably extinct."[275] If the concept of range did not include historic range there would have been no need to list the Texas gray wolf, for in the words of the Solicitor "to say that…[the Texas gray wolf] 'is in danger' in an area that is currently unoccupied, such as unoccupied historical range, would be inconsistent with common usage." Nonetheless, the FWS listed the Texas gray wolf. Furthermore, if the FWS had not recognized historical range, it could only have listed the Minnesota sub-species of the gray wolf, the only state in the contiguous United States

---

significant portion of its range." 16 U.S.C. § 1532 (6). The term is also part of the listing criteria where the statute admonishes the Secretary for considering "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1)(A) (2000). Contrary to the Solicitor's analysis the concept of present destruction of habitat or range suggests the destruction of something that was but is no longer. Such a reading is consistent with the legislative history of the ESA where in 1973 Congress was concerned about the fact that extinction was closely linked to the destruction of historic habitat. *See supra* at pp. 2-13 (discussing history of the ESA).

[274] 72 Fed. Reg. at 6,115.

[275] 43 Fed. Reg. at 9,607.

with a verified wolf population at that time of listing. Instead, FWS listed the gray wolf throughout the 48 contiguous United States.[276] And again in 1978 when wolves were reclassified and critical habitat designated FWS specifically noted:

> The gray wolf formerly occurred in most of the conterminous United States and Mexico. Because of widespread habitat destruction and human persecution, the species now occupies only a small part of *its original range* in these regions…the Service wishes to recognize that the entire species *Canis lupus* is Endangered or Threatened to the south of Canada.[277]

Thus, FWS listed the wolf throughout the 48 contiguous states despite the fact that it was only present in "a small part of its original range."[278] Moreover, subsequent reintroductions of gray wolves into Yellowstone, Central Idaho, and Northern Arizona make it clear that FWS—at least through the mid 1990s—was not only listing species in their historic ranges, but, at least in some instances, actively seeking to reintroduce species into portions of their historic range in which they once had thrived.[279]

Likewise the case of the lynx demonstrates that as late as 1993 FWS's own biologists rejected the notion of limiting the concept of range to a species current range as illustrated by the memorandum written by the Region 6 Director of FWS to the Acting Director of the FWS in March 1993 urging him to amend or rescind his denial of a petition to list North Cascades Canada lynx as a DPS.[280] The Region 6 Director pointed out that the petition finding denying protection to the lynx was inconsistent with previous FWS listing decisions because it "addressed the present range of the lynx and *did not*

---

[276] *Id.* at 9,608.
[277] *Id.* at 9607.
[278] *Id.* at 9607.
[279] *See generally,* Establishment of a Nonessential Experimental population of Mexican Gray Wolf in Arizona and New Mexico, 63 Fed. Reg. 1,752 (Jan. 12, 1998) and Proposed Establishment of an Experimental Population of Gray Wolf in Yellowstone National Park in Wyoming, Idaho and Montana, 59 Fed. Reg. 42, 118 (Aug. 16, 1994).
[280] *See, supra* 15-17 (discussing the lynx listing history).

properly consider historical range."[281] If the reasoning used by the Secretary in the lynx petition was applied to previously listed species, many presently listed species would not now be eligible for protection under the ESA.[282]

Indeed as early as 1978 or 1979 FWS had developed guidelines interpreting the SPR phrase in general, and "range" in particular to include historic range, an interpretation that was not exclusive to gray wolves. Thus, in May 1979, FWS informed the Government Accountability Office (GAO) which was auditing the ESA program that FWS draft guidelines defined a significant portion as "more than half of a species' range, *which may include historical as well as recent and anticipated future losses* or…losses of habitat totaling less than 50 percent for species of relatively small range, or in other circumstances where the loss may have an inordinately large negative impact on the species' survival."[283] These guidelines provide important insights into the FWS's thinking regarding what constitutes a "significant portion" of a species' range. Most importantly the guidelines recognize that (1) historical range should be included when considering what constitutes a significant portion of a species' range, and (2) *significant* could be defined quantitatively—in terms of a species total historic range, and qualitatively—in terms of the range's overall importance or "impact" on the survival of the species.

One need not look far to see the drawbacks to limiting the definition of range in the ESA to a species current range. For example, the definition of range advocated by the

---

[281] *Defenders (Lynx I)* 958 F. Supp. at 675 (quoting AR 265 at 1 (Memorandum from Deputy Regional Director Region 6 to FWS Director Regarding North Cascades Lynx Finding and Implications to Draft Vertebrae population Policy (March 11, 1993))(emphasis added).
[282] *Id.*
[283] 1978 GAO Report, *supra* note 47, at 59.

Solicitor would actually prevent the Secretary from listing species in suitable *historic* range that is adjacent to the species' current range—even if FWS determined that expanding protections to include adjacent habitat was the best method for preventing the extinction of the species. This is because, in the Solicitor's own estimation, FWS is precluded from applying the five statutory listing factors in areas outside of the species' *current* range. Accordingly, in unoccupied historic range the species would be considered *extinct* in that portion of its historic range, not *in danger of extinction,* and thus would not qualify for ESA protections.

Implementing the current range approach to the SPR phrase could also have profound effects on the viability of numerous species currently awaiting listing. The case studies of the wolf, lynx and lizard discussed here illustrate that species listings and conservation actions (e.g. designation of critical habitat, implementation of recovery plans and reintroduction) can be held up for years—and in some cases decades while species numbers and range continue to decline.[284] It is axiomatic that delays in listings diminish the benefit of listing to the species and reduces the likelihood that the species will escape extinction.[285] Since the ESA offers little protection to species awaiting listing, delays in listing may cause the irreversible loss of critical habitat, or to use the Solicitor's phrase "current range", to development so that by the time listing occurs the current range has been restricted well beyond the range of the species at the time it was

[284] For example, the case history for the lynx, which was first considered for listing in 1977. The case of the lynx was not fully resolved until 2007, roughly a quarter century later. *See supra* at 14-21.
[285] Ando, *supra* note 245, at 34. Ando notes that there are examples of species thought to have become extinct while waiting to be listed most notably the Alabama sturgeon which was dropped from consideration because it was believed to have become extinct. *Id.* at n. 15.

originally designated as a category 1 or category 2 species.[286] Delay may also lead to pushing the species back on the category 1 or category 2 species list as data becomes "decayed".[287]

Species listings may be delayed for a host of political reasons as well. In April 1995, Congress issued a moratorium prohibiting work on listing actions by denying funding and prohibiting the Secretary from funding listings.[288] In another example Julie MacDonald, former FWS Assistant Director deliberately disclosed nonpublic information to organizations intent on limiting and preventing endangered species listings.[289] Professor Ando in her analysis of the impacts of political pressure on species listing found that, on average, candidate species that inhabit "pro-land-use" areas spent more than one additional year awaiting listing when compared with species that inhabit "neutral" areas[290]. In fact, since the Bush administration took office in 2001 there has been a sharp decline in new species listings. Specifically, between 2001 and 2008, the Bush Administration listed approximately eight species per year whereas the average in all other years since the ESA was passed (i.e. 1973 through 2000) was forty-three species per year.[291]

Even after listing occurs, a significant lag time often occurs between listing and implementation of full-scale recovery efforts. A 1988 GAO report found that species

---

[286] *Id.* at 34-36.
[287] *Id.*
[288] Public L. No. 104-6, Ch. IV, 109 Stat. 73 (1995).
[289] U.S. Department of Interior, Office of Inspector General, Investigative Report: On Allegations Against Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife and Parks, http://wyden.senate.gov/DOI_IG_Report.pdf , last visited Feb. 22, 2008.
[290] Ando, *supra* note 245, at 42-47.
[291] U.S. Department of Interior, U.S. Fish & Wildlife Service, Federal Endangered and Threatened Species by Calendar Year, http://ecos.fws.gov/tess_public/SpeciesCountByYear.do, last visited Jan. 13, 2008.

spend on average 6.4 years after initial listing and awaiting approval of final recovery plans.[292] Little has changed since 1988. In 1995 Tear et al. found that the time between listing and recovery plan approval had expanded to 8.7 years for animals (9.4 years for vertebrate species and 6.3 years for invertebrates) as opposed to 4.1 years for plants.[293]

Slowing down ESA listing and thus the protection the ESA provides endangered and threatened species directly impacts species recovery. For example, Taylor et al. (2005) found that the longer a species is listed the more likely they are to improve.[294] The protections afforded to listed species (e.g. the designation of critical habitat and the development of single species recovery plans) also appear to be strongly correlated with species recovery.[295] Consequently, delays in listing likely jeopardize species conservation by reducing the likelihood or time to recovery, as well as reducing the areas in which a species could be protected under the Secretary's new definition of range as a species "current range" because a species would presumably be ineligible for ESA protections in portions of its historic range that are no longer part of its current range.

This discussion illustrates the advantages of delay to groups that oppose listing, advantages that are compounded by the Secretary's proposal to limit listings to a species' *current* range. By delaying the listing of a species in rapid decline, groups opposed to

---

[292] U.S. General Accounting Office, Comptroller General, Report to Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, Committee on Merchant marine and Fisheries, house of Representative: Endangered species – Management improvements could enhance recovery program, Doc. GAO/RCED-89-5 at 23-24 (1988).

[293] Timothy H. Tear, J. Michael Scott, Patricia H. Hayward, & Brad Griffiths, *Recovery plans and the Endangered Species Act: Are criticisms supported by data?,* 9 Cons. Bio. 182, 189 (1995).

[294] Martin F.J. Taylor, Kieran F. Suckling and Jeffrey J. Rachlinksi, *The Effectiveness of the Endangered Species Act: A Quantitative analysis,* 55 BioScience 360, 361 (April 2005).

[295] *Id.* at 362-65. Taylor et al. report "species with critical habitat for two or more years appeared to be more likely to be improving and less likely to be declining than species without." *Id.* at 362. Likewise, "[s]pecies with recovery plans for two or more years appeared to be more likely to be improving and less likely to be declining than species without plans." *Id.* at 364.

listing could effectively reduce the areas in which a species was eligible for protection. Moreover, this policy could actually encourage people who do not support species conservation or habitat protection to attempt to directly eliminate species before listing occurs—especially species with very limited distributions. Under the Solicitor's interpretation, once a species is removed from an area it is considered "extinct" and therefore would not be eligible for ESA protections. Thus, by limiting the range over which a species can be listed and by creating incentives for those opposed to endangered species conservation to hold up listings, it is possible that the policy advocated by the Solicitor could lead to additional species extinctions, a clear contravention to the intent of the ESA.

B. Implications of the Solicitor's Interpretation of the SPR Phrase for Large Terrestrial Mammals

How the Secretary chooses to interpret the SPR phrase—whether s/he includes historic range or limits the definition to current range or whether significance is limited to biological importance to the exclusion of geography as advocated by the Solicitor—has major implications for endangered species management in general, and especially for large mammals that once roamed large parts of the country. The following examples serve to illustrate the potential impact of this policy on the long-term conservation of large carnivores in the United States.

1. Bison

The recent case of the Yellowstone National Park Bison (Yellowstone Bison) provides clarity on how the Secretary intends to apply the Solicitor's interpretation of the

SPR phase. [296] The bison found inYellowstone National Park are a subspecies of bison called the plains bison (*bison bison bison*) that once ranged across the central and western plains of North America. The plains bison was nearly extirpated by the 1880s.[297] While arguably bison have made a "comeback"[298] in the United States there are few bison that have not been cross bread with domestic cattle. Yellowstone National Park (YNP) is "the only area in the United States where bison have existed in the wild state since prehistoric times."[299] The YNP herd is only one of three herds that show no evidence of genetic introgression from cattle.[300] In 2007 the FWS reported that the YNP herd numbered approximately 4,500.[301] Bison are nomadic creatures and, like other large herbivores, often roam during the winter months in search of forage. Thus portions of the YNP herd often migrate out of the park during the winter in search of forage.[302]

A great deal of controversy surrounds the management of the YNP herd. The vast majority of land surrounding YNP is federally held but is lightly interspersed with private holdings.[303] Some but not all of the federal holdings are subject to private grazing leases.[304] Two of the three genetically pure herds of bison—the YNP herd and the Grand

---

[296] *See* Endangered and Threatened Wildlife and Plants: 90-Day Finding on a Petition to List the Yellowstone National Park Bison Heard as Endangered, 72 Fed. Reg. 45,717 (Aug. 15, 2007) (2007 Bison Finding).
[297] *Id.*
[298] The FWS reports that there is an estimated 500,000 plains bison in the United States cultivated as government or private herds. However, the vast majority of these herds were reconstituted from bison-cattle hybrids. *Id.*
[299] *Id.*
[300] *Id.* The other two genetically pure herds are located in Wind Cave National Park and the Grand Teton National Park. *Id.*
[301] *Id.*
[302] *Id.* at 45718.
[303] General Accounting Office, Comptroller General, Report to Congress: Yellowstone Bison – Interagency Plan and Agencies' Management Need to Better Address Bison-Cattle Brucellosis Controversy, GAO 08.291 at 19 (2008)(2008 GAO Report).
[304] *Id.* at 21.

Teton herd—are chronically infected with brucellosis, a disease affecting cattle, bison and elk.[305] Brucellosis is "primarily transmitted through oral contact with aborted fetuses, contaminated placentas, and uterine discharges."[306] Although transmission of brucellosis between bison and cattle has been demonstrated in captive setting studies, "there is no confirmed case of transmission in the wild."[307] Nonetheless ranchers and some federal and state officials in the vicinity of YNP "believe that if wildlife poses a disease transmission risk to cattle, it is the diseased wildlife that should be the focus of management efforts."[308] The focus of management efforts for Yellowstone bison has been to capture bison as they leave the park, and ship them off to slaughter. In 1996, for example, 1,000 bison were sent to be slaughtered after seeking refuge outside of the park.[309] In 2000, a Bison Management Strategy was developed which permitted brucellosis free bison to leave the park but relied on continued slaughter to manage roaming bison infected with brucellosis.[310] Thus, in 2007throught 2008, 1,195 or a quarter of the park's bison population, were rounded up and slaughtered.[311] Although public official's argued that the slaughter was intended to stop the spread of brucellosis to domestic cattle, local activists complained that the strategy was less about disease control and more about the use of public lands for cattle grazing: "[t]he Montana cattle ranchers

---

[305] Delaney P. Boyd and Cormack Gates, *A Brief Review of the Status of Plains Bison in North America,* 45 J. Wildlife 15, 18-19 (Spring 2006). Brucellosis is thought to have been introduced into North America from Europe in the 16th century. *Id.*
[306] *Id.*
[307] *Id*. at 19.
[308] 2008 GAO Report, *supra* note 303, at 2.
[309] 72 Fed. Reg. at 45,719.
[310] 2008 GAO Report, *supra* note 303, at 3. The GAO reported that Interior has had limited success in implementing a successful Bison Management Plan for YNP.
[311] Jim Robbins, *Anger Over Culling of Yellowstone's Bison,* N.Y. Times, (Mar. 23, 2008), *available at* http://www.nytimes.com/2008/03/23/us/23bison.html?_r=1&oref=slogin.

don't want the competition for grass…[t]hey want the national forests and public lands to be all their public-lands grazing allotments, and in that process, they don't want bison."[312]

In 1999 a petition was filed with the Secretary to list the YNP herd "'because it [was] endangered in a significant portion of its range'" and requesting that the FWS list the YNP herd as a subspecies or a DPS.[313] The analysis applied by the FWS here is interesting. According to the FWS the agency must first determine whether the animal at issue is a species, subspecies or distinct population, it then applies the five listing criteria and finally it determines whether "there are any significant portions of its range that where *(sic)* the herd is *(sic)* in danger of extinction or is likely to become endangered in the foreseeable future."[314] The FWS acknowledged that the plains bison was a subspecies of bison[315] but did not assess whether the plains bison was in danger of extinction throughout a substantial portion of its range. Rather, FWS first concluded that the Yellowstone Bison met the requirements of a DPS[316] and then concluded that it was not in danger of extinction throughout a substantial portion of its range. In its analysis, FWS applied the five listing criteria to the Yellowstone Bison and concluded that there "was not substantial information to indicate that the YNP herd DPS may be threatened or endangered throughout all or a significant portion of its range."[317] Then the FWS undertook an analysis to determine whether there were significant portions of the YNP herd's range where the herd was in danger of extinction or was likely to become

---

[312] *Where the buffalo roam – and die*, CNN.com, http://www.cnn.com/2008/US/04/26/bison.slaughter/ (last visited May 16, 2008). Local activists point to the fact that elk are primary carriers of brucellosis but are permitted to roam in and out of YNP with few restrictions. 2008 GAO Report, *supra* note 303, at 2.
[313] 72 Fed. Reg. at 45,717.
[314] *Id.* at 45,718, 45,719, 45,721.
[315] *Id.* at 45,717.
[316] *Id.* at 45,719.
[317] *Id.* at 45,721.

endangered in the near future[318] and concluded that the petition had failed to "present substantial information that the Yellowstone bison … may be threatened or endangered in either of the potentially significant portions of the [bison's] range."[319]

Under the FWS new SPR interpretation a portion of a species range is significant if it: (1) "is part of the current range of the species *and"* (2) "is important to the conservation of the species because it contributes meaningfully to the representation, resiliency, or redundancy of the species." [320] The contribution of the portion of the species range must be such that "its loss would result in a decrease in the ability to conserve the species."[321] The first step in this analysis requires the FWS to identify portions of the species current range and then it will undertake a more detailed examination to determine what portions of the current range provide a meaningful contribution to the species existence. The FWS notes:

> [t]he range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be significant and threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is *substantial information* indicating that (i) the portions may be significant and (ii) the species may be in danger of extinction there or likely to become so within the foreseeable future. . . . If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the range that are unimportant to the conservation of the species, such portions will not warrant further consideration.
>
> If we identify any portions that warrant further consideration, we then determine whether in fact that species is threatened or endangered in any significant portion of its range. …Thus, if the Service determines that a portion of the range is not significant, the Service need not determine

[318] *Id.*
[319] *Id. at 45,722*
[320] *Id.* at 45,721 (emphasis added)
[321] *Id.*

> whether the species is threatened or endangered there; if the Service determines that species is not threatened or endangered in a portion of its range, the Service need not determine if that portion is significant.[322]

In assessing portions of the current range the FWS looks to the contribution of the range segment to the species resiliency, the redundancy of populations and representation of genetic diversity in the population.[323] In applying this standard the FWS did not use best scientific evidence but applied a "substantial information" test.[324]

What did this mean for the Yellowstone Bison? First it meant that the FWS would not examine the historic range of the plains bison or even geographically suitable range in determining whether the Yellowstone Bison was in danger of extinction throughout a SPR. Since the analysis was limited to current range, FWS needed only to examine populations of bison within YNP and the surrounding vicinity. Second, if threats to the YNP herd were uniform across the current range further considerations would not be considered regardless of the degree of threat to the species. For the YNP herd, threats to the herd were greater in habitat outside the YNP. Thus the FWS analyzed whether portions of the current range outside YNP contributed to the resiliency, redundancy and representation of the Yellowstone Bison DPS. Here the FWS determined that the Gardiner basin (north of YNP) outside YNP provides resiliency to the YNP herd because it contained existing suitable habitat that was necessary for the species to carry out important life-history functions such as breeding, feeding, migration, wintering and dispersal.[325] No other habitat outside YNP was analyzed for suitability[326]

---

[322] *Id.* (emphasis added).
[323] *Id.*
[324] *Id.*
[325] *Id.* at 45,721-22.

despite the fact that it is clear that Yellowstone Bison regularly migrate out of the park at the parks western boundaries.[327] Specifically, killing or hazing bison that left YNP minimized the size of the bison's current range to the Park. By concluding that Yellowstone bison constituted a DPS and focusing their analysis on the current range of the bison (e.g. YNP) within the DPS, FWS was able to disregard the fact that the larger species of plains bison had been removed from the vast majority of its historic range. Conveniently, this analysis permits FWS to ignore habitat on private land as unsuitable for the species and, therefore, not a significant portion of a species range or a development threat to species habitat, a primary driver for the adoption of the ESA.2. 2.

2. Florida Panther

The Florida panther (Puma concolor coryi) provides further illustration of the flaws inherent in the Solicitor's proposed SPR policy. The Florida panther considered by many to be one of the most endangered large mammal species in the United States is the last subspecies of *Puma* that still survives in the eastern United States. Although the Florida panther once roamed the southeastern United States, it is now restricted to less than 5 percent of its historic range.[328] Its restricted range is especially problematic for conservation efforts because the Florida panther "require[s] large contiguous areas" in

---

[326] *Id.*
[327] 2008 GAO Report, *supra* note 303, at 15.
[328] Notice of Availability of Draft of Third Revision of the Florida Panther Recovery Plan, 71 Fed. Reg. 5,066 (Jan. 31, 2006); *see also,* Liza Gross, *Why not the Best? How Science Failed the Florida Panther,* 3 PloS Biology 1525 (September 2005) www.plosbiology.org, last visited Feb. 14, 2008. The Florida panther's historic range once extended from Florida north to South Carolina and west to Arkansas and Louisiana. *Id.* at 1526. The Florida panther's current range is a segment of land in south west Florida generally south of Lake Okeechobee. *Id.*

order to prosper.[329] Indeed, the current FWS recovery plan identifies a preferred density of "2 to 3 animals per 100 square miles."[330]

The Florida panther was listed as "endangered throughout its historic range" on March 11, 1967[331] and at the time of its listing was thought to be extinct. In 1972 a single isolated breeding population was discovered in South Florida.[332] As a listed species the Florida panther received protection under the ESA upon passage of the ESA.[333] It has been given a recovery priority number of 6C by the FWS, which identifies the Florida panther "as a subspecies with a high degree of threat of extinction, but low recovery potential because recovery is in conflict with construction, other development projects, or other forms of economic activity."[334] While current population estimates for the Florida panther vary all concede that the current population is likely less than 100[335] and no reproducing population of panthers has been found outside of south Florida.[336]

Recovery of the Florida panther is not possible within its current range. Scientists agree that recovery of the Florida panther is dependent upon increasing its numbers

---

[329] 71 Fed. Reg. 5066. *See also,* U.S. Department of Interior, Fish and Wildlife Service, Panther Recovery Team, Draft Third Revised Florida Panther Recovery Plan (Jan. 31, 2006)(Third Revised Recovery Plan). Florida panther occur in low densities. Male panthers are polygynous and live in large overlapping home ranges with several adult females. The average range of a male is approximately 200 square miles. Females have a narrower home range of 75 square miles. Most young male adolescent panthers disperse from their home range to establish their own home range. *Id.* at 11-16.

[330] Third Revised Recovery Plan, *supra* note 291 at xi-xii.

[331] *Id.* at 5 (quoting 32 Fed. Reg. 4001 (March 11, 1967)). The Florida panther has been listed as "critically endangered" by the International Union for the Conservation of Nature and Natural Resources because it is at "extremely high risk of extinction" in the wild. IUCN 2007. 2007 IUCN Red List of Threatened Species. http://www.iucnredlist.org/search/search-basic last visited May 16, 2008.

[332] Gross, *supra* note 328, at 1526.

[333] Third Revised Recovery Plan, *supra* note 329, at 1.

[334] *Id.* at 4-5. The FSW gives a species a recovery priority number based on the "degree of threat, recovery potential, taxonomic distinctiveness, and presence of an actual or imminent conflict between the species and development activities." *Id.*

[335] Paul Beier, Michael R. Vaughn, Michael J. Conroy, & Howard Quigley, An Analysis of Scientific Literature Related to the Florida Panther, 46 (Florida Fish and Wildlife Conservation Commission Tallahassee, Fl December 2003).

[336] Third Revised Recovery Plan, *supra* note 329, at 4, 8.

outside its current range: "panthers suffer from a highly constricted range relative to their historical distribution, and… significant natural and anthropogenic barriers exist to dispersal, range expansion, and ultimately, population growth."[337] Thus the very recovery of the Florida panther is dependent upon its expansion beyond its current range into its historic range. The Panther Recovery Team has identified the following actions as essential to recovery of the Florida panther:

> …
> 2. Expand the known occurrence of panthers north of the Caloosahatchee River, if feasible.
> 3. Identify potential reintroduction areas within the historic range of the panther.
> 4. Reestablish viable panther populations outside of south and south-eastern Florida within the historic range.[338]

Both the Florida panther's listing and Recovery Plan are untenable under the Solicitor's proposed interpretation of the SPR phrase. First the Florida panther was listed at a time when it was thought to be extinct. While it must be conceded that the Florida panther was listed prior to the passage of the ESA under the Conservation Act of 1966 it is important to note that the listing criteria under the Conservation Act of 1966 were substantially narrower than those incorporated in the ESA.[339] However, using the Solicitor's logic the Florida Panther should not have been listed while it was thought to have been extinct because to quote the Solicitor "to say that…[the Florida panther was] 'in danger' in an area that is currently unoccupied, such as unoccupied historical range, would be inconsistent with common usage" of the language in the ESA. And certainly using the Solicitor's logic, once a Florida panther was discovered the FWS should have

[337] Beier et al, *supra* note 335, at 48.
[338] Third Revised Recovery Plan, *supra* note 329. at xii.
[339] *Supra* at 2-13 (discussing history of the ESA).

only listed the panther in its current range—that is, the roughly 5% of its historic range in which it continues to exist. Using this same logic, once the Florida panther's current range reached maximum carrying capacity the species should be deemed recovered, despite the fact that biologists agree that the Florida panther cannot recover so long as it is limited to its current range.

The FWS, however, has not limited recovery efforts to the Florida panther's current range. Recognizing that the viability of the Florida panther is dependent upon the species reclaiming at least some portion of its historic range the top objectives of Florida panther recovery proposed by the FWS Panther Recovery team include the reintroduction and establishment of a viable population of panthers outside their current range "within the panther's historic range," and the restoration and expansion of the Florida panther population.[340] This recovery proposal is contrary to the Solicitor's interpretation of SPR that would presumably limit protections to areas where the Florida panther currently exists (i.e. its current range), and would call into question FWS's plan to restore the panther to suitable portions of its historic range. Furthermore, because the Solicitor suggests it is not appropriate to apply listing factors outside a species' current range, protections would presumably be unavailable for panthers that move out of their current range into suitable adjacent range, an essential element to recovery of this species.[341] This analysis demonstrates the inconsistency between the Solicitor's interpretation and

[340] 71 Fed. Reg. at 5,067.

[341] Alternatively one could argue under this interpretation, that range equals current range, the FWS would be required to constantly monitor and adjust the range for species as they increase or decline in number and their range expands and contracts accordingly.

the underlying purpose of the ESA for applying the Solicitor's interpretation brings into question the recovery of one the United States most endangered species.

3. The Jaguar

In 1997, FWS issued a Final Rule extending protections to jaguars (*Panthera onca*) that reside within the United States.[342] Although breeding populations of jaguars in the United States were not known at the time of their listing, data dating back to the early part of the 20th Century indicates that the jaguar's historic range likely included Arizona, New Mexico, Texas, California and Louisiana.[343] The species was largely believed to have disappeared from the southern United States in about 1960.[344] Like the Florida Panther, the jaguar was originally listed as endangered under the 1969 Conservation Act.[345] In 1973 the jaguar was listed as endangered from the United States Mexican border south and thus was not protected in the United States.[346] Then in 1979 the FWS issued a notice asserting that the failure to list the jaguar in the United States had been an oversight. The FWS stated its intent to list the jaguar as soon as possible and a proposed rule was issued in July 1980 six months before the end of the Carter administration.[347] It was not, however, until 1997 that a Final Rule to Extend Endangered Species Status to the Jaguar in the United States was issued.

---

[342] Final Rule to Extend Endangered Species Status to the Jaguar in the United States, 62, Fed. Reg. 39,147 (July 16, 1997).
[343] *Id.*
[344] *Id.* at 39,147-48.
[345] *Id.* at 39,148.
[346] *Id. (*citing 37 Fed. Reg. 6,476 (March 30, 1972)).
[347] *Id.* At this point listing of the jaguar went through several delays. The proposed rule was withdrawn in 1982 for failure to take action within two years. *Id.* After numerous petitions, false starts and a Federal moratorium on listings, listing of the jaguar was back on track by 1996 when the U.S. District Court for Arizona ordered FWS to reopen the listing process for the jaguar. *Id.* at 39,148-49.

In the evaluation of the habitat criteria in the 1993 Jaguar Final Rule the FWS observed: "Although there is currently no known resident population of jaguars in the United States wanderers from Mexico may cross the borer and take up residency in available habitat [in the United States]."[348] The FWS concluded "based on this evaluation the preferred action is to list the jaguar as endangered throughout its range… no action or listing as threatened would be contrary to the [ESA]."[349] This action was taken despite the fact that at the time of listing "there [was] no known resident population of jaguars in the United States."[350] Apparently as late as 1993 FWS believed the ESA required it to afford protections of the Act to the jaguars that dispersed into the United States from Mexico despite the fact the United States was outside the jaguar's current range.

As with the Florida panther, an application of the Solicitor's interpretation of the SPR phrase suggests FWS's decision to list the jaguar was based on a faulty premise—that a species that was extinct throughout all of its historic range could be listed in that range. In listing the jaguar, FWS concluded that a species could be in danger of extinction even though it had been eliminated from all of its former (historic) range within the United States. The jaguar's current range was south of the United States-Mexico border. Applying the Solicitor's interpretation of the SPR phrase the jaguar could not have been listed north of the United States-Mexico border because it did not currently exist in any portion of its historic range within the United States. Such an

[348] *Id.* at 39,154. Indeed there had been sightings of jaguars in Arizona, Texas and New Mexico beginning in the mid to late 1980s. *Id.* at 39,147-48.
[349] *Id.*
[350] *Id.* at 39,154.

application could be disastrous to the jaguar, which without the listing would have had none of the protections of the ESA in the United States despite the fact that the United States presumably recognized that the jaguar was in danger of extinction in its current range in Mexico.

These examples illustrate important flaws in the Solicitor's interpretation of the SPR phrase. Specifically, by interpreting the term SPR to refer only to "biologically important" and "current" as opposed to historic range, the Solicitor's opinion could result in (1) the exclusion of whole species of endangered animals from ESA protections as seen in the case of the jaguar , (2) the inability of species to expand and recover as seen in the case of the Florida panther , and thus (3) an increased risk of extinction for such species throughout significant portions of their current and historic ranges. Clearly these outcomes are in opposition to the intent of the ESA. Additionally, the example of the wolf illustrates how FWS's focus on "core populations" for determining significance could lead FWS to exclude populations of species from ESA protections over large regions of their current and historic range. These shortcomings call into question FWS's ability to meet the very purpose of the ESA—"to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved"—were this interpretation to be instituted.

V. VIEWS FROM THE SCIENTIFIC LITEREATURE

Debate over the interpretation of the SPR phrase has not been limited to the legal context. Conservation scientists too have wrestled with the meaning of the SPR phrase. Vucetich, Nelson and Phillips in a 2006 article in *Conservation Biology* observed that

population biologists associate the words "threatened" and endangered" with the probabilities of a species' extinction within a specified period of time.[351] While the FWS regulations applying the ESA defines a recovered species as a species whose condition is improved "to the point at which listing is no longer appropriate,"[352] conservation biologists generally associate "recovery" with "population viability"[353]—that is, the ability of a species or population to endure over a period of time.[354] But generally a bright line does not exist between viability and non-viability from a scientific perspective. Vucetich, Nelson and Phillips note that:

> A fundamental principle of population biology is that a species may be more or less at risk but not simply at risk or not at risk. The ESA's notion of endangered is fundamentally normative insomuch as it requires specifying acceptable and unacceptable levels of risk [of species extinction].[355]

This is not to say that science has no opinion on what constitutes an acceptable risk of extinction and the relationship of that risk to how the term SPR is defined. However, the primary duty of science with respect to the ESA is to quantify a species' risk of extinction under a particular set of circumstances.

Recent debate about how to interpret the term "significant" in the scientific literature has focused on two approaches. The first would evaluate the term significant

---

[351] *See generally,* John A. Vucetich and Thomas A. Wait, *On the Interpretation and Application of Mean Times to Extinction* 7 Biodiversity and Cons. 1539 (1998)(discussing predicting risks of extinction in statistical terms); *see also,* John A. Vucetich, Michael P. Nelson, & Michael K. Phillips, *The Normative Dimension and Legal Meaning of Endangered and Recovery in the U.S. Endangered Species Act,* 20 Cons. Bio. 1383, 1384 (Jan. 2, 2006) (Vucetich, Nelson and Phillips).

[352] 50 C.F.R. § 402.02 (2002). When determining whether a species has recovered the Secretary is to apply the listing criteria. *Id.*

[353] Vucetich, Nelson, & Phillips, *supra* note 351, at 1384.

[354] The American Heritage Dictionary defines viability as "capable of living, developing or germinating under favorable conditions. The American Heritage Diction of the English Language (4th ed. 2006) http://dictionary.reference.com/browse/viable, last visited Feb. 28, 2008.

[355] Vucetich, Nelson, & Phillips, *supra* note 351, at 1384.

from the perspective of the size and quality of a species' range, while the second would look to a quantitative biological framework. Prior to the passage of the ESA scientists did not concern themselves with the SPR concept. Scientists had, however, recognized that "the geographic extent of a species is a general predictor of extinction risk."[356] Indeed, scientists often viewed extinction from a localized perspective—that is local extinction.[357]

To understand this geographical approach it is somewhat helpful to consider the issue from the perspective of recovery. Thus Vucetich, Nelson and Phillips note that if the definition of endangered is that a species is in danger of extinction throughout a significant portion of its range then the reverse is also true, a species is recovered if it "is in danger of extinction throughout at most an 'insignificant portion of its range' now or in the foreseeable future."[358] This logic suggests, they argue, that Congress intended that a recovered species should be reasonably well distributed throughout its historic range and, more importantly, that Congress viewed "the geographic extent of a species… [as] a general predictor of extinction risk."[359] If this is true then both size and historic extent of a species' range is central to the SPR concept. Also the SPR concept must vary by species and be dependent upon the size of the species' historic range and whether the ecology of the species is more or less homogenous.[360] However, such a model is inordinately complex, thus Vucetich, Nelson and Phillips argue that some minimum

---

[356] *Id.* at 1385 (citations omitted).
[357] *Id*. Vucetich, Nelson & Phillips note that the concept of local extinction or extinction in a portion of a species range is central to metapopulation dynamics and is regularly used in the scientific literature. *Id.*
[358] *Id*.
[359] *Id.* Vucetich, Nelson & Phillips note that this geographical approach is consistent with the World Conservation Union, which has as primary criteria for defining endangerment the percentage of a species range that is occupied by the species. *Id.*
[360] *Id* at 1386.

standard must be set for determining when the loss of a proportion of a species' range constitutes significance: "[i]t is difficult to conceive of circumstances in which [the loss of] 33% or more of a species' range could be considered insignificant."[361] Put another way a species would be endangered if it was threatened with extinction in one third or more of its range.

The definition of the term significant is inseparable from the term range if the ultimate goal is species recovery. Thus Vucetich, Nelson and Phillips reject the notion that "range" within the meaning of the ESA means a species "current range". To say that a species is in danger of extinction throughout all or a significant portion of its current range "is functionally identical to striking the last phrase of the ESA's definition [of endangerment] (i.e., throughout all or a significant portion of its range) or reducing the definition of endangerment to 'any species, which is in danger of extinction.'"[362] Research has documented what Congress suspected when it passed the ESA that "species are listed as endangered because [their] current range has been reduced by the enterprise of humans."[363] Congress' recognition of this fact is reflected in one of the core purposes of the ESA to "provide a means *whereby the ecosystems* upon which endangered species and threatened species depend may be conserved."[364] If ecosystem destruction is linked to species decline and the goal of the ESA is recovery then it would be reasonable to define range as that portion of the "historic range that is currently suitable or can be made

[361] *Id.* at 1386.
[362] *Id* at 1387.
[363] *Id.* (citations omitted).
[364] 16 U.S.C § 1532(b)(2000)(emphasis added).

suitable for the species."[365] Vucetich, Nelson and Phillips argue that such an approach is imperative for species recovery.

As previously noted such an interpretation of the term range is consistent with more than a quarter century of FWS policy in which FWS consistently defined range in terms of a species' *historical* distribution. For example, FWS clearly interpreted range to include historical range when it recognized and listed four subspecies of the gray wolf despite the fact that the best available science indicated at least one of these subspecies was "probably extinct".[366] If it had not recognized historical range, FWS would have only listed one sub-species of the gray wolf found in Minnesota, the only state with a verified wolf population at that time. Instead, FWS listed the wolf throughout the 48 contiguous United States. Furthermore, when wolves were reclassified and critical habitat designated in 1978, FWS specifically noted that "the species now occupies only a small part of *its original range* in these regions…the Service wishes to recognize that the entire species *Canis lupus* is Endangered or Threatened to the south of Canada. [367]In so stating the FWS recognized that the risk of extinction was intrinsically related to destruction of a species historic range.

Likewise, the FWS 1979 Draft Guidelines[368] demonstrate FWS not only recognized that historical range should be included when considering what constitutes a significant portion of a species' range, but also that *significant* could be defined both

---

[365] Vucetich *supra* note 351, at 1387.
[366] *Supra* pp. 34-41 (discussing listing history of the gray wolf).
[367] 43 Fed. Reg. at 9,607.
[368] *See supra* pp 8-10 (discussing the 1979 FWS Draft guidelines defining a significant portion as "more than half of a species' range, *which may include historical as well as recent and anticipated future losses* or…losses of habitat totaling less than 50 percent for species of relatively small range, or in other circumstances where the loss may have an inordinately large negative impact on the species' survival").

quantitatively—in terms of a species total range, and qualitatively—in terms of the range's overall importance or "impact" on the survival of the species.

In contrast to Vucetich, Nelson and Phillips; Waples et al attempt to develop a "biological framework," for determining significance. Their point of reference is at the species level; that is, how significant is this portion of the range to the species?[369] Thus a significant portion of a species' range would be "a geographic area(s) that contains a population unit(s) that, if lost, would cause the entire species to be in danger of extinction or likely to become so in the foreseeable future."[370] Put another way: "[i]f the species were to become extirpated from all areas in which it is currently at risk, at what point would the entire species be at risk of extinction (or likely to become so)? If it reaches the point of risk of extinction then these areas represent a significant portion of the species' range."[371] This definition starts with a species current range, a current range that is the equivalent of the range currently used by an existing population. The logic of the proposed definition requires that the species current range be constricted to the point of species' extinction. When we reach the point that the current range is so constricted that the species begins to collapse we have defined the significant portion of a species' range for now it is in danger of extinction everywhere.

In fact, this appears to be the very definition rejected by the Ninth Circuit in *Defender's (Lizard)* where the Secretary defined the SPR phrase to mean that a species is entitled to protection only if it "face[d] threats in enough key portions of its range that the

---

[369] Robin S. Waples, Per B. Adams, James Bohnsack & Barbara L. Taylor, *A Biological Framework for Evaluating Whether a Species is Threatened or Endangered in a Significant Portion of Its Range,* 21 Cons. Bio. 964, 965 (2007)
[370] *Id.* at 966.
[371] *Id.*

entire species is in danger of extinction, or will be within the foreseeable future." [372] As noted by the Ninth Circuit, such a definition of significant assumes that a species must be in danger of extinction every where before it is entitled to ESA protections, a notion rejected by the court as contrary to the underlying intent of the ESA.[373] However confusing the language of the ESA, what is clear is that Congress did not intend to allow a species to be taken to the brink of extinction and then pull back protection. Both the 1966 Preservation Act and the 1969 Conservation Act adopted a narrow construction of species preservation. It was this narrow approach that caused Congress to attempt to find a way to protect species and the ecosystems on which they depended before they reached the point of extinction. Waples et al. fail to read the ESA in this context. This is not to say that the biological quality of a species range is unimportant to the SPR phrase. Indeed the FWS, the Solicitor, the Courts, Waples et al. and Vucetich, Nelson and Phillips all agree that biological quality of range is essential to species survival. The fundamental difference between Vucetich, Nelson and Phillips and Waples et al is that the former defines SPR largely in terms of the geographic extent of quality historic range while the latter focuses on the biological importance of a species current range.

In our view the definition of the SPR phrase must incorporate both geographic size and biological importance or suitability of a species historic range. We agree with both the Solicitor and the Ninth Circuit that the Secretary should be given a wide degree of discretion when defining what constitutes significance. However, we do not believe

---

[372] *Defenders (Lizard),* 258 F.3d at 1141.

[373] *Id.* at 1141-1142. Vucetich, Nelson and Phillips also reject this notion noting Congress intended for a recovered species to be reasonably well distributed within its historic range. Vucetich *supra* note 351, at 1385. They argue further that the intent of the ESA is protecting ecosystems and therefore the ESA requires mitigation of range reduction not simply a description of range reduction. *Id.* at 1387.

that the Secretary should be able to pick and choose among these criteria – that is, the Secretary should not be able to use the ambiguity inherent in the SPR phrase to minimize the portion of range in which a species is entitled to ESA protection, as was done in the case of the wolf and lynx. Thus, rather than simply "take into account" the size and importance of range, as the Solicitor argued, we suggest establishing some minimum criteria that addresses both meanings of the term significant. Under this interpretation, the Secretary would be required to find those portions of a species' range significant that are both (1) "biologically important" *and (*2) *"*measurably large".

In defense of this view, we note that Congress did not use the phrase, *an important portion of its range*, nor did it use the phrase, *a large portion of its range*—though either phrase would have been arguably less ambiguous than the SPR phrase. Rather, Congress chose to use the word *significant*—perhaps because it understood that the term conveys both importance *and* size and that both were needed for species recovery. Consequently, in our view, a species that is threatened or endangered across a sizeable/measurably large portion of its range *or* an important portion of its range should be listed under the ESA.

Furthermore we agree with Vucetich, Nelson and Phillips that the most "sensible meaning of range is that portion of a species historic range that is "currently suitable" or that portion that could be made suitable by removing or sufficiently mitigating threats to the species. Such a definition recognizes the importance of historic range, while at the same time focusing on suitable areas in the historic range in which species have some reasonable probability of recovery. Rather than limiting species protections to their

current range, as the Solicitor has proposed, determining the ecological suitability of a species' historical range would allow FWS to consider past, present, and future conditions when making determinations regarding where a species should be listed, and thus, allow for maximum flexibility in species protection. Moreover, focusing on the current suitability of a species' historic range is consistent with FWS's past actions, which indicate the agency has attempted to protect species where they have a reasonable chance of a successful recovery.

Finally, establishing fixed, measurable criteria for determining what constitutes a significant portion of a species' range makes the listing process more transparent, and could help FWS and NMFS avoid future litigation. In the draft guidelines established in 1979, FWS suggested that loss of 50% of a species' historic range should qualify as significant.[374] The research of Easter-Pilcher demonstrates that, at least before 1997, the loss of 40% of historic range triggers listing under the threatened status, while a 60% loss triggers listing as endangered—in the majority of cases.[375] Thus historically the majority of species that are listed as endangered have already lost at least 60% or their historic range. Given that our definition of range limits the historic range that may be considered to those areas that *are currently or potentially suitable,* we favor Vucetich, Nelson and Phillips' more conservative estimate of 33%. Thus, in our view the loss of 33% of currently or potentially suitable historic range should be considered a significant portion of a species range, and should qualify a species for listing as threatened or endangered under the ESA.

---

[374] 1978 GAO Report, *supra* note 47, at 59.
[375] Andrea Easter-Pilcher, *Implementing the Endangered Species Act: Assessing the listing of species as endangered or threatened,* 46 BioScience 355, 358 (May 1996).

VI. SUMMARY AND CONCLUSION

Controversies regarding the listing and protection of endangered species during the 1990s precipitated a marked decline in species listings and a change in the way the Secretary of Interior interprets the phrase, "a significant portion of its range"—part of the definition of "endangered species" in the Endangered Species Act. In the case of the flat-tailed horned lizard, the Ninth Circuit Court of Appeals rejected the Secretary's interpretation, holding that several factors were involved in analyzing the "significant portion of a species range" including the areas in which a species had once flourished but no longer could. Thus consistent with the Secretary's past practices the court concluded that a species could be in danger of extinction if there were major geographic areas in which the species is no longer viable but once was. Several courts applied this standard, consistently rejecting the Secretary's attempts to narrowly define the phrase. In 2007, the Solicitor for the Department of Interior published a Memorandum detailing his legal opinion interpreting the SPR phrase. The Solicitor contended (1) that the term "range" within the SPR phrase refers to a species "current" range, and thus limits protections of the ESA to areas where a species currently resides, (2) that the Secretary has broad discretion in interpreting the term "significant" and should not be held to any one definition.

We disagree with the Solicitor's conclusion that the Secretary can only list species as threatened or endangered in their current range. This interpretation runs counter to a quarter century of FWS policy, is contrary to the legislative history of the ESA, and could provide incentives to hold up species listings thus harming threatened and endangered

species. Implementing such an interpretation would reduce the ability of the ESA to protect endangered species and the ecosystems on which they depend and could result in the creation of a system of disconnected, remnant populations of species—the functional equivalent of wilderness zoos. Thus, we advocate that FWS determine what portions of a species' historic range are currently "suitable" (or could become suitable in the near future), when determining where species should be listed. We believe that this is consistent with historical practice and Congressional intent.

In determining what constitutes, a "significant" portion of a species' range, the Secretary of Interior should consider both the size ***and*** importance of the historical range that is either currently or potentially suitable. Further, to avoid confusion and future litigation, the Secretary should establish fixed minimum criteria for determining if a portion of range is significant that can be applied in all listing determinations. These criteria should address both meanings of the term significant (i.e. measurably large, biologically important) and a species should be listed when *either* one of the minimum criteria are met. Specifically, species should be listed as endangered when either (1) the portion of range in which they are in danger of extinction is important to the species' long-term survival, or (2) when the portion of range in which they are in they are in danger of extinction constitutes a measurably large proportion of its currently or potentially suitable range.

CHAPTER 3: How Law Mattered to the Mono Lake Ecosystem[1]

A later version of this Chapter was published in
35 William and Mary Environmental Law & Policy Review 413 (2011)

Mono Lake lies in a lifeless, treeless, hideous desert, eight thousand feet above the level of the sea... This solemn, silent, sailless sea—this lonely tenant of the loneliest spot on earth—is little graced with the picturesque. . . . The lake is two hundred feet deep, and its sluggish waters are so strong with alkali that if you only dip the most hopelessly soiled garment into them once or twice, and wring it out, it will be found as clean as if it had been through the ablest of washerwoman's hands . . . . Half a dozen little mountain brooks flow into Mono Lake, but not a stream of any kind flows out of it. It neither rises nor falls, apparently, and what it does with its surplus water is a dark and bloody mystery.[2]

--Mark Twain

In the West, it is said, water flows uphill toward money. And it literally does, as it leaps three thousand feet across the Tehachapi Mountains in gigantic siphons to slake the thirst of Los Angeles . . . It still isn't enough.[3]

-- Marc Reisner

[1] Michael McCann argues that the key empirical question about the relationship between law and social change is "[h]ow law does and does not matter" to social change. Michael McCann, *Law and Social Movements: Contemporary Perspectives,* 2 Ann. Rev. L. Soc. Sci. 17, 19 (2006) (McCann (2006)).
[2] Mark Twain, *Roughing It* 259, 262 (Harper & Row 1913) (1871).
[3] Marc Reisner, *Cadillac Desert: The American West and Its Disappearing Water* 12 (rev. ed. 1993).

I. Introduction – Why Ecosystems Matter[4]

In 2005 the Millennium Ecosystem Assessment Board reported "[h]uman activity is putting such strain on the natural functions of the Earth that the ability of the planet's ecosystem[5] to sustain future generations can no longer be taken for granted."[6]

Ecosystems provide extensive services[7] to human wellbeing. These services can be divided into four categories:

1. Provisioning Services: products or commodities obtained from ecosystems and used for consumptive purposes including food, fiber, fuel, genetic medicinal, fresh water, energy, and ornamental.
2. Regulating Services: including air quality, climate regulation, water regulation (i.e. timing of runoff, groundwater recharge, flooding), water purification and waste treatment, disease and pest regulation, pollination, and natural hazard regulation.

---

[4] In preparing this article I am indebted to both Craig Anthony (Tony) Arnold and John Hart for their detailed case studies of the events surrounding the restoration of the Mono Lake Ecosystem. *See generally,* Craig Anthony (Tony) Arnold, Leigh A. Jewell and John Hart all of whom undertook extensive case studies of the events surrounding the recovery of the Mono Lake Ecosystem. *See generally,* Craig (Anthony (Tony) Arnold and Leigh Jewell, *Litigation's Bounded Effectiveness: The Aftermath of the Mono Lake Case,* 8 Hastings W.-Nw. J. Envtl L. & Pol'y 1 (2001-02); John Hart, *Storm Over Mono: The Mono Lake Battle and the California Water Future* (1996). I would also like to thank Prof. Dorothy Anderson, North Carolina State University; Prof. Brad Karkkainen, Mondale School of Law, University of Minnesota and Prof. Kristen Nelson, Department of Forest Resources, University of Minnesota, for taking the time to explore the mesh of social science and legal concepts analyzed in this article and for reviewing multiple drafts of this article. Your guidance and support with this project has been immeasurable. I must also thank Prof. J. David Prince and Prof. Marcia Gelpe, William Mitchell College of Law, for their thoughtful review and comments on earlier drafts of this article and the Consortium on Law and Values in Health, Environment and the Life Sciences at the University of Minnesota for providing financial support for this project.

[5] What constitutes an ecosystem is much debated among ecologists but for purposes of this article the definition provided by A.G. Tansley will suffice. Tansley defines an ecosystem as the ecological system or biological community that occurs in a given locale and the physical and chemical factors that make up the system's non-living or abiotic environment. A.G. Tansley, *The Use and Abuse of Vegetational Concepts and Terms,* 16 Ecology 284 (July 1935).

[6] Millennium Ecosystem Assessment Board, *Living Beyond Our Means: Natural Assets and Human Well-Being* 5 (Jose Sarakkhan and Anne Wyte ed., 2005).

[7] Ecosystem services are the benefits humans obtain from ecosystems. Millennium Ecosystem Assessment Board, *Ecosystems and Human Well-Being Wetlands and Water: A Synthesis* V (Jose Sarukhan and Anne Whyte ed., 2005) (Millennium Assessment *Wetlands and Water*).

3. Cultural Services: including contributions to spiritual and religious values; knowledge of systems; educational, inspirational and cultural heritage; our sense of place, and aesthetic and recreational values; and
4. Supporting Services: including soil formation, photosynthesis, nutrient cycling, water cycling and primary production.[8]

The destruction of watershed ecosystems[9] and their services can adversely affect human health, security, and general human welfare. For example destruction of ecosystems within watersheds may affect the ability of an ecosystem to purify water (a regulating function) which in turn may increase disease and decrease the amount of water available for human consumption (a provisioning service) which in turn may decreases personal security and social cohesion (a cultural service).[10]

To preserve ecosystems the scientific community has moved to a systems approach to environmental management.[11] This approach focuses on natural systems within geographic parameters such as watersheds, wildlife habitat or airshed and on maintaining the integrity of interdependent natural systems within those parameters to "insure sustainable resource development opportunities" and to preserve valuable resources.[12] "Effective ecosystem management requires … land managers identify and

---

[8] *Id.* at 40.
[9] Ecosystems exist in hierarchies, thus a pond may support a localized ecosystem that exists within the context of a larger ecosystem situated within a watershed system that supports numerous interacting ecosystems. Kenneth N. Brooks, Peter F. Ffolliot, Hans M. Gregersen and Leonard F. DeBano, *Hydrology and the Management of Watersheds,* xii (3rd ed. 2003). A watershed is defined by Brooks et al as a "[t]opigraphical delineated area drained by a stream system; that is, the total land area above some point on a stream or river that drains past that point. The watershed is a hydrologic unit often used as a physical-biological unit and a socioeconomic-political unit for the planning and management of natural resources." *Id.*
[10] *Id.* at 50; *see also,* Lynton K. Caldwell, *The Ecosystem as a Criterion for Public Land Policy,* 10 Nt. Resource J. 203, 207 (April 1970).
[11] Ecosystem management is a "regional" or "resource system" approach to environmental management. Robert B. Keiter, *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands,* 25 Land & Water L. Rev. 43, 45-46 (1990).
[12] *Id.*

analyze the full impact, both cumulatively and geographically, of management proposals on existing resource systems to minimize the disruption or fragmentation of ecosystem processes."[13]

This systems approach to environmental management is not reflected in our traditional approach to environmental policy that developed in the early 1970's. Environmental policy and law historically sought to minimize human impacts on the environment.[14] These historic constructs addressed human-environment interactions from the perspective of individual environmental medium (e.g. air, land and water) resulting in individual statutory schemes to eradicate air, land and water pollution.[15] These statutes were designed to limit environmental degradation through complex permitting and/or regulation schemes managed by divisions within federal agencies such as the U.S. Environmental Protection Agency (EPA) which resisted a cross-functional or systems approach to the environment – these division focused on single issues or functions such as air pollution, water pollution and the management of solid or hazardous wastes.[16] The result was a silo approach to environmental protection, which fails to assess the overall health of ecosystems. The Clinton Administration highlighted the shortcoming of this system when it concluded:

---

[13] *Id.*

[14] Modern environmental law and policy was premised on the theory that there was a natural "equilibrium between organisms and the environment" that could sustain itself absent human interference. Fred P. Bosselman and A. Dan Tarlock, *The Influences of Ecological Science on American Law: An Introduction,* 69 Chic.-Kent L. Rev. 847, 866-67 (1994).

[15] *Id.* at 867-68. For example the Clean Air Act was enacted to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" while the Clean Water Act had as it's purpose the "restoration and maintenance of the chemical, physical and biological integrity of the nation's waters". 42 U.S.C. § 7041(b)(1)(2005); 33 U.S.C. § 1251 (2005).

[16] For an excellent discussion of creation of the EPA and the development of a silo approach to environmental management *see,* Alfred A. Marcus, *EPA's Organizational Structure,* 54 Law & Cont. Prob. 5 (1991).

> [b]ecause EPA has concentrated on issuing permits, establishing pollutant limits and setting national standards, the Agency has not paid enough attention to the overall environmental health of specific ecosystems. In short, EPA has been 'program driven' rather than 'place-driven' . . .
>
> Recently we have realized that, even if we had perfect compliance with all our authorities we could not assure the reversal of disturbing environmental trends.[17]

Protecting the nation's ecosystems and the services they provide requires a shift from a "fragmented approach [to environmental management] to an approach that focuses on the ultimate goal of healthy, sustainable ecosystems that provide us with food, shelter, clean air, clean water and a multitude of other goods and services. We [must] . . . move toward a goal of ecosystem protection." [18]

Grumbine, in his review of ecosystem management literature suggests that this shift requires political and legal constructs that work across political and administrative boundaries that are reflexive and adaptive and capable of modification as new data is developed, that involve multiple levels of government and stakeholders that encompass organizational change and that infuse ecosystem values into human systems.[19] How might this change occur? The case history of the struggle of the citizens of California to protect and restore the Mono Lake ecosystem offers an opportunity to explore how social movements have used the law and litigation to protect ecosystems and the resulting

---

[17] Ecosystem Protection Workgroup, U.S. Envt. Prot. Agency, *Toward a Place-driven Approach: The Edgewater Consensus on an EPA Strategy for Ecosystem Protection* at 1 (March 15, 1994)(Edgewater Consensus).

[18] *Id.*; *see also,* Millennium Ecosystem Assessment Board, *Living Beyond Our Means: Natural Assets and Human Well-Being a Statement from the Board*, 12 (Jose Sarukhan and Anne Whyte ed. 2005). James Salzman, Barton H. Thompson, Jr. and Gretchen C. Daily, *Protecting Ecosystem Services: Science, Economics & Law,* 20 Stan. Env'tl L. J. 309, 309-10 (2001).

[19] R. Edward Grumbine, *What is Ecosystem Management,* 8 Cons. Bio. 27, 31 (March 1994).

change in the governance structures charged with the allocation of California's water resources.[20]

II. THE DEMISE OF THE MONO LAKE ECOSYSTEM

A. The Mono Lake Ecosystem

Mono Lake is situated at the base of the Sierra Nevada Mountains near the eastern entrance of Yosemite National Park (Figure 3.1).[21] The lake is 190 miles east of San Francisco and 300 miles north of Los Angeles.[22] Once part of the Great Basin stretching from the Great Salt Lake south- west to the Owens Valley and north to Klamath Lake, the Mono Lake watershed is a confined system.[23]

When Twain visited Mono Lake in 1870, the watershed was approximately 695 square miles and the lake itself was over 70 square miles (Figure 3.2).[24] The historic elevation of Mono Lake prior to diversion ranged from 6,404 to 6,428 feet above sea level (Figure 3.3). Mono Lake is fed by four tributaries that carry snowmelt from the Sierra Mountains.[25] Because Mono Lake is a terminal lake with no natural outlet, water

---

[20] Bradley C. Karkkainen, *Getting to "Lets's Talk": Legal and Natural Destabilizations and the Future of Regional Collaboration,* 8 Nev. L. J. 1, 814-817 (2007) Karkkainen argues that Mono Lake and Everglades ecosystem restoration are prime examples of the use of destabilizing litigation to foster both environmental and institutional change to protect ecosystems.

[21] *National Audubon Society v. Superior Court of Alpine County,* 658 P.2d 709, 711 (Cal. 1983) *cert. denied,* 464 U.S. 977 (1983).

[22] Michael C. Blumm, Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water,* 37 Ariz. L. Rev. 701, 703 (1995).

[23] Hart, *supra* note 4, at 9. Approximately three million years ago the Mono Lake watershed became isolated from the remainder of the Great Basin. Mono Lake reached its present size approximately 9,000 years ago. *Id.* at 9-13

[24] California Department of Water Resources, *Mono Lake Background* (March 2004) http://www.saltonsea.water.ca.gov/calendar/ac/03.23.2004/MonoLakeValues.pdf (last visited July 28, 2009).

[25] The primary tributaries of Mono Lake are Lee Vining Creek and Rush Creek, which is augmented by Parker and Walker Creeks, and Mill Creek. Hart, *supra* note 4, at 7.

leaves the system solely through evaporation, resulting in a high mineral concentration – currently three times saltier than the ocean.[26]

Figure 3.1: Mono Lake and Los Angeles Aqueduct found at http://www.hydrologyfutures.com/LAA_Map_1.gif *last visited March 23, 2010.*

[26] Gordon Young, *The Troubled Waters of Mono Lake,* 160 Nat'l Geographic 504 (October 1981). Mono Lake is a "triple-water lake: it is saline; it is alkaline; and, due to its volcanic surroundings, it is sulfurous." Hart, *supra* note 4, at 14.

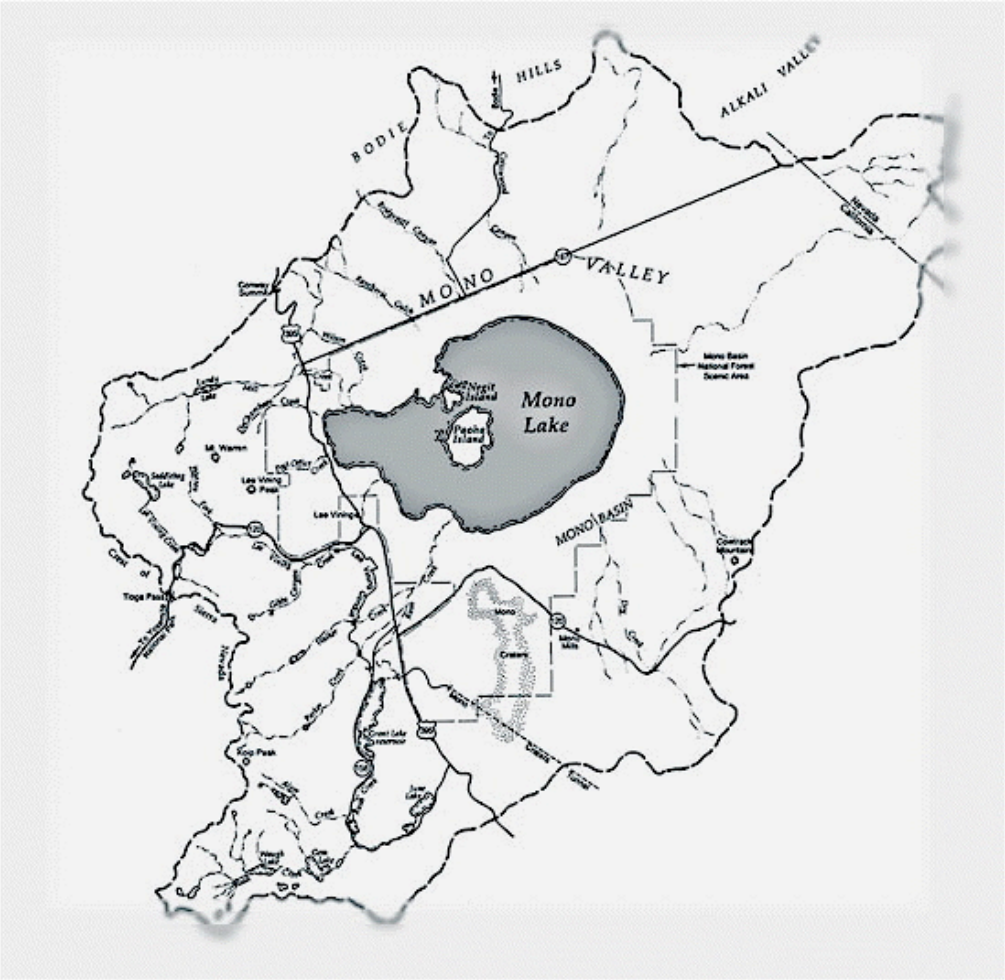

Figure 3.2: Mono Lake Watershed found at http://www.monolake.org/newsletter/images/99spmap.gif **last visited April 15, 2010.**

Historically, the Mono Lake watershed supported a unique and vibrant ecosystem. Although Mono Lake was too alkaline to support most fish species it produced both algae and microscopic plants "by the millions of tons."[27] These miniscule organisms fed the brine shrimp and the alkali flies in numbers that astounded Twain who reported:

> There are no fish in Mono Lake – . . . no living thing exists *under* the surface, except a white feathery sort of worm, one half an inch long, which looks like a bit of white thread frayed out at the sides. If you dip a gallon of water, you will get about fifteen thousand of these. . . . Then there is a fly, which looks something like our house-fly. These settle on the beach

[27] Hart, *supra* note 4, at 15.

to eat the worms that wash ashore – and any time, you can see there a belt of flies an inch deep and six feet wide, and this belt extends clear around the lake—a belt of flies one hundred miles long. . . . You can hold them under water as long as you please – they do not mind it – they are only proud of it. When you let them go, they pop up to the surface as dry as a patent office report . . . [28]

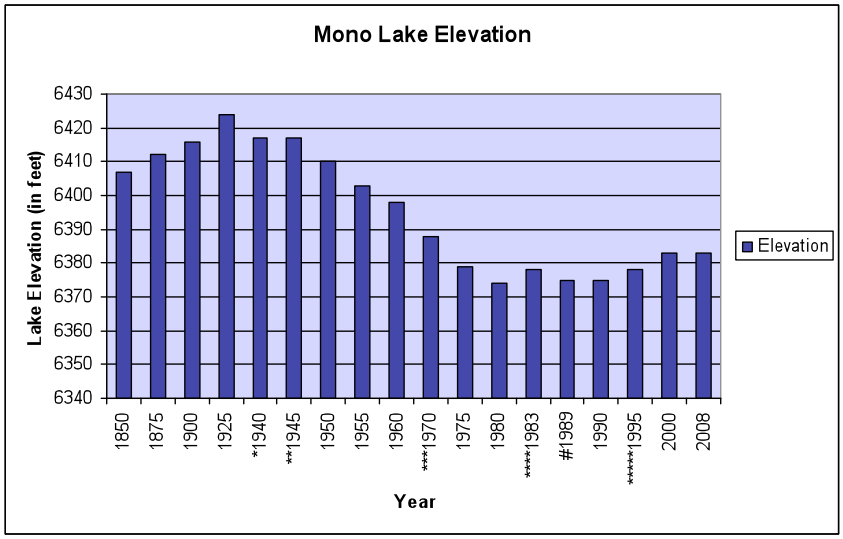

Figure 3.3: Mono Lake Elevation Level (Source Mono Lake Committee website located at http://www.monolake.org/live/level.htm last visited July 25, 2008).

*Water Board issues LADWP Water Permit
** 1942 Grant Lake Dam Completed
*** Second Barrel LA Aqueduct Completed
****_National Audubon_ Decision issued by Court & temporary injunction setting temporary lake level
Agreed upon low level base line for the lake
***** Settlement and Water Board Decision issued

The Mono Lake alkali fly (*Ephydra Hians)* and brine shrimp *(Artemia Monica)* are the primary food source of the more than 100 bird species that historically frequented Mono Lake, as many as 800,000 birds have been counted on Mono Lake in a single day.[29] Mono Lake is the primary nesting area for the California gull[30] and other

[28] Twain, *supra* note 2, at 261(emphasis in original).
[29] Young, *supra* note 26, at 509. *See also,* State of California Water Resources Control Board Mono Lake Basin Water Right Decision 1631 at 77 (Sept. 28, 1994)(1994 Water Right Decision*)*.
[30] *National Audubon,* 658 P.2d at 714, 716 (citing 1979 Task Force Study Report jointly prepared by the U.S. Department of Interior and the California Department of Water Resources). Ninety-five percent of California's California gull population and 25 percent of the nation's California gull population nest at Mono Lake. *Id.* at 716.

migratory birds use Mono Lake as a stop between their breeding grounds in North America and their wintering grounds in Central and South America.[31] The Lake also serves as a stop over in the migratory flight path of numerous duck species in such quantities that in the 1940's hunters and birders reported millions of waterfowl fed at Mono Lake.[32] Prior to diversion, the Mono Lake tributaries also supported a vibrant fish population. At the 1993-94 California State Water Resources Control Board (SWRCB) hearing to amend the Los Angeles' water diversion permit local residents and experts testified that the Mono Lake tributaries supported catchable brown trout and occasional eastern brook trout.[33] Mono Lake was also recognized for its scenic attributes. Muir described the area as "[a] country of wonderful contrasts, hot deserts bordered by snow-laden mountains, cinders and ash scatter on glacier-polished pavement, frost and fire working together in the making of beauty."[34]

This is not to say that the Mono Lake ecosystem was unimpaired prior to Los Angeles' water diversion from the Mono Lake tributaries. Mono Lake tributaries flowed year round often overtopping their banks during the spring depositing soils and sediment on the flood plains.[35] Both Hart and the SWRCB report that the flood plains of the

---

[31] Hart, *supra* note 4, at 16-20. The Wilson's Phalarope is an example of the many species dependent upon Mono Lake. The Wilson's Phalarope (phalarope) breeds in May in the northern Great Plains. In late June, the phalarope begins migration to its wintering grounds in the Central Andes. The first leg of this journey is the flight from the Great Plains to Mono Lake where phalaropes feast on brine shrimp preparing to journey south. Ornithologist, Joseph Jehl in 1981 reported: "[b]y the end of July, when migration began [from Mono Lake] the skies were thick with birds. The first females departed, to be followed by the fattened-up males by mid-August. Before leaving Mono Lake, the adults may double their weight, storing enough fat to power their *non-stop flight* to the northern coast-line of South America." Joseph R. Jehl, Jr., *Mono Lake: A Vital Way Station for the Wilson's Phalarope,* 160 Nat'l Geographic 520 (October 1981).
[32] Hart, *supra* note 4, at 20.
[33] 1994 Water Right Decision, at 22, 38-39, 53-54.
[34] *Id.* at 133.
[35] *See generally, id.* at 21-76 (discussing the historic hydrology of Lee Vining, Parker, Walker and Rush Creeks).

Mono Lake tributaries supported local grazing and irrigation for decades prior to the Los Angeles diversion.[36] However, during this period local water extractions had a negligible impact on Mono Lake's pre-diversion water levels. *See* Figure 3, Mono Lake Water Levels.

As evidenced by this overview, over time the Mono Lake ecosystem provided a number of ecosystem services. It served as a major rookery and migration stop for a vast array of bird species including waterfowl. This provisioning service contributed to extensive biological diversity not only in Northern California, but also within North America. Annual flooding of the tributaries provided supporting services such as nutrient cycling system. Cultural services provided a unique sense of place recognized by luminaries such as Twain, Muir and Adams. And then there were regulating services, services that only became apparent as Mono Lake levels began to plummet and air quality deteriorated after the Los Angeles diversion.[37]

B. The Los Angeles Diversion and Demise of the Mono Lake Ecosystem

Three hundred miles southwest of Mono Lake is the City of Los Angeles whose growth has long exceeded the available supply of local water (Figure 3.1).[38] As early as 1904 the Los Angeles Department of Water and Power (LADWP) cast its eyes eastward for water, to the Owens River Valley and by 1913 the LADWP had completed

---

[36] Hart, *supra* note 4, at 22-30, 39-42; *1994 Water Resources Board Decision,* at 21-76 (discussing historic hydrology and uses of Lee Vining, Parker, Walker and Rush Creeks).

[37] 1994 Water Right Decision, at 120-123. As lake levels declined larger swaths of Mono Lake's bed were exposed and a white ring of playa began to form around the lake. Wind erosion of the playa caused suspended particulate mater in quantities not seen at pre-diversion levels. *Id.* at 122. These suspended particulates were smaller than 10 pm and exceed national ambient air quality standards. *Id.* at 123-24.

[38] Reisner, *supra* note 3, at 60-16; *see also,* Kahrl, William L., *Water and Power: The Conflict over Los Angeles' Water supply in the Owens Valley* 270 (1982); Abraham Hoffman, *Vision or Villainy: Origins of the Owens Valley – Los Angeles Water Controversy* 44-45 (1981).

construction of an aqueduct to transport water from Owens Valley to Los Angeles.[39] Massive for its day, the aqueduct extended 223 miles and climbed 4,000 feet uphill from the Owens Valley to Los Angeles.[40] By 1925 the Owens River was virtually dry and the Los Angeles population had exploded beyond expectations.[41] The City of Los Angeles began casting around for another water source, which became Mono Lake and its tributaries.

Between 1912 and 1913 the LADWP began purchasing land and water rights in the Mono Lake watershed.[42] These acquisitions included land for a reservoir in which to store water from the Mono Lake tributaries. Water could then be transported from the Mono Lake tributaries to the reservoir for storage and then to the Owens River and the Los Angeles aqueduct.[43] In 1919 William Mulholland, Chief Engineer of the LADWP entered into a contract with the United States Reclamation Service (Bureau of Reclamation), an Agency of the Interior Department, to prepare plans, surveys and cost estimates for an expansion of the aqueduct from Owens Valley north into the Mono Lake Watershed. Mulholland and Bureau of Reclamation Chief Arthur Powell Davis also

---

[39] *See generally,* Kahrl, *supra* note 38*;* Reisner, *supra* note 3 at 52-103 and Hoffman, *supra* note 38, at 3-173 (containing a general history of the LADWP's acquisition of water in the Owens Valley and construction of the Los Angeles Aqueduct).

[40] Reisner, *supra* note 3, at 61, 84-85. Hoffman reports that when the Los Angeles Aqueduct was dedicated on November 5, 1913, and the first waters from Owens Valley spilled out LADWP Chief Engineer, William Mulholland was reported to have uttered only five words: "There it is. Take it." Hoffman, *supra* note 38, at 172.

[41] By 1900 the population of Los Angeles was 100,000. Reisner, *supra* note 3, at 62. By 1913 when the Los Angeles Aqueduct opened the population of Los Angeles had risen to 500,000. *Id.* at 73. And by the early 1920's Los Angeles' population had increased to such a degree that Mulholland decided that the only option was to dry up the Owens Valley and search for alternate water sources. *Id.* at 89. Reisner reports that in 1925 Mulholland had expected 350,000 people "but had 1.2 million on his hands instead." *Id.* at 87. And Kahrl notes that by 1920 growth in Los Angeles had upset all the calculations on which Mulholland had predicated the Los Angeles Aqueduct. Kahrl, *supra* note 38, at 260.

[42] Hart, *supra* note 4, at 37

[43] *Id.*

entered into a secret agreement to withdraw extensive public lands[44] in the Mono Basin from private settlement or claims in effect reserving these lands for acquisition by the LADWP facilitating the Mono Lake diversion.[45] This agreement would eventually backfire on Reclamation Chief Davis leading to his resignation, however, his successor Elwood Mead refused to overturn the Davis' decision noting "[t]here seems no question that the water of this region will soon be needed for domestic and industrial purposes in the City of Los Angeles, and its value for these purposes is far greater than for agriculture"[46] or for that matter the Mono Lake ecosystem. In 1923, the LADWP applied for a permit to appropriate the entire flow of the Mono Lake tributaries for domestic use and power generation.[47]

During this same time period California Water Law was in flux. Historically California operated a dual water rights system recognizing both riparian and appropriative water rights[48] but in 1913 it passed the Water Commission Act making all

[44] The majority of land in the Mono Basin was federally owned. *Id.* at 38. Through the 19th century the primary public land policy of the U.S. Government was one of disposal of public lands into private ownership to encourage settlement and development. Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and Congress,* 28 (June 20, 1970). Beginning in 1900 public lands began to be withdrawn from disposal. *Id.* Public land is considered withdrawn if a statute, executive order or administrative order designates a parcel as unavailable for disposal or resource exploitation. Jan G. Laitos, *Natural Resource Law* § 5.01(D)(3) at 161-62 (2002). Kahrl observes that the Bureau of Reclamation had a history of setting aside land for future reclamation projects to prohibit private parties from acquiring land that might be needed or used for water projects. Kahrl, *supra* note 38, at 40-41. A more detailed discussion of the withdrawal of federal lands for future construction of the Mono Lake project is outline in Kahrl's book on the construction of the Los Angeles Aqueduct. *Id.* at 330-338. Kahrl also notes that the Bureau of Reclamation made the withdrawal despite the fact that Los Angeles had no definite plans for the Mono Lake project at the time of the withdrawals. *Id.* at 337.

[45] Hart, *supra* note 4, at 37.

[46] *Id.* (quoting statement of Dr. Elwood Mead, Head Reclamation Service 1924 - 36)

[47] Hart, *supra* note 4, at 38.

[48] Historically California had a duel water rights system recognizing both riparian and prior appropriation doctrines. *National Audubon Society v. Superior Court of Alpine County,* 658 P.2d 709, 724 (Cal. 1983). Under California's riparian doctrine the owner of land abutting a watercourse had the right to" reasonable and beneficial use" of water on his or her land. *Id.* In contrast, the appropriation doctrine requires the taking or diversion of water from the water body for "useful and beneficial purposes." *Id.* An appropriative

water in the state that was not being applied to a "useful and beneficial purpose" eligible for appropriation under the prior appropriation system.[49] And in 1921 the Water Commission Act was amended allowing the SWRCB to reject an appropriation permit application when it determined the purpose of the appropriation was not in the public interest.[50] The 1921 amendment also admonished the SWRCB that "[i]n acting upon application to appropriate water . . . [it] shall be guided by the policy that domestic use is the highest use . . . of water."[51] And in 1926 the California Constitution was amended to provide:

> [T]he general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.[52]

Not only did the amendment abolish certain rights of riparian owners to use water, it required that all uses of water in California, including public trust water uses, "conform to the standard of reasonable use."[53] While under this amendment in-stream uses such as recreation were considered a beneficial use,[54]in-stream uses were not the highest use of

---

rights system is grounded in the belief that the greatest public good arises out of placing water rights in private hands.

[49] The Water Commission Act formalized the procedure by which a party could acquire appropriative water rights. *Id.* Only water that was not being applied to "useful and beneficial purposes" was eligible for appropriation. Appropriative rights acquired under the Water Commission Act were inferior to pre-existing rights including riparian rights. *Id.* at 725. *See also,* Cal. Water Code Annotated§ 1201 (West 2009).

[50] *National Audubon,* 658 P.2d at 713; *see also,* Cal. Water Code Annotated § 1255 (West 2009).

[51] *National Audubon,* 658 P.2d at 713; *see also,* Cal. Water Code Annotated § 1254 (West 2009).

[52] *National Audubon,* 658 P.2d at 725 *quoting* California Constitution Article X, section 2.

[53] *Id.*

[54] *City of Los Angeles v. Aitken,* 58 P.2d 585, 591 (Cal. Ct. App. 1935)(*Aitken)*; *see also, National Audubon,* 658 P.2d at 726 (citing *Aitken* for the principle that in stream-uses are reasonable and beneficial uses of water).

the water. The highest beneficial uses were extractive uses. The door was open for the LADWP's appropriation of water from the Mono Lake Watershed.

To appropriate water from the Mono Lake tributaries the LADWP had to meet three requirements. It had to obtain project financing, acquire riparian lands with pre-existing water rights, and obtain a permit from the SWRBC.[55] In 1930 after an extensive public campaign initiated by the LADWP proclaiming a forthcoming "water famine" the citizens of Los Angeles passed a $38.8 million bond to finance the Mono Lake water project.[56] The LADWP then condemned the private property necessary for the project, a process that in 1935 culminated in a condemnation action in Tuolumne County Superior Court.[57] Experts in the condemnation action testified that the diversions from the Mono

[55] The process for acquiring water rights through appropriation is set out in California's Water Code. The process is initiated by application to the SWRCB for a "permit to put unappropriated water to beneficial use." *California Trout, Inc. v. State Water Resources Control Board,* 207 Cal. App. 3d 585, 610 (Cal. Ct. Ap. 1989) (*Cal. Trout I)(*citing Cal. Water Code §1252). The application must include the nature and amount of the water request, the location and a description of the physical infrastructure needed for the diversion, the anticipated infrastructure completion date and must affirmatively state when *all* of the requested water will be put to its beneficial use. Cal. Water Code Annotated § 1260 (West 2009). If the application is approved by SWRCB a permit is issued giving the permitee the right to take and use water but "only to the extent and for the purpose granted". Cal. Water Code Annotated §§ 1380-81 (West 2009). The right to appropriate water under the permit is a conditional right and must be perfected by the permitee. Perfecting the right requires the permitee to diligently commence and complete infrastructure construction and apply the water to beneficial use in accordance with the terms of the permit. *Cal Trout I,* 207 Cal. App. 3d at 610 (citing Cal. Water Code Annotated §§1395-97 (West 2009)). The California water code provides that "[a]permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose . . . but no longer." *Id.* at 611 (quoting Cal. Water Code Annotated § 1390 (West 2009). If a permitee fails to make beneficial use of all or any part of the "water claimed by him, for which a right of use has vested . . . for a period of three years, such unused water reverts to the public and shall be regarded as unappropriated water." *Id.* (quoting 1943 Cal. Stat. ch. 368 section 1241 (Cal. Water Code § 1241 has since been amended to permit a five year time frame to use appropriated water). Additionally the California Water Code requires a permit to be revoked if the infrastructure necessary for diversion is not undertaken and completed with due diligence. Cal. Water Code Annotated§ 1410 (West 2009). If, however the infrastructure is diligently completed and the water is diverted and put to beneficial use then the SWRCB will issue a license confirming the permitee's rights to appropriate the water. Cal. Water Code Annotated § 1610 (West 2009).

[56] Hart, *supra* note 4, at 38.

[57] *Aitken,* 58 P.2d at 587. In *Aitken,* the City of Los Angeles and the LADWP brought suit to condemn riparian water rights and divert all of the water of Rush and Lee Vining Creeks for use by the City of Los Angeles. The court determined the taking of water for domestic use in Los Angeles was a public necessity.

Lake tributaries, would reduce the lake "to one-tenth of its present volume of water within five to ten years leaving the bed of the Lake and the exposed mud flats covered with a thick crust of mineral salt … which will pulverize and fly with every breeze that blows over the surrounding land, ruining all vegetation and destroying the fertility of the soil"[58] draining Mono Lake and creating a desert.[59] While the Court required the City of Los Angles to pay riparian owners for desertification and the taking of riparian water rights, the court found that the diversion itself met the public necessity requirement. The LADWP immediately began infrastructure construction for the diversion. [60]

In 1938 the SWRCB commenced hearings on the LADWP's appropriation request.[61] Locals opposed the appropriation alleging the diversion would reduce property values, destroy tourism and "lay waste and desert" to large areas of the Mono Lake Basin.[62] Despite opposition, the SWRCB, on June 1, 1940, granted the LADWP a permit

---

Id. at 586. At trial, the LADWP argued that the finding of necessity and California's constitutional requirement of beneficial use precluded payment of riparian owners for the taking of their littoral property rights or considering those rights in property valuation. LADWP argued that valuation should be premised on the assumption that Mono Lake did not add value to the adjacent properties. The Court disagreed, holding that although California's Constitution favored the beneficial use of water it did not obviate an adjacent owner's riparian rights. Thus the LADWP was required to pay the landowners property damage assuming the benefits to property value provided by Mono Lake. *Id.* at 592.

[58] *Id.* at 587.

[59] *Id.*

[60] The infrastructure necessary to transfer water from the Mono Lake tributaries to the Owens Valley included construction of a diversion dam on Lee Vining Creek; construction of a buried pipeline from Lee Vining designed to divert water from Rush Creek, Parker Creek and Walker Creek to Grant Lake Reservoir; construction of Grant Lake Reservoir for storage of the water from the Mono Lake tributaries; construction of a buried pipeline from Grant Lake to the Mono Craters; and construction of the Mono Craters Tunnel, an 11.5 mile tunnel carrying the water from Grant Lake to a discharge point on the upper Owens River. Once in the Owens River the water would flow into the Long Valley reservoir where it would be funneled through a series of power plants prior to rejoining the Owens riverbed to be funneled into the Los Angeles aqueduct. Hart, *supra* note 4, at 42 – 43.

[61] *Id.*

[62] *Id.* at 45.

to appropriate the entire flow of water from the Mono Lake tributaries.[63] In granting the permit the SWRCB stated:

> It is indeed unfortunate that the City's proposed development will result in decreasing the aesthetic advantages of Mono Basin but there is apparently nothing that this office can do to prevent it. The use to which the City proposes to put the water under its Applications . . . is defined by the Water Commission Act as the highest to which water may be applied . . . . This office therefore has no alternative but to dismiss all protests based upon the possible lowering of the water level in Mono Lake and the effect that the diversion of water from these streams may have upon the aesthetic and recreational value of the basin.[64]

The permit allowed the LADWP to divert the full flow of the Mono Lake tributaries despite the fact that the LADWP did not have the capacity to use all of the appropriated water. In 1940 the Los Angeles aqueduct could only carry one half of the flow of the Mono Lake tributaries – the Los Angeles aqueduct would not have capacity to carry the full flow until 1970 when a second barrel of the Los Angeles aqueduct was constructed.[65] The 1940 permit was, on its face, inconsistent with California's appropriation system, which required that appropriated water be put to beneficial use as a condition of the permit.[66]

The 1940 Mono Lake Permit decision was also inconsistent with the1940 Rock Creek ruling in which the SWRCB ruled that the California Water Commission Act required the State to protect streams in recreational areas by "guarding against depletion below some minimum amount consonant with the general recreational conditions and

---

[63] *Id*.
[64] *National Audubon,* 658 P.2d at 714 (quoting Division of Water Resources Decision 7053, 7055, 8042 & 8043 at 26 (April 11, 1940)).
[65] Hart, *supra* note 4, at 56. The infrastructure necessary to extract the total volume of water from the Mono Lake tributaries and store it in Grant Lake Reservoir was completed in 1940. *Id.*
[66] *Supra* note 55 (discussing the requirements of California's water appropriation scheme).

character of the stream."[67] That the Rock Creek ruling reasoning was not applied to the Mono Lake appropriation, is yet another illustration of the special relationship between the SWRCB and the LADWP – when it came to water appropriations what the LADWP wanted it got regardless of applicable law. A point further illustrated by the state's treatment of the "fishway rules" in case of the Mono Lake project.

Prior to the LADWP's Mono Lake project the Mono Lake tributaries supported "good trout populations."[68] Historically, California law required new dam constructions to include fish passages or "fishways."[69] In lieu of a fishway the project proponent could substitute a hatchery.[70] In 1935 the Fish and Game Commission conducted a hearing on the LADWP's proposed Grant Lake dam, part of the infrastructure needed to transport water from the Mono Lake tributaries south to the Owens Valley, and found that a fishway was not practicable and would not be required.[71] A second hearing reconsidering the issue was held in 1936 – the tentative resolution: the LADWP and the Fish and Game Commission were to work out the possibilities for a fish hatchery at Hot Creek.[72] Then, in 1937 the California Legislature imposed a requirement that "all dams, old or new . . . must let enough water pass to maintain, in good condition the fish in the streams below" the dam.[73] There appeared to be no way the LADWP could bypass this minimum flow requirement. By 1937 the LADWP had yet to complete construction of Grant Lake dam.

---

[67] *National Audubon,* 658 P.2d at 714, note 6 (quoting Division of Water Resources decision 3850 at 24(April 11, 1940)).
[68] *Trout I,* 207 Cal. App. 3d at 596.
[69] *See generally, id.* at 594 (citing Cal. Fish & Game Code § 5937 and noting that the predecessor to § 5937 was first enacted in 1933).
[70] *Id.*
[71] *Id.* at 594-95.
[72] *Id.*
[73] *Trout I,* 207 Cal. App. at 600 (discussing 1937 amendment to Cal. Fish & Game Code § 5937). *See also,* Cal. Fish & Game Code Annotated § 5937 (West 1998).

To comply with the fishway requirements the LADWP agreed to construct a hatchery on Hot Creek but made no provision to meet the minimum flow requirements below Grant Lake dam as required by law.[74] Then on November 25, 1940, the Chairman of the California Game and Fish Commission entered into an agreement with the LADWP exempting the Grant Lake dam from the 1937 statutory minimum flow requirements.[75] This meant that the LADWP could run the creeks dry below the Grant Lake dam, certain death for the trout in the Mono Lake tributaries.

Impoundment of waters from the Mono Lake tributaries began shortly after the LADWP received its appropriation permit and on April 1941 the LADWP began shipping water south to the Owens River. [76] Because the LADWP was only able to send half of the water appropriated from the Mono Basin tributaries through the aqueduct to Los Angeles the remaining portion of the Mono Lake diversion sat in Grant Lake.[77] The effect of the project on the Mono Basin tributaries was almost immediate. On March 10, 1941, a California Game and Fish, fisheries biologist Elden Vestal wrote to the LADWP reporting that Rush Creek had been dry since October 1940 and requesting that the LADWP maintain a minimum flow in Rush Creek to maintain fish hatcheries as required by statute.[78] Vestal received a letter from the LADWP advising him to consult with the terms of the Hot Creek Agreement.[79] Upon further inquiry with the Chief of the Bureau

---

[74] Hart, *supra* note 4, at 45.
[75] *Id.* at 45-46.
[76] *Id.* at 46.
[77] *National Audubon,* 658 P.2d at 714.
[78] Hart, *supra* note 4, at 47 (quoting letter to the Los Angeles Department of Water and Power from Elden Vestal, Fisheries Biologist, California Board of Game and Fish dated March 10, 1940).
[79] *Id.* at 47 (quoting letter from the Los Angeles Department of Water and Power to Elden Vestal, Fisheries Biologist, California Board of Game and Fish).

of Fish Conservation Vestal received a "thinly veiled warning to stop my investigations into what was apparently a very sensitive political question."[80]

The impact of the diversion on Mono Lake itself was also devastating. Between 1940 and 1970 the LADWP diverted an average of 57,067 acre-feet of water per year from the Mono Lake Watershed. The lake's surface level receded on average 1.1 feet per year (Figure 3.3).[81] Los Angeles' demand for water from the Mono Lake tributaries intensified in 1964 when the U.S. Supreme Court issued a decree limiting California's water allocation under the Colorado River Compact.[82] The amount of water the LADWP was able to transport to Los Angeles escalated in 1970 when it completed the second barrel of the Los Angeles aqueduct.[83] Completion of the aqueduct meant the LADWP could perfect its permit. In 1974, thirty-four years after granting the original permit to appropriate the full flow of water from the four Mono Lake tributaries, the SWRCB found that the LADWP "had perfected its appropriative right by the actual taking and beneficial use of water" and issued the LADWP two permanent licenses authorizing the LADWP to "divert up to 167,000 acre-feet annually" (far more than the average annual flow) of the Mono Lake tributaries. The SWRCB viewed this action as a ministerial action, based on the 1940 decision and held no hearings on the matter.[84] By 1979 the

---

[80] *Id.* (quoting Elden Vestal).
[81] *National Audubon,* 658 P.2d at 714.
[82] *Arizona v. California,* 376 U.S. 340 (1964). In 1952 the State of Arizona filed suit against the State of California regarding the volume of California's water appropriations from the Colorado River system. *Arizona v. California,* 373 U.S. 546, 551 (1963). Eventually the states of Nevada, New Mexico and Utah and the United States were added as parties in a case that ultimately was intended to apportion the waters of the Colorado River system. *See generally, id.* at 564-590 (discussing the allocation and apportionment of water of the Colorado River system among the states and other users).
[83] 1994 Water Rights Decision at 5-6.
[84] *National Audubon,* 658 P.2d at 714, note 8.

Mono Lake ecosystem supplied approximately twenty percent of Los Angeles' water supply.[85]

Between 1970 and 1980 LADWP was diverting on average 99,580 acre-feet per year from the Mono Lake watershed. By 1979 Mono Lake's surface level dropped from 6,435 feet above sea level to 6,373 feet above sea level (Figure 3.3).[86] The impacts of the LADWP diversion on the Mono Lake watershed ecosystems have been extensively documented in both the scientific and popular literature.[87] The four major Mono Lake tributaries were dry most if not all year round and fish populations disappeared.[88] Without fresh water input Mono Lake receded 43 feet below pre-diversion levels. *See*, Figure 3*,* Mono Lake Water Levels, exposing a mile wide ring of powdery alkali flats around the lake that as early as 1965 gave rise to a new phenomena in the Mono Basin, alkali dust storms.[89] These dust storms violated the ambient air standards of the Federal Clean Air Act.[90]

The lack of fresh water input also caused an increase in Mono Lake's salinity levels,[91] which in turn adversely affected the symbiotic populations of alkali flies and brine shrimp.[92] The closest alternative food source for migratory birds was the Salton

[85] Arnold (2001), *supra* note 4, at 7.
[86] *National Audubon,* 658 P.2d at 714.
[87] A comprehensive discussion of the environmental impacts of the LADWP diversion from the Mono Lake Basin is contained in the Mono Basin Environmental Impact Report prepared between 1989 and 1993 at the request of the SWRCB. The entire document may be accessed electronically at the Mono Basin Clearing House http://www.monobasinresearch.org/onlinereports/mbeir.htm last visited at April 1, 2009.
[88] 1994 Water Rights Decision, at 21-76.
[89] Young, *supra* note 26, at 506.
[90] 1994 Water Rights Decision, at 120; and Hart, *supra* note 4, at 52-53.
[91] 1994 Water Rights Decision, at 77
[92] *Id.* at 77-82.

Sea, 350 miles south of Mono Lake. Bird populations began to plummet.[93] And the receding waters exposed land bridges to Negit and Paoha Islands, primary nesting sites for California Gulls.[94] Between 1979 and 1994, coyotes crossed these land bridges feeding on nesting gulls and in 1979 coyote intrusions on Negit Island caused the California Gull to experience total reproductive failure.[95] Additionally, prior to the diversions Mono Lake was surrounded by extensive wetland and delta lagoon systems.[96] As the tributaries of Mono Lake dried up and lake levels dropped these systems were drained. [97] The loss of this habitat particularly affected waterfowl,[98]whose populations too began to dwindle.[99]

In short the Mono Lake ecosystem was dying – a death made possible by the political power of the LADWP facilitated by its established relationships with the State of California, the SWRCB and its publically stated position that the taking of water from Mono Lake was necessary for the continued health and well being of the citizens of Los Angeles. The issue was framed as an either or scenario, either water is provided for human survival and economic growth or the water is used to protect the ecosystem.[100] It

---

[93] Young, *supra* note 26, at 510.
[94] Ninety-five percent of the state of California's California gulls, one in five of all California gulls in the world, nest at Mono Lake. *Id.* at 509.
[95] 1994 Water Rights Decision, at 102-103.
[96] Of the 617 acres of wetlands fringing Mono lake there were 260 acres of brackish lagoons, 175 acres of dune lagoons, over 60 acres of delta lagoons, and 356 acres of marsh, wet meadow and wetland willow scrub. *Id.* at 94.
[97] *Id.* at 97-98.
[98] *Id.* at 100.
[99] Local residence reported that pre-diversion the sky was thick with ducks and geese; since diversion "its hard to find even one out there." Young, *supra* note 26, at 510. Current data indicates that duck populations at Mono Lake dropped from a pre-diversion level of 175,000 – 400,000 ducks per day to 11,000-15,000 ducks per year. 1994 Water Rights Decision, at 113 – 115.
[100] Editorial, *Water and Power in Our Future,* L.A. Times, Feb. 11, 1980, §II at 6 (arguing continued extractions from Mono Lake were needed for city's future). Los Angeles has a long history of framing the water issue as one of economic viability. Reisner reports that as early as 1905 LADWP officials were

was presumed that the citizens of California could not have it both ways. Saving the Mono Lake ecosystem would require a different approach to water allocation – a structural change in the water allocation decision-making process. Ultimately the task of changing this structure would fall upon the shoulders of graduate students turned activists who would use both social movements and litigation to facilitate change.

III. LITIGATION AND SOCIAL AND POLITICAL CHANGE – A THEORY

Lawyers and social scientists have long argued about the role of law and litigation in generating social and political change. As early as the mid-seventies legal scholars including Abram Chayes[101] and Joseph Sax[102] argued that "public law litigation" could facilitate social and political change and social science scholars led by Stuart Scheingold argued that litigation could alter public policy if players were willing to take a political approach to law and social change.[103] However, legal and social science theorists approach the role of litigation in promoting social and political change from different vantage points.

A. Public Law Litigation and Legal Theorists

It is often argued that environmental law is an example of how litigation can cause social and political change. Environmental law was born in the 1960's out of the common law as a means to "discipline public agencies, through 'public interest'

---

crafting a message of water scarcity and the need for water if Los Angeles was to thrive. Reisner, *supra* note 3, at 70-72.

[101] *See generally,* Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 Harv. L. Rev. 1281 (1976).

[102] *See generally,* Joseph Sax, *Defending the Environment: A Strategy for Citizen Action* (1970). (Sax (1970)).

[103] *See generally,* Stuart A. Scheingold, *The Politics of Rights: lawyers, public policy, and political change* (1974)

litigation."[104] This evolution was made possible by the rise of "public law litigation" in the latter part of the nineteenth century[105] and the relaxation of constraints on equitable remedies that permitted courts to examine controversies about future probabilities such as the impact of government agency policies.[106]

Unlike traditional common law litigation, which has at its heart the resolution of disputes between private individuals,[107] public law litigation focuses on "whether or how a government policy or program should be carried out."[108] As more political and policy decisions were made by bureaucratic agencies there was a recognition that agencies were locked in a symbiotic relationship with the very interests they sought to regulate – they were "captured."[109]

> On the environmental front, Sax argued that the administrative agency:
>
> has supplanted the citizen as a participant [in the decision making process] to such an extent that its panoply of legal structures actually forbid members of the public from participating even in the complacent process whereby the regulators and the regulated work out the destiny of our air, water and land resources. . . . The implementation of the public interest, he [the citizen] is told, must be left 'to those who know best'.[110]

---

[104] A. Dan Tarlock, *The Future of 'Rule of Law' Litigation,* 17 Pace Envt. L. Rev. 237, 241 (2000). *See generally,* J. B. Ruhl, *Toward a Common Law of Ecosystem Services,* 18 St. Thomas L. Rev. 1 (2005-06).
[105] Chayes, *supra* note 101, at 1284. The rise of public law litigation coincided with the increase of reform legislation at the close of the nineteenth century; the relaxation of rules governing pleadings, standing and class action litigation and the relaxation of constraints on equitable remedies. *Id.* at 1283-89, 1292.
[106] *Id.* at 1292-93.
[107] *Id.* at 1282-88. Traditionally, the lawsuit was viewed as a mechanism for settling private disputes between individuals about private rights. Legal liability was apportioned among litigants based on concepts of "intention" and "fault". Through the litigation process the parties received monetary relief (damages) for legal wrongs. *Id.*
[108] *Id.* at 1295.
[109] *See generally,* Robert Glicksman and Christopher H. Schroeder, *EPA and the Court: Twenty Years of Law and Politics,* 54 Law & Contemp. Probs. 249, 264-70 (1991)(discussing the theory of agency capture prevalent in the early to late 1970's) and Sax (1970), *supra* note 102, at 55-64, 82-85.
[110] Sax (1970), *supra* note 102, at xvii.

And those who knew best were the agency experts and those they regulated. Citizens with an interest in resource preservation lacked the political power to be meaningful players in the agency—developer decision-making process and were relegated to the position of outsider.[111] Citizens, Sax argued, should have the right to use litigation to access the policy decision making process: "[t]he availability of a judicial forum means that access to government is a reality for the ordinary citizen – that he can be heard and that, in a setting of equality, he can *require* bureaucrats and even the biggest industries to respond to his questions and to justify themselves before a disinterested auditor. . .[t]he citizen asserts rights, which are entitled to enforcement: he is not a mere supplicant."[112]

More recently Professor's Sabel and Simon, drawing on the work of Chayes and Roberto Unger's destabilization theory, argue that public law litigation can not only affect the outcome of bureaucratic policy decision-making but can also affect the manner in which public institutions make policy decisions.[113] Unger, in his examination of democratic societies observed that privileged members of societies or elites[114] exercised control over political resources including law,[115] that permit them to control public policy

---

[111] *Id.* at 82-88.
[112] *Id.* at 111-112.
[113] *See generally,* Charles F. Sabel and William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds,* 117 Harv. L. Rev. 1016 (2004)
[114] For purposes of this paper the concept of elite is as defined by C. Wright Mills in his classic text, *The Power Elite.* Mill's argues that the "power elite is composed of men whose positions enable them to transcend ordinary men and women: they are in positions to make decisions having major consequences . . . they are in command of the major hierarchies and organizations of modern society. They rule the big corporations. They run the machinery of the state and claim its prerogatives . . . They occupy the strategic command posts of the social structure, in which are now centered the effective means of the power and the wealth and the celebrity which they enjoy." C. Wright Mills, *The Power Elite,* 3-4(1956).
[115] McCann notes that law is a resource that is used by citizens to "structure relations with others, to advance goals in social lie, to formulate rightful claims, and to negotiate disputes where interests, wants or principle collide." McCann, *supra* note 1, at 22. Austin T. Turk, *Law as a Weapon in Social Conflict,* 23 Soc. Prob. 276, 280 (Feb. 1976). Turk argues that there are five types of political resources embodied in law. These resources are: an enforcement power or the implied threat of legal, physical coercion to

decisions to their benefit[116] creating the phenomenon of political blockage.[117] Political blockage occurs when the public policy decision making infrastructure "is substantially immune . . . [to] conventional political mechanisms of correction" and therefore becomes steeled to non-elite political pressures.[118] There are three types of political blockage:

1. Majoritarian political control -- which occurs when the political system is unresponsive to the interest of a vulnerable, stigmatized minority.[119]
2. The "'logic of collective action' – in which a concentrated group with large stakes exploits or disregards a more numerous but more diffuse group with collectively larger but individually smaller stakes."[120]
3. A hybrid of the two.[121]

Sabel and Simon suggest that the logic of collective action is the primary form of political blockage that affects environmental decision-making.[122]

The exertion of political power by the LADWP[123] in the acquisition of water from both the Owens Valley and the Mono Lake tributaries is a classic example of collective

---

enforce a legal decision to your benefit; economic/resource power which is the use of law to allocate or reallocate economic wealth or natural resources; political power which is access to the public decision making process in a manner that permits you to control how the decisions are made and the criteria applied to the decision; ideological power which is the use of law to help frame how the public gives meaning to a situation and how they define what is real and true; and diversionary power which is the use of the law by the media to shape the manner in which the issue is relayed to the public. *Id.* at 280-81.

[116] Roberto Mangabira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy from Politics: A Work in Constructive Social Theory*, 530-35 (Verso, 2001).

[117] Sabel and Simon, *supra* note 113, at 1062.

[118] *Id.* at 1062, 1064.

[119] *Id.* at 1064. This second type of political blockage encompasses the concept of traditional "agency capture". Chayes and Sax both identify agency capture as a concentrated minority (elites) with large stakes in the agency decision capturing the agency decision-making process to the detriment of a larger public concern. Sax (1970), *supra* note 102, at 189 and Chayes, *supra* note 101 at 1313.

[120] *Id.* at 1064.

[121] *Id.* at 1065.

[122] Sabel and Simon, *supra* note 113, at 1065.

[123] Although some might argue that a public agency, such as the LADWP is not in and of itself an elite, those within the LADWP in decision making positions "occup[ied] . . . strategic command posts". They effectively commanded power through their position within the agency, their celebrity, wealth and relationships with powerful elites within the City of Los Angeles and as such fall within the classic definition of an elite. C. Wright Mills, *supra* note 114, at 3-4. And even if not defined as elites those

action "political blockage". The LADWP had a long history of using its political resources to manipulate water allocation decisions to its benefit – when it came to water the LADWP got what it wanted. When it appropriated the water of the Owens Valley at the turn of the twentieth century it relied on it's political relations with the Bureau of Reclamation and state agencies as Kahrl observed: "[t]he fate of the Owens Valley was sealed the moment President Roosevelt determined that the greater public interest would be served by a greater Los Angeles. . . [opponents] lost without even having had the opportunity to have their representative present."[124]

The LADWP then proceed to exercise its political muscle and special relationships with both Federal and state governments to appropriate water from the Mono Lake tributaries. It convinced the Bureau of Reclamation to secretly withdraw

---

managing the LADWP had historically exercised significant political power. The LADWP dating back to 1899 and for at least three generations there after, was run by a group of wealthy business leaders and other professionals operating in their own self interest. *See generally,* Mike Davis, *City of Quartz, Excavating the Future in LA,* 110-115 (1992)*; see also,* Kevin Starr, *Material Dreams: Southern California: Through the Twenties,* 120 (1990)(Starr argues that Los Angeles at the turn of the century had a discernible class of elites – "the Oligarchy") and Kahrl, *supra* note 38, at 13-15. Mulholland through his celebrity and in his position as Chief Engineer of the LADWP was closely linked to and some would argue was part of the Los Angeles "Oligarchy". *See generally,* Kahrl, *supra* note 38, at ch1 and Catherine Mulholland, *William Mulholland and the Rise of Los Angeles,* 59-60, 80-92 (2000)(discussing Mulholland's rise to power and relationships with Los Angele' business leaders). The Oligarchy played a pivotal role in exerting their money, influence and political power to develop water resources in Los Angeles to promote business and urban development. *See generally,* Fion MacKillop, *The Influence of the Los Angeles "Oligarchy" on the Governance of the Municipal Water Department, 1902-1930: A Business Like Any other or a Public Service?* 2 Business and Economic History on line 1 (2004)(discussing the role of the Los Angeles Oligarchy and Mulholland in the development of the of the Los Angeles water system).

[124] Kahrl, *supra* note 38, at 142. The history of Owens Valley and the construction of the Los Angeles aqueduct
is illustrative of the political power of the City of Los Angeles and the LADWP. Even Hoffman, who gives the LADWP a more favorable treatment than most in the Owens Valley history observed: "[a]lthough the city needed water, it by no means needed the amount that would be coming down the aqueduct [from Owens Valley] once it was finished. Mulholland argued that the city's water rights were at stake in the matter; to obtain less than what was allowed might set undesirable precedents. At the same time, not needing a storage reservoir at Long Valley in the immediate future, Mulholland ignored Owens Valley needs." Hoffman, *supra* note 38, at 275. *See also,* Kahrl, *supra* note 38 (containing an excellent discussion of the LADWP's leveraging of political power in the construction of the Los Angeles Aqueduct).

public lands from public sale and to convey them to City of Los Angeles for future construction of the reservoir for the Mono Lake Project.[125] It convinced the SWRCB to issue a temporary permit for the full flow of the Mono Lake tributaries despite the fact that it did not have the capacity to use the entire flow and would not have the capacity to use the flow for thirty years.[126] And when the LADWP completed the second phase of the Los Angeles aqueduct in 1970 the Water Resource Board issued the LADWP a final license without so much as a public hearing.[127] Finally, the California Game and Fish Commissioner ignored the requirements of California's Fish and Game Code permitting the LADWP to run the Mono Lake tributaries dry devastating fish populations.[128] In the words of Elden Vestal "the City of Los Angeles was God Almighty."[129] Restoring the Mono Lake ecosystem would require a re-crafting of the LADWP's water permit a feat that required meaningful access to the Water Resource Board's decision-making process – access that was blocked by the LADWP.

Political blockage is counter to democratic accountability.[130] Destabilization theory is premised on the argument that citizens in democratic societies not only have the right to correct bureaucratic policy decisions made for the benefit of the politically powerful or elite but they also have the right to create structural changes in the social and political institutions necessary to reduce the elites' political power.[131] In destabilization theory a "destabilization right" is the right of citizens to make "claims to unsettle and

---

[125] *See discussion, supra* at 11-12.
[126] *See discussion, supra* at 15-16.
[127] *See discussion, supra* at 19.
[128] *See discussion, supra* at 16-18
[129] Hart, *supra* note 4, at 47 (quoting interview statement of Elden Vestel).
[130] Unger, *supra* note 115 at 530.
[131] Unger, *supra* note 115 at 532. *See also,* Sabel and Simon, *supra* note 113, at 1020.

open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal process of political accountability."[132] Public law litigation is a venue and means by which destabilization rights may legitimately be exercised – litigation provides citizens access to decision-making processes closed by political blockage. And as Sax and Chayes note such a venue in paramount where bureaucratic agencies play a major role in setting public policy. [133]

In the case of most modern social legislation Congress sets general policy objectives or orientations but leaves a fair degree of discretion to the bureaucratic agency to accomplish the statute's social objectives.[134] The agency is charged with administration of these social programs. This sometimes requires filling policy gaps left by Congress.[135] These same gaps also provided an opening for the court to act if the agency is not accountable to the statute's objective or, more importantly, if the agency has closed the decision making process to the public or acted without deference to "the levers of power in the system."[136] The court's attention does not focus on policy making per se – it assures democratic accountability in a decision-making process, which is easily captured by the politically powerful or elite.[137] The court's role in public law litigation is thus twofold: to assure that the agency action comports with Congressional intent and to assure some modicum of democratic accountability.

---

[132] Sabel and Simon, *supra* note 113, at 1020.
[133] *Id.* at 532. *See also,* Sabel and Simon, *supra* note 113, at 1020, Chayes, *supra* note 101, *at* 1313; Sax (1970), *supra* note 102, at 189 (discussing the right of citizen's to use the court system to gain access to bureaucratic agency decision making forums).
[134] Chayes, *supra* note 101, at 1314.
[135] *Id*.
[136] *Id.* at 1315
[137] *Id. See also,* Joseph l. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 Mich. L. Rev. 471, 558-560 (1969-70)(Sax 1969-70)(discussing the role of the court using the public trust doctrine to "promote equality of political power for a disorganized and diffuse majority").

The courts "pry open the democratic process and provoke consequences that are responsive to the merits of the controversy and [that are] more reflective of the variety of public constituencies which have an interest in the dispute."[138] The lawsuit is used to force the administrative agency to reconsider its decision under the hard questioning eye of the court putting the agency's discretion "to the test."[139] Additionally, the litigation alerts the legislature to differences of public opinion about the use and allocation of common pool natural resources.[140] It becomes a cue to the legislature that wider debate and policy discussions are needed about the allocation of common resources.

Beyond issue resolution, litigation, destabilization theorists argue, can break open large-scale organizations that remain closed to ordinary citizens and operate in insulated hierarchies of power and advantage.[141] To fully understand this perspective it is useful to examine the nature of private common law litigation. At common law the lawsuit is a mechanism for settling disputes between private individuals about private rights by apportioning legal liability based on concepts of "intention" and "fault".[142] Private litigation also performs an important social function through the doctrine of precedence – it clarifies "the law to guide future private actions." [143] The precedential function of law is inherently regulatory, reaching beyond the litigants;[144] it is both linear and web like. It

---

[138] Sax, *supra* note 102, at 180-81.
[139] *Id.* at 181
[140] *Id.* at 182.
[141] Sabel & Simon, *supra* note 113, at 1020.
[142] *See,* Chayes, *supra* note 101, at 1282-83. (discussing the characteristics of private litigation and comparing private litigation to public law litigation) Chayes argues that public law litigation substantially differs from public law litigation in its focus on the balance of competing interests in the implementation of broad public policy. *Id.* at 1288; *see also*, J. Hurst, *Law and the Condition of Freedom in Nineteenth Century United States*, 88-89 (1956).
[143] Chayes, *supra* note 101, at 1285.
[144] Sabel & Simon, *supra* note 113, at 1057.

is linear to the extent that the legal decision guides the outcome of future cases; it is web like to the extent that it influences markets, industry standards or the allocation of public and private resources[145] as illustrated by the influence of product liability litigation on industry manufacturing standards.[146]

The imposition of liability on product manufacturers has caused modifications of industry norms such as the requirement that industry should not sacrifice public safety for private gain as illustrated by the case of the Ford Pinto, *Grimshaw v. Ford Motor Co*[147] where the court concluded that Ford Motor Company could not trade correcting a life threatening product defect for profit.[148] The outcome of the *Grimshaw* case was twofold. It provided a monetary remedy settling the legal dispute and it indirectly changed the duty of care owed by the industry to the public because the rationale of the *Grimshaw* court was applied by courts across the nation in cases ranging from the safety of tires to breast implants and resulted in a new industry norm.[149]

The *Grimshaw* case illustrates the process of "creative destruction" in which new common law norms can reform institutions. In effect the rule of the case and the damage award, including in the *Grimshaw* case punitive damages, was a shot across the bow

---

[145] *Id.* at 1058.
[146] *See generally,* Michael J. Rusted, *How the Common Good is Served by the Remedy of Punitive Damages,* 64 Tenn. L. Rev. 793 (1997)(outlining the beneficial societal impacts of punitive damage awards in private litigation on industry norms and product safety).
[147] *Grimshaw v. Ford Motor Co.,* 174 Cal. Rept. 348 (Cal. Ct. App. 1981).
[148] *Grimshaw* involved the design of the Ford Pinto's fuel system, which exploded in impacts in excess of 20-30 mph. *Id.* at 384. Fixing the design defect was a relatively simple and inexpensive process, however, after conducting a cost benefit analysis Ford opted to forgo the correction reasoning the compensation it would pay in damages was less than the cost of a product recall. *Id.* at 397-99. The Grimshaw family sued Ford after a stalled Pinto was rear-ended and exploded killing Mrs. Gray and disfiguring a thirteen-year-old passenger (Grimshaw youth). *Id.* at 360-62. The jury awarded actual damages and punitive damages in excess of $3.5 million. Rusted, *supra* note 149, at 825. The appellate court upheld the trial courts award and reasoning that Ford could not trade public safety for profit. *Grimshaw,* 174 Cal. Rpt. at 391.
[149] Rusted, *supra* note 149, at 825-28.

warning manufacturers to modify their behavior. By holding the manufacture liable for the "consequences of socially unreasonable practices [the court] puts pressure on weaker, less adept firms [s]ome will improve their practices; some will go out of business. When a court raises standards for the industry it puts pressure on all firms. The reasonableness norm is continuously revisable; it is elaborated in the context of current social circumstances."[150]

In public law litigation this creative destructive[151] process takes on an added dimension in the embodiment of destabilization rights. Public law litigation can be used in democratic societies to "disentrench or unsettle a public institution when . . . it . . . fail[s] to satisfy minimum standards of adequate performance and . . . it is substantially immune from conventional political mechanisms of correction."[152] It can alter the manner in which bureaucratic agencies make decisions. Thus the question presented at Mono Lake is whether public law litigation could be used to: (1) alter the LADWP's license to protect the ecosystem and (2) change the decision making structure of the SWRCB compelling it to recognize ecosystem concerns in future water allocations.

---

[150] *Id.* at 825-28.

[151] The concept of "creative destruction" was developed by Joseph Schumpeter and refers to the process by which abrupt institutional "subversion and redeployment" disrupt market process and generate new economic development. Sabel and Simon, *supra* note 113, at 1059-60, (quoting Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, 81-86 (3rd ed. 1950)). Sabel and Simon argue that common law norms such as those developed in the *Grimshaw* case can play an important role in this disruption process creating room for new opportunities and new performance paradigms. *Id.* at 1060.

[152] *Id.* at 1062.

1. Essential Elements and Outcomes of Destabilizing Litigation

Sable and Simon identify two elements essential to successful destabilization litigation: the failure to satisfy some minimum legal standard[153] and the experimentalist remedy. [154]

At the outset effective destabilizing public law litigation requires the failure of the administrative agency to satisfy some minimum performance standard.[155] Generally these legal standards are uncontroversial or based on "industry standards" developed through custom and practice.[156] The court looks to these standards to define minimum performance standards for the public agency.[157]

A second essential element of destabilization is the experimentalist remedy. Because the remedy in public law litigation addresses policy decisions made by the public agency the legal issue is not easily resolved by the award of damages, rather the remedy looks to modification of the agency decision.[158] In the traditional command and control decree the court designs a remedy, generally with some assistance from the parties, to correct the agency action and commands the agency to implement the remedy.[159] The experimentalist remedy differs from the command and control decree in

---

[153] *Id.* at 1063.
[154] *Id.* at 1065.
[155] *Id.* at 1063.
[156] Sabel and Simon sight as an example of minimum performance standards prison standards adopted by the Federal Bureau of Prisons such as when Arkansas' prison administrator encouraged public law litigation to promote prison reform in the institutions he managed. *Id.* at 1063-64.
[157] *Id.* at 1063.
[158] *See generally,* Sax (1970), *supra* note 102, at 113-14.
[159] *See generally,* Chayes, *supra* note 101, at 1298-1300 (discussing the nature of the judicial decree).

that it: is negotiated by stakeholders, takes the form of a "rolling rule regime" and is transparent.[160]

When the court uses the experimentalist remedy it creates a space for the litigants and other stakeholders to negotiate a remedial plan.[161] The negotiation process requires the stakeholders, often under the oversight of a special master, to gather and share information, set agendas and rules for deliberation and decision-making, set goals, and reach a consensus about a remedial regime that implements the remedial goals.[162] Through the negotiation process the stakeholders build relationships that facilitate the creation of trust.[163]

Often negotiations between stakeholders are provisional and dependent upon unknown future contingencies, thus stakeholders continually reassess and reposition themselves as their knowledge becomes deeper and time reveals more information.[164] Because the complexities and futuristic nature of the issue requires stakeholders to make decisions based on incomplete information the stakeholder negotiations focus on: performance outcome norms and goals, monitoring and assessment of norms and goals and reassessment of norms and goals, knowledge is increased as a result of the success or failure of the negotiated remedy to meet performance measures.[165] This "rolling rule regime" requires the parties to interact and renegotiate over time[166] and assumes the court

[160] Sabel and Simon, *supra* note 113, at 1067-72.
[161] *Id.* at 1067.
[162] Negotiation among stakeholders is deliberative in nature requiring face-to-face interaction and good faith negotiation to build consensus. *Id.* at 1068.
[163] *Id.* at 1068.
[164] *Id.* at 1069.
[165] *Id.*
[166] *Id. at 1069-70.*

will maintain ongoing oversight over the litigation until the goals and implementation can be assessed over time.[167]

A final essential element of the experimentalist remedy is transparency in negotiation and remedy assessment process.[168] The court, through the negotiated process forces decisions that were once made in semi-public or non-public forums to be made publicly and subjects them to ongoing public scrutiny.[169]

Sable and Simon identify six destabilizing effects of public law litigation: the veil effect,[170] the *status quo* effect,[171] the deliberative effect, [172] the publicity effect,[173] the stakeholder effect,[174] and the web effect.[175] Together these effects alter the relationship between the public agency and its traditional constituency, the relationship between the blocked citizen and the agency and may alter the manner in which the agency implements public programs.

---

[167] *Id.* at 1070
[168] *Id.* at 1071.
[169] *Id.* at 1071-72.
[170]The negotiation of the remedy places the agency in an "uncertain" position in which the agency can no longer rely on past patterns. This requires the agency to reorient its goals, its partners and its understanding of how to solve problems. *Id.* at 1074-75
[171] Although the form of the negotiated remedy is unknown the parties realize that that the outcome will, by necessity, be different than the *status quo.* The negotiation stigmatizes the status quo reducing the risk of change – change becomes a forgone conclusion. *Id.* at 1075-76.
[172] Because the status quo is no longer an option the parties are forced to more fully explore alternatives developed by all of the stakeholders. *Id*.
[173] Vindication of the plaintiffs claim increases public scrutiny of the problem. *Id.* at 1077.
[174] The liability determination empowers the plaintiff and legitimizes their claim giving the plaintiff a viable position at the negotiation table. *Id.* at 1077. The liability determination and remedy negotiation also causes an internal power shift increasing the influence of the plaintiff and decreasing the influence of the traditional agency stakeholders or power elites. *Id.* at 1077-78.
[175] The negotiated remedy may spill back and forth between public and private realms in a process of "iterative disequilibriation and readjustment." *Id.* at 1081. Thus for example, a concern about discrimination may lead to a concern about the quality of services to the disadvantaged. *Id.*

B. Public Law Litigation, Social Movements and Social Science Scholarship

Social scientists, too, have explored the extent to which litigation can cause social and political change with a substantial amount of disagreement.[176] Stuart Scheingold in his groundbreaking work *The Politics of Rights,* posited that law and litigation could alter public policy but only if players were willing to abandon conventional legal perspectives in favor of a political approach to law.[177]

Scheingold argues that there are two prevailing views of law in American society: the "myth of rights" and the "politics of rights."[178] The "myth of rights"[179] has at its core a "legal paradigm – a social perspective which perceives and explains human interactions largely in terms of rules and the rights and obligations inherent in rules."[180] American's tend to believe that public policy development "is and should be conducted in accordance with the patterns of rights and obligations established under law."[181] Reform lawyers, who are students of this view, tend to distrust political processes in favor of exclusively "legal" approaches to policy change such as litigation and in so doing "grossly

---

[176] Rosenberg has characterized the two schools of thought about the ability of the court to instigate social change as the dynamic court view and the constrained court view. *See generally,* Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change* (1991). The constrained court view argues that courts are not effective tools of social reform because of the "limited nature of constitutional rights", the lack of judicial independence and the inability of the court to develop and implement appropriate policies. *Id.* at 10. Proponents of the dynamic court view argue that courts can produce significant social change through social movements. *Id.* at 22. *See also,* Michael McCann (2006), *supra* note 1, at 19.

[177] Scheingold, *supra* note 103, at 4-7. Scheingold was the "first to develop a systematic argument for the proposition that litigation and court decisions could be used as part of a broader strategy to organize and mobilize political action." Michael Paris, *The Politics of Rights: Then and Now,* 31 Law & Soc. Inq. 999, 1006 (2006).

[178] *Id.*

[179] The "myth of rights" has been the dominant view of law in American. Grounded in the Constitution it provides American democracy and politics with symbolic legitimacy." Scheingold, *supra* note 103 at 13. Symbolic rights such as the right to own property, the right to contract freely "reflect [the] values which are the building blocks of [American] political ideology." *Id.*

[180] *Id.*

[181] *Id.*

overestimate the political impact of court rulings."[182] This legal frame "[t]unnel[s] the vision . . . of activists leading to an oversimplified approach ... that grossly exaggerates the role that lawyers and litigation can play in a strategy for change. The assumption is that litigation can evoke a declaration of rights from courts"[183] a declaration that can be used to realize rights, the realization of which causes social and political change.[184] Thus the belief that litigation alone can cause social reform.

In truth, using litigation to promote social change is much more complex.[185] Litigation can be successful in promoting social only if it is directed "to the redistribution of power"[186] – if it is used politically. Scheingold characterizes this use of law as the "politics of rights" in which litigation becomes a "*political resource* [] of unknown value in the *hands of those who want to alter the course of public policy"*[187] no different than any other political resource. The value of the resource is dependent upon the manner in which the resource is used. For law and litigation to be used successfully to promote change two essential elements come into play: (1) a preexisting group of political activists promoting social change and (2) legal mobilization or the use of law or in Scheingold's words "rights" to develop political resources that can be used by activists in a larger context to promote social change.[188]

---

[182] Robin Stryker, *Half Empty, Half Full or Neither: Law, Inequality and Social Change in Capitalist Democracies,* Annu. Rev. Law & Soc. Sci. 69, 77 (2007)(Stryker (2007)).
[183] Scheingold, *supra* note 103, at 5.
[184] *Id.*
[185] Michael McCann, *Law and Social Movements* in *The Blackwell Companion to Law and Society* 506, 519 (2004) (McMann (2004)).
[186] Scheingold, *supra* note 103, at 6.
[187] *Id.* at 5.
[188] McCann (2006), *supra* note 1, at 21-22.

Social science scholars since Scheingold have argued that if law and litigation are to result in reform change they must be mobilized by an organized social movement.[189] The term social movement has been given a variety of definitions by social science scholars a discussion of which is beyond the scope of this paper. It is, however, useful to employ the definitions of Tilly and Tarrow. Tilly defines a social movement as "[a] sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation"[190] in which these activists make public demands for changes in the distribution and exercise of political power and "back those demands with public demonstrations of support."[191] Tarrow expands this definition further characterizing a social movement as "sequences of contentious politics that are based on underlying social networks and resonate collective action frames, . . . which . . . maintain sustained challenges against powerful opponents . . . . Collective action . . . is used by people who lack regular access to institutions, who act in the name of new or unaccepted claims, and who behave in ways that fundamentally challenge others or authorities."[192] In the context of political blockage a social movement is a group of citizens blocked from the political decision making process by concentrated elites and administrative agencies engaged in attempts to destabilize or challenge established political blockage to gain meaningful access to public decision-

[189] *See generally,* Charles R. Epp*, The Rights Revolution: Lawyers, Activists and Supreme Court in Comparative Perspective*, 21 (U. of Chi. Press, 1988) and Michael McCann, *Rights at Work, Pay Equity Reform and the Politics of Legal Mobilization*, 279-80 (1994)(McMann (1994)). Even Scheingold, in the preface of the second edition of *The Politics of Rights* notes that McMann clearly articulates an important element to public law litigation, which he, Scheingold presumes, that is the existence of a social movement organization. Scheingold, *supra* note 103, at *xxx*.
[190] Charles Tilly, *Social Movements and National Politics* in *Statemaking and Social Movements*, 276, 306 (C. Bright and S. Harding eds., 1984).
[191] *Id.*
[192] Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 2-3 (1998).

making forums and who have mobilized to make demands for access to political decision making forums.

McCann, in his overview of the use of litigation by social movement organizations (SMOs) to facilitate social and political change observes that SMOs seek both an immediate political decision to redress a past wrongs and structural change that eliminates political blockage opening policy decision making structures for the benefit of the politically disenfranchised.[193] Additionally SMOs seek to build the movement itself, to increase its power and thereby the likelihood of change.[194] Thus the desired outcome of an SMO is threefold: (1) short term political gains (policy outcome), (2) meaningful structural change that provides access to policy-making forums (policy structural outcome) and (3) movement building. In the context of social movement theory law and litigation is a political resource that can be mobilized to accomplish some or all of these outcomes.[195]

Law is a political resource,[196] which can be used by elites or SMOs to control or to promote their own interests or ideas over those of another.[197] It is generally conceded

---

[193] McCann argues that social movements "aim for a broader scope of social and political transformation" than do conventional activists. McCann (2006), *supra* note 1, at 23-24. While SMOs may press for short-term gains their true aim is a better society. *Id.* These SMOs employ a wide range of tactics but tend to rely on media campaigns and destructive symbolic tactics that halt or upset ongoing social practices. *Id.*

[194] McCann (1994), *supra* note 190, at 282.

[195] *See generally,* Bob Edwards and John D. McCarthy, *Resources and Social Movement Mobilization,* in *The Blackwell Companion to Social Movements*, 116-152 (David A. Snow, Sarah A. Soule and Hanspeter Kriesi eds., 2004)(containing a discussion of resources and their use in social movement mobilization).

[196] What constitutes a resource in the context of a social movement is to some degree dependent upon the social movement theory used by the scholar. Scholars of the rational choice or resource mobilization theory of social movements focus on the means available to collective actors to facilitate mobilization of social movements. Resources include money, time and human capital. These resources are internal to the SMO. Tarrow, *supra* note 192, at 15. Tarrow, in his synthesis of social movement theory argues that people engage in contentious politics when *political opportunities* are presented to them and that in this context a resource may be either internal to the SMO in the case of money or power leveraged to create change, or may be external to the SMO in the form of an external opportunity – an opening or access point

among SMO scholars that law as a political resource generally supports prevailing social relationships of the politically powerful or elites.[198] Political power is the control of political resources including law[199] and the exercise of political power is the mobilization of these resources to control the outcome of political conflicts or conflicts over public policy outcomes.[200]

In the context of Mono Lake, California's legislative water appropriation scheme became a political resource used by the LADWP's to access the Mono Lake tributaries. The California Constitutional provision "that the water resources of the State be put to beneficial use to the fullest extent of which they are capable"[201] was intended to stretch scarce water resources to ensure settlement.[202] Thus California's prior appropriation water system incorporated a beneficial use doctrine that equated to the "duty of water."[203] This historic definition of beneficial use weighed heavily in favor of an extractive and economic use of water. In this context the LADWP could use California water law as a political resource to justify the extraction of water from the Mono Lake tributaries to support economic and urban development in Los Angeles.

---

such as the Three Mile Island nuclear accident's impact on the anti-nuclear power movement in the United States. *Id.* at 19-20.

[197] Turk, *supra* note 115, at 280 and McCann (2006), *supra* note 1, at 21.

[198] McCann (2006), *supra* note 1, at 23.

[199] *See,* Turk, *supra* note 115 (analyzing the five types of political resources represented by law).

[200] *Id.* at 280.

[201] *National Audubon,* 658 P.2d at 725 (quoting California Constitution Article X, section 2 enacted in 1928 as Article XIV, section 3).

[202] *See generally,* Janet C. Neuman, *Beneficial Use, Waste and Forfeiture: The Inefficient Search for Efficiency in Western Water Use,* 28 Envtl. L. 919, 965-66 (1998)(for a general overview of the history and purpose of the beneficial use doctrine in Western water law).

[203] Samuel C. Wiel, *What is Beneficial Use of Water,* 3 Cal. L. Rev. 460, 462 (1915).

The LADWP could also and did use law as a resource to help frame[204] the water issue for the citizens of California. The framing power of law can impose limitations, perceived or real on alternative approaches to policy determinations.[205] In the case of Mono Lake the beneficial use doctrine linked the need for water with the human and financial wellbeing of the citizens of Los Angeles. As early as 1905 the LADWP and Mulholland used an economic frame to paint "bleak visions of water famines, drought and economic collapse" to support Los Angeles' quest for water and to gain support for the bonds necessary to fund the Los Angeles Aqueduct.[206] The Mono Lake project was presented to the citizens of Los Angeles "as a vitally important interim device to save Los Angeles from a water famine until the aqueduct to the Colorado could be completed."[207] Even the court in *City of Los Angeles v. Aitkens,* adopted this frame acknowledging that while the diversion would have a devastating impact on Mono Lake and the surrounding communities it was uncontroverted that the "condemnation of the waters of Rush and

[204] A "frame" is a "schemata of interpretation" that permits individuals to "locate, perceive, identify, and label" events and occurrences in their lives and in the larger world. Framing permits individuals to organize their experiences and information and serves to guide actions. Frames permit the individual to simplify and condense information. Robert D. Benford and David A Snow, *Framing Processes and Social Movements: an Overview and Assessment,* 26 Annu. Rev. Soc. 611, 614 (2000). And Nisbet, in his discussion of framing and climate change, notes that a frame is an "interpretive storyline" that communicates "why an issue might be a problem, who or what might be responsible for it, and what should be done about it." Matthew Nisbet, *Communicating Climate Change: Why Frames Matter for Public Engagement,* 51 Env. 12, 15 (March/April, 2009)(discussing the analysis of framing in social science disciplines). They convey why an issue matters. They lend "weight to certain considerations and arguments over others. Matthew C. Nisbet and Dietram A. Scheufele, *What's Nest for Science Communication? Promising Directions and Lingering Distractions,* 96 Am. J. of Botany 1767, 1770 (2009).

[205] Turk, *supra* note 115, at 281. Law plays a significant role in shaping the frames people use to give meaning to situations. *Id.* The fact that law supports one view can diminish the legitimacy of other views. *Id.*

[206] Kahrl, *supra* note 38, at 84-84.

[207] *Id.* at 342.

Leevining (sic) creeks by the City of Los Angeles [for municipal purposes] was a necessity."[208]

If, however, law is to matter in the struggle for political and social change then the power of law – the political resources it affords – must be made available to the SMO as a resource in the struggle for change. Through legal mobilization the SMO translates it's desire into an assertion of a lawful claim of right, to transform or to reconstitute the terms of the social and power relationships within polities.[209] But legal mobilization and court orders alone are insufficient to motivate political change.[210] Social Movement scholars argue that litigation matters only if it is part of a broader strategy to organize and mobilize political action resulting in the redistribution of political power.[211] It is the redistribution of political power and not litigation that brings about meaningful change as Stryker explains in her overview of studies examining the relationship between social movements and litigation: "maximizing real world inequality reduction through law requires combining a number of factors or conditions. Law interpretation and enforcement must be subject to sustained social movement pressure from below through a combination of litigation *and* mass political mobilization."[212]

---

[208] *City of L.A. v. Aitkens,* 52 P.2d at 586.
[209] McCann (2006), *supra* note 1, at 21-22.
[210] Social scientists argue that there are a number of factors which impact whether a court order will be enforced, let alone whether the order will result in political change. Those factors include but are not limited to whether the SMO is permitted to participate in the decision making process, whether the court exercises ongoing oversight over the matter, and whether the remedy fixes responsibility for and monitors the impact of organizational change and its outcome. Beth Harris, *Representing Homeless Families: Repeat Player Implementation Strategies,* 33 Law & Soc'y Rev. 911, 933 (1999) and Stryker, *supra* note 182, at 90.
[211] Stryker, *supra* note 182, at 76.
[212] *Id.* at 88 (emphasis added).

What role then can litigation play in the process to change political structures? Both legal theorists and social scientists identify a number of elements that appear to be necessary for successful destabilizing litigation that sustains political and social change. These elements include: an established social movement organization (SMO); a minimum legal standard that forms the basis for litigation;[213] political and legal mobilization;[214] the ability to use the litigation to frame the issue for bystanders and potential movement members;[215] ongoing court oversight;[216] and a decree that encompasses an experimental remedy which is negotiated by stakeholders in a transparent process subject to ongoing oversight by the court and flexible enough to permit modification as new information becomes available.[217]

What did this mean in the context of the Mono Lake ecosystem? As events would demonstrate, restoration and protection of the Mono Lake ecosystem would require not just a court order but a redistribution of political power that changed the criteria and method used to allocate California's water resources.

IV. METHODS

How then to explore the role of litigation in Mono Lake ecosystem restoration? In the context of historic events surrounding social change, the tool of narrative[218] is used

[213] Sabel and Simon, *supra* note 113, at 1063-64.
[214] *See generally,* Stryker, *supra* note 182, at 76-78.
[215] Bendford and Snow, *supra* note 204, at 614.
[216] *See generally,* Stryker, *supra* note 182, at 85.
[217] *See generally,* discussion *supra* at 30-32.
[218] A narrative is an analytical construct that unifies past and contemporaneous actions into a "coherent relational whole that gives meaning to and explains each of its elements and is, at the same time constituted by them." Larry J. Griffen, *Narrative, Event Structure Analysis, and Causal Interpretation in Historical Sociology,* 99 Am. J. Soc. 1094, 1097 (1993). A narrative is how we describe, reconstitute and describe events. *Id.* at 1098.

by historical sociologists to explore both what happened and to explain why events unfolded they way they did.[219] Using the history of events to explain how social change occurs permits the researcher to marry both theory and operating assumptions about how the world operates.[220] The narrative can also be used to build and test theories.[221]

Theory building from case histories involves the use of one or more cases "to create theoretical constructs, propositions and/or midrange theory from case-based empirical evidence" – recognizing patterns of relationships among constructs is used to develop theory.[222] This is an iterative process – "an *over-time process involving a continual interplay and mutual adjustment between theory and history.* Concrete and specific historic events and configurations are conceptualized in terms of abstract concepts and sensitizing frameworks. These concepts and frameworks are used to select, to order and to interpret . . . data."[223] From the narrative and its comparison to the theoretical frame and other cases the researcher can begin to make preliminary causal generalizations – to deductively explore how and why a given action does or does not produce another action in a causal sequence:[224]

Using a theoretical lens constructed from Sabel and Simon's destabilization model modified to reflect the findings of social scientists such as Scheingold, McCann, and Stryker this article examines the narrative of the Mono Lake restoration to explore

---

[219] Robin Stryker, *Beyond History Versus Theory: Strategic Narrative and Sociological Explanation,* 24 Soc. Meth & Research 304, 305 (1996) (Stryker (1996)) and Charles C. Ragin, *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies* 19-20 (1989).
[220] Lee Teitelbaum, *An Overview of Law and Social Research,* 35 J. Legal Educ. 465, 472-73 (1985).
[221] Kathleen M. Eisenhardt and Melissa A. Graebner, *Theory Building from Cases: Opportunities and Challenges,* 50 Academy of Mgmt. J. 25 (2007).
[222] *Id*.
[223] Stryker, *supra* note 219, at 310-11 (emphasis in original).
[224] *Id.* at 311.

the role of law and litigation in changing the political and social structures necessary to protect and restore the Mono Lake ecosystem using the narrative of the Mono Lake restoration constructed by Hart[225] supplemented by government documents, court decisions, media accounts and the work of other legal scholars as noted herein.

V. LESSONS LEARNED FROM MONO LAKE

A. Lesson 1: Social Movement Organizations (SMOs) Matter

Although legal scholars recognize that one of the primary goals of public law litigation is to provide citizens access to the public policy forum[226] social movement scholars argue that change litigation is most successful if it is brought by a SMO because SMO's aim for broader social and political transformations than do traditional litigants and thus while SMOs may achieve short term gains their primary push is for structural change to political and social institutions.[227] Additionally, SMOs that use litigation as a regular strategy are more adept at using litigation for social change because they are more likely to have pre-existing networks,[228] including activists and other organizations, capable of mobilizing the resources necessary to bring the litigation and take advantage

---

[225] Hart, *supra* note 4.

[226] *See generally,* Sax (1970), *supra* note 102, at 175-180. Sax posits that the purpose of public law litigation in the context of natural resource policy management is to provide citizens blocked from the policy realm an opportunity to challenge an agency in court on behalf of the public to stop a project that infringes on the public's rights to a common resource. *Id.* at 175. Likewise Sabel and Simon argue that one of the primary functions of destabilizing public law litigation is to give disenfranchised stakeholders access to policy decision making forums that have become politically steeled to consumers of citizen groups. Sabel & Simon, *supra* note 113, at 1064.

[227] McCann (2006), *supra* note 1, at 23-24.

[228] There is an extensive body of social science literature surrounding the concept of networks and the use of social networks by SMOs and others to accomplish change. For purposes of this article a social network is a social structure made up of individuals and/or organizations (nodes) connected by one or more types of interdependency. Nancy Katz, David Lazer, Holly Arrow and Nashir Contractor, *Network Theory and Small Groups,* 23 Small Group Research 307, 308-310 (June 2004)(discussing the structure of social networks).

of its outcomes.[229] These SMOs are "repeat players" in the litigation game. Repeat players are more likely to view litigation as a strategy increasing the likelihood that litigation will result in "redistributive change."[230] Further, research suggests that if SMOs are represented throughout the litigation courts are more likely to favor the interests they represent.[231] For Mono Lake, SMOs were central to restoration and these SMOs relied heavily on a litigation strategy.

Although there were some early attempts[232] to initiate interest in the restoration of Mono Lake, restoration of Mono Lake would ultimately fall on the shoulders of graduate students turned activists: David Gains[233] David Winkler[234] and Tim Such. [235] In 1976 Gaines and Winkler formed the Mono Basin Research Group to study the degradation of the Mono Lake ecosystem.[236] Both Gaines and Winkler were passionate about Mono Lake ecosystem restoration but neither was particularly interested in political activism –

---

[229] Stryker (2007), *supra* note 182, at 81.
[230] Joel B. Grossman, Stewart Macaulay and Herbert M. Kritzer, *Do the "haves" Still Come Out Ahead?,* 33 Law & Soc'y Rev. 803, 808 (1999)(discussing the difference between those who access the courts on a regular basis and those who are "one shotters"). *See also,* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the limits of Legal Change,* 9 Law & Soc'y Rev. 95 (1974). Galanter analyzed the impact of litigation based on the nature of the litigant. He posited that individuals or organizations that have only occasional recourse to courts (one shot players) are less successful in leveraging litigation to bring about social and political change than are repeat players, litigants who are engaged in similar pieces of litigation over time. One-shot players have higher costs, are more focused on the outcome of the individual lawsuit than the long-term picture, and are more likely to settle without obtaining redistributive relief. As a result institutions generally have an advantage in the litigation game.
[231] *See generally,* Harris, *supra* note 210, at 923-24.
[232] In 1961 David Mason, a limnology graduate student undertook a limnological study of the area. Mason tried to enlist Ansell Adams to use his influence to preserve Mono Lake. Mason also approached several environmental groups – they were sympathetic but showed little interest in taking on the Mono Lake cause. Hart, *supra* note 4, at 52. Mason was, however, able to stir the interest of local shoreline owners who joined together to form Friends of Mono Lake. *Id.* at 59
[233]In 1972 David Gaines, a U.C. Davis ecology graduate student was hired by the California Natural Resources Coordinating Council to do an inventory of Mono County and became alarmed by the state of Mono Lake. *Id.* at 65-66.
[234] In 1975 Gaines recruited Winker, then a student, to do research at Mono Lake. *Id.*
[235] Tim Such an undergraduate at UC Berkeley discovered Mono Lake as part of an assignment in his environmental studies class. *Id.* at 61.
[236] *See, Id.* at 66-71 (for a detailed outline of the biological research of the Mono Basin Research Group).

however, when in November 1977 Lake Levels dropped to 6,375 permitting Winkler to walk to Negit Island[237] Winkler and Gaines saw no alternative to political action.[238]

Together Gaines and Winkler approached a number of national environmental organizations (NEOs) for support; the NEOs all expressed concern but were unwilling to take action.[239] Finally Gaines received the support of the Santa Monica Bay Chapter of the Audubon Society to create the "Mono Lake Committee" as a subsidiary[240] while Winkler appealed to the state and the BLM to find a temporary solution for the elimination of the Negit Island land bridge. [241]

In March 1978, the California National Guard blasted a moat between Negit Island and the shores of Mono Lake and in that same month the Mono Lake Committee opened an office in a print shop in Oakland, California.[242] In its first publication the Mono Lake Committee called for restoration of Mono Lake water elevations to 6,378 – the 1976 level.[243] The LADWP did not even acknowledge the proposal.[244] Hart characterized the pending battle field:

> In this corner: the … LADWP. It's annual budget, over one billion… It had armies of engineers, armies of lobbyists. Its right to the waters it had

---

[237] Historically Negit Island was separated from the mainland and provided a primary nesting site for the California Gull. Hart, *supra* note 4, at 16-17. As early as 1972 *American Bird* magazine documented the creation of a land bridge between Negit Island and the mainland and predicted the total destruction of the California gull nesting population. *Id*. at *59 – 60.* As a symbolic response the Bureau of Land Management declared Negit Island an Outstanding National Area. *Id.*
[238] *Id.* at 71.
[239] *Id.* at 72. Gaines and Winkler reported approaching the Sierra Club, the Friends of the Earth and the Natural Resources Defense Council among others. *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.* at 72-74.
[243] This was the minimum level the Committee believed necessary for ecosystem restoration. *Id.* at 74. When criticized by the national environmental groups for not calling for an end to all diversion the committee retorted that it did not intend to overreach. It would seek the minimum they believed Mono Lake needed to survive based on evidenced compiled to date. *Id*.
[244] *Id.*

> tapped, however much resented by people in the source regions, seemed unassailable; it was anchored in a system of state water law that every water supplier in the state could be counted on to defend.
>
> And in the other corner: the upstart Mono Lake Committee. It spent, in 1978, $4,867.15. In the early days it could not be reached by phone. Its leaders worked out of "homes and tents scattered hither and yon …a small band of birdwatchers and graduate students…activated by nothing more complex than their deep affection for a place few Californians will ever see".[245]

While Winkler and Gaines were building the Mono Lake Committee Tim Such, independently, took a different track. Such began contacting established NEOs and government agencies urging them to litigate to halt the diversion. Such recalls: "[t]hey [NEOs] thought the Mono issue was too complex…you couldn't fight Los Angeles."[246] They suggested he come back "if you find a good legal theory."[247] Such suspended his undergraduate studies at Berkeley and began searching for a legal theory ultimately landing on the public trust doctrine when he read Joseph Sax's 1970 Law Review Article: *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention.*[248]

Such made a second round of the NEOs in 1978 with this new theory. Only the Friends of the Earth (the Friends) were receptive and, in a classic example of social networking, took the case to its attorney Andy Baldwin who in turn called his contacts in the law firm of Morrison and Foerster (MoFo).[249] MoFo agreed to take the case *pro bono* but it needed a plaintiff. In its search for a plaintiff MoFo looked not to an individual but

---

[245] *Id* at 74 (cites omitted).
[246] *Id.* at 61 (quoting interview with Tim Such between March 22 and March 29, 1994).
[247] *Id.*
[248] Sax (1969-70), *supra* note 137.
[249] Hart, *supra* note 4, at 65, 81. Most of the NEOs rejected Such's plea – they were gearing up for a fight over the Sacramento/San Joaquin Delta, and the Peripheral Canal. *Id.* at 65. Saving Mono Lake, these NEOs believed would only put more pressure on the Sacramento River and other Northern California water sources. *Id.*

to three SMOs: the Friends, the Mono Lake Committee and the National Audubon.[250] One participant at that first meeting between MoFo and the three Mono Lake plaintiffs observed: "[it was] the Children's Crusade at the court of some Eastern potentate. Trail mix and backwoods idealism confronted pinstripes across a corporate table."[251] The processes of initiating and financing the Mono Lake litigation are illustrative of the advantages of the SMO as litigant. Here the Friends' social network was used to locate an attorney, the financial resources of the Friends and the National Audubon were used to launch the litigation, and the national stature of the National Audubon was used to give the litigation credibility.[252]

The LADWP was, however, undaunted by the threat of litigation. The parties met in a pre-trial conference but no deal emerged. One LADWP representative was heard to remark: "[t]he last lawsuit we had like this took forty-three years."[253] With that ominous warning the parties filed suit. While the environmental goal of the litigation was clear – saving the Mono Lake ecosystem – in hindsight it is also clear that this environmental outcome required not only revisiting the1940 SWRCB permitting decision, but it would also require the SWRCB to consider the needs of the ecosystem in the permitting decision process and a change in the historic relationship between the LADWP and the SWRCB. Could the litigation accomplish this feat?

---

[250] *Id.* at 81. While all three organizations were named parties in the litigation, National Audubon was the first named plaintiff primarily because of its national stature and its financial resources. *Id.* at 82. Both Friends of the Earth and National Audubon contributed an initial $10,000 to cover costs and expenses. *Id.* at 82-83.
[251] *Id.* at 82 (quoting interview of Gray Brechin, May 26, 1994).
[252] *Id.* at 81-83.
[253] *Id.* at 83 (Interview with Bruce F. Dodge, Counsel to National Audubon Society, April 12, 1994).

B. Lesson 2: Minimum Performance Standards may not be Essential

Sabel and Simon argue that effective destabilizing litigation requires the failure of the administrative agency to satisfy some minimum performance standard.[254] A minimum performance standard is uncontroversial or based on "industry standards" developed through custom and practice.[255] The court looks to these standards to define the minimum performance standards in destabilizing litigation. Yet arguably the public trust doctrine relied on by Such and the Mono Lake Committee is one of the more elusive and controversial legal standards in environmental law.

The public trust doctrine, an ancient legal doctrine originating under Roman and English common law, is premised on the theory that certain types of public property, most notably seashores, tidal waters, fisheries, highways, and waterways, are dedicated to perpetual public use and must be held in trust for the public by the sovereign.[256] Historically, the sovereign could not convey trust lands to private interests although Parliament had the authority to enlarge of diminish trust rights for a "legitimate public purpose."[257] The U.S. Supreme Court recognized the application of the public trust doctrine in the United States as early as 1868.[258] And the ability of a state legislature to convey trust properties to private interests was most famously addressed by the U.S. Supreme Court in *Illinois Central Railroad Co. v. Illinois* where the court ruled that

---

[254] Sabel & Simon, *supra* note 113, at 1063

[255] *Id.* at 1063-64. Federal prison standards are illustrative of this type of uncontroverted legal standard. *Id.* Sabel and Simon cite to a number of cases where senior prison officials encouraged litigation by outsiders to promote prison reform. *Id.* at 1063.

[256] Sax 1969-1970, *supra* note 137, at 475-76. *See also,* Sax (1970), *supra* note 102, at 163-64. These public trust properties were distinguishable from general public property which the sovereign could grant to private owners. Sax 1969-1970, *supra* note 137, at 475.

[257] Sax 1969-70, *supra* note 137, at 476.

[258] *Railroad Company v. Shurmeir,* 74 U.S. (7 Wall.) 272 (1868). *See also, Shively v. Bowlby,* 152, U.S. 1, 9-10 (1894) (recounting of the history of the public trust doctrine in the United States).

because the public trust doctrine extended to navigable waters and streams the Illinois legislature could not convey the Lake Michigan water front and the associated control over commerce to a private enterprise. [259] The shores of Lake Michigan were a public trust asset and the state could not "abdicate its trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties."[260]

Sax, in his now famous law review article on the public trust doctrine argued the public trust doctrine should be extended beyond tide waters to form the basis of a legal theory which would enable private citizens to protect the public's interest in common pool resources such as air and water.[261] Sax noted that because the public trust doctrine rests upon the principle that the public's interest in certain natural resources is so important that these resources could not be transferred to private hands but should remain freely available to the entire citizenry, the role of the government must be to "promote the interests of the general public [in the common pool resource] rather than to redistribute public goods [intended] for broad public uses to restricted private benefit."[262] The transfer of trust assets into private hands, if permitted at all, must be accompanied by

---

[259] *Illinois Central Railroad Company v. Illinois,* 146 U.S. 387 (1892). *Illinois Central* involved a state grant of land under Lake Michigan to the Illinois Central Railroad. The grant extended one mile out and across the Chicago Harbor and comprised most of Chicago's commercial waterfront. *Id.* at 433-34. The Illinois legislature, regretting its decision, voted to repeal the grant and sued to have the grant declared invalid. *Id.* at 454. The Supreme Court upheld the revocation finding that the waters of Lake Michigan were "different in character from that which the state holds in lands intended for sale . . . [i]t is title held in trust for the people of the state." *Id.* at 452. For a more detailed history of the *Illinois Central* case *see* Joseph D. Kearney & Thomas W. Merill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central,* 71 U. Chi. L. Rev. 799, 800 (2004). *See generally,* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards,* 82 Notre Dame L. Rev. 699 (2006) (for a more detailed discussion of the history of the public trust doctrine in the United States since 1970).

[260] *Illinois Central,* 146 U.S. at 453-54.

[261] Sax (1970), *supra* note 102, at 173-74.

[262] *Id.* at 165.

"substantial evidence that some compensating public benefit is being achieved thereby."[263] The trust obligation was not unlimited but, where applicable, assured that "the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; . . . the property may not be sold, even for a fair cash equivalent; and . . . the property must be maintained for particular type[s] of uses" that benefit the larger public.[264] Citizens, Sax concluded, should be permitted to sue government to compel it to comply with its trust obligations.[265]

California itself had a long history of using the public trust doctrine to protect shoreline resources and navigable waters.[266] Since the mid 1860's California courts had regularly invalidated public - private conveyances of tidelands valued for navigation and fishing even where the legislature appeared to authorize the conveyances to private interests.[267] The California court observed that "'[n]othing short of a very explicit provision [in statute] … would justify us in holding that the legislature intended to permit the shore of the ocean … to be converted into private ownership.'"[268] Even where the legislature explicitly authorized the conveyance of trust property to private interests California courts were loath to find that the legislature had conveyed all public interest in the property. The grantee of trust lands was presumed to have obtained title subject to the public's right to navigation.[269]

---

[263] *Id.*
[264] Sax (1969-70), *supra* note 137, at 477.
[265] *See generally,* Sax (1970), *supra* note 102, at 175-192 (discussing the use of litigation to enforce trust obligations).
[266] Sax (1969-70), *supra* note 137, at 524-545 (discussing the California Courts use of the public trust doctrine prior to 1970).
[267] *Id.* at 525-26.
[268] *Id.* at 527 (quoting *Kimball v. MacPherson,* 46 Cal. 104, 108 (1873)).
[269] *Id.* at 528 (quoting *People v. California Fish Company,* 166 Cal. 576, 588 (1913)).

In 1971 the California Court expanded the scope of the public trust doctrine in *Marks v. Whitney*[270] a quiet title action. Mark's property had been acquired under a 1974 patent from California. Mark's claimed he had the right as owner of shoreline to fill and develop the property. Whitney, who owned property inland from Mark's opposed the shoreline fill arguing that it would cut off his rights to the tidelands, rights he held as a member of the public under the public trust doctrine.[271]

The trial court found that Whitney had "no standing to raise the public trust issue" – the California Supreme Court reversed.[272] The California Supreme Court's decision in *Marks v. Whitney* was important to the development of a legal theory for Mono Lake for three reasons. First, the court recognized that Whitney, as a member of the public could bring an action to enforce the public trust interest and furthermore, had Whitney not raised the issue the court itself could take judicial notice of the public trust burdens and raise the issue on its own.[273] This meant that any citizen could bring suit to protect the public's interests in trust assets.

Second, the court held that the public trust burden is both flexible and fluid. While historically the trust burden was limited to navigation and commerce over time the trust obligation had expanded to include hunting, fishing, boating and recreating.[274] Here the court noted:

> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one

[270] *Marks v. Whitney,* 491 P.2d 374 (1971).
[271] *Id.* at 377.
[272] *Id.*
[273] *Id.* at 378, 381-82.
[274] *Id.* at 380.

> mode of utilization over another. There is growing public recognition that one of the most important public uses of the tidelands – a use encompassed within the tidelands trust – is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[275]

Accordingly the public trust burden was sufficiently flexible to encompass changing values including the preservation of the trust asset in their natural state. This opened the door for use of the public trust doctrine to protect ecosystems.

Finally, the court concluded, that while the legislature could remove the trust burden from traditional trust lands it was up to the legislature "to take the necessary steps" to free trust lands of their trust burdens. [276] The natural conclusion of this holding is that put forth by Sax who argued: "Any action which will adversely affect traditional public rights in trust lands is a matter of general public interest and should therefore be made only if there has been full consideration of the state's public interest in the matter; *such actions should not be taken in some fragmentary and publicly invisible way."*[277]

The problem with the public trust doctrine from a destabilization perspective was that there was no agreement about the application of the public trust doctrine to water appropriations for the preservation of non-extractive trust assets – the public trust doctrine was hardly an uncontroversial performance standard. The SWRCB had long

---

[275] *Id.*
[276] *Id.* at 380-81.
[277] Sax (1969-70), *supra* note 137, at 531 (emphasis added)(It should be noted that at the time Sax wrote his public trust article in the Michigan Law Review the California Supreme court had not yet issued a final ruling in *Marks v. Whitney*. Sax had reviewed the appellate court decision and criticized the appellate court for not taking up the public trust issue).

argued that it had no alternative under California Law but to permit the appropriation of the Mono Lake tributaries. The SWRCB noted:

> It is indeed unfortunate that the City's proposed development will result in decreasing the aesthetic advantages of Mono Basin but *there is apparently nothing that this office can do to prevent it.* The use to which the City proposes to put the water . . . is defined by the Water Commission Act as the highest to which water may be applied . . . This office therefore has *no alternative but to dismiss all protests based upon the possible lowering of the water level in Mono Lake and the effect that the diversion of water from these may have upon the aesthetic and recreational value of the Basin.*[278]

To prevail in its legal challenge the Mono Lake Committee would have to convince the court to apply the public trust doctrine to California's water rights/appropriation system for the benefit of the natural system – a feat which would require the court to develop a new legal theory premised on the argument that California's water rights/appropriation system did not subsume the state's public trust obligations.[279]

Initially the prospect of litigation playing any role in Mono Lake ecosystem restoration seemed fairly bleak. Almost four years and several early defeats were to elapse before the Supreme Court of California issued its now landmark decision in *National Audubon Society v. Superior Court of Alpine County.*[280] The filing of the lawsuit in the spring of 1979 was followed by a flurry of motions and counter motions.[281]

---

[278] *National Audubon Society,* 658 P. 2d at 714 (quoting Div. Wat. Resources Dec. 7053, 7055, 8042 & 8043 at 26 (Apr. 11, 1940) (emphasis added by the court)). The SWRCB reiterated this argument in the lower court. *Id.* at 718.

[279] The California Supreme Court observed that the *National Audubon* case brought together "for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine." *Id.* at 712.

[280] *National Audubon Society,* 658 P.2d 709 (Cal. 1983).

[281] The lawsuit was originally filed in Mono County. The court granted the LADWP's first request for change of venue moving the matter to Alpine County but denied a second request for change of venue. Hart, *supra* note 4, at 89. The LADWP filed a cross claim against 117 residents of the Mono Basin

The venue of the Mono Lake litigation was not resolved until July 1980 when the Federal District Court for the Eastern District of California ordered the removal of the matter from California State Court to Federal District Court.[282] Removal was followed by further jurisdictional wrangling and an abstention order instructing Audubon and the Mono Lake Committee to file an action in state court to address: (1) the relationship between the public trust doctrine and California's water rights system and (2) whether Audubon was required to exhaust its administrative remedies prior to filing suit challenging the LADWP allocation permit.[283] Thus the matter was sent down to California's Alpine Superior Court.

On November 9, 1981, Judge Hilary Cook of the Alpine Superior Court dealt the Mono Lake Committee a devastating blow ruling that the plaintiffs – Audubon and the Mono Lake Committee – must exhaust their administrative remedies before the SWRCB prior to filing suit.[284] More importantly she found that California's prior appropriation system "is a comprehensive and exclusive system for determining the legality of the diversions for the City of Los Angeles in the Mono Basin . . . . The Public Trust Doctrine does not function independently of that system. . . . the Public Trust Doctrine is subsumed in the water rights system of the state."[285] Audubon and the Mono Lake

---

alleging that they had contributed to the decline in lake elevation. *Id. See also, National Audubon Society v. Department of Water& Power of the City of Los Angeles* 496 F. Supp. 499, 502 (E.D. Cal. 1980) (*National Audubon v. LADWP).* Not to be outdone the SWRCB filed a cross claim against Audubon and the Mono Lake Committee arguing that they had failed to exhaust their administrative remedies. *Id.* And the SWRCB filed a cross complaint naming the United States as a defendant which resulted in a petition to remove the case to Federal District Court. *National Audubon v. LADWP,* 496 F.Supp. at 502.

[282] *Id.*

[283] *National Audubon v. Department of Water,* 858 F.2d 1409, 1411 (9th Cir. 1988)(*National Audubon v. SWRCB)*.

[284] *National Audubon,* 658 P.2d at 729.

[285] *Id.* at 718 (quoting district court order dated November 9, 1981).

Committee immediately appealed requesting expedited review to the California Supreme Court – even with expedited review the matter would not be resolved until 1983.[286]

Meanwhile Mono Lake's levels continued to fall dropping to 6,373 feet in 1980 (Figure 3.3). By June 1981 Negit Island was "solidly fused" to the mainland, brine shrimp and gull hatches where at an all time low and many of those gulls that did hatch suffered massive die offs or were hunted by predators reaching nesting islands.[287] To many it seemed that the Mono Lake ecosystem was on the verge of collapse with no relief in sight. Then in the winters of 1981-82 the snow and the rains began.[288] There was more water than the reservoir could handle and Mayor Bradley was forced to order a reduction of Los Angeles' diversion, sending water down into Mono Lake giving the Lake a temporary reprise while the litigation plodded forward.[289]

On February 17, 1983, the California Supreme Court issued its now landmark decision holding the public trust interest in navigable waters and the lands beneath the navigable waters had not been subsumed by the California's appropriative water rights system.[290] Furthermore, the court held that the public trust obligation extended to non-navigable tributaries to the extent that damage to those tributaries damaged the navigable

---

[286] *Id.*
[287] Hart, *supra* note 4, at 93-97
[288] *Id.* at 100. The winter of 1981-82 had been extremely wet and the 1982-83 winter was the wettest winter of the century. *Id.*
[289] *Id.* This rapid rise of the lake levels caused meraomixis or the separation of salt water and fresh water into layers in Mono Lake. Under normal conditions, fresh water came into Mono Lake in a fairly steady even flow allowing the fresh and salt water to mix. The quick release of water by the LADWP was too much for Mono Lake's hydrological system. The fresh water settled on top of the salt water rather than mixing. This phenomenon persisted for six years from 1981 through 1987. *Id.* at 100-101.
[290] *National Audubon Society,* 658 P.2d at 727. *See also,* Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy,* 22 Ecology L. Q. 541, 564-568 (1995)(for an overview of the court's *National Audubon* decision).

water body into which they flowed.[291] The state had an ongoing public trust interest in these assets that prevented the LADWP from acquiring a vested right to appropriate water "in a manner harmful to the interests protected by the public trust."[292] Although the SWRCB had the authority to permit appropriation of the Mono Lake tributaries for beneficial use, it also had "an affirmative duty to take the public trust [interest in Mono Lake] into account in the planning and allocation of water resources and to protect the public trust uses whenever feasible."[293] Once the SWRCB approved an appropriation, the SWRCB had a continuing duty to supervise the taking and assess the impact on trust assets.[294]

Furthermore, the court ruled the state's duty to protect trust assets is subject to modification over time[295] and was more expansive than either the LADWP or the SWRCB had envisioned: "[t]he objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waters."[296] The doctrine was "sufficiently flexible to encompass changing public need"[297] and could expand to include inland waterways and tributaries flowing into navigable waters[298] and ecosystems in their natural state.[299] The court concluded: "One of the most important public uses of tidelands . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, as environments which

---

[291] *National Audubon Society,* 658 P.2d at 720-21.
[292] *Id.*
[293] *Id.*
[294] *Id.* at 728.
[295] *Id.*
[296] *Id.* at 719.
[297] *Id.* (quoting *Marks,* 491 P. 2d at 374).
[298] *Id.* at 721-7233 (discussing the reach of the public trust doctrine beyond tidelands.)
[299] *Id.* at 719.

provide food and habitat . . . which favorably affect the scenery and climate of the area."[300] The public trust doctrine is, "an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[301] This duty is a continuing duty imposed on the state in the allocation of the state's water resources,[302] a duty that the SWRCB failed to undertake in the initial allocation of water from the Mono Lake tributaries.[303] The Court concluded that "some responsible body ought to reconsider the allocation of the waters of the Mono Basin" to take into account the impact of the LADWP's diversion on the Mono Lake ecosystem.[304] The ruling did not vacate the LADWP permit but it did impose a new requirement on the SWRCB, a requirement that was ongoing and which applied to all water allocations past, present and future made by the SWRCB which affected a navigable water body including the allocation from the Mono Lake tributaries.[305] The matter was sent back to the Federal Court where it sat for another eighteen months.[306]

---

[300] *Id.* (quoting *Marks,* 491 P. 2d at 259-60.
[301] *Id.* at 724. The court did, however, note that consistent with California water law all uses of water in California "including trust uses, must now conform to the standard of reasonable use." *Id.* at 725. However, the "'use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water.'" *Id.* at 726 (quoting Cal. Water Code §1243).
[302] *Id.* at 732
[303] *Id.* at 728-29.
[304] *Id.* at 729. The court observed that both the California District Court and the SWRCB had concurrent original jurisdiction over the matter and declined to state which body should be the body to assess the impact of the LADWP's diversion on the public trust interest. *Id.* at 729-32. In any event the case was to continue in Federal District court, which had retained jurisdiction during the pendency of the state court actions. *National Audubon v. SWRCB,* 869 F. 2d at 1199.
[305] *National Audubon,* 658 P. 2d at 728. The LADWP immediately appealed the decision to the U.S. Supreme Court and the Mono Lake Committee filed a motion for injunctive relief in the Federal District Court to maintain flows to the Mono Lake tributaries. Hart, *supra* note 4, at 162. And the State of California requested that the matter be remanded to state court in its entirety. *Id.*
[306] Hart, *supra* note 4, at 103.

From the perspective of destabilization theory the Mono Lake Committee had won with an unconventional legal theory, however, neither the filing of the lawsuit nor the California Supreme Court's ruling resulted in an alteration of the SWRCB's permitting decision. There was no equitable relief for Mono Lake nor was there a "flexible remedy" bringing the parties together to negotiate a solution for the dying ecosystem. This was not due so much to the legal theory as it was to the fact that, as Rosenberg notes, court orders are not, in and of themselves, self-executing, execution may depend upon a number of variables including the availability of political support within the administrative agency[307] and broad political support beyond the administrative agency,[308] the existence of public support,[309] and the existence of incentives to comply.[310] Uncontroversial legal theories might be easier to implement when the theory has broad based support as Rosenberg notes but this does not mean that controversial theories cannot form the basis for structural change. For Mono Lake, it would simply take more than the court order to move the parties but in the end game, the litigation and the court's holding would play a major role in reconstructing water allocation in California, not only in the Mono Lake case but in all of California's water appropriation cases going forward.

In many respects the far reaching nature of the *National Audubon* decision, was in part due to the innovative theory applied by the plaintiffs suggesting that "a minimum performance standard" is less important than a legal standard which is fluid and flexible enough to give the court latitude to bring the parties together to craft a remedy as was the

[307] Rosenberg, *supra* note 176, at 19.
[308] *Id.* at 31.
[309] *Id.* at 32.
[310] *Id.* at 33-34.

case here where the California Supreme Court noted that it was incumbent upon either the California District Court or the SWRCB to incorporate trust principles into the LADWP allocation permit.

C. Lesson 3: The Ongoing Power of Framing

In the end, however, the *National Audubon* ruling facilitated change because it was used as an important political resource by the Mono Lake Committee to build a new collective action frame for the Mono Lake extraction. While there are many types of frames[311] from the perspective of SMOs "collective action frames" are the most meaningful. Collective action frames are used by SMOs for two important functions: 1) to mobilize "potential adherents and constituents" thereby building the SMO and 2) to garner "bystander support" to increase the legitimacy of the SMO and its views and to demobilize antagonists.[312] In the context of framing, law can be a resource used by the SMO to both build the SMO and to garner public support increasing the legitimacy of preferred policy outcomes through the framing process.

Framing played an important role in both the demise and restoration of the Mono Lake ecosystem. For years the LADWP controlled the framing game, it framed the water issue as one of economics and water scarcity – water was scarce but essential to economic growth, without it Los Angeles and California could not prosper. [313] When opponents objected to water appropriations from Mono Lake the LADWP, resorting to its frame, simply noted that the water would have to come from somewhere, perhaps the

[311] Nisbet, *Supra* note 204, at 15-16 (discussion how journalists, policymakers and experts use frames).
[312] Benford and Snow, *supra* note 204, at 614.
[313] *Supra* at 37-38 (discussing the LADWP's use of framing in the context of the construction of Los Angeles Aqueduct and the Mono Lake project).

Sacramento San Joaquin River Delta.[314] This frame was a dilemma for the Mono Lake Committee, saving the Mono Lake ecosystem would mean the destruction of the Delta ecosystem. Other environmental groups were reluctant to support the Mono Lake Committee if it meant taking water from the Sacramento San Joaquin River Delta.[315] Nor could the Mono Lake Committee ignore Los Angeles' perceived need for more water without raising the ire of the citizens of Los Angeles and their political leaders. The citizens of Los Angeles might support saving the Mono Lake ecosystem but would they do so at the expense of their morning shower?

Because frames spotlight events and their underlying causes and consequences for bystanders and directs attention away from other consequences the Mono Lake Committee had to find and build a new frame to replace the LADWP frame, a frame that could capture the attention of the citizens of Los Angeles and Californians if Mono Lake ecosystem restoration was to become possible.[316] Thus, David Gaines began to traverse the state in earnest delivering lectures on the dying Mono Lake ecosystem to anyone who would listen[317] and the Mono Lake Committee began publishing scientific studies

---

[314] Hart, *supra* note 4, at 76. This frame was successful in deterring efforts by the Mono Lake Committee to garner support from other environmental interest groups. These groups feared supporting Mono Lake would simply result in less water for Los Angeles and greater pressure for the Peripheral Canal a project to divert water from the Sacramento River around the San Joaquin Delta to supply Los Angeles. *Id.* and Kelly Zito, *Peripheral Canal Urged to Save the Delta,* San Fran. Chron. July 18, 2008 at A1 (available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/17/BA3911QA9U.DTL). The Peripheral Canal proposal was ultimately defeated in the 1980s but has become an issue again as pressure has built on California's water system. *Id.*

[315] *Id.*

[316] In general social movement parlance the citizens of California and Los Angeles are bystanders. Citizens generally construct their opinions based on cues flowing from issue framing or the relevance of the issue to their individual life. William A. Gamson, *Bystanders, Public Opinion and the Media* in The Blackwell Companion to Social Movements, 242, 245 (David A. Snow, Sarah A. Soule and Hanspeter Kriesi, ed. 2004).

[317] Hart, *supra* note 4, at 84.

documenting the impact of water extractions on the Mono Lake ecosystem health.[318] This frame carried a strong ethical component and attracted the attention of the national news media.[319] Between1978 and 1980 articles about the demise of the Mono Lake ecosystem appeared in the *Smithsonian, Sports Illustrated, National Geographic,* and *Outside Magazine*[320] boasting headlines such as "Elegy for a Dying Lake",[321] "Mono Lake: Silent, Sailess, Shrinking Sea", [322] "The Destruction of Mono Lake is on Schedule",[323] "The Troubled Waters of Mono Lake"[324]and "Is this a Holy Place?'[325] In 1981 a picture of Mono Lake "would drive the marriage of Prince Charles and Lady Diana Spencer off the cover of *Life"* magazine.[326]

The importance of mainstream national media coverage of the impact of the LADWP water extraction on the Mono Lake ecosystem cannot be over estimated. The ability of an SMO to promote change is dependent upon the SMO's ability to leverage resources to forward collective action.[327] One of the primary means of accomplishing change is by "mobilizing consensus" among the general population – "turning bystanders

---

[318] *Id.* at 80.
[319] Nisbet in his analysis of the framing of the climate change debate notes that the climate change debate has been characterized by a number of frame typologies, at least three of which are apparent in the history of framing in the context of Mono Lake ecosystem restoration: "economic development and competitiveness", "morality and ethics" and the "middle way/alternative path". Nisbet, *supra* note 204, at 18-20.
[320] *Id.* at 79.
[321] Gary Brechin, *Elegy for a Dying Lake"* San Fran. Examiner, October 1, 1978 Calif. Living Magazine
[322] Gallen Rowell, *Mono Lake: Silent, Sailess, Shrinking Sea,* Audubon, March 1978 at 102-06.
[323] Harold Gilliam, *The Destruction of Mono Lake is on Schedule, San Fran. Chron.,* Feb. 11, 1979.
[324] Young, *supra* note 26, at 504.
[325] Bill Gilbert, *Is this a holy place?, Sports Illustrated,* May 30, 1983, at 76-90.
[326] *America the Dry: The Booming Sunbelt is Drinking its Share of Water – and Much, Much More, Life.* July 1981 at 36.
[327] Bob Edwards and John D. McCarthy, *Resources and Social Movement Mobilization*, 116 in *The Blackwell Companion to Social Movements,* (David A. Snow, Sarah A. Soule and Hanspeter Kriesi, ed. 2004).

and opponents into adherents to the goals of the social movement."[328] "[P]rivate conflicts are taken into the public arena precisely because someone wants to make certain that the power ratio among the private interests shall not prevail."[329] Thus the SMO uses the media to convince bystanders to become engaged in the struggle for change in ways that alter the power dynamics among existing players.[330] The goal of the SMO in "framing" the issue in the mass media is to: (1) strengthen the readiness of SMO members to act, (2) increase the volume and intensity of bystander support, and (3) neutralize or discredit the framing efforts of adversaries and rivals.[331]

The mass media not only affects how bystanders frame an issue but how an issue is portrayed in the mass media reflects the success or failure of the SMO's press for political and social change.[332] Journalists decide which SMOs should be taken seriously – they are players who comment on the position of other players shaping and framing the discussion. A change in how the media portrays an issue challenges old frames and signals and spreads new frames. For an SMO to have its "preferred labels used [in the media] . . . is both an important outcome in itself and carries a strong promise of ripple effect."[333] The appearance of favorable media coverage on the devastating impacts of the water extraction on the Mono Lake ecosystem gave the Mono Lake Committee credibility among bystanders both nationally and in California, it was a signal to bystanders that the Mono Lake Committee's position should be taken seriously.

---

[328] *Id.* at 140.
[329] Elmer Eric Schattschnieder, *The Semi-Sovereign People: A Realists View of Democracy in America,* 38 (1960).
[330] Gamson, *supra* note 316, at 242.
[331] *Id.* at 250.
[332] *Id.* at 243.
[333] *Id.*

Despite growing credibility, the Mono Lake Committee still faced a conundrum – yes destruction of the ecosystem was sad but where was replacement water going to come from and what was the environmental cost to the ecosystem providing replacement water. The Mono Lake Committee had to face the water scarcity issue head on – the Mono Lake diversions represented twelve percent of Los Angeles' water supply. So the Mono Lake Committee began a search for "an alternate path":[334] finding replacement waters that would not damage another ecosystem.[335] Then the 1976-77 drought hit and Los Angeles cut its water consumption by nineteen percent with minimal conservation efforts. The Mono Lake Committee seized the moment – the city could reduce its water consumption and save the Mono Lake ecosystem without sacrifice by installing more efficient plumbing, reducing water main pressure, using drought tolerant plants on lawns and altering lawn irrigation systems.[336] The Mono Lake Committee used the opportunity to convert the frame from one of water scarcity to one of waste. A frame picked up by *Life* in 1981 – *Life* reported: "The sad irony is that minimal conservation could save Mono Lake and better water – demand management might obviate future aqueduct projects."[337] Find replacement water together with demand reduction and waste provided the basis for an "alternate path frame" for the Mono Lake issue.

Using both the ecosystem destruction ethical frame and the alternate path frame the Mono Lake Committee increased support among bystanders and political leaders

---

[334] *See discussion, supra* note 319.
[335] Hart, *supra* note 4, at 76-76. The Committee had to face the replacement issue head on because LADWP's historical response to calls for reductions in diversions from Mono Lake was to demand compensation in excess of $30 million a year, the cost of replacing the water from another source most likely the Sacramento/San Joaquin Delta which was facing environmental challenges of its own. *Id.* at 76.
[336] *Id.* at 76-77.
[337] *America the Dry: The Booming Sunbelt is Drinking its Share of Water – and Much, Much More, 38 Life.* July 1981.

across the state to such an extent that in 1978 the Brown administration formed an Interagency Task Force on Mono Lake to "'develop and recommend a plan of action to preserve and protect the natural resources in Mono Basin, considering economic and social factors.'"[338] While the primary focus of the Task Force was to find a new source of water for Los Angeles the Task Force also had extensive discussions about target lake levels[339] – an apparent acknowledgement that the Mono Lake ecosystem should not be permitted to crash.[340] When in mid-1979 the Task Force recommended raising lake levels[341] the LADWP was quick to veto the recommendation.[342] Despite the veto the Task Force Report provided legitimacy to the Mono Lake Committee's position that elevated Lake levels were needed to save a dying ecosystem, this legitimacy was important to growing bystander support.[343]

Despite national and statewide gains, however, the Mono Lake Committee's attempts at framing in the City of Los Angeles did not fare quite as well as evidenced by a review of editorials in the *L.A. Times*. When the 1979 Task Force Report recommended increased lake levels the *L.A. Times* was quick to back the position of the LADWP using the old economic frame to characterize the proposed reductions as a "harsh penalty"

---

[338] Hart, *supra* note 4, at 85 (quoting Interagency Task Force on Mono Lake Minutes). Although the Task Force received information from a variety of sources its membership was limited to government agencies including: the California Department of Water Resources, the California Department of Fish and Game, the U.S. Forest Service, the U.S. Bureau of Land management, the U.S. Fish and Wildlife Service, the County of Mono and the LADWP. *Id*. Non-governmental stakeholders had no formal voice on the Task Force.
[339] *Id.*
[340] This view appeared to have significant statewide support as evidenced by the response during the May 1979 Task Force public hearings on target lake levels. A quarter of the participants supported a lake level of 6,378 feet – the level formerly supported by the Mono Lake Committee. Hart *supra* note 4, at 85. And over half of the attendees supported a target lake level of 6,388 feet. *Id.*
[341] The Task Force recommended increasing lake levels to 6,388 feet. The 6,388-foot elevation would require the LADWP to cut its exports from the Mono Lake Tributaries by 15,000 acre-feet per year. *Id.* at 88.
[342] *Id*. at 89.
[343] *Id.* at 88.

imposed by the Task Force on Los Angeles rate payers.[344] And in February1983 when the California Supreme Court issued its landmark public trust decision the *L.A. Times* characterized the court's decision as "a far reaching reinterpretation of California water law" which would deprive the City of Los Angeles of seventeen percent of its water supply.[345]

But the litigation had provided the Mono Lake Committee with a powerful framing resource.[346] Law, litigation, and court rulings have the potential to affect bystanders by legitimizing SMO's policy preferences and frame when accompanied by sustained social movement pressure from mass political mobilization,[347] which is accomplished in part through the framing process. The very process of crafting a complaint in effect mobilizes the law into an assertion of a lawful claim of right – a claim that can be used to transform or reconstitute the terms of the social and power relationships within politics.[348] This certainly was true in the case of Mono Lake.

The use of the public trust argument in the complaint gave rise to a claim of right on behalf of the public – the public had a right to have its trust interest in Mono Lake at least recognized by the SWRCB. The legitimacy of the Mono Lake Committee argument and claim of right was formally recognized when less than a year after MoFo served and filed the compliant in the *National Audubon* case U.C. Davis held a two-day conference

---

[344] Editorial, *Water and Power in our Future,* L.A. Times, Feb. 11, 1980, § II at 6. The editorial alleges that the Task Force's proposed elevations were based on speculative data and argues that the City could not recoup the resulting 17% reduction in its water supply with conservation measures. *Id.*
[345] Editorial, *Water Revolution,* L.A. Times, Feb. 20, 1983, § IV at 4.
[346] Turk, *supra* note 115, at 281; McCann (2006), *supra* note 1, at 23.
[347] Stryker (2007), *supra* note 182, at 76; *see also,* McCann, *supra* note 1, at 23.
[348] McCann (2006), *supra* note 1, at 21-22.

on "The Public Trust Doctrine in Natural Resources Law and Management"[349] featuring the Mono Lake legal team.[350] A claim of right that was further legitimized when the California Supreme Court, the highest court in the State of California, ruled that the citizens of California had a public trust interest in lakes and their ecosystems which must be considered by the SWRCB in the allocation of the state's waters.[351]

These legal successes were coupled with the Mono Lake Committee's "Save Mono Lake" campaign – the "campaign that spawned a thousand bumper stickers"[352] including: "Save Mono Lake", "I save water for Mono Lake" and "Restore Mono Lake".[353] By the mid-1980s the Mono Lake Committee had grown to 20,000 members[354] evidence of a growing environmental ethic.[355] Educational campaigns were conducted across the state including information programs for Los Angeles youth.[356] Arnold reports that this educational campaign had an impact "on the attitudes of Southern California residents" – the primary water consumers.[357] Even the LADWP ultimately conceded that the Mono Lake Committee was a "well organized, effective group . . . [that had] done a pretty good job mobilizing public option" -- an effort one *Los Angeles Times*

---

[349] Harrison C. Dunnning, *The Public Trust Doctrine in Natural Resources Law and Management: A Symposium: Forward,* 14 U.C. Davis L. Rev. 181 (1980).
[350] Hart, *supra* note 4, at 91. U.C. Davis dedicated an entire volume of its law review to issues surrounding use of the public trust doctrine in natural resource management highlighting the work at Mono Lake. 14 U.C. Davis L. Rev. 181(1980-81). Hart reports that Prof. Johnson's session at the U.C Davis conference focused on the blending of prior appropriation water rights systems and public trust interests and featured the *National Audubon* case and litigation team. Hart, *supra* note 4, at 91. *See also,* Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels,* 14 U.C. Davis L. Rev. 233 (1980-81).
[351] *National Audubon Society,* 658 P. 2d 709.
[352] Koehler, *supra* note 290, at 564.
[353] Arnold, *supra* note 4, at 16.
[354] *Id.*
[355] Koehler, *supra* note 290, at 564.
[356] Arnold, *supra* note 4, at 16.
[357] *Id.*

reporter characterized as "selling the lake."[358] By 1981 the State of California had established a tufa reserve around the lake.[359] And in March 1983 the U.S. House of Representatives held hearings to create a national Monument at Mono Lake under the jurisdiction of the U.S. Forest Service.[360]

The Mono Lake Committee's work was furthered advanced by the water releases necessitated by heavy snows in the high Sierras in 1982-83. The LADWP's reservoir aqueduct system was full to overflowing and Mayor Bradley was forced to order a release of water into Mono Lake.[361] Although release of the water was a physical necessity given the limitations of the extraction infrastructure, both sides used the release to their political advantage. Bradley, who at the time was running for governor, used the release to appeal to voters in Northern California and the Mono Lake Committee "played along" praising the city.[362] And when Mono Lake levels began to rise even the *L.A. Times* editorial board grudgingly noted that although the Court's public trust decision abrogates the City's water rights the resumption of the City's extraction could "destroy a resource that is unique as it is vulnerable."[363] The veneer in Los Angeles was beginning to crack.

---

[358] Kevin Roderick, *Selling a Lake: Tenacious Mono Backers Use Sophisticated Tactics to Beat DWP to its Knees,* L.A. Times, Sept. 24, 1989, 3.
[359] *Id.*
[360] Hart, *supra* note 4, at 103. By 1989 250,000 people a year were visiting Mono Lake. Roderick, *supra* note 358, at 3.
[361] Hart, *supra* note 4, at 100. *See also, supra* at 52.
[362] *Id.*
[363] Editorial, *Mono Lake: Coming Back,* Los Angeles Times, May 29, 1983 § IV at 4. In 1985 one can detect further cracks in the veneer. In an editorial dated April 30, 1985, the Times praised the LADWP for hiring a new General Manager committed to pursuing innovative water development and conservation programs that would reduce Los Angeles's dependence on existing water sources. Editorial, *Melting Snows, Melting Hearts,* L.A. Times April 30, 1985 § II at 4. Up until this time the LADWP and the *L.A. Times* had taken the position that conservation or water rationing would not come close to meeting the shortfall that would result should the City be deprived of the Mono Lake water. See e.g., Editorial, *Water and Power in our Future,* Los Angeles Times, Feb. 11, 1980, § II at 6.

In the fall of 1983, the *Los Angeles Times'* editorial board began to call for the flexible remedy the court had yet to grant arguing: "obviously, a prudent balance must be struck and it is better to strive for it through good-faith negotiations than through a renewal of long and contentious actions in the courts."[364] In March 1984 this suggestion was picked up by the University of California Los Angeles' (UCLA) Public Policy Program which, at the urging of the Mono Lake Committee, brought the parties together to discuss resolution of the Mono Lake controversy.[365] Although nothing substantive was to come of this preliminary meeting the LADWP was finally at the table and talking.[366]

The LADWP's new willingness to talk rather than bully its way forward is evidence of the shifting power of the LADWP as litigation and framing began to change public sentiment in Los Angeles about the importance of the Mono Lake ecosystem. The relationship between the LADWP and the SWRCB had now been called into question by the court's decision in *National Audubon,* the national media, California citizens and the *Los Angeles Times* itself. And although the SWRCB had yet to implement the *National Audubon* decision, it knew that if it did not do so the court could.[367] Here then is evidence of both the veil effect and *status quo* effect of destabilizing litigation. No longer could the LADWP rely on past partners and patterns of doing business. And what now became clear to the LADWP was that these past business practices were stigmatized, forcing the LADWP into a new operational paradigm. But it is important to recognize

[364] Editorial, *Water and the Public Trust,* Los Angeles Times, Nov. 10, 1983 § II at 6.
[365] Hart, *supra* note 4, at 105. The parties came together in a jointly sponsored conference "Mono Lake: Beyond the Public Trust Doctrine". *Id.*
[366] *Id.*
[367] Hart, *supra* note 4, at 105.

that it was the combination of litigation together with ongoing framing that brought the LADWP to this point.

It would, however, take two more pieces of litigation before the Los Angeles City Council would break rank with the LADWP and SWRCB and the LADWP would become fully engaged in finding a remedy for the Mono Lake ecosystem. The LADWP were on the verge of exploring alternatives together with the Mono Lake Committee (the deliberative effect of destabilizing litigation) but the scales did not tip until the City of Los Angeles and the LADWP came face to face with the trout fishermen.[368]

D. Lesson 4: The Importance of Secondary Litigation

The gates to the Grant Lake reservoir remained open through the winter of 1984 pouring water down the Mono Lake tributaries into Mono Lake. With the water came the trout and the trout fishermen[369] but by fall 1984 the LADWP was ready to shut off the flow to Mono Lake[370] so Dick Dahlgren, an avid fisherman, wrote to Mayor Bradley "congratulating" him for restoring the flow and the fish to Rush Creek.[371] The letter found its way into the press.[372] While there was no response from Bradley's office, Dahlgren, in yet another example of the use of social networks created by the Mono Lake Committee, enlisted the support of CalTrout and the Mono Lake Committee to entice

---

[368] Under the Los Angeles City Charter the LADWP is governed by an independent board appointed by the Mayor and confirmed by the City Council. *Los Angeles, Cal. City Charter* art. VI § 70.1 (1999) (available at http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:la_charter). Prior to 1996 the Los Angeles City Council had no oversight over the LADWP as noted by Councilman Ferraro who acknowledged, "DWP does not have to come to the council for permission for their actions." Hart, *supra* note 4, at 110; *Los Angeles, Cal. City Charter* art. III § 32.4 (1996)(available at http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:la_charter).
[369] Hart, *supra* note 4, at 109.
[370] *Id.* at 108
[371] *Id.* at 109.
[372] *Id.*

City Councilman John Ferraro, chair of the Los Angeles City Council's Energy and Natural Resources Committee, to hold immediate hearings in the Energy and Natural Resources Committee.[373] At the hearing the Council ordered a fish study, appointed a citizen's advisory committee and requested that the LADWP keep water flowing into the Mono Lake tributaries.[374] The LADWP would bend but it would not break; it acquiesced to the study and the advisory committee but there would be no water.[375] While this was certainly bad news for the Mono Lake ecosystem, in the context of political blockage there was light – there was no longer a unified "city" position on Mono Lake – the LADWP and the Los Angeles City Council had split ranks.

When on November 14, 1984, the LADWP threatened to turn off the water to Rush Creek, the California Department of Fish and Game began a one-day trout rescue operation, CalTrout and the Mono Lake Committee organized a demonstration at Highway 395 at the Rush Creek Bridge[376] and Dahlgren and CalTrout filed suit in California District court to compel the LADWP to maintain water flow in Rush Creek to maintain trout populations.[377] The court issued a temporary restraining order[378] and on November 14, 1984, the Mono Lake County District Attorney and Sheriff went to Rush Creek court order in hand[379] to arrest any person that would close the water valve.[380] One

---

[373] *Id.*
[374] *Id.*
[375] *Id.*
[376] *Id*. at 110-111.
[377] *Id.* at 111, 114.
[378] Arnold, *supra* note 4, at 15. The temporary retraining order became a preliminary injunction in 1985. *Id.* In 1986 the California superior court issued a temporary restraining order to maintain flows into Lee Vining Creek. *Id.* A preliminary injunction for Lee Vining Creek was issued in 1987. *Id.*
[379] Hart, *supra* note 4, at 111, 114. The Mono Lake Committee and the National Audubon petitioned the court and were granted amicus status in the Dahlgren case. *Id.* Five days later the California District Court issued a temporary restraining order requiring the LADWP to maintain a flow of 19 cubic feet per second

cannot underestimate the power of the presence of law enforcement upholding the rights of the ecosystem in the framing of the Mono Lake controversy. What the citizens of Los Angeles saw that night on the evening news was a sheriff upholding the rights of Rush Creek and Mono Lake against the LADWP.[381] This judicial relief provided an important framing tool to the Mono Lake Committee as well as a temporary reprieve for both the trout and Mono Lake while the litigation marched on.

Dahlgren's initial suit was followed by a series of lawsuits brought by Dahlgren, CalTrout and the Mono Lake Committee to keep the water flowing in the Mono Lake tributaries.[382] The litigation relied on the vagaries of the California Fish and Game Code. Since 1933 California's Fish and Game Code had prohibited the dewatering of creeks below dams[383] and required that "[t]he owner of any dam shall allow sufficient water at all times ... to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."[384] The Code was amended in 1953 to prohibit the SWRCB from issuing any water appropriation permit or license after September 9, 1953, unless the permit or license was "conditioned upon full compliance" with the requirement to allow sufficient waters to pass below the dam to maintain fish

---

in Rush Creek. *Id.* A flow of 19 cubic feet per second would mean 14,000 acre feet in Mono Lake – not enough to stabilize the lake, but enough to create a "real crack in the dam" Hart, *supra* note 4, at 111, (quoting Mono Lake Committee newsletter.)

[380] *Id.* Five days later the California District Court issued a temporary restraining order requiring the LADWP to maintain a flow of 19 cubic feet per second in Rush Creek. *Id.* A flow of 19 cubic feet per second would mean 14,000 acre feet in Mono Lake – not enough to stabilize the lake, but enough to create a "real crack in the dam" Hart, *supra* note 4, at 111, (quoting Mono Lake Committee newsletter.)

[381] *Id.* at 113.

[382] *Trout I,* 207 Cal. Ap. 3d at 592.

[383] Cal. Fish and Game Code § 5937 (West 1984).

[384] *Trout I,* 207 Cal. App. 3d at 594, 599 (quoting Cal. Fish and Game Code § 5937).

populations.[385] CalTrout and the Mono Lake Committee argued[386] that these provisions were applicable to the LADWP and its Grant Lake Dam and requested that the court issue a writ of mandamus compelling SWRCB to rescind the LADWP's current permit and reissue it together with a requirement that the LADWP maintain sufficient water flow in the Mono Lake tributaries to support fish populations.[387]

The California Court of Appeals took a slightly different tact.[388] Relying heavily on California's water allocation scheme the court observed that under California law a permitee must act diligently to undertake and complete any construction necessary to perfect its water claim and must apply the water to beneficial use.[389] If a permitee fails to put appropriated water to beneficial use within three years the unused water reverts to the public and is considered unappropriated.[390] In the case of the Mono Lake appropriation the LADWP had received a permit to appropriate the entire flow of the Mono Lake tributaries in 1941. Although the LADWP could divert and store the water in 1941 it was incapable of putting the full volume of water to beneficial use until

---

[385] *Id.*
[386] The LADWP argued that the provisions of the Fish and Game Code only applied to the construction of a dam and not to the appropriation of water. Thus it reasoned that because the dam was constructed for the appropriation of water there was no requirement to permit enough water to pass to maintain fish populations. *Id.* at 599. The LADWP also argued that the Fish and Game Code did not apply to a license that was predicated upon a permit issued prior to September 9, 1953. *Id.* at 603. Finally, the LADWP argued that application of the statute to the LADWP's license constituted a retroactive application of law. *Id.* at 609-10.
[387] *Id.* at 592. The trial court denied the petition on the grounds that the Grant Lake dam had been built prior to 1953. *Id.* All of the trout cases were consolidated and appealed to the California Court of Appeals. *Id.*
[388] Cal Trout and the Mono Lake Committee had argued that the 1933 requirement that an owner of a dam was required to permit sufficient water to pass to support existing fish populations applied to the LADWP and required it to maintain flowage for fish populations. The California Court of Appeals did not rule on this issue finding it unnecessary in light of the history of the LADWP's appropriation of the waters from the Mono Lake tributaries. *Id.* at 601.
[389] *Id.* at 610.
[390] *Id.* at 611.

construction of the second barrel of the Los Angeles aqueduct in the early 1970s[391] – nearly twenty years after the effective date of the 1953 Fish and Game code amendment.[392] Thus in 1953 when the Fish and Game code was amended to apply to water appropriations the water to be carried by the second aqueduct had not yet been appropriated and could not be appropriated for another twenty years. Therefore, the LADWP was required to leave enough water in the Mono Lake tributaries to support existing trout populations. [393] The Court ordered the trial court to issue the appropriate writs to compel the SWRCB "to attach the conditions required by section 5946" to the LADWP's appropriation license.[394] When the SWRCB failed to attach these conditions in a timely manner the California Court of Appeals issued a second opinion ordering the trial court to issue a writ to the SWRCB ordering it to "exercise its ministerial duty [to set minimum flows] without delay" and to attach language to the LADWP's appropriation license providing that pursuant to "Fish and Game Code section 5946, this license is conditioned upon full compliance with section 5937 of the Fish and Game code. The

[391] *Id.* at 612.
[392] *Id.*
[393] *Id.* at 612-13. The Court also rejected the LADWP's argument that the SWRCB's numerous extensions to the 1940 permit vitiated the requirements of the 1953 Fish and Game Code Amendment. *Id.* at 614. Between 1948 and 1960 the SWRCB gave the LADWP no fewer than five permit extensions to "Complete Use of Water." *Id.* at 615 note 18. In each permit extension application the LAWPD was asked "Have you used as much water as you expect to use under this permit?" and in each case the LADWP responded "NO." *Id.* at 615. When asked when beneficial use would be perfected the LADWP responded, "When required by municipal needs." *Id.* at 616. It was not until the 1968 permit extension that there is any indication that the second aqueduct would be constructed. That extension asserts that the second aqueduct would be completed on or before December 1 1971 and that application of the water to be carried by that aqueduct "shall be completed on or before December 1, 1975." *Id.* at 615.
[394] *Id.* at 632-33.

licensee shall release sufficient water into the streams from its dams to reestablish and maintain the fisheries which existed in them prior to its diversion of water."[395]

Water left in the tributaries to support trout populations meant water for Mono Lake and the Mono Lake ecosystem.[396] While *National Audubon* resulted in ground breaking legal precedent compelling the SWRCB to consider public trust interests including ecosystem viability in the water appropriation process, the Mono Lake ecosystem might well have collapsed while waiting for the SWRCB to issue a new permit -- a hollow victory indeed. It was the trout litigation that forced the LADWP to limit its extractions and also gave the Mono Lake Committee's claims further legitimacy in the press, among bystanders and in Los Angeles' City Hall.

By 1986 the political atmosphere in Los Angeles had changed so significantly that when in August there was a symbolic 100-mile run to take water from the Los Angeles aqueduct intake to Mono Lake, the run was co-sponsored by Mayor Bradley and four members of the Los Angeles City Council.[397] During that same month the *L.A. Times* published an editorial urging a negotiated solution to the controversy (a push toward a deliberation) that afforded protection to the Mono Lake ecosystem arguing.[398] For all practical purposes, by 1986 there were significant fissures in the power relationships that

---

[395] *California Trout, Inc v. Superior Court of the County of Sacramento,* 218 Cal. App. 3d 187,212-13 (1990)(*Cal. Trout II*).

[396] While the releases into Rush Creek and Lee Vining Creek were not enough to stabilize the lake the Mono Lake Committee argued it was "the first real crack in the dam." Hart, *supra* note 4, at 111.

[397] *Id.* at 120. And by 1988 even some members of LADWP Board of Commissioners recognized that the Mono Lake Ecosystem was worth saving. *Id.* at 132.

[398] Editorial, *Mono Issue Can be Negotiated,* Los Angeles Times, Aug. 26, 1986, § II at 4. The editorial board argued "[b]arring catastrophic drought. . . California should have enough water, used wisely, to meet all reasonable needs including environmental protection." *Id.*

were the foundation of the LADWP's water claims – the blockage was beginning to dissolve.

E. Lesson 5: Court Sanctioned Temporary Relief and the Decree

The rise of public law litigation was, in part, enabled by the relaxation of constraints on equitable remedies,[399] which enabled courts to examine controversies surrounding future probabilities and allowed litigants and courts to realize the potential policy function of litigation in the context of public issues and in a manner not permitted by purely private litigation. In the context of environmental litigation the equitable remedy of injunction, essentially a judicially imposed prohibition, is fundamental[400] for indeed, how would it benefit Mono Lake if, during the course of litigation – litigation which was to extend almost fifteen years[401] – the LADWP extractions continued unabated causing the Mono Lake ecosystem to collapse. Injunctive relief permits the court to place a hold on an agency decision pending the termination of the litigation and creates the space needed to develop a flexible remedy – a remedy driven by the parties.[402]

Ironically it was the trout litigation and not the *National Audubon* case that gave the Mono Lake ecosystem the moratorium and water it needed to survive. In 1988, the *National Audubon*[403] litigation was consolidated with the trout cases by the California

---

[399] Chayes notes that by the turn of the century "the old sense of equitable remedies as 'extraordinary' has faded." Chayes, *supra* note 101, at 1292.
[400] Sax (1970), *supra* note 102, at 198.
[401] The Mono Lake litigation commenced in 1979 when MoFo filed the *National Audubon* complaint. Hart, *supra* note 4, at 82-83. The litigation was effectively concluded in 1994 when the SWRCB issued the *1994 Water Rights Decision.*
[402] Sabel & Simon, *supra* note 113, at 1057.
[403] The *National Audubon* litigation continued to bounce around federal court until 1988, when the 9th Circuit district court dismissed the federal air pollution claims sending the original public trust litigation

Supreme Court and assigned to Judge Finney of Eldorado County Superior Court.[404] On August 29, 1989 Judge Finney issued a temporary injunction "prohibiting respondent DWP from causing the level of Mono Lake to fall below 6,377 feet as a result of its diversions for the remainder of the current –runoff year ending March 30, 1990."[405] This left the court to resolve how to implement both the California Supreme Court's directive in the original *National Audubon* case and the Court of Appeals directive in the trout cases.

F. Lesson 6: The Experimental Remedy

The purpose of the remedy in any legal action is to give affect to the judgment made by the court.[406] The "remedy arises from a reflective effort to give meaning to the right . . . [it] is an elaboration of the rights in question: it is not a technical effort to execute an already defined norm, as rights essentialism implies; nor is it an exercise of instrumental discretion, as crude positivism suggests."[407] However in public law litigation the right is more ambiguous than in private litigation – seeking as it does the modification of public policy.[408]

Likewise, the remedy in public law litigation differs substantially from private litigation where the remedy is retrospective and intended to correct past legal wrong – the remedy in public law litigation it prospective designed to "modify a course of [agency]

---

back to state court. *National Audubon Society v. Department of Water,* 658 F. 2d 1409, 1417 (9th Cir. 1988).

[404] Hart, *supra* note 4, at 130.

[405] *Id.* at131. This preliminary injunction was extended until completion of the the SWRCB public trust hearing process was completed. *See, In re Mono Lake Water Rights Case,* No. 2284 and 2288, slip op. at 2 (El Dorado Co. Superior Ct. Apr 17, 1991).

[406] Sabel & Simon, *supra* note 113, at 1054.

[407] *Id.* at1055.

[408] Chayes, *supra* note 101, at 1282 -83.

conduct."[409] The remedy is embodied in the decree, a legal order that prescribes how the agency must modify its present and future actions to comply with the policy directives set forth in statute.[410] Historically in public law litigation the decree is prescriptive – often referred to as the "command-and-control decree".[411] This is no less true in the case of environmental public law litigation. [412]

Destabilization legal theorists argue that successful destabilizing litigation requires the court to abandon the traditional command and control decree for a decree that is both "flexible" and "ongoing".[413] Although the court uses the decree to impose a legal standard and to grant temporary injunctive relief, the court leaves the second part of the remedy –implementation of the legal standard – to the parties to negotiate subject to ongoing oversight. It is, destabilization theorists argue, the flexible or experimental

---

[409] *Id.* at 1296.
[410] *Id.* at 1296, 1298.
[411] Sabel & Simon, *supra* note 113, at 1019. Sabel and Simon suggest that the command and control decree has three characteristics: (1) it attempts to "anticipate and express . . . key directives to induce compliance in a single, comprehensive, and hard to change" order; (2) it requires compliance which is measured by the degree of the defendant's conformity to the prescriptions of the decree; and (3) it is directive in that the court undertakes a strong role in forming the redial norm. *Id.* at 1021-22.
[412] The case of *Citizens to Preserve Overton Park, Inc. V. Volpe,* 401 U.S. 402 (1971) is illustrative. In *Overton Park* an SMO sued the Department of Transportation (DOT) to stop construction of an interstate highway through Overton Park, a 342-acre public park in Memphis Tennessee. *Id.* at 406. The SMO alleged that the highway construction violated section 4(f) of the Transportation Act of 1966 which prohibits the use of federal funds to construct highways through public parks unless there is no "feasible and prudent" alternative to construction through the park. *Id.* at 405. The case landed in the U.S. Supreme Court where the court held that in passing section 4(f) Congress intended "that protection of parkland was to be given paramount importance . . . parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reach extraordinary magnitudes." *Id.* at 413. The Court clarified the policy analysis that the Secretary was required to undertake under section 4(f) and sent the matter back down to the district court. On remand, the federal district court issued a decree (remedy): (1) adopting the Supreme Court's interpretation of section 4(f), (2) enjoining the highway construction, and (3) ordering the DOT Secretary to make a route determination in compliance with the section 4(f) interpretation adopted by the court. *Citizen's to Preserve Overton Park v. Volpe,* 335 F. supp. 873, 885 (W.D. Tenn. 1972). In effect the decree set out the applicable legal standard and a two-part remedy. The first part of the remedy, the injunction halts the implementation of the contested agency policy – highway construction. The second part of the remedy requires the agency to modify its policy to conform to the court order after which the injunction will be lifted.
[413] Chayes, *supra* note 101, at 1298-1308 (discussing ongoing court oversight and negotiated decrees).

remedy that holds the greatest possibility for social and political change or destabilization because it is not the court's "legal determination" that causes social or political change but, as McCann notes, the manner in which the litigants and stakeholders assess how the court decision "indirectly create[s] important expectations, endowments, incentives and constraints" toward reform agendas that leads to social and political change.[414] Thus social scientists suggest that the remedy is more likely to result in social change if:

1. The order offers positive incentives to induce compliance – that is there some benefit to compliance.[415]
2. Some or all of the parties are willing to impose costs to induce compliance. [416]
3. The court's order provides "leverage, or a shield, cover, or excuse" to persons in positions to implement the change who are willing to but have been unable to act.[417]
4. The court order can be implemented through market mechanisms.[418]
5. There is ongoing court oversight.[419]
6. The members of the social movement are permitted to participate in the decision making process.[420]
7. The remedy fixes responsibility for and monitors the impact of organizational change and its outcome.[421]

Many of these elements are incorporated in the experimentalist remedy.

---

[414] Michael W. McCann, *How the Supreme Court Matters in American Politics: New Institutional Perspectives* in *The Supreme Court and American Politics: New Institutionalist Approaches* 68 (C. Clayton & H. Gillman ed., 1999).

[415] Rosenberg notes that there are two prevailing views among social scientist about the ability of the court to instigate social reform. Rosenberg, *supra* note 176, at 32-33. Proponents of the Dynamic Court view argue that courts can produce social reform when used effectively by SMOs. *Id.* at 21-22. Even then there are several contributing factors, which affect the effectiveness of litigation in stimulating social and political change including whether there is a benefit to elites and bureaucrats to comply with the court's order. *Id.* at 32-33. These benefits may but need not be monetary.

[416] *Id.* at 33.

[417] *Id.* at 35.

[418] *Id.* at 33. Stryker in her review of research on the politics of enforcement notes that corporate organizations are traditionally successful at defending against implementation of court orders where they are able to argue that enforcement interferes with economic viability. Stryker, *supra* note 182 at 84 (referencing studies by Melnick, Yeager, and Nelson and Bridges)

[419] Harris, *supra* note 210, at 933.

[420] *Id.*

[421] Stryker, *supra* note 182, at 90.

The experimentalist remedy has three general characteristics: first, it is negotiated by the stakeholders; second, it "takes the form or a rolling rule regime"; and third it is transparent.[422] To this we might add a fourth requirement that the remedy is ongoing and subject to court oversight.[423] A court using the experimentalist remedy requires the parties and stakeholders to negotiate a remedial plan.[424] This negotiation process, which is often overseen by a special master, requires stakeholders to gather information, share data, acquire resources, set agendas and ground rules for discussion and decision-making, deliberate together set remedial goals and reach consensus about a remedial regime that implements the remedial goals. Through this process the stakeholders build relationships that had, heretofore, been non-existent, these relationships facilitate the creation of trust.[425]

Harris highlighted the importance of the negotiated remedy in her analysis of litigation's impact on the ability of poverty lawyers to redistribute public resources for the benefit of homeless populations.[426] In her analysis of three homeless cases Harries observed that the court through the negotiated decree creates an avenue for those blocked from the agency decision making process (outsiders) to become insiders – players within the decision making process.[427] In effect the court uses its legal authority to create room in the agency decision- making process for the previously excluded voice of the poverty lawyer. In turn the poverty lawyer is able to mobilize judicial support to "induce" policy

[422] Sabel & Simon, *supra* note 113, at 1065.
[423] Harris, *supra* note 210, at 933 and Chayes, *supra* note 101, at 1298-1308.
[424] Sable & Simon, *supra* note 113, at 1067.
[425] *Id.* at 1068.
[426] Harris, *supra* note 210, at 911.
[427] *Id.* at 933-34.

reform.[428] The negotiation itself permits the poverty lawyer to act as an insider to help shape and reform the agency process. Sabel and Simon refer to this as the *stakeholder* effect noting that the liability determination empowers the outside player and legitimizes their claim giving the plaintiff a viable position at the negotiating table.[429] This in turn increases the power of the outsider and decreases the influence of traditional agency stakeholders or power elites.[430]

Harris contends, however, that the ability to participate in negotiation alone is not sufficient to cause change. Her analysis suggests that ongoing involvement of the poverty lawyer was only meaningful so long as the court itself maintained continued oversight of the process.[431] The presence of court oversight assures that the parties continue to give legitimacy to outsiders.[432] Such was the case with the Mono Lake negotiations although matters did not evolve in the manner in which Professors Sabel and Simon or Harris might have anticipated.

By 1989 the California Supreme Court had issued its landmark *National Audubon* decision ruling that the state had an ongoing obligation to protect the publics trust interest in public waters and to "take such uses into account in allocating water resources."[433] The Court also held that the superior court of California had concurrent original jurisdiction

---

[428] *Id.*
[429] Sabel & Simon, *supra* note 113, at 1031.
[430] *Id.* at 1077-78. Note that in terms of the power structure identified by Turk the court's liability determination increases the SMO's enforcement power – that is the SMO has the backing of the court to enforce its view of the law as applied to the policy context at issue. Turk, *supra* note 115 (discussing the types of power associated with law).
[431] Harris, *supra* note 210, at 933-34.
[432] *Id.*
[433] *National Audubon,* 658 P. 2d at 732.

with the SWRCB over the issue.[434] Thus when the matter was remanded to state court and consolidated in Judge Finney's court with the trout cases[435] Judge Finney could have immediately held a hearing, taken evidence and issued a decree directing the SWRCB to apply the trust doctrine to the LADWP allocation license. Additionally, in the trout cases, Judge Finney had the option of either issuing a writ that "commanded the immediate imposition of the conditions" of Fish and Game Code § 5937 and requiring the SWRCB to conduct a study to establish flow rates[436] or of conducting its own hearing and issuing a decree specifying flow rates necessary to comply with California Statute.[437] Rather than hold a hearing on the public trust and trout issues Judge Finney ordered the SWRCB to review Los Angeles' water rights in the context of the public trust doctrine and Fish and Game Code § 5937, staying the litigation until September 1993 pending the SWRCB determination, but Judge Finney also retained jurisdiction over the case, refusing to dismiss the cases, until the SWRCB had submitted its completed the work to the court for review.[438] This was not the traditional command and control decree nor was it, however, an order for formal negotiation as envisioned by destabilization theorists.

Application of the court's orders required the SWRCB to determine how much water was needed to support trout populations and public trust assets.[439] To support this analysis the SWRCB was required to prepare an Environmental Impact Report (EIR) and

---

[434] *Id.* at 731.
[435] *See,* discussion *supra* page 73 (discussing consolidation of the Mono Lake cases).
[436] *California Trout II,* 218 Cal. App. 3d at 211; see *also, California Trout I,* 207 Cal. App. at 632.
[437] *Id.*
[438] Hart, *supra* note 4 at 131 (siting *In re Mono Lake Water Rights Cases,* No. 2284 and 2288, slip op (El Dorado Co. Superior Ct. Aug. 29, 1989).
[439] California State Water Resources Control Board, *Final Environmental Impact Report for Review of Mono Basin Water Rights of the City of Los Angeles,* 2-1 (September 1994) (available at http://www.monobasinresearch.org/onlinereports/feir1.htm last visited April 1, 2009).

hold public hearings on the LADWP license a process that would take five years.[440] During this five year hiatus the Mono Lake Committee and the LADWP were in a state of limbo, neither could be certain of the final outcome of the SWRCB process, though it was certain that both the landscape and the rules of the game had changed. Thus the court, by its order, established the foundations for the flexible remedy. In issuing the order the court effectively gave notice to the parties that the *status quo* was dead. No longer could the LADWP rely upon its "traditional relationship" with the SWRCB to assure receipt of the entire flow of the Mono Lake tributaries – indeed it could not be certain of how the SWRCB would rule. The LADWP could either sit back and wait or try to negotiate an alternate remedy. And public sentiment was encouraging the negotiation option as evidence by the shifting tides on the *L.A. Times* editorial page which by 1989 was urging the LADWP to change its strategy. [441]

Additionally, the court's decision to maintain jurisdiction over the litigation meant that the LADWP could no longer ignore the claims of the Mono Lake Committee – the Committee now had the legitimacy of two court orders and the ongoing oversight of the court. This oversight, assured that the Mono Lake Committee would continue to have meaningful voice in the ultimate resolution of the Mono Lake dilemma. Finally, the

---

[440] *Id.*

[441] Editorial, *Halt the Decline at Mono Lake,* L.A. Times, June 17, 1989, §II at 4. By July 1986 the *L.A. Times* editorial board was pushing for a negotiated solution to the Mono Lake controversy noting "[n]egotiation of the Los Angeles-Mono Lake issue is bound to produce a more practical solution than protracted litigation that always carries the potential for surprising consequences not desired by either party." Editorial, *Mono Issue can be Negotiated,* L.A. Times, July 26, 1986, § II at 4. And by 1989 the Editorial Board observed that "Los Angeles should realize by now that it never will win its dogged legal battle to continue its historic diversion of eastern Sierra streams that naturally flow into Mono Lake . . . At some point the decline must be halted." Editorial, *Halt the Decline at Mono Lake,* L.A. Times, June 17, 1989, §II at 4.

length of time required to prepare the EIR gave the parties the space needed to negotiate the flexible remedy.

By necessity, negotiating a remedy is grounded in uncertainty and nowhere is this truer than in the arena of ecosystem management, which is grounded in the scientific uncertainty of the operation of biological systems.[442] Added to this is the fact that the negotiating process itself places the stakeholders in a position of uncertainty.[443] Parties can no longer rely on traditional relationships and as such must reorient their goals, their partners and even their understanding of the problem.[444] The status quo is no longer a possibility because the liability determination has stigmatized the status quo making it risky[445] and forcing the stakeholders to explore and develop new options previously politically unavailable.[446]

But the new remedy and the effectiveness of the remedy is itself unknown as are the new relationships between stakeholders forcing stakeholders to continually reassess and reposition themselves as knowledge about the issue becomes deeper and time reveals more information.[447] Often the complexities and futuristic nature of the issue requires the stakeholders to make decisions with incomplete knowledge forcing the stakeholders into a "rolling rule regime. To address this issue the stakeholders focus on: (1) outcome

---

[442] Mary Doyle, *Introduction* in *Large-Scale Ecosystem Restoration: Five Case Studies from the United States, xii-xiii (*Mary Doyle and Cynthia A. Drew, ed. 2008). Doyle notes that an ecosystem approach to environmental problem solving "is by definition comprehensive" and grounded in "scientific uncertainty and emerging scientific understanding" requiring an adaptive management approach. *Id.* Adaptive management assumes that policy makers and policies will be flexible enough to permit course changes as new scientific knowledge becomes available. *Id.* at xiii.
[443] Sabel and Simon refer to this as the veil effect. Sabel and Simon, *supra* note 113, at 1074.
[444] *Id.*
[445] Id. at 1075-76. Sabel and Simon refer to this as the status quo effect.
[446] *Id.* at 1075-76. Sable and Simon refer to this as the deliberative effect.
[447] *Id.* at 1068.

norms and goals; (2) monitoring and assessment of norms and goals as a rolling remediation plan is implement; and (3) reassessment of norms and goals based on information gleaned from previous attempts to realize norms and goals and from the success or failure of the negotiated remedy to meet performance measures.[448] This process of developing the remedy results in a remedy that is more fully explored and developed increasing the likelihood of its success and its acceptability across multiple stakeholders.[449]

Sabel and Simon argue that the negotiation process forces decisions that were previously made in non-public forums to be made in public as the parties work toward establishing, implementing and revising implementation strategies to meet the goals or performance measures established by the stakeholders in the decree.[450] The negotiation process also results in public vindication of the plaintiff's claim, brings public attention to the problem and caused increased public scrutiny.[451] The very public nature of the remedy, its design and implementation in accord with the legal standard established by the court ripples out beyond the litigation and the litigants into other private and public realms in a process of "iterative disequilibriation and readjustment."[452] While this is

---

[448] *Id.* at 1069-70.
[449] Sable and Simon characterize this outcome of the negotiated remedy as the deliberative effect of destabilized litigation. *Id.* at 1075-76.
[450] *Id.* at 1071-72.
[451] Sabel and Simon refer to this as the publicity effect and suggest that it is a natural outcome of the experimental remedy. *Id.* at 1077. But social scientists argue that the publicity effect is a combination of the court legitimizing the plaintiff's position and the plaintiff's willingness to use the outcome of the litigation as one of many political resources in the process of framing, an important part of social mobilization. *See discussion, supra* at 55-64.
[452] *Id.* at 1081. The ripple or web affect of the litigation affects how agencies make decisions in the future. *Id.*

ultimately what happened at Mono Lake, it did not happen in the manner envisioned by Sabel and Simon.

Once it was clear that the LADWP water allocation license would be subject to revision both the Mono Lake Committee and the LADWP had a significant incentive to negotiate a remedy. And the five-year process undertaken by the SWRCB to prepare the EIR gave them the space they needed to negotiate a remedy. For the Mono Lake Committee this was an opportunity to at last participate in the decision making process, for the LADWP it had become a necessity – for it had no way of predicting the outcome of the SWRCB process. Thus it was that in the early 1990's the Mono Lake Committee, the LADWP, the City of Los Angeles, Mono County and the U.S. Forest Service (collectively known as the Mono Lake Group)[453] collectively came together in earnest to wrestle with the major ecosystem restoration questions at Mono Lake. And while the negotiations did not take place in the public forum of the courts the Mono Lake Committee not only continued to report negotiation progress to its membership but it was able, through ongoing framing to keep the process in the media, which kept the pressure on the LADWP to find a resolution or to submit to the uncertainties of the outcome of the SWRCB deliberations that were under the court's oversight.

There were two central ecosystem restoration questions that the parties needed to resolve: (1) what was the appropriate lake level and (2) how would the City of Los Angeles make up for the lost water from the Mono Lake tributaries without stressing

[453] In fact the Mono lake Committee and the LADWP had been meeting quietly since the 1984 UCLA policy forum. In the summer of 1987 they broadened their discussions to include the U.S. Forest Service and Mono County forming the Mono Lake Group. Hart *supra* note 4, at 131. In late 1987 this group hired Tom Graff of the Environmental Defense Fund to find an alternative water source for Los Angeles. *Id.*

other ecosystems.[454] Although the parties had yet to determine how to accomplish this latter feat, meeting Los Angeles' water needs without damaging another ecosystem became an initial goal of the negotiation process. Discovering solutions for Los Angeles' water dilemma was an iterative process.

The seeds for a negotiated remedy would come from a number of sources. In 1988 California suffered yet another drought and Los Angeles instituted mandatory water rationing.[455] Water rationing created financial problems for the LADWP – as less water was used by citizens the per gallon cost of running the Los Angeles water system increased. Customers, however, paid a flat fee for water, which meant those customers that conserved water or cut their water use paid a higher per gallon rate than customers that did not limit water use.[456] To resolve this inequity Mayor Bradley appointed a new water rate committee to develop a new water rate scheme for Los Angeles and he invited the Mono Lake Committee to appoint a member to the committee, an invitation that was unimaginable just 10 years earlier.[457] The new rate scheme was a two-tiered system with reduced rates for small or moderate users while heavy users would pay a higher rated intended to finance the cost of developing new water sources.[458] The system was designed to both encourage conservation and explore alternative water sources.

In conjunction with the new rate scheme, the Los Angeles Urban Water Conservation Council issued a list of Best Management Practices for household water

---

[454] *Id.* at 146-48.
[455] *Id.* at 149. Hart reports that during the 1990-91 drought Los Angeles undertook a mandatory rationing program and experienced a larger than expected drop in water use. Per capita water use dropped by 30 percent. *Id.*
[456] *Id.*
[457] *Id.*
[458] *Id.* The two tiered rate scheme was adopted by the City of Los Angeles in February 2003.

conservation including subsidized installation of ultra-low-flush toilets and showerheads.[459] The Mono Lake Committee, in yet another example of framing in the heart of Lost Angeles, reinforced these practices with a series of television spots linking water use in Los Angeles to ecosystem destruction at Mono Lake and in the Santa Monica Bay (which received polluted waste water from Los Angeles) and reduced water use to reduced water rates and ecosystem restoration.[460] The new frame: what is good for your pocket book (decreased water use) was also good for the Mono Lake and Santa Monica Bay ecosystems. And when in July 1992 water rationing ended and people continued to conserve, Los Angeles' water consumption dropped by 15- 25 percent[461] it became clear to the Mono Lake Committee that some part of the water needed to restore the Mono Lake ecosystem could come through water conservation. The LADWP Assistant General Manager admitted as much in a letter in the *LA Times* but was apparently unwilling to formally concede the issue in negotiations until a lake level agreement was reached.[462]

The reduced water rates associated with conservation and the resulting perspective that saving the Mono Lake ecosystem could be accomplished without substantial financial burden to the citizen's of Los Angeles is illustrative of Rosenberg's observation that legal remedies promoting change are more likely to be implemented when they are supported by market mechanisms[463] and offer incentives for compliance.[464]

---

[459] *Id. See also, Draft Environmental Impact Report for the Review of Mono Basin Water Rights of the City of Los Angeles,* California State Water Resources Control Board, CL8-9 (May 1993) (Available at http://www.monobasinresearch.org/onlinereports/deir1.htm last visited April 23, 2009).
[460] Hart *supra* note 4, at 149.
[461] *Id.*
[462] Duane L. Geofeson, Editorial, *Water Shortage,* Los Angeles Times, August 7, 1987 § II at 6.
[463] Rosenberg, *supra* note 176, at 32-33.

The California Legislature was also the source of a potential financial incentive for change. In 1989 a number of Legislator's seeking resolution to the Mono Lake controversy approached the Mono Lake Group with a proposal to fund replacement water for Los Angeles.[465] Under the proposal the legislature would provide $60 million to develop new water for Los Angeles from grey water or from sources in the Central Valley with the proviso that money would only be allocated upon joint application of the LADWP and the Mono Lake Committee. But the Mono Lake Committee was reluctant to proceed forward until resolution of the lake level issue.[466] Despite the reluctance of the parties to jump at the legislative proposal, the proposal is an example of the impact of the deliberative effect of the negotiation process. Here was a potential alternative source of water for Los Angeles that did not depend on depriving either Mono Lake or any other natural system of water. If and how the parties would apply for and use this appropriation was unknown but what was clear was that there was some tentative agreement among the parties that any alternate replacement water source for Mono Lake waters, would not come at the expense of another ecosystem.

Setting the appropriate lake level proved to be the more difficult task and by 1991 it appeared that the parties were at an impasse.[467] Proposals for an acceptable lake level went back and forth without resolution and the money provided by the California

---

[464] *Id.* at 35.
[465] This proposal went through a myriad of forms as it moved through the California Legislature but as passed AB44 allocated $60million in state funding to develop replacement water. *Id.* at 132. The LADWP was skeptical of the proposal but now even the *Los Angles Times* was prodding the LADWP to find an alternative solution that would preserve the Mono Lake Ecosystem. *See,* Editorial, *At Last: A Solution for Mono Lake,* Los Angeles Times, Aug. 23, 1980, § II at 6. Part ii, Page 6.
[466] Hart, *supra* at note 4, 132-33.
[467] *Id.* at 144.

Legislature sat pending the outcome of the lake level debate.[468] In 1992 Mayor Bradley's office suggested that the parties apply for the legislative funding without resolving the lake level question but with the proviso that any water developed with the legislative funding would be credited to the Mono Lake ecosystem.[469] To sweeten the deal, the City of Los Angeles would agree to a moratorium of all diversions from the Mono Lake tributaries until the SWRCB reach its final resolution on the Los Angeles permit.[470] Although the LADWP ultimately vetoed the proposal,[471] this proposal made by the City of Los Angeles serves as yet another example of Sabel and Simon's "rolling rule regime" in which the parties explored and developed a series of new options and tentative agreements based on an ecosystem preservation outcome, outcomes, which just a few short years ago were beyond the realm of possibility.[472]

Another factor that aided the search for replacement water for the Mono Lake ecosystem and ultimately the development of a remedy was Los Angeles' growing interest in water reclamation spurred by the need for a sewage system upgrade.[473] Historically Los Angeles dumped wastewater effluent into the Pacific. Los Angeles was under continuous pressure to improve its sewage treatment to reduce effluent pollutants.

---

[468] *Id.* at 146. While the parties argued over the lake level, funding from the $60 million allocation were being diverted by the California Legislature for other purposes. *Id.*
[469] *Id.*
[470] *Id.*
[471] *Id.* at 147.
[472] Throughout the late 80's and early 90's a number of alternative water sources to replace waters from the Mono Lake tributaries were explored including exportation from the Sacramento/San Joaquin Delta, an option rejected by environmental groups. *Id.* Another option explored was water marketing, a scheme that involved purchasing water rights from farmers in the Central Valley where soil was "tainted with toxic selenium" and shifting that water to Los Angeles. *Id.* at 148.
[473] *Id.* at 148.

By 1991 water from local sewage treatment plants was almost potable.[474] The combined reclamation projects could yield upwards of 100,000 acre-feet of water. [475] But using this water for irrigation, to recharge groundwater aquifers or for other non-consumptive uses required an increase in reclamation capacity and the construction of transmission infrastructure.[476]

In a partnership, previously unimaginable in 1983, the LADWP and the Mono Lake Committee jointly, approached Congress for a federal appropriation to construct the necessary infrastructure to develop and transmit reclaimed water. An appropriation for the infrastructure project was included in the 1992 Federal Reclamation Projects Authorization and Adjustment Act.[477] Together the LADWP and the Mono Lake Committee found funding for the largest water reclamation project in the United States,[478] a project that would allow Los Angeles to meet its water needs without damaging other ecosystems while returning water to the Mono Lake ecosystem.

Within three years after the *National Audubon* and trout cases were consolidated in Judge Finney's court the stakeholders had developed a series of viable, ecosystem neutral water options for Los Angeles, the Mono Lake Committee had been incorporated into the City of Los Angeles' political decision making structure, and the LADWP, the City of Los Angeles and the Mono Lake Committee had developed enough trust in each other to jointly approach congress to find a partial resolution of the water supply issue – a

---

[474] *Id.*
[475] *Id.*
[476] Id.
[477] *Id. See also,* The Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575 Title XVI, § 1606 (1992) available at http://thomas.loc.gov/cgi-bin/query/F?c102:9:./temp/~c102J5j70q:e221780: .
[478] Hart, *supra* note 4, at 148.

prime example of the types of remedies developed through the rolling rule regime process and the modification of the political infrastructure in Los Angeles City Hall.

Resolution of the appropriate lake level, however, remained a roadblock. Then in May 1993 the SWRCB issued the *Draft Environmental Impact Report for the Review of Mono Basin Water Rights of the City of Los Angeles* (DEIR). The DEIR identified 6,383 feet as an "environmentally superior alternative" lake level for Mono Lake but concluded "[b]ased on an assessment of unmitigable cumulative impacts relative to pre-diversion conditions, the 6,390 foot alternative appears to be the environmentally superior [lake level] alternative."[479] The DEIR further concluded that the impact of the 6,390 lake level on the Los Angeles water supply would be "less-than-significant" if the LADWP adopted mitigation measures including conservation and best management practices to reduce water use.[480] The finding was jolting to the LADWP, which had continued to insist that 6,377 feet was the appropriate average lake level.[481] But the LADWP had no allies.[482] And even though the parties had not reached agreement about the appropriate

[479] *Draft Environmental Impact Report for the Review of Mono Basin Water Rights of the City of Los Angeles,* California State Water Resources Control Board, S-11 (May 1993) (Available at http://www.monobasinresearch.org/onlinereports/deir1.htm last visited April 23, 2009).
[480] *Id.* at 3L28-29. Mitigation measures recommended in the DEIR included application for AB444 funding to develop replacement water through reclamation, use of HR 429 funding to develop reclamation projects, development of demand-side reductions from water conservation programs, monitor compliance with best management practices, and recovery of storm runoff. *Id.* at 3L-27-28.
[481] In truth all of the parties always spoke of lake levels in ranges. The low level end of the range was the drought level and the upper level the wet year level but the focus of most lake level discussions was on the average lake level which was between the high and low levels. Hart *supra* note 4, at 160-163. The mid-level recommended by the LADWP (6,377 feet) would have maintained the status quo as it existed in 1992, the levels recommended by the DEIR would require returning Mono Lake to either 1989 or the 1940 lake levels. *Id.*
[482] By July 1993, the EPA, U.S. Forest Service and California Department of Fish and Game all supported a 6,390-foot lake level. *Id.* at 162. The U.S. Fish and Wildlife announced that if lake levels dropped below 6,390 it would list the brine shrimp as a threatened species. *Id.* And even the Los Angeles City Council's Commerce, Energy and Natural Resources Committee expressed concern about continuing to fund litigation when the money could be spent on water reclamation projects. *Id.* at 162.

lake level when the SWRCB commenced it's hearing on the LADWP permit in the summer of 1993[483] even the LADWP now recognized that the law required sufficient water flows into Mono Lake to support fish hatcheries and the Mono Lake ecosystem.[484] The fight had essentially devolved into a factual dispute over the needs of the ecosystem – could the ecosystem survive at a lake level of 6,377, the LADWP's preferred lake level, or was 6,390 the appropriate level for the ecosystem.

The SWRCB hearing had an interesting side benefit. Hart reports "[a]s the testimony trundled on toward Christmas, with no end in sight, a curious thing happened: the contending lawyers and witnesses, board staffers and onlookers, began to form a community, a sort of village."[485] Although the hearings did not constitute the traditional negotiation process envisioned by Sabel and Simon it was the means by which Judge Finney proposed resolving the underlying litigation. The hearing process itself forced daily interaction among stakeholders over five months and this interaction further facilitated the building of relationships and trust between stakeholders.

Thus it was that when, shortly before Christmas 1993, the City pulled the Mono Lake Committee and the LADWP together to again try to broker a deal for the water development funding offered by the California Legislature the parties agreed to try to

---

[483] The Water Resource Board Hearings on the Los Angeles Water Rights License was conducted in two phases. The first phase provided an opportunity for interested parties to present "non-evidentiary policy statements." 1994 Water Rights Decision, at14-15 (Sept. 28, 1993). The second phase was a formal evidentiary hearing. *Id.* In total the Water Resources Board hearing included 40 days of testimony from over125 witnesses and 1,000 exhibits. *Id.* The five month evidentiary hearing commenced in October 1993 and concluded in February 1994 and was followed by a briefing schedule that extended into April 1994. *Id.*

[484] Hart *supra* note 4, at 164-66.

[485] *Id.* at 167.

broker a deal without resolving the lake level issue.[486] In the end the Mono Lake Committee agreed to make a joint reclamation funding request and the LADWP agreed to "abandon its claim to at least 41,000 acre feet per year of the Mono Basin water."[487] This was tantamount to the LADWP relinquishing approximately one half of its annual diversion from the Mono Lake tributaries allowing this water to flow into Mono Lake for restoration purposes. The issue of the appropriate lake level was left to the SWRCB for resolution through the hearing process.[488]

In retrospect both the growing public opposition to the LADWP either or water scarcity frame and the court's *National Audubon* decision made it apparent to the City of Los Angeles and to some lesser degree to the LADWP that the status quo was dead and that Los Angeles was moving into uncharted political waters evidence of both the *veil* and *status quo* effect of the litigation and political mobilization of the litigation. This uncertainty created an incentive for the City of Los Angeles to explore alternate methods to meet its water needs – methods that would not entail ecosystem degradation. The *status quo* effect of the litigation and resulting mobilization of the litigation also induced the City's political structure, responding to changed constituency perspectives, to pressure the LADWP to recognize a changed reality.

These changes also induced the City to encourage the LADWP and the Mono Lake Committee to explore together new paradigms that would assure water both to the

---

[486] *Id.* at 168-69.
[487] *Id.* at 169. Between 1974 and 1989 the LADWP diverted on average 83,000 acre-feet of water from the Mono Lake tributaries per year. 1994 Water Right Decision 1631, at 6.
[488] *Id.* Although the LADWP had not agreed to a lake level, in hindsight it seems that the practical effect of the agreement to relinquish 41,000 acre feet of water per year was a concession by the LADWP that the lake level would be greater than 6,377 feet.

Mono Lake ecosystem and to the City of Los Angeles. In this process not only was the Mono Lake Committee and ecosystem interests assured greater voice in how water would be allocated between the natural and human systems, but the Mono Lake Committee's willingness to explore new paradigms while the LADWP came to the table reluctantly increased the Mono Lake's credibility as a can do partner in the water allocation decision making process.

Indeed, political landscape had so significantly changed that when on September 28, 1994, the SWRCB issued its decision calling for a lake level of 6,390 feet[489] the sticking point for the LADWP was not the lake level, which had indirectly been resolved in December 2003, but the restoration requirements.[490] And although LADWP professional staff favored contesting the SWRCB Decision the LADWP had lost virtually all of its historic allies including the Los Angeles City Council, the Mayor's office and the Water and Power Commissioners.[491] Even LADWP executive staff was disinclined to contest the decision – LADWP professional staff and attorney's stood alone in their desire to continue the contest.[492] The once powerful LADWP was essentially politically isolated evidencing a change in the water allocation decision-making structure. And in an ironic twist of events, it was the Mono Lake Committee that came forward to save the

[489] 1994 Water Rights Decision 1631, at 155. In truth setting the lake level issue was more complex than simply setting a lake level. The lake had to be restored to the 6,390-foot level. To accomplish this the Water Resources Board established a complex diversion scheme that essentially prohibited the LADWP from diverting any water until the lake reached 6,377 feet; thereafter the LADWP was permitted limited diversions until the lake reached 6,391 feet. *Id.* at 156-157, 203-204. The Water Resources Board's Decision also established dry and wet year flows for the Mono Lake tributaries. *Id.* at 196-200. These diversion limitations would essentially provide 30,800 acre-feet a year for Mono Lake. Hart, *supra* note 4, at 171. Finally, the Water Board's Decision ordered the LADWP to undertake extensive habitat restoration on the Mono Lake tributaries and to develop a waterfowl restoration plan for the Mono Lake Water Basin. 1994 Water Rights Decision 1631, at 204-206

[490] Hart, *supra* note 4, at 173.

[491] *Id.*

[492] *Id.*

day for the LADWP when, the day after the SWRCB Decision was issued Martha Davis, Executive Director of the Mono Lake Committee, sat down with LADWP Commissioners and agreed to help the LADWP secure trout stream restoration funding in exchange for assurances that the LADWP would not appeal the SWRCB Decision[493] an event that had seemed unimaginable in 1978 at the LADWP-Mono Lake Committee pretrial meeting. The agency that had once informed the Mono Lake Committee that it was prepared to outlast and out-litigate a group of "granola tree huggers" was now working with the Mono Lake Committee towards ecosystem restoration.

But what of the political power that permitted the LADWP to dominate water allocation determinations in California and that lead to the decision permitting the LADWP to divert all waters from the Mono Lake ecosystem? In the words of the *L.A. Times* editorial board:

> It is time to give up the Mono Lake battle, to move on and try to replace the lost water with reclaimed water and through conservation. The Metropolitan Water District says it can make up for much of the loss. But the possibility of more drought, federal and state requirements to increase fresh-water flows to repair environmental damage in the Sacramento Delta and other uncertainties mean the city should not lean too heavily on this old, reliable source [the LADWP]. As ever, water is the future of arid Southern California. But what is needed at the LADWP is not just more water, but more vision, leadership and courage.[494]

More importantly, the Mono Lake Committee had won a structural victory for not only did it have an ongoing voice in water allocation decisions in Los Angels but it had, through the *National Audubon* decision and a changed public ethos assured that the ecosystem would be considered in the context of the state's public trust

---

[493] *Id.* at 174.
[494] Editorial, *DWP's Terrible Case of Mono Mayor Riordan Works to Bring City Water Policies in the Modern Age,* L.A. Times Sept. 24, 1994 (Metro) B7.

obligation in future water allocation permitting decisions made by the SWRCB.[495]

VI. SOME FINAL INSIGHTS ABOUT DESTABILIZATING LITIGATION & ECOSYSTEM RESTORATION

Did law and litigation matter to the Mono Lake ecosystem and if so is litigation an effective tool to promote the protection and restoration of water based ecosystems? Today the elevation of Mono Lake is 6,382 feet, ten feet above its historic low, nine feet below the 6,391-foot level established by the SWRCB[496] and nineteen feet below pre-diversion levels. Between 1990 and 1994, shortly after the court of appeals issued its decision in *Cal Trout II*[497] the Restoration Technical Committee began restoration of Rush and Lee Vining Creeks.[498] Restoration efforts intensified after the SWRCB issued its 1994 decision setting target lake levels, establishing minimum and annual peak flows for the Mono Lake tributaries and ordering the LADWP to commence restoration of both Mono Lake and its tributaries pursuant to an approved restoration plan.[499] Today the parties have taken significant steps towards ecosystem restoration.[500] What is even more remarkable is that restoration has been accomplished without extracting water from other ecosystems to replace the reduction in waters going to Los Angeles as a result of restoration. Thus it seems clear that the answer to the question "did law matter to the Mono Lake ecosystem" must be yes, but in a more complex manner than anticipated by

---

[495] *National Audubon Society,* 658 P.2d at 719-21 (holding the state has an ongoing public trust interest in its navigable waters which prevents appropriation of water in a manner harmful to the interests protected by the public trust including the state's interest in ecosystems in their natural state).
[496] *See,* http://www.monolake.org/ last visited March 31, 2009.
[497] *California Trout, Inc. v. Superior Court of Sacramento,* 266 Cal. Rptr. 788, 802 (Cal. Ct. Ap. 1990):
[498] *See,* http://www.monolake.org/mlc/restochr last visited March 31, 2009.
[499] *Id., see also* 1994 Water Board Decision, at 1631
[500] *See http://www.monolake.org/mlc/restochr* for a chronology of the restoration of the Mono Lake ecosystem.

destabilization theorists. While the Mono Lake Committee credits both the initial public trust litigation and the trout litigation for the restoration outcome[501] in truth, as this analysis of the historic narrative and litigation history of the events leading to the Mono Lake ecosystem restoration suggests, the success of Mono Lake ecosystem restoration was dependent on far more than litigation alone.

So what does the Mono Lake case tell the environmental practitioner, the social scientist, and destabilization theorists about the ability of litigation to change political and social structures to protect ecosystems? At the outset, the lessons from Mono Lake suggest that if the Sabel and Simon destabilization litigation model is to be a successful tool for promoting changes in political and social structures necessary for ecosystem protection and restoration litigation must be approached as a political resource mobilized by environmental organizations as part of a larger strategy to promote ecological as well as political and social change. This requires a strategic litigant willing to look beyond the desired environmental outcome of the litigation – a litigant willing to focus on the change in the underlying social and political structure that made the initial decision resulting in ecological degradation.

The case of Mono Lake suggests that the goal of change litigation should be twofold: (1) alteration of the ecological outcome and (2) alteration of underlying political and social environmental decision making structures. To accomplish this end, the litigant must look beyond correction of the "environmental wrong" through a consent decree to the necessary changes in political and social structures that would result in long term ecosystem protection. In short, accomplishing and sustaining long term ecosystem

[501] *See* http://www.monolake.org/mlc/restoration last visited on March 31, 2009.

protection requires the litigant to explore how destabilizing litigation can be mobilized in conjunction with other strategies to facilitate meaningful change. For as the tale Mono Lake ecosystem restoration efforts tells us – had the Mono Lake Committee simply relied on the *National Audubon* litigation to motivate the LADWP to change it is far from certain what if anything would have been accomplished. It was the *National Audubon* decision in conjunction with resource mobilization including ongoing framing and the secondary trout litigation that pushed the parties to negotiate a flexible remedy in compliance with the *National Audubon* decision and which ultimately led to ecosystem restoration for Mono Lake. More importantly, from the perspective of water-based ecosystems in California it was the use of the *National Audubon* court order as a political resource in the context of political mobilization of other resources that resulted in the development of a flexible remedy that modified California's water allocation rules and decision making structures in a manner that gave voice to natural systems.

Thus the primary lessons from Mono Lake indicate that effective use of Sable and Simon's destabilization theory to promote change requires an intermingling of legal strategy and political mobilization. More specifically, Mono Lake suggests that effective destabilization in environmental litigation is facilitated by: (1) the existence of an active social movement, (2) the ability of the social movement to effectively use framing to build support for the litigation and the willingness and ability to use the litigation as a framing resource to foster ecosystem and political outcomes, (3) the use of secondary litigation to complete the job and (4) the ability to develop flexible performance standards that permit a systems approach to environmental management.

A. The Litigant Matters

The Mono Lake case supports Scheingold and McCann's argument that destabilizing, change litigation is most successful if brought by SMOs that aim for broader social and political transformation than do traditional litigants because SMOs are more likely to seek the structural changes that bring access to policy making forums. The observation that organizational litigants make a difference appears to be borne out by many of the cases sited by Sabel and Simon in support of destabilization theory. A brief overview of these cases indicates that many were brought by either SMOs or groups of plaintiff's represented by a single attorney indicating some type of organized approach to the litigation and its underlying purpose.[502]

The importance of the SMO as litigant is illustrated by the Mono Lake case. The complex strategy that led to ecosystem restoration at Mono Lake required extensive financial resources, the development of and access to complex networks, ongoing framing to develop support from both bystanders and supporters and a leadership succession plan to accommodate the changing interests and availability of early Mono Lake Committee leaders Winkler and Gaines. Not only was it necessary to garner these resources but these resources had to be maintained over the twenty years it took to negotiate a restoration agreement and to accomplish the changes in California's water allocation scheme that would eventually result in the recognition of water ecosystem

[502] *See e.g., Rizzo v. Goode,* 423 U.S. 362 (1976)(class action brought by brought by individuals and organizations alleging police brutality); *Sheppard v. Phoenix,* 210 F. Supp. 2d 450 (S.D.N.Y. 2002)(action brought by current and former prison inmates to challenge use of force practices in New York City jails); and *New York State Association for Retarded Children v. Carey,* 393 F. Supp. 715 (E.D.N.Y. 1975).

values in water appropriation decisions a task which would have been difficult for a single citizen litigant.

The Mono Lake case also supports Galanter's theory[503] that organizations with access to ongoing resources are more successful at leveraging litigation to bring about structural social change, especially where accomplishing change requires ongoing and repeated litigation and the development of public support for a changed environmental paradigm. The characteristics of the Mono Lake case study comport with the observation of social scientists that successful litigants are generally those with a long term view that think strategically about the outcomes of the litigation and implications of the litigation beyond the courthouse and those types of litigants tend for the most part to be organizations or litigants that regularly appear in court.[504]

However, the existence of an SMO as litigant does not, standing alone, insure that successful destabilizing litigation will occur. It is equally apparent that how the SMO leverages its resources, including litigation, has a signification bearing on whether litigation will result in destabilization. Furthermore, as the discussion of framing below suggests, the type of SMO bringing the litigation may also play a role in the ability of the SMO to leverage destabilizing change. The use of framing in the Mono Lake case raises the question: what resources must the SMO have access to successfully mobilize litigation in support of destabilizing change?

[503] *See, supra* notes 230-31 (discussing the importance of repeat players in change litigation).
[504] *See discussion, supra* note 233.

B. Framing – Fertilizing the Ground

The Mono Lake experience also demonstrates that destabilizing change is facilitated when litigation is accompanied by political mobilization brought about by resource mobilization and framing. The framing process is a reflexive process and occurs when resources are mobilized to frame an issue for bystanders and potential supporters. As McCann observed framing plays a vital function not only in building the environmental movement or SMO but also in preparing "the field" for successful litigation by increasing public support. Pre-litigation it appears that framing plays three important functions essential to preparing the way for destabilization. At these early stages framing can: (1) build support for ecosystem restoration across the population, (2) discredit historic frames that lead to ecosystem degradation and (3) provide preliminary legitimacy to the SMO's legal claim of right.

These lessons were borne out at Mono Lake where the Mono Lake Committee intuitively prepared the field for successful destabilizing litigation by consciously building a new water frame designed to shift the public understanding from an either/or frame of economic growth or ecosystem destruction to an ethical/alternate path frame built premised on ecosystem destruction caused by water waste – a frame that found resonance in the national press. This frame supported the public trust claim of right – that the state had an affirmative duty to take the state's public trust interest in the Mono Lake ecosystem into consideration in the water allocation scheme.

Early framing also permitted the SMO to make use of a more flexible, albeit more controversial legal standard. Sabel and Simon suggest that effective destabilization

claims are claims premised on the failure of the public agency to meet an uncontroversial or widely accepted performance standard.[505] In environmental law, a silo based system of laws, there are few performance standards designed to effectively protect ecosystems, and those that do exist, such as the public trust doctrine, are hardly non-controversial[506]. Yet in the Mono Lake case, the destabilizing change litigation was premised on a legal theory, which though ancient, had never been extended to inland tributaries of navigable waters nor applied to ecosystem protection and which, in the view of Los Angeles was intended to deprive the city of "valid water rights it has held for more than a half a century."[507] Arguably, the acceptability of the public trust doctrine as a legal theory was premised on a claim of right to a healthy ecosystem on behalf of the citizens. Support for this claim of right was developed through extensive framing that built public acceptance in both the media and among the citizens of California citizens and was ultimately recognized by legal scholars when the University of California at Davis held a day long seminar on the use of the public trust doctrine featuring the Mono Lake attorneys. This framing helped build legitimacy for the Mono Lake Committee legal argument at the time the complaint was filed and suggests that framing can be used prior to litigation to build support for an otherwise controversial legal standard.

---

[505] Sabel & Simon, *supra* note 113, at 1063.

[506] One need only peruse the range of law review articles published on the public trust doctrine since 1970 to glimpse the degree of controversy surrounding the public trust doctrine. *See e.g.* Hope M. Babvock, *The Public Trust Doctrine What a Tall Tale They Tell,* 61 S.C.L.Rev. 393 (2009); Barton H. Thompson, Jr., *The Public Trust Doctrine A Conservative Reconstruction & Defense,* 15 Southeast Envtl. L. J. 47 (2006); Michael C. Blumm, *Renouncing the Public Trust Doctrine: An assessment of the Validity of Idaho House Bill 794,* 24 Ecology L. Q. 461 (1997); Darren K. Cottriel, *The Right to Hunt in the Twenty-first Century: Can the Public Trust Doctrine Save an American Tradition,* 27 Pac. L.J. 1235 (2996); and Thomas A. Campbell, *The Public Trust, What's it Worth,* 34 Nat. Resources J. 73 (1994).

[507] Editorial, *Water and Power in our Future,* L.A. Times, Feb. 11, 1980 §II at 6. *See also,* Editorial, *Water Revolution,* L.A. Times, Feb. 20, 1983 IV at 4 (discussing the controversial nature of the court's public trust ruling).

The Mono Lake case also highlights the importance of using the litigation itself as a framing resource. As McCann notes, simply crafting a complaint can mobilize the law into an assertion of a lawful claim of right that can be used to transform power relationships within politics and can legitimize the SMO's legal claim. And indeed it might be argued that the destabilizing affect of litigation for Mono Lake was as much a result of using the litigation as a framing tool throughout the life of the litigation as was the destabilizing impact of the litigation itself. The Mono Lake Committee began using the litigation as part of its framing process to illustrate a legitimate claim of right as soon as the litigation was filed. By the time the California Supreme Court issued its landmark *National Audubon* decision in 1983, the Mono Lake Committee claim of right had received legitimacy in the national press, in major portions of the legal community, among political forces in Sacramento, and among citizens across the state – and although inroads in the City of Los Angeles were harder to find even the LADWP grudgingly admitted that the Mono Lake Committee's framing efforts had done a decent job of mobilizing the public and creating public acceptance of a claim of right to a healthy Mono Lake ecosystem.

Nor does the importance of framing diminish after the court has issued its determination, for as Stryker and Harris note, the mere fact that the court has issued an order does not in and of itself mean that the court order will be enforced or resulted in destabilizing change.[508] The case of Mono Lake case supports the conclusion that post litigation, the ability and willingness of an SMO to use a court's legal ruling and decree beyond the court house to support a new frame appears to be central to successful,

[508] *See discussion, supra* note 210.

destabilizing litigation. Like the proverbial mustard seed there is little advantage to an advantageous legal determination if nothing is done with it, it may sprout institutional change, it may not.

This need for ongoing framing post litigation is clearly illustrated by the Mono Lake case. For although the California Supreme Court issued its *National Audubon* decision in 1983 the Federal District Court made no effort to enforce the determination, instead the matter languished in Federal Court for another six years. The transformation of the *National Audubon* decision to a destabilization tool was a tribute to the Mono Lake Committee's decision to use the court order as a framing tool to continue to build public support for a restored ecosystem and the Mono Lake Committee's willingness to undertake the secondary trout litigation that would ultimately become the forum for implementation of the *National Audubon* court order.

Conversely, even though the *National Audubon* court order was not immediately implemented the court order gave significant legitimacy to the Mono Lake Committee's frame. A legitimacy that was recognized by the *L.A. Times,* an historical supporter of the LADWP, when in 1989 it observed "Los Angeles should realize by now that it never will win its dogged legal battle to continue its historic diversion of eastern Sierra streams that naturally flow into Mono Lake . . . At some point the decline must be halted."[509] It is doubtful that a court order alone could have instigated this shift absent active framing and acceptance of this new frame by Californians, particularly Los Angeles residents. But it is likewise true that the court order itself validated the Mono Lake Committee's claim of

[509] Editorial, *Halt the Decline of Mono Lake,* L.A. Times, June 17, 1989 Section II at 4.

right giving important legitimacy to the Mono Lake Committee's frame and this legitimacy increased the Mono Lake Committee's political power and voice.

Additionally, in recognizing the Mono Lake Committee's claim of right the *National Audubon* Court ruptured the old water decision-making paradigm casting both the LADWP, the SWRCB, and California water law into a state of state of uncertainty, for no longer can it be presumed that trust interests are subsumed in California's water allocation schemes, at the very least the SWRCB had to separately consider the public trust interest in a healthy ecosystem in the allocation process – and this required giving voice to the ecosystem, the very frame advocated by the Mono Lake Committee.

In short, these events suggest that the success of litigation in destabilizing change that transforms environmental outcomes and the structures that create them is dependent not only on successful litigation but on the SMOs willingness to use litigation outcomes to frame the environmental demands for movement members and bystanders as a claim of right, thereby, maintaining pressure on political and social structures to adopt a changed paradigm in their operating structures – the transformation of the structure that made the challenged environmental decision.

C. Secondary Litigation – Once May not be Enough

A third important lesson from the Mono Lake case is that once may not be enough. From a legal perspective the Mono Lake Committee was wildly successful in its *National Audubon*[510] litigation but the litigation did little to move the LADWP, change the immediate political landscape, or provide temporary relief to the ecosystem. It took

[510] *National Audubon,* 658 P. 2d 709.

the trout litigation and the resulting temporary restraining order to move the LADWP to negotiate a resolution and to provide temporary relief to the ecosystem in the form of an order mandating the LADWP to maintain minimum flows in the Mono Lake tributaries.

The Mono Lake case supports the observation made by McCann and others, that a court order may provide important expectations and incentives for reform[511] but that court orders are not, in and of themselves self-executing. Those court orders that are most effective in promoting change are those that are executed, that provide some inducement (either positive or negative) to the parties to perform, and those that are accompanied by ongoing court oversight.[512] One method for providing negative inducement as illustrated by the Mono Lake case is secondary litigation.

Arguably it was the secondary trout litigation that prodded the California court and the parties into action when, in 1984, the Mono Lake Committee and California Trout sued to sustain water in the Mono Lake tributaries for trout populations. Only then did the Mono Lake Committee get its injunctive relief for the Lake. This injunctive relief had three immediate impacts: (1) it insured much needed water for Mono Lake, (2) it created actual impacts that the LADWP was forced to acknowledge – a reduction in its water allocation and (3) it gave rise to the uncertainty that made the *status quo* impact real for the LADWP. For the first time the LADWP was forced to accept reduced water allocations for the benefit of the environment – it could no longer be certain that it would receive its full allocation of water from the Mono Lake tributaries. This uncertainty was

[511] *Supra* note 417.
[512] *Supra* notes 419-424 and accompanying text.

magnified when, in 1989, the matter was consolidated in Judge Finney's court.[513] Now there was both incentive to act in the face of uncertainty and ongoing court oversight insuring that if the parties did not act, the court would and did when it issued a decree to the SWRCB to apply both the public trust doctrine and the holding from the trout cases to the LADWP's allocation license.[514]

The Mono Lake case also suggests that ongoing court oversight and time, in conjunction with uncertainty, may be more essential to destabilizing litigation than a court ordered negotiation. It is interesting to note that Judge Finney did not order the parties to negotiate a remedy, rather he ordered the SWRCB to implement the *National Audubon* and *Trout I* decisions by balancing the public trust interest with the water needs of the LADWP and the minimum stream flows needs of the trout populations. To support this decision-making process the SWRCB commenced a 3-4 year study followed by extensive permit hearings. The court maintained oversight over the process pending the SWRCB's final decision. The court's order left the LADWP in a state of uncertainty; it could no longer depend on the outcome of the water allocation process. And ongoing court oversight insured that the parties would not relapse to the status quo. In light of this uncertainty the LADWP entered into protracted negotiations with the Mono Lake Committee. The outcome of the negotiation included agreed upon lake levels and restoration of the Mono Lake ecosystem, a changed water use and acquisition paradigm for the city of Los Angeles that relied extensively on conservation and re-use, and the acceptance of new natural system values incorporated in California's water allocation

[513] *Supra* note 407.
[514] *Supra* notes 439-441 and accompanying text.

system – a complex and flexible remedy as befitting a complex ecosystem. This outcome was essentially negotiated outside the courtroom while the SWRCB prepared its documentation and commenced the LADWP permit hearing. And while the Court or the SWRCB could have squelched the agreement it is noteworthy that the parties were not ordered to negotiate a resolution, rather it was the uncertainty – the knowledge that the status quo was no longer possible (status quo effect), which brought with it an uncertain future (veil effect) that pushed the LADWP to the negotiating table.

D. Flexible Remedy – A Necessity for Ecosystem Restoration

Ecosystems are complex systems and restoring an ecosystem requires working across large landscapes in the face of scientific uncertainty.[515] Given that ecosystem science and management for complex systems is uncertain, a degree of policy flexibility is required as scenarios are tested and accepted or rejected. Decisions must be amenable to modification "as new scientific knowledge reveals that the previously established plan was misguided, is deficient or needs to be adjusted."[516]

Ecosystem restoration presents "metaproblems" intermingling both human and natural systems and reaches across a multitude of stakeholders some of who, like the Mono Lake Committee, have a vested interest in healthy ecosystems. These stakeholders are highly diverse and fragmented.[517] Yet "no one organization, even in the case of the least complex ecosystems, can solve the problems of ecosystem management

---

[515] Doyle, *supra* note 442, at xii-xiii.
[516] *Id.* at xiii.
[517] For a general discussion of stakeholders and ecosystem restoration *see,* Frances Westly, *Governing Design: The Management of Social Systems and Ecosystems Management* in *Barriers & Bridges: to the Renewal of Ecosystems and Institutions* 391, 406-07 (Lance Gunderson, C.S. Holling & Stephen S. Light, ed. 1995).

unilaterally."[518] Nor is there necessarily equal political power among stakeholders or agreement about the need for or nature of restoration. Thus, it appears that successful ecosystem restoration requires collaborative, flexible decision-making in a process designed to give meaningful voice to divergent stakeholders, that has public support and which provides a mechanism for resolving disputes amongst stakeholders.[519]

As ecosystems go, one might argue that Mono Lake restoration was far less complex then restoring the Everglades or the Great Lakes ecosystems, but even in the Mono Lake case it was recognized that ecosystem restoration required managing the interaction of multiple systems and identifying appropriate water levels for trout and lake levels that support brine shrimp and protected nesting areas. Added to this complexity was the need to find replacement water supply or to reduce water needs in Los Angeles. And on top of this complexity, the existing California water appropriation structure, as managed by the SWRCB, did not recognize the need for restoration nor was its decision-making process designed to address restoration challenges or incorporate collaborative decision-making.

And although the Mono Lake Committee went to court to rectify an environmental wrong, it unwittingly used the flexible remedy of destabilizing litigation to help restore the Mono Lake ecosystem. It used the court not only to give voice to its claimed wrong, but also to establish standing for its voice on behalf of the ecosystem and to increase its political power – political power which was necessary during the negotiation of the flexible remedy. The Mono Lake Committee together with the City of

---

[518] *Id.*
[519] *See generally, Id*. 406-19 and Doyle, *supra* note 442, at 294-98.

Los Angeles and the LADWP used the time and uncertainty created by the court decision to explore alternate water sources and restoration scenarios all while the court provided the oversight necessary to keep the parties at the table. Thus the Mono Lake case serves as an illustration of how a SMO might strategically use the flexible remedy of destabilizing litigation as a political resource to promote the structural change necessary for successful ecosystem restoration.

V. CONCLUSION

As this case study of the Mono Lake restoration indicates, the use of litigation to protect ecosystems can be an important and effective tool. To better understand the effectiveness of that tool, however, requires a broader understanding of the interrelationship between Sabel and Simon's destabilization theory and social movement theory in practice.

Recently a colleague, an environmental litigator, bemoaned the fact that the day of "environmental change litigation" is gone a view shared in part by Professor Tarlock in his much discussed article *The Future of Environmental 'Rule of Law' Litigation.*[520] Indeed Tarlock suggests that the role of litigation in improving environmental performance is limited in part because while "environmental lawyers may have thought Unger [and destabilization] . . . they have litigated H.L. A. Hart"[521] and because

[520] A. Dan Tarlock, *The Future of Environmental 'Rule of Law' Litigation,* 17 Pace Envtl. L. Rev. 237 (200). *See also,* A. Dan Tarlock, *the Future of 'Rule of Law' Litigation and There is One,* 19 Pace Envtl L. Rev. 611 (2002).
[521] Tarlock (2000), *supra* note 512 at 252.

environmental law is now a mature area of law which relies heavily on collaborative decision making which is ill suited to a rule of law approach to litigation.[522]

But this argument assumes that we must continue to operate within present legal constructs. And while Tarlock and others recognize that the complex ecosystem challenges we face call for new collaborative approaches to environmental decision-making based on a claim of right to shared environmental resources operating within complex human and natural systems – a construct not incorporated in our present system of environmental laws and regulations they do not see a role for law or litigation in fostering change. They have, as Scheingold suggests approached the law from a conventional perspective and not as a political resource to be mobilized to promote changer.[523] But the lessons from Mono Lake tell another story, they suggest that the strategic use of litigation can provide the tools and framework necessary to protect ecosystems and the services they provide to human wellbeing.

[522] *Id.* at 255-56.
[523] *Supra* notes 177-188 and accompanying text.

CHAPTER 4: DID LAW MATTER TO EVERGLADES RESTORATION?

The Everglades "problem" has been "settled" more often than the Arab-Israeli conflict . . .The Everglades' dispute offers high notoriety, enduring fame and self-satisfaction to any public figure who can lay claim to solving it. It's complexities, long time frames, and slow feedback gives every politician and lawyers that serve them the win-win mythology they prefer: "We can have big agriculture and water and the Everglades if you stick with me for the next ten years."[1]

– William H. Rodgers, Jr.

I. INTRODOUCTION – WHY ECOSYSTEMS[2] MATTER

In 2005 the Millennium Ecosystem Assessment Board reported: "human activity is putting such strain on the natural functions of the Earth that the ability of the planet's ecosystem to sustain future generations can no longer be taken for granted"[3] causing irreversible losses to the diversity of life on our planet and the degradation of ecosystem services necessary to human well-being including: provisioning services[4], regulating services[5], cultural services[6], and supporting services[7]. The destruction of aquatic

[1] William H. Rodgers, *Miccousukee Indians and Environmental Law: A Confederacy of Hope,* 31 ELR 10918, 10922 (August 2001).

[2] The definition of what constitutes an ecosystem is subject to debate, this article, however, will use A.G. Tansley's definition. Tansley defines an ecosystem as the ecological system or biological community that occurs in a given locale and the physical and chemical factors that make up the system's non-living or abiotic environment. A.G. Tansley, *The Use and Abuse of Vegetational Concepts and Terms,* 16 Ecology 284 (July 1935)

[3] Millennium Ecosystem Assessment Board, *Living Beyond our Means: Natural Assets and Human Well-Being, 5 (Jose Sarukhan and Anne Whyte ed., 2005).*

[4] Provisioning services provided by ecosystems include the production of food, fiber, fuel, genetic materials, medicinal materials, fresh water, and energy. *Id.* at 40.

[5] Ecosystems regulate air quality, climate, water quality, the timing of runoff, groundwater recharge, flooding, the treatment of waste and pollunation. They also provide, disease, pest and natural hazard regulation. *Id.*

[6] Ecosystems are integrally related to the spiritual and religious values across numerous cultures. Additionally, ecosystems increase humans understanding of systems, are closely linked to our sense of place and our cultural heritage. Ecosystems also enrich our educational, aesthetic, and recreational experience. *Id.*

[7] Ecosystems are essential to the support of earth's systems. They form soils, provide photosynthesis, and cycle nutrients and water. *Id.*

ecosystems[8] within watersheds,[9] can adversely affect human health, security and welfare. The Everglades ecosystem, for example, serves as a natural purification system (a regulatory function) purifying water in the Biscayne aquifer the primary drinking water source for south Florida (an ecosystem provisioning function).[10] So linked are healthy natural systems to human systems that preservation of the Everglades ecosystem is a necessary condition for the preservation of South Florida's drinking water supply and its economic and social well-being.

To sustain ecosystems such as the Everglades, natural scientists have turned to the concepts of ecosystem management[11] and adaptive management. Ecosystem management focuses on natural systems within geographic parameters such as watersheds and requires land managers to "identify and analyze the full impact, both cumulatively and geographically, of management proposals on existing resource systems to minimize the disruption or fragmentation of ecosystem processes."[12] Adaptive management, on the other hand, embodies the adjustment of natural and social systems in

---

[8] Ecosystems exist in hierarchies, thus a pond may support a localized ecosystem but this local ecosystem exists within larger ecosystems situated within the watershed. A watershed may support a number of ecosystems. Heinz Center for Science, Economics and the Environment, *The State of the Nation's Ecosystems: Measuring the Lands, Waters and Living Resources of the United States,* 8-9 (2002)

[9] For purposes of this article, a watershed is defined as a "[t]opographical delineated area drained by a stream system: that is the total land area above some point on a stream or river that drains past that point. The watershed is a hydrologic unit often used as a physical-biological unit and a socioeconomic-political unit for the planning and management of natural resources." Kenneth N. Brooks, Peter F. Ffolliot, Hans M. Gregersen and Leonard F. DeBano, *Hydrology and the Management of Watersheds,* xii (3rd ed. 2003).

[10] *See generally,* Edward Maltby and Patrick J. Dugan, *Wetland Ecosystem Protection, Management, and Restoration: An International Perspective* in *Everglades: The Ecosystem and Its Restoration* 29-41 (John C. Ogden and Steven M. Davis ed. 1994)(discussing generally services provided by wetland ecosystems).

[11] Ecosystem management is a "regional" or "resource system" approach to environmental management. Robert B. Keiter, *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands,* 25 Land & Water L. Rev. 43, 45-46 (1990).

[12] *Id.*

a manner designed to alleviate the adverse changes in natural systems, often caused by human systems, in the face of uncertainty.[13]

Both adaptive management and ecosystem management are premised on a systems approach to ecosystems – a concept that is not reflected in current environmental policy and legal systems, which address human-environment interactions through individual statutory schemes intended to eradicate air, land and water pollution.[14] Traditional environmental legal schemes are media based; rely upon complex permitting and regulation schemes resulting in a "silo" approach to environmental protection.[15] This approach has caused our environmental policy to be "'program driven' rather than 'place driven'. Recently we have realized that, even if we had perfect compliance with all our authorities we could not assure the reversal of disturbing environmental trends."[16]

Protecting ecosystems such as Florida's Everglades requires shifting from the traditional "fragmented approach [to environmental management] to an approach that focuses on the ultimate goal of healthy, sustainable ecosystems that provide us with food, shelter, clean air, clean water and a multitude of other goods and services."[17] To protect ecosystems requires policies and legal constructs that work across political and

---

[13] D.R. Nelson, W.N. Adge and K. Brown, *Adaption to Environmental Change: Contributions of a Resilience Framework,* 32 Annu. Rev. of Envt. & Resources 395, 397-99 (2007)(discussing the concept of adaption and eco-social systems) and D. Huitema and S. Meijerink, *Realizing Water Transitions: The role of policy entrepreneurs in water policy change,* 15 Ecology and Society 26 (2010), http://www.ecologyandsociety.org/vol15/iss2/art26/ .

[14] Fred P. Bosselman and A. Dan Tarlock, *The Influences of Ecological Science on American Law: An Introduction,* 69 Chic. Kent L. Rev. 847, 866-67 (1994). Environmental law and policy was premised on the theory that there is a natural "equilibrium between organisms and the environment" that could sustain itself absent human interference. *Id.*

[15] Ecosystem Protection Workgroup, U.S. Envt. Prot. Agency, *Toward a Place-driven Approach: The Edgewater Consensus on an EPA Strategy for Ecosystem Protection,* at 1 (March 15,1994)(Edgewater Consensus).

[16] *Id.*

[17] *Id.; see also,* Millennium Ecosystem Assessment Board, *Living Beyond Our Means: Natural Assets and Human Well-Being a Statement from the Board,* 12 (Jose Sarukhan and Anne Whyte ed., 2005).

administrative boundaries, that are reflexive and adaptive, that are capable of modification as new data are developed, that involve multiple levels of government and stakeholders, and that infuse ecosystem values into human systems.[18]

Nowhere is the struggle to restore and preserve ecosystems more evident than in the Florida Everglades ecosystems (Everglades). Using the tool of historic narrative and a "modified destabilization frame" this article explores how attempts this to protect Florida's aquatic Everglades ecosystem has evolved and the role of law and litigation in these attempts.

II. PARTITIONING THE EVERGLADES' ECOSYSTEM & ITS IMPACTS

A. The Historic Everglades' Ecosystem

Marjory Stoneman Douglas in her 1947 book *The Everglades: River of Grass* describes the Everglades as an entirely unique[19] natural system. It extends "100 miles from Lake Okeechobee to the Gulf of Mexico, fifty, sixty, even seventy miles wide . . . [a] wilderness of nothing but grass. [And] down [an] almost invisible slope the water moves . . . there is the heart, the current, the meaning of the Everglades." [20]

In fact, the historic Everglades described by Douglas is part of the larger Kissimmee, Okeechobee, Everglades' drainage basin (KOE Drainage Basin)[21] (Figure 4.1). The KOE Drainage Basin originates in a strand of lakes connected by the Kissimmee River that drains into the northern reaches of Lake Okeechobee.

---

[18] R. Edward Grumbine, *What is Ecosystem Management,* 8 Cons. Bio. 27, 31 (March 1994).
[19] Marjory Stoneman Douglas, *The Everglades: River of Grass* at 5 (50th Ann. Ed. 1997)(1947).
[20] *Id.*, at 10.
[21] Stephen S. Light, Lance H. Gunderson and C.S. Holling, *The Everglades: Evolution of Management in a Turbulent Ecosystem in Barrier and Bridges to the Renewal of Ecosystems and Institutions* at 107 (Lance H. Gunderson, C.S. Holling, Stephen S. Light, ed. 1995)

With no natural outlet, Lake Okeechobee's drainage was a matter of topography.[22] During wet periods Okeechobee would swell until water spilled over its southern rim in one tremendous sheet into the upper Everglades and slowly drained into Florida Bay and the Gulf of Mexico.[23]

A number of factors contribute to the unique Everglades' foremost among them geology. South Florida emerged from the ocean during the last interglacial melt when ancient seas deposited a porous layer of limestone under the Everglades[24] and along the Atlantic Coastal forming a coastal ridge (Figure 4.1). The Atlantic Coastal Ridge, a five-mile elevated ridge of limestone, extends down Florida's eastern coast impoundig drainage water from Lake Okeechobee and storm events in a geological bowl that is Florida's interior. As water elevations in Florida's interior increase the water is forced from Florida's interior to the Gulf of Mexico in a shallow sheet flow. This sheet flow forms the hydrologic base of the Everglades system (Figure 4.1).[25] Overlying the Everglades' limestone foundation is a layer of peat and calcitic muds[26] and underlying this limestone foundation is the Biscayne Aquifer, a 3,000-mile shallow aquifer that is

[22] Michael Grunwald, *The Swamp: The Everglades, Florida and the Politics of Paradise* 18-19 (2006). South Florida is relatively flat with a slight southwest incline. *Id.*
[23] *Id.*
[24] *See generally,* Patrick J. Gleason and Peter Stone, *Age, Origin, and Landscape Evolution of the Everglades Peatland in Everglades: The Ecosystem and Its Restoration* 149 (Steven M. Davis and John C. Ogden ed. 1994)(discussing the geology of the Everglades). A more detailed discussion of the geologic composition of these various Everglades' limestone formations may be found in Gleason and Stone's discussion of the formation of the Everglades. *Id.* at 156-161.
[25] Light, Gunderson & Holling, *supra* note 21, at 109.
[26] Gleason & Stone, *supra* note 24, at150-51.

recharged by water flowing though the Everglades.[27] The Biscayne Aquifer is a primary drinking water source for south Florida.[28]

A second factor affecting the Everglades ecosystem is rainfall, the primary hydrologic input to the Everglades' system. Like many tropical regions Florida has essentially two seasons: wet and dry.[29] During the wet season South Florida receives an average of fifty inches of rain a year.[30] Seventy to ninety percent of rainfall entering the Everglades leaves the ecosystem through evapotranspiration.[31] Remaining storm run-off drains through the KOE Drainage Basin (Figure 4.1). Rainfall during the dry winter months is more infrequent,[32] by spring the system is generally dry[33] and subject to wildfires.[34] As a result of this combination of geology and rainfall patterns, seventy percent of the Everglades experienced annual flooding.[35] The health of the Everglades' ecosystem is dependent on this hydrologic system.

---

[27] Stephen S. Light and J. Walter Dineen, *Water Control in the Everglades: A historical Perspective* in *Everglades: The Ecosystem and Its Restoration* 47, 51 (Steven M. Davis and John C. Ogden ed. 1994).
[28] Frank E. Maloney, Sheldon J. Plager, Fletcher M. Baldwin, Jr., *Water Law and Administration: The Florida Experience,* §§51.1- 51.3 (1968). Under the Biscayne Aquifer is a layer of salt water from Florida's geological past. *Id.* at §52.3 (1968).
[29] Light, Gunderson & Holling, *supra* note 21, at 107. South Florida receives approximately eighty percent of its annual rainfall from mid May through October in a combination of daily convection thunderstorms, tropical depressions and hurricanes. *Id.*
[30] Light Gunderson & Holling, *supra* note 21, at 107.
[31] M. J. Duever, J.F. Meeder, L.C. Meeder and J.M. McCollom, *The Climate of South Florida and Its Role in Sharing the Everglades Ecosystem,* in *Everglades: The Ecosystem and Its Restoration* 225, 233 (Steven M. Davis and John C. Ogden ed. 1994).
[32] Light, Gunderson & Holling, *supra* note 21, at 107.
[33] *Id.* at 109.
[34] *See generally*, L. H. Gunderson and J.R. Snyder*, Fire Patterns in the Southern Everglades* in *Everglades: The Ecosystem and its restoration* 291, 296-299 (Steven M. Davis and John C. Ogden, ed. 1994)(discussing annual and seasonal burn patterns in the Everglades).
[35] Grunwald, *supra* note 22, at 17.

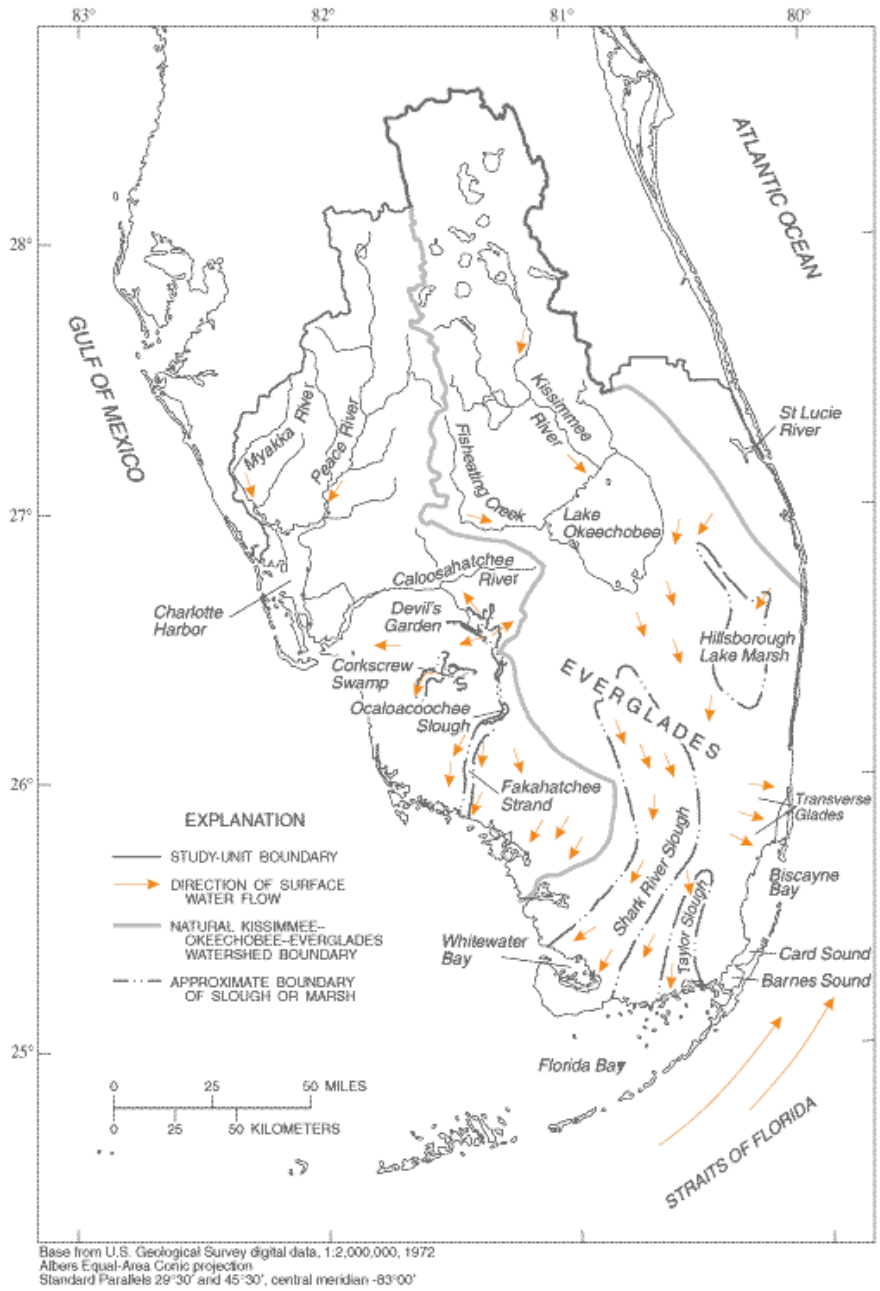

Figure 4.1: Historic Kissimmee, Okeechobee, and Everglades Water Basin. Found at http://sofia.usgs.gov/publications/circular/1134/images/fig17x.gif

A third factor affecting the development of the Everglades ecosystem is water quality. The Everglades aquatic ecosystem is oligotrophic – it receives nutrient inputs directly from rainfall. As a result the historic Everglades had low phosphorus levels[36] likely below 10 ppb.[37] As a phosphorus starved system only species of flora adapted to low phosphorus environments (phosphorus scavengers) could survive in the Everglades. The terrestrial landscape of the historic Everglades was a terrestrial "mosaic" of wet prairies, sloughs, tree islands, and sawgrass with its low nutrient requirements and its ability to thrive in floods, fire, and drought,[38] was the characteristic plant of the Everglades.[39] Extensive, vibrant populations of periphyton, the base of the Everglades' food pyramid, were able to thrive in this phosphorus-starved environment.[40]

This diverse habitat supported over 30 species of fish in freshwater marshes[41] and a spectacular population of wading birds – Ogden reports that as late as 1933 the south Everglades supported between 180,000 to 245,000 nesting wading birds.[42] At the pinnacle of the Everglades food pyramid was the alligator – a keystone species in the

---

[36] Steven M. Davis, *Phosphorus Inputs and Vegetation Sensitivity in the Everglades* in *Everglades: The Ecosystem and its Restoration* 357, 358 (Steven M. Davis and John C. Ogden ed. 1994).
[37] Historic Everglades' phosphorus levels were likely at or below10 ppb. Jerry Stober, Daniel Scheidt, Ron Jones, Kent Thornton, Robert Ambrose, and Danny France, *South Florida Ecosystem Assessment – Monitoring for Adaptive Management: Implications for Ecosystem Restoration (Interim Report*), EPA 904-R-008, at 4 (December 1996).
[38] Davis, *supra* note 36, at 358.
[39] Lance H. Gunderson, *Vegetation of the Everglades: Determinants of Community Composition in Everglades: The Ecosystem and its Restoration,* 323, 331 (Steven M. Davis and John C. Ogden ed. 1994).
[40] Joan A Browder, Patrick J. Gleason, and David R. Swift, *Periphyton in the Everglades: Spatial Variation, Environmental Correlates, and Ecological Implications in Everglades: The Ecosystem and its Restoration* 379-80 (Steven M. Davis and John C. Ogden 1994).
[41] William F. Loftus and Anne-Marie Eklund, *Long-Term Dynamics of and Everglades Small-Fish Assemblage in Everglades: The Ecosystem and its Restoration,* 461, 462 (Steven M. Davis and John C. Ogden 1994).
[42] John C. Ogden, *A Comparison of Wading Bird Nesting Colony Dynamics (1931 –1946 and 1974 – 1989) as an Indication of Ecosystem Conditions in the Southern Everglades* in *Everglades: The Ecosystem and its Restoration,* 533 (Steven M. Davis and John C. Ogden 1994).

Everglades ecosystem[43] which not only influenced the populations of their prey but whose activities structured animal and plant communities throughout the Everglades.[44]

As one scientist interviewed for this project observed, the natural Everglades in its pre-drainage condition was a complex wetland ecosystem:

> a system that was unique in the true sense of the word. Unique is a terribly misused word in modern language but the Everglades was a very different kind of wetland system [different] than any other wetland in the world [a fact that we began to understand] as we began to understand how different animals operated in the system.[45]

B. Partitioning the Everglades and its Ecosystem Impacts

The Everglades remained largely undeveloped until the middle of the 19th century[46] despite numerous attempts to drain portions for agricultural development.[47] The 19th century Everglades was most noted for extreme land speculation and swindles as one dismayed buyer observed: "I have bought land by the acre, and I have bought land by the

---

[43] Frank J. Mazzotti, G. Ronnie Best, Laura A. Brandt, Michael S. Cherkis, Brian M. Jeffery and Kenneth G. Rice, *Alligators and Crocodiles as Indicators for Restoration of Everglades Ecosystems,* 9 Ecological Indicators 137, 140-142 (Supp. 1 November 2009) (discussing the role of alligators as keystone species in the Florida Everglades ecosystem).

[44] Frank J. Mazzotti and Laura A. Brandt, *Ecology of the American Alligator in a Seasonally Fluctuating Environment* in *Everglades: The Ecosystem and its Restoration,* 485, 486 (Steven M. Davis and John C. Ogden 1994).

[45] Interview Q. The interviews conducted for this research project were undertaken pursuant to the requirements of 45 C.F.R. 46.102 and the University of Minnesota's Institutional Review Board. The interview protocol for this project was reviewed and approved by the University of Minnesota's Institutional Review Board (IRB No. 0609E92806). Consistent with the requirements the University of Minnesota's Institutional Review research protocol involving human subjects the identity of the subjects of individual interviews may not be disclosed. To maintain the confidentiality of interviewees each interviewees were assigned a letter reference and all interview citations will refer to the letter attributed to the individual interview.

[46] Steven M. Davis, Lance H. Gunderson, Winifred A Park, John R. Richardson, and Jennifer E. Mattson, *Landscape Dimensions, Composition, and Function in a Changing Everglades' Ecosystem in Everglades: The Ecosystem and its Restoration, 419,* 422 (Steven M. Davis and John C. Ogden ed. 1994).

[47] *See generally,* Grunwald, *supra* note 22, at 81-196 (documenting the numerous attempts to drain and develop the Everglades between 1881 and 1932) and Light, Gunderson & Holling, *supra* note 21 at 119-25.

foot; but by God, I have never before bought land by the gallon."[48] In 1905 Governor Napoleon Bonaparte Broward dedicated himself to draining the Everglades just below Lake Okeechobee. By 1920 four major canals bisected the upper Everglades draining water from the upper Everglades to the Atlantic. A muck dike was constructed around Lake Okeechobee's southern shores preventing Lake Okeechobee from draining into the upper Everglades. This development made the upper Everglades south of Lake Okeechobee available for agricultural development including sugar cane.[49] At the same time, the Atlantic Coastal Ridge was experiencing a development boom spilling urban development into the eastern Everglades.[50] The Tamiami Trail connecting Florida's Atlantic and Gulf Coast developments was near completion.[51] Once completed the highway would permanently bisect the Everglades preventing sheet flow from the upper Everglades into the lower Everglades.

Development was further facilitated when in1928, after a series of hurricane related flooding events, President Hoover ordered the Army Corps of Engineers (Corps) to replace the muck dike around Lake Okeechobee with a more permanent structure (the Hoover Dike).[52] The Hoover Dike permitted the upper Everglades to be securely converted to sugar fields, decimating the pond apple belt along Okeechobee's southern shores.[53] Despite these inroads the permanence of at least some remnants of the

[48] Grunwald, *supra* note 22, at plate 8.
[49] Light, Gunderson & Holling, *supra* note 21, at 121 and Grunwald, *supra* note 22, at 181
[50] Grunwald, *supra* note 22, at 176-183 (discussing development along Florida's Gold Coast).
[51] *Id.* at 172. The Tamiami Trail essentially functions as a dam blocking the north-south flow of water through the Everglades. *Id.*
[52] *Id.* at 191-98.
[53] *Id.* at 199-202.

Everglades seemed assured when in1935 the United States Congress authorized the establishment of the Everglades National Park (the Park) south of Tamiami Trail.[54]

But according to Light et al. it took two events to bring permanent Everglades' drainage to fruition: the flood of 1947 and a demand for a source of cheap, domestic sugar.[55] In 1947, after a decade of drought, Florida was deluged with summer downpours and fall hurricanes, which collectively dropped 108 inches of rain on south Florida and covered 1.2 million hectares with water for six months.[56] The Everglades was tenacious – the *Miami Herald* reported, the "Everglades is Unconquered Despite Man's Great Fight":[57]

> Mother Nature . . . [had reasserted] her authority, reclaiming the reclaimed Everglades, reflooding just about every wetland that had been drained or paved for agriculture or development – from the pastures of the Kissimmee valley to the farms of the upper Glades to young suburbs . . . She turned most of the region into a shallow lake, reminding its residents they would never be safe as long as she remained on the loose.[58]

Congress quickly responded passing the Flood Control Act of 1948 authorizing the Corps to construct the Central and South Florida Flood Control Project (C&SF Project).[59] Construction commenced shortly thereafter and when the Corps was done

---

[54] Light, Gunderson & Holling, *supra* note 21, at 122-23. *See also,* Grunwald, *supra* note 22 at, 206-215. Despite the 1935 authorization of Everglades National Park (the Park), the Park was not dedicated until 1947, in large part because of disagreements about the Park boundaries. As originally envisioned the Park was to include the southern Everglades extending 15 miles north of Tamiami Trail and including Florida Bay, the Ten Thousand Islands, the Big Cypress, and the upper Keys – two million acres in all. Grunwald, *supra* note 22, at 208. The purpose of the Park was the preservation of ecosystem diversity. *Id.* In the end the Park would be 1.3 million acres and would exclude all lands north of Tamaimi Trail, the coral reefs, the upper Keys, Big Cypress, the marshes northeast of shark Slough, and a 22,000 acre tract of farmland in the middle of the Park. *Id.* at 213. Even with these exclusions the Park was still the third largest national park in the country. *Id.*

[55] Light, Gunderson & Holling, *supra* note 21, at 125,129.

[56] Light, Gunderson & Holling, *supra* note 21, at 125 and Grunwald, *supra* note 22, at 218.

[57] Grunwald, *supra* note 22, at 218 (quoting *Miami Herald* November 2, 1947).

[58] *Id.*

[59] Flood Control Act of 1948, Pub. L. No. 80-858, 62 Stat. 1175 (June 30,1948).

every drop of water flowing through this once natural system was subject to human control (Figure 4.2).[60] The C&SF Project consisted of:

- An eastern perimeter levee and borrow canal stretching from Palm Beach to Miami Dade county and a 3-6 meter continuous wall extending 160 km parallel to the coastal ridge impounding water at the Everglades eastern edge and providing flood control to development on the Atlantic coastal ridge.
- Levees dividing the northern Everglades into the Everglades Agricultural Area (EAA) and four water conservation areas (WCA 1-3B)(including the Loxahatchee Wildlife Refuge (Loxahatchee Refuge)). Pumping stations permitted water to be pumped from the EAA into the WCAs and between the WCAs. Water could also be pumped from the WCAs into Everglades National Park.
- A channelized and straightened Kissimmee River.
- Control outlets constructed on the east and west banks of Lake Okeechobee connecting Lake Okeechobee to the St. Lucie and Caloosahatchee Rivers. Water from Lake Okeechobee was no longer permitted to flow into the southern reaches of the Everglades but was directly dumped into the Gulf of Mexico and the Atlantic Ocean. [61]

The only undisturbed portions of the natural Everglades aquatic ecosystem were located south and west of the WCA and the Tamiami Trail.[62] Water could be distributed to this natural system through pumping stations as directed by the South Florida Water Management District (SFWMD), [63] which assumed management of the C&SF Project from the Corps.

---

[60] Grunwald, *supra* note 22, at 221.
[61] *Id.* at 222-23 and Light, Gunderson & Holling, *supra* note 21, at 125-26.
[62] The Big Cypress National Preserve was not established until the mid 70's as a direct result of the Jetport dispute. *See discussion, infra* at Part IV.A.
[63] The South Florida Water Management District (SFWMD) is the successor in interest of the Everglades Drainage District and the Central and South Florida Flood Control District. *See generally,* Malone, Plager & Baldwin*, supra* note 28, at § 101 and Light, Grunderson & Holling, *supra* note 21 at 119-132 (discussing the history of Everglades drainage and the construction of the C&SF Project). For purposes of this paper these agencies are collectively referred to as the SFWMD.

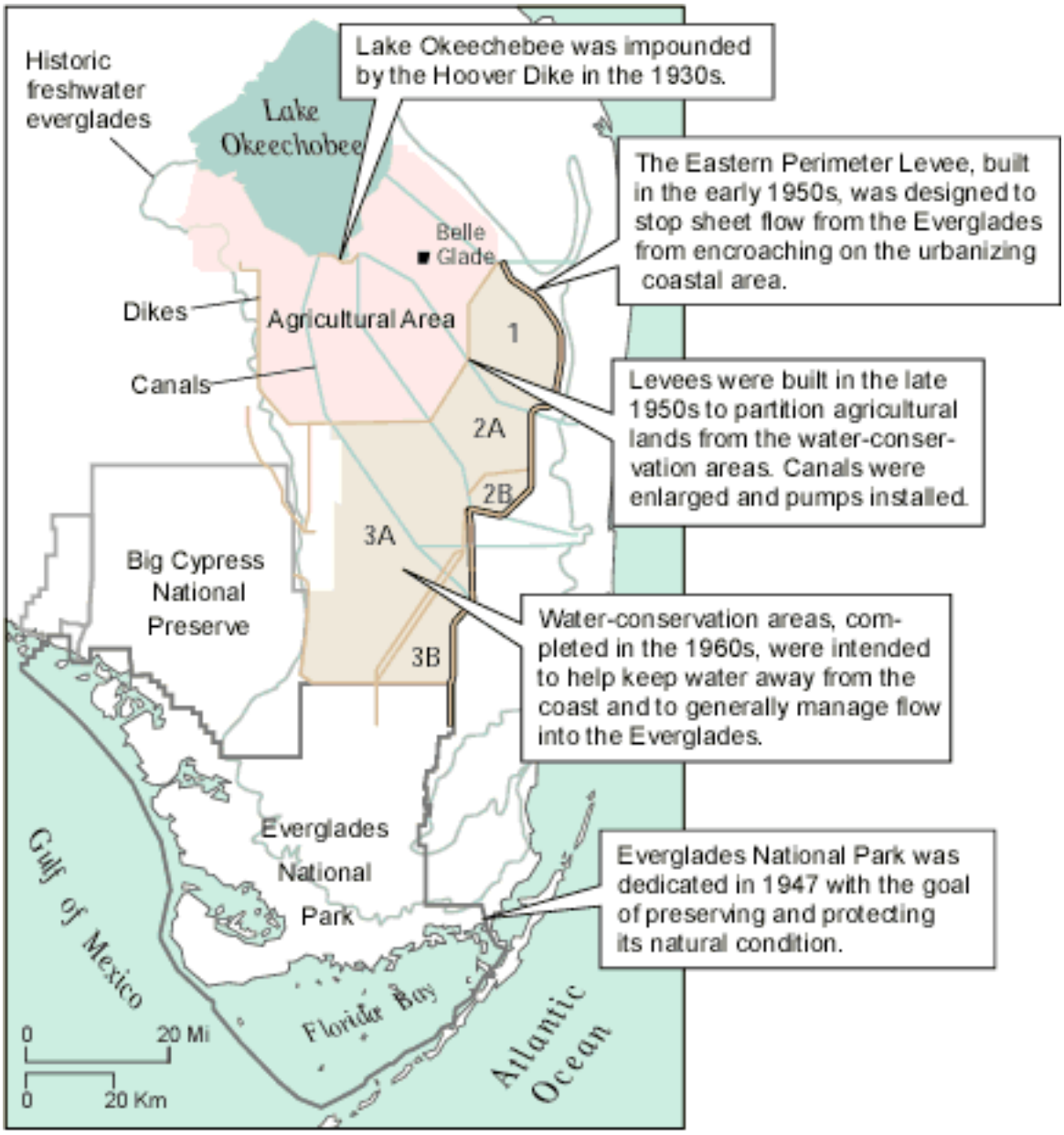

Figure 4.2: **Present day Everglades Ecosystem.** The Everglades Ecosystem with the completed Central and Southern Florida Flood Control Project (C&SF Project) available at http://sofia.usgs.gov/publications/circular/1182/

The C&SF Project "facilitated the growth of Greater Miami by taking the worst risk out of the continuing encroachment upon the Everglades floodplain."[64] It became a

[64] Luther Carter, *The Florida Experience: Land and Water Policy in a Growth State,* 44-45 (1974).

primary engine for economic growth in South Florida spurring both agricultural and urban development. By 1988 170,000 hectares in the EAA were in sugarcane production[65] and urban development had quadrupled.[66] Prior to the 2008 recession, development showed no signs of abating; one county official interviewed for this project reported that in 2007, 1,000 people per day moved to south Florida.[67] Today less than one half of the historic Everglades remain in some semblance of its original state.[68]

The C&SF Project design was based on the assumption that the natural system was benign – it intended to strike a balance between humans and nature. [69] But compartmentalization of the natural system by the C&SF Project put the natural system at war with itself and with urban and agricultural development interests. The C&SF Project caused three hydrologic ecosystem wide phenomena: (1) alterations in the volume of water flowing through the system; (2) alterations in the timing of flows; and (3) an increase in phosphorus levels.

Although the purpose of the WCAs was to hold water on the surface to augment the water supply for both development and the Park,[70] controversy soon erupted about the amount and timing of water that should be released into the natural system and the Park.[71] The C&SF Project provided development interests "a sense of security in a wildly

---

[65] Light, Gunderson & Holling, *supra* note 21, at 129.
[66] Grunwald, *supra* note 22, 229-232 (discussing development in South Florida after the construction of the SFWMD). Carter reports that by 1950 Florida ranked twentieth among the states in population and by 1970 it was ninth. Florida was growing faster than any other state in the union. Carter, *supra* note 64, at 5.
[67] Interview T.
[68] *Id.* Urban development consumes approximately twelve percent of the original Everglades while agriculture consumes another twenty-seven percent. Light, Gunderson & Holling, *supra* note 21, at 111, Table .1. Approximately twenty-one percent of the original Everglades system is preserved in the Park or other preserves. *Id.*
[69] Light, Gunderson, & Holling, *supra* note 21, at 132.
[70] Light & Dineen, *supra* note 27, at 63.
[71] Light, Gunderson & Holling, *supra* note 21, at 126.

fluctuating environment" by assuring flood control in wet years and water in drought years.[72] It seemed to many that both the Corps and the SFWMD viewed their mission as one of managing the C&SF Project for the benefit of agriculture/sugar and development interests.[73] While Congress viewed the C&SF Project and the natural Everglades as complimentary to the built environment and anticipated the C&SF Project could preserve and restore the natural system[74] it quickly became apparent that the state only intended to release water to the park in wet years[75] and even then the timing of releases did not reflect natural hydrologic regimes.[76] Thus between 1963 and 1965 the SFWMD halted sheet flow into Sharks Slough and halved water entering the southern Everglades below Tamiami Trial.[77] As a result of these water regime changes, whole rookeries of ibis and egrets failed to form.[78] When drought hit in the early 1970s the SFWMD halted water deliveries to the Park altogether believing that if water was released to the Park "less would be available for recharging the Biscayne Aquifer and protecting the Gold Coast well fields from salt intrusion . . . 'people come before birds.'"[79] By the late 1960's the volume of water flowing through the remaining natural ecosystem was fifty percent of "primeval times" and what flow went to the Everglades came in spurts rather than sheets[80].

---

[72] *Id.,* at 132, 166.
[73] Interview D, Interview N, and Interview O
[74] U.S. Army Corps of Eng'rs, Comprehensive Report on Central and South Florida for Flood Control Purposes, H.R. Doc. No. 80-643 at 32-33 (1948).
[75] Carter, *supra* note 64, at 117-120 (discussing relationships between the state of Florida and Everglades National Park in the early 70's).
[76] Interview D, and Light, Gunderson & Holling, *supra* note 21, at 140.
[77] Light, Gunderson & Holling, *supra* note 21, at 126-27.
[78] *Id.* at 127.
[79] Carter, *supra* note 64, at 119.
[80] Light, Gunderson & Holling, *supra* note 21, at 131.

But the Everglades had another problem as it became apparent that what water was permitted to flow into the Everglades natural system was laden with phosphorus. The advent of agriculture in the Everglades had brought with it phosphorus and by the mid-1900's phosphorus inputs into the Everglades had increased nearly threefold from pre-drainage conditions.[81] Increased phosphorus levels altered characteristic Everglades' vegetation as evidenced by the invasion of cattails and retrenchment of sawgrassand periphyton.[82]

Damage to the remaining natural Everglades aquatic ecosystem attributable to these changed water regimes was apparent by the mid-1960's and included:

- Extinction of three of the seven major physiographic landscapes indigenous to the Everglades (eastern cypress band, peripheral wet prairies and custard (pond) apple swamp);
- Loss of transverse glades that provided early-season feeding habitat for wading birds;
- Modifications of flow pattern (attenuated sheet flow to pulsed flow) which reduced hydro periods;
- Unnatural pooling and over drainage;
- Accelerated reversal of muck building to rapid oxidation; and
- Abandonment of nesting areas in the park.[83]

Additionally wildlife populations, especially wide ranging ones, lost the habitat range needed to maintain healthy populations – these alterations have caused shifting and

[81] *See generally,* Davis, *supra* note 36, at 357-366 (discussing phosphorus levels in the Everglades system in both the pre-drainage and post-drainage systems).
[82] *Id.* at 366-75 and Browder, Gleason & Swift, *supra* note 40, at 379 (discussing the impact of phosphorus on periphyton mats in the Everglades). By the late 1980s the NPS estimated that cattails had displaced over 6,000 acres of sawgrass in the Loxahatchee Refuge. Robert Malinoski, *The Phosphorus Standard and Everglades Restoration: Will this Standard Lower Phosphorus in the Everglades or is the Proposed Standard a Hollow Promise?,* 12 U. Miami Bus. L. Rev. 35, 37 (2004).
[83] Light, Gunderson & Hollling, *supra* note 21, at 130.

conflicting habitat demands among historic Everglades' species populations.[84] Noted one scientist:

> when I first started working in [the] Everglades . . . we were still having some of these big super colonies [of wading birds] forming in the Park. . . And they've totally disappeared now for many years…there's still people … alive who hunted the system in the 30s and 40s and you talk to the people like that you begin to get a feeling of the abundance that was in the system as recently as the 40s and 50s and a lot of that seems to have declined, really that decline was triggered by the construction of the… [WCAs] in the 50s and beginning to wall off the system, to compartmentalize it . . . [starting] the real collapse of the system. . . [85]

The loss of the Everglades ecosystem also comes at a human cost not the least of which is a decline in the replenishment of the Biscayne Aquifer, the primary drinking water source for much of south Florida.

Attempts to restore the Everglades ecosystem began even before the ink was dry on the 1948 Flood Control Act with the publication of Marjory Stoneman Dougla's *The Everglades: River of Grass*[86] but it was not until the late 1960's when Miami Dade County proposed constructing a Jetport in the Big Cypress Swamp that Everglades restoration got any real traction.[87] It would take another thirty years before President Clinton, in the waning days of the Clinton administration, would sign the 2000 Water Resource Development Act (WRDA 2000) authorizing $7.8 billion to "restore" the Everglades.[88] How this sea change evolved and the role of law in the struggle to reclaim

---

[84] Steven M. Davis and John C. Ogden, *Toward Ecosystem Restoration in Everglades: The Ecosystem and its Restoration* 779 (Steven M. Davis and John C. Ogden ed. 1994).
[85] Interview Q.
[86] Douglas, *supra* note 19.
[87] Light, Gunderson & Holling, *supra* note 21, at 128.
[88] Grunwald, *supra* note 22, at 2.

the Everglades ecosystem can provide insight about the use of law and litigation as a resource in leveraging the political change needed to protect natural systems.

III. A LENS TO ANALYZE EVERGLADES' RESTORATION

Case oriented event history research focuses on the events surrounding social change and the causal complexity of social phenomena leading to change in social and political systems.[89] Using case history narratives[90] of the evolution of an event such as an ecosystem restoration project allows the researcher to explore what happened and why an event or series of events happened.[91] The use of case history narratives to explore how social and political change occurs requires the marriage of theory – the operating assumptions about how the world operates – with the historic narrative.[92] Historic narrative provides the frame for constructing the history-theory relationship while theory serves as a lens with which to explore how and why change occurs.[93] The narrative can be used to both develop and test theories by operationalizing both narrative and comparative research techniques.[94]

---

[89] Charles C. Ragin, *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies,* 1-20 (University of Calif. 1989).

[90] A narrative is a sequential account of events that tells a story about what happened – it is a chronological linkage of discrete parts that take on meaning in light of the story of an event. Robin Stryker, *Beyond History Versus Theory: Strategic Narrative and Sociological Explanation,* 24 Soc. Meth. & Research 304, 305 (1996)(Stryker (1996)). Griffin defines a narrative as an analytic construct that unifies "a number of past or contemporaneous actions and happenings, which might otherwise have been viewed as discrete or disparate, into a coherent whole that gives meaning to and explains each of its elements and is, at the same time constituted by them", it is how we describe, reconstitute and comprehend events. Larry J. Griffin, *Narrative, Event Structure Analysis, and Causal Interpretation in Historical Sociology, 98 Am. J. Soc. 1094, 1097-98 (1993).*

[91] Stryker (1996), *supra* note 90, at 305.

[92] Lee E. Teitelbaum, *An Overview of Law and Social Research,* 35 J. Legal Educ. 465, 472-73 (1985).

[93] Stryker (1996), *supra* note 90, at 305.

[94] Stryker (1996), *supra* note 90, at 308-09. There is a significant debate among social science scholars concerning the role of theory in historical sociology. *See generally,* Edgar Kiser & Michael Hechtner*, The Role of General Theory in Comparative-Historical Sociology,* 97 Am. J. of Soc. 1 (1991); Jill Quadagno & Stan J. Knapp, *Have Historical Sociologists Forsaken History? Thought on the History/Theory Relationship,* 20 Soc. Methods, 481, 490 (1992); and James Mahoney, *Revisiting General Theory in*

Theory is developed by exploring patterns of relationships between and among events, creating "theoretical constructs, propositions and/or midrange theory from case-based empirical evidence".[95] This approach is an iterative process – it involves a "*continual interplay and mutual adjustment between theory and history.* Concrete and specific historic events and configurations are conceptualized in the context of abstract concepts and sensitizing frameworks. These concepts and frameworks are used to select, to order and to interpret . . . data"[96] permitting a deductive exploration of potential casual relationships between a sequence of events. This interplay between theoretical concepts and historical data is used to build and refine a theoretical lens used to explore an event to further understand causal interactions.[97] Using the evolution of Everglades' ecosystem restoration event history as a case study this research tests the theoretical lens of the Sabel and Simon modified destabilization model, which posits that public law litigation can, in certain circumstances stimulate change in policy decision-making constructs.[98]

The strategic narrative of Everglades' restoration was constructed using both primary and secondary data.[99] It was not the intent of this project to undertake a full or

---

Historical Sociology, 83 Social Forces 459 (2004). Mahoney suggests that historical sociology has been grounded in one of three general theories "functionalist, rational choice and power". *Id.* at 460. Destabilization and legal mobilization theories upon which the research in this article is based is nested in "power theory" which posits that the causal agent of social change is collective actors that engage in "relatively" coordinated action to cause social change. *Id.* at 473. These actors develop and mobilize resources to overcome obstructions to structural change. *Id.* at 474.

[95] Kathleen M. Eisenhardt and Melissa A. Graebner, *Theory Building from Cases: Opportunities and Challenges,* 50 Academy of Mgmt. J. 25 (2007).

[96] Stryker (1996), *supra* note 90, at 310-11 (emphasis in original).

[97] *Id.*

[98] *See discussion, infra,* Part III.A

[99] There are numerous examples of narratives built on secondary data most notably Tilly's work on collective violence in France and Skopol's work on social revolutions. William Sewell, *Three Temporalities: Toward an Eventful Sociology in Logics of History: Social Theory and Social Transformation* at 88-93 (2005). This is in contrast to McCann's work on wage equity, which involved

exhaustive process tracing of Everglades restoration, rather the aim was to provide a rich, contextual exploration of the Everglades' restoration event history. In this context, secondary data, including Grunwald's[100] and Godfry's[101] detailed accounting of the evolution of Everglades' restoration was used to construct an in depth preliminary event history of Everglades' restoration between 1980, the passage of WRDA 2000, and the preliminary implementation of restoration efforts between 2000 and 2003. This preliminary event history was supplemented with information gathered from newspaper articles including articles from the *Miami Herald*, the *Washington Post*, the *New York Times*, the *Sun Sentinel*, the *Tampa Herald*, and the *Palm Beach Post*; articles from national periodicals; legal documents including Court Orders, Opinions, Consent Decrees, and other documents filed by litigants; documentation of Congressional Proceedings; written agreements between Florida and the Federal Government; and the Restoration Yellow Book, which documents the Comprehensive Everglades Restoration Plan (CERP).

This secondary data was supplemented with information gathered from detailed semi-structured interviews with twenty-five key persons who participated in the evolution of the Everglades' restoration vision between 1980 and 2000. Interviewees were selected

---

primary data in the form of extensive interviews. *See generally* Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, 279-80 (1994)(McCann 1994).

[100] *See generally,* Grunwald, *supra* note 22; Michael Grunwald, *Growing Pains in Southwest Fla; More Development Pushes Everglades to the Edge,* Wash. Post June 25, 2002 at A-1 (hereinafter *Growing Pains*; and Michael Grunwald, *When in Doubt Blame Big Sugar: Once the Everglades' Chief Ecological Villain, Industry has Plenty of Company,* Wash. Post June 25, 2002 at A-1(hereinafter *When in Doubt)*;Michael Grunwald, *Between a Rock and a Hard Place: Wetlands Shrink Before Growing Demands of Industry, Consumers,* Wash. Post June 24, 2002 at A-1 (hereinafter *Between a Rock and a Hard Place)*; and Michael Grunwald, *A Rescue Plan, Bold and Uncertain; Scientists, Federal Officials Question Projects Benefits for Ailing Ecosystem,* Wash. Post, June 23, 2002 at A-1 (hereinafter *A Rescue Plan)*.

[101] Mathew C. Godfry, *Rivers of Interest: Water Management in South Florida and the Everglades, 1948-2000* (2006) available at http://www.evergladesplan.org/about/river_interior_history

to assure broad stakeholder representation. Interviewees included representatives from the Department of Interior, the Corps, the SFWMD, local units of government, tribes, environmental social movement organizations (SMOs) including grass roots organizations such as Friends of the Everglades, national SMOs including National Audubon Society, and hunting and fishing SMOs. Interviews ranged between one hour and four hours. The interviews were based on a three page semi-structured interview guide (Appendix 1) designed to explore the process that led to the development and implementation of Everglades protection and restoration, the development of the Everglade's phosphorus standards, development of the CERP, the role of litigation in this process, the implementation of the CERP in the three years following the adoption of WRDA 2000, and the role of stakeholders throughout the restoration development history. Interviews were digitally recorded and transcribed. Interview transcripts were used to supplement the Everglades' restoration event history.

Primary and secondary data were analyzed and coded using content coding.[102] The content codes were designed to explore Everglades' restoration in the context of the modified destabilization theory, to test the theory for fit, to examine and weigh the importance of the deviations of Everglades' restoration from the theory, and to adjust the theory accordingly.

[102] Stryker (1996), *supra* note 90, at 316

A. The Modified Destabilization Theory –A Theoretical Lens

Legal theorists and sociologists alike posit that law and litigation can be an important resource in promoting social and political change.[103] Both schools of thought have, however, approached the role of law and litigation in promoting social and political change from different vantage points. Learning grounded in both social science and legal scholarship were used to refine a theoretical lens; this lens was then used to examine the Everglades restoration narrative to explore the role of law and litigation in Everglades' restoration. The theoretical framework used to construct the lens is outlined below.

1. Public Law Litigation and Political Blockage

The use of law and litigation as a resource to stimulate political and social change arises out of the concept of legal precedence and the rise of "public law litigation" in the latter part of the twentieth century.[104] Historically, civil litigation was viewed as a mechanism to settle private disputes between private individuals about private rights by apportioning legal liability based on concepts of intent or fault.[105] But private litigation also performs a secondary social function. Through the doctrine of precedence, private litigation clarifies the law and through this clarification process guides the behavior of non-litigants.[106] Thus litigation also performs a regulatory function.[107] This regulatory function is both lineal affecting subsequent legal decisions and web like affecting

---

[103] *See generally* Robin Stryker, *Half Empty, Hal Full or Neither: Law, Inequality and Social Change in Capitalist Democracies,* Annu. Rev. Law Na Social Sci. 69 (2007) (Stryker (2007)) and Charles F. Sabel and William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds,* 117 Harv. L. Rev. 1016 (2004).
[104] Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 Harv. L. Rev. 1281, 1284 (1976).
[105] *Id.* at 1282; *see also,* J. Hurst, *Law and the Condition of Freedom in Nineteenth Century United States* 88-89 (1956).
[106] *See generally* Sabel & Simon, *supra* note 103, at 1059-62
[107] *Id.* at 1057 (2004).

markets, the development of new industry standards, and/or the allocation of public and private resources.[108] When litigation impacts are coupled with public law litigation the potential of litigation to stimulate social and political change is magnified.

Unlike civil litigation, which has at its heart the resolution of disputes between private litigants, public law litigation asks, "Whether or how a government policy or program should be carried out."[109] It balances competing public policy interests in public program implementation.[110] Public law litigation embodies both a constitutional or statutory right and the use of the court's equitable powers to enforce said right.[111] Like civil litigation, public law litigation is bound by the concept of precedence.

The ability of public law litigation to influence public policy became apparent with the growth of the administrative state as public policy was increasingly developed through the bureaucratic agency decision-making processes. These agencies, which were charged by Congress with allocating public resources or the regulation of social programs, lacked democratic accountability, and were often locked in symbiotic relationships with the very interests they sought to regulate – they are "captured".[112] Sax was one of the first to recognize this dilemma in the environmental field observing that:

---

[108] *Id.* at 1058; *see also,* Michael J. Rusted, *How the Common Good is Served by the Remedy of Punitive Damages,* 64 Tenn. L. Rev.793, 825-28 (1997) (containing a detailed discussion of the societal benefits of punitive damage awards on industry norms surrounding product liability).
[109] Sabel & Simon, *supra* note 103, at 1058.
[110] Chayes, *supra* note 104, at 1282. The rise of public law litigation coincided with the increase of reform legislation, the rise of the administrative state, and the relaxation of equitable remedies, which permitted courts to examine controversies surrounding future probabilities such as the impact of government policies. *Id.* at 1288, 1292-93; *see also,* Hurst, *supra* note 105, at 88-89.
[111] *Id.* at 1295.
[112] *See generally,* Robert Glicksman and Christopher H. Schroeder, *EPA and the Court: Twenty Years of Law and Politics,* 54 Law & Contemp. Probs. 249, 264-70 (1991) and Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action,* 55-64, 82-85 (1970)(Sax (1970)). *See also,* Louis M. Kohlmeir, Jr., *The Regulators and the Regulated* in *The Regulators: Watchdog Agencies and the Public Interest,* 69-82 (1969)(for a general discussion of the theory of agency capture within the context of the

> the administrative agency had "supplanted the citizen as a participant [in the decision making process] to such an extent that its panoply of legal structures actually forbid members of the public from participating in the complacent process whereby the regulators and the regulated work out the destiny of our air, water and land resources. . . . The implementation of the public interest, he [the citizen] is told, must be left 'to those who know best'"[113]

And those that knew best were the agency experts and those they regulate.

More recently Sabel and Simon, drawing on the work of Roberto Unger characterized this capture phenomenon as political blockage.[114] In a democratic society political blockage occurs when privileged members of societies exercise control over political resources including law[115] and use these resources to control public policy decisions to their benefit.[116] Consequently the public policy decision making infrastructure becomes "substantially immune . . . [to] conventional political mechanisms of correction" and steeled to non-elite political pressures.[117] Drawing from Unger's destabilization theory, Sabel and Simon identified three types of political blockage that

---

environment and the environmental movement of the 60s). *See also,* Zahara Mehani and Jennifer Kuzma, *The "Revolving Door" between Regulatory Agencies and Industry: A Problem that Requires Re-conceptualizing Objectivity,* 24 J. Ag & Env'l Ethics 575 (2011)(For a current discussion of the symbiotic relationship between bureaucratic agencies and those they regulate in the context of the development of new and often risky technologies). While this article uses the theory of "agency capture" to explore the concept of political blockage an equally plausible theory to explain agency action in the context of political blockage is "empire building" which suggests that agency bureaucrats act to maximize their budgets, ideological preferences, and constituency goals. *See generally* Daryl Levinson, *Empire-Building Government in Constitutional Law,* 118 Harv. L. Rev. 915, 932-34 (2005). This theory is one actively advanced by journalist Michael Grunwald, who has written extensively about the impact of the Corps of Engineers on a number of natural systems. Michael Grunwald, *Jounalist Michael Grunwald on the hubris of the Army Crops,* Grist Mar. 19, 2008 available at http://grist.org/cities/grunwald1/ and Michael Grunwald, *A Rescue Plan,* Wash. Post June 23, 2002 at A-1.

[113] Sax (1970), *supra* note 112, at xvii.

[114] Sabel & Simon, *supra* note 103, at 1062.

[115] That law is a political resource is an idea long recognized in the sociology of law. *See generally,* Robin Stryker, *Rules, Resources, and Legitimacy Processes: Some Implications for Social Order, Conflict and Change,* 99 Am. J. of Soc. 847 (1994)(Stryker (1994)) and Austin T. Turk, *Law as a Weapon in Social Conflict,* 23 Soc. Prob. 276, 280 (Feb. 1976).

[116] Roberto Mangabira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracies* from *Politics: A Work in Constructive Social Theory* 503-35 (Verso, 2001)(1987).

[117] Sabel & Simon, *supra* note 103, at 1062, 1064.

subvert broader public voices in policy decision-making processes:[118] majoritarian political control,[119] the logic of collective action, and hybrid blockage[120]. In the environment and natural resources policy arena collective action blockage appears to have the greatest impact.[121] Collective action blockage occurs when "a concentrated group [or interests] with large stakes exploits or disregards a more numerous but more diffuse group with collectively larger but individually smaller stakes."[122] Development of the Everglades in South Florida is a case in point. Decisions about how to manage the Everglades were historically driven by two concentrated interests – agriculture and land developers. As early as 1881 developers, farmers, and politicians were cutting deals to drain the Everglades.[123] By 1930 these two interest groups began driving Everglades' drainage and management decisions in south Florida.

Of all agricultural interests in South Florida, sugar has had the biggest impact on the Everglades. The sugar industry first arrived in the Everglades in 1931[124] laying claim to the rich peat lands just south of Lake Okeechobee. By the 1950's "sugar production in

---

[118] *Id.* at 1065.
[119] Majoritarian political blockage occurs when a political system is unresponsive to the rights and/or interests of a "stigmatized minority." *Id.*
[120] Hybrid blockage encompasses features of majoritarian blockage (unresponsiveness to vulnerable minorities) and collective action blockage (where a concentrated group exploits or disregards the rights of a more numerous). *Id.*
[121] *Id.* at 1065.
[122] *Id.* at 1064-65.
[123] *See generally* Grunwald, *supra* note 22, 85 (documenting the history of attempts to drain the Everglades). In 1881 the *Weekly Floridian* reported: "all know the value of lands if reclaimed and the immense benefit that would accrue to the state. Now men of capital and energy have taken hold of the matter with an earnestness that convinces us that they mean to carry out the great work." *Id.* (quoting *Weekly Floridian* 1 (Feb. 1, 1881)).
[124] Grunwald, *supra* note 22, at 200.

the United States increased six-fold" much of it in South Florida.[125] Today there are over 450,000 acres of sugar cane in the EAA[126] over half of which are owned by either U.S. Sugar or Florida Crystal Sugar Corp.[127] Together, these two companies receive substantial federal and state assistance. In addition to the federal commitment to buy back sugar, at taxpayer expense, the industry cannot sell; the sugar industry is the recipient of over $1.9 billion in annual federal subsidies.[128] At the state level, the sugar industry uses billions of gallons of water at a cost that does not begin to reflect the cost of building and operating the C&SF Project.[129] Until the mid-1990s the sugar industry used the Everglades as its wastewater disposal system pumping untreated, wastewater from cane fields directly into the remnants of the natural system – the Everglades Protection Area, the WCAs, and Lake Okeechobee.[130]

The political power of the Florida sugar industry is widely acknowledged in south Florida resulting in its nickname "Big Sugar". The Florida sugar industry donates millions of dollars to state and federal politicians and in return gets immediate political attention as exemplified by the fact that "President Bill Clinton interrupted his breakup with Monica Lewinsky to take a 22 minute phone call from Alfonso Fanjul Jr., chief

---

[125] Terrance "Rock" Salt, Stuart Langton, and Mary Doyle, *The Challenges of Restoring the Everglades Ecosystem in Large-Scale Ecosystem Restoration: Five Case Studies From the United States* 10 (Mary Doyle and Cynthia A. Drew ed. 2008).
[126] Michael Grunwald, *When in Doubt Blame Big Sugar,* Wash. Post June 25, 2002 at A-09.
[127] Grunwald, *supra* note 22, at 281.
[128] Michael Grunwald, *When in Doubt Blame Big Sugar*, Wash. Post June 25, 2002 at A-09.
[129] *Id.*
[130] Light, Gunderson & Holling, *supra* note 21, at 113. Phosphorus from sugar fields is the primary cause of eutrophication in the Everglades. *Id.* at 113-114; G.H. Snyder and J.M. Davidson, *Everglades Agriculture: Past, Present, and Future,* 85, 101-103, 109-112 *in Everglades: The Ecosystem and its Restoration* (Steven M. Davis and John C. Ogden ed. 1994)(discussing the environmental impacts of sugar production on the Everglades ecosystem).

executive of Florida Crystal Corp."[131] Reported one former Democratic Florida assemblyman: "I saw firsthand how Big Sugar bought the Florida Legislature"[132] a fact confirmed by numerous stakeholders across multiple sectors interviewed for this project.[133] Noted one stakeholder, the Florida sugar industry had unprecedented access to the Governor's office[134] and together with "the State of Florida is complicit . . . for destroying the Everglades." [135] In effect, noted another stakeholder, "they [Sugar] could do anything they wanted on their land and dump anything they wanted on my land . . . they were not good citizens."[136] A third stakeholder summed it up noting:

> The agricultural folks are so powerful and hold so much sway over politicians . . . [Company X's CEOs] divide their wealth. One of them is a Democrat; one's a Republican so during political campaigns they're shoveling money out in both directions . . . Tremendous amounts of money. And they have again, very high influence so if left to political pressure [from the general population] there's not been, at least historically the political pressure to fix the problems [with the Everglades].[137]

But sugar was not the only interest driving decisions about how to manage the Everglades; development interests too had a major voice. Development was well established on Florida's coastal ridge by 1900 and by 1915 was spilling into the Everglades.[138] Development was further facilitated by passage of the Flood Control Act of 1948.[139] *Harpers* characterized the public investment in the C&SF Project as "[t]he

---

[131] Grunwald, *When in Doubt Blame Big Sugar,* A-09 Wash. Post (June 25, 2002).
[132] *Id.*
[133] Interviews B, O, P, and R.
[134] Interview I.
[135] Interview I.
[136] Interview B.
[137] Interview R.
[138] *Supra* notes 49-51.
[139] Flood Control Act of 1948, Pub. L. 80-858, 62 Stat. 1175 (June30, 1948).

Florida Swamp that Swallows your Money" noting that the chair of the SFWMD board would make millions off the C&SF Project as a result of escalating land values.[140] Observed one U.S. Congressman: "the federal government [by funding the C&SF Project has] subsidiz[ed] the development of Florida."[141]

Between 1950 and 1970, when the CS&F Project was completed, Florida doubled its population[142] and assessed property values in south Florida rose from $1.2 billion in 1950 to $15.8 billion.[143] In Dade County, where development was particularly rampant a Metro Commission was established to guide growth by implementing comprehensive planning and regulating water and sewer systems.[144] It was soon evident, however, that the Metro Commission had neither the commitment nor the ability to regulate growth. The "pressure from development by both local and outside interests" including contractors and labor unions, mortgage lenders, banks, eastern investment houses, insurance companies and large industrial corporations "some of which were not beyond blatant attempts at political manipulation to get their way" was too great.[145]

The result of rampant development was a competition between the natural system and development interests for water and development generally won.[146] People just took what they wanted from the aquifers, noted one stakeholder, it was essentially "Katy bar the door" – they were drawing water down to salt water.[147] Even though the Corps' 1948

---

[140] L. Boyd Finch, *The Florida Swamp that Swallowed Your Money,* Harpers' (Feb. 1959).
[141] Grunwald, *supra* note 22, at 229.
[142] Robert H. Boyle & Rose Mary Mechem, *There's Trouble in Paradise,* Sports Illustrated, February 9, 1981 at 82-84.
[143] Grunwald, *supra* note 22*,* at 234.
[144] Carter, *supra* note 64, at 153-54.
[145] *Id.* at 154.
[146] *Id.* at 118.
[147] Interview P.

Project Report had contained "vague assurances" of ongoing water supply for the natural system, the SFWMD was intent on increasing water storage to meet development and agricultural needs and was only willing to release water to the natural system in wet years.[148] When drought hit in the early 1960's the SFWMD shut down all water deliveries to the natural system. The Park essentially received no water between 1962 and 1965. Park hydrologists at the time observed that there was sufficient water to release some modicum of water to the Park but that meant there would be less water for "recharging the Biscayne Aquifer and protecting the Gold Coast well fields from salt intrusion."[149] The SFWMD was "unwilling to make such a sacrifice."[150]

Things finally reached a head in October 1961 when, at a negotiating session between the Corps and the National Park Service (NPS), the NPS threatened to go to Congress if the Corps did not accommodate the Park's water needs.[151] The Corps response was two fold, the NPS would have to make arrangements with the State of Florida, specifically the SFWMD, to get the needed water and moreover, no water could be released "until more accurate knowledge was available about the Park's minimum water requirements and east coastal demands."[152] In the summer of 1962, the Senate Committee on Public Works ordered the Corps to undertake "a comprehensive survey of existing water supplies to the park and to recommend how it [the Park] could receive

---

[148] Carter, *supra* note 64, at 118.
[149] *Id. at 119.*
[150] *Id.*
[151] Godfrey, *supra* note 101, at 75.
[152] *Id. quoting* W.V. Storch. The NPS was ultimately unsuccessful at negotiating more water for the Park and resorted to Congress, which in 1962 passed a resolution directing the Corps to undertake a comprehensive survey to examine how to meet the Parks water needs. *Id.*

more water."[153] In its preliminary findings the Corps recommended an annual 315,000 acre-feet water delivery to the Park.[154] Development and agricultural interests objected and the Corps backed down noting '"parks do *not* have an established priority over other authorized project purposes'" most notably South Florida's development interests.[155]

In 1971 Governor Askew attempted to calm the waters calling a stakeholder Water Conference to address growth in South Florida.[156] In the end, Water Conference participants recommended limiting development in South Florida through comprehensive water and land use plans developed and enforced by state and regional boards appointed by the governor. The Water Conference was guided by the collective belief that:[157]

> there is a limit to the number of people which the South Florida basin can support and at the same time maintain a quality environment. The State and appropriate regional agencies must develop a comprehensive land and water use plan with enforcement machinery to limit population. . . . The population level must be one that can be supported by the available natural resources, especially water, in order to sustain a quality environment. A State comprehensive land and water use plan would include an assessment of the quality and quantity of these resources... [and] set density controls on the further development by regions and sub-regions.[158]

These recommendations were incorporated in the Florida Comprehensive Planning Act[159]

---

[153] *Id.* at 75.
[154] *Id.* at 83.
[155] *Id.* at 84 *quoting* Draft General Position on Everglades (Nov. 7, 1967) File Central Florida Water Supply, Central and Southern Florida, Box II-13, Office of History HQUSACE. *See also,* Carter, *supra* note 64, at 121-123.
[156] Carter, *supra* note 64, at 125. *See also,* Light, Gunderson & Holling*, supra* note 21, at 133-34. Stakeholders represented in the Water Conference included the Park, environmentalists, legislators, industry, and scientists. *Id.*
[157] Carter, *supra* note 64, at 126.
[158] David L. Powell, *Growth Management: Florida's Past as Prologue for the Future,* 28 Fla. St. U.L.Rev. 519, 522-23 (2001) *quoting, Governor's Conf. on Water Mgmt. in S. Fla., a Statement to Reubin O'D. Askew, Governor State of Florida,* 2-3 (1971).
[159] Fla. Stat. Ch. 23 (1972).

and the Water Resources Act (1972 Water Act),[160] which together recognized the intrinsic link between land use planning, water quality and water quantity.[161] The 1972 Water Act required the Governor to develop a comprehensive state water plan and to establish five water management districts whose primary responsibilities included assuring adequate water supply, water quality, and protection of environmental systems.[162] This assurance was accomplished by requiring all water permit applicants to demonstrate that the requested water use was a "reasonable beneficial use", would not interfere with other existing legal water uses, and was "*consistent with the public interest*."[163] According to one stakeholder involved with passage of the 1972 Water Act this provision was specifically designed to assure adequate water for natural systems and to permit the SFWMD to deny or limit permits if adequate water supplies for natural

---

[160] Fla. Stat. Ch. 373 (1972)

[161] John J. Fumero, *Florida Water Law and Environmental Water Supply for Everglades Restoration,* 18 J. Land Use & Envtl. L. 379, 383 (2003)(Fumero (2003)). The proposed legislation was based on the Model Water Code developed by Professor's Maloney, Ausness, and Morris. *Id.* at 380-81, *see also,* Frank E. Maloney, Richard, C. Ausness and Scott Morris, *A Model Water Code With Commentary* (1972). The Model Water Code recognized the "interrelationship of the various forms of water requires planning on the basis of hydrologically interrelated units. Planners must take cognizance of the effect on the hydrologic cycles of water pollution, use of land resources, drainage of ground water recharge areas, and urban development." *Id.* at 73.

[162] Maloney, Ausness, and Morris, *supra* note 161, at 73. The Water Resources Act of 1972 (1972 Water Act) requires the Florida Department of Environmental Protection (DEP) to develop a state water plan and water quality standards. Fla. Stat. Ann. § 373.036 (2006). *See also,* Ronald A. Christaldi*, Sharing the Cup: A Proposal for the Allocation of Florida's Water Resources,* 23 Fla. St. U. L. Rev. 1063, 1076 (1996). These documents together constitute the Florida Water Plan. *Id.* Factors that the DEP must consider in formulating the State Water Use Plan include the control of water "for purposes such as environmental protection." Fla. Stat. Ann. § 373.036 (2)(a)-(b) (2006). The 1972 Water Act also established five regional water management districts (Districts) based on watershed boundaries including the South Florida Water Management District (SFWMD). Fla. Stat. Ann.§ 373.069 (2006). These Districts, which are managed by boards appointed by the governor, regulate, manage, conserve develop and generally assure proper use of Florida's surface and ground waters and are required to prepare a 20 year water plan that assures water "reasonably anticipated " for "future needs and to sustain the water resources and related natural systems.". Fla. Stat. Ann. §§373.036 (2)(b)(4)(b) & 373.069 (2006); *see also,* Christine A. Klein, Mary Jane Angelo & Richard Hamann, *Modernizing Water Law: The Example of Florida,* 61 Fla. L. Rev. 403, 421 (2009).

[163] Fla. Stat. Ann. §373.223 (1)(2006). Model Water Code comments note that the public interest provision of the permitting scheme permits only uses not in conflict with the public interest. Maloney, Ausness & Morris*, supra* note 161, at 179 (emphasis added).

systems were threatened.[164] This interpretation is supported by the comments to the Model Water Code, which provided: "a proposed [water] use, otherwise valid, which would have an unreasonably harmful effect on fish or wildlife might well be rejected as being inconsistent with the express statement of public interest in the protection of fish and wildlife."[165] The 1972 Water Act, however, leaves the public interest determination in the hands of the individual Water Management Districts[166] and numerous stakeholders interviewed for this project observed that the SFWMD has never denied a permit to agricultural or development interests in order to preserve water supplies for the natural system.[167]

Thus, despite attempts in the early 70's to restrain development and to assure water for the natural system including the Park, growth continued at a steady pace. Challenges to development were often futile, noted Charles Lee, a lobbyist for Florida Audubon Society:

> [environmental challenges to proposed development] funnel [] into government for a hearing. If you can muster a coalition with clout . . . you have a chance, but it's a case-by-case treadmill. Proponents of development projects are well financed and usually politically well connected, while opponents are most often citizen groups that don't have the resources of the pro-development forces.[168]

Lee's view was affirmed by the Orlando *Sentinel Star,* which reported that local public officials were "negligent and guilty of political cowardice" unwilling to protect the

---

[164] Klein et al, *supra* note 162, at 424.
[165] Maloney, Ausness & Morris, *supra* note 161, at 179.
[166] Klein *et al., supra* note 162, at 424.
[167] Interview N, Interview O, and Interview P. *See also* Grunwald, *supra* note 22, at 340-41.
[168] Boyle & Meechem, *There's Trouble in Paradise,* Sports Illustrated, Feb. 9, 1981 at 85-86.

environment.[169] Even *Sports Illustrated* characterized South Florida as a '"leading contender for first place in the nation's chamber of environmental horrors.'"[170]

The history of Everglades development, then presents a classic example of collective action blockage where the voices of the sugar industry and development interests outweighed NPS and environmental interests in decisions affecting the quality and quantity of water made available to the Everglades' ecosystem. Decisions regarding how water was managed in South Florida were made by the SFWMD and the Corps to benefit their primary constituents: agriculture and development. Everglades' restoration would require changing this decision-making constructs if sufficient, quality water was to reach the Everglades ecosystem a necessity if the Everglades ecosystem was to survive.

2. Public Law Litigation, Change, and Destabilization Theory

Destabilization theory posits that political blockage, such as that encountered in south Florida, is contrary to democratic accountability[171] and that in democratic societies citizens have the right to correct bureaucratic policy decisions and political structures that favor the politically powerful over democratic accountability.[172] This "right" often referred to, as the "destabilization right," is the right of citizens to make "claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal process of political accountability."[173] Public law litigation is a mechanism available to citizens to exercise

---

[169] *Id.* at 90, citing Orlando Sentinel Star *Florida's Water: Clean it or Kill it"* September 1980 (supplement).
[170] *Id.* at 85.
[171] Unger, *supra* note 116, at 530.
[172] *Id* at 532, *see also* Sabel and Simon, *supra* note 103, at 1020.
[173] Sable and Simon, *supra* note 103, at 1020.

their destabilization right – to provide access to decision-making processes closed by political blockage. This access is paramount in democratic societies where bureaucratic agencies play a major role in setting public policy[174] as was the case in south Florida with water management and the Everglades.

While the Flood Control Act of 1948 established the C&SF Project and arguably assured water to natural system including the Park it was short on specifics and thus gave a good deal of discretion to the Corps and the SFWMD to decide when, if, and under what conditions the natural system would receive quality water.[175] But statutory vagueness and discretion also creates an opening for the court to act if the agencies are not accountable to statutory objectives or where the agencies deny public interests access to decision-making processes.[176] In such cases, destabilization theorists argue, courts can force democratic accountability by assuring that agencies act in concert with legislative intent.[177] In effect, the court "pry[s] open the democratic process and provoke[s] consequences that are responsive to the merits of the controversy and [that are] more reflective of the variety of public constituencies which have an interest in the

---

[174] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource law: Effective Judicial Intervention,* 68 Mich. L. Rev. 471, 532 (1970) (Sax, *Public Trust Doctrine)*. *See also,* Sabel and Simon, *supra* note 103, at 1020; Chayes, *supra* note 104 at 1313 (1976); Sax (1970), *supra* note 112, at 18 (discussing the right of citizen's to use the court system to gain access to bureaucratic agency decision making forums). In the case of most modern social legislation, legislative bodies set general policy objectives but leave bureaucratic agencies discretion in how to accomplish statutory objectives and to fill gaps. Chayes, *supra* note 104, at 1314.

[175] Flood Control Act of 1948, Pub. L. No. 80-858, 62 Stat. 1175 (June 30, 1948). H. R. Doc. No. 80-643 (May 6, 1948) which accompanied the Flood Control Act of 1948 observed that one of the primary reasons for the 1945 wildfires, the 1947 floods, and the intrusion of salt water into the Biscayne Aquifer was "basically the result of altering the balance of natural forces." *Id.* at 32-33. The report concluded that it was necessary to "restore the natural balance between soil and water insofar as possible by establishing protective works, controls, and procedures for conservation and use of water and land." *Id.* at 33.

[176] Chayes, *supra* note 104, at 1314.

[177] Chayes, *supra* note 104, at 1315. *See also,* Sax, *Public Trust Doctrine* at 558-60 (discussing use of the public trust doctrine by courts to achieve political power equity for a "disorganized and diffuse majority").

dispute" forcing agencies to reconsider their decisions under the questioning eye of the court.[178] The litigation also alerts the legislature about the wider public debate and provides a cue that wider debate and policy discourse is necessary.[179]

Additionally, destabilization theorists argue public law litigation can, under certain circumstances, break open large-scale bureaucratic organizations, like the Corps and the SFWMD, that have historically been closed to broader public input.[180] This phenomenon is due to both the linear and web like impact of public law litigation[181] through which court decisions reach beyond the litigants to indirectly set new standards of agency accountability.[182] Through this "creative destruction"[183] process public law litigation is used to "disentrench or unsettle … public institution[s] when . . . [they] fail to satisfy minimum standards of adequate performance and [are] . . . substantially immune from conventional political mechanisms of correction"[184] thus altering the manner in which bureaucratic agencies make decisions. Whether public law litigation can perform this destabilization function is, according to Sabel and Simon, dependent

[178] Sax (1970), *supra* note 112, at 180-81.
[179] *Id.* at 182.
[180] *See* Chayes, *supra* note 104, at 1282-83 (comparing the characteristics of public law litigation and private litigation). Chayes argues that public law litigation differs from private litigation in its focus on the balance of competing interests in the implementation of broad public policy. *Id.* at 1288. *See also,* Hurst, *supra* note 105, at *88*-89.
[181] *See* Sabel and Simon, *supra* note 103, at 1020.
[182] *Id.* at 1057-59.
[183] Joseph Schumpeter developed the concept of "creative destruction" to refer to the process by which abrupt institutional change "subversion and redeployment" disrupt market processes and generates new economic development. Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* 81-86 (3rd ed. 1950). Sable and Simon argue that common law norms can play an important role in this disruption process creating room for new opportunities and new performance standards. Sabel and Simon, *supra* note 103, at 1060.
[184] Sabel and Simon, *supra* note 103, at 1062.

upon two events: the failure of the administrative agency to satisfy some minimum standard[185] and the willingness of the court to adopt an experimental remedy.[186]

The court looks to minimum performance standards to define minimum performance for the public agency.[187] These standards are implemented through the experimentalist remedy, which differs from the traditional command and control decree in that: it is negotiated by stakeholders, takes the form of a "rolling ruler regime", and is transparent.[188] The experimentalist remedy "creates a space for the litigants and other stakeholder" to negotiate a remedial plan.[189] Through the negotiation process, conducted under the oversight of the court, the stakeholders gather and share information, set agendas and rules of deliberation and decision-making, set goals, and reach a consensus about a remedial regime to implement agreed upon remediation goals.[190] The negotiation process has both a substantive impact on the nature of the remedy ultimately adopted as well as an impact upon the relationship between the stakeholders.

The court uses the experimental remedy as an alternative to the command and control decree ordering the stakeholders to come together in a deliberative process to design a remedy. But historic experience with blockage often causes stakeholders to approach this deliberative process cautiously and with a high degree of distrust.

---

[185] Sabel and Simon, *supra* note 103, at 1065. Sabel and Simon characterize these legal standards as uncontroversial standards developed through custom and practice. *Id.* at 1063-64. An example of a minimum performance standard used in destabilizing litigation is the use of federal prison standards in destabilizing litigation to promote prison reform in Arkansas state prisons. *Id.*

[186] *Id.* at 1054. The goal of most public law litigation is the modification of policy decisions made by the agency. The remedy available to the litigant is a court order requiring the agency to modify its decision. *See generally* Sax (1970), *supra* note112, at 113-14. The traditional "command and control" decree requires the agency to correct its past action by implementing a remedy designed by the court. *See generally* Chayes, *supra* note 104, at 1298-1300 (discussing the nature of the judicial decree).

[187] Sabel and Simon, *supra* note 103, at 1063.

[188] *Id.* at 1067-72.

[189] *Id.* at 1067.

[190] *Id.* at 1068.

Additionally, stakeholders often hold divergent views about what constitutes an appropriate remedy and, therefore, remedies collaboratively developed by divergent stakeholders are often provisional and dependent upon unknown future contingencies causing individual stakeholders to continually reassess and reposition themselves as their individual and collective knowledge becomes deepens over time.[191] This reassessment process is amplified by the complexities, uncertainties, and futuristic nature of the issues stakeholders are required to address,[192] a factor particularly accentuated in environmental cases involving coupled social-ecological systems[193] such as the Everglades system, which by their nature are grounded in complexity.[194] Working in coupled human-natural systems requires acting with imperfect knowledge[195] and creates challenges for stakeholders as they try to negotiate environmental outcomes in the face of uncertainty. Through the experimental remedy stakeholders are forced to focus on benchmarks such as performance outcomes, norms, and goals that they reassess over time as ideas are tested and knowledge increases.[196] One stakeholder analogized the deliberative process of developing a scheme for Everglade's restoration to sailing a ship in search of the Northwest Passage:

---

[191] *Id.* at 1069.
[192] *Id.*
[193] The management of water-based ecosystems is complicated by the intrinsic link between hydrologic, terrestrial and aquatic ecosystems, and social systems in a coupled human and natural system. C. Folke, T. Hahn, P. Olsson and J. Norberg, *Adaptive Governance of Social—Ecological Systems,* 30 Ann. Rev. of Env. Resources 441, 442-43 (2008). These social—ecological systems are open, dynamic, complex, spontaneous and variable, subject to the vagaries of collective action. *Id.* at 443-44 and *see generally* W. Medema, B.S. McIntosh, and P.J. Jeffrey, *From Premise to Practice: A Critical Assessment of Integrated Water Resources Management and Adaptive Management Approaches to the Water Sector,* 13 Ecology and Society 29 (2008) *available at* http://www.ecologyandsociety.org/vol13/iss2/art29/.
[194] Folke et al., *supra* note 193, at 442-44.
[195] D. Huitema and S. Meijerink, *Realizing water transitions: The role of policy entrepreneurs in water policy change,* 15 Ecology and Society, 26 (2010), *see also* Sabel and Simon, *supra* note 103, at 1069 (the experimental remedy requires stakeholders to negotiate a remedy in the face of imperfect knowledge).
[196] Sabel and Simon, *supra* note 103, at 1069.

> … restoration is somewhere over the horizon that we cannot see . . . we're going to get on the ship all together and we're going to point it in the direction of Everglades Restoration and then we're going to start sailing, and instead of putting very specific interim point that we have to get to we're going to put a range of points. We're going to say oh it has to be somewhere between here and here . . . Well . . . what if restoration is here and you're pointed this way . . . you might still be in the range of your very loosely written interim goals but you're now no longer pointed toward restoration.[197]

The social science literature on social learning[198] in the context of environmental problem solving observes that deliberative processes such as that undertaken in the experimental remedy increases instrumental learning and learning capacities of stakeholders. Through the deliberative process stakeholders gain new skills and knowledge about the substantive environmental issue by engaging with new data and conducting new fact-finding.[199] These types of deliberative processes also increase the communicative learning among and between stakeholders giving the stakeholders a deeper understanding of the each other's values, viewpoints, and intentions as they learn how to work together and create a common identity.[200] Sabel and Simon affirm this claim arguing that, based on their review of past cases involving experimental remedies, the "rolling" nature of the remedy development requires stakeholders to interact and

---

[197] Interview N.

[198] Social learning is "learning that occurs when people engage one another, sharing diverse perspectives and experiences to develop a common framework of sharing diverse perspectives and experiences to develop a common framework of understanding and basis for joint action." Tania M. Schusler, Daniel J. Decker, and Max J. Pfeffer, *Social learning for collaborative natural resource management,* 16 Soc. & Nat. Resources 309, 311 (2003).

[199] *See generally* Rachel F. Brummel, Kristen C. Nelson, Stephanie Grayzeck Souter, Pamela J. Jakes and Daniel R. Williams, *Social learning in a policy-mandated collaboration: community wildfire protection planning in the eastern United States,* 53 J. Envt'l Planning & Mgmt. 681, 682-83 (2010).

[200] *Id.* and Judith Petts, *Learning about learning: Lessons from public engagement and deliberation of urban river restoration,* 173 Geographical J. 300, 301-02 (2007).

reconfigure the remedy over time, as additional information becomes known.[201] Throughout this process the stakeholders are kept at the table by the ongoing oversight of the court and through this interaction they deepen their understanding of each other building new relationships and trust.[202] Together, these two types of learning, embodied in the experimental remedy, create the opportunity for transformative learning – learning which permits stakeholders to find more "integrated, sustainable solutions to difficult environmental problems."[203] And this transformative learning facilitates the destabilization process.

Destabilization theorists categorize the destabilizing outcomes of the court's legal finding and the experimental remedy as follows:

1. Veil effect: The negotiation process places the agency in an "uncertain" position so the agency can no longer rely on past patterns or practice. It must reorient its goals, its partners and its understanding of how to problem solve.[204]
2. *Status quo* effect: The court action stigmatizes the *status quo*, forcing the stakeholders to accept the fact that the *status quo* is dead. This in turn reduces the risk of change as change becomes a foregone conclusion.[205]
3. Deliberative effect: The status quo's death forces the parties to explore alternatives developed through the negotiation process.[206]
4. Publicity effect: Vindication of the plaintiffs claim increases public scrutiny of the problem.[207]
5. Stakeholder effect: The court's liability determination empowers the plaintiff and legitimizes their claim increasing the plaintiff's position at the negotiation table and increasing the plaintiff's political power while decreasing the influence of traditional agency constituencies and power elites.[208]

---

[201] Sabel and Simon, *supra* note 103, at 1069-70.
[202] *Id.* at 1070.
[203] Brummel et al, *supra* note 199, at 682. *See generally,* John Mezirow, *Understanding transformational theory,* 44 Adult Ed. Quarterly 222 (1994).
[204] *Id.* at 1074-75.
[205] *Id.* at 1075-76.
[206] *Id.* at 1076.
[207] *Id.* at 1077.
[208] *Id.* at 1077-78.

6. Web effect: The impact of the negotiated remedy spills back and forth between public and private realms in a process of "iterative disequiliberation and readjustment."[209]

Taken together these effects transform the relationship between the agency and its traditional constituency, the relationship between the agency and the blocked citizen constituency, and the manner in which the agency implements public programs moving forward.

3. Public Law Litigation, Change and Legal Mobilization

Social scientists also have examined the potential of law and litigation to motivate political change.[210] Stuart Scheingold, in *The Politics of Rights,* one of the seminal works on litigation and social change, argues that law and litigation can alter public policy *if* lawyers, litigants, and the courts are willing to abandon conventional legal perspectives in favor of a political approach to law.[211] But a political approach to litigation was contrary to the traditional American perspective of law[212] a perspective

[209] *Id.* at 1081.

[210] Social scientists disagree about the potential of law to cause political and social change. These divergent views are embodied in two separate schools of thought: the dynamic court view and the constrained court view. *See generally* Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change* (1991). Proponents of the dynamic court view argue that courts can produce significant social change through social movements. *Id.* at 22; *see also* Michael McCann, *Law and Social Movements: Contemporary Perspectives,* 2 Ann. Rev. L. Soc. Sci. 17, 19 (2006)(McCann (2006)). The constrained court view argues that courts are not effective tools of social reform because of the "limited nature of constitutional rights", the lack of judicial independence, and the inability of the court to develop and implement policies that stimulate change. Rosenberg, *supra,* at 10. Arguably the experimental remedy as articulated by Sabel and Simon provides a counter to the claim that courts cannot develop and implement remedies that stimulate change.

[211] Stuart A. Scheingold, *The Politics of Rights: lawyers, public policy, and political change,* 13 (1974). Scheingold argues that litigation and court decisions can be used as part of a broader strategy to organize and mobilize political change. *Id., see also* Michael Paris, *The Politics of Rights: Then and Now,* 31 Law & Soc. Inq. 999, 1006 (2006).

[212] Scheingold posits that there are two prevailing views of law in American Society: the "myth of rights" and the "politics of rights". The myth of rights embraces a social perspective that perceives and explains human interactions in terms of rules, rights and obligations inherent in rules. Scheingold, *supra* note 210, at 13. The "myth of rights" has been the dominant view of law in American. Grounded in the Constitution it provides American democracy and politics with symbolic legitimacy." *Id*. Symbolic rights such as the

embodied in the "myth of rights."[213] The American perspective has at its core a "legal paradigm – a social perspective which perceives and explains human interactions largely in terms of rules and the rights and obligations inherent in rules."[214] Thus American's tend to believe public policy development "is and should be conducted in accordance with the patterns of rights and obligations established under law"[215] and reform lawyers, who are students of this view, tend to distrust political change processes in favor of "legal" approaches to policy change such as litigation.[216] This legal frame "[t]unnel[s] the vision . . . of activists leading to an oversimplified approach [to the use of law to advance social change. An approach] ... that grossly exaggerates the role that lawyers and litigation can play in a strategy for change. The assumption is that litigation can evoke a declaration of rights from courts"[217] and that this declaration can be used to realize rights that in turn can cause social and political change.[218]

In truth, the use of litigation to promote social change is a much more complex process.[219] Sociologists argue litigation is only successful in promoting change when directed "to the redistribution of power."[220] Scheingold characterizes this political use of litigation as "politics of rights" in which litigation becomes a "*political resource* [] of

---

right to own property, the right to contract freely "reflect [the] values which are the building blocks of [American] political ideology." *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] Stryker (2007), *supra* note 103 at 77.

[217] Scheingold, *supra* note 211, at 5.

[218] *Id.*

[219] Michael McCann, *Law and Social Movements* in *The Blackwell Companion to Law and Society* 506, 519 (2004) (McCann (2004)).

[220] Scheingold, *supra* note 211, at 6.

unknown value in the *hands of those who want to alter the course of public policy."*[221] The value of litigation as a political resource is dependent upon the manner in which it is used both inside and outside of the courtroom. Accordingly, successful use of law and litigation to promote change is dependent upon two essential elements: (1) a preexisting group of political activists promoting social change and (2) legal mobilization or the use of law or "rights" to develop political resources that can be used by activists within a larger context to promote social change.[222]

Social science scholars since Scheingold argue law and litigation are most successful at stimulating change when mobilized by organized social movements.[223] Social movements are "sequences of contentious politics" undertaken by people linked by underlying social networks and collective action frames which are used to maintain sustained challenges against established politically powerful opponents. [224] In the context of political blockage a social movement organization (SMO) is a group of citizens blocked from the political decision making process by politically powerful interests and administrative agencies. SMOs use "collective action" to destabilize or challenge

---

[221] *Id.* at 5.
[222] McCann (2006), *supra* note 210, at 21-22.
[223] *See generally* Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Court in Comparative Perspective*, 21 (U. of Chi. Press, 1988) and McCann (1994), *supra* note 99 at 279-80 (1994). Scheingold, in the preface of the second edition of *The Politics of Rights* concurs with McCann that an important element of public law change litigation is a social movement organization willing to mobilize the litigation. Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change, xxix – xxx* (2nd ed 2004)(1974). The term social movement has been given a variety of definitions a discussion of which is beyond the scope of this article. This paper employs Tilly's definition which defines a social movement as a "sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation" in which activists make public demands for change in the distribution and exercise of political power and "back those demands with public demonstrations of support. Charles Tilly, *Social Movements and National Politics* in *Statemaking and Social Movements*, 276, 306 (C. Bright and S. Harding eds., 1984).
[224] Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 2-3 (1998).

established political blockage to gain meaningful access to public decision-making forums.

The desired outcome of an SMO is threefold: (1) short term political gains (policy outcome), (2) meaningful structural change that provides access to policy-making forums (policy structural outcome), and (3) movement building. From a policy perspective SMOs seek both an immediate political decision to redress past wrongs and a structural change that opens policy decision-making structures to the politically disenfranchised.[225] To accomplish this end the SMO must build support for the movement thereby increasing the movement's power and the likelihood of change.[226] SMOs mobilize political and other resources including law and litigation to accomplish these outcomes.[227]

In this context law is a political resource[228] used by both established political interests and SMOs to promote their own interests and to control decision-making

[225] McCann argues that social movements "aim for a broader scope of social and political transformation" than do conventional activists. McCann (2006), *supra* note 210, at 23-24. While SMOs may press for short-term gains their true aim is a better society. *Id.* SMOs employ a wide range of tactics to achieve their ends but tend to rely on media campaigns and destructive symbolic tactics that halt or upset ongoing social practices. *Id.*

[226] McCann (1994), *supra* note 99, at 282.

[227] *See generally,* Bob Edwards and John D. McCarthy, *Resources and Social Movement Mobilization,* in *The Blackwell Companion to Social Movements*, 116-152 (David A. Snow, Sarah A. Soule and Hanspeter Kriesi eds., 2004)(containing a discussion of resources and their mobilization by SMOs).

[228] What constitutes a resource is, to some degree, dependent upon the social movement theory used by the scholar. Scholars of the rational choice or resource mobilization theory focus on the means available to SMOs to facilitate mobilization. These resources include money, time and human capital. Resources are internal to the SMO and used in conjunction with political opportunities. Tarrow, *supra* note 224, at 15. Tarrow, in his synthesis of social movement theory argues that people engage in contentious politics mobilizing their resources or when political opportunities are presented. In this context a resource may be either internal to the SMO in the case of money or power leveraged to create change, or may be external to the SMO in the form of an external opportunity – an opening or access point such as the Three Mile Island nuclear accident's impact on the anti-nuclear power movement in the United States. *Id.* at 19-20.

processes.[229] The control of law as a political resource increases the political power of established political interests or SMOs.[230] Using a political resource to increase one's political power involves the mobilization of political resources to control the outcome of political conflicts over public policy outcomes.[231] It is, however, generally conceded among SMO scholars that law as a political resource generally supports prevailing politically powerful interests.[232]

Florida law is a case in point. Florida, dating back to the 1800s and for over a century thereafter, was premised on a development frame[233] – it assured agricultural and urban development as an essential component of Florida's economic future. Florida law supported this frame. When Florida entered the Union in 1845 it was granted 500,000 acres of land for internal improvement.[234] This grant was augmented by the Swamp and Overflowed Lands Act, which transferred title of all federal lands within Florida's boarders that were "unfit for cultivation by its swampy or overflowed condition" to the

---

[229] Austin T. Turk, *Law as a Weapon in Social Conflict,* 23 Soc. Prob. 276, 280 (Feb. 1976) and McCann (2006), *supra* note 209, at 21.
[230] *See generally,* Turk, *supra* note 229 (analyzing the five types of political resources represented by law).
[231] *Id.* at 280.
[232] McCann (2006), *supra* note 210, at 23.
[233] A "frame" is a "schemata of interpretation that [permits] individuals to 'locate, perceive, identify, and label'" events and occurrences in their lives and in the larger world. Robert D. Beford & David A Snow, *Framing Processes and Social Movements: An Overview and Assessment,* 26 Annu. Rev. Soc. 611, 614 (2000). Framing permits an individual to organize his/her experiences and information to guide his or her actions. *Id.* They are a means of condensing and simplifying information. *Id.* Essentially the frame is an "interpretive storyline" that communicates "why an issue might be a problem, who or what might be responsible for it, and what should be done about it." Matthew C. Nisbet, *Communicating Climate Change: Why Frames Matter for Public Engagement,* Env't Mag. Mar.-Apr. 2009, at 12, 15 (discussing the concept of framing in the social science disciplines). Frames tell us why an issue matters – they lend "weight to certain considerations and arguments over others." Matthew C. Nisbet & Dietram A. Scheufele, *What's Next for Science Communication? Promising Directions and Lingering Distractions,* 96 Am. J. of Botany1767, 1770 (2009).
[234] Maloney Plager & Baldwin*, supra* note 28, at §101.1(b) *citing* U.S. Dep't of Agriculture, *Water (The Yearbook of Agriculture)* 555 (1955).

State of Florida [235] encouraging Florida to "reclaim" and sell the land.[236] Florida quickly adopted laws facilitating the drainage and development of its "swampland".[237]

Florida, like most states east of the 100th meridian was a riparian rights state – owners of property abutting a navigable water body had the right to make "reasonable use" of the abutting water body so long as the use did not unreasonably interfere with the use of other riparian owners. [238] Water uses could be either consumptive or non-consumptive[239] but were limited to the riparian property, thus a riparian owner could not sell water rights or export water to a location beyond the riparian property.[240] But navigable waters in Florida and the land there under was the property of the state to be held for the benefit of the "whole people" thus a riparian owner's rights were not exclusive below the ordinary high water mark.[241] Florida also retained the right to use and to allocate the use of all excess waters not used by riparian owners.[242] Thus Florida had broad authority and discretion to control the free flow of water and to divert and

---

[235] Swamp & Overflowed Lands Act of 1850, Ch. 84 §2, 9 Stat. 519 (Sept. 28, 1850). This grant included much of the Everglades. *Id.*

[236] *Id.*

[237] *See,* Grunwald, *supra* note 22, at 68-171 for a detailed discussion of attempts to drain the Everglades between 1850 and 1914.

[238] Maloney Plager & Baldwin*, supra* note 28, at § 21. The reasonable use doctrine permits a riparian owner to make reasonable use of water bodies abutting his or her property so long as he or she does not interfere with the use rights of other riparian owners. *Id.* at 156 (§54.2 (b)(3). Florida also applies a reasonable use doctrine to "percolating water" permitting landowners' beneficial use of underlying groundwater so long the surface owner used the water for a beneficial purpose and there was a reasonable relationship between the use of the water and the use of the overlying land. *Koch v. Wick,* 87 So. 2d 47, 48 (Fla. 1956), *see generally* Maloney Plager & Baldwin, *supra* note 28, at §54(2)(c).

[239] Maloney, Plager & Baldwin, *supra* note 28, at § 21.2.

[240] *Id.* at §54.2(b)(3).

[241] *Merril-Stevens Co. v. Durkee,* 57 So. 428, 431 (Fla. 1912)

[242] Maloney, Plager & Baldwin, *supra* note 28, at §62.3(b). The state retained the right to allocate the use of ground water not used by overlying landowners. *Id.*

allocate water within its boundaries for public or private use.[243] Florida used this authority to begin drainage of its "swampland" for agriculture and urban development.

Initially Florida relied on private development interests to drain and develop the Everglades region.[244] But in 1901 Florida amended its water law to permit counties to "reclaim" or drain private lands if the county commissioners determined that reclamation would benefit agriculture or public health.[245] In 1905, Governor Broward, proposed funding Everglades drainage in order to advance private development of three million acres of the state's "swampland".[246] The Florida legislature responded by establishing the Everglades Drainage District, the precursor to the SFWMD, whose sole purpose was to facilitate Everglades' drainage.[247] The Everglades Drainage District set to work draining "excess water" from the region south of Lake Okeechobee to make the "swamp land" available for agricultural development.[248] By 1925 sugar cultivation in the region south of Lake Okeechobee had soared from zero to 100,000 acres.[249] Sugar interests quickly became a primary concern of Florida and the nation's political infrastructure.[250]

---

[243] *Id.* at §94.4(a)(discussing the State of Florida's historic right to authorize the diversion of water from surface water bodies and ground water aquifers "in excess of the average minimum flow"). *See also,* Fla. Stat. § 373.141 (1967) *repealed by* 1972 Fla. Laws 72-299, Part VI §1.

[244] Maloney, Plager & Baldwin, *supra* note 28, at § 101.1(b).

[245] Act of May 31, 1901, ch. 5035 , 1901 Fla. Laws 188.

[246] Godfry, *supra* note 101, at 7-8.

[247] *Id., see also* Maloney, Plager & Baldwin, *supra* note 28, at §101.1(b). In 1912, M.O. Leighton, Chief Hydrographer of the U.S. Geological Survey noted: "Our swamps are the greatest single menace that remains to public health. As a people we cannot feel that our full duty has been performed until we have made these swamp lands centers of prosperity and comfort for ourselves and those who shall come after. . . . They are not unproductive; they can be made sources of great national wealth." http://sofia.usgs.gov/publications/circular/1275/devimpact.html last visited December 14, 2011.

[248] Maloney, Plager & Baldwin, *supra* note 28, at 246, §§84.3 (c)(1) and 101.1(b). Water was drained from the landscape through a series of canals below Lake Okeechobee. These canals dumped "excess water" into the Atlantic Ocean and the Gulf of Mexico. *Id.*

[249] *Id.* at §101.1(b)

[250] The predominance of sugar in the Everglades was further solidified by the passage of the Sugar Act of 1934 which was designed to provide stability of sugar prices and insured sugar prices for growers. Note, *The Sugar Act of 1937,* 47 Yale L. J. 980 (1938).

With the population and agricultural influx of these "swamp lands" came a new challenge which Florida law was quick to redress – flood control.[251] The hurricanes of 1924, 1927, and 1947 required a frame shift from drainage to flood control – protecting humans from natural disasters and maintaining valuable land for production.[252] The framing power of law can impose limitations, perceived or real, on alternative approaches to policy determinations.[253] This was the case in South Florida where drainage law that had supported a "reclamation frame" gave way to a "flood control" frame in which the only perceived flood control option was to harness the Everglades. This feat accomplished in 1948 when Congress authorized construction of the C&SF Project.[254] The State of Florida responded by passing the Flood Control Enabling Act which permitted the SFWMD to work "with the United States in the manner provided by Congress for flood control, reclamation, conservation and allied purposes. . . ."[255] The

[251] Maloney, Plager & Baldwin, supra note 28, at §101.1(b) (noting that the management emphasis of the Everglades Drainage District shifted from drainage to flood control as development increased within the Everglades).
[252] The Everglades Drainage District issued a "Tentative Report of Flood Damage" associated with the 1947 flood. The Reports cover is an illustration of a "weeping cow", an image strategically designed to dramatize the severity of flood impacts on development and the need for a comprehensive mechanism to control flooding in the developed regions of the Everglades. http://sofia.usgs.gov/publications/circular/1275/devimpact.html last visited February 2, 2011. *See also* Grunwald, *supra* note 22, plate 11 and Godfry, *supra* note 101, at 10-12. The aftermath of each Everglades "flood" event brought with it a new waive of federal and state legislative activity intended to minimize flooding within the Everglades. Maloney, Plager & Baldwin, *supra* note 28, at § 101.1(b), *see also* Godfry, *supra* note 101, at 10-14 (discussing federal and state responses to recurrent flooding in the upper Everglades).
[253] Turk, *supra* note 229, at 281. Law plays a significant role in shaping the frames people use to give meaning to situations. *Id.* The fact that law supports a particular view or frame can diminish the legitimacy of other views or frames. *Id.*
[254] Financing and construction of the C&SF Flood Control Project was dependent upon cooperation between the Corps and the State of Florida. Flood Control Act of 1948, Pub. L. 80-858 § 203, 62 Stat. 1175 (June 30, 1948).
[255] Fla. Stat. 378.01(1)(1967) *repealed by* 1972 Fla. L. 72-299, §1, *see also* Maloney, Plager & Baldwin, *supra* note 28, at §101.1(d)

completed C&SF Project was managed by the SFWMD[256] which was responsible for managing all water in the Everglades flow way. One of the ironies of the flood control frame and the resulting C&SF Project was that many of the components of the C&SF Project designed to control Everglades' "flood" waters could also be used for water storage – water which had once flowed through the natural system could now be stored in the WCAs. [257]

This storage capacity became increasingly important as growing urban development and populations along the coastal ridge challenged Florida's ability to provide adequate drinking water.[258] South Florida had historically relied on the Biscayne Aquifer for drinking water.[259] However, the C&SF Project and development within the Everglades footprint reduced the volume of water flowing through the natural system and thus the replenishment of the Biscayne Aquifer. At the same time, as the population and water demands of South Florida increased the available water in the Biscayne Aquifer decreased.[260] The loss of water in the Biscayne Aquifer caused a head reduction in the aquifer, which in turn resulted in salt-water intrusion.[261] And salt-water intrusion made water from the Biscayne Aquifer unsuitable for human consumption.[262] To resolve the issue Florida had two alternatives: pump water into the Biscayne Aquifer or make water

---

[256] The Everglades Drainage District was abolished in 1955 and replaced by the Central and South Florida Flood Control District. Gunderson, Light & Holling, *supra* note 21, at 126. The Central and South Florida Flood Control District was abolished in 1972 when the state created the SFWMD. Gunderson, Light & Holling, *supra* note 21, at 126, 134-35. For purposes of this article these agencies are collectively referred to as the SFWMD.
[257] Maloney, Plager & Baldwin, *supra* note 28, at §101.1(h)
[258] *Id.* at §101.1 (h).
[259] *See discussion, supra* Part II.A.
[260] *See generally,* Maloney, Plager & Baldwin, *supra* note 28, at §§ 51.3 – 52.2.
[261] *Id.* at §52.3(b).
[262] *Id.* at §52.3(b). According to the Florida Board of Health water is unsuitable for human consumption when the chloride content exceeds 250 parts per million. *Id.*

captured by the C&SF Project available for consumptive use – either alternative meant less water for the natural Everglades system.

Florida water law authorized the SFWMD to issue consumptive water permits for "excess" water not consumed by riparian owners.[263] Using this legal authority the SFWMD gave preference to consumptive uses over natural system needs.[264] The SFWMD continued to reduce water flow to the natural system during dry years while flooding the system during wet years.[265]

Those advocating on behalf of the natural system did attempt to insure adequate water for the remaining portions of the natural system. For example, William Warne, Assistant Secretary of Interior, in a letter to the Corps expressed significant concern about the impact of the operation of the C&SF Project on the Park to congress. The Corps, Warne complained, could not be counted on to guarantee adequate water for the Park.[266] But in the face of the "flood control" frame and the discretion granted to the Corps and the SFWMD, Warne lacked the political resources, including law and litigation, to assure adequate quality water for the Everglades natural system. It would remain to others to leverage their political resources to assure an adequate water supply for the Everglades. Conservation and restoration of the Everglades ecosystem would ultimately require and SMO willing to mobilize its political resources, including law, to protect the natural system.

---

[263] Fla. Stat. § 378.17(1) (1966) *recodifed and renumbered* Fla. Stat. Ann. § 373.0831 (2006) and *supra,* note 243.
[264] *Id.*
[265] Gunderson, Light and Holling, *supra* note 21, at 126-27, 129-31.
[266] U.S. Army Corps of Eng'rs, Comprehensive Report on Central and South Florida for Flood Control Purposes, H.R. Doc. No. 80-643 at vi-xi (May 6, 1948)(Letter of William G. Warne, Assistant Secretary of Interior to Lt. Gen. R.A. Wheeler, April 13, 1948).

Legal mobilization can translate an SMO's claim into a lawful claim of right thereby transforming or reconstituting the terms of the social and power relationships within polities.[267] But legal mobilization and court orders alone are insufficient to motivate political change.[268] According to social movement scholars, litigation matters only if it is part of a broader strategy to organize and mobilize political action to redistribute political power.[269] It is the redistribution of political power and not litigation that brings about meaningful change. As Stryker explains in her overview of studies examining the relationship between social movements and litigation: "maximizing real world inequality reduction through law requires combining a number of factors or conditions. Law interpretation and enforcement must be subject to sustained social movement pressure from below through a combination of litigation *and* mass political mobilization."[270]

Both legal theorists and social scientists identify a number of elements necessary for successful destabilizing litigation that sustains political and social change. These elements include: an established social movement organization (SMO); a minimum legal standard that forms the basis for litigation;[271] political and legal mobilization;[272] the

---

[267] McCann (2006), *supra* note 209, at 21-22.
[268] Social scientists argue that there are a number of factors which impact whether a court order will be enforced or whether the order will result in political change. Those factors include but are not limited to whether the SMO is permitted to participate in the decision making process, whether the court exercises ongoing oversight over the matter, and whether the remedy fixes responsibility for and monitors the impact of organizational change and its outcome. Beth Harris, *Representing Homeless Families: Repeat Player Implementation Strategies,* 33 Law & Soc'y Rev. 911, 933 (1999) and Stryker (2007), *supra* note 216, at 90.
[269] Stryker (2007), *supra* note 103, at 76.
[270] *Id.* at 88 (emphasis added).
[271] Sabel and Simon, *supra* note 103, at 1063-64.
[272] *See generally* Stryker (2007), *supra* note 103, at 76-78.

ability to use the litigation to frame issues for bystanders and potential SMO members;[273] ongoing court oversight;[274] and a decree that encompasses an experimental remedy developed by stakeholders in a transparent process subject to ongoing court oversight flexible enough to permit modification as new information becomes available.[275] To what extent were these factors at play in efforts to launch and implement Everglades' restoration?

IV. ANALYSIS – THE EVERGLADES' NARRATIVE & HOW LAW MATTERED TO EVERGLADES' RESTORATION

Efforts to restore the Everglades began almost before the cement was dry on the C&SF Project. By the early 1970's headlines ranging from "Disaster Threatens the Everglades"[276] to "The Imperiled Everglades"[277] were prominent in the national news media as the impacts of the C&SF Project and associated human development on the remaining Everglades ecosystem became apparent. But raising concerns about Everglades' ecosystem health is a far cry from adopting a restoration agenda. Even if Florida embraced and ecosystem restoration agenda restoration for the Everglades, restoration itself was a challenge in complexity and uncertainty complicated by changes to the natural system made by human systems, a lack of scientific knowledge, and science's inability to predict the impact of restoration on the Everglades ecosystem.[278] As one Corps official is fond of saying: "Restoring the Everglades . . . was not brain

[273] Bedford and Snow, *supra* note 233, at 614.
[274] *See generally* Stryker (2007), *supra* note 103, at 85.
[275] *See generally,* Sabel and Simon, *supra* note 103, at 1067-73.
[276] Peter Farb, *Disaster Threatens the Everglades,* Audubon, September-October 1965 at 302.
[277] Fred Ward, *The Imperiled Everglades*, 141 National Geographic 1 (January 1972). The degradation of the Everglades even made headlines in Playboy. Richard Rhodes, *The Killing of the Everglades,* Playboy, January 1972 at 112.
[278] Davis and Ogden, *supra* note 84, at 788-89.

surgery; it is much more complicated."[279] In 1970 Florida lacked the operating theater and instruments to undertake the necessary surgery – it did not have the political or social constructs necessary to sustain an ecosystem agenda.

Ecosystem restoration projects are not susceptible to traditional command and control regulatory and political regimes that focus on individual pollution sources.[280] Restoration decisions must be made at regional scales, across landscapes.[281] Restoration requires adaptive ecosystem management to "provide[] a framework for achieving a mutually dependent, sustainable society and environment" it focuses "on human and natural system interactions at regional spatial and integrational time scales."[282] In 1970 such governance frameworks necessary to address the key environmental stressors which stood as a barrier to ecosystem restoration.[283]

Although there are a number of stressors that lead to the decline of the Everglades ecosystem the key connecting environmental stressors across the Everglades ecosystem were hydrological:[284] the "quantity, quality, timing and distribution of water to the natural

---

[279] Grunwald, *supra* note 22, at 316.
[280] J.H. Gentile, M.A. Harwell, W. Cropper Jr., C.C. Harwell, D. DeAngelis, S. Davis, J.C. Ogden, and D. Litman, *Ecological conceptual models: a framework and case study on ecosystem management for South Florida Sustainability,* 274 The Sci. of the Total Env. 231, 232 (2001).
[281] *Id.* at 232.
[282] *Id.*
[283] Ecosystem management is informed by environmental risk assessments designed to identify key environmental ecosystem stressors and to evaluate the impact of those stressors on ecological functions. *Id* at 232, 239.
[284] *Id.* at 235, 239. Scientists agree a "regional hydrologic restoration plan" is a necessary "prerequisite" to Everglades restoration. Mary Doyle and Donald E. Jodery, *Everglades Restoration: Forging New Law in Allocating Water for the Environment,* 8 Envt'l Lawyer 255, 262 (2001-2002) and United State Army Corps of Engineers, *Central and South Florida Project Comprehensive Review Final Integrated Feasibility Report and Programmatic Environmental Impact Statement*, 5-28 (1999) [hereinafter *Comprehensive Review Study*].

system has to mimic as closely as possible pre-drainage systems."[285] Efforts to accomplish this hydrologic goal are complicated by human development and alterations of the landscape once occupied by the Everglades. Restoring the Everglades hydrology was a two-phased process that involved litigation to improve the quality of water flowing into the Everglades and a politically designed collaborative negotiation to restore flow regimes.

A. The Role of Social Movements in Birthing Everglades Restoration

Grass roots social movements initially drove Everglades' restoration[286] and these efforts were grounded in a relationship forged between sportsman and local environmental activists. This unlikely partnership was tested in the jetport controversy and arguably birthed Everglades' restoration.

By the early 1960's the aviation industry either directly employed or supported the employment of approximately one fifth of Dade County. Growth for Dade County required growth of the aviation industry. Experts predicted that the Miami International Airport "would reach its air traffic saturation point by 1973"[287] but Miami International

---

[285] Salt, Langton and Doyle, *supra* note 125, at 5, 16 *citing* South Florida Ecosystem Restoration Task Force, *Coordinating Success: Strategy for Restoration in the South Florida Ecosystem* at 14 (July 31, 2000) available at www.sfrestore.org/documents/isp/sfweb/sindex.htm

[286] Freudenberg and Steinsapir observed that by the 1990's the U.S. environmental movement was composed of three levels of social movement organizations: community based groups, statewide and regional groups, and national environmental groups. Nicholas Freudenberg and Carol Steinsapir, *Not in our Backyards: The Grassroots Environmental Movement,* 27, 28 in *American Environmentalism: The U.S. Environmental Movement, 1970-1990* (Riley E. Dunalp & Angela G. Mertig ed. 1992). Grassroots organizations, which formed the foundation of the environmental movement, were generally local organizations focused on environmental issues within their communities. *Id.* at 29. The goal of these organizations was to push government to fix an environmental problem. These groups often used litigation and lobbying to achieve their objectives. *Id., see also* Grunwald, *supra* note 22, at 244-46.

[287] Godfry, *supra* note 101, at 108 and Carter, *supra* note 64, at 188-89.

Airport, which sat at the edge of downtown Miami, had little room for expansion.[288] In the late 1960's the Dade County Port Authority (Port Authority), the Federal Aviation Administration (FAA) and the Department of Housing and Urban Development had began searching for a new jetport site in uninhabited areas near the population centers of Miami and Naples.[289] After abandoning a site at the edge of the Park, the Port Authority and the FAA selected a jetport site in the Big Cypress swamp (the Big Cypress) and began acquiring property.[290] The problem with the site from an environmental standpoint was approximately fifty percent of the surface water entering the Park and all of the water sustaining the Ten Thousand Islands area northwest of Florida Bay came through the Big Cypress.[291] The Big Cypress was also home to seventeen endangered species including the Florida Panther.[292]

Many in the environmental movement thought the jetport was a done deal. While the NPS had expressed concerns about jet fuel water contamination initially only Joe Browder of the Florida Branch of the National Audubon Society and Gary Soucie of the local branch of the Sierra Club indicated that the jetport site should be moved to another location.[293] Browder, an ex-reporter turned environmental activist, immediately set to work using his networks to build a grassroots coalition to halt the jetport.[294] He appealed to a broad array of constituencies using his media savvy to stir up publicity and public

---

[288] Carter, *supra* note 64, at 188-89.
[289] Godfry, *supra* note 101, at 108.
[290] Godfry, *supra* note 101, at 110; Carter *supra* note 64, at 188.
[291] Godfry, *supra* note 101, at 108.
[292] *Id.* at 108.
[293] Carter, *supra* note 64, at 194-95 and Godfry, *supra* note 101, at 110. At a SFWMD meeting of interested agencies and environmentalists only Browder and Soucie vocally supported site relocation. *Id.*
[294] Grunwald, *supra* note 22, at 255. Browder's grassroots coalition was rumored to include such diverse groups as the Miccosukee Tribe, hunting groups, airline unions, and even a "notorious gator poacher." *Id.*

support.[295] His network of Everglades' supporters included Arthur Marshall, Jr.[296] a U.S. FWS marine biologist who had been calling for restoration of the Everglades ecosystem since the 1950's, and Nathaniel Reed, a "blue blood" outdoorsman and aide to Governor Kirk.[297] At a February 1969 jetport public hearing, Browder, Reed, and Marshall pressed the Port Authority to address the environmental impacts of the jetport project on both the Big Cypress and the Everglades' ecosystem.[298] Their request fell on deaf ears – Reed left the hearing believing that the jetport was a done deal although he continued to wage a quiet political campaign enlisting the support of both Governor Kirk and Interior Secretary Hickle.[299] Browder, on the other hand, engaged in a public assault: "unless the Port Authority could provide assurances that the jetport would not harm the Everglades ecosystem, he would wage a national campaign to stop its construction"[300] and Browder, in a classic use of framing, made good on his word.[301] Articles decrying the impact of the jetport on the Everglades and Big Cypress ecosystems began to appear in major, national news outlets including *Time*[302] and *Life*[303]. Browder

---

[295] *Id.* at 245.
[296] Equated by some as Florida's Rachel Carson, Art Marshall, a FWS marine biologist and director of the FWS south Florida office, became one of the first scientific advocates for Everglades' restoration. Marshall developed one of the first Everglades' restoration plans (The Blueprint). Grunwald, *supra* note 22, at 246.
[297] *Id.* at 251. Reed was from old money but developed an affinity for natural systems in his youth, a passion he carried with him to Governor Kirk's staff. *Id.* at 249. Reed turned his office in the Governor's office into a "war room" to protect Florida's natural systems. *Id.* at 250.
[298] *Id.* at 255-56 and Carter, *supra* note 64, at 196.
[299] Reed convinced Governor Kirk to withdraw support for the jetport. Grunwald, *supra* note 22, at 256. Reed also convincd Governor Kirk to approach Interior Secretary Walter Hickel, Hickel agreed to take on Nixon's transportation team and to make the Everglades "his [Nixon's] signature conservation issue." *Id.*
[300] Godfry, *supra* note 101, at 111.
[301] Grunwald, *supra* note 22, at 257.
[302] *Conservation: Jetport v. Everglades,* Time Magazine, Aug. 22, 1969 at 42 *available at* http://www.time.com/time/magazine/article/0,9171,898538,00.html last visited March 18, 2011.
[303] John MacDonald, *Last Chance to Save the Everglades,* 67 Life 58 (Sept. 5, 1969) *available at* *http://books.google.com/books?id=FU8EAAAAMBAJ&pg=PA58&lpg=PA58&dq=Everglades+jetport+life+magazine&source=bl&ots=_G6SbAWDGq&sig=McJyoge5Jcr0kT-*

also formed the Everglades Coalition, a network of twenty-one local and national environmental groups opposing the jetport.[304] The result of Browder's framing and networking efforts included growing national bystander support for Everglades' preservation, an effort buttressed by Browder's outreach to "the most famous Everglades advocate" of them all Marjory Stoneman Douglas.[305] Douglas responded to Browder's challenge to engage in the jetport controversy by founding her own grassroots organization, Friends of the Everglades (FOE).[306] Douglas was soon traversing the state denouncing the jetport.[307]

Another one of Browder's many allies in the jetport fight was a plumber, fisherman, and outdoor enthusiast Johnny Jones.[308] Jones was an active member of the Florida Wildlife Federation (the Federation) and in 1971 became its first full time Executive Director.[309] Established in 1937[310] the Federation was a conservation group composed of sportsman organized to preserve game habitat.[311] The Federation had long

---

meP1nXBg2IjE&hl=en&ei=QbCDTfLWEc6-0QGT3sDNCA&sa=X&oi=book_result&ct=result&resnum=3&ved=0CCIQ6AEwAg#v=onepage&q=Everglades%20jetport%20life%20magazine&f=false last visited March 17, 2011.

[304] Grunwald, *supra* note 22, at 257 and Carter, *supra* note 64, at 196-97.

[305] Grunwald, *supra* note 22, at 257. Browder visited the 78-year-old Douglas and asked her to publically denounce the jetport. When she replied that people wouldn't listen to an old lady, they only listened to organizations. Browder challenged Douglas to found a local organization to challenge the jetport. In response to Browder's challenge Douglas founded Friends of the Everglades. *Id.*

[306] Grunwald, *supra* note 22, at 257.

[307] *Id.* at 258. "[N]obody can be rude to me, this poor little old woman," she is reported to have said, "I can be rude to them, poor darlings, but they can't be rude to me." *Id. quoting* Margarita Fichtner, *Marjory Stoneman Douglas,* Miami Herald, Sept. 22, 1985.

[308] Notes from Joe Browder's Remarks at Johnny Jones Memorial Service, July 17, 2010 *available at* http://groups.google.com/group/e-everglades/web/johnny-jones-sr?version=22 last visited March 18, 2011.

[309] Willie Howard, *Johnny Jones Remembered as Stubborn Advocate for the Environment,* Palm Beach Post, July 12, 2010 *available at http://www.palmbeachpost.com/news/johnny-jones-remembered-as-stubborn-advocate-for-the-798479.html* last visited March 18, 2011.

[310] http://www.fwfonline.org/accomplishments.htm last visited March 17, 2011.

[311] Jack E. Davis, '*Conservation is now A DEAD WORD': Marjory Stoneman Douglas and the Transformation of American Environmentalism,* 8 Envt'l History 53, 66 (Jan. 2003)(Davis, *Conservation is Now a DEAD WORD)*, *see also http://www.fwfonline.org/about/chair.htm* last visited March 17, 2011. The

been active in attempts to prevent dredging, road construction, and development in the Everglades and the Big Cypress including construction of the jetport. [312] Jones and the Federation joined Browder, Marshall, and Douglas[313] in mobilizing opposition to the jetport. By 1969 there were mounting threats to sue both the Port Authority and the FAA to halt jetport development under Section 4(f) of the Department of Transportation Act of 1966.[314]

In the face of mounting political pressure, both locally and nationally, the Nixon administration "chose the River of Grass" over the jetport.[315] In January 1970, the State of Florida, the Port Authority and the U.S. Departments of Interior (Interior) and Transportation signed the Jetport Pact effectively abandoning construction of the jetport in the Big Cypress.[316]

Federation was also instrumental in passage of Florida's Endangered Species Act and in promoting the public purchase of environmentally sensitive lands. *Id.*

[312] *Id.* and Interview B. The Federation was also working to obtain federal protection for the Big Cypress and to restore the Kissimmee River. Grunwald, *supra* note 22, at 269; *see generally,* History of Big Cypress, available at http://www.evergladesonline.com/history-big-cypress.htm last visited March 21, 2011; Notes from Joe Browder's Remarks at Johnny Jones Memorial Service, July 17, 2010 *available at* http://groups.google.com/group/e-everglades/web/johnny-jones-sr?version=22 last visited March 18, 2011; and Gaylord, *supra* note 101, at 122.

[313] Grunwald, *supra* note 22, at 269; *See generally,* History of Big Cypress, available at http://www.evergladesonline.com/history-big-cypress.htm last visited March 21, 2011; Notes from Joe Browder's Remarks at Johnny Jones Memorial Service, July 17, 2010 *available at* http://groups.google.com/group/e-everglades/web/johnny-jones-sr?version=22 last visited March 18, 2011; and Gaylord, *supra* note 101, at 122. Grunwald, *supra* note 22, at 268-69.

[314] Godfry, *supra* note 101, at 113. Section 4(f) of the Federal Transportation Act of 1966 prohibits the use of federal funds to construct highways through publicly owned open space including parks, recreation areas, or wildlife refuges unless there is no "feasible and prudent" alternative to construction through said public land. 49 U.S.C. § 303 (2010)(formerly codified at 49 U.S.C. §§ 1651(b)(2) and 1653(f)). Because the jetport construction would require rerouting I-75 through Water Conservation Area 3, environmental SMOs argued that the Department of Transportation was legally bound to study alternatives to construction in Water Conservation Area 3. They argued that no work could proceed on either I-75 or the jetport until it was determined that there was no feasible and prudent alternative to construction through Conservation Area 3. Godfry, *supra* note 101, at 113-114. Interview U.

[315] Grunwald, *supra* note 22, at 258. Nixon received very favorable publicity for his support of the National Environmental Policy Act (NEPA) and early in his administration was a strong proponent of environmental issues. Godfry, *supra* note 101, at 117.

[316] Carter, *supra* note 64, at 207-08.

Although the jetport controversy did not result in the political destabilization, the jetport controversy can be credited for birthing the political mobilization that would ultimately give rise to Everglades' restoration. In an example of classic SMO theory, grass roots organizers such as Browder and Jones mobilized their political resources including framing, networks,[317] and threats of litigation to obtain short term political gains (the defeat the jetport proposal) and to build the movement necessary to advocate for longer term Everglades' restoration.[318] Within a few short years after its founding FOE had three thousand members across thirty-eight states.[319] The burgeoning social movement supporting Everglade's preservation and restoration included a network of both environmentalists and sportsmen. Environmental organizers had formed important alliances with the Florida's leading conservation groups. The movement also spawned new grass roots organizers including Jim Webb[320], Alan Farago,[321] and Joette Lorion[322] all of whom were committed to grassroots mobilization and would play an active role in Everglades' restoration. Through framing these grassroots SMOs also began to build the

[317] There is a considerable body of social science literature surrounding the concept of social networks and the use of social networks by SMOs to exchange political resources and accomplish change. For purposes of this article a social network is a social structure made up of individuals and/or organizations (nodes) connected by one or more types of interdependency. Nancy Katcz, David Lazer, Holly Arrow and Nashir Contractor, *Network Theory and Small Groups,* 23 Small Group Research 307, 308-310 (June 2004)(discussing the structure of social networks). Social network analysis focuses on the relationship between social entities (individuals and groups), and the patterns or regularities in the interactions between social entities. Stanley Wasserman and Katherine Faust, *Social Network Analysis*, 3 (1994).
[318] *See* McCann (1994), *supra* note 99, at 282, *see generally* Edwards and McCarthy, *supra* note 227, at 116-152 (containing a discussion of political resources and their use in social movement building and mobilization).
[319] Davis, *'Conservation is now A DEAD WORD', supra* note 311, at 64.
[320] Grunwald, *supra* note 22, at 278.
[321] Farago has served as the Conservation Chair of the Miami Sierra Club and is now the Conservation Chair of Friends of the Everglades. *See* http://www.sierraclub.org/planet/200009/whoweare.asp and http://www.nationalparkstraveler.com/2009/11/friends-everglades-down-not-out4911
[322] Jacob Bernstein, *Resignation Indignation: When Joette Lorion Publicly Quite Friends of the Everglades Some Environmentalists Scoffed,* Miami New Times, Dec. 31, 1998 *available at* *http://www.miaminewtimes.com/content/printVersion/239149/*

bystander support[323] that would be an important foundation for the structural change needed for long term Everglades' restoration.

Over the next decade the Miami chapters of the National Audubon and the Sierra Club, FOE, the Wilderness Society, and the Federation would continue to push to implement Art Marshall's Everglades' Restoration blueprint[324] and as well as for legislation to restore the Kissimmee River above Lake Okeechobee.[325] And they were getting results, in 1983 Governor Graham, in the face of national media pressure as well as pressure from local environmentalists and sportsmen announced his "Save Our Everglades" program modeled on Marshall's blueprint.[326] But Graham was focused on "win-win solutions that didn't gore anyone's ox"[327] and implementing true restoration could not be accomplished without "goring" development and agricultural interests. The "goring" would not come until the mid-80's with the filing of a law suit described as "one of the most creative contributions in the history of modern environmental law."[328]

---

[323] Frames, especially frames supported by the national media are important garnering bystander support and thereby increasing the legitimacy of an SMOs' claim and in demobilizing opponent view points. Robert D. Benford & David A. Snow, *supra* note 233, at 614.

[324] Davis, '*Conservation is now a DEAD WORD', supra* note 311, at 66 and Grunwald, *supra* note 22, at 246. Marshall's vision for restoration of the Everglades, commonly referred to as the "Marshall Plan" involved re-establishing sheet flow to the Everglades, de-chanelizing the Kissimmee, and improving water quality throughout the system. Arthur R. Marshall, *For the Future of Florida Repair the Everglades,* 2 (3rd ed. 1982) *available at* http://ufdc.ufl.edu/FI06011102/00001/2j

[325] Grunwald, *supra* note 22, at 272-74.

[326] Grunwald, *supra* note 22, at 272-74. The "Save our Everglades" program focused on reestablishing the Kissimmee River, restoring sheet flow on public lands within the EAA, modifying Alligator Alley and the Tamiami Trail to reconnect the northern Everglades tot he Southern Everglades. It also involved land acquisition in the eastern Everglades and in the Big Cypress for Florida Panther Habitat. Godfry, *supra* note 101, at 180.

[327] *See,* Grunwald, *supra* note 22, at 275 (characterizing Graham's proposal as "radical, but not overly controversial.")

[328] William H. Rodgers, *Miccousukee Indians and Environmental Low: A Confederacy of Hope,* 31 ELR 10918, 10922 (August 2001)(Rodger's (2001).

B. Litigating Water Quality – *United States v. SFWMD*[329]

The cornerstone of any "regional hydrologic restoration plan" for the Everglades' was water quality restoration, including, primarily the reduction of phosphorus loads.[330] Historic phosphorus levels in the Everglades were at or below 10ppb.[331] But phosphorus levels in the Everglades by the 1970s were far in excess of 10 ppb as a result of phosphorus levels in EAA entering the Everglades' natural system at 200 ppb.[332] Taking on phosphorus meant taking on the sugar industry.[333] Grass roots SMOs had been pushing to improve Everglades' water quality but the sugar industry was a barrier. Both the Federation and FOE used litigation to restrict development and reduce environmental degradation within the Everglades with limited success.[334] In 1979, for example, FOE

---

[329] *United States v. South Florida Water Management District,* 847 F. Supp 1567 (S.D. Fla. 1992), *aff'd in part and rev's in part, remanded* 28 F. 3d 1564 (11th Cir. 1994) *cert denied,* 115 S.Ct. 1956 (1995).

[330] *See generally,* Davis, *supra* note 36, at 357-377 (containing a discussion of phosphorus levels in the historic Everglades Ecosystem and the impact of phosphorus loading on the Everglades ecosystem). The 1991 Settlement Agreement notes that the "ecological integrity and … the survival of the [Everglades National] Park are threatened" by the inflow of water from the Everglades Agricultural Area containing phosphorus levels at concentration levels ten to twenty times higher than background levels. *United States v. South Florida Water Management District Settlement Agreement,* Case No. 88-1886-Civ-WMH at 7 (S.D. Fla. July 26, 1991) *available at* http://exchange.law.miami.edu/everglades/litigation/federal/usdc/88_1886/pleadings/settle_ag.html

[331] Godfry, *supra* note 101, at 280. *See also* Declaration of Dr. Ronald Jones, *United States v. South Florida Water management District,* Case No. 88-1886-Civ-WMH (S.D.Fla, Sept. 18, 1990) *available at* http://exchange.law.miami.edu/everglades/litigation/federal/usdc/88_1886/pleadings/us%20m%20sj/m_sj_jones.html

[332] Godfry, *supra* note 101, at 282.

[333] *Supra* at Part III.A.1 (discussing sugar cane in the EAA and the status of sugar growers as elites). Grunwald reports that Nathaniel Reed, who was then sitting on the SFWMD Board, had convinced the state to fund a study of phosphorus levels coming out of the EAA into the Everglades as early as 1981-82. These studies indicated high levels of phosphorus but the "sugar-friendly board" refused to do anything about the phosphorus issue – after all phosphorus "was a natural nutrient." Grunwald, *supra* note 22, at 283.

[334] *See eg., Florida Wildlife Federation v. Goldschmidt,* 611 F.2d 547 (5th Cir 1980); *Campo and Florida Wildlife Federation v. State of Florida Department of Environmental Regulation,* 390 So.2d 64 (Fla. 1980); *Friends of the Everglades v. Board of County Commissioners of Monroe Co,* 456 So. 2d 904 (Fla. App. 1984); *Friends of the Everglades v. South Florida Water Management District,* 446 So. 2d 117 (Fla App. 1984); *Friends of the Everglades v. State Department of Environmental Regulation,* 387 So. 2d 511 (Fla. App. 1980); and *Estuary Properties Inc. v. Askew,* 381 So. 2d 1126 (Fla. App 1979).

and the Federation jointly sued the SFWMD and the Florida Sugar Cane League to stop the back pumping of phosphorus and fertilizer laden waters into Lake Okeechobee.[335]

When in the late 1970's Federation members began noticing declines in wildlife [336] the Federation began to look for a "university type" to take and evaluate water samples for use in a legal challenge. But the Federation couldn't find anyone willing to do the work, recalls one Federation member, most university professors in the region "had huge grants from the EAA . . . [and were unwilling to do a] study that hurt . . . [their] benefactor."[337] The Federation finally located a professor willing to do sampling work on the condition that the results not become part of a legal challenge. When the samples came back showing extensive water impairment the Federation couldn't use them.[338] Then in the early 1980's a Park hydrologist, Dr. Peter Rosendahl, sent a package of data to a Federation member containing [339]"'baseline research for phosphate and nitrate pollutions and how to fix Everglades National Park." Rosendahl advised the

[335] Davis, '*Conservation is now a DEAD WORD', supra* note 311, at 67 *citing, Florida Wildlife Federation v. State of Florida Department of Environmental Regulation,* DOAH case no 79-256 (1979). Over the years the Federation and the Friends of the Everglades participated in a number of pieces of water quality litigation the most notably *South Florida Water Management District v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004) *on subsequent appeal, Miccosukee Tribe of Florida v. South Florida Water Management District,* 559 F.3d 1191 (11th Cir. 2009).

[336] Interview B and Interview G. One stakeholder recalls hunters "would go to their camps and there would be very little water and all of a sudden the water would come up over night because they . . . turned on the huge pumps and water moccasins would be floating belly up – dead in the morning." Interview B.

[337] Interview B.

[338] *Id.*

[339] Dr. Rosendahl's decision to contact the Federation is yet another example of the importance of networking. Dr. Rosendahl and the Federation had worked together on the Turner River Restoration Plan and the Federation had helped Dr. Rosendahl "on some political stuff to see that it [the Turner River Restoration Plan] got done." *Id*.

Federation to "hold it [the data] until you need it, I'm out of here. I'm frustrated.'"[340] The data documented the high phosphorus levels coming out of the EAA.[341]

By 1988, however, the Federation was spread thin and unable to take on another piece of *pro bono* litigation and there was a general reluctance in the environmental community to take on both the sugar industry and government – "[e]ven if the largest national environmentalist groups pooled money and resources, they would be no competition for the government or the sugar barons."[342] But Dexter Lehtinen, the newly appointed federal prosecutor for south Florida, and a Everglades' sportsman, was willing[343] and he informed his deputy on his first day at work that "he intended to do something about the Everglades."[344] Over the next several months Lehtinen met "secretly" with sportsmen, environmentalists and Park Superintendent Finley to craft a complaint that would address the phosphorus issue[345] – a complaint that would provide a foundation for Everglades' restoration.

1. Unlikely Performance Standards

Destabilization theorists Sable and Simon posit that effective destabilizing litigation is grounded in the failure of an administrative agency to satisfy some minimum performance standard – an uncontroversial standard or industrial standard developed

---

[340] *Id*.
[341] *Id.*
[342] Lisa Gibbs, *Federal Suit to Protect Everglades Bogs Down Florida Blames its Hired Guns from DC Office of Skadden, Arps,* Legal Times, July 8, 1991 at 6 (Lisa Gibbs, *Federal Suit to Protect Everglades Bogs Down)*.
[343] Interview B and Grunwald, *supra* note 22, at 285-86. There is disagreement among environmental NGOs, sportsmen, and other stakeholders interviewed for this project as well as in the public record about whether Lehtinen acted on is own or whether he was prodded by environmental and sports activists. *Id.* What is clear is that by the spring of 1988 Lehtinen was in conversations with the Park, environmental, and sports interests about potential litigation to improve water quality in the Everglades. *Id.* and Lisa Gibbs, *Federal Suite to Protect Everglades Bogs Down,* Legal Times, July 8, 1991 at 6.
[344] Grunwald, *supra* note 22, at 286.
[345] Grunwald, *supra* note 22, at 286.

through custom and practice.[346] But an uncontroversial legal standard was not available to Lehtinen – the only thing that all parties agreed on was that "the water flowing into the Everglades was dirty."[347]

In the mid-1980's the most obvious minimum performance standards for water quality were found in the Clean Water Act (CWA). [348] The CWA required states to set water quality standards[349] and prohibited any point source[350] from discharging any pollutant into the navigable waters of the United States without first obtaining a National Pollution Discharge and Elimination System Permit (NPDES).[351] While the CWA would, seemingly, apply to agriculture runoff collected and conveyed through ditch systems from EAA sugar cane fields into the WCAs, the CWA specifically exempted agricultural storm water run off and "return flows from irrigated agriculture"[352] from CWA regulation despite the fact that the definition of pollution under the CWA included "agricultural

---

[346] Sabel & Simon, *supra* note 103, at 1062-63. Sable and Simon site to federal prison standards as an example of an uncontroverted legal standard. *Id.* at 1063.
[347] Lisa Gibbs, *Federal Suit to Protect Everglades Bogs Down,* Legal Times, July 8, 1991 at 6.
[348] Cong. Research Serv. & the Library of Cong., *Clean Water Act: A Summary of the Law,* 2 (2010)(discussing the history of the CWA and its precursor the Federal Water Pollution Control Act of 1948). Pub. L. 92-500 § 101(a), 86 Stat. 816 (1972) codified at 33 U.S.C. § 1251(a)(2006). The CWA had two primary objectives to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" and that the nation's water be "fishable" and "swimable" by 1983. Cong. Research Serv. & the Library of Cong., *Clean Water Act: A Summary of the Law,* 2 (2010), *see also* Pub. L. 92-500 § 101(a), 86 Stat. 816 (1972) codified at 33 U.S.C. § 1251(a)(2006).
[349] 33 U.S.C. §1313 (a)-(c)(2006).
[350] A point source is a "discernible, confined and discrete conveyance including but not limited to any pipe, ditch, channel, conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362 (14) 2006).
[351] 33 U.S.C. § 13111(a) and § 1342(a) (2006). Florida did not agree to accept delegation of the Federal NPDES Program until 1995. Richard T. Donelaw, *The Florida Wastewater Regulation Program: NPDES and DEP,* at 1 available at http://ufdc.ufl.edu/WL00004562/00001/8j last visited April 15, 2011. A discharge is defined as the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(2006).
[352] 33 U.S.C. § 1362(14) and § 1362(l)(2006). *See generally* Andrew C. Hanson &David C. Bender, *Irrigation Return Flow or Discrete Discharge: Why Water Pollution from Cranberry Bogs Should Fall within the Clean Water Acts NPDES Program,* 37 Envtl L. 1 (2007) (containing a detailed discussion of the irrigation return flow exemption for agriculture).

waste discharged into water."[353] Thus the CWA precluded Lehtinen from suing to compel the sugar industry to meet minimum water quality standards.

The agricultural limitations of the not withstanding, section 303(d) of the CWA could hypothetical provide an alternative avenue to tackle agricultural water pollution.[354] Many policy analysts view section 303(d) of the CWA as a "second-string safeguard" and the only real means to address non-point agricultural pollution.[355] The CWA requires the states, including Florida, to promulgate water quality standards;[356] to identify water bodies not adequately protected by the NPDES permit program;[357] prioritize those water bodies according to the severity of their pollution;[358] and establish total maximum daily pollutant loads (TMDL) designed to meet state water quality standards for said water bodies.[359] In theory the TMDL would specify the volume of a pollutant, such as phosphorus, is allowable in an impaired water body and requires the states to allocate the allowable pollution load among pollution sources – these load designations were a means for attaining and maintaining water quality standards across a water body.[360] Under the TMDL program, the states were required to allocate pollutant levels for both point and

---

[353] 33 U.S.C. § 1362 (6)(2006); *see also* Alfred R. Light, *The Myth of Everglades Settlement,* 11St. Thomas L. Rev. 55, 57 (1998)(Light (1998)) and *see generally* David Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 Harv. Envtl. L. Rev. 515 (1996)(discussing attempts to address non-point pollution using the CWA).
[354] 33 U.S.C. 1313(d)(2006).
[355] Jim Vergura and Ron Jones, *The TMDL Program: Land Use and Other Implications,* 6 Drake J. of Ag. L. 317, 320 (2001).
[356] *See,* 33 U.S. C. § 1313 (a) – (c) (2006) (outlining the requirements for promulgation of state water quality standards).
[357] 33 U.S.C. 1313(d)(1)(A)(2006).
[358] 33 U.S.C. § 1313(d)(1)(A)(2006).
[359] 33 U.S.C. § 1313(d)(1)(C)(2006).
[360] *See generally* 40 C.F.R. ¶ 130.7(2011), *see also* Vergura and Jones, *supra* note 355, at 320-23 (discussing operation of the TMDL Program).

non-point sources, including agricultural sources across a watershed and institute controls and management practices designed to reduce pollution from *all* pollution sources.[361]

The State's did not embrace the TMDL program and in 1984, the Seventh Circuit, in *Scott v. City of Hammond, Ind*., found that the failure of a state to establish and implement a TMDL for a pollutant for which a TMDL was "suitable" constituted a "constructive submission" of no TMDL by the State to the EPA[362] and imposed on the EPA a mandatory duty to issue its own TMDL for the water body.[363] The court in *Scott* found:

> the CWA should be liberally construed to achieve its objectives – in this case to impose a duty on the EPA to establish TMDLs when the states have defaulted by refusal to act over a long period. We cannot allow the states' refusal to act to defeat the intent of Congress . . . the EPA's inaction appears to be tantamount to approval of state decisions that TMDLs are unneeded. State inaction amounting to a refusal to act should not stand in the way of successfully achieving the goals of federal anti-pollution policy.[364]

Florida had never adopted a numerical water quality standard for phosphorus let alone set a phosphorus TMDL for the Everglades. The state relied on a narrative standard, which provided that phosphorus levels should not cause an "imbalance in the flora or fauna"[365] and while EPA had the authority to compel Florida to set a numeric

---

[361] 40 C.F.R. ¶130.7(c), *see also* Vergura and Jones, *supra* note 359, at 321.
[362] *Scott v. City of Hammond, Ind.,* 741 F.2d 992, 996-97 (7th Cir. 1984). *Scott v. City of Hammond* was the first of a series of lawsuits brought across the country to compel the EPA to implement the TMDL program. EPA reports that since the mid 1980's plaintiffs have filed "39 additional pace-of-TMDL development lawsuits against EPA in 35 states" including Florida. http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/lawsuit.cfm . As a result of this litigation, the EPA, by 1998, had been ordered to establish TMDLs in ten states and was litigating the issue in an additional thirteen states. Light (1998), *supra* note 353, at 61-62.
[363] *Id.* at 997
[364] *Id.* at 998.
[365] Fla. Admin. Code R. 62-302.530(2000), *see also* Light (1998), *supra* note 353, at 60-62.

phosphorus water quality standard and to implement a TMDL for the Everglades, it failed to do so.[366]

Thus in 1988 when Lehtinen was preparing the Everglades' water quality litigation, there was no meaningful phosphorus standard to apply to Florida's failure to limit phosphorus inflows into the Everglades. Lehtinen could, hypothetically sue the EPA but suing the EPA under the CWA on behalf of Interior and its FWS and NPS agencies required approval from Washington.[367] "Lehtinen knew his bosses in the Reagan Administration would never approve legal action against EPA; nor for that matter would they approve litigation against Florida and Governor Bob Martinez, a Republican whose commerce secretary was Vice President George H.W. Bush's son Jeb." [368] Litigation against the sugar industry was also out of the question because one of the top donors to Vice President Bush's presidential campaign was the president of a major Florida sugar company.[369]

In light of the politics of the situation, Lehtinen decided the best recourse was to avoid a CWA lawsuit and to sue the State of Florida using state law claims. Lehtinen's complaint alleged that Florida violated its own narrative phosphorus water quality standard and asked the court to translate the narrative phosphorus standard to a numeric standard.[370] The complaint also alleged that the Florida Department of Environmental Regulation's (DER) failure to issue discharge permits for the C&SF Project pumping

---

[366] Light (1998), *supra* note 353 at 61.
[367] Interview h and Interview J.
[368] Grunwald, *supra* note 22, at 286. *See also,* James Carney, *Last Gasp for the Everglades,* Time, Sept. 25, 1989 *available a*t http://www.time.com/time/magazine/article/0,9171,958625,00.html .
[369] *Id.*
[370] *United States v. South Florida Water Management Dist,* 922 F.2d 704, 707 (11th Cir. 1991).

station operated by the SFWMD constituted a violation of Florida's Air and Water Pollution Control Act; [371] the failure of the SFWMD to reduce nutrient levels in water deliveries to the Park was causing irreversible ecological damage and was a breach of the water delivery contract between the SFWMD, the Corps and the Park; [372] the SFWMD's failure to regulate water quality violated the federal government's riparian water rights and was a public nuisance; [373] and the damage caused to federal property by the state's failure to regulate water quality violated the Property Clause, the National Park Service Organic Act, and the Everglades National Park Authorization Act.[374]

Lehtinen's complaint was highly controversial. By characterizing the C&SF Project pumping stations as stationary sources requiring a discharge permits under Florida Statute, Lehtinen was using the C&SF Project pumping stations to do indirectly what the CWA prevented him from doing directly – regulating the phosphorus content of agricultural runoff.[375] The *Legal Times* characterized the complaint as "a barefaced challenge of the *status quo* in water management, a system that favored agriculture and industry over nature; in particular, it was a potent threat to the sugar and farming interests whose continued power and wealth depended on their ability to wash crop fertilizers into

---

[371] *United States v. SFWMD,* case No. 88-1886-Civ. Hoevler, Compl. Count I at 12-15 (Oct. 11, 1988)
[372] *Id.* at Count III, 18-20.
[373] *Id.* at Count IV, 20-23.
[374] *Id.* at Count V, 23.
[375] The regulation of agricultural runoff was highly controversial in the passage of the CWA despite the fact that agricultural run of was "by far the most extensive source of [water] pollution." Michael R. Eitel, *The Farm and Ranch Lands Protection Program: An Analysis of the Federal Policy on United States Farmland Loss,* 8 Drake Journal of Agricultural Law 591, 623 (2003); Zaring, *supra* note 353, at 539-543 (1996)(discussing Congress' reluctance to impose limitations on agricultural nonpoint pollution). Zaring argues that one of the primary reasons for Congress' failure to address the agricultural nonpoint issue was the political power of agricultural interests. *Id.* at 540-43, *see also* J.B. Ruhl, *Farms, Their Environmental Harms and Environmental Law,* 27 Ecology L.Q. 263, 331-340 (2000)(discussing the political power of the agricultural sector in "safeguarding" the agricultural sector from environmental compliance)

the Everglades."[376] Environmental lawyers characterized the litigation as innovative.[377] Governor Martinez, the sugar industry and the Corps lobbied the Justice Department to drop the lawsuit and the sugar industry wanted Lehtinen fired.[378] When Lehtinen was summoned to Washington, Lehtinen's staff immediately contacted the local Sierra Club to advise environmental SMOs that they "must intervene [in the litigation] on Monday to prevent the Justice Department from killing the suit outright."[379] The SMOs filed a motion to intervene and held a supporting press conference even before Lehtinen reached Washington.[380] Lehtinen's "bosses savaged him as a rogue prosecutor and a disloyal Republican"[381] but they were also concerned about political fallout if they dropped the suit.[382] Washington would allow the suit to proceed forward if Lehtinen would drop the most controversial claims—the Property Clause, riparian landowner and nuisance claims.[383] But unlike most large pieces of environmental litigation where the United States is represented by the Environment and Natural Resources Division out of the Department of Justice in Washington, *United States v. SFWMD* would continue to be handled by Lehtinen out of Florida's U.S. Attorney's office. Lehtinen, himself was never formally nominated or confirmed[384] – noted one stakeholder close to Lehtinen: "politics

---

[376] Lisa Gibbs, *Florida Suit to Protect the Everglades Bogs Down,* Legal Times, July 8, 1991 at 6.
[377] *Id.*
[378] Grunwald, *supra* note 22, at 287.
[379] Lisa Gibbs, *Florida Suit to Protect the Everglades Bogs Down,* Legal Times, July 8, 1991 at 6.
[380] *Id*.
[381] Grunwald, *supra* note 22, at 287.
[382] Lisa Gibbs, *Florida Suit to Protect the Everglades Bogs Down,* Legal Times, July 8, 1991 at 6.
[383] *Id.* and James Carney, *Last Gasp for the Everglades,* Time, Sept. 25, 1989 *available at* http://www.time.com/time/magazine/article/0,9171,958625,00.html . On December 24th, 1988, the complaint was amended to remove the property clause claim, the riparian rights claim and the nuisance claim. *U.S. V. Southern Florida Water Management District*, 28 F.3dn1563, 1568 (11th Cir. 1994) and Lisa Gibbs, *Florida Suit to Protect the Everglades Bogs Down,* Legal Times, July 8, 1991 at 6.
[384] Grunwald, *supra* note 22, at 287.

is politics, you know, you cross the big boys and you pay the price."[385] Without strong support from Washington, Lehtinen had few resources to pursue the case.[386] Meanwhile a list of agricultural interests including the Florida Sugar Cane League, the Florida Fruit & Vegetable Association, and the Western Palm Beach County Farm Bureau moved to intervene[387] throwing significant financial resources behind the SFWMD.[388]

The litigation's goal of clean water for the Everglades quickly descended into a two year "petty slugfest" pitting "two very confrontational pit bulls" in a discovery battle characterized by outside observers as a "sustained dogfight."[389] Florida hired a "pricey New York law firm" "with a reputation for scorched-earth litigation"[390] and buttressed its arsenal with the support of the sugar industry, causing Lehtinen to conclude that the litigation was as much about "dirty politics" and the sugar industry's "stranglehold on the state" as it was about dirty water.[391] Litigation bills mounted into the millions of dollars -- by the early 1990's the Everglades phosphorus litigation rivaled the Exxon Valdez oil spill litigation as the most expensive environmental litigation on record[392] a fact that Sen. Lawton Chiles used as a central strategy in his campaign to unseat Governor Martinez.[393]

---

[385] Interview B.
[386] Gaylord, *supra* note 101, at 283; Light (1998), *supra* note 353, at 56.
[387] The sugar industry's motion to intervene was initially denied but on appeal the Eleventh Circuit permitted limited intervention on Count I of the Amended Complaint which alleged that the State's narrative phosphorus water quality standard was not protective of Everglades' water quality. *U.S. v. South Florida Water Management District,* 922 F.2d 704, 707-10 (11th Cir. 1991). The Eleventh Circuit denied the sugar industry's request to intervene on all other claims made in the Amended Complaint. *Id.* at 710-712. *See also,* John M. Fumero and Keith W. Rizzardi, *The Everglades Ecosystem: From Engineering to Litigation to Consensus-Based Restoration,* 13 St. Thomas l. Rev.667, 673-74 (2001).
[388] Godfry, *supra* note 101, at 283.
[389] Lisa Gibbs, *Florida Suit to Protect the Everglades Bogs Down,* Legal Times, July 8, 1991 at 6.
[390] Grunwald, *supra* note 22, at 287.
[391] *Id.* at 288.
[392] Godfry, *supra* note 101, at 283.
[393] *Id*.

2. Destabilizing Impacts of United States v. SFWMD and the Settlement

Lehtinen saw litigation as a political change strategy; he believed that "Florida was never going to get serious about protecting the Everglades as long as the sugar industry was calling the shots."[394] *United States v. SFWMD* was a "barefaced challenge of the status quo in water management that favored agriculture and industry over nature … [a challenge] to the sugar and farming interests whose continued power and wealth depended on their ability to wash crop fertilizers into the Everglades."[395] Lehtinen observed: '"we are trying to divest Florida water politics of the old system."'[396]

Lehtinen hoped that *United States v. SFWMD,* would result in short term environmental gains in the form of improved water quality. Structurally, Lehtinen wanted to reduce the voice of the sugar industry in Everglades' water management decision-making. The experimental remedy has the potential to address both an agency's policy decision and the decision-making structure.[397] For *United States v. SFWMD* an experimental remedy held the potential to redress the Everglades phosphorus levels as well as how Florida made decisions about agricultural non-point pollution contaminating the Everglades. Traditionally the remedy in private civil litigation gives effect to the court's judgment by giving meaning to the rights of the parties – it "is an elaboration of the rights in question [in the litigation]: it is not a technical effort to execute an already defined norm, as rights essentialism implies; nor is in an exercise of instrumental

---

[394] Grunwald, *supra* note 22, at 288-89. The sugar industry's influence on Florida's political infrastructure as evidenced by Senator Graham's statement that "the health of the Everglades is inextricably linked to the sugar industry's economic stability … Florida sugar cane fields are an integral component of the Everglades ecosystem." *Id*. at 289 *quoting Florida's Sugar Daddies,* St. Petersburg Times*,* Feb. 2, 1990.
[395] Lisa Gibb, *Florida Suit to Protect the Everglades Bogs Down,* Legal Times, July 8, 1991 at 6.
[396] *Id.*
[397] Sabel & Simon, *supra* note 103, at 1063.

discretion, as crude positivism suggests."[398] But in public law litigation such as *United States v. SFWMD* the "right" is more ambiguous related, as it is to the modification of public policy[399] – in this case water quality. In public law litigation the remedy is prospective, designed to "modify a course of [agency] conduct."[400]

However, traditionally the public law litigation remedy is embodied in the consent decree often characterized as a "command and control"[401] decree, which prescribes how the agency must modify its present and future actions to comply with the policy directives set forth in statute.[402] "Reform lawyers" tend to prefer a command and control decree because they tend to believe that the declaration of rights contained in a command prefer can cause political and social change.[403] Lehtinen was a "reform" lawyer, he believed in the "rule of law" and that a judicial decree could cause change.[404] Like most reform lawyers he distrusted political processes in favor of a "legal" approach to policy change.[405] He did not believe in consensus, he wanted "strict mandates and deadlines, backed by a court order."[406] In short, Lehtinen wanted a traditional command and control

---

[398] Sabel & Simon, *supra* note 103, at 1054-55.
[399] Chayes, *supra* note 104, at 1302.
[400] *Id.* at 1296.
[401] Sabel & Simon, *supra* note 103, at 1019. According to Sabel and Simon the command and control decree is characterized by three elements: (1) its attempt to "anticipate and express key directives needed to induce compliance in a single, comprehensive, and hard to change" order; (2) its compliance requirements measure compliance by the degree of the agency's conformity to the "detailed prescriptions" of the decree; and (3) the strong directive role the court takes in forming the remedial norm. *Id.* at 1021-22.
[402] Chayes, *supra* note 104, at 1296-1300.
[403] *See generally,* Scheingold, *supra* note 211, at 5 -13 and Stryker (2007), *supra* note 103, at 77.
[404] Grunwald, *supra* note 22, at 288.
[405] Scheingold, *supra* note 211 at 7. *See also* Stryker (2007)*, supra* note 103, at 77. Stryker argues that in taking an overly "legal" approach to how the courts might be used to foment social change the lawyer grossly exaggerates the role that lawyers and litigation can play in change strategies. *Id.* Both Scheingold and Stryker argue that litigation can be successful in promoting social change if the underlying goal is the redistribution of politically power, that is if the litigation is used politically. *Id.* Scheingold, *supra* note 211, at 6-7.
[406] Grunwald, *supra* note 22, at 288.

consent decree directing Florida to adopt and enforce a 10 ppb phosphorus standard. He believed that such a decree could alter the historic relationship between the sugar industry and Florida. He did not believe he could get the same result through a deliberative process and while many might argue the history of the sugar industry in the Everglades was evidence enough to support Lehtinen's distrust of a political, consensus based resolution,[407] his view affected the ability of stakeholders to fully leverage an experimental remedy to promote political change in the context of *United States v. SFWMD*.

But destabilization theorists argue a command and control decree lacks many of the elements necessary to foment change.[408] The experimental remedy can stimulate political change in part because; unlike a command and control decree is "deliberative", "flexible", and "ongoing."[409] In destabilizing litigation the court imposes a legal standard and may grant temporary equitable relief but allows the parties to negotiate and implement a remedy in a deliberative process subject to ongoing court oversight.[410] The experimental remedy has some basic features that appear to drive destabilizing change: it involves public, deliberative, face-to-face, stakeholder negotiations to develop a remedial plan[411] that is modified over time through a rolling rule[412] that encompasses explicit policies and operating norms that are adjusted over time as stakeholder knowledge about the issue and each other deepens.[413] The destabilizing impact of litigation is also

---

[407] *Id.*
[408] Sabel & Simon, *supra* note 103, at 1067-68.
[409] Chayes, *supra,* note 104, at 1298-1302 (discussing ongoing oversight and negotiated decrees).
[410] Chayes, *supra* note 104, at 1281, 1304.
[411] Sable & Simon, *supra* note 103, at 1068-69.
[412] *Id.* at 1069.
[413] *Id.* at 1071, *see also, supra,* at Part III.A.2 (discussing transformative social learning).

impacted by the manner in which the litigants and stakeholders assess how the court decision "indirectly create[s] important expectations, endowments, incentives, and constraints" toward reform agendas that lead to social and political change.[414] Social scientists suggest that the remedy in public law litigation is more likely to result in social change if:

1. Implementing the order offers positive incentives to induce compliance.[415]
2. Some or all of the parties are willing to "impose costs to induce compliance"[416]
3. The court's order provides "leverage or a shield, cover, or excuse" to persons in positions to implement the change who are willing but have been unable to act.[417]
4. The court order can be implemented through market mechanisms.[418]
5. There is ongoing court oversight.[419]
6. The members of the social movement are permitted to participate in the decision-making process.[420]
7. The remedy "fixes responsibility for" and monitors the impact of organizational change and its outcome.[421]

Many of these factors support the conclusion of destabilization theorists that face-to-face, deliberative negotiations and ongoing oversight are key factors for effective destabilizing litigation. For example, changes in the status quo (status quo effect)[422] can develop as a

---

[414] *See* Michael McCann, *How the Supreme Court Matters in American Politics: New Institutionalist Perspectives, in The Supreme Court in American Politics: New Institutionalist Interpretations* 68 (Cornell Clayton & Howard Gillman eds., 1999).
[415] Rosenberg, *supra* note 210, at 32-33. Proponents of the Dynamic Court view of the court's ability to instigate change argue that litigation can produce social reform in conjunction with SMO mobilization. *Id* at 22-23. However, there are several contributing factors that affect the ability of litigation to stimulate social and political change including whether there is a benefit to elites and bureaucrats to comply with the court's order. *Id. at 32.*
[416] *Id.* at 33.
[417] *Id.* at 35.
[418] *Id.* at 33. In her review of research on the politics of enforcement, Stryker notes that corporate organizations are often able to mount a successful defense against implementation of court orders by arguing that enforcement interferes with economic viability. Stryker (2007), *supra* note 103, at 84.
[419] Harris, *supra* note 268, at 933.
[420] *Id.*
[421] Stryker (2007), *supra* note 103, at 90.
[422] Sabel & Simon, *supra* note 103, at 1074-75.

result of allowing SMOs to participate in the negotiation process under court oversight[423] as the historic politically powerful recognizes that theirs is not the predominant constituency voice given weight in the decision making process.

The rolling nature of the experimental remedy may be especially important in driving the structural change necessary for ecosystem scale environmental problem solving particularly those ecosystems linked to complex social systems. Social-ecological systems such as the Everglades are open, dynamic, complex, spontaneous, and variable.[424] These systems are subject to the vagaries of collective action[425] and managing these coupled social-natural systems involves managing change in response to structural circumstances"[426] with uncertain knowledge.[427] It requires the adjustment of ecological and social systems in response to observed or expected changes in natural systems in a manner designed to alleviate the adverse changes to natural systems over time using a dynamic dialectic based on knowledge, learning and practice.[428]

The rolling rule, experimental remedy can provide a framework for adaptive decision-making where past political blockage has been a barrier to ecosystem management. The deliberative nature of the remedy allows the stakeholders to deepen their communicative knowledge while they collectively develop and explore environmental outcomes and norms and make adjustment to the remedy implementation as their collective knowledge about the ecosystem and its response to social systems

[423] Harris *supra* note 268, at 933.
[424] Medema, McIntosh & Jeffery, *supra* note 193, at 29-30.
[425] Folke et al., *supra* note 194, at 442-45.
[426] Huitema & Meijerink, *supra* note 195, at 1.
[427] *Id.*
[428] *See generally,* Nelson, Adge & Brown, *supra* note 13 and Folke et al., *supra* note 194.

deepens over time.[429] This dialectic process is particularly important in coupled systems as complex as the Everglades socio-ecological systems.

a. The destabilizing impact of Chile's confession of liability.

An experimental remedy for the Everglades restoration became a possibility when, on May 21, 1991, Governor Chiles entered the federal courthouse and announced:

> I came here today convinced that continuing the litigation does little to solve the problem of restoring the Everglades…I am ready to stipulate today that [the] water is dirty… [what this is] about …is how do we get clean water? I am here, and I brought my sword. I want to find out who I can give that sword to and I want to be able to give that sword and have our troops start the reparation, the clean up... let us use our troops to clean up the battlefield now, to make right this water; to make this water clean …We want to surrender. We want to plead the water is dirty. We want the water to be clean, and the question is how can we get it the quickest.[430]

Chile's announcement was the equivalent of a court order on liability. By conceding water entering the Everglades was contaminated and the Florida was responsible, Chile's created the space for the development of an experimental remedy that established numeric phosphorus levels in the Everglades; [431] applied the phosphorus standard to water entering the Everglades; and could make adjustments to the implementation mechanisms if the agreed upon standards were not met. Over the next several years the

---

[429] Sabel & Simon, *supra* note 103, at 1069-1070.
[430] *United States v. South Florida Water Management District,* case No. 88-1886-Civ-Hoevler, Transcript of Hearing Proceedings (May 21, 1991). In fact the Chiles administration had initiated closed door meetings with the federal government to settle *United States v. South Florida Water Management District* shortly after Chiles' election. *Discussion Set in Everglades Suit,* Palm Beach Post, March 19, 1991 at 14A.
[431] Fla. Admin. Code R. 62-302.530 (2000). *See* Light (1998), *supra* note 353 at 60-62 (for a detailed discussion of the relationship between Florida's narrative water quality standards and the requirements of the Clean Water Act).

court and the parties would struggle mightily to break out of the historic political constructs to find such a remedy.

At the outset Chile's confession of liability had a *status quo* and veil impact – it signaled a relationship shift to SMOs, the sugar industry, development interests, and Interior. *United States v. SFWMD* had been characterized as "a bare face challenge of the status quo in water management, a system that favored agriculture and industry over nature."[432] Chiles, by confessing liability, signaled the sugar industry and development interests that decision-making constructs were about to change – the state was going to confront its water quality issues to protect the Everglades natural system. Noted one SFWMD official:

> . . . [prior to Chiles confession of liability the SFWMD's] position was that the US attorney was wrong. . . [the SFWMD was] essentially on the same side as the Ag industry. And that had gone on for an extended period of time. The Governor after the election decided that we had wasted enough money on attorney's fees, we weren't making any progress, the Everglades were dying, and so Governor Chiles went into court and handed in his sword and I think that really signaled the beginning of a change in the relationship between the SFWMD . . . and Ag.[433]

Chile's statement cast the SFWMD's traditional constituencies, the sugar industry and development interests, into uncertainty giving rise to important elements of the veil and status quo effect of destabilizing litigation.

The SFWMD and Corps and their traditional constituencies, the sugar industry and development interests were forced to enter a "veil of ignorance",[434] they could no longer be certain whether water management decisions made by the SFWMD and the

[432] Lisa Gibbs, *Florida Suit to Protect the Everglades Bogs Down,* Legal Times, July 8, 1991 at 6.
[433] Interview V.
[434] Sabel & Simon, *supra* note 103, at 1074-75.

Corps would inure to their benefit.[435] This uncertainty, traditionally brought about by a liability determination, constrains historic constituencies from pursuing traditional political pathways to achieve decisions benefiting their self interests because they are uncertain "how [their] selfish goals will be served in as yet untried arrangements."[436] Stakeholders, including traditional constituencies are forced to open themselves up to new ways of interacting, "reorienting their goals, their ideas of potential collaborations, and their understanding of fruitful problem-solving strategies."[437]At the same time the liability determination "reverses the normal presumption in favor of the status quo"[438] it disentrenches the status quo and thereby reduces the risk of abandoning the status quo in favor of alternative policies.[439]

Evidence of both the veil and status quo effect became apparent shortly after Chiles' made his concession of liability. The sugar industry and development constituencies were put on notice that water quality was about to become a key factor in SFWMD water management policies but they did not know what "making the water right" and "cleaning the battlefield" meant or how accomplishing these goals would affect their business practices – they entered a veil of uncertainty. At the same time the SFWMD was, through the litigation and confession of liability, forced to alter its

---

[435] During the election campaign then candidate Chiles had been critical of the tight relationship between the sugar industry and the SFWMD. '"We are not going to be part of agreements made at night behind closed doors without everybody being informed and understanding what was going on"' Chiles said of the SFWMD's closed door litigation meetings with the agricultural industry. Mary McLachlin, *Chiles Tells WMD to Skip Closed-Door Deals with Farmers,* Palm Beach Post, Oct. 17, 1990 at 10A.
[436] Sable & Simon, *supra* note 103, at 1074.
[437] *Id.* at 1075.
[438] *Id.* (discussing the status quo effect of the liability determination in destabilizing litigation).
[439] *Id.* at 1076. Psychological research indicates that people tend to favor a known status quo over the risk of an uncertain alternative. Under normal conditions this status quo 'inertia" is difficult to overcome. One of the destabilizing impacts of the liability determination is to stigmatize the status quo and reduce the risk of alternatives. *Id.*

historical relationships and positions. When Lehtinen filed *United States v. SFWMD,* the state expressed puzzlement. Then DER Secretary Twatchtmann "dismissed the notion that unlicensed pumping stations operated by the . . . [SFWMD] were responsible for pollution in the Everglades."[440] Florida had vigorously defended itself against claims in a legal battle that one SFWMD attorney compared to the Vietnam War.[441]

Even before Chiles' confession of liability there were some subtle indications that change was in the wind, change brought about by the litigation. The SFWMD in 1990 began "secret" negotiations with the sugar industry to develop a Surface Water Improvement and Management (SWIM) Plan to address water contamination from the EAA.[442] The proposed SWIM Plan allocated some remedial responsibility, albeit minimal, to the sugar industry.[443] And during the 1990 gubernatorial campaign Chiles sent the SFWMD a shot across the bow when he criticized the SFWMD for "making closed-door deals with agriculture and spending millions of dollars to fight a federal lawsuit instead of settling it."[444] Chiles' post election confession of liability solidified the message that the status quo was dead. His confession of liability also conferred legitimacy on long standing water quality claims made by both environmental and

---

[440] Gary Kane, *Everglades Lawsuit Cheered; Conservationists Applauded while State Asks: Why Us?* Palm Beach Post, Oct. 13, 1988 at 1B.
[441] Lisa Gibbs, *Florida Suit to Protect the Everglades Bogs Down,* Legal Times, July 8, 1991 at 6.
[442] Mary McLachlin, *Cleanup Proposal Blasted; U.S. Agencies Criticize Everglades SWIM Plan,* Palm Beach Post, March 1, 1990 at 1A.
[443] *Id.* the SWIM Plan, which was roundly criticized by the NPS as insufficient to protect the Everglades, proposed phosphorus levels at .03 ppm, well above the 10 ppb level recommended by the scientific community. *Id.*
[444] Mary McLachlin, *Chiles Tells WMD to Skip Closed-Door Deals with Farmers,* Palm Beach Post Oct. 17, 1990, at 10A.

conservation SMOs[445] an important political resource that could be used by SMOs in the framing process exposing the sugar industry to further uncertainty.[446]

b. The destabilizing impacts of United States v. SFWMD settlement negotiations

Although the multi-phased process that led to the final settlement parameters for *United States v. SFWMD,* had some resemblance to the experimental remedy "rolling rule" the water quality remedy's destabilizing potential was greatly influenced by the state and federal governments' decision to limit the access of SMOs and agricultural interests including the sugar industry to settlement negotiations. Since Chiles' confession of liability it was Florida and not the court that drove settlement negotiations and both SMOs and the sugar industry were dependent upon the federal and state governments' willingness to allow them to participate in settlement negotiations. Although representatives from the various SMOs interviewed for this project report that they were consulted during the first phase of settlement negotiations, neither the SMOs nor the sugar industry were active p0articipants in initial settlement negotiations.[447] As a result, allegations abounded about the secretive nature of the federal-state negotiations.[448]

---

[445] *See* discussion *supra* Part IV.B; *see also infra* Part IV.C (discussing the use of *United State v. SFWMD* in framing efforts.

[446] *See infra* Part IV.C (discussing the use of *United States v. SFWMD* in framing efforts).

[447] Interviews B, G, H, and I. Robert M. Jones, *Finding Common Ground – The Everglades Mediation: Reframing the Politics of Consensus,* draft unpublished manuscript at 10-12 (2002) (on file with Florida State University and available at http://consensus.fsu.edu/staffarticles/Everglades_Med.pdf). There was extensive disagreement between federal and state scientists about the technical issues associated with settlement of the Everglades phosphorus litigation and Lt. Governor Buddy MacKay who had been charged by Chiles with negotiating the settlement on behalf of the State brought in the Florida Conflict Resolution Consortium to attempt to mediate an agreement between the federal and state scientists. Robert M. Jones, *Finding Common Ground – The Everglades Mediation: Reframing the Politics of Consensus,* draft unpublished manuscript at 10-11 (2002) (on file with Florida State University and available at http://consensus.fsu.edu/staffarticles/Everglades_Med.pdf).

[448] Mary McLachlin, *Everglades Suit Secretly Settled After 2 ½ Years,* July 11, 1991 at A1and Mary McLachlin, *Everglades Suit Secrecy Must Go, Sugar Lobby Says,* Palm Beach Post, March 29, 1991 at 1B.

In July 1991, Florida and the federal government announced they had reached a settlement agreement.[449] The 1991 Settlement Agreement was premised on Florida's concession that the "ecological integrity" of the natural system, including the Park and the Loxahatchee Refuge, were threatened by "high levels of phosphorus" "discharged from the EAA".[450] The 1991 Settlement Agreement set interim and long-term numeric phosphorus limits for both the Park and the Loxahatchee Refuge, established a remediation program to restore water quality in the natural system, and established a multi-agency Technical Oversight Committee to monitor compliance with interim and long-term phosphorus limits.[451] The remediation program consisted of the construction of four storm water treatment areas (STAs) to treat phosphorus contaminated waters, a regulatory permitting program for C&SF Project pumping stations, and best management practices (BMPs) directed at reducing phosphorus from EAA sugar cane fields.[452]

---

[449] The agreement was approved by the SFWMD Board on July 27, 1991 by a 6-1 vote. Jean DuBail, *Water District Oks 'glades Settlement, Objections to Anti-pollution Plan Rejected,* Sun Sentinal, July 27, 1991 (available at http://articles.sun-sentinel.com/1991-07-27/news/9101280049_1_everglades-pollution-lawsuit-board-members-everglades-national-park/2).

[450] *United States v. South Florida Water Management District,* case No. 88-1886-Civ-Hoevler, Settlement Agreement at 7 (July 26, 1991).

[451] *See generally United States v. South Florida Water Management District,* case No. 88-1886-Civ-Hoevler, Settlement Agreement (July 26, 1991). The 1991 Settlement Agreement is a fairly complex document. It required that Florida meet interim phosphorus goals by July 1, 1997. These goals ranged from 8 ppb to 14 ppb depending upon measurement locations in the Loxahatchee Refuge and Sharks Slough. *Id.* at 9-11. Florida was required to meet long-term phosphorus goals by July 1, 2002. *Id.* Long-term goals ranged from 8 ppb to 11 ppb again depending on the location of measurement. *Id., see also, United States v. South Florida Water Management District,* 847 F.Supp.1567, 1569-70(1992)(containing an overview of the terms of the 1991 Settlement Agreement).

[452] *United States v. South Florida Water Management District,* case No. 88-1886-Civ-Hoevler, Settlement Agreement, at 17-23 (July 26, 1991). The STAs were designed to act as "buffer zones" between the natural system and the EAA. *United States v. South Florida Water Management District,* 847 F.Supp. at 1570. BMPs, permits and other regulatory mechanisms were designed to reduce phosphorus levels in water discharged from the EAA into the STAs. *Id.* The STAs were designed to reduce phosphorus levels of in the water from the EAA before it entered the natural system. *Id.* These requirements would be incorporated in a Surface Water Improvement and management Plan (SWIM Plan) adopted by the SFWMD. *United States v. South Florida Water Management District,* case No. 88-1886-Civ-Hoevler, Settlement Agreement at 19 (July 26, 1991). BMP were designed to reduce phosphorus levels before run

Primary responsibility for financing the remedy fell on EAA agriculture, primarily the sugar industry.[453] Implementation of the 1991 Settlement Agreement was subject to ongoing court oversight pending attainment of long-term phosphorus limits.[454] The very fact of the 1991 Settlement Agreement and its assignment of financial responsibility for remediation of phosphorus levels on the sugar industry was clear evidence to the sugar industry that the status quo was dead.

The terms of the 1991 Settlement Agreement were incorporated in the Marjory Stoneman Douglas Everglades Protection Act (Everglades Protection Act).[455] The Everglades Protection Act directed the SFWMD to incorporate the requirements of the 1991 Settlement Agreement in a SWIM plan that included acquisition of cane fields for construction of the STAs and authorized the SFWMD to levy utility fees within EAA storm water utility districts to finance the construction and maintenance of the STAs.[456] To address due process arguments the SWIM plan was subject to review under Florida's Administrative Procedures Act (APA).[457]

While the 1991 Settlement Agreement met with mixed reactions in the environmental community the sugar industry alleged the 1991 Settlement Agreement

---

off reached the STAs, growers were expected to reduce phosphorus levels by 25 percent. Grunwald, *supra* note 22, at 291.

[453] *See generally, United States v. South Florida Water Management District,* case No. 88-1886-Civ-Hoevler, Settlement Agreement (July 26, 1991).

[454] *Id.*

[455] 1991 Fla. Laws ch. 91-80.

[456] 1991 Fla. Laws Ch. 91-80, § 2(3)-(6) available at http://exchange.law.miami.edu/everglades/statutes/state/florida/msd91-80.html , *see also, United States v. South Florida Water Management District,* 847 F. Supp. at 1570.

[457] 1991 Fla. Laws ch. 91-80, § 2(3)(b) available at http://exchange.law.miami.edu/everglades/statutes/state/florida/msd91-80.html and *United States v. South Florida Water Management District,* 847 F. Supp. at 1570.

would likely bankrupt a number of growers.[458] This economic viability strategy, the linkage of compliance with economic hardships, is a common and effective political strategy employed by industry to undermine court orders and the use of court orders in a change to stimulate social and political change.[459] The sugar industry coupled this economic strategy with an attack on the scientific underpinnings of the 1991 Settlement Agreement[460] – the 10ppb phosphorus standard and the claim that agriculture was the primary source of phosphorus degradation in the Everglades.[461]

Left out of settlement negotiations, the sugar industry challenged the 1991 Settlement Agreement in both federal and state court in an attempt to forestall or reconfigure implementation of the federal-state agreement.[462] The Miccosukee Tribe, the FOE and the Wildlife Federation quickly moved to intervene on behalf of the natural system.[463] By the end of 1992 the SFWMD "concluded that it was facing over thirty

---

[458] *Id.*

[459] Stryker (2007), *supra* note 103, at 84 (referencing studies by Melnick, Yeager, and Nelson and Bridges discussing economic viability claims as a strategy to undermine court orders).

[460] Jean DuBail, *Water District Oks 'glades Settlement , objections to Anti-pollution Plan Rejected,* Sun Sentinal, July 27, 1991 (available at http://articles.sun-sentinel.com/1991-07-27/news/9101280049_1_everglades-pollution-lawsuit-board-members-everglades-national-park/2). Industry scientists argued that the Everglades could tolerate phosphorus levels up to 50 ppb. Grunwald, *supra* note 22, at 289.

[461] *Sugar Cane Growers Cooperative of Florida v. SFWMD,* DOH Case No. 92-3038, Petition at 17-18 (April 9, 1991) (available at http://exchange.law.miami.edu/everglades/litigation/state_agency/state_administrative/doah/92_3038/pleadings/plead_1.html).

[462] *Sugar Cane Growers Coop of Fla. v. SFWMD,* DOAH Case No. 92-3038 (consolidated cases); *Florida Sugar Cane League, Inc. SFWMD*, DOAH Case No. 92-3039 (petition filed April 27, 1992*); Florida Fruit and Vegetable Ass'n v. SFWMD*, DOAH Case No. 92-3040 (petition filed April 9, 1992); *Sugar Cane Growers Coop of Fla. v. DER*, DOAH Case No. 92-6796 (petition filed Nov. 4, 1992); *Florida Sugar Cane League, Inc. v. DER*, DOAH Case No. 92-6797 (petition filed Nov. 12, 1992) and *Florida Fruit & Vegetable Ass'n v. DER,* DOAH Case No. 92-6799 (petition filed Nov. 12, 1992). The court rejected the sugar industry's initial challenges, brought before the adoption of the SMIM Plan, as premature. *See generally, United States v. SFWMD,* 847 F. Supp. 1567 (S.D. Fla. 1992) and *Florida Sugar Cane League, Inc. v. SFWMD,* 617 So.2d 1065 (Fla. 4th DCA, 1993).

[463] *Sugar Cane Growers Cooperative of Florida v. SFWMD*, DOH Case No. 92-3038 hearing transcript (Sept. 21, 1992) (available at http://exchange.law.miami.edu/everglades/).

different lawsuits related to the Everglades restoration effort."[464] Carol Browner, then serving as secretary of Florida's Department of Environmental Regulation (DER), "quipped", "we get sued every day by sugar. I call it 'suit du jour.'"[465] The sugar industry, left out of remedy negotiations, was strategically using litigation, as a legal and political resource to reconfigure the terms of the settlement agreement. [466]

There was an up side to *United States v. SFWMD,* the sugar industry's vehement opposition to the settlement coupled with the declining health of the Everglades' ecosystem kept Everglades' preservation and restoration on the front page of newspapers and periodicals across the country.[467] The attention of mainstream national media, particularly in the midst of the 1992 presidential campaign, was an important political resource for SMOs promoting Everglades' restoration – it allowed SMOs to garner bystander support and gave legitimacy to an Everglades restoration frame.[468] On the federal level the litigation helped shift the discussion from "*if* the government should develop and implement a comprehensive plan for saving the Everglades" to one of "how"

---

[464] Fumero & Rizzardi, *supra* note 387, at 677.
[465] Norman Bouchar, *Smart as Gods: Can we put the Everglades back together again,* 35 Wilderness 10, 12 (Winter 1991).
[466] The sugar industry is a classic example of Galanter's repeat player litigant in the litigation game. *Why the "Haves" Come Out Ahead: Speculation of the Limits of Legal Change,* 9 L. & Soc'y' Rev. 95, 98-103 (1974)(discussing how repeat player leverage strategically leverage litigation). Galanter in his analysis of the impact of litigation based on the nature of the litigant found that repeat organizational litigants tend to "come out ahead" in the litigation game because they approach litigation with a longer-term strategy for litigation. *Id* at 125. And Grossman et al. observe that repeat players, such as the sugar industry, have the resources to pursue longer-term objectives through litigation. Joel B. Grossman, Herbert M. Kritzer & Stewart Maccaulay, *Do the "Haves" Still Come Out Ahead,* 33 L. & Soc'y 803 (1999).
[467] *See eg,* Jeffrey Schmaltz, *Pollution Poses Growing Threat to Everglades,* N.Y. Times, Sept. 17, 1989 §1, Pt. 1at 1; Marc Levinson & Peter Kate, *Not so Sweet in Sugar Land,* Newsweek, Oct, 14, 1991 at 49; James Carney, *Last Gasp for the Everglades,* Time, Sept. 25, 1989 at 26; Ron Moreau, *Everglades Forever?,* Newsweek, April 7, 1986 at 72; and Ronald A. Taylor, *Long Abused Now Cherished, the Everglades is Pawn in Fight for Water, Saving a Fountain of Youth,* U.S. News & World Report, Feb. 24, 1986 at 63.
[468] *See discussion, infra* at Part IV.C discussing the role of framing in Everglades' restoration.

to restore the Everglades.[469] When Clinton named Al Gore as his running mate, Florida's environmental SMOs had reason to hope that Everglades' restoration would be a top federal priority.[470] Their optimism increased when Clinton made a number of appointments with Everglades' connections to the Everglades including EPA Administrator, Carol Browner, Florida's former DER Secretary; Interior Secretary, Bruce Babbitt, a friend of Everglades activist Jim Webb; and Attorney General, Janet Reno, whose sister was an Everglades activist.[471] Babbitt[472] evidenced his support of Everglades' restoration shortly after his appointment, at the 1993 annual Everglades Coalition conference, when he announced his intent to make Everglades restoration a top administration priority.[473] "It's sort of like the cavalry's riding in," said Everglades' activist Browder.[474]

In the face of this changed landscape U.S. Sugar Co. called a press conference and offered to drop industry opposition to the 1991 Settlement Agreement promising to

---

[469] Godfry, *supra* note 101, at 293.
[470] Grunwald, *supra* note 22, at 294. Gore had argued that federal sugar price supports had accelerated the collapse of the Everglades' ecosystem. Al Gore, *Earth in the Balance: Ecology and the Human Spirit),* at 340 (New York: Penguin Books, 1993).
[471] Grunwald, *supra* note 22, at 294-95.
[472] Babbitt further evidenced his support of Everglades' restoration by creating a federal Everglades Task Force chaired by Assistant Secretary of Interior, George Frampton, formerly director of the Wilderness Society. Grunwald, *supra* note 22, at 296. Babbitt also reached out to Colonel "Rock" Salt, District Engineer of the Jacksonville District, Corps of Engineers. *Id.* and Godfry, *supra* note 101, at 299-300. In 1999 Babbitt appointed Webb's wife, Mary Doyle, Dean of the Miami School of Law, as acting Assistant Secretary of Water and Science and charged her with coordinating Everglades' restoration. *Mary Doyle Named to Two Major Posts,* Press Release University of Miami, available at http://exchange.law.miami.edu/everglades/conference/2003/01/um_colloquim/062900%20umlaw%20mary_doyle_named_to_2_major_post_ct.htm last visited June 9, 2011.
[473] Jeff, Klinkenberg, *A Great Day for the Everglades,* St. Petersburg Times, Feb. 28,1993 at 4D and Robert McClure, *Interior Chief Vows to Help Everglades,* Sun Sentinel, Feb. 23, 1993 available at http://articles.sun-sentinel.com/1993-02-23/news/9301110300_1_everglades-problems-natural-water-flows-everglades-coalition last visited June 9, 2011 [hereinafter *Interior Chief Vows*].
[474] Robert McClure, *Interior Chief Vows,* Sun Sentinel, Feb. 23, 1993 available at http://articles.sun-sentinel.com/1993-02-23/news/9301110300_1_everglades-problems-natural-water-flows-everglades-coalition last visited June 9, 2011.

remove phosphorus from EAA run off if Florida would subsidize the construction of the STAs[475] and Flo-Sun, Florida's other major sugar company, approached Babbitt about a possible settlement of outstanding sugar industry litigation challenges to the 1991 Settlement Agreement.[476] Both Chiles and Babbitt believed that getting to Everglades' restoration meant resolving *United State v. SFWMD* – '"I knew we could fight sugar until the end of time, and everyone would feel righteous, but nothing would get done. There had to be a solution and sugar had to be part of it,'" Babbitt is reported to have said.[477] So in the spring of 1993 Babbitt "met secretly … with Flo-Sun CEO Alfanso "Alfie" Fanjul Jr. … [and] then assigned [Assistant Secretary] Frampton to negotiate a cleanup deal with the industry, using a Flo-Sun proposal as a starting point."[478] By July 1993 the Clinton administration announced that it had reached a tentative agreement with the sugar industry[479] – an agreement that would mean revising the 1991 Settlement Agreement.

The Statement of Principles negotiated between the sugar industry, Florida and the federal government, relied on the strategies set out in the 1991 Settlement Agreement including the construction of a series of STAs [480] and BMPs.[481] But the Statement of Principles deviated from the 1991 Settlement Agreement by extending the compliance

---

[475] Jeff Klinkenberg, *A Great Day for the Everglades,* St. Petersburg Times, Feb. 28,1993 at 4D.
[476] Grunwald, *supra* note 22, at 297.
[477] *Id.* at 296-97 (quote from Grunwald interview of Secretary Babbitt). Godfry argues that the Clinton administration believed that all sides had "to relinquish a little, end the fighting without declaring winners or losers, and move forward with a new consensus…which meant bringing Big Sugar into the circle." Godfry, *supra* note 101, at 313.
[478] Grunwald, *supra* note 22, at 297.
[479] Tom Kenworthy, *Everglades Revival Plan Unveiled; $465 Million Government – Industry Pact Arouses Controversy,* Wash. Post July 14, 1993, §1 at A1.
[480] Statement of Principles (July 13, 1993) available at http://exchange.law.miami.edu/everglades/litigation/state_agency/state_administrative/docs/st_prin_071393.html#Attachment%203 last visited at June 9, 2011.
[481] *Id.* The Statement of Principles sets out a rolling regime of reductions starting at 30% in 1994 and escalating to 45% by 2013. *Id.* at attachment 1.

schedule to twenty years[482] and shifting a large percentage of remediation costs from the sugar industry to tax payers.[483] More importantly, the Statement of Principles did not contain a final numeric phosphorus level,[484] a task that would be left for a later day.

Environmental, hunting and fishing SMOs, who had been excluded from the mediation process, reviled the agreement as a sellout.[485] Only Jim Webb, of the Wilderness Society, supported the agreement and the St. Petersburg Times characterized his support as ginger.[486] Browder, who was now working for the Everglades Coalition, lambasted the agreement as "a betrayal of the Everglades."[487] Clean Water Action called the agreement a "taxpayer bailout of the sugar industry"[488] and Dexter Lehtinen characterized the agreement as "vague and ambiguous on all the important points… It reminds me of Vietnam. You give up, declare victory, and go home."[489] The Clinton Administration was undaunted, Frampton, Babbitt's Everglades lead, later observed: '"The enviros were obsessed with phosphorus, because they were obsessed with

---

[482] *Id.* The Statement of Principles sets out rolling phosphorus reduction goals for the sugar industry starting at 30% in 1994 and escalating to 45% in 2013. *Id.* at attachment 1.
[483] Florida agreed to cover $503 million of the cost of phosphorus remediation of which $426 million would be generated through a twenty-year ad valorem tax. *Id.* The sugar industry's contribution was reduced to $322 million with opportunities for further reductions if the sugar industry exceeded phosphorus goals. *Id.* Proposed annual agricultural payments ranged from $12.5 million per year to $18.5 million per year but payments could be reduced to $11.625 million in any given year based on a reimbursement formula, which established credit offsets for every 1% of phosphorus reductions over a 25% reduction level. *Id.*
[484] *Id.* Shortly after the announcement of the Statement of Principles Florida, the federal government, and the sugar industry began negotiations on the finer details of a Settlement Agreement. Godfry, *supra* note 22, at 321-22. Negotiations with the sugar industry were touch and go and were not finalized until the parameters of an agreement were incorporated in the Everglades Forever Act in 1994. *Id.,* Grunwald, *supra* note 22, at 300.
[485] Godfry, *supra* note 101, at 316.
[486] Karl Vick, *Agreement Would Clean Up the Everglades,* St. Petersburg Times, July 14, 1993 at 1A.
[487] *Id.*
[488] Godfry, *supra* note 101, at 319.
[489] Robert McClure and William Gibson, *Miccosukees, Others Rip Into Cleanup Pact,* Sun Sentinel, July 13, 1993, available at http://articles.sun-sentinel.com/1993-07-13/news/9301230811_1_miccosukees-polluted-water-buddy-mackay last visited June 16, 2011.

punishing sugar. We saw the pollution lawsuits as a diversion, a distraction from the larger restoration of the Everglades. We wanted to move on.'"[490]

The sugar industry would not, however, finalize the agreement without legislation[491] so in February 1994 the Chiles' administration proposed "the Marjory Stoneman Douglas Act."[492] The Clinton Administration supported the legislation[493] and the sugar industry "hired three dozen lobbyists to work the bill" while environmentalists struggled to find a single major law firm without connections to the sugar industry that could lobby the bill on behalf of the natural system.[494] Again SMOs were essentially cut out of the dialogue.[495] Outraged, Marjory Stoneman Douglas wrote to Chiles demanding her name be removed from the bill.[496] The legislation was renamed the Everglades Forever Act (EFA) and passed overwhelmingly by the Florida legislature despite Douglas' opposition.[497]

Ron Jones, the hydrologic expert that Lehtinen relied on when he filed *United State v. SFWMD*, characterized the bill as a "total and complete disaster"[498] and in the eyes of environmentalists; the EFA failed to adequately address the phosphorus issue.[499]

---

[490] Grunwald *supra* note 22, at 297 (quoting interview with George Frampton).
[491] *Id.* at 300. When the sugar industry started to raise roadblocks to implementation of the Statement of Principles, Babbitt suggested that the Clinton administration would propose termination of federal sugar subsidies. Karl Vick, *Big Sugar, A sweet deal under fire,* St. Petersburg Times, May 15, 1994 at 1A.
[492] Grunwald, *supra* note 22, at 300.
[493] *Id.* at 301.
[494] *Id*.
[495] William Booth, *Critics Say Cleanup Act is Sweet Deal for Sugar,* Wash. Post, May 2, 1994 at A1. (hereinafter *Critics Say)*
[496] Grunwald, *supra* note 22, at 301.
[497] *Id*.
[498] William Booth, *Critics Say,* Wash. Post, May 2, 1994 at A1. *See also,* Kirk Brown, *Chiles Signs Everglades Act, Trades Barbs With Protesters,* Palm Beach Post, May 4, 1994 at 1A.
[499] William Booth, *Critics Say,* Wash. Post, May 2,1994, at A1.

The EFA set interim phosphorus levels at 50 ppb[500] leaving the establishment of final numeric phosphorus standards to a separate, future rule making process to be completed by December 31, 2003.[501] The SFWMD and the sugar industry were to fully comply with the final phosphorus standards by December 31, 2006.[502] The implementation provisions of the EFA closely paralleled the Statement of Principles including authorization of the STAs,[503] development of a DER permitting scheme for C&SF Project pumping stations, [504] BMP implementation,[505] and adoption of a public private funding scheme.[506] The EFA requirements were folded into an amended settlement agreement that was approved by the court in 2001.[507]

The Miccosukee Tribe immediately notified the EPA Administrator that Florida, through passage of the EFA, had effectively changed Florida's water quality standards without complying with the procedural requirements of the CWA.[508] When EPA found that the EFA did not impermissibly alter state water quality standards, the Miccosukee Tribe sued to compel EPA to make an independent assessment of the effect of the EFA on state water quality standards.[509] Meanwhile Save our Everglades, a coalition of

---

[500] Everglades Forever Act (EFA), Fla. Stat. § 373.4592(11)(c)(1994).
[501] EFA, Fla. Stat. § 373.4592(4)(e)2 (1994). The EFA did contain a default phosphorus standard of 10 ppb if the state failed to adopt a numeric phosphorus standard by December 31, 2003. *Id.*
[502] EFA, Fla. Stat. § 373.4592(10)(1994).
[503] EFA, Fla. Stat. § 373.4592(4)(a)(1994).
[504] EFA, Fla. Stat. § 373.4592(9)-(10)(1994).
[505] EFA, Fla. Stat. § 373.4592(4)(f)(1994).
[506] Godfry, *supra* note 101, at 323. Funding of the system was to be through a rather complex funding and taxing structure outlined in the EFA. EFA, Fla. Stat. § 373.4592(6) & (8)(1994).
[507] *United States v. South Fla. Water Management District*, No. 88-1886)(S.D. Fla. April 27, 2001) (Omnibus Order approving 1995 request to modify Settlement Agreement to reflect the provisions of the EFA) available at http://www.evergladeshub.com/lit/LEGAL/Hoeveler01-USA-Micco-8-1886civHoeveler-Decree-010427.pdf last visited June 17, 2011), *see also* Fumero & Rizzardi, *supra* note 387, at 679.
[508] *Miccosukee Tribe of Indians of Fla. v. United State Environmental Protection Agency,* 105 F.3d 599, 601 (11th Cir. 1997).
[509] *Id.*

environmentalists and environmental SMOs decried the EFA as another public sugar subsidy and in the fall of 1993 launched a referendum asking voters to impose a "penny a pound" tax on sugar growers to finance Everglades' restoration.[510]

(1) The federal-state negotiation strategy.

In many respects the federal-state decision to exclude non-governmental stakeholders from initial remedy negotiations and the subsequent decision to include only the sugar industry in remedy negotiations undermined the full potential of destabilizing litigation. A truly deliberative remedy negotiation involving the full range of stakeholders forces stakeholders with divergent interests to work together to agree upon a negotiation process and rules, to gather and share background information, and to defend their relative positions.[511] This deliberative process[512] results in both instrumental and communicative learning thereby increasing the possibility of transformative problem solving.[513] Deliberative problem solving in the context of negotiating and implementing a remedy increases dialogue and knowledge sharing between stakeholders creating new knowledge as individual stakeholders garner a deeper and more nuanced understanding of their individual positions and the positions of other stakeholders.[514] Through the

---

[510] Carolyn Fretz and Mary Ellen Klas, *Tax Proposal Could Stall Everglades Talks,* Palm Beach Post Sept.30, 1993 at 1A. The Florida court over ruled initial attempts to put the "penny a pound" referendum on the ballot in May 1994. Kirk Brown, *Court Keeps Penny-a-Pound Sugar Tax Off Ballot,* Palm Beach Post, May 27, 1994 at 1A. Save our Everglades launched a second effort to get a "penny-a-pound" tax on the ballot in the spring of 1996. Peter Wallsten, *Environmentalists Pushing New Sugar Tax,* St. Petersburg times, March 26, 1996 at 1B. In February 1996 environmental interests convinced the Clinton administration to propose a national "penny-a-pound" sugar tax to fund Everglades restoration. Lisa Shuchman, *Gore to unveil Penny-a-Pound Sugar Tax,* Palm Beach Post, Feb. 17, 1996 at 1A.
[511] Sabel & Simon, *supra* note 103, at 1068.
[512] *Id.* at 1069.
[513] *See generally,* Brummel et al, *supra* note 199, at 682-83 and *infra* Part III.A.2 (discussing social learning in deliberative processes), *see also* Sabel & Simon, *supra* note 103, at 1069, 1076-77.
[514] *Id.* at 1076-77.

deliberation process the relative power of the stakeholders begin to shift[515] as new avenues are developed for "outsiders" (those previously blocked from the agency decision-making process) to become "insiders."[516] The court's supervision of this deliberative process confers further legitimacy on "outsiders" such as environmental SMOs – legitimacy that may be mobilized to induce policy reform.[517]

Conversely, the failure to use a deliberative process to develop the experimental remedy can adversely impact the full potential of destabilizing litigation as evidenced by the fallout from the *United States v. SFWMD* settlement. Traditional mediation or settlement negotiations can undermine destabilization to the extent that they discourage broad inclusive stakeholder representation in settlement negotiations in the belief that including "stronger ideologues and the true believers who make their deals only with God" will obstruct settlement.[518] Exclusion of SMOs representing "true believers" reinforces the perception that negotiated decision-making processes are "secretive, closed and inflexible"[519] and often leads to ongoing litigation.[520]

The decision at the outset to exclude traditionally blocked SMOs (traditional "outsiders") from settlement negotiations undermined the destabilizing impact of *United States v. SFWMD* in a number of ways: it hardened the lines between and increased distrust among stakeholders; it changed many SMOs' long term litigation strategies

---

[515] *Id.* at 1077-78.
[516] Harris, *supra* note 268, at 911-12.
[517] *Id.* at 933-34
[518] William H. Rodgers Jr., *Deception, Self-Deception, and Myth: Evaluating Long-Term Environmental Settlements,* 29 U. Rich. L. Rev. 567, 572 (1995)(Rodgers (1995) *citing* Kai N. Lee, *afterward to* A. Talbott, *Environmental Mediation: 3 Case Studies – The Island, The Highway, The Ferry Terminal (*(Ins. for Envtl. Mediation ed., 1981) and Jan McCarthy & Alice Shorett, *Negotiating Settlements: A Guide to Environmental Mediation,* 18-20 (American Arbitration Ass'n ed.,1984).
[519] *Id.*
[520] McCarthy & Shorett, *supra* note 518, at 18-20.

giving rise to extensive secondary litigation and framing efforts; it diminished resources available for long term Everglades restoration; and it emphasized the strength of the bond between the sugar industry, Florida, and the federal government.

The impact of excluding the sugar industry in initial settlement negotiations was immediately apparent in the number of lawsuits filed contesting the 1991 Settlement Agreement.[521] Litigation became a strategy used by the sugar industry to halt the implementation of the 1991 Settlement Agreement and to regain their voice in the decision making process.[522] The sugar industry's litigation strategy was an effective strategy, Babbitt, a "consensus politician",[523] saw the phosphorus issue and its surrounding litigation as a barrier to getting to the bigger issue, the Everglades restoration[524] and when Flo-Sun approached Babbitt about negotiating a phosphorus clean up deal for the Everglades, Babbitt seized the opportunity.[525] Babbitt was focused on an environmental end and did not view an inclusive negotiated settlement of *United States* v. *SFWMD* from an SMO perspective – as a strategic opportunity to alter the relationship between the sugar industry, the Corps, and the SFWMD.

It may well be that Babbitt and Interior believed that they were fully capable of speaking for the natural system in settlement negotiations. This assumption, however, raises a more fundamental question: who should speak for the natural system in settlement negotiations? Settlement of environmental disputes requires those that

---

[521] Rodgers, *supra* note 518, at 572.
[522] *For Farmers a Choice,* Palm Beach Post, July 18, 1991, 19A and Grossman, Kritzer & MacCaulay, *supra* note 468, at 803-04.
[523] Grunwald, *supra* note 22, at 295 (citing interview with Bruce Babbitt).
[524] *Id.* at 297 (citing interviews with Babbitt and Frampton).
[525] *Id.* at 297.

negotiate on behalf of nature to "discount real tangible gains by indeterminate prospects" leaving one to guess at the relative merit of the tradeoffs made by the negotiators.[526] The uncertainty about the merits of a settlement can boil over to distrust where negotiations are non-public and those who have traditionally advocated for the environment are excluded from negotiation processes. This was the case with the settlement of *United States v. SFWMD*.

For decades environmentalists such as Browder, Douglas, and Webb and sportsmen such as Jones, and the SMOs they represented had effectively been the environmental voice of the Everglades.[527] Now these SMOs were cut out of settlement negotiations, essentially told by Interior and the Florida DEP, "trust us we have the best possible deal for the Everglades."[528] But environmental SMOs were skeptical; from their perspective the Statement of Principles put too great a burden on the public and did not provide the necessary assurance that the sugar industry would actually follow through with its commitments.[529] While Interior's Frampton saw the environmentalist as "obsessed" with punishing sugar, the SMOs saw the sugar industry reasserting its political power. By excluding environmental and hunting and fishing SMOs from settlement talks Florida and the federal government reinforced the perceived political power of the sugar industry and thereby augmented distrust among the stakeholders.

---

[526] Rodgers (1995), *supra* note 518, at 573. Rodgers' notes, for example, the Hudson River Settlement where the negotiators decided to forgo $500,000 for cooling towers that environmentalists argued could save millions of fish in favor of $2 million in attorney's fees that might serve as a future deterrent to ecological degradation. *Id.*

[527] *See, supra* Part IV.A.1 and Grunwald, *supra* note 22, at 278-79

[528] At the press conference announcing the settlement federal officials argued that they had "driven a hard bargain" and were ready to "litigate to the wall." Tom Kenworthy, *Everglades Revival Plan Unveiled; $465Million Government-Industry Pact Arouses Controversy,* Wash. Post, July14, 1993 at A1.

[529] *Id.*

The Statement of Principles also caused SMOs to reassess their litigation strategy. SMOs had trusted the Justice Department and Interior to do the right thing for the Everglades in *United States v. SFWMD*. SMOs had forgone litigation choosing instead to support the federal plaintiffs through intervention and press coverage. In the end SMOs learned that if you can't give up control of the litigation you could be cut out of the process. One SMO leader remembers a federal attorney telling him "what a good deal" the federal government had gotten for the Everglades. This SMO leader was incensed, "I told [the federal attorney] . . . Well you wouldn't represent me with a traffic ticket. I gave you documents that said point blank they [the sugar industry] were polluting all of this land and I gave you the research that pointed out that they were destroying . . . [the Park] and you threw the case point blank you threw the case. She didn't deny it, she didn't even argue."[530] The take away for this stakeholder and the SMO he represented: "Play politics until you're sure you have a good law and you're sure you have a direct purpose for the litigation and [then you sue and] *you* control the lawyers."[531]

Another SMO member observed: "Clinton and Babbitt were determined to have an agreement, Graham was determined to have an agreement and they were very closely aligned with sugar interests and contributions from the sugar industry and once the issue was removed from Federal Court [through settlement negotiations] environmentalists really had to play on a new playing field in which they had to compete with all of the influences that were being raised by campaign money."[532] In this SMO's eyes "Clinton and Babbitt were clearly interested in everyone making kumbaya . . . They did not want

[530] Interview B.
[531] *Id.*
[532] Interview I.

criticism from this [the environmental side] of their political ledger"[533] settlement was, quite simply, a political decision on an election political ledger.

From the SMO perspective litigation was the only means of obtaining a voice in the water quality debate. In 1994, SMOs including FOE, the Florida Keys Fishing Guides, Clean Water Action, the Florida Chapter of the Sierra Club, the Florida Audubon Society, and the Fishermen against Destruction of the Environment, together with the Miccosukee Tribe brought suit to compel the DEP to adopt numeric phosphorus standards in compliance with the CWA.[534]

Many of the government stakeholders interviewed for this project view this secondary litigation as an "annoyance" that slows down the Everglades' restoration. They argue that secondary litigation is nothing more than a way for these SMOs to get attention "so that they have to be dealt with."[535] But a number of government scientists see litigation as central to the Everglades' protection because it mitigates political influences.[536] Observed one such scientist, "I look at the water quality issue in South Florida in general and the only place we've made significant investment and really made significant progress is the result of a lawsuit because the politics otherwise overwhelm the situation, because stakeholders like agricultural folks are so powerful . . ." and when asked what would increase water quality in the Everglades this scientist responded "more lawsuits."[537]

---

[533] *Id.*
[534] *In re Petition to Initiate Rulemaking to Adopt a Numerical Criterion for Phoshphorus Concentration in the Everglades*, OCG Case No. 94-0693 (Fla. Dept. Envt'l Protection Jan 22, 1996) available at 1996 WL 85176.
[535] Interview C, Interview L, and Interview O.
[536] Interviews Interview D, Interview E, and Interview W.
[537] Interview R.

In retrospect the SMO's distrust was somewhat valid. Initially the sugar industry reported significant progress toward meeting interim phosphorus goals[538] but by early 2001 Florida had yet to adopt numeric phosphorus criteria.[539] By the spring of 2003 the sugar industry was actively trying to legislatively set the long-term phosphorus standard at15 ppb and to shift the phosphorus compliance deadline from 2006, set in the EFA to 2026.[540] According to some it was '"a battle . . . fought on the basis of power, not on what's good for the Everglades."'[541] In the end, DEP announced that it would adopt the default phosphorus standard of 10 ppb.[542]

But the Bush administration continued to back a 2026 compliance deadline.[543] The extension was clearly contrary to the settlement agreement and so concerned U.S District Court Judge Hoevler that he ordered a hearing on the impact of the legislation 2001 Consent Decree, which embodied the final settlement agreement between Florida,

---

[538] Robert P. King, *Big Sugar Gets Good Report,* Palm Beach Post, July 11, 1997 at 1B and William Booth, *Sweet Progress in Everglades: Florida Farmers Send Less Phosphorus into Marshes,* Wash. Post, Sept. 4, 1996 at A01; *see also,* Kenneth Weber, Temperince Bennett, Grover Payne, Guy Germaen, Steven Hill & Nennand Iricnic, *Chapter 4: Water Quality in the EPA,* 4-1 in 2001 Everglades Consolidated Report (Jan. 1, 2001) *available at* http://my.sfwmd.gov/portal/page/portal/pg_grp_sfwmd_sfer/portlet_prevreport/consolidated_01/index.html

[539] The EFA required the DER to establish a numeric phosphorus level by December 31, 2003. In the event the DER failed to meet this deadline the default setting of 10 ppb would automatically go into effect. Fla. Stat. §373.4592 (2003).

[540] Mike Salinero, *Battle Rages to Ease Everglades Pollution Standard,* Tampa Tribune, April 3, 2003 at Metro 4

[541] *Id.*

[542] *See* S. Fla. Water Mgmt. Dist., *2004 Everglades Consolidated Rep., 2c-1(2004)* available at http://sfwmd.gov/org/ema/everglades/consolidated 02/final/chapter s/ch2c.pdf; *see also* Robert Malinoski, *The Phosphorus Standard and Everglades Restoration: Will This Standard Lower Phosphorus in the Everglades or is the Proposed Standard a Hollow Promise?* 12 U. Miami Bus. L. Rev. 35, 38-39(2004). The debate over phosphorus standards continued well after the adoption of the 10ppb phosphorus levels. There were ongoing debates about testing criteria and moderating provisions including whether phosphorus testing should be conducted at the edge of the EAA where phosphorus levels would presumably be higher or within the Everglades where phosphorus loads would be diluted. Malinoski, *supra,* at 45-46. Ultimately the DER and the Environmental Regulation Commission adopted internal monitoring sights over the objections of environmental interests. *Id.*

[543] Robert P. King, *20 year Delay Sought for Everglades Cleanup Law,* Palm Beach Post, April 3, 2003 at 1B.

the federal government and the sugar industry.[544] At the hearing Hoevler made it clear that he did not intend to allow Florida, through legislation, to back out of the Consent Decree.[545] Judge Hoevler's admonitions, however, went unheeded as Governor Bush "retreated behind closed doors to sign the legislation.[546] The St. Petersburg Times reported: "The governor has often outraged environmentalists…But in case anyone feared that he was wracked with guilt over this breach of faith with the Everglades' agreement, Bush let it be known that he 'sleep(s) well at night." He didn't say whether he could still look at himself in the mirror, or whether he had been visited by the ghost of Everglades' agreements past."[547] In hindsight, it seems that *United States v. SFWMD* may have shifted landscape but the sugar industry retained the ability to exert its political influence over state water policy.

(2) Ongoing court oversight

Destabilization theorists and social scientists alike argue that ongoing court oversight is essential to change litigation.[548] Court oversight both assures that the remedy is adjusted and implemented over time[549] and gives legitimacy to previously unrepresented voices.[550] Court oversight has been essential to the Everglades water quality remedy.

---

[544] Craig Pittman, *Judge intervenes on Everglades,* St. Petersburg Times, April 24, 2003, at 1A.
[545] Craig Pittman, *Judge holds fast to Glades plan,* St. Petersburg Times, May 3, 2003 at 1B.
[546] Editorial Desk, *Everglades betrayal,* St. Petersburg Times, May 23, 2003 at 18A. The St. Petersburg times opined that "[n]obody in his right mind wants to be seen in public anywhere near this irresponsible piece of work." *Id.*
[547] *Id.*
[548] Sabel & Simon, *supra* note 103, at 1070 and Harris, *supra* note 268, at 934.
[549] Sabel & Simon, *supra* note 103, at 1070.
[550] Harris, *supra* note 268, at 934.

The modified settlement of *United States v. SFWMD* incorporated in the Consent Decree envisioned a multi-year process involving implementation interim phosphorus standards, setting long-term phosphorus standards, the implementation of long-term phosphorus standards, and a compliance schedule to assure implementation of interim and long term standards.[551] The court in its 2001 order adopting the revised settlement entered as a Consent decree observed: "The Consent Decree in this case . . . is something of a *rare avis.* It does not completely bind the parties to a particular outcome or require the agencies to adopt the terms of the Agreement. . . It imposes 'a process rather than a result while preserving this Court's ultimate jurisdiction.'"[552] The Court went on to note that the behavior of the parties over the ten years prior to entering the consent decree "provide[d] a sufficiently clear indication that this Court and the parties envisioned future modifications . . . Given '[t]he essence of the Agreement [was] to achieve compliance with [s]tate law' . . . it is certainly forseable by all of the parties to this litigation that the Consent Decree might need to be modified."[553] Day to day monitoring of the implementation of the Consent Decree was the task of the Technical Oversight Committee (TOC).[554] The TOC, a quasi "multi-stakeholder" group composed of scientists from the Corps, the SFWMD, the Loxahatchee, the DER, and the NPS, was responsible for monitoring Consent Decree compliance and resolving compliance

[551] *United States v. SFWMD,* Case No. 88-1886, Omnibus Order (April 27, 2001) and Exhibit B Amended Settlement Agreement (the Amended Settlement Agreement is the 1991 Settlement Agreement modified to delineate revisions made pursuant to the Statement of Principles and EFA) *available at* http://exchange.law.miami.edu/everglades/litigation/federal/usdc/88_1886/index.html
[552] *United States v. SFWMD,* Case No. 88-1886, Omnibus Order at 12 (April 27, 2001)(emphasis in original)(citations omitted).
[553] *Id.* at 12-13 (citations omitted).
[554] *United States v. SFWMD,* Case No. 88-1886 Civ., Omnibus Order at 10-13 (April 27, 2001) and *United States v. SFWMD,* Case No. 88-1886 Civ. Settlement Agreement at 24-25 (July 26, 1991), *see also* Everglades TOC Portal at http://www.sfwmd.gov/portal/page/portal/xweb%20about%20us/toc

disputes between the parties including determining whether an exceedance of the phosphorus standards constituted a violation of the Consent Decree.[555] The parties to the litigation, including intervening SMOs, under the terms of the Consent Decree can challenge TOC's violation determinations.[556] The Court has not shied away from holding Florida accountable for its commitments under the Consent Decree. Thus, for example, the Court found Florida in violation of the Consent Decree for exceeding phosphorus goals in both 2005 and 2010.[557]

In the minds of many SMOs, the Court has been the forum most willing to give voice to SMOs and the Miccosukee Tribe on water quality issues. Observed one environmental SMO representative:

> Well it's very clear . . . to any of us who had worked in grass roots that the minute we [are]. . . out of Federal Court we . . . [are] at a big disadvantage because the law was on our side but the politics were not on our side. The influence of money in politics was the main reason, we simply couldn't raise the kind of money that . . . [the sugar industry and development interests] could.[558]

Having voice in the litigation was an important check, from the SMO perspective, on the political processes that favored political influences over clean water.

---

[555] *United States v. SFWMD,* Case No. 88-1886 Civ. Exhibit B Settlement Agreement at 24-25 (April 27, 2001) *available at* http://exchange.law.miami.edu/everglades/litigation/federal/usdc/88_1886/index.html . The TOC meets quarterly and reviews quarterly water quality compliance reports prepared by the SFWMD. Everglades TOC Portal at *http://www.sfwmd.gov/portal/page/portal/xweb%20about%20us/toc* . The TOC is also responsible for overseeing and monitoring all water quality science in the Everglades and determining whether an exceedance is due to natural phenomenon or error or is a violation of the Consent Decree *Id., see also United States v. SFWMD,* Case No. 88-1886, 2005 WL 13277359 (S.D.Fla. June 1, 2005) (granting Motion for Declaration of Violation in Loxahatchee Refuge) and Interview R.

[556] *United States v. SFWMD,* Case No. 88-1886 Civ., 2005 WL 13277359 (S.D.Fla. June 1, 2005) (granting Motion for Declaration of Violation in Loxahatchee Refuge).

[557] *Id*. and *United States v. SFWMD,* Case No. 88-1886 Civ., 2010 WL 1292275 (S.D. Fla. March 31, 2010).

[558] Interview I.

This became particularly apparent when in 2003 Governor Bush's administration and the Florida Legislature attempted, at the behest of the sugar industry, to modify the timeline for implementation of the10 ppb deadline set out in the 2001 Consent Decree through legislation. Upon learning of the scheme, the court, *sua sponte* called a hearing to address the impacts of proposed 2003 amendments to the EFA on the 2001 Consent Decree.[559] In his subsequent order, Judge Hoevler, who had presided over *United States v. SFWMD* since its inception, reaffirmed the courts commitment to enforcement of the terms of the 2001 Consent Decree stating:

> To be clear I wish to reiterate in the strongest possible terms that insofar as the new legislation proves inconsistent with the Decree the parties' obligations as set forth in the Decree remain unaltered. The agreement embodied in that Decree remains binding on the parties, and I intend to enforce it as it currently reads, unqualified.[560]

Judge Hoevler further admonished Florida politicians:

> While I am deeply troubled by the content of the bill, I am dismayed by the process that led to its passage. The bill has moved quickly through the legislative process, reportedly at the behest of more than forty lobbyists for the sugar industry. There is simply not acceptable explanation for the speed by which this was accomplished, given the fact that the deadline remains three and one half years off and given the state's assurances that much of the cleanup project is proceeding on track. . . Moreover, the sponsors of the bill should have allowed time to consider input from the broad range of interests impacted. Yet the treatment of the bill seemed calculated to avoid federal participation and public scrutiny.[561]

[559] *United States v. SFWMD,* No. 88-1886 CIV, 2003 WL 21145799 (S.D. Fla., May 9, 2003).
[560] *Id.* at 1
[561] *Id.*

Passage of the legislation, in the court's opinion, indicated that Florida had withdrawn its support of the settlement and the court cautioned Florida that it would not defer to the legislation as it affected federal lands in the Everglades system. [562]

Shortly thereafter U.S. Sugar filed a motion to disqualify Judge Hoevler and vacate his order alleging the order was biased and Judge Hoevler had improperly granted interviews to the news media.[563] Florida declined to take a position on the motion.[564] And while Judge Hoevler was ultimately disqualified largely because the he had held a press conference perceived to be in violation of the rules of judicial conduct the court refused to vacate Judge Hoevler's order admonishing Florida for its political shenanigans.[565] Furthermore, if the sugar industry and Florida thought the court was now going to concede to the extension of the 10 ppb phosphorus levels incorporated in the new legislation they were mistaken. In 2010, for example, the court issued an order finding the SFWMD violated the 2001 Consent Decree by failing to enforce the10 ppb standard within the time frame set out in the 2001 Consent Decree[566] and in 2011 it issued an order finding that the EPA by failing to compel Florida to implement numeric phosphorus standards, had violated the CWA. [567] In the face of such inaction, Judge Moreno cautioned Florida '"I am a jailing judge, not a fining judge."'[568]

---

[562] *Id.*
[563] *U.S. v. SFWMD,* 290 F.Supp. 2d 1356, 1358 (S.D. Fla. 2003).
[564] *Id.* at 1358-59.
[565] *Id.* at 1361-62.
[566] *See generally United States v. SFWMD,* No. 88-1886 Civ., 2010 WL 1292275 (S.D. Fla. March 31, 2010).
[567] *See generally United States v. SFWMD,* No. 88-1886 Civ., 2011 WL 1099865 (S.D. Fla. March 31, 2010) and *Miccosukee Tribe v. United States,* 706 F. Supp. 2d 1296 (S.D. Fla. 2010)
[568] Robert P. King, *Everglades' Plan Oversight Unlikely to End; U.S. Cool to Governor's Bid to End Judges Role,* Palm Beach Post, March 31, 2006 at 1C.

Thus court oversight has served an important counter balance to the political power of the sugar industry. The court, through its oversight of the 1991 Settlement Agreement and the 2001 Consent Decree and its implementation, provides an alternate forum in which to evaluate policy decisions about water quality in the Everglades', a forum in which SMOs are not politically outgunned by the sugar industry. The court in essence has assured that "democratic processes were brought to bear on [the] environmental problems" [569] of the Everglades. The impact of the court's ongoing oversight in *United States v. SFWMD* confirms the validity of arguments advanced by both Chayes and Sax decades ago that in historically politically laden scenarios the court, free from political screening, can assure those denied access to decision making forums "at least a hearing and honest consideration of matters"[570] and can force both administrative agencies and "even the biggest industries" to respond to and address the merits of the environmental controversy."[571]

C. Litigation and Framing as Political Change Resources

Everglades' restoration was, in large part, facilitated by the SMOs use of framing in conjunction with litigation as a political resource. Frames are important to SMOs' change strategies because they help individuals (both bystanders and potential SMO members) assess why an issue such as the Everglades' restoration matters.[572] Frames are used by agencies, the politically powerful and SMOs to encourage bystanders to give

---

[569] McGovern, George, *Introduction* in *Defending the Environment: A Strategy for Citizen Action* at xi-xii (1970). McGovern's argument is not a new one but was espoused as early as the middle 19th century by DeTocquiville. Alexis DeTocquieville, *Democracy in America* 104 (Alfred A. Knoff 1994)(1835)
[570] Sax (1970), *supra* note 112, at 111-112. *See also,* Chayes, *supra* note 104, at 1313.
[571] Sax (1970), *supra* note 112 at 111-112 and Chayes, *supra* note 1044, at 1313.
[572] Nisbet & Sceufele, *supra* note 233, at 1770.

weight to certain policy considerations over others.[573] For decades the Corps and Florida used a two-prong flood control and economic development frame[574] to construct and management of the C&SF Project in a manner that allowed expansion of urban and agricultural, assured development and agricultural interests access to water supplies, and permitted agricultural interests to pay little attention to the quality of water coming off of cane fields. Restoring the Everglades required the development of a new frame – a collective action frame. Collective action frames are used by SMOs to "mobilize potential adherents and constituents" to build the SMO and to "garner bystander support" thereby increasing the legitimacy of the SMO and its views while demobilizing antagonists.[575]

The ability of an SMO to promote change is dependent upon its ability to garner political resources to forward collective action[576] and one of the primary resources to forward collective action is "mobilizing consensus" across the general population "turning bystanders and opponents into adherents to the goals of a social movement."[577] To garner and mobilize this consensus the SMO uses the media to convince bystanders to become engaged in the SMO struggle in ways that alter the power dynamics among existing players.[578] An SMO frames issues in the media to: (1) strengthen the readiness

---

[573] *Id.*
[574] Nisbet, *supra* note 233, at 17-18. Nisbet describes a number of framing typologies used in science related policy debates in the United States and Europe. *Id.* at 17. The frame historically used in the Everglades to support development and mange flooding is illustrative of an "economic development and competitiveness frame." *Id.* at 18.
[575] Benford & Snow, *supra* note 233, at 614, (quoting Benford & Snow, *Ideology, Frame Resonance, and Participant Mobilization,* 1 Int'l Soc. Mov't Res. 1997, 1998 (1988)).
[576] Edwards & McCarthy, *supra* note 227, at 116.
[577] *Id.* at 140.
[578] E.E. Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America* 38 (1960).

of SMO members to act, (2) increase the volume and intensity of bystander support, and (3) "neutralize and discredit the framing efforts of adversaries and rivals."[579]

SMOs seek media attention because not only does the media affect how bystanders frame an issue, but how an issue is portrayed in the media reflects the success or failure of the SMO's press for political and social change.[580] "Journalists decide which . . . [SMOs] should be taken seriously . . . [They are] players who comment on the position of other players, shaping and framing the discussion. . . . ."[581] A change in the way the media portrays an issue challenges old frames and signals and spreads new frames.[582] For an SMO to have its "preferred labels used [in the media] . . . is both an important outcome and carries a strong promise of a ripple effect."[583]

The foremost Everglades activist, Marjory Stoneman Douglas acknowledged the importance of framing as an essential political resource for SMOs promoting Everglades' restoration when she acknowledged: "with increasing publicity, we're hoping that more people will understand the dilemma and we'll have a great public outcry that necessarily precedes a solution."[584] This framing effort began in earnest in 1969 with the Jetport controversy as SMOs, lead by leaders such as Douglas, Marshall, Browder, Jones, and Webb, began to actively build a preservation and ultimately a restoration vision for the Everglades. This vision was premised on two frames – a "social progress" frame and a

---

[579] William A. Gamson, *Bystanders, Public Opinion, and the Media, in* The Blackwell Companion to Social Movements at 242 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004).
[580] *Id.* at 243.
[581] *Id.*
[582] *Id.*
[583] *Id.*
[584] Marjory Stoneman Douglas and John Rothchild, *Voice of the River,* 231 (1987).

"polluter pay" frame. The ability to develop and leverage these frames was facilitated by litigation.

The Everglades "social progress" frame[585] linked ecosystem preservation with Florida's water supply – preserving Florida's water supply for human well-being meant restoring the Everglades ecosystem. Interior Secretary Babbitt, in his reflection of natural landscapes observed that the concept of restoration – "the notion that some development had gone too far and should now be reversed" was in many respects birthed in the Everglades.[586] This frame was grounded in Douglas' *River of Grass,* credited by many for first bringing national attention to the plight of the Everglades.[587] With Marshall's restoration blueprint the frame took a further shift from preservation to restoration.[588] This restoration "social progress" frame was refined and developed by SMO activists such as Browder, Jones, and Webb.[589] Douglas and Rothchild summarized the Everglades' "social progress" frame in *Voice of the River*: "we need to be constantly on alert against any threat to the Kissimmee-Okeechobee-Everglades basin. It's the central support for our south Florida existence – the drinking water, all our water, all our rainfall. If the flow stops, it would mean the destruction of south Florida."[590]

---

[585] A "social progress" frame defines science related policy issues as "a means of improving quality of life or solving problems" or as providing an "alternative interpretation as a way to be in harmony with nature instead of master it." Nesbit, *supra* note 233, at 18.
[586] Bruce Babbitt, *Cities in the Wilderness: A New Vision of Land Use in America,* at 17-18 (2005)
[587] *See generally,* Douglas, *supra* note 1. Douglas began writing about the impact of urban and agricultural development in the Everglades as a reporter for the Miami Herald. *Everglade Biographies: Marjory Stoneman Douglas 1890-1998,* Everglades Digital Library, Florida International University *available at* http://www2.fiu.edu/~glades/reclaim/bios/douglas.htm , last visited, July 1, 2011.
[588] *See generally,* Marshall, *supra* note 325 and Grunwald, *supra* note 22, as 272-74.
[589] Grunwald, *supra* note 22, at 278-79. Interview I and Interview O.
[590] Douglas & Rothchild, *supra* note 584, at 231.

In 1969, in the midst of the jetport controversy, *Life* Magazine legitimized this new frame characterizing South Florida developers as "sweaty" with excitement over "explosive growth" and huge profits – why "save a sick park when it stands in the way of progress?"[591] *Life* reported more than a dying ecosystem hung in the balance; destruction of the Everglades threatened Florida's drinking water system as well as "one of the richest breeding ground's for marine life on the continent."[592] The article's conclusion was a ringing endorsement of a new environmental "social progress" frame: "[I]s this" *Life* posited, "the place where finally, we stop brutalizing our environment in the name of that sort of progress that makes things quite different – but never any better and usually worse than we would believe?"[593]

Life did not abandon the frame once the jetport controversy had been resolved. In 1971, while fires raged in the Everglades *Life* ran an article headlined: "A Fiery Ordeal of the Everglades: A parched Florida wilderness pays the penalty of years of draining" claiming Everglades drainage for development and flood control caused water levels in groundwater aquifers to drop permitting salt intrusion and contamination of Florida's freshwater supply.[594] By 1981 *Sports Illustrated* had picked up the new environmental social progress frame reporting that "too many people [were] demanding too much of the state's fragile land and water systems"[595] ". . . as bad as the mess is in Florida, it would be a lot worse where it not for the local environmentalists who have been battling this

---

[591] John D. McDonald, *Last Chance to Save the Everglades,* Life Sept. 5, 1969 at 58, 61.
[592] *Id.* at 63.
[593] *Id.* at 64.
[594] *Fiery Ordeal of the Everglades: A parched Florida wilderness pays the penalty for years of drainage,* Life Magazine, April 30, 1971 at 42.
[595] Robert H. Boyle & Rose Mary Mechem, *There's Trouble in Paradise,* Sports Illustrated, Feb. 9, 1981 at 82.

degradation since the 1960s."[596] The *Sport's Illustrated* article endorsement of the environmental social progress frame legitimized the work of local SMOs and increased the credibility of the Everglades change frame among bystanders.

By 1982 when Marshall released his restoration blueprint[597] SMOs had garnered significant legitimacy and support for a new Everglades' frame, one that then Governor Graham could no longer ignore and in 1983 he announced a "Save Our Everglades" program focused on Kissimmee River restoration.[598] By 1986, the Everglades Coalition and its member SMOs had begun to explore how to restore clean water supplies to the Everglades' ecosystem in the face of population booms.[599] Webb, Browder, Jones and others recognized that to garner bystander support for Everglades' restoration in south Florida SMOs needed a solution and a frame that provided water for both human and natural systems, one that assured that water flowing into the natural system was clean.[600] Webb knew "'it was going to be tough to get billions of dollars for sawgrass. But if you could help the residential areas with water supply you're in business.'"[601] One party interviewed for this project who was close to both Browder and Webb during this time period observed the development of this framing process: "Webb worked with Joe Browder in conceptualizing the whole thing . . . the notion that the health of the natural system of the Everglades is the key to the future health of the built environment here because it's the sponge that stores the water supply." Thus while the phosphorus

---

[596] *Id.* at 90.
[597] Arthur R. Marshall, *For the Future of Florida Repair the Everglades,* 2 (3rd ed. 1982) *available at* http://ufdc.ufl.edu/FI06011102/00001/2j
[598] Godfry, supra note 101 and Grunwald, supra note 22, at 275.
[599] Grunwald, *supra* note 22, at 278. The C&SF Project was "originally designed for 2 million people [but]. . . supported 6 million." *Id.*
[600] Grunwald, *supra* note 22, at 278-79.
[601] *Id.* at 278 (quoting interview with George Frampton).

litigation was pending the members of the Everglades Coalition began working on a restoration vision for the Everglades that would further shift the debate from a purely "economic development and competitiveness" frame to a "social progress" frame. This new frame focused on "changing the water management system [in South Florida] to maximize natural values in all parts of the Everglades system . . . [and to] improve the system's ability to serve the water supply and flood protection needs of south Florida's growing economy."[602] Virtually every national and state environmental SMO signed on to the restoration vision and revised frame[603] but to truly advance this frame they needed clean water and to get clean water they needed success in *Unite States v. SFWMD.* In May 1992 with settlement of the phosphorus litigation in site, the Everglades Coalition seized the opportunity to advance its "environmental social progress" frame and announced it was now time "to overhaul the entire Everglades' water management system and develop an overall Everglades survival plan, rather than concentrate on piecemeal restoration efforts."[604] The Everglades Coalition embraced a collaborative approach pledging to work with "public officials and economic leaders of urban south Florida, [to] encourage cooperation with State of Florida Authorities and the U.S. Interior Department, Army Corps of Engineers and other federal agencies" to restore the

---

[602] The Everglades Coalition, *Everglades in the 21st Century: The Water Management Future,* at 5 (2nd printing, 1993) hereinafter *Everglades in the 21st Century* available at http://www.evergladescoalition.org/documents/1993_21stcentury_VisionStatement.pdf last visited July 29, 2011. The Everglades Coalition first issued *Everglades in the 21st Century* in June 1992 at its 1992 annual conference, thirteen months after Governor Chiles announced his intent to settle the phosphorus litigation. Grunwald, *supra* note 22, at 278-79, *see also* Everglades Coalition Website, http://www.evergladescoalition.org/past_conferences.htm

[603] Everglades Coalition, *supra* note 602, at ii. The plan was announced at the 1992 Everglades Coalition Conference with both Chiles and Browner in attendance. Everglades Coalition Website, http://www.evergladescoalition.org/past_conferences.htm last visited July 11, 2011.

[604] *Id.*

Everglades' ecosystem.[605] The introduction of this new frame together with the push for the type of collaborative and deliberative problem solving envisioned by Sable and Simon, all be it outside of the courtroom, opened the door for development of a comprehensive Everglades restoration plan.

A second frame used by SMOs to promote Everglade's restoration was the "polluter pay" principle or frame.[606] While the "social progress" frame was important in creating bystander support for the wider Everglades' restoration, the "polluter pay" frame was instrumental in undermining the sugar industry's political power. Well before *United States v. SFWMD* SMOs began raising concern about declining water quality in the Everglades. Noted one hunting SMO member interviewed for this project by the late 1970s hunting and fishing SMOs were taking the media and anyone who would listen on airboat tours of the Everglades to talk about cattail invasions and water quality.[607] Sport's Illustrated pick up on the water quality issue observing that "Floridians have, in essence, run a hose from their toilet to the kitchen faucet" and agriculture was cited as a primary source of the problem.[608] But it was the filing of *United States v. SFWMD* that truly gave credibility to the "polluter pay" frame.[609] On October 1, 1989, just one year after the filing of *United States v. SFWMD*, the *New York Times* editorialized – the practices of the sugar industry in concert with the federal and state regulator's refusal to take enforcement

---

[605] Everglades Coalition, *supra* note 602, at 5.
[606] The polluter pay principle assumes that those how cause pollution should be responsible for remediating pollution. Neil Gunningham and Darren Sinclair, *Policy Instrument Choice and Diffuse Source Pollution,* 17 J. Envt'l L. 51, 71-72 (2005). This principle is grounded, in part, in equity. *Id.*
[607] Interview B.
[608] Robert H. Boyle & Rose Mary Mechem, *There's Trouble in Paradise,* Sports Illustrated, Feb. 9, 1981 at 82.
[609] A member of a grass roots SMO interviewed for this project observed "While we were in Federal Court in the 1990's . . . . we had a frame for engaging the public . . . 'the state of Florida is complicit with the sugar industry for destroying the Everglades, they have to fix it or its got to be fixed now."' Interview I.

actions against the sugar industry had "soured the Everglades."[610] Locally, the *St. Petersburg Times* carried articles criticizing the sugar industry opining: "Cane growing is a big business but it's no sweet deal for America."[611]

The "polluter pay" frame was further legitimized by Chiles' confession of liability and the announcement of the 1991 Settlement Agreement requiring the sugar industry and other agricultural interests to undertake and pay for phosphorus pollution remediation in the Everglades.[612] The announcement of the 1991 Settlement Agreement set off a two year framing battle between SMOs, which continued to rely on a "polluter pay" frame, and the sugar industry, which relied on an "economic" frame characterizing the 1991 Settlement Agreement as a job and business killer.[613] In essence the Everglades water quality restoration battleground was "a testing ground for values."[614] Observed a *St. Petersburg Times* reporter: "Farmers, these days, know they are engaged in the battle of their lives, which is saying something. In the past they've had some pretty good tussles

---

[610] Editorial Desk, *Sugar Sours the Everglades,* NY Times, April 1, 1989, at Sect. 1-26.
[611] Jon East, *Big Sugar: Cane growing is a big business, but it's no sweet deal for America,* St. Petersburg Times, Oct. 1, 1989 at 1D (discussing the impact of sugar on the American diet and the Everglades, and political power of the sugar industry). *See also* Editorial Desk, *Big, Bad Sugar,* St. Petersburg Times, Oct. 1, 1989 at 2D (discussing the impact of the sugar industry on the Everglades Ecosystem and questioning whether Florida's representatives should "vote to subsidize an industry that is poisoning the Everglades?").
[612] *See,* discussion Part IV.2, *see also,* Editorial Desk, *Score One for the Glades,* St. Petersburg Times, July 14, 1991 at 2D.
[613] *See e.g.* Kirk Brown, *Study: Glades Cleanup to Cost 874 Jobs; Farmers Predict a Loss of 15,000,* Palm Beach Post, July 8, 1992, at 1B and Editorial Desk, *For Farmers, A Choice,* Palm Beach Post, July 18, 1991, at 19A. The Sugar Cane Growers Cooperative of Florida and the Florida Sugar Cane League alleged that the 1991 Settlement Agreement was "a threat to the heart of the industry," and would "destroy agriculture in the EAA." *Id.* In the spring of 1992 a group of "women opposed to Everglades cleanup plan" expressed concerns that the polluter pay proposal incorporated in the 1991 Settlement Agreement would put "the[m] or their husbands" out of work. Mitch McKenney, *Group Against Glades Cleanup Grows to 300,* Palm Beach Post, April 3, 1992 at 1B, *but see,* Michael Crook, *Study Rebuts Arguments By Sugar Industry,* Miami Herald, July 8 1992 at 6B.
[614] Jeff Klinkenberg, *Showdown in the Everglades,* St. Petersburg Times Sept. 27, 1992 at 1F (quoting Senator Bob Graham (R-Fla.)).

over their treatment . . . of the environment. But they've usually emerged unscathed. . . This time everything seems different to them."[615]

The true challenge was whether a "polluter pay" frame could sustain the necessary political will to meet the legal challenges and political resistance of the sugar industry over the years it would take to remediate Everglades' phosphorus pollution. [616] "It's hard to imagine an industry so financially successful as an underdog," opined one reporter who observed that in the 1980's the sugar industry spent $2.8 million dollars more than General Motors funding congressional races.[617] When the Clinton administration announced its intent to adopt a renegotiated phosphorus remediation plan incorporated in the Statement of Principles SMOs concluded, the Clinton and Chiles administrations lacked the necessary political will to hold the sugar industry accountable.

Excluded from settlement negotiations between the sugar industry, the federal government, and Florida, a number of SMOs saw little recourse than to more aggressively pursue their "polluter pay" frame. [618] SMOs publically characterized the renegotiated agreement incorporated in the Statement of Principles and the EFA alternatively as '"a death sentence for the Everglades'"[619] and a "giveaway to the sugar industry that will delay for decades meaningful cleanup of the ecologically imperiled Everglades,"[620] shortly thereafter a number of SMOs formed joined forces the Save Our Everglades alliance and launched a statewide sugar tax referendum to finance

---

[615] *Id*.
[616] K. Michael Fraser, *Huge Environment Project Aims to Save Florida's Everglades,* Christian Science Monitor, July 30, 1991 at 1 (quoting Kathy Anclade, SFWMD).
[617] Jeff Klinkenberg, *Showdown in the Everglades,* Sept. 27, 1992 at 1F.
[618] Godfry, *supra* note 101, at 316.
[619] William Booth, *Everglades Forever?,* Wash. Post, May 2, 1994 at Sect. A1. (quoting Tom Weiss, director, Clean Water Action).
[620] William Booth, *Everglades Forever?,* Wash. Post, May 2, 1994 at Sect. A1.

Everglades' remediation.[621] The "penny-a-pound" campaign, which ran from September 1993 through November 1996, used a "polluter pay" frame in an attempt to shift the full burden of phosphorus remediation from tax revenues to the sugar industry. What ensued was one of the most expensive[622] and "dirty"[623] framing wars in the history of attempt to restore the Everglades.

While a detailed analysis of the three year "penny-a-pound" campaign is beyond the scope of this article evidence suggests that the SMO framing effort's were so successful that one local newspaper observed "the Everglades are up there with motherhood . . . calling someone anti-Everglades 'is kind of like calling someone a racist or a sexist.'"[624] The *Tampa Tribune* characterized the three, penny-a-pound amendments as "Three wise Everglades Amendments" querying: "Should the major polluter of the Everglades pay for the bulk of its cleanup costs? Or should taxpayers at large pay instead?"[625] Just weeks before the election the Everglades amendments appeared to have

---

[621] Carolyn Fretz and Mary Ellen Klas, *Tax proposal Could Stall Everglades Talks,* Palm Beach Post, Sept. 30, 1993 at 1A

[622] Paul Tudor Jones and George Barley alone are believed to have spent $4 million financing the "penny-a-pound" campaign on behalf of environmental SMOs. Lisa Shuchman, *Millionaire Bets on Everglades' Future,* Palm Beach Post, Sept. 30, 1996 at 1A. The sugar industry spent another $25million fighting the proposal. Grunwald, *supra* note 22, at 308 and Lisa Shuchman, *Sugar-Tax Campaign Leaves Bad Taste in Voters' Mouths,* Palm Beach Post, Nov. 3, 1996 at 1A. The *St. Petersburg Times* characterized the battle as "the most expensive political advertising campaign in Florida history. David Olinger, *Everglades ads have it all – except the Everglades,* St. Petersburg Times, Oct. 21, 1996 at 1B.

[623] *Id.* The campaign was characterized by misinformation and distortions – while Save Our Everglades suggested in ads that phosphorus pollution was killing deer the sugar industry claimed the tax would give government the power to indiscriminately raise property taxes and grocery bills. The sugar industry's property tax brochure was so misleading that state attorney, Lawson Lamar, sent a letter to the sugar industry "warning that the brochure's misrepresentations may violate Florida law." Lisa Shuchman, *Sugar-Tax Campaign Leaves Bad Taste in Voters' Mouths,* Palm Beach Post, Nov. 3, 1996 at 1A.

[624]David Olinger, *Everglades ads have it all – except the Everglades,* St. Petersburg Times, Oct. 21, 1996, at 1B (quoting U.S. Sugar Vice President Buker).

[625] Editorial Desk, *Three wise Everglades amendments,* Tampa Tribune, Oct. 18, 1996, at 16. Amendments 4, 5, and 6 directly addressed phosphorus remediation in the Everglades. Amendment 4 imposed a penny-per-pound tax on each pound of raw sugar grown in the EAA. Amendment 5 imposed a polluter pay requirement requiring those agricultural interests that caused phosphorus pollution in the Everglades to pay

such wide bystander support that U.S. Sugar Vice President, Bob Buker observed: "If you put this on an up-and-down vote on the environment, we lose."[626] U.S. Sugar, one of the top two sugar companies in Florida, was so concerned that it delayed its harvest instead paying employees full wages and travel expenses to conduct a statewide door-knocking campaign to explain to citizens that the proposed tax could cost 40,000 jobs.[627] The "economic" frame advanced by the sugar industry in the final days before the election muddied the water enough that in a matter of days support for the tax shifted from a slight majority to a dead heat – people were no longer sure what the tax would do or whether voting "no" or "yes" meant that sugar would pay.[628] Thus while the penny-a-pound measure was defeated by fifty-four percent but a second "polluter pay" amendment requiring Everglades' polluters including the sugar industry to pay the cost of pollution remediation passed by a two to one margin.[629] Noting that the vast amount of disinformation surrounding the penny-a-pound tax amendment Lt. Governor Buddy MacKay concluded, the majority of voters were confused by the tax amendment but passage of the polluter pay amendment by such a wide margin indicated '"[o]n an issue . . . [citizens] could understand, they damn well want sugar to pay up. "'[630]

---

for the cost of remediation. Amendment 6 created an Everglades Trust fund to assure that funds raised by the sugar tax would be used for Everglades restoration. *Id.*

[626] David Olinger, *Everglades ads have it all – except the Everglades,* St. Petersburg Times, Oct. 21, 1996, at 1B.

[627] Lisa Shuchman, *U.S. Sugar Delays Harvest To Fight Tax,* Palm Beach Post, October 25, 1996, at 1D and Jan Hollingsworth, *Sugar fee foes fighting to bitter end,* Tampa Tribune, November 3, 1996, at Metro 1

[628] Lisa Shuchman, *Sugar-Tax Campaign Leaves Bad Taste in Voters' Mouths,* Palm Beach Post, Nov. 3, 1996 at 1A.

[629] David Olinger, *Sugar growers beat penny-a-pound,* St. Petersburg Times, November 6, 1996 at 1A.

[630] David Olinger, *Sugar growers beat penny-a-pound,* St. Petersburg Times, November 6, 1996 at 1A (quoting Florida Lt. Governor Buddy MacKay).

Despite the failure of the penny-a-pound amendment at the ballot box it is clear that there was significant bystander support for the "polluter pay" frame as evidenced by the forty-six percent of the populace that supported the penny-a-pound amendment and the sixty percent that approved the "polluter pay" amendment. This support grew out of efforts of the "polluter pay" frame developed by SMOs and the legitimacy given to that frame by *U.S. v. SFWMD,* Chiles confession of liability, and media support. Conversely, bystander support of a "polluter pay" frame was important to the election of Governor Chiles and his decision to enter into settlement negotiations to resolve *U.S v. SFWMD*.

Although the 1991 Settlement Agreement was ultimately renegotiated with terms more favorable to the sugar industry, the very fact that the sugar industry felt compelled to negotiate a settlement agreement at all was evidence of the sugar industry's diminished political power. Ten years before few imagined that anyone could take on the sugar industry and win. *Newsweek* observed:

> as south Florida grows. The sugar industry's political clout is waning. The proof came in July, when state officials outraged the industry by admitting federal civil charges that Florida had failed to protect the Everglades against phosphate runoff from cane fields . . . In the end the sugar industry will have to bend to keep from forfeiting its support in Congress.[631]

By 1993 the Fanjul's, owners of one of the largest sugar companies in Florida, were ready to make a deal, all-be-it one that would be more favorable to sugar interests than the 1991 Settlement Agreement.[632] And by October 1996, at the height of the "penny-a-pound" campaign, even U.S. Sugar had to concede that politics around the Everglades had changed "there is no turning the clock back" concluded U.S. Sugar, Senior Vice

[631] Mark Levinson & Peter Kate, *Not So Sweet in Sugar Land,* Newsweek, Oct. 14, 1991 at 49.
[632] Kirk Brown, *Fanjuls Ready to Deal on Everglades Cleanup,* Palm Beach Post, Jan. 15, 1993 at 1A.

President, Malcolm "Bubba" Wade.[633] One must then conclude, that one of the most significant outcomes of the *U.S. v. SFWMD* and the SMO's "polluter pay" framing efforts was a diminishment of the sugar industry's political power.

Framing Everglades' restoration was a multi-decade political mobilization effort one, which established political actors, failed to fully appreciate according to many grass roots organizers. Despite the literature on the importance of framing and litigation as political resources in change strategies there was little recognition of the scope of their importance in accomplishing an Everglades' change agenda outside of electoral politics. Everglades' restoration was viewed simply as an important election issue as noted by Mary Doyle, one of Babbitt's Everglades point persons:

> It turned out that Florida's 25 electoral votes were up for grabs in the presidential election of 2000 and not a lock for the Republicans as some had anticipated. This significantly advantaged the cause of Everglades' restoration in Congress. Polls showed Floridians wanted the Everglades saved, by margins of more than two-to-one, and they were willing to pay for it. Neither political party could afford to antagonize the voters of Florida by opposing the Everglades cause.[634]

Outside of electoral politics there was a sentiment that bystander support was less important as was maintaining that support between election cycles. As one Clinton official observed:

> I don't know how much general education you really need. . . People are interested in other things . . . But as long as you can keep the political will going to keep the federal dollars flowing and keep the process moving. You have to have movement, that's as much public awareness as you need – that politicians are responding, particularly that they [politicians] don't want to see a

[633] Robert Dodge, *An experiment in the Everglades; Alliance between competing interests could redefine rules of political debates about environment,* The Dallas Morning News, Oct. 6, 1996 at 1J.
[634] Mary Doyle, *Implementing Everglades Restoration,* 17 J. Land Use & Envt'l. L. 59, 61 (2001)

> negative portrayal of themselves as being unfriendly to the Everglades. That's as much as you need I think.[635]

But grass roots SMOs involved in Everglades' restoration take a longer-term view of the challenge inherent in building, maintaining, and mobilizint bystander support.[636] These grass roots SMOs use their influence over public perception to spotlight issues and actors to:

> strengthen the resolve both of, in some cases, law enforcement agencies and in other cases government organizations and government agencies . . . you put people in places where they make . . . decision makers uncomfortable . . . in doing so you tend to generate more attention by the mainstream media . . . Having grass roots really active starts to generate some momentum both within the consciousness of reporters and in editorial boards. [637]

This synergistic process is time consuming, expensive, and to be effective must be maintained over a series of years[638] a fact that appears to be unappreciated by public officials and national environmental SMOs:[639]

> The role of grass roots in influencing public perception . . . has . . . been relegated to the back burner [and] every time you get to an election cycle there is suddenly this renewed interest in what can grass roots groups do for progressive candidates . . . . So grass roots are always under the cloud of having to reinvent the wheel every time there's an election cycle. So what really has been lost is the capacity building and the recognition in effect by donors to environmental groups or to progressive causes that building effective grass roots infrastructure is a long term investment that does not always yield measurable results but which is indispensable at the time you need grass roots to do certain kinds of work that actually do influence public perception.[640]

---

[635] Interview O.
[636] Interview I.
[637] Interview I.
[638] Interview B, Interview H, and Interview I.
[639] Interview B and Interview I.
[640] Interview I.

There are, however, signs that this attitude towards maintaining ongoing bystander support may be changing as both federal and SFWMD officials attempt to implement adaptive management in the context of Everglades' restoration. Because adaptive ecosystem restoration requires acting in the face of uncertainty and imperfect knowledge about the natural system and its interaction with human systems[641] adaptive management requires adaptive governance, governance which permits experimentation with policies and practices in the natural system[642] – a decision making system where "science is contextual, knowledge is incomplete, multiple ways of knowing are present, policy is implemented to deal with modest steps and unintended consequences and decision making is both top down (although fragment) and bottom up."[643] In short, adaptive governance requires ongoing public trust and support[644] or bystander support.

Both Federal and SFWMD officials recognize restoring the Everglades using adaptive management will require wide scale public support [645] but this support is presently lacking. Noted one SFWMD official "we have done the poorest job at involving … public interest" in the restoration process[646] as compared to other national restoration projects:

> Clearly there are better or maybe stronger or more frequent messages we could convey [about Everglades restoration] . . . . [I've spent] several days at a time out on Smith Island in the

[641] Medema, McIntosh & Paul J. Jeffrey, *supra* note 194, at 3.

[643] Lance Gunderson & Stephan S. Light, *Adaptive Management and Adaptive Governance in the Everglades Ecosystem,* 39 Policy Sciences 323, 325 (Dec. 2006)(Gunderson & Light (2006).
[644] Per Olsson, Lance H. Gunderson, Steven R. Carpenter, Paul Reyes, Louis Lebel, Carl Folke and C.S. Holling, *Shooting the Rapids: Navigating Transitions to Adaptive Governance of Social-Ecological Systems,* 11 Ecology & Society (2006) *available at* http://www.ecologyandsociety.org/vol11/iss1/art18/ .
[645] Interview L and Interview Q.
[646] Interview Q.

> middle of Chesapeake Bay in a little commercial fishing village and I'm very envious of the people up there because its seems like everybody is aware of, is concerned about the Chesapeake Bay restoration. Not just the commercial fishermen but the public in general, there's a thing called the Chesapeake Foundation maybe that's got tens of thousands of members, very proactive, its all private. [647]

Historically, it has been grass roots SMO that have undertaken the Everglades framing work. The outstanding question is whether in sidelining those grass roots environmental SMOs through the settlement of *U.S. v. SFWMD* and the demolition of collaborative forums post 2000, there remains the willingness or capacity to build the bystander support needed to move forward with long term Everglades' restoration.

D. "Getting the Water Right" – a Negotiated Remedy that Evolved from the Destabilizing Impact of *United States v. SFWMD*

Restoring the Everglades meant "getting the water right"[648] – delivering the appropriate amount of water to the natural system at the appropriate time and in the appropriate places.[649] The ability to address this important restoration issue was made possible by the convergence of three factors: the work and commitment of SMOs to Everglades' restoration, the commitment of the Chiles and Clinton administration to a broad ecosystem restoration vision, and *United States v. SFWMD*.

---

[647] Interview Q.
[648] U.S. Army Corps of Eng'rs, Jacksonville Dist., & So. Fla. Water Mgmt. Dist., *Central and South Florida Comprehensive Review Study Final Integrated Feasibility Report and Programmatic Environmental Impact Statement: Introduction* 1-3 (1999) *available at* http://www.evergladesplan.or/docs/comp_plan_apr99/sect1.pdf [hereinafter *Restudy: Introduction*].
[649] Doyle & Jodrey, *supra* note 284, at 274.

Local SMOs had been advocating for Everglades' preservation and restoration since the1970s. [650] When, in 1986, Webb came to southern Florida to work on Everglades' issues for the Wilderness Society, he observed, although Florida had five times the water as his home state of Arizona, there was not enough water in southern Florida to meet the needs of both natural and human systems.[651] The C&SF Project, in an effort to control "flooding" in agricultural and developed areas located in the historic Everglades' footprint now dumped billions of gallons of fresh water out to tide.[652] Webb hypothesized if this water was captured and stored there might be sufficient water to meet the needs of both human and natural systems.[653]

With the election of Chiles in 1990 and the announcement of the 1991 Settlement Agreement local SMOs thought the time might be right to push a larger Everglades' restoration vision.[654] The Everglades Coalition enlisted Webb to develop a restoration vision and action agenda, *Everglades in the 21st Century,* premised on the belief that changing south Florida's water management systems to "maximize natural values in all parts of the Everglades system will . . . improve the system's ability to serve water supply and flood project needs of south Florida's growing economy. [655] The Everglades Coalition committed to work together with divergent stakeholders to develop a comprehensive system wide restoration plan.[656]

---

[650] The first comprehensive plan for Everglades' restoration was that developed by Art Marshall in 1982. Arthur R. Marshall, *For the Future of Florida Repair the Everglades,* 2 (3rd ed. 1982) *available at* http://ufdc.ufl.edu/FI06011102/00001/2j
[651] Grunwald, *supra* note 22, at 278.
[652] *Id.* and Interview O and Interview P.
[653] Grunwald, *supra* note 22, at 278-79.
[654] Godfry, *supra* note 103, at 284 (citing interview with George M. Barley, Jr.)
[655] The Everglades Coalition, *Everglades in the 21st Century: The Water Management Future* at 11 (1993).
[656] *Id.* at 4-5 and 10-29.

Webb shopped the Everglades Coalition vision around to the federal agencies and found an unlikely ally in Colonel Terrance "Rock" Salt, Jacksonville District Engineer. Salt was charged with overseeing construction of Modified Waters Project (Mod Waters), a project intended to restore natural sheet flow into Sharks River and Taylor Sloughs.[657] Salt expressed interest in the restoration concept[658] an interest that became more salient when in 1992 Congress directed the Corps to undertake a comprehensive re-evaluation of the C&SF Project (hereinafter "the Restudy") to improve environmental quality, aquifer protection, and urban water supply.[659]

A second factor influencing Everglades' restoration was the 1992 presidential election. The Clinton Administration made ecosystem restoration and a shift away from top-down management to collaborative environmental management a core component of its environmental agenda.[660] Shortly after his appointment, Interior Secretary, Babbitt sensed that divergent interests were coming together around the Everglades and he could '"see a path forward"' for Everglades restoration – that path lead through the Corps.[661] Babbitt met with Corps leadership and informed them that the Clinton administration was

---

[657] *See generally,* Everglades National Park Protection and Expansion Act of (1989), Pub. L. 101-229, § 104, 103 Stat. 1946, 1949 (Dec. 13, 1989) codified at 16 U.S.C. § 410r-8, *see also,* Godfry *supra* note 101, at 381 (containing a more detailed description of the Mod Waters Project and the controversy surrounding its construction).
[658] Grunwald, *supra* note 22, at 279.
[659] Water Resources Development Act of 1992 § 309(1), Pub. L. No. 102-580.
[660] Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration,* 2002 Wis. L. Rev. 555, 562-62 (2002) (Karkkainen (2002))(outlining collaborative ecosystem restoration efforts undertaken by the Clinton Administration).
[661] Grunwald, *supra* note 22, at 295-96 (quoting interview with Secretary Babbitt). Babbitt, himself observed that although he initially endorsed the Everglades Coalition restoration vision, he was skeptical the "ambitious proposal" could become a reality. Babbitt, *supra* note 586, at 19-20. However, after further investigation he concluded that this vision extended beyond environmental SMOs to bystanders including leading business leaders and the general population. *Id.* at 20-26.

committed to the Restudy as well as ecosystem restoration.[662] Shortly thereafter Babbitt formed the South Florida Ecosystem Restoration Task Force (SFERTF) a multi agency task force responsible for coordinating Everglades' restoration.[663] The SFERTF included Corps and Interior Everglades leadership.[664]

A third factor influencing water quantity restoration was the settlement of *United States v. SFWMD* and the creation of the Governor's Commission for Sustainable South Florida. According to many involved in Everglades' restoration *United States v. SFWMD* "was a necessary instrument of change"[665] making possible a negotiated restoration vision. Colonel Salt and Interior official Mary Doyle, both major players in the development of the Restudy, the Comprehensive Everglades Restoration Plan (CERP), and its adoption credit *United States v. SFWMD* for clearing the way "for the parties and other stakeholders to consider the wider issues of Everglades restoration,"[666] which required hydrologic restoration. Chiles took up this challenge when, shortly after the passage of the EFA he announced the formation of the Governor's Commission for Sustainable South Florida (Governor's Commission). [667]

---

[662] Grunwald, *supra* note 22, at 296 and Babbitt, *supra* note 586, at 26-30. Grunwald reports that at the time of Babbitt's meeting with the Corps the Clinton administration had yet to fully commit to the Restudy. Grunwald, *supra* note 22, at 296.
[663] Salt, Langton & Doyle, *supra* note 125 at 13. The SFERT was formally embraced by Congress in 1996 and expanded to include state, local, and tribal representatives. Water Resources Development Act of 1996, Pub. L. 104-303 §528(f), 110 Stat. 3658, 3770-71 (Oct. 12, 1996).
[664] Salt, Langton & Doyle, *supra* note 125, at 13.
[665] Godfry, *supra* note 101, at 289. (citing Nate Reed).
[666] Salt, Langton & Doyle, *supra* note 125, at 13.
[667] Grunwald, *supra* note 22, at 296. *Restudy* at 6-1.

Unlike the "team" that negotiated the *United States v. SFWMD* settlement and Babbitt's SFERTF, the Governor's Commission was a true multi-stakeholder forum[668] with forty-two stakeholders representing a range of interests,[669] including SMOs.[670] The Governor's Commission's charge was to develop recommendations "for achieving a healthy Everglades ecosystem that can coexist and be mutually supportive of a sustainable South Florida economy and quality Community."[671] The members of the Governor's Commission were challenged by Chiles to create a new environmental vision for the Everglades, to work within a new paradigm of environmental management – ecosystem restoration. Babbitt characterized the challenge:

> For a hundred years conservation had been about preservation – setting aside and protecting land before it was lost to development. . . . To restore the Everglades we would have to challenge the assumption that permanent conquest and occupancy always resulted in good outcomes, no matter the land's location or use. . . . It was time to weigh the benefits of marginal developments against the damage they might cause to surrounding ecosystems and to think seriously about changing the proportions between human space and wild space.[672]

The Governor's Commission commenced work in April 1994 at the height of the "penny-a-pound" campaign, which, in conjunction with the manner in which *United*

---

[668] Grunwald, *supra* note 22, at 296, 312. The membership of the Governor's Commission included over forty voting members representing federal, state and local government, the sugar industry, the business community, hunting and fishing interests and environmental SMOs. *Id.,* Governor's Commission Sustainable South Florida, *A Conceptual Plan for the C&SF Project Restudy,* (Aug. 28, 1996)(including a list of the Governor's Commission Members) and Interview P.

[669] Interview P.

[670] The Governor's Commission included both local grass roots SMOs and national SMOs. A schism between national SMOs and local grass roots SMOs developed over the course of the Governor's Commission work. Interviews F, P, O, I, G, C, and V. The inclusion of national environmental SMOs in the Governor's Commission is blamed by some for causing a schism between hunting and fishing SMOs, and environmental SMOs. Interviews G, N. J, O. and B. While a full discussion of these schisms is beyond the scope of this paper, there is evidence that these schisms have had a detrimental impact on the ongoing role of SMOs in Everglades' restoration. Interview P, N, I, and B.

[671] Governor's Commission for Sustainable South Florida, *Initial Report,* 8 (Oct. 1, 1985).

[672] Babbitt, *supra* note 586, at 18-19.

States v. SFWMD was settled, elevated distrust between stakeholders. Both SMOs and the sugar industry were unhappy with how *United States v. SFWMD* was settled, recalls one stakeholder,[673] this distrust was amplified by the uncertainty and complexity of the Governor Commission's task. When Governor's Commission Chair, Pettigrew[674] initially proposed breaking the Governor's Commission into subcommittees there was vocal opposition among the stakeholders. "The distrust was so great," recalled one stakeholder that everyone wanted to be on every subcommittee because they didn't trust anybody to do the right thing.[675]

Pettigrew's strategy, after adopting rules of "civility", was to work with the stakeholders to develop a collective understanding of the impact of the C&SF Project on the natural system and establish a conceptual framework for ecosystem restoration.[676] Through collective data collection and synthesis and collective decision making on non-controversial matters Pettigrew hoped to build trust among the stakeholders and work toward an unknown restoration vision.[677] In effect, Pettigrew was taking on the role destabilization theorists envision for a special master in the context of the experimental remedy. In this role Pettigrew used a social learning strategy designed to increase the Governor Commission's instrumental learning through information and data gathering and sharing, resource acquisition, agenda setting, and rule setting, in order to set remedial goals with an eye toward reaching consensus about an unknown regime to implement the

[673] Interview P.
[674] Dick Pettigrew was the former speaker of the Florida House of Representatives and Chiles' choice to chair the Governor's Commission. Grunwald, *supra* note 22, at 296.
[675] Interview P.
[676] Interview P.
[677] Interview P.

remedial goals.[678] Through the process of instrumental learning Pettigrew homed to develop relationships and trust between and among the stakeholders – increase communicative learning. Through this process Pettigrew hoped to build a transformational vision for the Everglades.

Despite Pettigrew's efforts the Governor's Commission remained fractured until November 1994, when a new stakeholder accused a representative of the sugar industry of representing "corporate felons."[679] Pettigrew "upbraided him" for violating the Governor's Commission's rules of civility and Governor's Commission members joined in the admonition, "they all felt that they had been assaulted" it "was a unifying event"[680] – a tipping point. Over the next several months the stakeholders began to collectively develop a shared understanding of the impacts of the C&SF Project on both Florida's human and natural systems. They agreed: "if . . . [Florida] continue[s] down the current path of divided special interest groups fighting each other over scarce resources, South Florida's future is grim. That path leads to polluted waters; droughts and floods; . . . [and] an increasingly divided society".[681] The Governor's Commission concluded "our quality of life is inextricably linked to the health and viability of natural systems; that a healthy

[678] Sabel & Simon, *supra* note 103, at 1067.
[679] Interview P.
[680] Interview P.
[681] Governor's Commission for Sustainable South Florida, *Initial Report,* Preface (Oct. 5, 1995).

Everglades system is vital to natural plant, animal, and human populations alike."[682] A sustainable South Florida required a restored Everglades ecosystem.[683]

The conceptual plan developed by the Governor's Commission linked human and natural systems as a necessary prerequisite to a sustainable south Florida.[684] The plan advanced five broad the first of which was the restoration of the Everglades' ecosystem. The cornerstone of Everglades' was insuring adequate clean water supplies for human, natural, and economic systems.[685] To advance this goal the Governor's Commission recommended a comprehensive approach to water management that linked state water plans to community development plans.[686] But the Governor's Commission did not believe these goals could be accomplished unless they were incorporated in the Corps Restudy and for this reason the Governor's Commission recommended an ongoing role for multi-stakeholder involvement in Everglades' planning and the Corps Restudy. [687]

Although not developed as a "remedy" in a court action, the early work of the Governor's Commission incorporated many features of a deliberative, experimental remedy. The complexity of the Everglades ecosystem and uncertainty about how a restored Everglades might operate made it impossible for the stakeholders to understand

---

[682] The Governor's Commission for Sustainable south Florida, *A Conceptual Plan for the C& SF Project Restudy,* at 9 (Aug. 28, 1996) *available at http://www.sfrestore.org/documents/gov_commission_reports/Gov's_Commission_Conceptual_Plan_082896.pdf* (herinafter *Conceptual Plan*) (quoting the *Initial Report*).
[683] *Id*, at 8.
[684] *Id.* at 7 (discussing the *Initial Report*).
[685] *Id.* at 19 -20 (discussing recommendations of the *Initial Report)*.
[686] *Id*. (discussing recommendations of the *Initial Report)*.
[687] Letter from Richard A. Pettigrew, Chairman, Governor's Commission on Sustainable South Florida, to the Honorable Lawton Chiles, Governor, State of Florida (Oct. 1, 1995) *available at* http://www.sfrestore.org/crogee/ra3/ra3.html

how Everglades' restoration would impact their individual interests.[688] This uncertainty, in the context of the ongoing Everglades restoration framework had a both status quo and deliberative effect. Through the process set out by Pettigrew, the stakeholders gradually came to grips with the realization that the status quo was likely dead – Everglades' restoration could happen and would likely mean a change in both water management and development practices in south Florida[689] as they struggled to develop a new shared vision and supporting goals for South Florida and its water management, a vision that included a restored Everglades ecosystem.[690] Pettigrew himself observed in his letter transmitting the Governor's Commission's *Initial Report*:

> The unanimous adoption of the *Initial Report* does not reflect the often contentious discussions and deliberations that led to its adoption, but its content does represent the months of difficult negotiations that were needed to find means of resolution. The Commission broke new ground in consensus building as diametrically opposed stakeholders gradually realigned their positions to reach sustainable solutions. For example, the Commission agreed that past water management activities in Florida, geared predominantly toward satisfying urban and agricultural demands, have often ignored the many needs of the natural system, particularly in drought conditions. The Commission, under the consensus approach, has strongly recommended that the South Florida Water Management District establish minimum flows and level describing when withdrawals from a water source must cease.[691]

---

[688] Many of the stakeholders could not even come to agreement about what "restoration" meant. In the end definition of the term was left to the programmatic regulations. Interview N

[689] *See generally*, Sabel & Simon, supra note 103, at 1075

[690] *See generally,* Governor's Commission for Sustainable South Florida*, Initial Report*, preface (Oct. 1,1995) *available at* http://www.sfrestore.org/crogee/ra3/ra3.html .

.

[691] Letter from Richard A. Pettigrew, Chairman, Governor's Commission on Sustainable South Florida, to the Honorable Lawton Chiles, Governor, State of Florida (Oct. 1, 1995) *available at* http://www.sfrestore.org/crogee/ra3/ra3.html.

This early work of the Governor's Commission also had a significant "stakeholder effect"[692] as representatives from *all* stakeholder groups were given voice in the deliberative process to develop an Everglades' restoration plan. The role of Governor Chiles in this process was not unlike the oversight role played by the court in destabilizing litigation. Harris in her work on litigation's impact on the ability of poverty lawyers to redistribute benefits to the homeless observed that a significant advantage of change litigation over traditional decision making processes is that the litigation creates an avenue for "outsiders" to become "insiders" in government decision making processes.[693] In the case of destabilizing litigation, the court uses its legal authority to create room in the decision making process for previously excluded voices to participate in decision-making processes and in turn newly included voices use the court's support to mobilize judicial support to induce policy reform.[694]

Like other pieces of change litigation, Chiles' confession of liability and settlement of *United States v. SFWMD* created the opportunity for a deliberative negotiated Everglades restoration. Like a court using it judicial authority to make room for excluded stakeholder in the design of an experimental remedy, Chiles, by creating and supporting an ongoing, multi-stakeholder state-decision making process to revision water management and development in South Florida, used his executive authority to make

[692] Sabel and Simon identify a number of potential stakeholder effects of destabilizing litigation including the fact that the liability determination and remedy negotiation increases the influence of formerly disenfranchised stakeholders. Sabel & Simon, *supra* note 103, at 1077-78.
[693] Harris, *supra* note 268, at 933-34.
[694] *Id*.

room for SMO's[695] in the state water management decision-making. SMOs used the legitimacy of the forum created by Chiles to advance their restoration vision.

The Governor's Commission work also had veil and web impacts of the type associated with destabilizing litigation in that their work reached beyond traditional state decision-making processes to the Corps' Restudy and in so doing affected historic relationships between the Corps and the SFWMD.[696] The Corps, like other federal agencies, relied on traditional review and comment procedures, to solicit public input on Corps projects such as the Restudy of the C&SF Project (Restudy) directed by the Water Resource Development Act of 1992 (WRDA 1992).[697] However, traditional review and

[695] Rodger's notes that representation of environmental interests in stakeholder deliberative processes is often problematic because there are only a limited number of seats around the bargaining table, consequently a "few people end up speaking for many, and only a few of these presume to speak for the natural systems . . . who cannot speak for themselves." Rodgers (1995), *supra* note 518, at 571. Several stakeholders representing environmental SMOs interviewed for this project observed this representation phenomenon. One stakeholder noted that there is never an expectation that one person represent all of the various business or industry interests yet there is often an expectation that one person can represent the natural system so in many negotiations the environmental interest is out weighed by business interests five or ten to one. Interview N. Another stakeholder involved in grass roots environmental organizations observed that because of this representation phenomenon grass roots organizations, many of whom are instrumental in raising and drawing public attention to the environmental issue, instigating litigation, or mobilizing for the change that brought about the negotiation are in the end not allowed around the negotiating table – they are "not allowed in polite company" this stakeholder observed. Interview I.

[696] *See supra* Part III.A (discussing the historic relationship between the Corps and the SFWMD in making decisions about the management of the C&SF Project and water needs for the natural system).

[697] The Corps was directed to determine whether modifications to the C&SF Project were "advisable" as a result of changed conditions in south Florida and in particular whether modifying the project might enhance environmental quality, aquifer protection, and the integrity of urban water supplies. Water Resources Act of 1992, Pub. L. No. 102-588 §309(1), 106 Stat. 4797, 4844-45 (Oct. 31,1992). *The Restudy* was conducted as a Programmatic Environmental Impact Statement. Memorandum from Joe R. Miller, Colonel, Corps of Engineers, Commanding, Jacksonville District Corps of Engineers for Commander, South Atlantic Division, Corps of Engineers, U.S. Department of the Army (April 1, 1999). Public input in the Corps environmental review process are in conformance with the public input requirements of the Council on Environmental Quality (CEQ). 33 C.F.R. §§230.18-19 (2011). CEQ regulations require the preparing agency to "Make diligent efforts to involve the public in preparing and implementing" their environmental review requirements but this is done primarily through a public hearing, review and comment process. 40 C.F.R. § 1506.6 (2011). However, as an elevated status in the environmental review process to cooperating state agencies – those state agencies that have "jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal." 40 C.F.R. §§ 1501.6 and 1508.5 (2011).

comment processes are notoriously ineffective at promoting genuine public participation in decision-making processes[698] and the Federal Advisory Committee Act (FACA) prohibits federal agencies from working with Advisory Committees to develop federal policy unless authorized by statute or by an established advisory committee formed under the direction of the agency head.[699] The Governor's Commission believed successful Everglades' restoration required ongoing stakeholder participation and recommended that Congress remove FACA impediments to stakeholder participation in the decision-making processes which they believer were required for successful Everglades ecosystem restoration.[700] The Corps leadership, agreed, having observed the work of the Governor's Commission, the Corps was convinced that input from the Governor's Commission was an important component for the Restudy – input from the SFWMD alone was not sufficient.[701] This reflected a change in the traditional Corps-SFWMD decision-making mode. Stuart Appelbauem, charged with managing the Restudy project for the Corps, observed: "The Corps couldn't tell Florida what to do. The political consensus had to come first."[702]

In 1995, the Corps formally approached the Chiles administration and requested the Governor's Commission design the conceptual framework for the Restudy.[703] The

---

[698] Judith E. Innes & David E. Booher, *Reframing Public Participation: Strategies for the 21st Century,* 5 Plan. Theory & Prac. 419, 419-21 (2004)
[699] 5 U.S. C. App. 2 § 9 (2006).
[700] *Conceptual Plan,* at 67. The Governor's Commission argued that FACA limited the non-governmental stakeholder and non-governmental scientific, technical, and policy input that would be necessary for restoration, planning. *Id.* at 68
[701] Grunwald, *supra* note 22, at 307.
[702] *Id.*
[703] Salt, Langton & Doyle, *supra* note 125, at 13 and Letter from Richard A. Pettigrew, Chairman, Governor's Commission on Sustainable South Florida, to the Honorable Lawton Chiles, Governor, State of Florida (Oct. 1, 1995) *available at* http://www.sfrestore.org/crogee/ra3/ra3.html.

Conceptual Plan for the C&SF Project Restudy (Conceptual Plan) developed by the Governor's Commission became the framework used to fit the Restudy into the broader vision for a sustainable South Florida. [704] The *Conceptual Plan* became the Governor's Commission's preferred alternative for the Restudy and incorporated "concepts" that the Governor's Commission believed to be "vital to solving the water resource problems of South Florida."[705]

The work of the Governor's Commission on the *Conceptual Plan* had many characteristics of a rolling rule regime remedy development used in a destabilizing litigation. In developing the *Conceptual Plan,* the Governor's Commission first developed and agreed upon a list of twenty-three planning objectives that it would apply to individual Restudy alternatives. These objectives fell into three categories: ecologic, hydrologic and socio-economic.[706] It quickly became apparent, however, water was the vital component linking both ecologic and socio-economic systems, and that the challenge was one of developing hydrologic objectives capable of meeting the needs of both ecologic and socio-economic systems.[707] The hydrologic planning objectives developed by the Governor's Commission included:

---

[704] The Governor's Commission for Sustainable South Florida, *A Conceptual Plan for the C&SF Project Restudy* 12 (Aug. 28, 1996)(*Conceptual Plan)*.
[705] *Conceptual Plan* at 1 and 12.
[706] *Conceptual Plan* Table 1 at 14. Ecologic objectives included improved habitat quality and connectivity, replication of pre-drainage mosaic habitat characteristics, and sustainable populations of native plant and animal species. *Id.* at 14. Socio-economic goals included flood protection; water management that supports both economic diversity and natural and developed systems; water management that "supports economical diversity and sustainability derived from the natural and developed systems"; economic opportunities consistent with sustainable marine ecosystems; and protecting, preserving and enhancing cultural, archeological and recreational resources, values, and opportunities. *Id.* at 20-21.
[707] The Commission itself noted that creating a sustainable south Florida was dependent upon the ability to protect and manage water resources. *Conceptual Plan* at 21.

- Restoring natural hydro patterns in the natural system including sheetflow;
- Providing water of sufficient quality and quantity water to the Everglades, estuaries, and coral reef ecosystems in a time frame and distributions that reflected historic freshwater flow;
- Ensuring adequate water supply and flood protection for urban, natural and agricultural systems;
- Controlling saltwater intrusions in freshwater aquifers; and
- Regaining lost water storage capacity.[708]

With these objectives to guide them the members of the Governor's Commission began to develop Restudy alternatives [709] in an almost classic example of a rolling rule regime where stakeholders, unable to develop a fixed restoration regime, established vague restoration objectives leaving room for contingencies that might develop in the negotiation process as knowledge became more refined. One stakeholder characterized the process as analogous to searching for the Northwest Passage in the 15th century.[710] There was no map for the Governor's Commission to use to set a restoration course other than a general direction provided by the planning objectives, which provided broad navigational parameters.

The alternatives developed by the Governor's Commission were grounded in the vision first advanced by the Everglades Coalition in 1992-93 – recapture the 1.7 billion gallons of freshwater daily draining out of Florida's heart into the ocean.[711] By recapturing freshwater during the wet season and redistributing it to the natural and

---

[708] *Conceptual Plan,* Table 1 at 14.
[709] *Conceptual Plan* at 20.
[710] Interview N.
[711] *See generally* The Everglades Coalition, *Everglades in the 21st Century: The Water Management Future,* at 5 (2nd printing, 1993) hereinafter *Everglades in the 21st Century* available at http://www.evergladescoalition.org/documents/1993_21stcentury_VisionStatement.pdf last visited July 29, 2011 and Grunwald, *supra* note 22, at 312.

human systems seasons as needed the Governor's Commission believed it could [712] expand the water pie: "It was a win-win compromise, a perfectly balanced plan; no one would get hurt, and everyone would work together. 'We had to come up with something for everyone,' Pettigrew opined."[713]

Through a series of public workshops the Governor's Commission developed sixty-six restoration options covering segments of the natural and human systems.[714] The Corps technical team analyzed these options assessing their ability to restore the natural systems while ensuring adequate water supply and flood protection for human systems.[715] The options were grouped into alternatives by the Governor's Commission and were used by the Governor's Commission stakeholders to explore and debate interrelationships and impacts on human and natural systems. Through this process the Governor's Commission arrived at forty options, which were advanced to the Corps for technical evaluation.[716] All forty options adhered to three fundamental principles: (1) "the burden and responsibility for water storage should be shared across the system; (2) water quality and treatment should be addressed and optimized throughout the system;" and (3) projects should "salvage, clean up, and reuse water."[717] These forty options were grouped into thirteen thematic concepts to form the Florida's preferred alternative for the Restudy.[718]

---

[712] Grunwald, *supra* note 2, at 312.
[713] *Id.*
[714] *Conceptual Plan* at 22.
[715] *Id.* at 13.
[716] *Id.* at 22.
[717] *Conceptual Plan* at 22.
[718] *Conceptual Plan* at 22. Thematic concepts ranged from regional water storage across geographic areas within the Everglades watershed, water supply and flood protection; continuity of natural areas; sufficient

The *Conceptual Plan* was completed in August 1996 and presented to the Governor, the SFWMD, and the SFERTF[719] and ultimately became the framework for the Restudy preferred alternative and were used to design the goals, objectives, and detailed components of a restoration plan: the Comprehensive Everglades Restoration Plan (CERP).[720] Over the next several months the Corps Restudy Team developed a series of restoration alternatives,[721] which were evaluated and debated by the Governor's Commission with the goal of reaching consensus on a preferred restoration alternative.[722] According to a number of stakeholders who participated in the Governor's Commission's alternative analysis, the stakeholders would explore the ability of the various alternatives presented by the Corps Restudy Team to meet the *Conceptual Plan* objectives. [723] Individual alternatives were collectively analyzed and accepted, rejected, or sent back to the Corps Restudy Team for further development or adjustment based on concerns raised by the stakeholders.[724]

Two issues are illustrative of the Governor's Commission's struggles to reach agreement on a preferred restoration alternative and the resulting stakeholder and deliberative effects of the Governor's Commission's deliberations: urban water supply

---

water quality for ecosystem functioning; and aquifer storage and recovery. *Conceptual Plan* Table 3 at 23-24.

[719] *Conceptual Plan* at 61.

[720] U.S. Army Corps of Engineers, *Central and Southern Florida Project Comprehensive Review Study: Final Integrated Feasibility Report and Programmatic Environmental Impact Statement,* at 7-3 (April 1, 1999) *available at* http://www.evergladesplan.org/search/index.aspx . The evolution of the CERP from the *Conceptual Plan* was an iterative process in which the Corps vetted restoration goals, objectives and components through a series of public meetings. *Id.*

[721] *See generally* U.S. Army Corps of Engineers, *Section 7: Plan Formation and Evaluation* in *Central and Southern Florida Project Comprehensive Review Study: Final Integrated Feasibility Report and Programmatic Environmental Impact Statement* (April 1, 1999)(for a general overview of how the Corps developed and evaluated the various alternatives).

[722] *Id.* and Interview P and Interview N.

[723] Interview N.

[724] Interview F and Interview N.

and restoration water. The water supply issue was essentially a water allocation issue – how much water should be allocated to continued urban development. Florida law required the SFWMD to develop a twenty year water supply plan to accommodate present and future growth assuming a "1 in10" level of service.[725] Florida statute also required the SFWMD to develop a list of water supply development projects designed to assure a "1 in 10" level of service over the twenty year planning period.[726] At the time of the Restudy South Florida's development plans assumed 12 to 20 million-population increases over the twenty-year planning period.[727] Water projects designed to meet the SFWMD twenty-year water plan were included in a number of Restudy alternatives.[728] If these projects were included as part of the Restudy preferred restoration alternative SMOs were concerned that a number of "true" restoration options would be dropped from the preferred alternative because they did not coincide with the SFWMD twenty-year water plan. In essence the preferred alternative would become an urban water supply project supporting population growth rather than restoration.[729] Ultimately, the stakeholders agreed that the Restudy preferred alternative, the CERP, would not be responsible for meeting the 1 in 10 level of service.[730] The urban water supply issue did,

[725] Interview F. A 1 in 10 level of service assumes that that there will be no water restrictions during the 10 year drought cycle. Fla. Stat. § 373.0361 (2)(a)(1)(2007).
[726] Fla. Stat. § 373.0361 (2) (2007), *see e.g.* SFWMD, *Caloosahatchee Water Management Plan* (April 2000). The Caloosahatchee Water Management area is a subset of four regional planning areas in the SFWMD. *Id.*
[727] Louis C. Burney, Tom Swihart and Janet Llewllyn, *Water Supply Planning in Florida,* Figure 1 at 28 (October, 1998).
[728] Interview N.
[729] Interview I and Interview N.
[730] Interview N, Interview P and Interview T. The urban communities were basically told that they could not depend on "new" water to support development associated with population growth. Interview T.

however, bleed into a second, more vexing issue: how much water was needed to assure restoration of the natural system?

Guaranteeing adequate water for restoration had been an ongoing issue for the Governor's Commission. The Park, the Corps, and the SFWMD disagreed about acceptable levels of hydrologic performance needed by the natural system for restoration.[731] In late 1998, as deadlines were approaching for finalizing the Restudy preferred alternative, SMOs threatened to "blow the lid off" of deliberations unless there was better hydrologic performance for the natural system.[732] One stakeholder recalls:

> we had performance measures all throughout . . .[the natural system] for hydro patterns. . . and . . . [the Corps] would run the scenarios and . . . [we] would get back a scenario and the performance would be great along the east coast [in developed areas] and it would be . . . crappy in the natural system.[733]

Things came to head in December 1998 when the Park submitted its comments on the Restudy Draft. Using data provided by the Corps, Park scientists concluded "There is insufficient evidence to substantiate claims that [the plan] will result in the recovery of a healthy, sustainable ecosystem . . . . Rather, we find substantial, credible, and compelling evidence to the contrary."[734] Park Science Director, Robert Johnson concluded: "The Corps gave the cities and the ag guys all the water they needed up front . . . Then they said: Okay, if there's anything left, we'll try to get it to the Everglades someday, as long as nobody gets flooded. How is that for an environmental plan?"[735] The Park's concerns

---

[731] Interview N and Grunwald, supra note 22, at 314-316 (documenting disagreements between Corps and the Park regarding restoration.)
[732] Interview N
[733] Interview N and Grunwald, *supra* note 22, at 320.
[734] Grunwald, *supra* note 22, at 320 (citing Everglades National Park, Comments to the U.S. Corp of Engineers at 20 December 31, 1998) and Interview D.
[735] Grunwald, *supra* note 22, at 321 (quoting Robert Johnson).

were echoed by a host of ecological experts who in a letter to Secretary Babbitt argued the Corps' proposal did "not go far enough in re-establishing the natural flow of shallow water" through the Everglades, rather the plan "leave[s] the Everglades much as they are now: a series of disconnected fragments."[736] The Park was ready to go public, recalls one stakeholder:

> [We were down to the final alternative, D13R] . . . So the Park Services . . . takes D13R out and they took magic markers and they colored green, yellow, or red based on the performance of D13R. They show up at this inter-agency meeting where they are going to decide on the preferred alternative, the press is there, everyone's there and the Park puts this overhead up and basically it shows all the developed areas are green meaning all targets had been met and the whole natural systems was yellow and red (none of the natural system targets had been met). Well the Corps shuts the meeting down – time out. The press is there furiously writing "Everglades Restoration Plan is more a water supply plan, less a restoration plan." So they [the Corps] go back to the drawing board. . . and in a last ditch effort to get the Park on board and the enviros on board they come up with this alternative they called D13R4 which includes the delivery of an additional 240,000 acre feet of water [to the natural system].[737]

SMOs were divided about how to respond to either the Park's allegations or the Corps' proposed fix. Fault lines between National Audubon and other environmental and hunting and fishing SMOs, particularly grass roots SMOs, that had developed during the Governor Commission's Restudy deliberations and disagreements about the development of Homestead Air Force Base,[738] were beginning to resurface. National

---

[736] William K. Stevens, *Everglades Restoration Plan Does too Little, Experts Say,* New York Times, Feb. 22, 1999 at A-1.
[737] Interview N.
[738] Clinton visited the Holmstead Air Force base site in 1992 and promised to support private development of the site located between Biscayne and Everglades National Parks. Grunwald, *supra* note 22, at 309. In what can only be described as the epitome of political deal making the Dade County Commissioners awarded Carlos Herrera and the Latin Builders Association a multi-million dollar no-bid lease even though

Audubon believed it was important for the environmental community to "keep their eyes on the prize" and were concerned about alienating the administration by appearing obstinate or fixated with "side issues" such as the Homestead Air Force Base development project.[739] Grassroots environmental and hunting and fishing SMOs "saw little difference between moderation and capitulation" [740] and believed that development of Homestead Air Force Base between two national parks in the heart of the remaining foot print of the natural system was an anathema.[741]

Grass roots SMOs were also skeptical about the motivation of National SMOs and their motivations for participating in the development of the Everglades' restoration plan. Many members of local grass roots SMOs believed:

> the big national organizations saw Everglades' restoration as a way of generating a national campaign, improving their chances for a national donor base and raising money – national SMOs had to demonstrate a win in the Everglades to maintain their donor base and political power even if that meant capitulating on important issues. This was not necessarily true for local grass roots groups.[742]

---

both Herrera and the Association refused to release any financial statements. Grunwald, *supra* note 22, at 309. Herrara, was Republican but a generous Clinton Donor and the bureaucratic skids were greased for the development. *Id.* According to one environmental activist involved in preparing a lawsuit challenging the Air Force EIS, the government did not even identify the Biscayne Bay or the Biscayne National Park in the Holmstead EIS. Interview J. Many SMOs were intent on challenging the development but the National Audubon Society was vehemently opposed – they did not want to "waste the energy and political capital" fighting the development and believed that it would alienate the administration and other community leaders. Grunwald, *supra* note 22, at 309. One stakeholder interviewed for this project instrumental in challenging the Holmstead redevelopment project noted that National Audubon would not take a position on the Holmstead development and opposed action by the Everglades Coalition on the issue. It wasn't until "the New York Times came out with an editorial, then they [Audubon] changed [their position]. If the New York Times is against this well it must be a bad thing." Interview J.

[739] Grunwald, *supra* note 22, at 310 and 324 and Interview F.

[740] Grunwald, *supra* note 22, at 310

[741] Interview I, Interview J, and Interview N.

[742] Interview B.

Grass roots groups such as FOE, the Federation, and the local Sierra Club Chapter would be living with the Everglades restoration plan long after the national SMOs had declared victory and moved on.[743] Until the Governor's Commission was established it was grass roots SMOs advocating for the Everglades but:

> once the [Governor's] Commission got started all these national groups saw money, and membership and PR and ran down here. . . What they're doing is sucking the money that would go to the local . . . [grass roots organizations] and because they have paid staff, and maybe better credentials and 'smarter people' -- but as soon as it gets tough and the money dries up . . . they're going to cut and run. . . . [And as the Restudy moved closer to completion the national groups were] patting themselves on the back and running around trumpeting their horns and getting membership because we [were] sav[ing] the Everglades. But we didn't save the Everglades. [744]

Normally these tensions might have been sorted out in the Governor's Commission – Pettigrew had a history of pushing parties with disagreements to work together to find solutions.[745] But in December 1998 not only was time short if the Corps was going to meet the Congressional timeline for the Restudy but the landscape had changed for Everglades' restoration with the election of Governor Jeb Bush. According to numerous stakeholders interviewed for this project, Bush was not interested in continuing the Governor's Commission's consensus process.[746] When Pettigrew met with Bush to discuss the future of the Governor's Commission, Bush told Pettigrew "I wouldn't spend all that time doing that [developing consensus] I would just tell them what to do."[747] It appeared that Bush was into mandates while "the whole restoration

[743] Interview I
[744] Interview B.
[745] Interview P.
[746] Interview F, Interview N, Interview O, Interview P, Interview R and Interview V.
[747] Interview P.

program had been developed in an evolution of everyone having their say. . . we didn't go into the room with an answer. . . . we said here's the problem how do we solve it."[748] Bush essentially said:

> sorry everyone, I get to make this choice and so here is the edict, [and] the message that it sends is that in the future you're not going to be at the table . . . Now it's every person for themselves all over again and if you are a nation without laws you can – Jeb discovered this, you can decree things and even in a nation with laws you can decree some things and get away with it . . . and of course Jeb . . . [knew] this . . . You do your thing and let the other people sue.[749]

Bush allowed the Governor's Commission to expire shortly after taking office in January 1999[750] and without a forum in which the parties could further develop, refine, and monitor the remedy it was each interest for itself.

Absent the Governor's Commission, Deputy Assistant Army Secretary for Civil Works, Michael Davis, tried to find a solution that would assure water for the natural system and with it the Park's to support. Davis ordered the Corps' Restudy Team to run the scenarios and find more water for the natural system.[751] Corps technicians were able to find another 79 billion gallons of water but it was too late to amend the Restudy Report

---

[748] Interview V.
[749] *Id.*
[750] Interview P. On June 24, 1999, Bush appointed the Commission for the Everglades to serve as an advisory body to the SFWMD as it implemented the Restudy. State of Florida, Executive Order No. 99-144, June 24, 1999 available at http://exchange.law.miami.edu/everglades/statutes/state/State%20of%20Florida%20-%20Executive%20Order%20Number%2099-144.htm (hereinafter Executive Order No. 99-144). Non-profits including both environmental SMOs and hunting and fishing SMOs were allocated four seats of which environmental SMOs received two seats. *Id.* and Interview N. Environmental SMOs were outnumbered by agriculture and business interests 4-1. The odds were even greater when one considered the 6 representatives from local government – including local planning councils that had traditionally acted as a voice for the development community. Executive Order No. 99-144, Interview N, and Interview P. The Bush's Commission for the Everglades was not a consensus organization – said one of the environmentalists serving on the Commission for the Everglades. It was essentially a "kangaroo court. Oh, it was just horrible, just horrible." Interview N, s*ee also* Grunwald, *supra* note 22, at 330.
[751] Grunwald, *supra* note 22, at 327.

which was due to Congress July 1, 1999, so Davis ordered the Corps to insert a pledge to provide an additional 79 billion gallons of water to the Park in the "Chief's Report".[752] Additionally, the "Chief's Report" included a statement that restoration was CERPs primary objective – water supply and flood control was a CERP goal only "to the extent practicable."[753] The CERP overview, presented by Vice President Gore to Congress, guaranteed that 80% of the newly developed water would be delivered to the natural system.[754]

While Davis' proposal solved the Park's problem and assured SMO support[755] it was inconsistent with the consensus alternative developed by the Governor's Commission, which claimed to "balance" human and natural systems.[756] Development interests and the sugar industry argued the Chief's Report elevated nature over people and violated the now defunct, Governor's Commission's consensus process.[757] The Bush administration too rejected the "Chief's Report" proposal and went so far as to consider privatization of water developed by the CERP.[758]

In the spring of 2000, the Clinton Administration proposed CERP legislation. The proposal backed off the water guarantee contained in the "Chief's Report"[759] and set out a two-year process to determine how water from restoration projects should be

---

[752] *Id.*
[753] Grunwald, *supra* note 22, at 327
[754] U.S. Army Corp of Engineers, *Rescuing an Everglades Ecosystem: The Plan to Restore America's Everglades,* at 9 (July 1999).
[755] Grunwald, *supra* note 22, at 338 and Michael Grunwald, *In Everglades, a Chance for Redemption: Can Agency Reverse the Damage it Has Done?,* Wash. Post, Sept. 14, 2000 at A1 (Hereinafter *In Everglades, a Chance for Redemption)*.
[756] Grunwald, *supra* note 22, at 330.
[757] Grunwald, *supra* note 22, at 338.
[758] Grunwald, *supra* note 22, at 331 and Michael Grunwald, *How Enron Sought to Tap the Everglades,* Wash. Post, Feb. 8, 2002, at A12.
[759] Grunwald, *supra* note 22, at 339

allocated between the natural system and urban and agricultural land uses.[760] The Corps would lead the allocation process in consultation with both federal and state agencies, but Interior would have an elevated status as a consenting agency.[761]

The Bush administration too announced a restoration legislative proposal and pledged significant state funding for Everglade's restoration.[762] But the Bush administration opposed a solution that put the federal government, and in particular Interior, in the drivers seat preferring newly developed water be allocated using Florida water allocation law.[763] In his congressional testimony, Bush criticized the federal water allocation process outlined in the Clinton Administration bill:

> Too often in the past, the partnerships of this nature between the Federal and State Governments have been anything but partnerships . . . they have been master/servant arrangements. The Administration's bill that you are considering today, I believe is an example of this . . . the governance issue, I think, is one that is quite important. The Administration bill seeks to redefine the project purpose; to establish Federal agencies as the principal water managers of South Florida's water resources, and to be the sole arbiter of differences that exist.[764]

---

[760] Larry Lipman, *Administration Everglades Plan Sets Stage for Fight in Congress,* Palm Beach Post, April 12, 2000 at 8A.
[761] Larry Lipman, *Administration Everglades Plan Sets Stage for Fight in Congress,* Palm Beach Post, April 12, 2000 at 8A.
[762] *Bush solid Everglades Plan,* Tampa Tribune, Jan. 29, 2000 at 14.
[763] *S. Hrg. 106-729 Everglades Restoration: Hearing on the Comprehensive Everglades Restoration Plan Proposed by the State of Florida, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers Before the Subcommittee on Transportation and Infrastructure and the Committee on Environment and Public Works,* 106th Cong. 97 (2000)(statement and testimony of David B. Struhs, Fla. DER Commissioner).
[764] *S. Hrg. 106-729 Everglades Restoration: Hearing on the Comprehensive Everglades Restoration Plan Proposed by the State of Florida, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers Before the Subcommittee on Transportation and Infrastructure and the Committee on Environment and Public Works,* 106th Cong. 148-49 (2000)(statement and testimony of Jeb Bush, Governor, State of Florida).

When questioned about assurances for the natural system Bush pointed out that Florida law permitted Florida "to give primacy to the natural system" a fact that the SFWMD had historically ignored when it came to water for the Everglades.[765] Bush's position was supported by the Corps, which was not interested in sharing power with Interior[766] and Frampton, who was now in the White House. Frampton was willing to strip Interior of its role in the water allocation decision-making process leaving the water allocation determination to the Corps and Florida, precisely where it had been since construction of the C&SF Project, if it meant getting an Everglades bill.[767]

SMOs characterized the Bush proposal as the "trust us bill"[768] – Florida had consistently refused to deliver water to the Everglades natural systems and SMOs had no reason to believe that it would now.[769] Most SMOs and Babbitt wanted real "assurances" that water would be delivered to natural systems.[770] The Everglades Coalition, with the exception of National Audubon, which was concerned about anything that would undermine passage of a restoration bill,[771] continued to push for a role for Interior in the decision making process as well as assurances that water would be made available to natural systems.[772] But without the Governor's Commission SMOs had limited voice in the political process. While Gore was a strong proponent of Everglades' restoration he

---

[765] *See supra* Part II.A.1.
[766] Grunwald, *supra* note 22, at 340.
[767] *Id.*
[768] Interview N.
[769] *Id.*
[770] Grunwald, *supra* note 22, at 340-41
[771] Grunwald, supra note 22, at 341.
[772] *S. Hrg. 106-729 Everglades Restoration: Hearing on the Comprehensive Everglades Restoration Plan Proposed by the State of Florida, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers Before the Subcommittee on Transportation and Infrastructure and the Committee on Environment and Public Works,* 106th Cong. 237 (2000)(statement and testimony of David Guggenheim, President the Conservancy of South West Florida and Co-Chair, the Everglades Foundation).

was in the midst of a presidential campaign and Frampton, who had advanced Babbitt's restoration vision before moving to the White House, was "tired of the Everglades Coalition's whining."[773] Without political intervention, the Everglades' restoration decision making, the Corps and the SFWMD would make decisions with limited voice for Interior and the SMOs advocating for the natural system. In the end, it took Babbitt's threat to publicly withdraw his support of the CERP [774] and Senator Baucus' "concerns" that the restoration plan "didn't pass the smell test"[775] to force inclusion of "assurances" for the Everglades natural system in WRDA 2000.

Bush's decision to disband the Governor's Commission just as CERP was transmitted to Congress and the resulting political machinations as stakeholders broke rank to support either the Bush Administration and Clinton Administration proposal demonstrates an important strategic advantage of developing remedies within the context of a legal proceeding. For while the Governor's Commission had many of the attributes of a destabilization remedy in the end centering deliberations in the executive branch could not assure ongoing voice to the SMO "outsiders" in the decision-making process to the same degree that a court can when it uses its' legal authority to assure that that traditional agencies and stakeholders will give meaningful, ongoing, and continuing voice to outsiders.[776] As Sax noted over three decades ago

> The availability of a judicial forum means that access to government is a reality for the ordinary citizen – that he can be

[773] Grunwald, *supra* note 22, at 340.
[774] *Id.* at 340-41
[775] *S. Hrg. 106-729 Everglades Restoration: Hearing on the Comprehensive Everglades Restoration Plan Proposed by the State of Florida, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers Before the Subcommittee on Transportation and Infrastructure and the Committee on Environment and Public Works,* 106th Cong. 221 (2000)(statement of Sen. Baucus (D-Mont.)).
[776] Harris, *supra* note 268, at 934.

> heard and that, in a setting of equality, he can *require* bureaucrats and even the biggest industries to respond to his questions and justify themselves before a disinterested auditor who has the responsibility and the professional tradition of having to decide controversies upon the merits.[777]

It is oversight coupled with a seat at the table that confers legitimacy to the outsider.

Bush's decision to dissolve the Governor's Commission also sent a message to the conventional stakeholders, the sugar industry and development interests, that they could resort to business as usual, which they did as evidenced by their use of their political power in 2003 to push back the phosphorus compliance deadlines while ignoring SMOs' objections.[778] From the SMO perspective, with the demise of the Governor's Commission the sugar industry had the liberty to back off of the consensus reached by the Governor's Commission: "There was a concerted effort on the part of the sugar industry to break the consensus developed through the Governors' Commission. . . The sugar industry went directly to the Governor's [Bush's] office and manipulated the system."[779] Oversight provided by court processes, on the other hand, are not so susceptible to the caprice of the electoral processes as evidenced by Judge Hoevler's response to the sugar industry's attempt to legislatively modify the phosphorus compliance deadlines.[780]

In the end, with no forum to resolve the disagreements among stakeholders, Congress fell back on the consensus plan developed by the Governor's Commission as

---

[777] Sax (1970), *supra* note 112, at 112 (emphasis in the original).
[778] *See supra* Part IV.B.2.b.(2).
[779] Interview N. This observation saw also supported by at least one Clinton Administration official interviewed for this project. Interview O.
[780] *Supra* Part IV.B.2.b.(2).

incorporated in the Restudy preferred alternative – the CERP.[781] Congress rejected the natural system first approach promoted by the Chief's Report adopting, instead the "balance" incorporated in the Restudy which provided that "modifications and operational changes to the C&SF Project . . . needed to restore, preserve, and protect the South Florida ecosystem *while providing for other water-related needs of the region*, including water supply and flood protection."[782]

With regard to assuring water for Everglades' restoration, WRDA 2000 is contradictory. On the one hand Congress expressly rejected the Davis' proposal guaranteeing 79 billion gallons of water for the Park and instead orders the Corps and Florida to conduct a "project specific feasibility study" on "the need for any physical delivery" of water to the natural system.[783] On the other hand, Congress, mindful of the water allocation controversy, inserted assurance mechanisms in WRDA 2000 to ensure that water by authorized water projects would "be made available for restoration of the natural system".[784] In so doing, however, it made Florida, as the "non-federal sponsor" a

---

[781] Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572 (codified as amended in scattered sections of 16, 33, 42 U.S.C.)[hereinafter WRDA 2000]. Title VI of WRDA, §§ 601-02, 114 Stat. at 2680-94 is devoted to "Comprehensive Everglades Restoration" or (CERP). WRDA 2000 authorized fifteen of the sixty-eight CERP projects for implementation. *Id.* at § 601(b)(1)(B)(2) and Programmatic Regulations for Comprehensive Everglades Restoration Plan, 68 Federal Register, 64,2000 (Nov. 12, 2003) (codified at 33 C.F.R. pt. 385).

[782] *Id.* at § 601(b)(A)(emphasis added). The Corps was required to seek individual appropriations to implement the remaining forty-nine CERP projects. WRDA 2000, *supra* note 781 at § 601(d).

[783] *Id* at § 601(g)(1).

[784] The Restudy recognized the need for some type of "assurance" to ensure water users and stakeholders that CERP would not interfere with current levels of service. U.S. Army Corps of Engineers, *Section 10: Implementation Plan* at 10-11 – 10-12 in *Central and Southern Florida Project Comprehensive Review Study: Final Integrated Feasibility Report and Programmatic Environmental Impact Statement* (April 1, 1999). The Restudy also recommends "assurances" for the natural system. *Id.* at 10-13 - 10-14.

partner with the Corps in the water allocation issue while limiting Interior's role to that of concurring agency.[785]

The "assurance" mechanisms became the central instrument for assuring water delivery to natural systems. The assurance mechanisms included: (1) a binding agreement executed by the President and Florida's Governor promising the delivery of newly developed water to the natural system (Binding Agreement);[786] (2) promulgation of Programmatic Regulations to ensure that the CERP goals and purposes were achieved,[787] (3) project specific regulations developed concurrently with each water project that allocated the water developed by the project,[788] and (4) the creation of an independent scientific review panel to "review progress toward achieving the natural system restoration goals." [789]

The Binding Agreement was intended to prevent Florida from over allocating newly developed water to the built environment through its consumptive use permitting program[790] by requiring Florida to "ensure by regulation or other appropriate means, that water made available by each . . . [CERP] project" would "not be permitted for . . . consumptive use or otherwise made unavailable by the State until such time as sufficient reservations of water for the restoration of the natural system are made under State

[785] Interior's role was limited to that of a concurring agency in the context of the Programmatic Regulations. *Id* at § 601(h)(3). Florida as the "non-federal sponsor" had broad and in some acted as a co-equal with the Corps in the development and management of CERP projects and allocation of water developed by CERP projects. *See generally, Id.* at § 601(h).
[786] *Id.* at §601(h)(2).
[787] *Id.* at §601(h)(3).
[788] *Id.* at §601(h)(4).
[789] *Id.* at §601(j).
[790] S. Rep. No. 106-362, at 55 (2000).

Law."[791] In an attempt to provide additional oversight, WRDA 2000 authorized citizens to sue Florida and the Corps to compel compliance with the terms of the Binding Agreement.[792]

The Binding Agreement was intended to operate in conjunction with the Project Implementation Reports (PIR). WRDA 2000 required the preparation of a PIR prior to the construction of each CERP project[793] in part to identify the water volume developed by the CERP project that would be reserved for, dedicated to, and managed for the natural system.[794] The Corps was precluded from entering into a cooperative agreement with Florida for construction of a CERP project until "any reservation or allocation of water for the natural system identified" in the PIR was guaranteed by Florida under state law.[795]

The Bush brothers entered into a *Comprehensive Everglades Restoration Plan Assurance of Project Benefits Agreement* (Binding Agreement) on January 9, 2002.[796] In addition to developing the aforementioned procedures to guarantee water for the natural system, the Binding Agreement included commitments to the adaptive management and assessment frame outlined in the Restudy[797] as well as funding commitments.[798] Florida committed:

---

[791] WRDA 2000, *supra* note 781, at § 601(h)(2).
[792] *Id.* at §601(h)(2)(B)(i).
[793] *Id.* at § 601(h)(4)(A).
[794] *Id* at § 601 (h)(4)(A) (IV)-(V).
[795] *Id.* at § 601(h)(4)(B)(ii)
[796] *Comprehensive Everglades Restoration Plan Assurance of Project Benefits Agreement* (Jan. 9, 2002), *available* at http://exchange.law.miami.edu/everglades/010902_Comp_Ever_Restor_Plan_Benefits_Agmt.htm last visited Sept. 13, 2011 [hereinafter *Agreement*]
[797] *Agreement* at 3. The Restudy recommends an "adaptive assessment" to assess how well the phased CERP projects are meeting projected targets. U.S. Army Corps of Engineers, *Section 9: The Recommended*

> To undertake reservations of water for the natural system upon completion of each PIR, and to ensure that reservations of water for the natural system will be consistent with information developed in the PIR, indicating appropriate timing, distribution, and flow requirements sufficient for the restoration of the natural system.
>
> To manage its water resource allocation process to ensure that water made available by each project in the . . . [CERP] will not be permitted for consumptive use or otherwise mad unavailable for restoration of the natural system, consistent with the PIR and the provisions of . . . WRDA 2000.[799]

The Binding Agreement was tested in 2007 when the Natural Resources Defense Council (NRDC) and Sierra Club challenged the State's construction of one of the CERP projects under Florida's Acceler8 program.[800] Because these CERP projects were initiated and financed by Florida, Florida did not technically consider the Acceler8 Projects to be part of CERP.[801] While some environmental SMOs were pleased that, at last, some progress was being made on Everglades restoration they expressed concern that the water developed by the projects would be delivered to urban and agricultural

---

Comprehensive Plan 9-38 in *Central and Southern Florida Project Comprehensive Review Study: Final Integrated Feasibility Report and Programmatic Environmental Impact Statement* (April 1, 1999). The assessment process permits modification to CERP projects as crises points develop. *Id.*

[798] The federal government committed to including CERP projects in the President's budget submission as "necessary to implement the Federal share" of CERP implementation and Florida committed to provide funding matches. *Agreement* at 2.

[799] *Agreement* at 3.

[800] *Natural Resources Defense Council, Inc. v. Antwerp,* No. 07-8044 (S.D. Fla. May 23, 2007). Federal funding for CERP projects was not authorized during the Bush Administration. Kelly F. Taylor, *A Trickle of Cash for the River of Grass: Federal Funding of Comprehensive Everglades Restoration a Critique and a Proposal,* 64 U. Mia. L. Rev. 1407, 1423-24 (2010) and Mary Doyle, *Conclusion: Assessing Ecosystem Restoration Projects,* in Large-Scale Ecosystem Restoration: five Case Studies from the United States 291, 294 (Mary Doyle and Cynthia A. Drew ed. 2008). Florida, in 2004, proposed moving eight key CERP water restoration projects, most of which were water supply reservoir projects forward without federal funding. Grunwald, *supra* note 2, at 360 and Taylor, *supra*, at 1424-25.

[801] The Corps did try to integrate the Acceler8 projects in the PIR process. Alfred R. Light, *Beyond the Myth of Everglades Settlement: The Need for a Sustainability Jurisprudence,* 44 Tulsa L. Rev. 253, 267 (2008)(Light (2008)) and WRDA 2000, *supra* note 781, at § 601(h)((2)(A) and (4)(A).

users, not the natural system[802] –that Florida by initiating Acceler8 could bypass the natural system water guarantee process set out in the Binding Agreement.[803] As one environmental SMO stakeholder put it "the beauty of it was, from their perspective, when you pull something out of CERP you don't have to be bothered with those pesky rules and regulations that are in CERP or WRDA."[804]

In *Natural Resources Defense Council v. Antwerp*[805] the NRDC alleged that the Corps' in approving the modified EAA Storage Reservoir (EAA Reservoir), one of the eight CERP Acceler8 projects, without the accompanying STA and without complying with the procedural requirements set out in WRDA 2000, the Binding Agreement, and the Programmatic Regulations violated WRDA 2000[806] as evidenced by the fact that the SFWMD refused to sign a statement that water from the EAA Reservoir would be dedicated to Everglades' restoration over urban and agricultural needs.[807] In May 2008, the SFWMD suspended construction of the EAA Reservoir citing *NRDC v. Antwerp.*[808] *NRDC v. Antwerp* was dismissed without prejudice in June 2009.[809]

---

[802] Michael Grunwald, *Fla. Steps In to Speed Up State-Federal Everglades' Cleanup,* Wash. Post Oct. 14, 2004 at A-03.
[803] Alfred R. Light, *Beyond the Myth of Everglades Settlement: The Need for a Sustainability Jurisprudence,* 44 Tulsa L. Rev. 253, 268-69 (2008).
[804] Interview N.
[805] CERP included a large reservoir located in the EAA in western Palm Beach County. Light (2008), *supra* note 803, at 268. This reservoir consisted of two cells designed to hold 360,000 acre-feet of water and associated features such as canals, pumping stations water control structures, etc. *Id.* The project as outline in the CERP also included construction of a STA. *Id.* The Acceler8 project was a smaller portion of this reservoir design to hold 190,000 acre-feet and although construction of associated STAs was contemplated as part of Acceler8 they were not part of the Acceler8s EAA reservoir project. *Id.*
[806] *Natural Resources Defense Council, Inc. v. Antwerp,* No. 07-80444 Civ. Middlebrooks (S.D. Fla. Filed May 24, 2007).
[807] Editorial Desk, *Finally Make it Official: Everglades Comes First,* Palm Beach Post, May 20, 2008 at A10.
[808] Elliot Kleinberg, *U.S. Sugar Deal Fogs Activists Lawsuit Against Corps over Everglades Reservoir, Palm* Beach Post, July 18, 2008 at 3B and Jason Schultz, *Miccosukees Sue to Restart Construction of Reservoir,* Palm Beach Post, July 12, 2008 at 1B. Many more cynical observers are that the suspension

The second major assurance provided by WRDA was the Programmatic Regulations which were intended to "assure that the goals and the purposes of the . . . CERP were achieved"[810] and to establish a process "to ensure the protection of the natural system consistent with the goals and purposes of the . . . CERP, including the establishment of interim goals to provide a means by which the restoration success . . . may be evaluated throughout the implementation process."[811] In essence the Programmatic Regulations were designed to ensure that the individual CERP projects would meet overall restoration goals.[812] It is, however, unclear whether there was a true meeting of minds about the purpose of the Programmatic Regulations. The Corps, which would be charged with developing the Programmatic Regulations, in its Senate testimony suggested that the Programmatic Regulations were, in part, intended to assure a balance between the natural and the human systems. Noted one Corps official, the purpose of the Programmatic Regulations was "to identify, in greater detail, the amount of water to be dedicated and managed for the natural system and the human environment. . . [they] serve as a bridge between the legislation, the project implementation reports and the project specific operating regulations."[813] But Interior, which had helped to develop the

---

was due more to Governor Crist's quest for money to fund a multi-million dollar land deal in the hear of the Everglades than to concern about the viability of the NRDCs legal claims. *Id.*

[809] *Miccosukee Tribe v. U.S.,* Slip. Copy 2011, WL1624977 n.14 (S.D. Fla., April 26, 2011). In a surprising move, in March 20ll, Judge Moreno, the presiding judge in *U.S. v. SFWMD,* urged the SFWMD to convert the half completed EAA Reservoir to an STA to treat EAA runoff. *U.S. v. SFWMD,* No. 88-1886 slip copy, 2011 WL1099865 (S.D. Fla. March 22, 2011). SMOs lauded the decision noting the STA would do more to advance Everglades restoration. Christine Stapleton, *Federal Judge reverses ruling for District to build reservoir*, Palm Beach Post, March 24, 2011 at 4A

[810] WRDA 2000, *supra* note 781, at § 601(h)(3)(A)

[811] *Id.* at § 601 (h)(3)(C)(i)(III).

[812] S. Rep. No. 106-362, at 52 (2000).

[813] *S. Hrg. 106-729 Everglades Restoration: Hearing on the Comprehensive Everglades Restoration Plan Proposed by the State of Florida, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers Before the Subcommittee on Transportation and Infrastructure and the Committee on*

Programmatic Regulation, had a different view – the Programmatic Regulations, in Interiors view, were designed to assure specific quantities of water for the natural system. Acting Interior Assistant Secretary of Water and Science, Mary Doyle, who chaired the SFERTF, had played a major role in negotiating the restoration terms in WRDA 2000, testified:

> I would like to tell you what our concept was in providing for these programmatic regulations. This is a provision for providing a process to quantify the amount of water needed to restore and preserve the natural system. And here I am talking not just about the federally managed natural system, but the tribally and State managed aspects of the interrelated ecosystem.
>
> Although the programmatic regulations are intended to provide a process for this quantification, . . . The idea is to lay down at the beginning of the implementation a notion of overall what quantities of water need to be delivered to the natural system . . . so that when all these . . . 68 project features come on line over a period of 20 years, we can look back and see that the sum parts add up to delivering the benefits promised.[814]

But Interior's views would not prevail and Interiors voice in the development of the Programmatic Regulations would be limited – Interior would only be allotted the status of concurring agency[815] and while Florida's role vis-a- vis the Programmatic Regulations while formally limited to concurrence[816] was augmented as Florida still retained its

---

Environment and Public Works, 106th Cong. 219 (2000)(testimony of Dr. Joseph Westphal, Asst. Sec. of Army for Civil Works, U.S. Army Corps of Engineers).

[814] *S. Hrg. 106-729 Everglades Restoration: Hearing on the Comprehensive Everglades Restoration Plan Proposed by the State of Florida, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers Before the Subcommittee on Transportation and Infrastructure and the Committee on Environment and Public Works,* 106th Cong. 214 (2000)(statement and testimony of Mary Doyle, Acting Assistant Secretary of Water and Science and Chair, South Florida Ecosystem Restoration Task Force, U.S. Department of Interior).

[815] WRDA 2000, *supra* note 781, at § 601 (h)(3)(B)

[816] *Id.*

authority to allocate water developed by CERP projects under Florida law.[817] Thus although Interior would continue to participate in the interagency teams charged with designing and implementing CERP its voice was arguably not equal to either the Corps or Florida's.[818] In essence, Congress re-affirmed the Corps-SFWMD decision-making construct that had, for decades refused to deliver water to the Park, Loxahatchee or any other part of the natural system and, at least in the Governor Bush's administration, this meant that both agricultural and development interests had elevated access and influence in the water allocation decision making process.[819]

In the end while Gore had promised[820] and the Senate Report[821] stated that 80% of the water developed by CERP projects would be allocated to natural system restoration, the Corps was reluctant to guarantee any volume of water to the natural system in the Programmatic Regulations believing that setting even a percentage constrained its ability to "adapt to new information."[822] Instead the Corps relied on the "trust us" approach stating: "the final regulations ensure that adequate water will be allocated or reserved for the benefit of the natural system without regard to this ratio by requiring that each . . . [PIR] evaluate and identify water to be reserved for the natural system and . . . other

---

[817] *See generally,* Binding Agreement.
[818] *Id, see generally,* U.S. Army Corps of Engineers, *Section 10: Implementation Plan* in *Central and Southern Florida Project Comprehensive Review Study: Final Integrated Feasibility Report and Programmatic Environmental Impact Statement* (April 1, 1999).
[819] *See generally,* Michael Grunwald, *A Rescue Plan, Bold and Uncertain,* Wash. Post, June 23, 2002 at A1.
[820] U.S. Army Corp of Engineers, *Rescuing an Everglades Ecosystem: The Plan to Restore America's Everglades,* at 9 (July 1999).
[821] S. Rep.106-362 at 41. The Senate Committee Report states: "the committee fully expects that the water necessary for restoration currently estimated at 80% of the water generated by the Plan, will be reserved or allocated for the benefit of the natural system." *Id*.
[822] *Programmatic Regulations of 2003,* 68 Fed. Reg. at 64205.

water-related needs of the region"[823] which included agricultural and consumptive uses. Thus, final water allocation determinations would be made by the Corps and the SFWMD – together they would determine the quantity of water generated by each CERP project "including the quantity expected to be generated for the natural system to attain restoration goals as well as the quantity expected to be generated for use in the human environment "[824] and the Corps would make the final determination of how much water would be provided to the natural system.[825] Interior was not an equal partner in this water allocation process but was relegated to the role of concurring agency.[826] Nor did the Programmatic Regulations provided am opportunity for stakeholders to participate in decision-making process outside of traditional review and comment[827] foreclosing meaningful and effective participation in water allocation decision-making forums to SMOs. [828]

The issuance of the Draft Programmatic Regulations was met with skepticism by the SMOs. Grunwald, in an extensive series of articles in the Washington Post in 2002 observed that "Jeb Bush and his aides – backed by developers, agribusiness, water utilities and, at times, Indian tribes – have fought consistently and successfully to make sure the . . . CERP does not put nature ahead of his constituents."[829] While Richard Harvey, EPA's South Florida Director characterized the CERP after the release of the

---

[823] *Id.* at 64,205.
[824] *Id.* at 64,205, *see also* 33 C.F. R. 385.35(b)
[825] 33 C.F.R. 385.35(b)
[826] *Id.*
[827] *See generally,* Alfred R. Light, *Spark Plugs of Policy Implementation: Intergovernmental Relations and Public Participation in Florida's Acceler8 Initiative to Speed Everglades Restoration,* 30 Vt. L. Rev. 939, 945-953 (2006) (containing a discussion of public participation measures in the Programmatic Regulations).
[828] *Id.* at 964-65.
[829] Michael Grunwald, *A Rescue Plan, Bold and Uncertain,* June 23, 2002 at A1.

Draft Programmatic Regulations as nothing more than s '"a massive urban and agricultural water-supply. . . It's all falling apart before my eyes. . . we were all singing 'Kumbaya.' Now we're singing Can't Get No Satisfaction.'"[830] Shannon Estenoz, co-chair of the Everglades Coalition observed '"I'm getting angrier by the day. . . I'm starting to think we were suckers for supporting this."[831]

Nor did the final Programmatic Regulations meet with any greater support. SMOs alleged that the final Programmatic Regulations relegated Interior to the back seat and potentially turned CERP into a "water supply" project.[832] Most telling of all, however, is the fact that as of 2007, not a single CERP project has been completed.[833] While some blame the lack of federal funding [834] it seems likely that the lack of a negotiating forum and the destabilizing impact such a forum might provide makes proceeding forward with Everglades restoration challenging at best. Because of the distrust that has arisen as a result of the termination of the Governor's Commission, attempts to alter phosphorus standards at the behest of the sugar industry, and the relegation of SMOs to the side lines it seems unlikely that, absent clears guarantees to the natural system, attempts to move forward with specific CERP projects would not be challenged by at least some environmental SMOs both in and out of court.

---

[830] *Id.*
[831] *Id.*
[832] Robert P. King, *Everglades Restoration Rules Blasted,* Palm Beach Post, Nov. 5, 2003 at 11A.
[833] U.S. Gov't Accountability Office, *South Florida Ecosystem: Restoration is Moving Forward But is Facing Significant Delays, Implementation Challenges and Rising Costs,* at 7 (2007) *available at* http://www.gao.gov/products/GAO-07-1250T
[834] *See generally,* Taylor, *supra* note 800 (containing a discussion of CERP funding challenges).

V. DISCUSSION, OBSERVATIONS, AND CONCLUSION

Professor Rodger's once observed that "the very idea of 'settlement' or 'management' of … complex ecological worlds suggests an off-the-the chart arrogance or, at the least, a conspicuous faith in the capacities of human reason."[835] But this is precisely what effective ecosystem restoration such as Everglades' restoration requires and what CERP and the water quality Consent Decree attempt to accomplish.[836] But accomplishing this feat in the Everglades has been illusive. A review of the CERP web site indicates that the Modified Water Project (Mod Waters), a prerequisite to the majority of the CERP Projects,[837] is finally moving forward[838] though woefully behind schedule, and eight years after the passage of WRDA 2000, not a single CERP related project had been completed.[839] The National Academy of Science, Committee on Independent Scientific Review (Scientific Review Committee) observed that as of 2008 Everglades' restoration progress "continues to suffer as a result of a complex and sometimes contentious planning process, funding uncertainties, lack of clear restoration priorities that are central to restoration, and statutory and regulatory impediments."[840] More specifically the Scientific Review Committee observed that the CERP process has been plagued by the inability to develop CERP project plans "that are acceptable to agencies and stakeholders. . . [in fact] [t]he process of resolving disagreement among

---

[835] Rodgers (1995), *supra* note 518, at 572.
[836] Karkkainen (2002), *supra* note 660, at 569.
[837] WRDA 2000, *supra* note 781, at §601(b)(2)(C)(iv).
[838] U.S. Army Corps of Engineers, *Fact Sheet: Modified Water Deliveries: Everglades National Park & Tamiami Trail* (July 2011) *available* at http://www.evergladesplan.org/docs/fs_tamiami_july_2011.pdf .
[839] Committee on Independent Scientific Review of Everglades Restoration Progress, National Research Council of the National Academy of Sciences, *Progress Towards Restoring the Everglades: The Second Biennial Review-2008,* at 6 (2008) *available* at http://www.nap.edu/catalog.php?record_id=12469#toc last visited Sept. 22, 2011)(hereinafter Committee on Independent Scientific Review 2008).
[840] Committee on Independent Scientific Review 2008, *supra* note 839, at 6.

agencies and stakeholders has led to lengthy delays in the development of some . . . [PIRs]."[841] In its analysis of delays in implementation of the Mod Waters project the Scientific Review Committee recognized that "strong leadership focused on building and maintaining support among stakeholders and overcoming conflicts, is essential" for Everglades' restoration. "If there is insufficient political leadership to align research, planning, funding, and management with restoration goals agreed upon by the stakeholders the CERP will be likely to result in an abbreviated series of disconnected projects that ultimately fail to meet the restoration goals."[842]

Water quality restoration is meeting with somewhat greater success. In 2005, the Corps, Interior, EPA, and the Department of Justice found that Everglades' water quality was generally in compliance with the Consent Decree interim phosphorus limits.[843] However, the report also concluded reaching the final phosphorus goal of 10ppb would likely require further water quality improvements.[844] In short, Everglades' restoration is still in its infancy.

This analysis of the development of Everglades' restoration suggests that the success of Everglades' restoration may depend as much on structural changes to water management decision-making constructs as upon engineering. While litigation and SMOs played a substantial role in stimulating the political change necessary to instigate restoration, it is also clear that decisions made by both Florida and the federal

---

[841] *Id.* at 7.
[842] *Id.* at 10.
[843] National Park Service, *Joint Report to Congress: Everglades Water Quality, Resource Eval. Rpt*. SFNRC Tech Series 2005:1, at 16 (2005). The *Joint Report* acknowledged that there had been some exceedances of interim limits. *Id.*
[844] *Id.*

government during *U.S. v. SFWMD* settlement negotiations and about the need to perpetuate ongoing and meaningful stakeholder forums since the passage of WRDA 2000 has had negative repercussions on ongoing Everglade's restoration. The Everglades case also suggests that the failure to use a negotiated, experimental remedy may not simply leave the parties in the status quo but may in fact, undermine the stakeholder interactions, social learning, trust, and adaptive capacity needed to implement CERP's adaptive management restoration model.

From a destabilization perspective, the political grounds in Florida seems to have shifted as a result of *United States v. SFWMD* and the work of the Governor's Commission, but it is unclear whether there are significant long term changes in the political decision-making constructs involving water management. Upon reflection, the largest gains in both restoration and changes in policy constructs have occurred around water quality and are the result of the destabilizing impacts of litigation. Implementation of the Consent Decree supporting litigation has required Florida to adopt written phosphorus standards and regulate EAA water quality. These requirements have imposed on both Florida and the agricultural community, primarily the sugar industry, water quality limits and management practices, however imperfect. South Florida has become one of the few locations in the country where agricultural practices are subject to more than voluntary BMPs. South Florida has accomplished, what few if any of the other forty-nine states have been able to accomplish under the CWA, it has begun to address, in a meaningful way, non-point agricultural pollution.[845] On the other hand, while the sugar industry has lost some of its political power, it still holds significant political sway over

[845] Ruhl, *supra* note 375, at 331-40, Eitel, *supra* note 375, at 623, and Zaring, *supra* note 353, at 539-43.

water management decision-making in south Florida as illustrated by the Bush administration and the Florida legislatures' attempts to undermine the Consent Decree's final phosphorus standards and their implementation schedule by rewriting the EFA at the behest of the sugar industry.[846]

A. Lessons From the Swamp

What then are the lessons for environmental litigators, destabilization theorists, and environmental practitioners, from the thirty plus year path of Everglades' restoration?

Lesson 1: SMOs do matter

The Everglades' restoration case history affirms that SMOs do matter and that grass roots SMOs are particularly important in both setting the stage for effective destabilizing litigation, and in accomplishing the structural change needed for ecosystem restoration. In the case of the Everglades, it was grass roots environmental and hunting and fishing SMOs that put Everglades' conservation and restoration on the map. Beginning in the early 1970's grass roots SMOs were formed and came forward to fight attempts to develop the Everglades – they advanced an Everglades' conservation goal. Over time these grass roots SMOs and their members developed and promoted some of the first Everglades' restoration frames. Using Marshall's Everglades' restoration vision and a "social progress" water frame that linked the decline of the Everglades' ecosystem to the availability of fresh water for human systems these SMOs built media and bystander support. This bystander support helped legitimize a new Everglades' frame focused on restoration and had the side benefit of increasing membership in grass roots

[846] *Supra,* Part IV.B.2.b.(2).

SMOs such as FOE, the Federation, Florida Audubon, and the Florida Branch of the Sierra Club. These SMOs essentially became the environmental voice for the Everglades' ecosystem at a time when Interior was blocked from participating in water management decisions – a time in which the Corps and SFWMD looked to the sugar industry and development interests when making water management decisions.

These SMOs effectively used litigation and threats of litigation first to forestall destruction of the remaining environmental footprint of the Everglades' ecosystem and later to advance ecosystem restoration. It was the work of theses SMOs and their use of litigation and litigation threats as a political resource that lead to favorable resolution of the Jetport project and conservation of the Great Cypress. Litigation and the threat of litigation became an important political resource that these SMOs continued to use to help advance a preservation frame and to further increase local and national bystander awareness about Everglades' degradation.[847]

Having established both the legitimacy of their organizations and the Everglades' preservation frame, SMOs used the preservation frame to develop a restoration frame, which they first leveraged to urge Governor Graham to take preliminary Everglades' restoration steps on the Kissimmi. Absent this fundamental groundwork by grass roots SMOs one wonders if Lehtinen could have even successfully filed *United States v. SFWMD,* whether he would have been forced by the first Bush administration to dismiss the suite, or whether Governor Chiles could have made Everglades water quality a central plank of his gubernatorial campaign. From the Everglades' experience one must

[847] Robert H. Boyle & Rose Mary Mechem, *There's Trouble in Paradise,* Sports Illustrated, Feb. 9, 1981 at 82 and John D. McDonald, *Last Chance to Save the Everglades,* Life Sept. 5, 1969 at 58.

conclude that grass roots SMOs play a fundamental role in laying the groundwork for successful change strategies including destabilizing litigation.

Lesson 2: Litigation and its destabilizing impacts are important political resources in a ecosystem change agenda

The Everglades' restoration narrative also teaches important lessons about the use of litigation to accomplish environmental outcomes. As Scheingold and McCann observed, SMOs do matter to change litigation but equally important to change litigation is a change strategy.[848] Everglades' restoration required both ecological wins such as the adoption of numeric phosphorus standards and a change strategy designed to dislodge the relationship between the Corps and the SFWMD and the sugar industry and development interests in order to make room for the new social and political structures necessary to implement a long-term ecosystem restoration strategy.

The evidence indicates that SMOs recognized the need for a structural change to achieve Everglades' restoration and that changing the necessary water management decision making constructs would mean taking on the sugar industry and development interests but the evidence also suggests that these SMOs may have made a strategic error when they permitted Dexter Lehtinen and the Department of Justice to take the litigation lead, a decision that SMO representatives attributed to limited financial resources. This tactical decision had major consequences for the SMO change strategy and their ability to use litigation as a resource to promote change. This was, in part, due to Lehtinen's approach to the litigation and in part because ceding the litigation lead to the federal

[848] Scheingold, *supra* note 211, at 5-6 and McCann, *supra* note 210 at 23-24.

government meant that SMOs had little control over the course of litigation and could not carve out a place for themselves in remedy deliberations.

While Lehtinen understood that to accomplish Everglades' restoration he needed to break open the relationship between the Corps, the SFWMD and the sugar industry[849] he wasn't interested in sitting down with the sugar industry and negotiating a remedy in a deliberative process.[850] To borrow from Tarlock, Lehtinen "may have thought Unger [and destabilization] but . . . [he] litigated H.L.A. Hart."[851] Lehtinen wanted a command and control decree ordering the Corps, the SFWMD, and the sugar industry to clean up the mess they had made of the Everglades. [852] In effect, Lehtinen fell into the trap of the "myth of rights"[853] articulated by Scheingold, he distrusted political processes and favored a legal approach through change litigation. In so doing, Lehtinen "grossly overestimat[ed] the political impact of court rulings."[854] For it is not the court order alone that gives rise to change but, it is the manner in which the litigants and other stakeholders asses how the court's order "indirectly create[s] important expectations, endowments, incentives, and constraints" toward reform agendas that leads to necessary social and political change.[855] Litigation is more likely to result in change if the litigation is used as

---

[849] Grunwald, *supra* note 22, at 288-89.
[850] *Id.* at 288.
[851] A. Dan Tarlock, *The Future of Environmental "Rule of Law" Litigation,* 17 Pace Envt'l L. Rev. 237, 252 (2000). Tarlock observes that Unger advocated for a non-formal, destabilizing approach but environmental lawyers, perceiving environmentalism as a non-radical and legitimate goal have opted for the more formal approach to law advocated by H.L.A. Hart. *Id.*
[852] Grunwald, *supra* note 22, at 288.
[853] Scheingold, *supra* note 211, at 7
[854] Stryker (2007), *supra* note 103, at 77.
[855] *See* Michael McCann, *How the Supreme Court Matters in American Politics: New Institutionalist Perspectives, in* The Supreme Court in American Politics: New Institutionalist Interpretations 68 (Cornell Clayton & Howard Gillman eds., 1999).

a political resource[856] the value of which is dependent upon how the resource is mobilized to control the outcome of political conflicts and conflicts over public policy outcomes.[857]

Lehtinen saw the politics surrounding the management of water quality in the Everglades as an anathema and because he did not trust political processes he did not push for a stakeholder negotiated experimental remedy when Governor Chilles surrendered the state's sword and committed to cleaning water entering the Everglades. Rather, the federal government and the Florida commenced negotiations sidelining SMOs as well as the sugar industry. Lehtinen's strategy and the strategy advanced by the federal and state governments failed to acknowledge that simply because a court issues an order does not mean that the parties will rush to comply. There are many factors influencing whether a party, such as the sugar industry, will comply with a court order or a consent decree foremost among them whether the consent decree offers incentives to induce compliance,[858] whether the consent decree offers a shield or excuse for parties who may have been predisposed to comply but whom have been unable to do so absent a court order, [859] market mechanisms,[860] and whether the SMOs are permitted to participate in decision-making processes. [861] The 1991 Settlement Agreement illustrates that while a command and control consent decree may have some destabilizing impacts on political

[856] Scheingold, *supra* note 211, at 6-7.
[857] *See generally,* Turk, *supra* note 115, at 280-81.
[858] Rosenberg, *supra* note 210, at 32-33. There are several contributing factors that affect the ability of litigation to stimulate social and political change including whether there is a benefit to elites and bureaucrats to comply with the court's order. *Id. at 32.*
[859] *Id.* at 35.
[860] *Id.* at 33. In her review of research on the politics of enforcement, Stryker notes that corporate organizations are often able to mount a successful defense against implementation of court orders by arguing that enforcement interferes with economic viability. Stryker (2007), *supra* note 103, at 84.
[861] *Id.*

power such as signaling to stakeholders a shift in the *status quo,* that the failure to use a deliberative remedy negotiation may reduce the full destabilizing potential of litigation as demonstrated by the sugar industry's response to the 1991 Settlement Agreement. Not only was there extensive opposition to compliance with the terms of the 1991 Settlement Agreement across the sugar industry as illustrated by extensive litigation brought by the sugar industry challenging the 1991 Settlement Agreement,[862] but the sugar industry was quick to argue that compliance with the 1991 Settlement Agreement would have substantial adverse market repercussions – it would bankrupt the sugar industry.[863] In the end the federal government and Florida were forced to reopen settlement discussion. This time they included the sugar industry but they continued to exclude SMOs. Predictably, when the Statement of Principles, a modified and restructured agreement that appeared to back away from the commitments of the 1991 Settlement Agreement, was announced SMOs were outraged but as "outsiders" had little recourse than to find other mechanism to give their viewpoint voice.

This did not mean that SMOs did not use the litigation as a political resource in their restoration change strategy. Indeed, the litigation legitimized the claim long made by SMOs that contaminated EAA water entering the Everglades was destroying the Everglades ecosystem and that the sugar industry was responsible for this contamination. Reports in the media attested to the legitimacy of this claim and ultimately the citizen's of Florida recognized this claim by supporting a "polluter pay" constitutional

---

[862] *See* Fumero & Rizzardi, *supra* note 387, at 677 and Bouchar, *supra* note 465, at 12.
[863] Jean DuBail, *Water District Oks 'glades Settlement, Objections to Anti-pollution Plan Rejected,* Sun Sentinel, July 27, 1991 *available at* http://articles.sun-sentinel.com/1991-07-27/news/9101280049_1_everglades-pollution-lawsuit-board-members-everglades-national-park .

amendment. SMOs were able to use the litigation together with Chiles' confession of liability as a political opportunity to tee up a larger Everglades' restoration vision.

But the decision to exclude SMOs in the settlement process had significant negative implications for the larger change strategy needed to accomplish Everglades' restoration. The decision and SMO response confirms McCarthy and Shorett's claim that the stakeholders with strong interests excluded from settlement negotiation processes are more likely to resort to litigation to find a voice in decision-making processes[864] a fact born out in *United States v. SFWMD* where SMOs and the Miccosukee tribe have continued to use litigation in attempt to enforce the terms of the Consent Decree and advance restoration goals. More importantly, however, the failure of federal and state governments to involve SMOs in phosphorus deliberations had a detrimental impact on trust, trust that was necessary to build a restoration and, more to implement an adaptive restoration plan for the Everglades ecosystem over the twenty plus years it would take to accomplish Everglades' restoration.

Lesson 3: The importance of true multi-stakeholder deliberations

Destabilization theorists posit that the deliberative processes, through on-going dialogue, permits divergent stakeholders to develop a deeper understanding of each other's positions and helps build the relationships and trust between stakeholders needed to develop and test alternative remedial solutions. Conversely, the history of Everglades' restoration suggests that excluding deeply vested stakeholders from deliberative

[864] *See discussion* supra at Part IV.B.2.b(1).

processes can undermine trust and the building of the very relationships necessary to accomplish structural change.

For decades, SMOs had been the primary environmental voice of the Everglades. Yet, in the settlement of *U.S. v. SFWMD* these SMOs were essentially told to trust that Interior, the Corps and the SFWMD, the two agencies they held responsible for destroying the Everglades' natural system, would do the right thing. The resulting Statement of Principles which pulled back from the commitments made in the 1991 Settlement Agreement[865] was evidence to these SMOs that they were still playing on the same political landscape – that is water management decisions would continue to be made by the Corps, the SFWMD, and the sugar industry in a manner favoring development interests over natural systems. From the SMOs' vantage point, SMOs were still outsiders in the political decision-making process.

The decision to exclude SMOs from *U.S. v. SFWMD* settlement negotiations also served as evidence to many SMOs that not only was the relationship between the sugar industry, the Corps, and the SFWMD intact but now their historical government ally, Interior, was in league with the Corps, the SFWMD, and the sugar industry. For decades the SMOs had carried the environmental message for the Everglades and in so doing and advocated to protect the interests of the Interior agencies, the Park and the Loxahatchee Refuge. Now not only had Interior's leadership in Washington joined league with the Corps, the SFWMD and the sugar industry to support an agreement which looked like

[865] The Statement of Principles and the resulting passage of the EFA failed to set a numeric phosphorus level instead postponing the establishment of final phosphorus levels until 2003 and shifted substantial portions of the cost of remediation from the sugar industry to the public. *See supra* Part IV.B.2.b.

back sliding but it also appeared Interior took the support of the SMOs for granted and as Interior officials in Washington treated any SMO criticism as disloyalty.[866]

The lessons learned by many SMOs, particularly grass roots SMOs: you need to manage your own litigation because you cannot trust the federal government. You just "don't let the federal government into your state"[867] noted one stakeholder involved in grass roots mobilization. When you let the federal government in you open the door to national electoral politics and grassroots SMOs "don't have the resources to compete with the sugar industry on that level."[868] Several members of local grass roots SMOs observed that Interior and the Clinton administration took the support of Florida's environmental SMOs for granted in the national election cycle and, therefore, did not see a need to include SMOs in the litigation negotiation process.[869] Interior officials, in turn, felt betrayed and were frustrated that their historical allies, environmental SMOs, would criticize a settlement that permitted all to move on to the larger restoration task, improving water flow into the Everglades.[870] Whether or not these perceptions were true is irrelevant, what is relevant is that these perceptions existed and fostered an atmosphere of distrust, an atmosphere that has haunted Everglades' restoration.

In a larger context, if inclusion of outside players, such as environmental SMOs in the negotiation process legitimizes an SMO's claim and decreases the influence of traditional agency decision makers and stakeholders,[871] the events surrounding

---

[866] *See supra* Part IV.B.2.b.
[867] Interview B. This sentiment was echoed time and again by a number of grass roots SMOs involved in Everglades restoration. *See also,* Interview J, Interview I, Interview G, and Interview U.
[868] Interview N.
[869] Interview J, Interview I, Interview U and Interview N.
[870] Grunwald, *supra* 22, at 300-301.
[871] Sabel & Simon, *supra* note 103, at 1077-78.

Everglades restoration suggest that the converse may also be true – to exclude vested stakeholders may undermine the legitimacy of the excluded stakeholder and may suggest to traditional agency decision makers and traditional elite stakeholders that they still retain significant political power. One might speculate, for example, about whether the Bush Administration, the Florida legislature, and the sugar industry would have tried to rewrite the Consent Decree by amending the EFA if disputes about remedy implementation were required to be resolved in the context of an ongoing negotiated remedy that included both SMOs and Interior.

Additionally, one might surmise that Governor Bush's decision to dissolve the Governor's Commission undermined the ability of stakeholders to develop a remedy to address the primary water issue left unresolved by CERP – how much of the newly developed water should be dedicated to the natural system and when in the twenty year restoration process new water would actually be delivered to the natural system. Without a Governor's Commission, these determinations were left to a formal rule making process managed by the Corp and the SFWMD – a process with a limited role for Interior and no formal role for stakeholders other than traditional review and comment and the litigation check provided by the Binding Agreement. The sugar industry and development interests continued to have access to water management and allocation decision-making the process through the Bush Administration while SMOs, who continued to see themselves as the voice of the Everglades, were left out in the cold. The result has been ongoing litigation by a variety of SMOs. While agency personnel

involved in restoration view this litigation as a waste of time and resources[872] SMOs view litigation as essential to assuring that restoration moves forward in a manner protective of the natural system.[873]

The important lesson for environmental SMOs, environmental policy makers, and environmental litigators that are increasingly relying on adaptive management strategies for long term ecosystem management and restoration is that the decision not to engage the full range of vested stakeholders in an experimental remedy may have long term implications for ecosystem restoration itself. A lesson verified by the Everglades' Scientific Review Committee which observed that stakeholder distrust and skepticism about agency commitment to collaborative decision-making are significant barriers to implementing Everglades' Restoration.[874] The Scientific Review Commission, noted that "[t]he most difficult of the issues to resolve [of Everglades' restoration efforts] is that of mistrust among stakeholders."[875] The Scientific Review Commission attributed the distrust to a number of factors including:

- The perception that an agency has gone back on a commitment or a promise made in the past.
- The perception that persons or agencies were working behind the scenes contrary to public pronouncements.
- The perception that agency action was not driven by legal requirements and technical data but rather that persons within the agencies manipulated legal requirements and technical data to advance a preferred outcome.
- The perception that certain agencies or groups never considered their [stakeholders] concerns or act against the interests of the stakeholder.[876]

---

[872] Interview O, Interview Q, Interview L, and Interview C.
[873] Interview X, Interview M, Interview I, and Interview N.
[874] Committee on Independent Scientific Review, *supra* note 839, at 6.
[875] *Id.*
[876] *Id*.

Many of these factors find their roots in the decision to exclude stakeholders from the litigation settlement negotiations and Bush's decision to sunset the Governor's Commission. Doyle[877] and many others involved in this project[878] have reiterated the need to reestablish a collaborative decision making process like the Governor's Commission if CERP is to succeed in restoring the Everglades, however, some of the grassroots SMOs are so skeptical at this point that it is unclear whether a Governor's Commission could be successfully re-established.[879] More importantly, even if another Governor's Commission were successfully established it is uncertain whether such a commission would be permitted by political operatives to continue to operate of the twenty plus years it will take to implement Everglades' Restoration or whether it would be demolished by successive gubernatorial administration.

Lesson 4: The essential element – ongoing oversight

Perhaps a key learning of this Everglades' restoration case history is the need for ongoing oversight of the negotiated remedial process by some institution with sufficient longevity and political power to keep stakeholders at the table and to assure voice for all stakeholders. In destabilizing litigation this stability is provided by the court system.[880] As Harris notes, ongoing court oversight is important both for creating an avenue for excluded stakeholders to become "insiders" and to give those same stakeholders

[877] Mary Doyle, *Implementing Everglades Restoration,* 17 J. Land Use & Envtl. L. 59, 64 (2001).
[878] Interview O, Interview Q, Interview L, and Interview C
[879] Interview B, Interview, J, Interview I, and Interview G.
[880] Sax, *supra* note 112, at 231 and Sabel & Simon, *supra* note 103, at 1068-69.

legitimacy at the negotiation table.[881] Some mechanism for providing ongoing oversight over time is particularly essential in the context of ecosystem restoration.

Karkkainen and others suggest that the complex nature of ecosystem restoration requires the type of experimentation, provisional policy making, new learning, and adaptive response mechanisms that are embodied in an experimental remedy[882] in part because it is the deliberative negotiation process creates the new social learning that helps to destabilize old power relationships and alters the manner in which agencies implement public programs.[883] The challenge in the context of ecosystem restoration is maintaining these forums over the decades required to restore ecosystems. The Everglades' restoration case history, involving as it does both a remedy overseen by the federal court system and a remedy that was the outgrowth of a process established by the executive branch, suggests that those processes overseen by the executive branch may be unable to go the distance needed to accomplish ecosystem restoration.

This analysis of Everglades' restoration indicates that the Everglades' water quality restoration has been more successful than attempts to restore water flow in the Everglades. One of the primary differences between the processes designed to address these separate issues is the ongoing court oversight of the water quality issue. Even though settlement of *U.S. v. SFWMD* did not involve a deliberatively negotiated remedy on the scale envision by Sabel and Simon, the fact that the court has continued to oversee

---

[881] Harris, *supra* note 268, at 911-12.
[882] Karkkainen (2002), *supra* note 660, at 568. *See generally,* Jody Freeman and Daniel A. Farber, *Modular Environmental Regulation,* 54 Duke L. J. 795 (2005) and Annecoos Wiersema, *A Train Without Tracks: Rethinking the Place of Law and Coals in Environmental and Natural Resource Law,* 38 Envt' L. 1289 (2008).
[883] Sabel & Simon, *supra* note 103, at 1068-71.

and evaluate implementation of the Consent Decree for over fifteen years through almost four, four-year election cycles, has provided some degree of assurance that the phosphorus remedy, however imperfect, will move forward. Ongoing court oversight of the phosphorus remedy has also provided a forum for the range of stakeholders, including SMOs and the Miccosukee Tribe, albeit, that voice is primarily in the form of legal challenges to progress toward interim and final phosphorus remedies or lack thereof, made by the federal government and the SFWMD under the Consent Decree. These challenges have also helped to assure progress under the Consent Decree.[884]

Nor did transfer of the case from Judge Hoeveler to Judge Moreno dramatically affect the court's oversight[885] even though the transfer was attributed to a motion brought by the sugar industry to remove Judge Hoevler for bias.[886] The Everglades narrative suggests, then that courts' provide more stable oversight than other branches of government, for although court's can be influenced by political ideologies, judges (unlike legislators, governors, and appointed officials) are not free to ignore the law for political expediency.[887] In the eyes of many, to the extent that progress has been made on Everglades water quality, it is because of the litigation, and many believe that absent the litigation politics would "overwhelm the situation" and undermine steps designed to

[884] Several scientists interviewed for this project observed that water quality restoration would be nowhere but for the willingness of the Tribe and SMOs to vigilantly litigate the matter. Interview R, Interview W, and Interview D.
[885] *See supra* Part IV.B.2.b.(2)
[886] *U.S. v. SFWMD,* 290 F. Supp. 1356, 1358 (S.D. Fla. 2003)
[887] *See generally,* Thomas J. Miceli, *Legal Change: Selective Litigation, Judicial Bias, and Precedent,* 38 J. Legal Studies 157 (2009).

improve water quality.[888] It is, in large part, court oversight that has pushed the parties forwarded and provided the insulation from the shifting political winds – insulation that is needed to assure long-term remedy implementation.

The CERP, water quantity implementation process has not faired as well. The process lacks a stable oversight authority with the ability to assure meaningful voice to the range of stakeholders. As governor, Chiles provided the initial oversight that gave voice to the full range of stakeholders, including SMOs. In appointing Pettigrew to manage the process, Chiles essentially appointed a special master that was directly accountable to the Governor's office for progress on the water quantity issue – progress that included water for Everglades' restoration. Chiles' commitment to a negotiated remedy for water quantity gave credibility to the restoration vision advanced by SMOs as well as voice and legitimacy to those same SMOs in the decision-making process.

Governor Bush's decision, however, to sunset the Governor's Commission at the end of Chiles' term suggests that elected executives may not be the best mechanism to provide the long-term, neutral stability, and oversight needed to keep stakeholders at the table to implement and make the necessary adjustments to adaptive restoration visions. Once the Governor's Commission was dissolved there was no meaningful forum in which to negotiate the vexing water allocation issues that arose, as the CERP preferred alternative was transferred to the Clinton Administration and Congress. Governor Bush's administration chose to be a player rather than an arbitrator in the dispute over the volume of water to allocate to the natural system. Rather than telling the stakeholders to

[888] The many of those interviewed for this project argued that the improved water quality in the Everglades Protection Area was directly due to the litigation and the ongoing oversight of it's implementation. Interview R, Interview S, Interview K, Interview I, Interview O, and Interview P.

resolve their differences in accord with an agreed upon goal in a deliberative forum, as a court overseeing a negotiated remedy might, Governor Bush adopted the position advanced by the sugar industry and development interests arguing that the natural system should not be elevated above the human system and advocated that position in Congress.[889]

Implementation of the restoration plan under the Bush administration was premised on a "trust us" frame. Without an ongoing forum all Bush had to offer skeptical stakeholders was the ability of his administration to be an independent overseer of CERP committed to moving restoration forward. But the Bush administration's behavior suggested to SMOs that the Bush administration lacked the commitment to lead the SFWMD to implement CERP and the restoration vision set out in WRDA 2000. In 2000 for example, just shortly after WRDA 2000 was signed, the SFWMD, at the urging of the sugar industry, reversed, without so much as a public hearing delivered water to sugar can fields in the middle of a drought, in contravention to an established drought water management policy requiring the state to hold water in Lake Okeechobee during the pendency of the drought. Lake levels dropped nine feet, bass populations plummeted, boating and resort businesses suffered unprecedented losses; but the sugar industry, in the midst of a drought, had a historically high harvest.[890] This event, together with other decisions made by the Bush administration suggests that the Bush administration was

---

[889] *S. Hrg. 106-729 Everglades Restoration: Hearing on the Comprehensive Everglades Restoration Plan Proposed by the State of Florida, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers Before the Subcommittee on Transportation and Infrastructure and the Committee on Environment and Public Works,* 106th Cong. 147-50 (2000)(statement and testimony of Jeb Bush, Governor, State of Florida).

[890] Grunwald, *A Rescue Plan,* Wash. Post, June 23, 2002 at A-01.

unwilling to provided the type of oversight needed to advance restoration. By 2002, many of the SMOs that had supported CERP were skeptical "that the highly political agencies that nearly killed the Everglades can save it now."[891]

These events confirm that political executives may play an important leadership role in instigating ecosystem restoration but they do not have the staying power necessary to implement long-term restoration agendas. The import of this finding for ecosystems is indeed grave for it suggests that absent some alternative oversight mechanism to help navigate ecosystem restoration, ecosystem restoration implementation will be subject to the political winds of the day – winds that may well blow restoration off course in an attempt to serve alternative interests with greater, more immediate political gain.

B. Conclusion

This analysis of Everglades' ecosystem restoration indicates that it is the court system that has provided the most stable and successful oversight of Ecosystem restoration efforts over an extended period of time and, therefore, provides the most hope, for Everglades' restoration. But courts may be willing to take on this new, oversight role leading one to conclude as has Light, in one of his many articles on Everglades' restoration and adaptive management, that there is an urgent need for a new jurisprudential dimension that recognizes an environmental systems problem solving approach embodied in sustainability and adaptive ecosystem management,[892] a jurisprudential model that moves beyond procedural.[893]

---

[891] *Id.*
[892] Light (2008), *supra.* note 801, at 254.
[893] *Id.* at 270-71.

Environmental lawyers, like scientists and engineers struggling to find new mechanisms to restore unstable ecosystems, must reach for a jurisprudential framework that encourages stakeholders to "think large", to explore solutions in the face of uncertainty, and to modify solutions as our knowledge about environmental systems increases.[894] This analysis suggests that a destabilization model that incorporates deliberative collective decision making subject to some stable oversight model incorporates many of the important characteristics needed to oversee ecosystem restoration projects over time and offers a framework for the development of the new governance models necessary to protect and restore ecosystems and the services they provide to human well-being. And while one of the strengths of the destabilization model is the gravitas of the court system in fostering the *status quo,* veil, deliberative, and stakeholder effects needed for structural change, the shortcoming of the model is that the model is grounded in chance – in finding the right social movement to bring litigation and the right judge willing to advance an experimental mechanism. What is needed if ecosystem restoration is to be accomplished over time is a new jurisprudential framework that incorporates the essential elements of destabilizing litigation and remedy development.

[894] *Id.* at 272-73.

Chapter 5

"Would you tell me, please, which way I ought to go from here?" asked Alice "That depends a good deal on where you want to get to," said the Cat. " I don't care where—" said Alice. "Then it doesn't matter which way you go," said the Cat" – so long as I get somewhere," Alice added as an explanation. "Oh, you're sure to do that, " said the Cat, "if you only walk long enough."

Lewis Carroll[1]

Professor Rodger's once observed that "the very idea of 'settlement' or 'management' of … complex ecological worlds suggests an off-the-the chart arrogance or, at the least, a conspicuous faith in the capacities of human reason."[2] The challenge of ecosystem restoration is complicated by the complex interaction of natural and human systems[3] and the fact that our current governance system is not well designed to address the complexity of managing watersheds and ecosystems.[4] Ecosystem management requires governance constructs that are flexible and permit action in the face of scientific uncertainty.[5] But as Scheingold, Stryker, McCann, Sax, Chayes, Sabel and Simon all note modifying government decisions and decision- making structures to institute these changes requires access to and modification of agency decision-making constructs. Social scientists and legal theorists alike posit that litigation can be used under certain circumstances to instigate change. The papers included in this dissertation explore the

[1] Lewis Carroll, *Alice's Adventures in Wonderland* 5, 55 in The Best of Lewis Carroll (Castle 1983)(1965) .
[2] William H. Rodgers, Jr., *Deception, Self-Deception, and Myth: Evaluating Long-Term Environmental Settlements,* 29 U. Rich. L. Rev. 567, 572 (1995).
[3] C. Folke, T. Hahn, P. Olsson and J. Norberg, *Adaptive Governance of Social—Ecological Systems,* 30 Ann. Rev. of Env. Resources 441,442-43 (2008).
[4] *See generally, supra* Chapter 1 at 7-8.
[5] C. Folke, T. Hahn, P. Olsson and J. Norberg, *Adaptive Governance of Social—Ecological Systems,* 30 Ann. Rev. of Env. Resources 441, 442-43 (2008) and Annecoos Wiersma, *A Train Without Tracks: Rethinking the Place of Law and Goals in Environmental and Natural Resources Law,* 38 Environmental Law 1239, 145-1255 (2008).

conditions under which litigation might be an effective to instigate the political change necessary to protect complex ecosystems nested in watersheds.

I. DISCUSSION

Scholars have acknowledged that the ability of citizens to influence governmental decisions affecting public policy, including those related to environmental management, can be limited by the symbiotic relationship between the administrative agency and those they regulate[6] (Figure 5.1; #s1 and 2). In the "classic government decision-making model" policy decisions made by government agencies tend to result in the allocation or

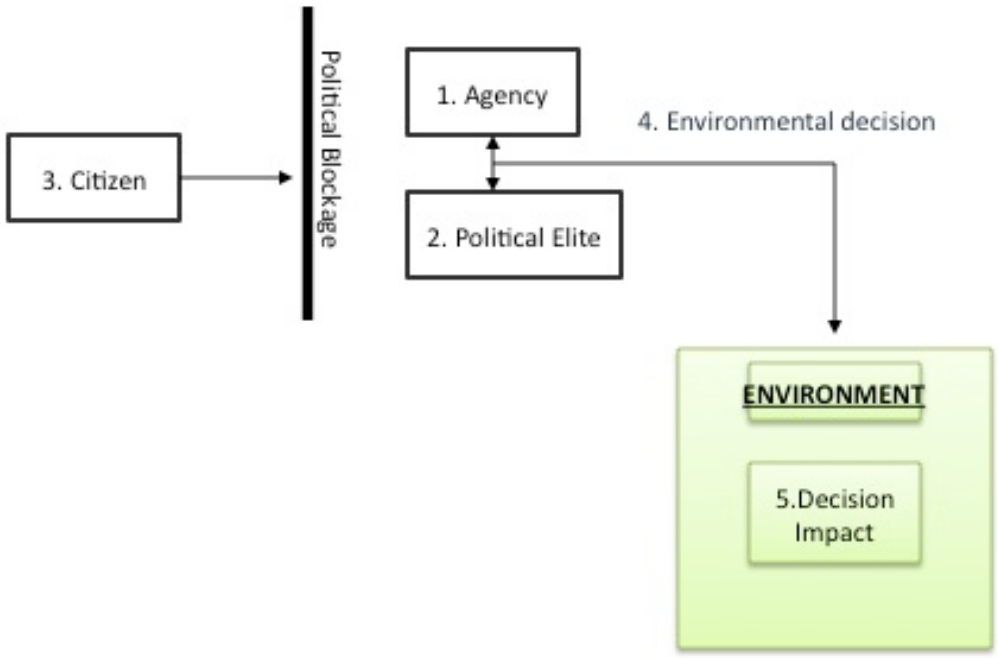

Figure 5.1: Classic Government Decision-Making Model (Sabel and Simon)

[6] *See generally, supra* Chapter 1 at 12-15 (discussing the impact of political blockage on government decision making).

use of public resources for the benefit small concentrated groups with large stakes that are able to exploit or disregard the interests of a broader public that are blocked from government decision-making forums[7] (Figure 5.1; #4). When these governance decision-making constructs involve ecosystems the result can be devastating to the ecosystem as illustrated in both the Mono Lake and Everglades case studies (Figure 5.1; #5). In the case of Mono Lake, for example, decisions about the allocation of water from the Mono Lake tributaries Mono Lake was greatly influenced by the close symbiotic relationship between the California State Water Resources Control Board (SWRCB) and the Los Angeles Department of Water and Power (LADWP). Citizen's had little voice in the SWRCB decision permitting the LADWP to extract fresh water from the Mono Lake tributaries for consumptive use in Los Angeles. The result was a near ecosystem collapse at Mono Lake.[8] Likewise, water management decisions made by the Corp of Engineers (Corps) and the South Florida Water Management District (SFWMD) about water flowing through the Everglades ecosystem were designed to meet the flood control and water needs of development interests and the sugar industry. These decisions resulted in the loss of over one half of the Everglades' ecosystem and reduced water storage in the Biscayne Aquifer.[9]

Public law theorists including Chayes and Sax and more recently Sabel and Simon posit that citizens can use public law litigation to break open or destabilize

[7] *Id.* at 25-27.
[8] Sherry A. Enzler, *How Law Mattered to the Mono Lake Ecosystem,* 35 Wm. & Mary Envt'l L. & Policy J. 413, 425-36 (2011).
[9] *Supra,* Chapter 2, Part II.B and Part III.A.1

politically blocked decision-making processes and assure democratic accountability.[10] As illustrated in Figure 5.2, a citizen can use litigation to challenge agency decision makers that have violated minimum performance standards to bring the agency decision and decision-making processes under the spotlight of the adjudicatory process (Figure 5.2; #s3, 1, and 6). When the court, using its equitable authority issues temporary relief staying the agency action and halting the activity that lead to the environmental degradation (Figure 5.2; #s 7 and 8) and in so doing signals the stakeholders that the *status quo* is dead – that the decision making landscape has changed. This "*status quo"* effect is reinforced by the courts' decision on the merits and the court's appointment of a special master to oversee the deliberative development and implementation of an experimental remedy by the stakeholders (Figure 5.2; #s 9, 10, and 11). The development of the experimental remedy, especially as it relates to complex issues such as ecosystem management, forces stakeholders into a realm of uncertainty as they design and implement a flexible remedy in an adaptive process premised on agreed upon goals and objectives (Figure 5.2; #s 11, 12a, and 12b). This ongoing process confirms to stakeholders that the *status quo* is dead, forces stakeholders to build new relationships, and ultimately leads to the creation of new decision making structures that break open political blockage (Figure 5.2; # 12a).

[10] *Supra,* Chapter 1, Sec. III.B.1

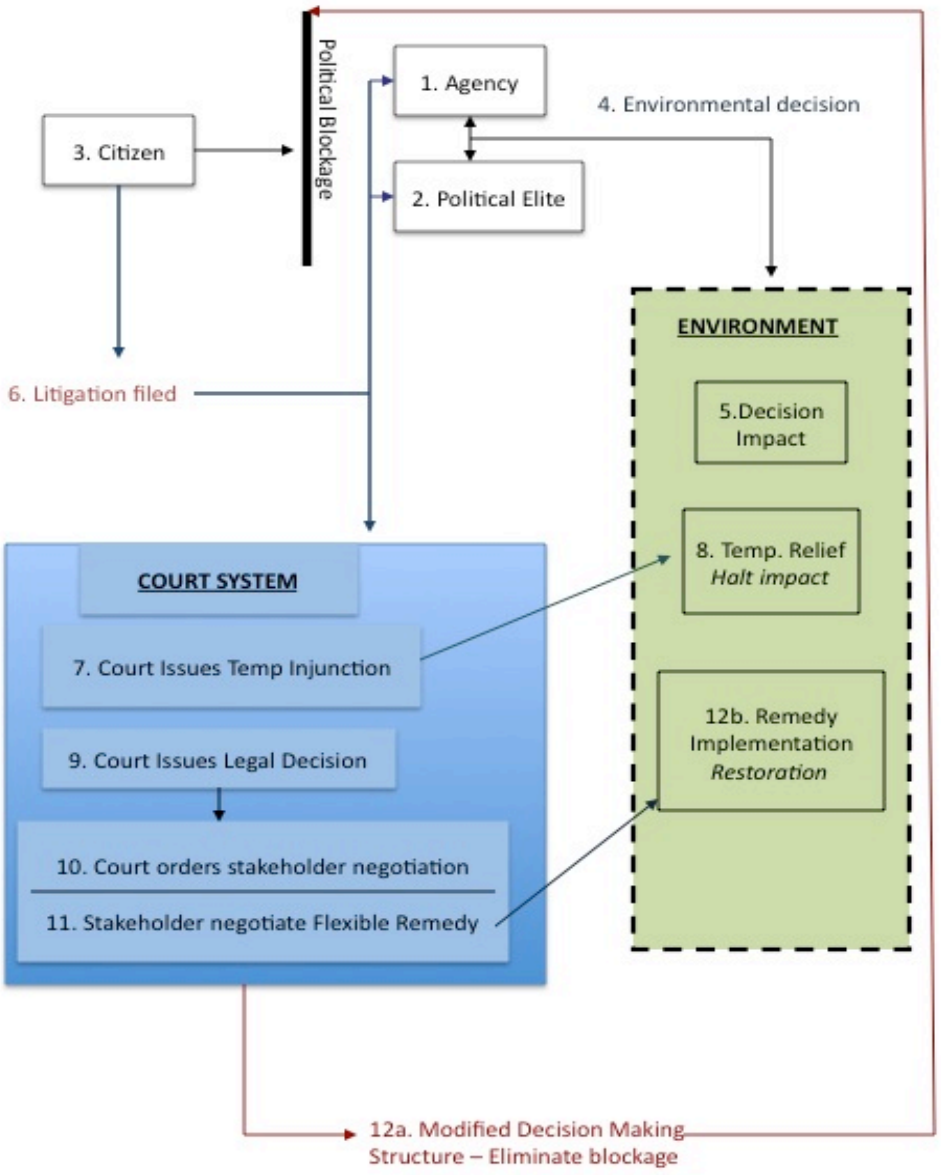

Figure 5.2: Sabel and Simon Destabilization Model

Applying the Sabel and Simon Destabilization Model, illustrated in Figure 5.2, to ecosystem restoration and protection one might hypothesize that a citizen wanting to protect aquatic ecosystems could use the court to challenge an agency's resource

management alleging the agency failed to apply some minimum environmental performance standard. In response, the court would issue temporary injunctive relief staying the agency decision and the resulting environmental degradation (Figure 5.2; #s 7 and 8) pending the court's final decision and the development of an experimental remedy by the parties. The experimental remedy, designed by the parties in a deliberative process, clarifies, applies, and implements the performance standards encompassed in the court's legal decision (Figure 5.2; #s 9 and 10). The experimental remedy and the legitimacy conferred on the stakeholders and the deliberative remedy by the court gives the citizen voice in the decision making process forcing both the agency and the political "elite" to modify past decisions (Figure 5.2; #s11, 12, and 12b). Through the deliberative remedy development the parties gain new knowledge about the environmental issue and each other, they set performance standards, test and implement remedies and in so doing create a new decision-making construct (Figure 5.2; #12a).

Yet, as illustrated in Chapter 2, the mere fact that a citizen or even an environmental organization has successfully brought a law suite challenging government agency decisions made in concert with a politically powerful does not, in and of itself, lead to destabilization. Nowhere is this more apparent than in the case of the Canada Lynx and the gray wolf. Both instances involve carnivores in the west and pit protection of these carnivores against powerful interests including the logging industry, ski resort owners, and hunting and ranching interests.[11] In both instances environmental

[11] Jeremy T. Bruskotter, Eric Toman, Sherry A. Enzler & Robert H. Schmidt, *Are Gray Wolves Endangered in the Northern Rocky Mountains? A Role for Social Science in Listing Determinations,* 60 Bio Science 941,945-47 (2010)(discussing the influence of ranching and hunting interests in wolf management in the west) and Ivans J. Lieben, *Political Influences on USFWS Listing Decisions Under the ESA: Time to*

organizations successfully sued the Fish and Wildlife Service (FWS). In the case of the Canada lynx the federal court found, on three separate occasions, the FWS decision not to list the Canada lynx arbitrary and capricious and contrary to the determination of FWS's own biologists.[12] On each occasion the FWS simply reframed and reissued its previous decision not to list.[13] A similar pattern can be seen in attempts by environmental interest groups to keep the FWS from de-listing the gray wolf in both the Northern Rockies and the Western Great Lakes where delisting decisions were successfully challenged in court by environmental interest groups only to have the FWS re-frame and re-issue its previous delisting decision.[14] In neither of these cases did litigation change either the FWS' environmental decision or the political decision making structure.

The cases of the Canada lynx and the gray wolf lead to the conclusion that litigation alone, even successful litigation may not be sufficient to destabilize political blockage. These cases reflect the norm in public law litigation (Figure 5.3), a norm that has caused Tarlock to conclude that environmental change litigation is dead.[15] In these cases involving the gray wolf and Canada lynx an environmental organization filed a law suit against an agency decision maker such as the FWS expecting the court to issue a command and control decree ordering the agency to reassess its decision to list or de-list a species based on the courts' order. As illustrated in Figure 5.3, these cases suggest that

---

Rethink Priorities, 27 Envt'l L.1323, 1362-64 (1997)(discussing the influence of the timber industry and ski resort owner in decisions not to list the Canada Lynx).

[12] *See generally,* Sherry A. Enzler and Jeremy T. Bruskotter, *Contested Definitions of Endangered Species: The Controversy Regarding How to Interpret The Phrase "A Significant Portion of a Species Range*, Va. Envt'l L. J. 1, 14-24 (2009) and *supra,* Chapter 2, Section III.B.1.

[13] *Id.*

[14] *See generally,* Enzler & Bruskotter, *supra* note 14 at 25-30 and *supra,* Chapter 2, Section III.B.2.

[15] A. Dan Tarlock, *The Future of Environmental "Rule of Law" Litigation and There Is One,* 19 Pace Envt's L. Rev. 611 (2002).

under normal circumstances, a court order upholding a performance standard may or may not lead to a changed environmental decision. These cases also suggest that in traditional environmental litigation the court decree is not likely to lead to destabilization without some further element such as a concurrent negotiated remedy developed through a deliberative process. It is unclear from these cases, however, when a negotiated or experimental remedy of the sort that could lead to destabilization might be used or what other factors, external to the litigation process, might contribute to destabilization.

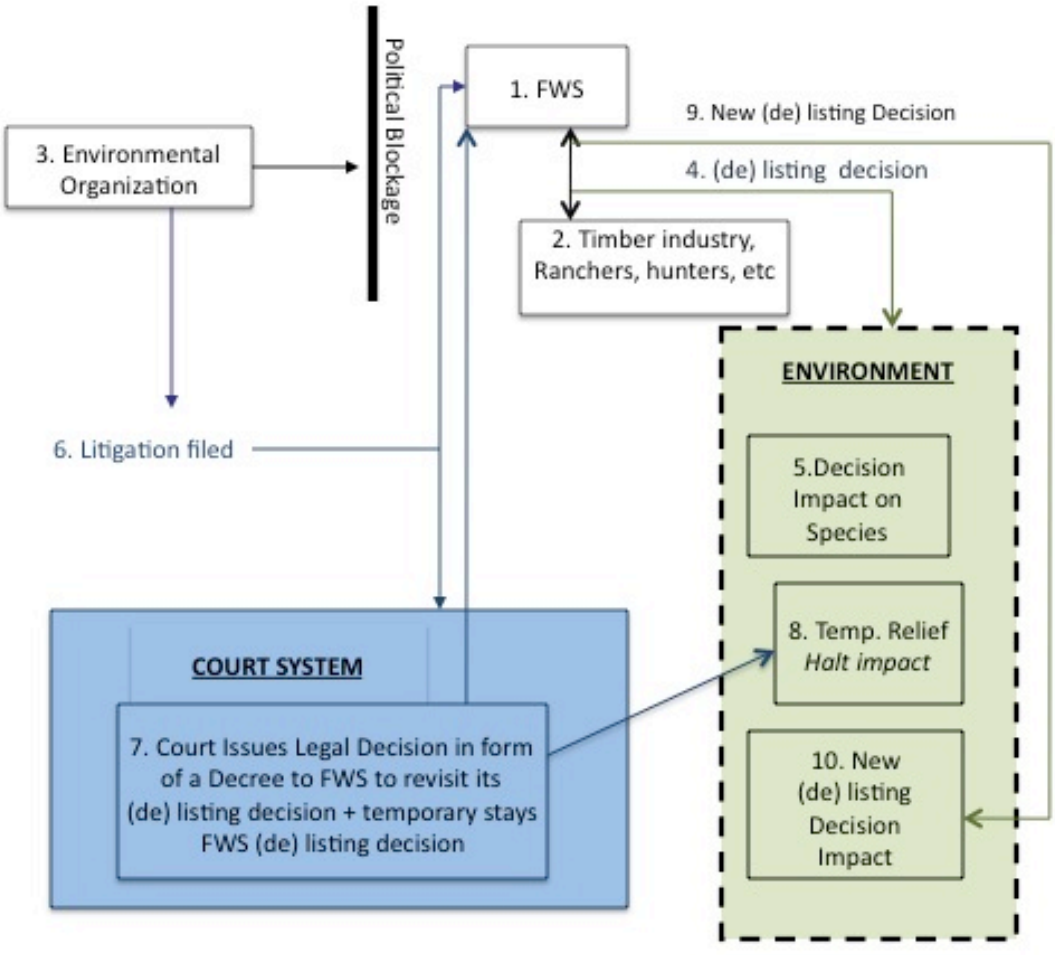

Figure 5.3: Traditional Public Law Litigation Model

The social science literature provides some insight into factors that might contribute to destabilizing change litigation. This body of literature argues that successful change litigation requires, at a minimum a social movement organization (SMO) with the ability to use litigation as a political resource as part of a larger change strategy.[16] SMOs advancing change strategies seek both immediate political decisions to redress past wrongs and structural changes designed to elimination of political blockage by changing government decision-making constructs. In the context of social movement theory, litigation is a political resource to be strategically mobilized together with other resources to accomplish change.[17] An SMO that uses litigation as a political resource in a larger change strategy is more likely to think strategically about both the short-term and long-term implications of litigation[18] including the use of litigation to frame an issue and the generation of broad public or bystander support for the claimed change advocated by the SMO.[19]

Using insights from the social science literature, a Modified Destabilization Model was developed as illustrated in Figure 5.4. This model incorporates the claim made by social scientists that effective change litigation is most often brought, not by citizens but by SMOs (Figure 5.4; #s 3 and 6a). The Destabilization Model was also modified to reflect the SMO's use of framing before litigation, at the time litigation is filed, and during the litigation process to build the SMO and bystander support necessary to advance a change agenda (Figure 5.4; #s 61 and 11). In the context of change

[16] *Supra,* Chapter 1, Section III.C.
[17] *Id.*
[18] *Id.*
[19] *Id.*

litigation, bystander support developed through framing and the use of litigation in the framing process plays an important function – bystander support applies pressure on the agency to participate in the experimental remedy, to develop a remedy that reflects a changed status quo (Figure 5.4; #s 11a and 12b). This Modified Destabilization Model was then tested for fit using the Mono Lake and Everglades case studies.

As Stryker notes, "some stories about who did what, when, where, why, how, and with what consequences will be more necessary and useful to theory building and for the mutual construction of history and theory than will others."[20] These "stories" provide an opportunity to test theory. Mono Lake presents such a story. The "story" of the role that litigation claimed to play in the restoration of Mono Lake is a story that is almost mythic among environmental attorneys. The tale is well documented and for this reason was chosen as the first case study to test the Modified Destabilization Model. The Modified Destabilization Model was used as a lens to explore the historic events (historic narrative) that led to restoration of the Mono Lake ecosystem. The analysis of the Mono Lake restoration historic narrative suggested a basic soundness in the model fit as well as some interesting anomalies (Figure 5.5).

[20] Robin Stryker, *Beyond History Versus Theory: Strategic Narrative and Sociological Explanation,* 24 Soc. Meth & Research 304, 309 (1996).

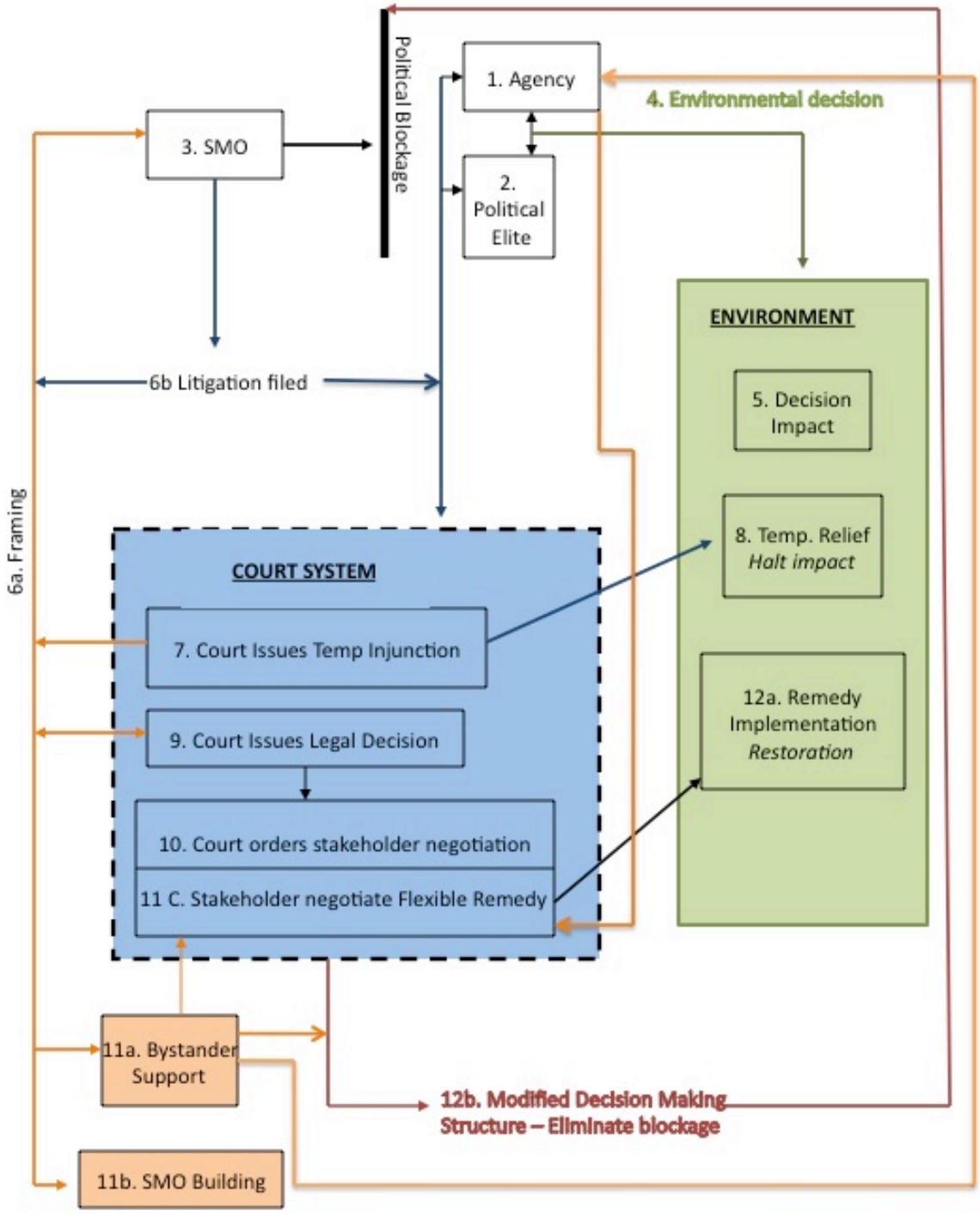

Figure 5.4: Modified Destabilization Model

The Mono Lake experience appears to confirm the hypothesis that social movements matter. Although a number of local citizens opposed the LAPWD diversion from the Mono Lake tributaries because of the diversions likely impacts on the Mono Lake ecosystem,[21] the concerns of these citizens did not impact the LADWP's decision to issue the 1940 LADWP water permit. As illustrated in Figure 5.5, it was the mobilization of a group of college researchers, which began as early as 1976 and which culminated in the formation of the Mono Lake Committee that gave birth to initial efforts to restore the Mono Lake ecosystem and it was the Mono Lake Committee that was primarily responsible for mobilizing the political resources necessary to initiate the destabilization process. Within months after its formation the Mono Lake Committee began to develop a Mono Lake restoration frame and used this frame to reach out to bystanders across the state and nation in one-on-one conversations and through the national media (Figure 5.5; #7).

[21] *City of Los Angeles v. Aitken,* 52)2d 585, 587 (Cal. Dis. Ct. App. 1935)

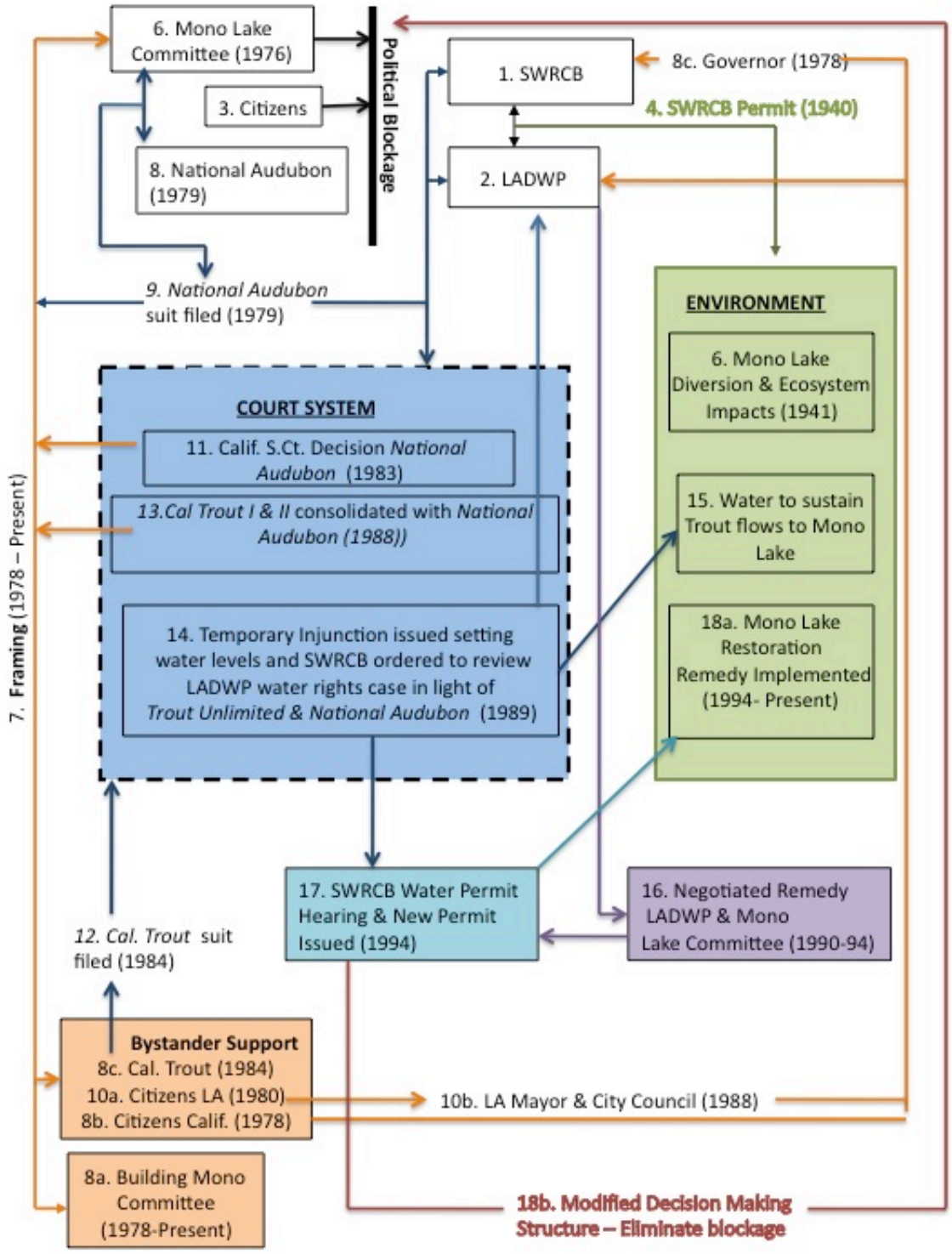

Figure 5.5: Mono Lake Destabilization Model

The Mono Lake case study also confirms the important and symbiotic relationship between framing and litigation in the destabilization process. By 1978, the frame developed by the Mono Lake Committee had such wide spread acceptance among Californians outside of Los Angeles that Governor Brown formed an Interagency Task Force to discuss target lake levels (Figure 5.5; #s 7, 8b, and 8c). Both bystander support and the Interagency Task Force work gave legitimacy to the Mono Lake Committee's claim of right (a restored Mono Lake ecosystem) and was arguably a factor that convinced the National Audubon Society join the Mono Lake Committee in filing suit against the LADWP and the SWRCB (Figure 5.5; #s 8 and 9). Conversely, both the filing *National Audubon Society v. Superior Court of Alpine County*[22] (hereinafter *National Audubon)* and the California Supreme Court' *National Audubon* decision gave legitimacy to the claims made by the Mono Lake Committee and became an important framing tool used by the Mono Lake Committee in developing a water conservation frame within Los Angeles (Figure 5.5; #s7 and 10a). As bystander support of the Mono Lake Committee conservation frame increased within Los Angeles both the Mayor office and the City Council to felt increased pressure compel the LADWP to reduce the Los Angeles water appropriation from Mono Lake – to compel the LADWP to accept the fact that the *status quo* was dead (Figure 5.5; #s10a and10b).

But the Mono Lake case study also suggests certain anomalies in the Modified Destabilization Model. Perhaps the most notable anomaly is that the *National Audubon* decision, groundbreaking as it was, did not result in temporary relief staying the

[22] *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty,* 658 P.2d 709, 711 (Cal. 1983)(*National Audubon).*

SWRCB's permitting decision (Figure 5.5; #11). Secondary litigation, *Cal. Trout, Inc. v. State Water Resources Control Board* and *Sal Trout, Inc. v. Superior Ct. of Sacramento Cnty*[23] (hereinafter *Cal. Trout I & II),* was required to provide the temporary relief necessary to restore minimum water flows to Mono Lake (Figure 5.5; #s12 and 14). Arguably, *Cal. Trout I & II*, brought by a separate SMO partnering with the Mono Lake Committee, was made possible by the media focus on Mono Lake, a focus that was the direct result of the Mono Lake Committee's framing efforts and *National Audubon.* The temporary relief imposed by the court in *Cal Trout I and II* had an additional *status quo* impact on the LADWP in forcing the LADWP to release water into the Mono Lake tributaries. For the first time the LADWP was unable to make unilateral decisions about the volume of water it would take from the Mono Lake tributaries, it had to come to terms with the fact that the status quo was dead. In short, it took the court orders in *National Audubon, Cal Trout I* and *II,* and ongoing framing efforts by the Mono Lake Committee to convince the LADWP that the status quo was dead.

A second important anomaly in the Mono Lake case is the fact that the negotiated remedy was not ordered by the court, although the court retained jurisdiction over both *National Audubon* and *Cal. Trout I and II* during the pendency of the remedy development. The court, did, however, create the space for a deliberative remedy development. The LADWP was forced into a position of uncertainty when the court stayed *National Audubon* and *Cal. Trout I* and *II* for two years pending the preparation of an Environmental Impact Report (EIR) by the SWRCB reflecting the court's liability

[23] *Cal. Trout, Inc. v. State Water Res. Control Bd,* 255 Cal. Rptr. 184 (Cal. Ct. App 1989) and *Cal. Trout, Inc. v. Super. Ct. of Sacramento Cnty.,* 266 Cal. Rptr. 788 (Cal. Ct. App. 1990) (hereinafter *Cal Trout I and II)*

determination in both *National Audubon* and *Cal Trout I and II*. Either the LADWP could wait for the SWRCB to issue the EIR and hold a contested case hearings to set new, lower, water limits, a decision which would almost certainly be ratified by the court, or it could broker a deal with the Mono Lake Committee that reflected ecosystem needs, an agreement that the stakeholders could jointly present to the SWRCB. Faced with this uncertainty, the LADWP and the Mono Lake Committee opted to use the two years between the court order and the SWRCB EIR determination to develop an experimental remedy (Figure 5.5; #16). The SWRCB and the Court ultimately adopted this remedy. The Mono Lake remedy became the basis for Mono Lake restoration and the principles it embodied were used by the SWRCB in subsequent water allocation determinations (Figure 5.5; #s17, 18a and 18b).

The Mono Lake case suggests that both framing and SMOs are important to destabilizing litigation. The Mono Lake case also suggests that while courts may create the space (in time) for a deliberatively developed, experimental remedy it may be uncertainty that forces the stakeholders to negotiate rather than a court order. Finally the Mono Lake case indicates that it may take more than a single piece of litigation to move an entrenched "elite" such as the LADEWP to conclude that it is in its best interest to undertake an experimental remedy in conjunction with other stakeholders.

One other curiosity of the Mono Lake case is that it was an SMO, the Mono Lake Committee, which took the most active role in moving the restoration frame and the litigation to an experimental remedy. The Mono Lake Committee can best be described

as a grassroots SMO[24] as compared to the main stream environmental SMOs involved in the ESA litigation outlined in Chapter 2. This raises the question whether certain types of SMOs are bettered suited to mobilize litigation as a political resource than others.

The second historic narrative used to test the Modified Destabilization Model was that of Everglades' restoration. The Everglades is one of the first large scale ecosystems where implementation of a "restoration" vision has been attempted. Interior Secretary Babbitt credits Everglades' restoration for birthing a new national environmental vision, premised "on the notion that some development had gone too far and should now be reversed" – it is an unprecedented vision in conservation history moving us from preservation to restoration.[25] As one of the first large scale restoration projects in the United States, the Everglades restoration narrative and the use of litigation as a means to stimulate the development and possible implementation of the Everglades restoration is heralded,[26] and is well documented although the impact of the Everglades restoration plan has yet to be fully realized. The analysis of the Everglades' restoration historic narrative (Figure 5.6) suggests a basic soundness in some important elements of the Modified Destabilization model as well as some significant anomalies. Of equal interest is what the Everglades case history tells us about the consequences of failing to leverage important elements of the Modified Destabilization Model for restoration efforts.

---

[24] Grass roots SMO are generally local community organizations focused on environmental issues within their community. Nicholas Greudenberg and Carol Steinsapir, *Not in our Backyards: The Grassroots Environmental Movement,* 27, 28 in *American Environmentalism: The U.S. Environmental Movement, 1970-1990* (Riley E. Dunalap & Angela G. Mertig ed. 1992). The goal of these organizations is to get government to fix the problem and failing in these efforts they will often use litigation or lobbying to achieve their objectives. *Id.*

[25] Bruce Babbitt, *Cities in the Wilderness: A New Vision of Land Use in America,* 17-18 (2005).

[26] *See generally,* Alfred R. Light, *The Myth of Everglades Settlement,* 11 St. Thomas L. Rev. 55 (1998)

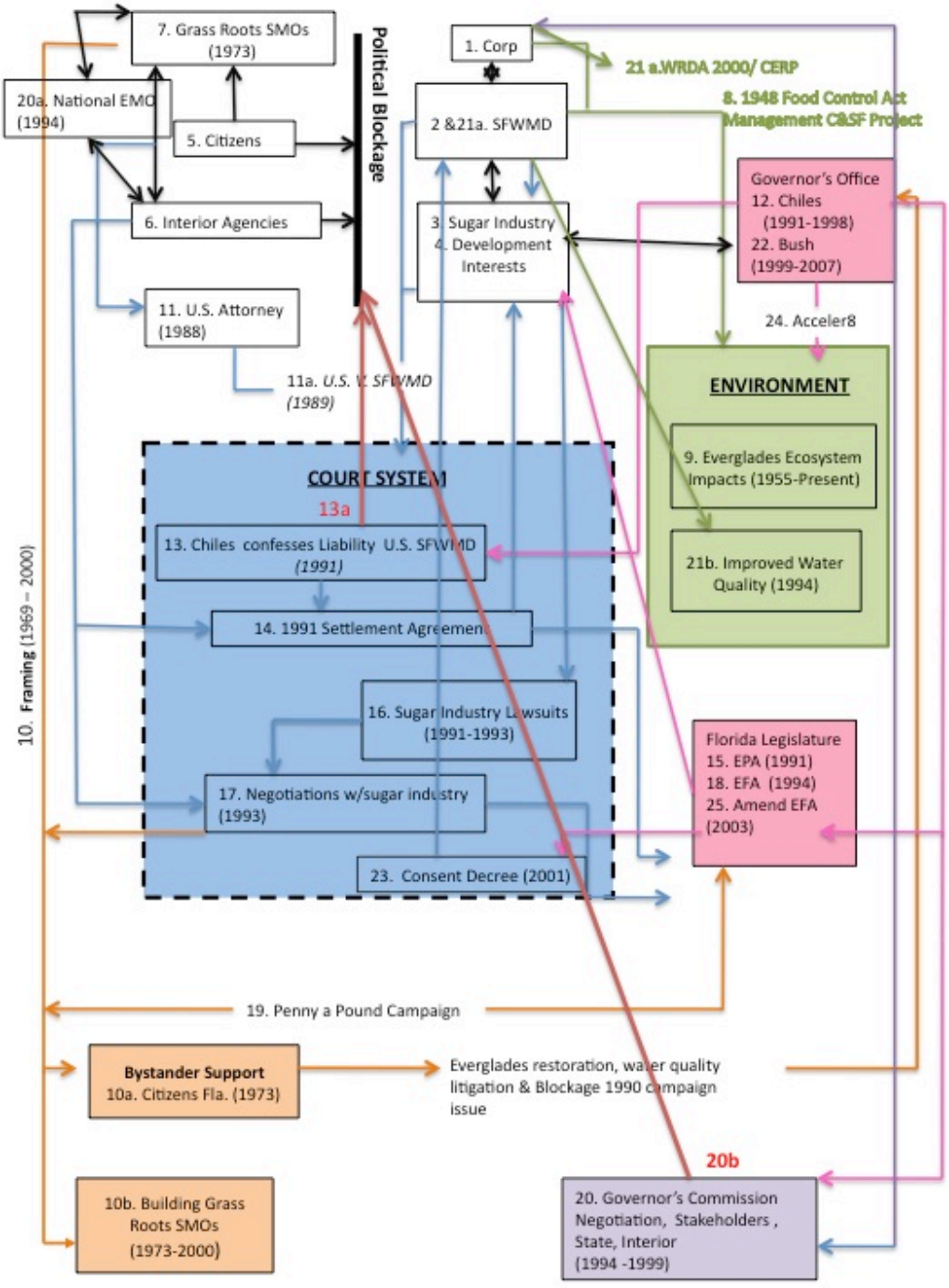

Figure 5.6: Everglades Destabilization Model

An analysis of the Modified Destabilization Model adjusted for the Everglades confirms the finding of the Mono Lake case study that SMOs matter. As was the case at Mono Lake, grassroots mobilization was instrumental in birthing Everglades' restoration efforts. Up until the jetport controversy in the late 1960's the bulk of decisions about water management in south Florida and the Everglades were made by the Corps and the SFWMD to benefit development interests and the sugar industry (Figure 5.6; #s 1 through 4). Neither citizens proclaiming an environmental concern about the operation of the C&SF Project nor Interior, which was responsible for the health of the remaining Everglades' ecosystem, were historically able to break into the symbiotic relationship between the Corps, the SFWMD and its constituencies (Figure 5.6; #s 5 and 6).

The jetport controversy gave rise to active grass roots mobilization efforts among hunting and sports SMOs as well as in environmental community. These efforts culminated in the creation of a conservation frame for the Everglades' ecosystem and the development of a number of new grass roots SMOs including the Friends of the Everglades. These SMOs were the first to actively advocate for preservation and restoration of the Everglades.

As was the case at Mono Lake, framing efforts by Everglades' grass roots SMOs, which included environmental, hunting and sports SMOs (hereinafter SMOs), were picked up by national and local media and formed the foundations of national and statewide bystander support for an Everglades' preservation frame. Grassroots SMOs continued to use framing through 2000 to advance a preservation and later a restoration frame. In this framing process, litigation became an important resource. As was the case

at Mono Lake, the filing of the phosphorus litigation, *U.S. v. SFWMD,* together with Governor's Chiles' confession of liability, the equivalent of a court determination on the merits, were used to legitimize the SMOs' claims of right – a restored Everglades (Figure 5.6; #s10, 10a and 10b). Conversely, the growth of bystander support developed through this framing process was central in convincing Governor Chiles to make settlement of *U.S. V. SFWMD* a core component of his campaign for governor (Figure 5.6; #s10a and 12).

The Everglades' case study also supports the Modified Destabilization Model to the extent that it establishes that ligation can be an important political resource mobilized by SMOs to promote change. Beginning with the Jetport controversy SMOs demonstrated a willingness to mobilize litigation as a political resource to protect the remnants of the Everglades' ecosystem. Threats of litigation were also instrumental in causing the Nixon administration to terminate the Jetport project.

But the Everglades case study also suggests that to advance an experimental remedy an SMO may be better off mobilizing litigation itself rather than depending on federal litigation. Although many acknowledge *U.S. v. SFWMD* played an important role by laying the groundwork for a larger Everglades' restoration project by addressing potentially resolving the water quality (phosphorus) issue and making room to address water quantity, the settlement of the phosphorus issue did not involve an experimental remedy. By letting the federal government take the litigation lead, the SMOs made it possible for Interior and Florida to exclude SMOs from the phosphorus remedy development process. And even though the court has been vigilant in providing ongoing

oversight over the phosphorus remedy implementation, the exclusion of the SMOs from the remedy development process heightened the distrust between SMOs, Interior, the Corps, SFWMD, and the sugar industry. Thus although the negotiated remedy likely decreased the political power of the sugar industry (Figure 5.6; #13a) and had some destabilizing *status quo* impacts by modifying the landscape for the sugar industry the sugar industry retained significant political power which it continued to leverage in the executive and legislative branches during the Jeb Bush era.

The litigation did, however, make room for the larger water quantity "remedy". Just as in the Mono Lake case where the court ordered the SWRCB to prepare an EIR making a space in time for the Mono Lake Committee and the LADWP to develop a remedy, the ongoing implementation of the *U.S. v. SFWMD* Consent Decree in the Everglades made room for the development of a water quantity remedy, a necessary requirement for Everglades' restoration. Unlike Mono Lake where the negotiated remedy was indirectly subject to court oversight to the extent that a resolution for Mono Lake was required to be ratified by the court in a Consent Decree subject to ongoing court oversight in the Everglades there was no procedural link between *U.S. v. SFWMD* and the negotiated water quality remedy (Figure 5.6, #s 17, 12, and 20).

The Everglades negotiated water quality remedy was a product of the executive branch initiated by Governor Chiles when he created the Governor's Commission for Sustainable South Florida (Governor's Commission). In many respects, the Governor's Commission, although birthed in litigation, is representative of some of the new governance and democratic experimentalism decision making models which advocate

flexible, less hierarchical, multi-stakeholder constructs for ecosystem management and restoration.[27] While these models have some similarities to an experimental remedy, they are dependent upon the executive branch and not ongoing court oversight for legitimacy. The Governor's Commission's contribution to the Everglades' water quantity resolution and the voice of the SMOs in that process were dependent upon the legitimacy conferred upon the Governor's Commission by Governor Chiles and the Clinton Administration, particularly Secretary Babbitt and Colonel Salt.

The Everglades water quality remedy – CERP development, adoption, and implementation process illustrates a key weakness of remedies that are not closely linked to and designed in judicial processes. Although the Governor's Commission embodied many of the characteristics of an experimental remedy, in the end it was dependent upon the ongoing support of the Governor and the Clinton Administration for its existences. When Governor Jeb Bush was elected, political support for the Governor's Commission evaporated and with it went the only stakeholder forum with the ability to make the necessary adjustments to the water quantity restoration plan – adjustments that would be necessitated over the twenty-year restoration period. Additionally, Bush's actions signaled to stakeholders a return to old decision making patterns – patterns grounded in political blockage. Thus while the decision making landscape may have shifted as a result of the destabilizing impacts of the phosphorus litigation and the work of the

[27] *See generally,* Annecoos Wiersema, *A Train Without Tracks, Rethinking the Place of Law and Goals in Environmental and Natural Resources Law,* 38 Envt'l L. 1239, 1253-55 (2008)(discussing concepts of New Governance and Democratic Experimentalism in the context of environment and natural resource law).

Governor's Commission, political blockage in Everglades water management remains intact although somewhat eroded.

In the end, both the Everglades and Mono Lake case studies suggest that ongoing oversight by a politically stable institution capable of traversing election cycles might be a key factor in the development and implementation of ecosystem restoration visions. At Mono Lake court oversight played an important role in indirectly keeping the parties at the table and in overseeing the initial implementation of a restoration remedy. In the case of the Everglades the water quality Consent Decree is subject to ongoing court oversight. The longevity of this remedy, insured by the court's oversight, has been responsible for improved water quality across the Everglades. In contrast, there has been little progress on water quantity restoration in the Everglades. While many blame the lack of federal funding for this stalemate, it is clear from the analysis of the Committee on Independent Scientific Review that the lack of an ongoing stakeholder forum is a key stumbling block to Everglades' restoration. This study suggests that the lack of stable oversight mechanism capable of keeping divergent stakeholders at the table over time to resolve important disagreement, such as that provided by the court system may be necessary for ecosystem restoration.

II. FUTURE RESEARCH

This research suggests a number of important future research questions. First, although this study confirms the importance of SMOs in change litigation it also suggests that grassroots SMOs might be the most effective at leveraging change litigation. This research also suggests a bifurcation between grassroots environmental SMOs and

national SMOs that may hinder the implementation of ongoing change strategies. Further research is needed to explore the role that grass roots SMOs and National SMOs together play in change litigation. Second, litigation has been credited for moving California's Delta ecosystem restoration project forward. Exploring this case using the Modified Destabilization Model would further our understanding of the role litigation and law play in ecosystem protection and restoration. Finally, while this research focused on the role of litigation in promoting the social and political change necessary to protect ecosystems, it now appears that some or the learning from this analysis might enlighten our understanding of effective new governance models and the role these models might play in the restoration of hydrologic systems and the ecosystems that are dependent on those hydrologic systems. Further case studies at sites that have not relied upon litigation as a political resource as part of a change strategy might be beneficial. By exploring historic narratives from these sites and comparing them to the historic narratives from sites that have relied on litigation as a political resource to advance ecosystem restoration we might develop a deeper understanding of those mechanisms best able to foster the change necessary to protect and restore large-scale ecosystems. For as Rodgers observed "any successful long-term environmental settlement must address the challenge of successful management of chaotic systems. Any serious intervention in non-linear systems, such as the social and ecological environment of major water bodies, can change the trajectory of events for better or worse"[28] and the better we understand how to develop the flexible

[28] William H. Rodgers, Jr. *Deception, Self-Deception, and Myth: Evaluating Long-Term Environmental Settlements,* U. Rich. L. Rev. 567, 578 (1994-95).

systems necessary to manage complex ecological systems the greater our ability to protect ecosystems and the services they provide to human well being.

BIBLIOGRAPHY

12-Month Finding for a Petition to List the Contiguous U.S. Population of the Canada Lynx, 62 Fed. Reg. 28,653 (May 27, 1997).

12-Month Finding for a Petition to List as Endangered or Threatened the Contiguous United States Population of the Canada Lynx, 59 Fed. Reg. 66,607 (Dec. 17, 1994).

1991 Fla. Laws ch. 91-80.

2007 IUCN Red List of Threatened Species.

Act of May 31, 1901, Ch. 5035, 1901 Fla. Laws 188.

Amendments to Lists of Endangered Fish and Wildlife, 28 Fed. Reg. 14,678 (June 4, 1973).

America the Dry: The Booming Sunbelt is Drinking its Share of Water – and Much, Much, More, Life, July 1981, at 36.

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (4th ed. 2006).

Ando, Amy Whritenour, *Waiting to be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay,* 42 J.L. & Econ. 39 (1999).

Arnold, Craig Anthony (Tony), *Working Out an Environmental Ethic: Anniversary Lessons from Mono Lake,* 4 Wyo. L. Rev. 2004).

Arnold, Craig Anthony (Tony) & Leigh A. Jewell, *Litigation's Bounded Effectiveness and the Real Public Trust Doctrine: The Aftermath of the Mono Lake Case,* 8 Hastings W.-NW J. Envt'l L. & Pol'y 1 (2001).

Babbitt, Bruce, CITIES IN THE WILDERNESS: A NEW VISION OF LAND USE IN AMERICA (2005).

Babcock, Hope M., *The Public Trust Doctrine: What a Tall Tale They Tell,* 61 S.C. L. Rev. 393 (2009).

Bean, Michael J. *Historical Background to the Endangered Species Act, in* ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVE, 11 (Donald C. Baur & William Robert Irvin, ed 2002).

Beier, Paul, Michael R. Vaughn, Michael J. Conroy & Howard Quigley, *Florida Fish and Wildlife Conservation Commission, An Analysis of Scientific Literature Related to the Florida Panther,* (Dec. 2003).

Benford, Robert D. and David A. Snow, *Framing Processes and Social Movements: an Overview and Assessment,* 26 Ann. Rev. of Sociology 611 (2000).

Bernstein, *Resignation Indignation: When Joette Lorian Publicly Quite Friends of the Everglades Some Environmentalist Scoffed,* MIAMI NEW TIMES, Dec. 31, 1998.

BLACKS LAW DICTIONARY, (4th ed. 1951).

Blumm, Michael C. et al., *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794,* 24 Ecology L. Q. 461 (1997).

Blumm, Michael C. & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water,* 37 Ariz. L. Rev. 701 (1995).

Bosselman, Fred P. & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction,* 69 Chi.-Kent L. Rev. 847 (1994).

Boucar, Norman, *Smart as Gods: 'Can we put the Everglades back together again,* 35 Wilderness, 10 (Winter 1991).

Boyd, Delaney P. and Cormack Gates, *A Brief Review of the Status of Plains Bison in North America,* 45 J. Wildlife 15 (Spring 2006).

Boyle, Robert H. and Rose Mary Mechem, *There's Trouble in Paradise,* SPORTS ILLUSTRATED, Feb. 9, 1981 at 82.

Brechen, Gary, *Elegy for a Dying Lake,* CAL. LIVING MAG., Oct. 1, 1978, at 10.

Brooks, Kenneth N., Peter F. Ffolliot, Hans M. Gregersen, and Leonard F. DeBano, HYDROLOGY AND THE MANAGEMENT OF WATERSHEDS, (3rd ed., 2003).

Booth, William, *Critics Say Cleanup Act is Sweet Deal for Sugar,* WASH. POST, May 2, 1994 at A1.

Booth, William, *Everglades Forever?,* WASH. POST, May 2, 1994 at A1

Booth, William, *Sweet Progress in Everglades: Florida Farmers Send Less Phophorus into Marshes,* WASH. POST, Sept. 4, 1996 at A1

Boyle, Robert H. and Rose Mary Mechem, *There's Trouble in Paradise,* SPORTS ILLUSTRATED Feb. 9, 1981 at 82.

Browder, Joan A., Patrick Gleason, and David R. Swift, *Periphyton in te Everglades: Spatial Variation, Environmental Correlates, and Ecological Implications Everglades in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 379 (Steven M. Davis & John C. Ogden ed. 1994).

Brown, Kirk, *Chiles Signs Everglades Act, Trades Barbs with Protesters,* PALM BEACH POST, May 4, 1994 at 1A.

Brown, Kirk, *Court Keeps Penny-a-Pound Sugar Tax Off Ballot,* PALM BEACH POST, May 27, 1994 at 1A.

Brown, Kirk, *Study: Glades Cleanup to Cost 874 Jobs: Farmers Predict a Loss of 15,000,* PALM BEACH POST, July 8, 1992 at 1B.

Brummel, Rachel F., Kristen C. Nelson, Stephanie Grayzeck Souter, Pamela J. Jakes and Daniel R. Williams, *Social learning in a policy-mandated collaboration: community wildfire protection planning in the eastern United States,* 53 J. Envt'l Planning & Mgmt. 681 (2010).

Bruskotter, Jeremy T., Eric Toman, Sherry A. Enzler & Robert H. Schmidt, *Are Gray Wolves Endangered in the Northern Rocky Mountains? A Role for Social Science in Listing Determinations,* 60 Bio Science 941 (2010).

Burney, Louis C., Tom Swihart, and Janet Llewllyn, *Water Supply Planning in Florida* (Oct., 1998).

Bush solid Everglades Plan, TAMPA TRIBUNE, Jan. 29, 2000 at 14.

Caldwell, Lynton K., *The Ecosystem as a Criterion for Public Land Policy,* 10 Natural Resources J. 203 (April 1970).

California State Water Res. Control Board, *Draft Environmental Impact Report for the Review of Mono Basin Water Rights of the City of Los Angeles* (1994).

California State Water Res. Control Board, *Final Environmental Impact Report for the Review of Mono Basin Water Rights of the City of Los Angeles* (1994).

California Dep't of Water Resources, *Mono Lake Background (2004),* http://www.water.ca.gov/saltonsea/historicalcalendar/ac/03.23.2004/MonoLakeValues.pdf.

Campbell, Thomas A., *The Public Trust, What's It Worth?,* 34 Nat. Resources J. 73 (1994).

Carney, James, *Last Gasp for the Everglades,* TIME, Sept. 25, 1989 *available at* http://www.time.com/time/magazine/article/0,9171,958625,00.html

Carter, Luther, THE FLORIDA EXPERIENCE: LAND AND WATER POLICY IN A GROWTH STATE (1974).

Carroll, Lewis, ALICE'S ADVENTURES IN WONDERLAND, in *The Best of Lewis Carroll* (Castle 1983)(1865).

Chayes, Abram, *The Role of the Judge in Public Law Litigation,* 89 Harv. L. Rev. 1281 (1976).

Christaldi, Ronald A., *Sharing the Cup: A Proposal for the Allocation of Florida's Water Resources,* 23 Fla. St. U.L. Rev. 1063 (1996).

Clean Water Act, Pub.L. 92-500, 86 Stat. 816 (1972), codified at 33 U.S.C. §1251 *et seq.*(2006).

Coggins, George Cameron, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973,* 51 N. D. L. Rev. 315 (1975).

Committee on Independent Scientific Review of Everglades Restoration Progress, National Research Council of the National Academy of Sciences, *Progress Towards Restoring the Everglades: The Second Biennial Review – 2008* (2008).

Comprehensive Everglades Restoration Plan Assurance of Project Benefits Agreement (Jan. 9, 2002) *available at* http://www.presidency.ucsb.edu/ws/?pid=73225#axzz1nFVhtQw6 .

Cong. Research Serv. & the Library of Cong., CLEAN WATER ACT: A SUMMARY OF THE LAW (2010).

Conservation: Jetport v. Everglades, TIME MAGAZINE, Aug. 22, 1969 at 42.

Cottriel, Darren K, Comment, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?,* 27 Pac. L. J. 1235 (1996).

Crook, Michael, *Study Rebuts Arguments by Sugar Industry,* MIAMI HERALD, July 8, 1992 at 6B.

Davis, Jack E., *'Conservation is now A DEAD WORD': Marjory Stoneman Douglas and the Transformation of American Environmentalism,* 8 Envt'l History 53 (Jan. 2003).

Davis, Mike, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES (1992).

Davis, Steven M., *Phosphorus Inputs and Vegetation Sensitivity in the Everglades in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 357 (Steven M. Davis & John C. Ogden ed. 1994).

Davis, Steven M., Lance H. Gunderson, Winifred A. Park, John R. Richardson and Jennifer E. Mattson, *Landscape Dimensions, Composition, and Function in a Changing Everglades' Ecosystem in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 419 (Steven M. Davis & John C. Ogden ed. 1994).

Davis, Steven M. and John C. Ogden, *Toward Ecosystem Restoration in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 779 (Steven M. Davis & John C. Ogden ed. 1994).

Determination of Threatened Status for the Contiguous U.S. Distinct Population Segment of the Canada Lynx and Related Rule, 65 Fed. Reg. 16,052 (March 24, 2000).

DeTocquieville, Alexis, DEMOCRACY IN AMERICA (Alfred A. Knoff 1994)(1835).

Dodge, Robert, *An experiment in the Everglades; Alliance between competing interests could redefine rules of political debates about environment,* THE DALLAS MORNING NEWS, Oct. 6, 1996 at 1J.

Donelaw, Richard T., *The Florida Wastewater Regulation Program: NPDES and DEP available at* http://ufdc.ufl.edu/WL00004562/00001

Doremus, Holly, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy,* 75 Wash. U. L. Q. 1029 (1997).

Douglas, Marjory Stoneman, THE EVERGLADES: RIVER OF GRASS (50th Ann. Ed. 1997)(1947).

Douglas, Marjory Stoneman, and John Rothchild, VOICE OF THE RIVER (1987).

Doyle, Mary, *Conclusion: Assessing Ecosystem Restoration Projects* in LARGE-SCALE ECOSYSTEM RESTORATION: FIVE CASE STUDIES FROM THE UNITED STATES 291 (Mary Doyle and Cynthia Drew ed 2008).

Doyle, Mary, *Implementing Everglades Restoration,* 17 J. Land Use & Envt'l L. 59 (2001).

Doyle, Mary, *Introduction: The Watershed-Wide, Science-Based Approach to Ecosystem Restoration, in* LARGE-SCALE ECOSYSTEM RESTORATION: FIVE CASE STUDIES FROM THE UNITED STATES, ix (Mary Doyle & Cynthia A. Drew eds., 2008).

Doyle, Mary and Donald E. Jodery, *Everglades Restoration: Forging New law in Allocating Water for the Environment,* 8 Envt'l Lawyer 255 (2001-2002).

DuBail, Jean, *Water District Oks 'glades Settlement, Objections to Anti-pollution Plan Rejected,* SUN SENTINEL, July 27, 1991 *available at* http://articles.sun-sentinel.com/1991-07-27/news/9101280049_1_everglades-pollution-lawsuit-board-members-everglades-national-park

Duever, J.J., J.F. Meeder, L.C. Meeder & J.M. McCollom, *The Climate of South Florida and Its Role in Sharing the Everglades Ecosystem, in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION, 225 (Steven M. Davis and John C. Ogden ed. 1994).

Dunning, Harrison C., *The Public Trust Doctrine in Natural Resources Law and Management: A Symposium,* 14 U.C. Davis L. Rev. 181 (1980).

Dwyer, John P., *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation,* 60 L & Contemp. Problems 203 (1997).

East, Jon, *Big Sugar: Canegrowing is a big business, but it's no sweet deal for America,* ST. PETERSBURG TIMES, Oct. 1, 1989 at 1D.

Easter-Pilcher, Andrea, *Implementing the Endangered Species Act: Assessing the Listing of Species as Endangered or Threatened,* 46 BioScience 355 (May 1996).

Ecosystem Protection Workgroup, U.S. Envt'l Prot. Agency, *Draft, Toward a Place-Driven Approach: The Edgewater Consensus on an EPA Strategy for Ecosystem Protection* (1994).

Editorial Desk, *At Last: A Solution for Mono Lake,* L.A. TIMES, Aug 23, 1989, §II, at 6.

Editorial Desk, *Big Bad Sugar,* ST, PETERSBURG TIMES, Oct. 1, 1989 at 2D.

Editorial Desk, *Everglades' betrayal,* ST. PETERSBURG TIMES, May 23, 2003 at 18A.

Editorial Desk, *For Farmers a Choice,* PALM BEACH POST, July 18, 1991 at 19A

Editorial Desk, *Halt the Decline at Mono Lake,* L.A. TIMES, June 17, 1989, § II at 8.

Editorial Desk, *DWP's Terrible Case of Mono,* L.A. TIMES, Sept. 24 1994, at B7.

Editorial Desk, *Finally Make it Official: Everglades Comes First,* PALM BEACH POST, May 20, 2008 at A10.

Editorial Desk, *Melting Snows, Melting Hearts,* L.A. TIMES, April 30, 1985, § II, at 4.

Editorial Desk, *Mono Issue Can be Negotiated,* L.A. TIMES, Aug. 26, 1986, § II, at 4.

Editorial Desk, *Mono Lake: Coming Back,* L.A. TIMES, May 29, 1983, § IV, at 4.

Editorial Desk, *Score One for the Glades,* ST. PETERSBURG TIMES, July 14, 1991 at 2D.

Editorial Desk, *Sugar Spurns the Everglades*, N. Y. TIMES, April 1, 1989

Editorial Desk, *Three Wise Everglades amendments,* TAMPA TRIBUTNE, Oct. 18, 1996 at 16.

Editorial Desk, *Water and Power in Our Future,* L.A. TIMES, Feb, 11, 1980 at D6.

Editorial Desk, *Water and the Public Trust,* L.A. TIMES, Nov. 10, 1983, § II, at 6.

Editorial Desk, *Water Revolution,* L.A. TIMES, Feb. 20, 1983, § IV, at 4.

Edwards, Bob and John D. McCarthy, *Resources and Social Movement Mobilization,* in *The Blackwell Companion to Social Movements* 116 (David A Snow et al. eds. 2004).

Eisenhardt, Kathleen M. and Melissa A. Graebner, *Theory Building from Cases: Opportunities and Challenges,* 50 Academy of Mgmt. J. 25 (2007).

Eitel, Michael R. *The Farm and Ranch Lands Protection Program: An Analysis of the Federal Policy on United States Farmland Loss,* 8 Drake J. of Ag. L. 591 (2003).

Endangered Species Act of 1973, P.L. No. 93-205, 87 Stat. 884 (1973)(codified at 16 U.S.C. §§1531-1544 (2000).

Endangered and Threatened Wildlife Plants: 90-Day Finding on a Petition to List the Yellowstone National Park Bison Herd as Endangered, 72 Fed. Reg. 45,717 (Aug. 15, 2007).

Endangered and Threatened Wildlife and Plants; Proposed Threatened Status for the Pacific Coast Population of the Western Snowy Plover, 57 Fed. Reg. 1443 (Jan. 14, 1992).

Endangerd Species Act of 1973, P.L. No. 93-205, 87 State 884 (codified in 16 U.S.C. §§ 1531-1544 (2000)).

Enzler, Sherry A., *How Law Mattered to the Mono Lake Ecosystem,* 35 Wm. & Mary Envt'l L. & Policy J. 413 (2011).

Enzler, Sherry A. and Jeremy T. Bruskotter, *Contested Definition of Endangered Species: The controversy regarding how to interpret the phrase "a significant portion of a species range",* 27 Va. Envt'l. L. J. 1 (2009).

Epp, Charles R., *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (1998).

Establishment of a Nonessential Experimental population of Mexican Gray Wolf in Arizona and New Mexico, 63 Fed. Reg. 1752 (Jan. 12, 1998).

Etsy, Daniel C. and Marian R. Chertow, *Thinking Ecologically: An Introduction to Thinking Ecologically* in *The Next Generation of Environmental Policy* (Daniel C. Esty & Marian R. Chertow, ed. 1997).

Everglades Coalition, EVERGLADES IN THE 21ST CENTRUY: THE WATER MANAGEMENT FUTURE (2nd printing, 1993).

Everglades Drainage District, *Tentative Report of Flood Damage* (1947)

Everglades National Park Protection and Expansion Act of (1989), P. Law 101-229 codified at 16 U.S.C. § 410r-8.

Farb, Peter, *Disaster Threatens the Everglades,* AUDUBON, September-October 1965 at 302.

Farm Bill Feeds Greed, LOS ANGELES TIMES March 21, 2008 available at http://articles.latimes.com/2008/mar/21/opinion/ed-hunger21

Fiery Ordeal of the Everglades: A parched Florida wilderness pays the penalty for years of drainage, LIFE MAGAZINE, April 30, 1971 at 42.

Finch, L. Boyd, *The Florida Swamp that Swallowed Your Money,* HARPERS Feb. 1959.

Final Rule to Extend Endangered Species Status to the Jaguar in the United States, 62 Fed. Reg. 39,147 (July 16, 1997).

Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Coterminous United States; Establishment of Two Special Regulations fro Threatened Gray Wolves, 68 Fed. Reg. 15,804 (April 1, 2003).

Flood Control Act of 1948, Pub. L. No. 80-858, (62 Stat. 1175)(June 30, 1948).

Folke, C., T. Hahn, P. Olsson and J. Norberg, *Adaptive Governance of Social-Ecological Systems,* 30 Ann. Rev. of Env. Resources 441 (2008).

Fraser, K. Michael, *Huge Environment Project Aims to Save Florida's Everglades,* CHRISTIAN SCIENCE MONITOR, July 30, 1991 at 1.

Freeman, Jody and Daniel A. Farber, *Modular Environmental Regulation,* 54 Duke L. J. 795 (2005).

Fretz, Carolyn and Mary Ellen Klas, *Tax Proposal Could Stall Everglades Talks,* PALM BEACH POST, Sept. 30, 1993 at 1A.

Freudenberg, Nicholas and Carol Steinsapir, *Not in our Backyards: The Grassroots Environmental Movement,* 27 in AMERICAN ENVIRONMENTALISM: THE U.S. ENVIRONMENTAL MOVEMENT, 1970-1990 (Riley E. Dunlap & Angela G. Mertig ed. 1992).

Fumero, John J., *Florida Water Law and Environmental Water Supply for Everglades Restoration,* 18 J. Land Use & Envt'l L. 379 (2003).

Fumero, John and Keith W. Rizzardi, *The Everglades Ecosystem: From Engineering to Litigation ton Consensus-Based Restoration,* 13 St. Thomas L. Rev. 667 (2001).

Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change,* 9 Law & Soc'y Rev. 95 (1974).

Gamson, William A., *Bystanders, Public Opinion, and the Media, in The Blackwell Companion to Social Movements* 242 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004).

General Accounting Office, Comptroller General, *Report to Congress: Endangered Species – A Controversial Issue Needing Resolution*, Doc. B118370 (1978)(1978 GAO Report).

General Accounting Office, *Yellowstone Bison – Interagency Plan and Agencies' Management Need to Better Address Bison-Cattle Brucellosis Controversy,* GAO 08.291 (2008).

Geoffroy, Kate and Thomas Doyle, *Listing Distinct Population Segments of Endangered Species: Has it Cone too Far?,* A.B.A. Nat. Res. & Env't Fall 2001 at 82.

Georgeson, Duane L., Letter to the Editor, *Water Shortage,* L.A. TIMES, Aug. 7, 1987, § II at 4.

Gentile, J.H., M.A. Harwell, W. Cropper Jrl, C.C. Harwell, D. DeAngelis, S. Davis, J.C. Oden, and D. Litman, *Ecological conceptual models: a framework and case study on ecosystem management for South Florida Sustainability,* 274 The Sci. of the Total Env. 231 (2001).

Gibbs, Lisa, *Federal Suit to Protect Everglades Bogs Down Florida Blames its Hired Guns from DC Office of Skadden, Arps,* LEGAL TIMES, July 8, 1991 at 6.

Gilbert, Bill, *Is this a Holy Place:,* Sports Illustrated, May 30, 1983.

Gilliam, Harold, *The Destruction of Mono Lake is on Schedule,* S.F. Exam., Feb/ 11, 1979, at 41.

Gleason, Patrick J. and Peter Stone, *Age, Origin, and Landscape Evolution of the Everglades Peatland in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION, 149 (Steven M. Davis & John C. Ogden ed. 1994).

Glicksman, Robert & Christopher H. Schroeder, *EPA and the Court: Twenty Years of Law and Politics,* 54 L. & Contemp. Problems 249 (1991).

Godfry, Mathew C., RIVER OF INTEREST: WATER MANAGEMENT IN SOUTH FLORIDA AND THE EVERGLADES, 1948-2000 (2006) *available at* http://www.evergladesplan.org/about/river_interest_history.aspx

Governor's Commission for Sustainable South Florida, *A Conceptual Plan for the C&SF Project Restudy* (Aug. 28, 1996).

Governor's Commission for Sustainable South Florida, *Initial Report* (Oct. 5, 1995).

Griffin, Larry J., *Narrative, Event-Structure Analysis, and Causal Interpretation in Historical Sociology,* 98 Am. J. Soc. 1094 (1993).

Gross, Liza, *Why Not the Best? How Science Failed the Florida Panther,* 3 PloS Biology 1525 (Sept. 2005)

Grossman, Joel B., Stewart Macaulay and Herbert M. Kritzer, *Do the "Haves" still Come Out Ahead?,* 33 Law and Soc'y Rev. 803 (1999).

Greudenberg, Nicholas and Carol Steinsapir, *Not in our Backyards: The Grassroots Environmental Movement in American Environmentalism: The U.S. Environmental Movement, 1970-1990* at 27 (Riley E. Dunalap & Angela G. Mertig ed. 1992).

Grumbine, R. Edward, *What is Ecosystem Management?,* 8 Conservation Biology 27 (1994).

Grunwald, Michael, *Between a Rock and a Hard Place: Wetlands Shrink Before Growing Demands of Industry, Consumers,* WASH. POST June 24, 2002 at A-1.

Grunwald, Michael, *Growing Pains in Southwest Fla: More Development Pushes Everglades to the Edge,* WASH. POST June 25, 2002 at A-1.

Grunwald, Michael, *How Enron Sought to Tap the Everglades,* WASH. POST, Feb. 8, 2002 at A12.

Grunwald, Michael, *In Everglades, a Chance for Redemption: Can Agency Reverse the Damage it Has Done?,* WASH. POST, Sept. 14, 2000 at A1.

Grunwald, Michael, *Journalist Michael Grunwald on the hubris of the Army Corps,* GRIST Mar. 19, 2008 *available at* http://grist.org/cities/grunwald1/

Grunwald, Michael, *A Rescue Plan, Bold and Uncertain; Scientists, Federal Officials Question Projects Benefits for Ailing Ecosystem,* WASH. POST June 23, 2002, at A-1.

Grunwald, Michael, *The Swamp: The Everglades, Florida, and the Politics of Paradise* (2006).

Grunwald, Michael, *When in Doubt Bale Big Sugar: Once the Everglades: Chief Ecological Villain, Industry has Plenty of Company,* WASH. POST June 25, 2002 at A-9.

Guide to the Endangered Species Law, in THE ENDANGERED SPECIES DESK BOOK 5 (Lawrence R. Liebesman & Rafe Peters eds., 2003).

Gunderson, Lance H., *Vegetation of the Everglades: Determinants of Community Composition in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 323 (Steven M. Davis & John C. Ogden ed. 1994).

Gunderson, Lance H. and Stephan S. Light, *Adaptive Management and Adaptive Governance in the Everglades Ecosystem,* 39 Policy Sciences 323 (Dec. 2006).

Gunderson, Lance H. and J.R. Snyder, *Fire Patterns in the Southern Everglades in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 291 (Steven M. Davis & John C. Ogden ed. 1994).

Gunningham Neil, and Darren Sinclair, *Policy Instrument Choice and Diffuse Source Pollution,* 17 J. Envt'l L. 51 (2005).

Guth, Joseph H., *Cumulative Impacts: Death Knell for Cost-Benefit Analysis in Environmental Decisions,* 11 Barry L. Rev. 23 (2008).

Hanson, Andrew C. & David C. Bender, *Irrigation Return Flow or Discrete Discharge: Why Water Pollution from Cranberry Bogs Should Fall within the Clean Water Acts' NPDES Program,* 37 Envt'l L. 1 (2007).

Harris, Beth, *Representing homeless families: repeat player implementation strategies,* 33 Law & Soc'y Rev. 911 (1999).

Hart, John, STORM OVER MONO LAKE: THE MONO LAKE BATTLE AND THE CALIFORNIA WATER FUTURE, (1996).

Heinz Center for Science, Economics, and the Environment, *The State of the Nation's Ecosystems: Measuring the Lands, Waters, and Living Resources of the United States* (2002)

History of the Big Cypress, available at http://www.evergladesonline.com/history-big-cypress.htm

History of the Mono Lake Committee, Mono Lake Comm. http://www.monolake.org/mlc/history

Hoffman, Abraham, *Vision or Villainy: Origins of the Owens Valley – Los Angeles Water Controversy* (1981).

Holling, C.S., *What Barriers? What Bridges? in* BARRIERS & BRIDGES TO THE RENEWAL OF ECOSYSTEMS AND INSTITUTIONS 6 (Lance H. Gunderson, C.S. Holling, and Stephen S. Light ed., 1995).

Hollingsworth, Jan, *Sugar gee goes fighting to bitter end,* TAMPA TRIBUNE, Nov. 3, 1996 at Metro 1.

House Rep. No. 93-412 (1973).

Howard, Wilie, *Johnny Jones Remembered as Stubborn Advocate for Environment,* Palm Beach Post, July 12, 2010 *available at* http://www.palmbeachpost.com/news/johnny-jones-remembered-as-stubborn-advocate-for-the-798479.html

Huitema, D. and S. Meijerink, *Realizing Water Transitions: The role of policy entrepreneurs in water policy change,* 15 Ecology and Society 26 *available at* http://www.ecologyandsociety.org/vol15/iss2/art26/

Hurst, James Willard, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956).

Innes, Judith E. and David E. Booher, *Reframing Public Participation: Strategies for the 21st Centruy,* 5 Plan. Theory & Prac. 419 (2004).

Jehl, Jr. Joseph R., *Mono Lake: A Vital Way Station for the Wilson's Phalarope,* 160 Nat'l Geographic 520 (1981)

Jones, Robert M., *Finding Common Ground – The Everglades Mediation: Reframing the Politcs of Consensus,* (2002) *unpublished manuscript available at* *http://*consensus.fsu.edu/staffarticles/**Everglades**_Med.pdf .

Jones & Stoke Assocs., *Mono Basin Environmental Impact Report,* (1993).

Johnson, Ralph W., *Public Trust Protection for Stream Flows and Lake Levels,* 14 U.C. Davis L. Rev. 233 (1980).

Kahrl, William L., WATER AND POWER: THE CONFLICT OVER LOS ANGELES' WATER SUPPLY IN THE OWENS VALLEY (1982).

Kane, Gary, *Everglades Lawsuit Cheered; Conservationists Applauded while State Asks: Why Us?,* PALM BEACH POST, Oct. 13, 1998.

Karkkainen, Bradley C., *Environmental Lawyering in the Age of Collaboration,* Wis. L. Rev. 556 (2002).

Karkkainen, Bradley C., *Getting to "Lets' Talk:" Legal and Natural Destabilizations and the Future of Regional Collaboration,* 8 Nev. L. J. 811 (2007).

Kattelman, Richard, Sierra Nev. Aquatic Research Lab, *Historic Floods in the Eastern Sierra Nevada,* in *History of Water: Eastern Sierra Nevada, Owens Valley, Shite-Inyo Mountains* (1992).

Katcz, Nancy, et al., *Network Theory and Small Groups,* 23 Small Group Res. 307 (June 2004).

Kearney, Joseph D. and Thomas W. Merill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central,* 71 U. Chi. L. Rev 799 (2004).

Keiter, Robert B., *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands,* 25 Land & Water L. Rev. 43 (1990).

Kenworthy, Tom, *Everglades Revival Plan Unveiled; $465 Million Government-Industry Pact Arouses Controversy,* WASH. POST, July 14, 1993 at §1 A1.

King, Robert P., *20 year Delay Sought for Everglades Cleanup Law,* PALM BEACH POST, April 3, 2003 at 1B.

King, Robert P., *Big Sugar Gets Good Report,* PALM BEACH POST, July 11, 1997 at 1B.

King, Robert P., *Everglades Plan Oversight Unlikely to End; U.S. Cool to Governor's Bid to End Judges' Role,* PALM BEACH POST, Mar. 31, 2006 at 1C.

King, Robert P., *Everglades Restoration Rules Blasted,* PALM BEACH POST, Nov. 5, 2003 at 11A.

Kingsbury, Benedict, *Representation in Human Rights Litigation,* Carnegie Council (April 6, 2000), http://www.carnegiecouncil.org/resources/publications/dialogue/2_02/articles/611.html

Kiser, Edgar and Michael Hechtner, *The Role of General Theory in Comparative Sociology,* 97 Am. J. of Soc. 1 (1991).

Klass, Alexandra B., *Modern Public Trust Principles: Recognizing Rights and Integrating Standards,* 82 Notre Dame L. Rev. 699 (2006).

Klein, Christine A., Mary Jane Angelo and Richard Hamann, *Modernizing Water Law: The Example of Florida,* 61 Fla. L. Rev. 403 (2009).

Klinkenberg, Jeff, *A Great Day for the Everglades,* ST. PETERSBURG TIMES, Feb. 28, 1993 at 4D.

Klinkenberg, Jeff, *Showdown in the Everglades,* ST. PETERSBURG TIMES, Sept. 27, 1992 at 1F.

Klinkenberg, Jeff, *U.S. Sugar Deal Fogs Activists Lawsuit Against Corps over Everglades Reservoir,* PALM BEACH POST, July 18, 2008 at 3B.

Koehler, Cynthia L., *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy,* 22 Ecology L. Q. 541 (1995).

Kohlmeir, Louis, M. Jr., *The Regulators and the Regulated in* THE REGULATORS: WATCHDOG AGENCIES AND THE PUBLIC INTEREST, 69 (1969).

Laitos, Jan. G. NATURAL RESOURCE LAW (2002).

Levinson, Daryl J., *Empire-Building Government in Constitutional Law,* 118 Harv. L. Rev. 915 (2005).

Levinson, Mark and Peter Kate, *Not so Sweet in Sugarland,* NEWSWEEK, Oct. 14, 1991 at 49.

Lieben, Ivans J., *Political Influences on USFWS Listing Decisions Under the ESA: Time to Rethink Priorities,* 27 Envt'l L. 1323 (1997).

Light, Alfred R., *Beyond the Myth of Everglades Settlement: The Need for Sustainability Jurisprudence,* 44 Tulsa L. Rev. 253 (2008).

Light, Alfred R., *The Myth of Everglades Settlement,* 11 St. Thomas L. Rev. 55 (1998).

Light, Alfred R., *Spark Plugs of Polity Implementation: Intergovernmental Relations and Public Participation in Florida's Acceler8 Initiative to Speed Everglades Restoration,* 30 Vt. L. Rev. 939 (2006).

Light, Stephen S. and J. Walter Dineen, *Water Control in the Everglades: A Historical Perspective in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 47 (Steven M. Davis & John C. Ogden e 1994).

Light, Stephen S., Lance H. Gunderson and C.S. Holling, *The Everglades: Evolution of Management in a Turbulent Ecosystem* in BARRIERS & BRIDGES: TO THE RENEWAL OF ECOSYSTEMS AND INSTITUTIONS at 106 (Lance H. Gunderson, C.S. Holling & Stephen S. Light eds. 1995).

Lipman, Larry, *Administration Everglades Plan Sets Stage for Fight in Congress,* PALM BEACH POST, April 12, 2000 at 8A.

Lists of Endangered and Threatened Fauna, 40 Fed. Reg. 17,590 (April 21, 1975).

Loftus, William F. and Anne-Marie Eklund, *Long-Term Dynamics of and Everglades Small Fish Assemblage Everglades in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 461 (Steven M. Davis & John C. Ogden ed. 1994).

MacDonald, John, *Last Chance to Save the Everglades,* 67 Life 58 (Sept. 5, 1969).

MacKillop, Fionn, *The Influence of the Los Angeles "Oligarchy" on the Governance of the Municipal Water Department, 1902-1930: A Business Like Any Other or a Public Service,* 2 Bus. & Econ. Hist. On-Line 1 (2004) http://www.hnet.org/~business/bhcweb/publications/BEHonline/2004/MacKillop.pdf

Mahoney, James, *Revisiting General Theory in Historical Sociology,* 83 Social Forces 459 (2004).

Malinoski, Robert, *The Phosphorus Standard and Everglades Restoration: Will this Standard Lower Phosphorus in the Everglades or is the Proposed Standard a Hollow Promise?,* 12 U Miami Bu. L. Rev. 35 (2004).

Maltby, Edward and Patrick J. Dugan, *Wetland Ecosystem Protection, Management, and Restoration: An International Perspective, in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION (John C. Ogden and Steven M. Davis ed. 1994).

Maloney, Frank E., Richard C. Ausness and Scott Morris, A MODEL WATER CODE WITH COMMENTARY (1972).

Maloney, Frank E, Sheldon J. Plager, & Fletcher M. Baldwin, Jr., WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE (1968).

Marshall, Arthur R., FOR THE FUTURE OF FLORIDA REPAIR THE EVERGLADES (3rd ed. 1982).

Matell, Nora, *The Student Revolution that Saved Mono lake: Los Angeles' Diversion of Mono Basin Water* in 1941 THREATENED THIS 700,000 YEAR-OLD-LAKE, Cal. Historian, http://www.californiahistorian.com/articles/mono-lake.html

Mazzotti, Frank J., G. Ronnie Best, Laura A. Brandt, Michael S. Cherkis, Brian M. Jeffery and Kenneth G. Rice, *Alligators and Crocodiles as Indicators for Restoration of Everglades Ecosystems,* 9 Ecological Indicators 137 (Supp. 1, Nov. 2009).

Mazzotti, Frank J. and Laura A. Brandt, *Ecology of the American Alligator in a Seasonally Fluctuating Environment in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 485 (Steven M. Davis & John C. Ogden ed. 1994).

Mazzotti, Frank J., Kenneth Rice, Laura A. Brandt, Clarence Abercrombie, Christa Zwig, Michael Cherkiss & Mark Perry, *Role if the American Alligator in Measuring Restoration Success in the Florida Everglades,* U.S. Geological Survey South Florida Information Access, http://sofia.usgs.gov/geer/2003/posters/gator_restore/

McCann, Michael, *Law and Social Movements: Contemporary Perspectives,* 2 Ann. Rev. Soc. Sci. 17 (2006) (McCann 2006)).

McCann, Michael, *Law and Social Movements* in THE BLACKWELL COMPANION TO LAW AND SOCIETY 506 (2004).

McCann, Michael, *How the Supreme Court Matters in American Politics: New Institutionalist Perspectives, in* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 68 (Cornell Clayton & Howard Gillman eds., 1999).

McCann, Michael, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

McCarthy, Jan and Alice Shorett, NEGOTIATING SETTLEMENTS: A GUIDE TO ENVIRONMENTAL MEDIATION (Ameircan Arbitration Ass'n. ed., 1984).

McClure, Robert, *Interior Chief Vows to Help Everglades,* SUN SENTINEL, Feb. 23, 1993 *available at* http://articles.sun-sentinel.com/1993-02-23/news/9301110300_1_everglades-problems-natural-water-flows-everglades-coalition .

Mclure, Robert and William Gibbson, *Miccusikees, Others Rip Into Cleanup Pact,* SUN SENTINEL, July 13, 1993, *available at* http://articles.sun-sentinel.com/1993-07-13/news/9301230811_1_miccosukees-polluted-water-buddy-mackay .

McGovern, George, *Introduction* in DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1970).

McLachlin, Mary, *Everglades Suit Secretly Settled After 2 ½ Years,* PALM BEACH POST, July 11, 1991, at 1A.

McLachlin, Mary, *Everglades Suit Secrecy Must Co, Sugar Lobby Says,* PALM BEACH POST, March 29, 1991, at 1B.

McLachlin, Mary, *Chiles Tells WMD to Skip Closed-Door Deals with Farmers,* PALM BEACH POST, Oct. 17, 1990, at 10A.

McLachlin, Mary, *Cleanup Proposal Blasted: U.S. Agencies Criticize Everglades SWIM Plan,* PALM BEACH POST, March 1, 1990 at 1A.

Mech, L. David, *The Wolf: The Ecology and Behavior of an Endangered Species* (9th ed. 1994).

Mech, L. David, Layne G. Adams, Thomas J. Meier, John W. Burch, & Bryce W. Dale, *The Wolves of Denali* (1998).

Medema, W., B.S. McIntosh, and P.J. Jeffery, *From Premise to Practice: A Critical Assessment of Integrated Water Resources Management and Adaptive Management Approaches to the Water Sector,* 13 Ecology & Soc'y 29 (2008).

Mehani, Zahara and Jennifer Kuzma, *The "Revolving Door" between Regulatory Agencies and Industry: A Problem that Requires Re-conceptualizing Objectivity,* 24 J. Ag. & Envt'l Ethics 575 (2011).

Memorandum from Dep't Interior, Office of the Solicitor to Dir. Of U.S. Fish and Wildlife Serv., *The Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range",* M-37013 (March 16, 2007).

Memorandum from Joe R. Miller, Colonel, Corps of Engineers, Commanding, Jacksonville District Corps of Engineers for Commander, South Atlantic Division, Corps of Engineers, U.S. Department of the Army (April 1, 1999).

Mezirow, John, *Understanding transformational theory,* 44 Adult Ed. Quarterly 222 (1994).

Miceli, Thomas J., *Legal Change: Selective Litigation, Judicial Bias, and Precedent,* 38 J. Legal Studies 157 (2009).

Millennium Ecosystem Assessment Bd*., Ecosystems and Human Well-Being: Wetlands and Water: Synthesis,* (2005)(Millennium Ecosystem Assessment Bd., *Synthesis*).

Millennium Ecosystem Assessment Bd*., Living Beyond Our Means: Natural Assets and Human Well-Being* (2005).

Mills, C. Wright, THE POWER ELITE (1956).

Minnesota Pollution Control Agency, *Final Minnesota Statewide Mercury Total Maximum Daily Load* (March 2007).

Minnesota Pollution Control Agency, *Impaired Waters Face Sheet 4-01: Draft Statewide Mercury TMDL Study* (2006).

Mono Lake Basin, Decision 1631, Cal. State Water Resources Control Board, Sept. 28, 1984).

Mono Lake and Los Angeles Aqueduct, Hydrology Futures, http://www.hydrologyfutures.com/LAA_Map_1.gif (last visited Dec. 28, 2011).

Mono Lake Watershed, Mono Lake Comm., http://www.monolake.org/newsletter/images/99spmap.gif

Moreau, Ron, *Everglades Forever?,* NEWSEEK, April 7, 1986 at 72

Mulholland, Catherine, WILLIAM MULHOLLAND AND THE RISE OF LOS ANGELES (2000).

National Park Service, *Joint Report to Congress: Everglades Water Quality, Resource Evaluation Rpt.,* SFNRC Tech Series 2005:1 (2005).

Nelson, D.R., W.N. Adge, and K. Brown, *Adaptation to Environmental Change: Contributions of a Resilience Framework,* 32 Annu. Rev. of Envt. & Resources 395 (2007).

Neuman, Janet C., *Beneficial Use, Waste and Forfeiture, The Inefficient Search for Efficiency in Western Water Use,* 28 Envtl. L. 919 (1998).

Nisbet, Matthew, *Communicating Climate Change: Why Frames Matter for Public Engagement,* ENVT'L MAG., Mar.-Apr. 2009 at 12.

Nisbet, Matthew C. & Dietram A. Scheufele, *What's Next for Science Communication: Promising Directions and Lingering Distractions,* 96 Am. J. of Botany 1767 (2009).

Note, *The Sugar Act of 1937,* 47 Yale L.J. 980(1938).

Notice of Availability of Draft of Third Revision of the Florida Panther Recovery Plan, 71 Fed. Reg. 5066 (Jan. 31, 2006).

Notice of Remanded Determination of Status for Contiguous United States Distinct Population Segment for the Canada Lynx, 68 Fed. Reg. 40,076 (July 3, 2003).

Notice of Not Substantial Petition Findings on the North Cascades Lynx, 58 Fed. Reg. 36,924 (July 9, 1993).

Ogden, John C., *A Comparison of Wading Bird Nesting Colony Dynamics (1931-1946 and 1974 – 1989) as an Indication of Ecosystem Conditions in the Southern*

Everglades in EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 533 (Steven M. Davis & John C. Ogden ed. 1994).

Olinger, David, *Everglades ads have it all – except the Everglades,* ST. PETERSBURG TIMES, Oct. 21, 1996 at 1B.

Olinger, David, *Sugar growers beat penny-a-pound,* ST. PETERSBURG TIMES, Nov. 6, 1996 at 1A.

Olsson, Per, Lance H. Gunderson, Steven RCarpenter, Paul Teyes, Louis Lebel, Carl Folke and C.S. Holling *Shooting the Rapids: Navigating Transitions to Adaptive Governance of Social-Ecological Systems,* 11 Ecology & Society (2006) *available at* http://www.ecologyandsociety.org/vol11/iss1/art18/ .

Paris, Michael, *The Politics of Rights: Then and Now,* 31 Law & Soc. Inq. 999 (2006).

Percival, Robert V., *Checks without Balance: Executive Office Oversight of the Environmental Protection Agency,* 54 Law & Contemp. Probs. 127 (1991)

Petts, Judith, *Learning about learning: Lessons from public engagement and deliberation of urban river restoration,* 173 Geogrphical J. 300 (2007).

Pittman, Craig, *Judge intervenes on Everglades,* ST. PETERSBURG TIMES, April 24, 2003 at 1A.

Pittman, Craig, *Judge holds fast on Glades Plan,* ST. PETERSBURG TIMES, May 3, 2003 at 1B.

Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58612 (Nov. 1991).

Policy Regarding the Recognition of Distinct Population Segments under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996).

Powell, David L., *Growth Management: Florida's Past as Prologue for the Future,* 28 Fla. St. U. L. Rev. 519 (2001).

Proposed Establishment of an Experimental Population of Gray Wolf in Yellowstone National Park in Wyoming, Idaho and Montana, 59 Fed. Reg. 42,118 (Aug. 16, 1994).

Proposal to List the Contiguous United States Distinct Population Segment of the Canada Lynx, 63 Fed. Reg. 36, 994 (Proposed July 8, 1998).

Proposed Rule Designating the Great Lakes Population of Gray Wolf as a Distinct Population Segment and Removing this Distinct Population Segment from the Federal List of Endangered and Threatened Wildlife, 72 Fed. Reg. 6052 (Feb. 8, 2007).

Proposed Rule designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment from the Federal list of Endangered and Threatened Wildlife, 72 Fed. Reg. 6106 (Feb. 8, 2007).

Proposed Rule to Amend the Listing for the Preble's Meadow Jumping Mouse and to Specify Over What Portion of Its Range the Subspecies is Threatened, 72 Fed. Reg. 62,992 (Nov. 7, 2007).

Proposed Rule to List the Flat Tailed Horned Lizard as Threatened, 58 Fed. Reg. 62,624 (Nov. 29, 1993).

Pub. Land Law Review Comm'n, *One Third of the Nation's Land: A Report to the President and Congress* (1970).

Pub. L. No. 89-699, 80 Stat. 926 (1966).

Pub. Law. No. 104-6, Ch. IV, 109 Stat. 73 (1995).

Publication of 90-Day Findings for Two Petitions to List the North American Lynx in the North Cascades of Washington and Three Oaks from California as Endangered, 57 Fed. Reg. 46,007 (Oct. 1992).

Quadangno and Stan J. Knapp, *Have Historical Sociologists Forsaken Theory? Thoughts on the History/Theory Relationship,* 20 Soc. Meth. & Research 481 (1992).

Ragin, Chales C., THE COMPARATIVE METHOD: MOVING BEYOND QUALITATIVE STRATEGIES (1989).

Reclassification of the Gray Wolf in the United States and Mexico, with Determinations of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 17,590 (March 9, 1978).

Reisner, Mark, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (Penguin Books rev. & updated ed. 1993).

Restoration Chronology 1982-2009, Mono Lake Comm. http://www.monolake.org/mlc/restochr

Review of Vertebrate Wildlife for Listing as Endangered or Threatened Species, 47 Fed. Reg. 58,454 (Dec. 30, 1982).

Rhodes, Richard, *The Killing of the Everglades,* PLAYBOY, January 1972 at 112.

Robins, Jim, *Anger Over Culling of Yellowstone's Bison,* N.Y. TIMES (Mar. 23, 2008), *available at* http://www.nytimes.com/2008/03/23/us/23bison.html?pagewanted=all

Roderick, Kevin, *Selling a Lake: Tenacious Mono Backers Use Sophisticated Tactics to Beat DWP to Its Knees,* L.A. TIMES, Sept. 24, 1989, at 3.

Rodgers, William H. Jr., *Deception, Self-Deception, and Myth: Evaluating Long-Term Environmental Settlements,* 29 Rich. L. Rev. 567 (1995).

Rodgers, William H. Jr., *Miccosukee Indians and Environmental Law: A Confederacy of Hope,* 31 ELR 10918 (August 2001).

Rodgers, William H. Jr., *The Myth of Win-Win: Misdiagnosis in the Business of Reassembling Nature,* 43 Ariz. L. Rev. 297 (2000).

Rosenberg, Gerald N., THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

Rosenberg, Ronald H., *Federal Protection of Unique Environmental Interests: Endangered and Threatened Species,* 58 N.C.L.Rev. 491 (1980).

Rowell, Gallen, *Mono Lake: Silent, Sailess, Shrinking Sea,* AUDUBON, Mar. 1978, at 102.

Ruhl, J.B., *Ecosystem Services and the Common Law of "the Fragile Land System",* NAT. RESOURCES & ENV'T, Fall 2005 at 3.

Ruhl, J.B., *Farms, Their Environmental Harms and Environmental Law,* 27 Ecology L.Q. 263 (2000).

Ruhl, J.B., *Toward a Common Law of Ecosystem Services,* 18 St. Thomas L. Rev. 1 (2005-2006).

Rustad, Michael J., *How the Common Good is Served by the Remedy of Punitive Damages,* 64 Tenn. L. Rev. 793 (1997).

Sabel, Charles F. & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds,* 117 Harv. L. Rev. 1016 (2004).

Salinero, Mike, *Battle Rages to Ease Everglades Pollution Standard,* TAMPA TRIBUNE, April 3, 2003 at Metro 4.

Salt, Terrance "Rock", Stuart Langton, and Mary Doyle, *The Challenges of Restoring the Everglades in* LARGE-SCALE ECOSYSTEM RESTORATION: FIVE CASE STUDIES FROM THE UNITED STATES 10 (Mary Doyle and Cynthia A Drew ed 2008).

Sawyer, Andrew H., *Changing Landscapes and Evolving Law: Lessons from Mono Lake on Takings and the Public Trust,* 50 Okla. L. Rev. 311 (1997).

Salzman, James, Barton H. Thompson, Jr. & Gretchen C. Daily, *Protecting Ecosystem Services: Science, Economics, & Law,* 20 Stan. Envt'l L. J. 309 (2001).

Sax, Joseph, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1970) (Sax 1970).

Sax, Joseph, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention,* 68 Mich. L. Rev. 471 (1970)(Sax, *Public Trust*).

Schattschneider, E.E., THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (1960).

Scheingold, Stuart A., THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE (2nd ed. 2004).

Scheingold, Stuart A., THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE (1970).

Schmaltz, Jeffrey, *Pollution Poses Growing Threat to Everglades,* N.Y. TIMES, Sept. 17, 1989, §1, Pt. 1 at 1.

Schumpeter, Joseph A., CAPITALISM, SOCIALISM AND DEMOCRACY (3rd ed. 1950).

Schusler, Tania M., Daniel J. Decker, and Max J. Pfeffer, *Social learning for collaborative natural resource management,* 16 Soc'y & Nat. Resources 309 (2003).

Schultz, Jason, *Miccosukees Sue to Restart Construction of Reservoir,* PALM BEACH POST, July 12, 2008 at 1B.

Senate Hrg. No. 106-729 *Everglades Restoration: Hearing on the Comprehensive Everglades Restoration Plan Proposed by the State of Florida, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers Before*

the Subcommittee on Transportation and Infrastructure and the Committee on Environmental and Public Works, 106th Cong. (2000)

Senate Rep. No. 96-151 (1970).

Senate Rep. No. 106-372 (2000)

Sewell, William, THREE TEMPORALITIES: TOWARD AN EVENTFUL SOCIOLOGY IN LOGICS OF HISTORY: SOCIAL THEORY AND SOCIAL TRANSFORMATION at 100 (2005).

Shuchman, Lisa, *Gore to unveil Penny-a-Pound Sugar Tax,* PALM BEACH POST, Feb. 17, 1996 at 1A.

Suchman, Lisa, *Millionaire Bets on Everglades' Future*, PALM BEACH POST, Sept. 30, 1996 at 1A.

Lisa Shuchman, *Sugar-Tax Campaign Leaves Bad Taste in Voters Mouths*, PALM BEACH POST, Nov. 3, 1996 at 1A.

Lisa Shuchman, *U.S. Sugar Delays Harvest to Fight Tax,* PALM BEACH POST, Oct. 25, 1996 at 1D.

Snow, David, et al., *Mapping the Terrain, in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 3 (David A. Snow et al. eds. 2004).

Snyder, G.H. and J.M. Davidson, *Everglades Agriculture: Past, Present, and Future in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 85 (Steven M. Davis and John C. Ogden ed. 1994).

Society for Ecological Restoration International Science & Policy Working Group, *The SER International Primer on Ecological Restoration,* (Oct. 2004) *available at* http://www.ser.org/content/ecological_restoration_primer.asp#3

Soule, Michael E., *Conservation: Tactics for a Constant Crisis,* 253 Science 744 (Aug. 16, 1991).

South Florida Water Management District, *2004 Everglades Consolidated Report* (2004).

South Florida Water Management District, *Caloosahatchee Water Management Plan* (April 2000).

Stanford Environmental Law Society, THE ENDANGERED SPECIES ACT (2001).

Stapleton, Christine, *Federal Judge reverses ruling for District to build reservoir,* PALM BEACH POST, Mar. 24, 2011 at 4A.

Starr, Kevin, MATERIAL DREAMS: SOUTHERN CALIFORNIA THROUGH THE 1920S (1990).

State of Florida, Executive Order No. 99-144, June 24, 1999.

Statement of Principles (July 1, 1993) *available at* http://exchange.law.miami.edu/everglades/litigation/state_agency/state_administrative/docs/st_prin_071393.html .

Stevens, William K., *Everglades Restoration Plan Does Too Little, Experts Say,* N.Y. TIMES, Feb. 22, 1999 at A-1.

Stober, Jerry, Daniel Scheidt, Ron Johes, Kent Thornton, Robert Ambrose, and Danny France, *South Florida Ecosystem Assessment – Monitoring for Adaptive Management: Implications for Ecosystem Restoration (Interim Report),* EPA 904-R-008 (December 1996).

Stryker, Robin, *Half Empty, Half Full or Neither: Law Inequality and Social Change in Capitalist Democracies,* 3 Ann. Rev. L. & Soc. Sci 69 (2007) (Stryker (2007).

Stryker, Robin, *Beyond History Versus Theory: Strategic Narrative and Sociological Explanation,* 24 Soc. Meth. & Research 304 (1996)(Stryker (1996)).

Swamp & Overflowed Lands Act of 1850, Ch. 84 2, 9Stat. 519 (Sept. 28, 1850).

Tadano, Nicole M., *Piecemeal Delisting: Designating Distinct Population Segments for the Purpose of Delisting Gray Wolf Populations is Arbitrary and Capricious,* 82 Wash. L. Rev. 795 (August 2007).

Tansley, A.G., *The Use and Abuse of Vegetational Concepts and Terms,* 16 Ecology 284 (1935).

Tarlock, A. Dan., *Garrison Lecture on Environmental Law: The Future of Environmental 'Rule of Law' Litigation and There is One,* 19 Pace Envtl. L. Rev. 611 (2002)(Tarlock 2002).

Tarlock, A. Dan, *The Future of Environmental "Rule of Law" Litigation,* 17 Pace Envt'l L. Rev. 237 (2000)(Tarlock 2000).

Tarrow, Sidney, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS (2nd ed. 1998).

Taylor Kelly F., *A Trickle of Cash for the River of Grass: Federal Funding of Comprehensive Everglades Restoration a Critique and a Proposal,* 64 U. Mia. L. Rev. 1407 (2010).

Taylor, Martin F.J., Kieran F. Suckling & Jeffrey J. Rachlinksi, *The Effectiveness of the Endangered Species Act: A Quantitative Analysis,* 55 BioScience 360 (April 2005).

Taylor, Ronald A., *Long Abused Now Cherished, the Everglades is Pawn in Fight for Water, Saving a Fountain of Youth,* U.S. NEWS & WORLD REPORT, Feb. 24, 1986 at 63

Tear, Timothy H., Michael Scott, Patricial H. Hayward & Brad Griffiths, *Recovery Plans and the Endangered Species Act: Are Criticisms Supported by Data,* 9 Cons. Bio 182 (1995).

Teitelbaum, Lee E., *An Overview of Law and Social Research,* 35 J. Legal Educ. 465 (1985).

Thompson, Barton H. Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense,* 15 Southeastern Envt'l L. J. 47 (2006).

Tilly, Charles, *Social Movements and National Politics, in* STATEMAKING AND SOCIAL MOVEMENTS: ESSAYS IN HISTORY AND THEORY 297 (Charles Bright & Susan Harding eds. 1984).

Turk, Austin T., *Law as a Weapon in Social Conflict,* 23 Soc. Problems 276 (1976).

Twain, Mark, ROUGHING IT (Harper & Brow. Ed, P.F. Collier & Son Co. 1913)(1871).

Unger, Roberto Mangabeira, *False Necessity:* ANTI-NECISSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY FROM POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY (Verso 2001) (1987).

U.S. Army Corps of Engineers, *Central and South Florida Project Comprehensive Review Final Integrated Feasibility Report and Programmatic Environmental Impact Statement* (1999).

U.S. Army Corps of Eng'rs, Comprehensive Report on Central and South Florida for Flood Control Purposes, H.R. Doc. No. 80-643 (May 6, 1948).

U.S. Army Corps of Engineers, *Fact Sheet: Modified Water Deliveries: Everglades National Park & Tamiami Trail* (July 2011).

U.S. Army Corps of Engineers, *Rescuing and Everglades Ecosystem: The Plan to Restore America's Everglades* (July 1999).

U.S. Dept. of Interior, Office of Inspector General, *Investigative Report: On Allegations Against Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife and Parks*, http://wyden.senate.gov/DOI_IG_Report.pdf

U.S. Environmental Prot. Agency, Pub'n No. EPA/600/R-98/086, *Ecological Research Strategy* (1998).

U.S. General Accounting Office, *Endangered Species – Management Improvements Could Enhance Recovery Program,* Doc. GAO/RCED-89-5 23-24 (1988).

U.S. Government Accountability Office, *South Florida Ecosystem: Restoration is Moving Forward But is Facing Significant Delays, Implementation Challenges and Rising Costs,* Doc. CAO-07-1250T (2007).

University of Miami, *Press Release: Mary Doyle Named to Two Major Posts* (Summer 2000) *available at* http://exchange.law.miami.edu/everglades/conference/2003/01/um_colloquim/Former_UM_Law_Dean_Mary_Doyle.htm

Vergura, Jim and Ron Jones, *The TMDL Program: Land Use and Other Implications,* 6 Drake J. of Ag. L. 317 (2001).

Vick, Karl, *Big Sugar, A sweet deal under fire,* ST. PETERSBURG TIMES, May 15, 1994 at 1A.

Vick, Karl, *Agreement Would Clean Up the Everglades,* ST. PETERSBURG TIMES, July 14, 1993 at 1A.

Vorster, Peter and G. Mathais Kondolf, *The Effects of Water Management and Land Use Practices on the Restoration of Lee Vining and Rush Creeks, in Proceeding of the California Riparian Systems Conference: Protection, Management, and Restoration for the 1990s* 405 (Dana L. Abell, ed. 1989).

Vucetich, John A. & Thomas A. Wait, *On the Interpretation and Application of Mean Times to Extinction,* 7 Biodiversity and Cons. 1539 (1998).

Vucetich, John A. et al., *The Normative Dimension and Legal Meaning of Endangered and Recovery in the U.S. Endangered Species Act,* 20 Cons. Bio. 138 (Jan. 2, 2006).

Wallsten, Peter, *Environmentalists Pushing New Sugar Tax,* ST. PETERSBURG TIMES, Mar. 26, 1996 at 1B.

Waples, Robin S., Per B. Adams, James Bohnsack & Barbara L. Taylor, *A Biological Framework for Evaluating Whether a Species is Threatened or Endangered in a Significant Portion of Its Range,* 21 Cons. Bio 964 (2007).

Ward, Frd, *The Imperiled Everglades,* 141 National Geographic 1 (January 1972).

Wasserman, Stanley and Katherine Faust, SOCIAL NETWORK ANALYSIS (1994).

Water Resources Act of 1992, Pub. L. No. 102-588 §309(1), 106 Stat. 4797, 4844-45 (Oct. 31,1992).

Water Resources Development Act of 1996, Pub. L. No. 104-303 §528(f), 110 Stat. 3658, 3770-71 (Oct. 12, 1996).

Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572 (codified as amended in scattered sections of 16, 33, 42 U.S.C.).

Weber, Kenneth, Temperince Bennett, Grover Payne, Guy Germaen, Seven Hill & Nennand Iricnic, *Chapter 4: Water Quality in the EPA* in EVERGLADES CONSOLIDATED REPORT (Jan. , 2001).

WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (David G. Guralnik ed. 1980).

Westley, Frances, *Governing Design: The Management of Social Systems and Ecosystems Management, in* BARRIERS AND BRIDGES: TO THE RENEWAL OF ECOSYSTEMS AND INSTITUTIONS 391 (Lance Gunderson, C.S. Holling & Stephen S. Light eds., 1995).

Where the buffalo roam – and die, CNN.com, *available at* http://articles.cnn.com/2008-04-26/us/bison.slaughter_1_yellowstone-bison-bison-herd-bison-and-cattle?_s=PM:US

Wiel, Samuel C., *What is Beneficial Use of Water,* 3 Cal. L. Rev. 460 (1915).

Wiersema, Annecoos, *A Train Without Tracks, Rethinking the Place of Law and Goals in Environment and Natural Resources Law,* 38 Envt'l L. 1239 (2008).

Withdrawal of the Proposed Rule to List the Flat-Tailed Horned Lizard as Threatened, 62 Fed. Reg. 37,852 (July 15, 1997).

Young, Gordon, *The Troubled Waters of Mono Lake,* 160 Nat'l Geographic 504 (1981).

Zaring, David, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Watter Act's Bleak Present and Future,* 20 Harv. Envt'l L. Rev. 515 (1996).

Zito, Kelly, *Peripheral Canal Urged to Save the Delta,* S.F. Chron., July 18, 2008 http://articles.sfgate.com/2008-07-18/news/17172640_1_peripheral-canal-water-system-water-supply

Federal Statutes and Regulations

16 U.S.C. §§ 1531, 1531(a), 1531(b), 1532(6), 1532(15), 1532(20), 1533, 1533(a), 1533(b)(1)(A), 1533(b)(2) 1536(a), 1538(a)(1) (2006).

16 U.S.C. §1533(b)(1)(A)(1973).

15 U.S.C. § 2601 (2006).

33 U.S.C. §§ 1251, 1311, 1313(a)-(d), 1342(a), 1362(6)(12), 1364(1) (2006).

42 U.S. C. § 6901 (2006).

42 U.S.C. § 7401(b)(1)(2006).

49 U.S.C. § 303 (2010).

33 C.F.R. §§230.18-19 (2011).

40 C.F.R. 130.7 (2011).

40 C.F.R. §§ 1506.6 and 1508.5 (2011).

50 C.F.R. 40202 (2002).

State and Local Statutes, Ordinances, & Rules

Cal. Fish and Game Code §§ 5937 (West 2010).

Cal. Water Code §§ 102, 1241, 1252, 1254, 1255, 1260, 1380-81, 1390, 1395-97, 1410, 1610 (West 2010).

Charter of the City of Los Angeles, art. III, §32.4 (1999).

Charter of the City of Los Angeles, art. VI, §70.1 (1991).

Fla. Stat. Ch. 23 (1972)

Fla. Stat. Ann. §§ 373.036, 373.0361, 373.039, 373.069, 373.223 (2006).

Fla. Stat. § 373.141 (1967) *repealed by* 1972 Fla. Laws 72-299, Part VI §1.

Fla. Stat. §373.4592 (1994).

Fla. Stat. 378.01(1)(1967) *repealed by* 1972 Fla. Laws 72-299, §1

Fla. Stat. § 378.17(1) (1966) *recodifed and renumbered* Fla. Stat. Ann. § 373.0831 (2006).

Fla. Admin. Code R. 62-302.530(2000).

Cases

Arizona v. California, 376 U.S. 340 (1964), *amended by* 383 U.S. 268 (1966), *overruled in part by* 438 U.S. 645 (1978), *per curiam supplemental decree at* 439 U.S. 419 (1979), *supplemental opinion at* 460 U.S. 605 (1983), *supplemental opinion at* 564 U.S. 144 (1984), *supplemental opinion at* 531 U.S. 1 (2000), *amended by* 547 U.S. 150 (2006).

Cal. Trout, Inc. v. Super. Ct. of Sacramento Cnty., 266 Cal. Rptr. 788 (Cal. Ct. App. 1990).

Cal. Trout Inc. v. State Water Res. Control Bd. (Cal. Trout I), 255 Cal. Rptr. 184 (Cal. Ct. App. 1989)

Campo and Florida Wildlife Federation v. State of Florida, 390 So.2d 65 (Fla. 1980).

Canada Lynx v. Babbitt, No C92-1269 (W.D. Wash. 1992).

Center for Biological Diversity v. Norton, 411 F. Supp. 2d 1271 (D.N.M. 2005).

Center for Biological Diversity v. U.S. Fish & Wildlife Serv., 402 F.Supp. 2d 1198 (D. Or. 2005)

Citizens to Preserve Overton Park v. Volpe, 335 F. Supp. 873 (W.D. Tenn. 1972).

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

City of Los Angeles v. Aitken, 52 P.2d 585 (Cal. Dist. Ct. App. 1985).

Defenders of Wildlife v. Babbitt, No. 97-CV-2330TW(LSP) 1999WL 33537981 (S.D. Cal. 1999), *rev'd Defenders of Wildlife v. Norton,* 258 F.3d 1136 (9th Cir. 2001).

Defenders of Wildlife v. Babbitt, 958 F. Supp. 670 (D.D.C. 1997).

Defenders of Wildlife v. Kempthorne, No. 04-1230, 2006 WL 2844232 (D.D.C. Sept. 29, 2006).

Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001).

Defenders of Wildlife v. Norton, 239 F.Supp. 2d 9 (D.D.C. 2002).

Defender of Wildlife v. Norton, 239 F. Supp. 2d 9 (D.D.C. 2002).

Defenders of Wildlife v. Norton, CA 99-02072 (D.D.C. Dec. 13, 2001).

Defenders of Wildlife v. Sec'y of Interior, 354 F. Supp. 2d 1156 (D. Or. 2005).

Estuary Properties Inc. v. Askew, 381 So. 2d 1126 (Fla. App. 1979).

Florida Sugar Cane League, Inc. v. SFWMD, 617 So. 2d 1065 (Fla. 4th DCA, 1993).

Florida Wildlife Federation v. Goldschmidt, 611 F. 2d 547 (5th Cir. 1980).

Friends of the Everglades v. Board of County Commissioners of Monroe Co., 456 So. 2d 904 (Fla. App. 1984).

Friends of the Everglades v. SFWMD, 446 So.2d 117 (Fla. App. 1984).

Friends of the Everglades v. DER, 387 So. 2d 511 (Fla. App. 1980).

Friends of the Wild Swan v. U.S. Fish & Wildlife Service, 12 F. Supp. 2d 1121 (D. Or. 1997).

Grimshaw v. Ford Motor Company, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

The Humane Soc'y of the United States v. Kempthorne, No. 1:07-cv-00677 (D.C. Cir. Nov. 14, 2007).

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).

In re Petition to Initiate Rulemaking to Adopt a numerical Criterion for Phosphorus Concentration in the Everglades, OCG Case No. 94-0693 (Fla Dept. Envt'l Protection, Jan 22, 1996) *available at* 1996 WL 85176.

Marks v. Whitney, 491 P. 2d 374 (Cal. 1971).

Merril-Stevens Co. v. Durkee, 57 So. 428 (Fla. 1912)

Miccosukee Tribe of Indians of Fla. v. United States, 2011 WL 1624977 (S.D.Fla. April 26, 2011).

Miccosukee Tribe of Indians of Fla. v. United States, 706 F.Supp. 2d 1296 (S.D. Fla. 2010).

Miccosukee Tribe of Indians of Fla. v. U.S. EPA, 105 F.3d 599 (11th Cir. 1997).

Nat'l Audubon Soc'y v. Dept. of Water, 858 F.2d 1409 (9th Cir. 1988).

National Audubon Soc'y v. Dep't of Water & Power of Los Angeles, 496 F. Supp. 499 (E.D. Cal. 1980).

National Audubon Society v. Super. Ct. of Alpine Cnty, 658 P.2d 709 (Cal. 1983).

National Wildlife Federation v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005).

Natural Resources Defense Council, Inc. v. Antwerp, No. 07-8044 (S.D. Fla. May 23, 2007).

Pollard v. Hagan, 44 U.S. 387 (1892).

Scott v. Hammond, Ind., 741 F.2d 992 (7th Cir. 1984).

SFWMD v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) *on subsequent appeal, Miccosukee Tribe of Florida v. SFWMD,* 559 F.3d 1191 (11th Cir. 2009).

Southwest Center for Biological Diversity v. Norton, CA Bi, 98-934m 1001 WL 1733618 (D.D.C. July 29, 2002).

State v. Super. Ct. Placer Cnty., 625 P.2d 256 (Cal. 1981).

Sugar Cane Growers Coop. of Florida v. SFWMD, Fla. DOAH Case No. 92-3038 (April 9, 1991).

Transcript, *Sugar Cane Growers Coop. of Florida v. SFWMD,* Fla. DOAH Case No. 92-3038 (Sept. 21, 1992).

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

United States v. SFWMD, 290 F. Supp. 2d 1356 (S.D. Fla. 2003).

United States v. SFWMD, 847 F. Supp. 1567 (S.D. Fla. 1992), *aff'd in part and rev'd in part, remand* 28 F. 3d 1564 (11th Cir. 1994) *cert. denied,* 115 S.Ct. 1956 (1995).

United States v. SFWMD, 922 F. 2d 704 (11th Cir. 1991).

United States v. SFWMD, Case No. 88-1886, 2003 WL 21145799 (S.D. Fla. May 9, 2003).

United States v. SFWMD, Case No. 88-1886, 2005 WL 13277359 (S.D. Fla. June 1, 2005).

United States v. SFWMD, Case No. 88-1886, 2010 WL 1292275 (S.D. Fla. Mar. 31, 2010).

United States v. SFWMD, Case No. 88-1886, 2011 WL 1099865 (S.D. Fla. Mar. 22, 2011).

United States v. SFWMD, Case No. 88-1886, 2011 WL 1624977 (S.D. Fla. April 26, 2011).

Declaration of Dr. Ronald Jones, *United States. v. South Florida Water Management District,* Case No. 88-1886-Civ (S.D. Fla. Sept. 18, 1990).

Omnibus Order, *United States. v. South Florida Water Management District,* Case No. 88-1886-Civ (S.D. Fla. April 27, 2001).

Settlement Agreement, *United States. v. South Florida Water Management District,* Case No. 88-1886-Civ (S.D. Fla. July 26, 1991).

APPENDIX A
EVERGLADES STRUCTURES INTERVIEW QUESTIONS
IRB STUDY NO. 0609E92806

1. Pre-Litigation

- How/why did you become interested in the Florida Everglades?
- When?
- What concerns did you have about the condition of the Florida Everglades?
- How did you become aware of these conditions?
- What did you perceive were the primary causes of this condition
- What were the barriers
- Was this perception widely held?
- What caused you to act?
- What did you think the best way to act was?
- What did you do initially to address these concerns?
- Who did you take up these issues with?
- Why these institutions/people?
- What let you to the conclusion you had to litigation?

2. Preparing to Litigate

- What did you hope to achieve by litigating?
- What was your strategy?
- How did you finance the litigation?
- Who supported you in the litigation?
- Who did you choose to litigate against (parties) Why?
- What type of out reach did you do to educate the public
- Experts, who, how located, difficulty in obtaining
- How did you determine your cause of action? What was it?
- What outcome were you hoping for
- Who did you decide to sue, why did you choose these defendant(s)
- Were there others you wish you had involved? Who? Why?
- Any removal of judges, why?
- Did the judge make a difference? Why?

3. The Litigation

- Cause of action
- Remedy sought
- What was the response of the press to the litigation
- What was the response of the public to the litigation
- Do you think you used the litigation to you benefit outside the court room, how, why, why not?

- What was the response of the Defendant(s)
- Describe the litigation process
- Outcome of the litigation- (Court order)(on the landscape)
- Nature of remedy
- Were you satisfied/ why/ why not
- What was the response of the public to the court order
- What was the response in the media
- Reaction of Defendants
- Reaction of other stakeholders
- Did the litigation change the political landscape

4. Remedy

- Describe remedy/settlement agreement
- Parties involved in implementing the remedy
- Were they the right parties, who was missing why
- Your role in implementation of the remedy
- Describe in general how the remedy was implemented
- What was the impact of the remedy on the Physical landscape
- What was the impact of the remedy on the barriers to everglades restoration
- What was the impact of the remedy on the political structures governing the Everglades
- How did the Everglades impact the types and amounts of resources made available for ecosystem restoration
- How did this litigation impact how decisions were made about the Everglades
- Do you think these changes would have occurred without the litigation? Why or why not?

5. Background information

- Age
- Place of birth
- Years lived in community
- Education
- Occupation
- Parental occupation
- Parental education