

The New Age of Environmental Restoration

Joseph L. Sax*

The leading edge in environmental law has taken a dramatic turn in the last half-dozen years. While certain great issues remain at the forefront of global concern, in particular planetary warming and population, the focus of domestic environmental law for nearly three decades—air and water pollution, superfund cleanup, and the whole regulatory apparatus that implemented those laws—has yielded primacy to a strikingly new concern. Its centerpiece is biodiversity; its spotlight is on restoration, and its agenda is not directed at the individual factory, waste repository, or discharge pipe. The focus is, instead, a biologically integral unit, commonly a watershed or what is sometimes called a problem-shed. The idea is to move toward a more regionally-oriented management of land and water. The implications of this shift for law, and for governance, are dramatic and fundamental, but their full significance has so far been little recognized. The following pages are devoted to an effort, necessarily preliminary, to call attention to some of the opportunities, as well as the challenges, this change of focus is generating.

The most significant catalyst for the changes I shall discuss, though by no means the only one, is a law enacted more than a quarter-century ago, but whose import has only begun to be felt and acknowledged in the last half-dozen or so years. That law is the federal Endangered Species Act (the ESA).¹ Probably most people, even those whose involvement with environmental law does not go beyond scanning headline stories or watching the nightly news, recognize that the ESA is a very powerful law. Among them many doubtless believe that it is a rather indiscriminately powerful law, because it not only brings its great clout to bear on elements of our biological and genetic heritage that are generally understood to be important, such as the grizzly bear, the wolf, the Pacific salmon, and the eagle, but also on a plethora of things that hardly anyone has ever heard of, let alone seen. For better or worse, a number of species listed under the law as threatened or endangered have what appear to be ridiculously odd names, such as Furbish's lousewort, the Delhi Sands Flower-Loving Fly, or the notorious Snail Darter (which is a fish).²

Despite its nominal vulnerability to ridicule, the Act has both broad and deep public support, which is no doubt significantly ex-

* James H. House & Hiram H. Hurd Professor, University of California, Berkeley, School of Law (Boalt Hall). The 2001 Foulston & Siefkin Lecture, Washburn University School of Law.

1. 16 U.S.C. §§ 1531-1544 (1999).

2. Species are listed at 50 C.F.R. §§ 17.11, 17.12 (2000).

plained by the general, if scientifically limited, appreciation by most people that our rich biological heritage is of fundamental importance and that the ESA—whatever its limitations may be—is the central tool we have to protect that heritage. Distinguished scientists such as E.O. Wilson of Harvard University, who have written eloquently on this subject for non-specialists, have had a powerful impact on the general public. In his book *The Diversity of Life*, Wilson explains:

[T]he normal “background” extinction rate is about one species per one million species a year. Human activity has increased extinction between 1,000 and 10,000 times over this level in the rain forest Clearly we are in the midst of one of the great extinction spasms of geological history Ninety-nine percent of all the species that ever lived are now extinct. The modern fauna and flora are composed of survivors that somehow managed to dodge and weave through all the radiations and extinctions of geological history They are living genetic libraries Organisms more complex than bacteria . . . contain . . . more than enough in pure information to compose an equivalent of the *Encyclopedia Britannica* Such is the ultimate . . . truth about every kind of organism, large and small Every kind of organism has reached this moment in time by threading one needle after another, throwing up brilliant artifices to survive and reproduce against nearly impossible odds Why should we care? What difference does it make if some species are extinguished? . . . Only in the last moment of human history has the delusion arisen that people can flourish apart from the rest of the living world . . .³

The journey of the ESA itself has reflected the growing impact of the warnings from experts like Wilson upon public officials and legislators as well. The evolution of the law is indicative. From a beginning in which attention seems to have been focused largely upon specific and easily identifiable individual species, such as the grizzly bear, and upon the management of the federal conservation lands, it has expanded to recognize the centrality of habitat; that is, that species can only be viewed within the larger land and water environments upon which they depend. Similarly the law has expanded to acknowledge that biodiversity concerns cannot be restricted to land that happens to be publicly owned, but must be protected on private lands as well, and that new and innovative ways must be found to accommodate the need to use private lands for agriculture, mining, forestry, urban growth and the like, while at the same time maintaining and restoring ecological services sufficiently to secure such lands’ values as habitat.⁴ In short, environmental concern has expanded to embrace the entirety of the spaces in which we live and work.

3. EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 280, 344-45 (1992).

4. These concerns are primarily reflected in §§ 9 and 10 of the Act, 16 U.S.C. §§ 1538(a)(1)(B), 1539(a).

These developments have brought about fundamental changes in the way we had long thought about environmental protection. For example, for well over 100 years, since the first national parks, forests, and refuges were set aside, we had relied upon what may be called the enclave theory of conservation: the idea was that some lands should be set aside for preservation and protection purposes, and that we would meet our conservation goals within them, while the rest of the land would be available for use in the economy and essentially could be used in whatever ways maximized their economic value. What might be called the ESA map—illustrating the distribution both of biodiversity hot spots (those very productive areas that need protection) and biological hazard zones (where diversity is in jeopardy)—has made the old enclave theory as outdated as the slide rule.

Biodiversity has to be protected where it is found, which may or may not be on public or protected lands. Moreover, the needs of biodiversity protection, as knowledgeable experts explain, often bear little relationship to the pattern of traditional public enclaves, which tend to be block-like areas with politically drawn lines, that may stop at a road, the middle of a river, or a mountaintop. Conversely, biodiversity protection requires features like corridors to promote connectivity between habitat areas and to prevent isolation of populations; and its boundaries are set by the occupancy needs of the species, which do not respect political boundaries or agency jurisdictional lines.

The shift from enclave to habitat engendered another dramatic re-orientation in the traditional way of doing environmental business. Let me cite as an example the habitat of a given species, the delta smelt, a species of fish found in the waterways that converge in the flows that enter San Francisco Bay. For years this focal point in California, a kind of central switching area for the great bulk of water that supplies both the state's agriculture and virtually all its major urban areas, had been a source of controversy.⁵ Many different interests, private and public, each acted individually to advance their particular missions. State agencies concerned themselves with water supply, quite independently of the EPA, which addressed water quality and claimed to have no role in water supply. Other federal agencies like the Bureau of Reclamation operated its dams and reservoirs to meet contract obligations, with little if any attention to these other controversies that swirled about them, while the federal Corps of Engineers similarly tended to its dredge and fill permitting duties. At the same

5. Patrick Wright, *Fixing the Delta: The CALFED Bay-Delta Program and Water Policy Under the Davis Administration*, 31 GOLDEN GATE U. L. REV. 331 (2001).

time the Delta was enmeshed in litigation.⁶ This sort of operational chaos has pretty much been standard practice everywhere—with every entity tending to its own mission and more or less oblivious to others around it.

Finally, beginning in the mid-1990's, an effort began to bring the various Delta interests together in an effort to forge a common plan that would address each of the various problem areas that had been plaguing it for decades: a reliable water supply for agriculture and cities; improvement of water quality, in the context of ocean salt water incursion, and contamination from agricultural run-off; protection of listed species; restoration of habitat for long-blocked salmon runs, and restoration of wetlands; and levee protection for the low-lying Delta agricultural lands.⁷

One inspiration for this effort, and others like it around the country, was the painful experience with the spotted owl in the Pacific Northwest.⁸ That experience had shown the negative potential of environmental legislation combined with recalcitrant government regulators and unyielding industry—its capacity to throw a problem into the hands of the courts, potentially to shut down a regional economy, and then produce insufficient and short-lived solutions if the issue was seen as simply protecting a particular species, rather than getting a regional economy onto a track where it could function over the long term in harmony with contemporary environmental values.

The spotted owl issue did not move toward resolution until the President himself went up to the site and personally brought the contending interests to the table for sessions that went on for several days. Obviously that is not a model that can or should be followed. But it set the stage for controversies elsewhere, including the Bay-Delta of California. One of the most important lessons taken from the spotted owl debacle was that the Endangered Species Act offered a structural model, habitat-based planning, that was designed both to protect species in their habitat, and to allow economic activity to continue by lifting rigorous prohibitions so long as species viability was protected, adverse impacts were mitigated and minimized, and opportunities were presented to move toward long-term recovery. The Act also offered the potential to develop long-term plans by incorporating

6. *E.g.*, *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161 (Cal. Ct. App. 1986).

7. *See* CALFED BAY-DELTA PROGRAM, CALIFORNIA'S WATER FUTURE, A FRAMEWORK FOR ACTION (2000); CALFED BAY-DELTA PROGRAM, PROGRAMMATIC RECORD OF DECISION (2000).

8. An early stage in the long story is provided in *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991). *See generally* STEVEN L. YAFFEE, *THE WISDOM OF THE SPOTTED OWL: POLICY LESSONS FOR A NEW CENTURY* (1994).

multiple species' needs in a plan, including those that had not yet been listed as threatened or endangered.

By means of an administrative innovation, the so-called “no surprises policy”,⁹ businesses could be given assurances that the commitments they made were secure and that government would not come back for more the next year, or the next, when new problems were discovered. At the same time, habitat conservation planning could incorporate adaptive management, so that new knowledge could be applied to existing plans. The device for doing all this was to shift future needs revealed by adaptive management from private parties to the public. The “no surprises” policy has been controversial,¹⁰ and its long-run impact remains to be seen. Success will depend upon the adequacy of monitoring, and the willingness of the public to meet new needs that may arise as time goes on. In the short term, however, the policy has brought private and public stakeholders to the table to work on plans that accommodate habitat needs while permitting needed economic activity to go forward. This alone represents a significant move forward from the old enclave theory—a recognition that land management for biodiversity protection and restoration is an issue everywhere, and not just on lands designated for environmental protection.

Impressed by the positive potential of habitat-based planning, one of former Interior Secretary Bruce Babbitt's most important decisions was the effort to use the Endangered Species Act proactively as a tool to generate regional, bio-diversity based habitat plans, as the centerpiece of his administration of the ESA. Several different places, with significantly different problems, were selected as experimental areas. One was urban southern California (California gnatcatcher),¹¹ where land values were extremely high, and where species-based planning could be incorporated with local land use planning, and public desires for values such as open space. Another such effort was made in the Southeast (red-cockaded woodpecker),¹² where commercial timber harvesting on private land was the issue, and the desire was to

9. See Habitat Conservation Plans (“No Surprises”) Rule, 63 Fed. Reg. 8859 (Feb. 23, 1998).

10. *National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d 1274 (E.D. Cal. 2000), involved a claim that the no surprises provision in a habitat conservation plan violated the Endangered Species Act. Held, unripe.

11. See Availability of an Environmental Assessment and Receipt of an Application for an Incidental Take Permit for the Coastal California Gnatcatcher Associated with Residential Development in the City of Fullerton, County of Orange, California, 65 Fed. Reg. 15914 (Mar. 24, 2000).

12. See Availability of a Draft Combined Environmental Assessment and Habitat Conservation Plan, Preliminary Finding of No Significant Impact, and Notice of Receipt of an Application for an Incidental Take Permit by Plum Creek Timber Company for Forest Management and Timber Harvest on Plum Creek Lands in Arkansas and Louisiana, 66 Fed. Reg. 19792 (Apr. 17, 2001).

develop a habitat-based plan with private commodity-using industry (the spotted owl plan was built on public land). A somewhat different effort was launched in the Florida Everglades,¹³ where the ESA was not the focus, but the setting was ideal to test the potential of a large-scale restoration effort in an area where decades of habitat modification of the Everglades water system had been imposed in order to promote sugar plantations in the region north of the Everglades National Park.

Nowhere, however, was the effort more concentrated and committed than in the Bay-Delta, because nowhere had the problems previously proven more difficult and intractable. Secretary Babbitt assigned one of his most respected aides, Betsy Rieke, who was then Assistant Secretary for Water and Science, to personally head the effort to put together a version of habitat conservation planning, and to create a governance structure to administer such a plan. Rieke spent week after week, month after month, to bring the contending and contentious forces to the table. To an extent no one would have thought possible even a few years earlier, her labors were productive.¹⁴

In addition to the effort to develop a set of integrated plans to address both environmental and economic concerns simultaneously, the so-called Bay-Delta program has transformed the governing structure in the region by establishing both an intergovernmental organization known as the CalFed, and a setting in which all the stakeholders, public and private, participate. The Bay-Delta program is still the subject of intense controversy between water interests that want the assurance of future supply through development of physical facilities, and environmental interests that want to focus on restoration and a minimization of structures. It also depends upon continuing infusions of money from the government.

Nonetheless, by now all the interests recognize that moving forward is the only way to go, and they all have a very considerable stake in making the process work (though both sides want it to work their way). For all its starts and stops, the CalFed program still clearly represents a dramatic and fundamental change in the way environmental business is being done in a number of critical respects. Most importantly, it reflects a shift to regional management (away from management whose scope was based either on traditional political boundaries, or a single issue such as a particular contaminant in the water). It embraces not only repair of an existing problem (measured

13. U.S. DEPARTMENT OF THE INTERIOR, A COMPREHENSIVE PLAN FOR THE RESTORATION OF THE EVERGLADES (Jan. 19, 1996); Water Resources Development Act of 2000, Pub. L. No. 106-541, § 601, 114 Stat. 2572 (2000) (authorizing Everglades Restoration Project).

14. Elizabeth Ann Rieke, *The Bay-Delta Accord: A Stride Toward Sustainability*, 67 U. COLO. L. REV. 341 (1996).

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by salvage or non-degradation), but a commitment to restoration, focusing on matters such as returning salmon runs that had been profoundly depleted for many years. And it has generated a managerial entity that is designed for regional governance, consciously blurring the agency-based or political boundary lines, or public-private, or federal-state boundaries.

Rather than any of those established lines, the focus for management is habitat needs for the protection and restoration of biodiversity, measured not by some ideal pre-European settlement standard, but by an achievable level that looks to recovery of indigenous species like salmon at sustainable levels, while maintaining a prosperous agricultural economy and accommodating not only existing levels of population, but substantial anticipated growth. How can all these seemingly competing interests be satisfied simultaneously? While the ultimate success of these efforts remains to be proven, a great deal of energy is being applied in settings like the Bay-Delta to demonstrate that biodiversity-based regional planning need not be a zero-sum game.

In the Bay-Delta setting, the central focus is water: enough water to flush through to San Francisco Bay; enough water instream to support and restore fish populations; enough water to supply farms in the Sacramento River and San Joaquin River valleys, and enough water to export to coastal cities in both northern and southern California. All this is being attempted in a setting where existing water supplies have already been thought to be fully allocated, and where it is virtually universally accepted that we should not be building any more large dam and reservoir projects, with their environmentally destructive impacts.

Thus far much has been done to confirm that necessity can indeed be the mother of invention. For example, there are times when the usual water needed to be pumped for export to farmers in the Central Valley is also needed to flow out the Delta to the Bay to meet fish needs. As an alternative to denying water to farmers, an Environmental Water Account (EWA) has been established. This account, like a bank account, will have a supply of water stored away that it can withdraw and release to farmers when water otherwise available to them is needed for the fish. Where will this water come from? Several places. One innovative plan is to develop a conjunctive use system; that is, during periods of very high flows, when there is excess water, to take that water and store it underground, so that it can be pumped up and delivered to farmers when needed. Underground storage can serve the same purposes as above-ground dam and reservoir facilities, but without either the environmental detriments, or the

enormous costs, since the underground aquifers exist in nature. While conjunctive use programs present some problems of their own (e.g., assuring that underground water quality is not degraded), undoubtedly they present great, as-yet-untapped, possibilities.

Another source for the EWA is what are known as dry-year options. The Account buys from farmers who are willing to sell, an agreement that they will limit their demand for a certain amount of water during specified dry years (e.g., the last—and least valuable—ten percent of their annual entitlement). Those options then function as available water for the EWA during periods when water is short and especially needed for fish, and the system then cuts back those farms that have sold dry-year options. This, of course, is a water-based version of interruptible supplies in utility systems.

Yet a third source of water will come from technical improvements that conserve water in agricultural use. This is a particularly promising means of providing additional water needed for urban growth without diminishing environmental flows. In this situation, cities (which can afford much higher prices for water than agriculture) pay to improve agricultural systems, and in exchange get the saved water, at the same time paying the farmers a premium, so that everyone gains. What are the improvements? Earthen ditches that leak can be closed and concrete-lined; flood irrigation can be replaced by drip irrigation through tubes beneath the surface, thus saving water from evaporation and reducing the amount applied to each plant; and simple improvements in management, such as better ordering practices for the delivery of water, shutting off flows when not needed, and building re-regulating ponds to hold excess-delivered water to be used later. All these are well-established techniques that can save substantial amounts of water.

We shall also see efforts in the coming years to shift some sectors of agriculture from growing relatively low-economic-value, high-water-using crops, to less consumptive more valuable crops. It continues to be the case in much of the arid West that low-value forage crops consume much of our water. Transitioning to more valuable, less consumptive crops is one of the most promising ways to sustain a flourishing agricultural sector while significantly diminishing the amount of water used in agricultural irrigation.

Similar innovations are being developed in urban and suburban land use, and in traditional commodity areas, such as mining and timber harvesting. All these changes give promise of a new century in which land and water management is ecologically rational, focused on watersheds and landscapes, rather than on arbitrary political boundaries; in which public and private agencies work together toward inte-

grated management, and in which we can look forward to restoration to a high level of valued service of lands that have been too long degraded by unnecessarily destructive practices in grazing, irrigation, timber harvesting, mining, and residential and commercial development.

The changes just described offer enormous promise, but they present difficult challenges as well. Perhaps most importantly, as new managerial entities are developed to replace the old jurisdictional, enclave-based, authorities, the questions arise, how will responsibility be parceled out, and where will authority now come to rest?

As we move to embrace environmental problems on a regional level, the question of “managerial practicability” arises. One profoundly important question is to what extent we may have to break problems down into artificial units simply to be able to cope with them at all. The watershed, or whatever the hydrologically-rational unit may be, usually bears little if any relationship whatever to governmental units at any level—from the county to the country. Nor is there any hydrological or ecological measure of managerial capacity. One measure of the difficulty we are engaging is to note the way in which established lines of authority are being affected by the sort of developments described above, and to ponder how durable and how reproducible they will prove to be. Are institutional arrangements being established in the California Bay-Delta, for example, that can serve as workable precedents for what governance will (or should) look like elsewhere around the West, or around the country?

These new managerial issues also suggest a striking paradox. To manage on a watershed level (or some even more embracing ecological level) may call for more centralized administration. Bigger governance units seem to imply bigger government. Yet at the same time we have been experiencing strong desires along a broad spectrum for more local autonomy. Oddly enough, localism has been a rallying call both for political conservatives and for important elements of the environmental community. For example, there is now much popular support for what are usually called local “watershed” councils,¹⁵ which are thought to be especially well-suited to seek accommodation of ecological demands and local economic sustenance. The watershed council is an interesting name, for these entities—with their commitment to local concerns—are ordinarily focused only on a segment of a watershed. The question they raise is how well watershed manage-

15. E.g., Sean T. McAllister, *The Confluence of a River and a Community: An Experiment with Community-Based Watershed Management in Southwestern Colorado*, 3 U. DENV. WATER L. REV. 287 (2000).

ment in the large comports with the desire for more local participation and autonomy.

To be sure, between pure localism and total centralization of authority there is a wide range of intermediate choices. Recent efforts to deal with regional water problems, on places as diverse as the Platte River,¹⁶ the Rio Grande,¹⁷ and the Bay-Delta, have spawned some rather novel sorts of collaborative entities, borne out of negotiation (and sometimes litigation). They bring local stakeholders together with state and federal officials, generating new forms of governance that are essentially created contractually, rather than through the political process.

One interesting question these developments raise is whether we are seeing viable new institutional arrangements being fitted to the hydrological realities, and a genuine withering away of some of the old boundaries and the old politics. If so, a core question is what the power relationships are going to be in the new entities thus created? To read current press reports about CalFed, for example, is to hear about a great deal of unresolved conflict, suggesting that power relationships are still significantly unresolved. In another setting, there is ongoing an effort to develop a Multiple Species Conservation Plan (MSCP) on the Lower Colorado River, which is moving ahead though the environmental organization participants have walked out of the process. Is this a workable process, a hopeful example of the innovative approach former Secretary Babbitt's administration was meant to spawn,¹⁸ or simply a prelude to further litigation somewhere down the line?¹⁹

Another fundamental question raised by the effort to forge a new balance between developmental and ecosystemic values is what will count as success? The goal, after all, is some measure of restoration of biological services; the watershed is simply the medium for working toward that goal. But the goal itself is far from clear, and it is kept unclear, among other things, by the ESA's focus on jeopardy avoidance, and its ambiguous posture toward recovery.²⁰ There are few precedents here thus far, the most advanced perhaps being the final

16. See J. David Aiken, *Balancing Endangered Species Protection and Irrigation Water Rights: The Platte River Cooperative Agreement*, 3 GREAT PLAINS NAT. RES. J. 119 (1999).

17. For examples, see Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History*, 88 CAL. L. REV. 2375 (2000).

18. For a tour of the Babbitt regime by an insider who was himself instrumental in developing many of the policies see John D. Lesly, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 31 ENVTL. L. 199 (2001).

19. One stage in the controversy is found in *Southwest Center for Biological Diversity v. Babbitt*, 143 F.3d 515 (9th Cir. 1998). See also David Hayes, *Interior's View of Colorado River Issues*, in COLORADO RIVER PROJECT, SYMPOSIUM PROCEEDINGS 73 (1999).

20. Recovery must be planned for, but its exact meaning and its achievement, are left as goals, rather than mandates, under the ESA. See Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1 (1996).

resolution of the *National Audubon* case dealing with California's Mono Lake on the east side of the Sierra.²¹ An article written some years ago about the spotted owl spoke of a process of "unintentional evolution toward ecosystem management."²² The phrase is intriguing, but the fact remains that we are far from sure what our goal is supposed to be (what recovery means, not only as a biological concept, but as a public policy goal) beyond avoidance of jeopardy opinions.²³

Efforts at comprehensive planning work best when essentially everyone in the habitat area has a self-interest in obtaining an approved plan, and is willing to work together to put such a plan together. Bluntly put, that usually means when the alternative to working together—such as a court-ordered shutdown of activity—looks worse. Perhaps the negotiations on the Platte River are illustrative, where three states (Wyoming, Colorado, and Nebraska) were able to come together to hammer out a negotiation designed to meet species' needs on the river in the downstream (Nebraska) state.²⁴

The Platte may, however, be more the exception than the rule, and even there one participant considers it a failure of collaborative planning, rather than a partial or interim success.²⁵ It isn't easy to bring all the relevant stakeholders on a river (or elsewhere) together to try to hammer out a mutually acceptable allocation of responsibilities. In the Platte case, the incentive to negotiate was primarily triggered by the need for a Federal Energy Regulatory Commission (FERC) license renewal for a dam in Nebraska. Under ordinary circumstances the entire ESA burden might have focused on that facility: that is, the license renewal would likely have been conditioned on the applicant's ability to assure adequate water flows for the downstream listed species. But, as it happened, the three basin states were (and still are) at the time engaged in a reopening of an interstate equitable

21. See California State Water Resources Control Board, Decision and Order Amending Water Right Licenses to Establish Fishery Protection Flows in Streams Tributary to Mono Lake and to Protect Public Trust Resources at Mono Lake and in the Mono Lake Basin, Decision 1631 (1994); California State Water Resources Control Board, Order Requiring Stream and Waterfowl Habitat Restoration Measures by the Board, Order No. 98-05 (1998).

22. E. Charles Meslow, *Spotted Owl Protection: Unintentional Evolution Toward Ecosystem Management*, 10 ENDANGERED SPECIES UPDATE 34 (1983).

23. A footnote on this matter is the case of the Salton Sea in California's Imperial Valley. It exists today by virtue of out-of-watershed agricultural return flows, and it is threatened by proposed efficiency improvements in that irrigation, and by marketing of some of that irrigation water to out-of-basin municipal use. No notion of restoration or return to "normalcy" will save the Salton Sea (and its now significant ecological values). Only some yet-more-unnatural technical fixes can do that. The Salton Sea is only the most obvious example of how dramatically we have changed the natural landscape, and how extensive the adaptations to it are. Among the central issues in watershed management (of which "restoration" is a prominent element) is what our baseline is to be. See M. COHEN ET AL., HAVEN OR HAZARD: THE ECOLOGY AND FUTURE OF THE SALTON SEA (1999).

24. Discussed in Sax, *supra* note 17.

25. See John D. Echeverria, *No Success Like Failure: The Platte River Collaborative Watershed Planning Process*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 559 (2001).

apportionment case in the U.S. Supreme Court,²⁶ where downstream environmental needs were an issue, and so each of them may have been vulnerable in that setting. In addition, Colorado was facing loss of some of its water upstream in the setting of a bypass flow controversy on national forest lands.²⁷ For these, and no doubt other reasons, Nebraska was not left alone to face the ESA problem; and a watershed-wide negotiation was initiated and pursued.

Is this sort of achievement the exception, rather than the emerging rule? As indicated above, we are far from being able to make a final judgment. Even now, the ESA is often criticized for generating piecemeal, non-comprehensive outcomes. Tribes have been prominent critics of the ESA consultation process, which works to award the last available water to a project proponent, leaving tribes with senior but unused reserved water rights out in the cold because their unbuilt projects are not included in the ESA-determined water baseline that underlies jeopardy opinions. Conversely, because the ESA is administered project by project, consultation by consultation, a given project proponent may have to bear an undue burden of mitigation, while others who are also contributing to jeopardy are not brought to task because their activity does not trigger a consultation.

In addition, because the Fish and Wildlife Service, the primary administrator of the ESA, prefers to act through the section 7 consultation process, rather than the section 9 “take” provision, it appears to self-limit its potential for attacking jeopardy issues more comprehensively. The point is simply that while the ESA is certainly a watershed-management-friendly sort of law (with its environmental goals and habitat-based concerns), it has often been administered in a very narrow, case-specific way.

So the story is a complicated mixture—exciting innovations, bureaucratic foot-dragging, much promise, much pessimism. The Clinton Administration certainly made ambitious efforts to manage at the watershed-scale, as exemplified by the Everglades, the Northwest Forest Plan (Spotted Owl), and the Platte River. The Bay-Delta, an extraordinarily promising model, nonetheless still seems to be torn by irresolution. Another critical watershed, the Columbia-Snake River system, which extends beyond even its vast watershed out into the ocean, and beyond national borders, and where environmental issues have been at the forefront of attention for a long time, has so far eluded efforts to get a firm grip on the salmon restoration problem. In the end, the central question may be what institutional structure is

26. See *Nebraska v. Wyoming*, 515 U.S. 1 (1995).

27. See JOSEPH L. SAX, BARTON H. THOMPSON JR., JOHN D. LESHY, ROBERT H. ABRAMS, *LEGAL CONTROL OF WATER RESOURCES* 874 (3d ed. 2000).

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best fitted for such large-scale managerial efforts, and how comprehensively a managerial system can function without collapsing of its own bulk and complexity.

Some very impressive and unexpected changes have been brought about in recent years. Watershed restoration is a reality and a central agenda item at every public and private level. Species protection and biodiversity concerns are on everyone's agenda, a dramatic change from even a few years ago. New institutions are coming into place that reflect biological realities. But the road ahead is full of obstacles, and the imaginative leadership that Bruce Babbitt brought to these issues seems to be in cold storage, at least for a while. Nonetheless, we have the tools at hand to bring an era of restoration to the American landscape. Patience and perseverance are the watchwords.