Ecological Policy and the Courts: Of Rights, Processes, and the Judicial Role

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> Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. . . The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, hear, and all other animals, including man, who are dependent on it or who enjoy it for its sights, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. (Sierra Club v. Morton 1972)

> The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) *can* be converted into an individual right by a statute [namely the Endangered Species Act] that denominates it as such, and that permits all citizens ...to sue. .. To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'We Care that the Laws be faithfully executed." (Lujan v. Defenders of Wildlife 1992)

These views, expressed by Supreme Court justices William O, Douglas and Antonin Scalia in 1972 and 1992, respectively, span the modem era of environmental litigation and reflect radically different views of the judicial role in addressing environmental controversies and in shaping ecological policy. Although Justice Douglas' views on standing for environmental objects did not prevail in the ***Sierra Club* v. *Morton*** (1972) ruling, his notion that the federal courts should be open and receptive to environmental claims did become the norm, This enlarged view of standing paved the way for an enormous number of judicial decisions sustaining environmental claims and sometimes even installing federal judges as *de facto* managers of federal range, timber, and fisheries resources. Justice Scalia's quite different views on the judiciary's role is set forth in his opinion in ***Lujan v. Defenders of Wildlife*** (1992), which rejects an expansive view of standing and finds that Congress violated the Constitution when it sought to allow any citizen to enforce the Endangered Species Act's (ESA) strictures. In a related decision, Justice Scalia has opined that the ESA should not be interpreted to "conscript [private property] to national zoological use" ***(Babbitt v.*** Sweet ***Home Chapter of Communities*** 1995). This liiited view of the judicial role and environmental legislation has prompted federal courts to begin abstaining from reviewing environmental claims while extending legal protection to property rights claims.

Drawing upon these two very different perspectives, this essay will addresses the role that courts are playing in defining and shaping new ecological policies for managing the nation's natural resources. It begins by briefly identifying the principal rights and responsibilitiss that have received judicial protection in current ecological policy controversies. It then places the judicial role in the larger context of our democratic institutions and examines the role courts have played in contemporary environmental controversies. Next, it notes the retrenchment that has occurred as both the courts and Congress have sought to reduce the judicial role in advancing ecological initiatives. Finally, it concludes with observations on what might be expected from the courts in the future and how this might influence advocacy on behalf of new ecological policies.

The Legal Foundation for Ecological Policy

The legal rights that shape ecological policy are primarily public rights that have been statutorily enshrined by Congress. There is no general constitutional right to an ecologically healthy environment; rather the Constitution grants Congress broad power over the nation's public lands, its commerce, and its spending (U.S. Const. Art. IV, § 3; Art. I, § 8). Drawing upon these powers, Congress has fashioned an impressive array of environmental laws that collectively support the current movement toward more ecologically sensitive natural resource policies (Interagency Ecosystem Management Task Force 1995). These laws create substantive environmental rights and establish important procedural requirements that the courts have been willing to enforce through injunctions and other remedial devices. Substantive environmental rights are most obviously reflected in laws like the Endangered Species Act (16 U.S.C. §§ 1531-43), Clean Water Act (33 U.S.C. § 1251-1387), and National Forest Management Act (NFMA; 16 U.S.C. § 1600-1614), which establish specific standards that natural resource managers must meet. Under the Endangered Species Act, species must be protected against extinction, an obligation that generally takes priority over economic and other considerations (*Tennessee Valley Authority* v. *Hill* 1978). Most administrative decisions under the act are based on scientific requirements: whether to list a species as endangered or threatened (16 U.S.C. § 1533), what to designate as critical habitat (ibid.), whether an action jeopardizes a listed species or its habitat (16 U.S.C. § 1536(b)), or whether an illegal taking has occurred (16 U.S C. § 1538(a)). Although

critics have noted that administrative interpretations have "watered down" the Act's seemingly absolutist language (Houck 1993), the ESA is, nonetheless, a powerful substantive law with important ecological overtones. The courts have enforced vigorously both its substantive and procedural mandates (e.g., *Thomas v. Peterson* 1985; *Sierra Club v. Yeutter* 1991). Similarly, the Clean Water Act, through a cooperative federal-state enforcement system, establishes quantitative water quality standards (33 U.S.C. §§ 1288, 1342), and protects the nation's ecologically important wetlands from adverse modification (33 U.S.C. § 1344). The National Forest Management Act also contains substantive limitations on the Forest Service's managerial discretion, including a prohibition on steep slope timber harvesting, aquatic buffer requirements, and regeneration standards (16 U.S.C. § 1604(g)(3)(E)), that have been judicially enforced (e.g. ***Sierra Club v. Cargill*** 1990; *Ayers v. Espy* 1994). Whether or not the NFMA's minimum viable population regulation is a meaningful substantive restraint is not yet clear ***(Sierra Club v. Robertson*** 1994b; ***Leavenworth Audubon v. Ferraro*** 1995), though it has been treated as such in the spotted owl litigation ***(Seattle Audubon Society v. Evans*** 1991; Tuholske and Brennan 1994).

Contemporary environmental laws also impose myriad procedural obligations on natural resource managers to ensure that environmental considerations are accounted for in planning and management decisions. The principal procedural laws include the National Environmental Policy Act (NEPA) (42 U.S.C. §§ 4321-4361), NFMA (16 U.S.C. §§ 1600-1614), and Federal Land Policy Management Act (FLPMA; 43 U.S.C. §§ 1701-1784). Although the Supreme Court has labeled NEPA primarily a procedural law ***(Robertson v. Methow Valley Citizens Council*** 1989), NEPA still serves as a major vehicle for mounting environmental challenges to federal agency decisions. Indeed, the courts have transformed NEPA into a law of real significance; judicial rulings have consistently enforced and expanded NEPA procedural obligations, even incorporating ecological concerns into its interpretation (Bear 1994). In ***Marble Mountain Audubon Society v. Rice*** (1990), for example, the Nmth Circuit Court of Appeals ruled that federal agencies must assess the environmental impacts timber harvesting will have on migratory wildlife corridors. The NFMA and FLPMA impose detailed land and resource planning obligations on the Forest Service (16 U.S.C. § 1604) and Bureau of Land Management (BLM; 43 U.S.C. § 1712), including NEPA obligations. Several judicial rulings have enforced these procedural planning requirements, notwithstanding contrary arguments advocating deference to agency discretion (e.g. ***Citizens for Environmental Quality v. United States*** 1989; ***National Parks and Conservation Ass'n v. FAA*** 1993).

Collectively, these laws provide even more powerful support for ecological management than can be extracted from any single law (Keiter 1994). In ***Seattle Audubon Society v. Lyons*** (1994), a federal judge invoked four different laws—NEPA, NFMA, FLPMA, and the ESA—to endorse the ecosystem management policy adopted in the President's plan for ending the spotted owl/logging controversy. The White House Interagency Ecosystem Management Task Force (1995) similarly relied upon a plethora of laws to establish a legal foundation for current federal ecosystem management approaches. To ensure careful consideration of ecological consequences, the courts have extracted complex planning and consultation obligations from the overlapping environmental statutes that govern public-land managers. In Pacific ***Rivers Council*** v ***Thomas*** (1994), for example, the Ninth Circuit ruled that the Forest Service must reconsult with the US. Fish and Wildlife Service before implementing a forest plan when a new species is subsequently listed under the ESA. The court enjoined all forest plan activities until reconsultation was completed, thus suggesting that these procedural consultation obligations are important to ensure that a plan's full ecological consequences are assessed before implementation decisions are made piecemeal (Bada 1995). In short, contemporary environmental laws provide a strong legal basis for the ecosystem-based management policies and initiatives that are surfacing across the public domain and elsewhere (Keiter 1994; Breckemidge 1995).

The Judiciary and Ecological Policy

During the past quarter century, the courts have played a major role in shaping natural resource policy and resolving related controversies. Proponents of environmental reform often regard the courts as the only sympathetic forum available to them; they view litigation as the only meaningful check on a resource management bureaucracy "captured" hy industry and beholden to local economic interests. Ironically, private landowners and industry also regard the judiciary as a last line of defense against an overzealous government bureaucracy intent on imposing more and more rigorous environmental regulations. Natural resource managers, however, generally regard judicial intervention as a sign of failure, reflecting an inability to achieve consensus or a rejection of their scientific conclusions. Whether or not these perceptions are entirely accurate, they help explain the role that the judiciary is playing in the ecological policy debate.

The judiciary is one of three branches of government in our tripartite democratic system, which is built on the concept of separated powers. The Constitution vests Congress with legislative power (U.S. Const. *Art.* I); Congress is responsible for makiig the law and thus establishes the basic direction and philosophy for natural resource policy. The Executive branch, including the President, Cabinet officers, and the professional bureaucracy, is responsible for implementing and enforcing the law (U.S. Const. *Art.* II); the agencies translate congressional laws into consistent, workable policies governing the public lands and natural resources. The judiciary is charged with interpreting and applying the law (U.S. Const *Art.* III); through the judicial review process, courts are available to review the actions of the other two branches to enforce constitutional, statutory, or other legal obligations. In short, the judiciary is responsible for ensuring government accountability and for protecting individual rights against government over-

reaching. In fulfilling its role of interpreting the law, the courts also serve—as Alexis de Tocqueville (1947) noted more than 100 years ago—as referees in major public policy disputes.

Indeed, the latter half of the twentieth century bas witnessed a veritable explosion in public interest litigation. As Congress and the Executive branch have expanded the scope of federal activity and regulation, the courts have been called upon to review this process and to enforce federal legal norms. The modem era of public interest litigation can be traced to the Supreme Court's decision in ***Brown v. Board of Education*** (1954), which triggered extensive judicial intervention into the nation's public school systems to vindicate constitutional equality principles. In *Brown's* aftermath, the courts came to be viewed as an appropriate forum for resolving thorny social controversies, often through the medium of an equitable injunction. Drawing upon the civil rights model of institutional reform through litigation, various environmental, consumer, and other public interest groups turned to the courts as a hospitable venue for pressing their cause (Chayes 1976).

At the same time, the courts themselves proved supportive of public interest litigation. A series of Supreme Court rulings liberalized Article III's standing doctrine, opening the federal courts to new cause-oriented litigants who were only required to show a personal injury (e.g., ***United States v. SCRAP*** 1973). The Supreme Court also adopted the "hard look" doctrine for reviewing agency actions, signaling the lower federal courts to begin carefully examining the basis for administrative decisions (***Citizens to Preserve Overton Park v Volpe*** 1971). To remedy constitutional and statutory violations, the federal courts began wielding their equitable injunctive powers more broadly, using them to restrain illegal government actions and to reform recalcitrant bureaucracies (Fiss 1979). And by interpreting the rules of civil procedure broadly, the courts permitted multiple parties to join in public-interest lawsuits, thus enabling the multifarious interests involved in environmental controversies to participate in the litigation as well as remediation negotiations (Chayes 1976).

Congress also encouraged these trends and further legitimized public-interest litigation. Congress revised the Administrative Procedure Act (*5* U.S.C. §§ 551-559) to promote citizen participation in federal agency processes and to authorize judicial review of agency actions (Schwartz 1991). In the environmental field, Congress likewise promoted the concept of judicial oversight: it adopted NEPA and its Environmental Impact Statement (EIS) requirement, which the courts transformed into a major litigation tool; it passed numerous statutes, including the Endangered Species Act and Clean Water Act, that contain citizen suit provisions and vest courts with specific remedial powers (16 U.S.C. § 1540, 33 U.S.C. §§ 1319,1365); and it provided for attorney fee awards (28 U.S.C. § 2412). By making attorney fees available to prevailing parties, Congress has ensured that lawyers are available to vindicate the public interest as "private attorney generals." Such diverse organizations as the Natural Resources Defense Council and Mountain States Legal Foundation have used these judicial and legislative changes to access the courts to test the limits of agency authority and policy. Despite regular criticism and some retrenchment, Congress has continued to include judicial review provisions in its major environmental legislation, and it has even incorporated natural resource damage provisions in recent laws (e.g. 42 U.S.C. § 9607, 33 U.S.C. § 2706), thus providing an additional incentive for litigation.

As a result, the courts have become prominent participants in the evolution and definition of public policy in the environmental arena, including the emergence of new ecological policy. Nowhere has this been more evident than in the Pacific Northwest's spotted owl controversy. During the late 1980s, a series of federal judicial rulings, based on modern forest management and environmental protection statutes, brought public-land logging to a virtual halt on the nation's most productive timber lands (Flournoy 1993; Sher 1993). The various injunctions, designed to prevent further violations of the NFMA, NEPA, and ESA, prevented the Forest Service from selling its timber until the survival of the northern spotted owl, a previously little known and reclusive forest dwelling bird of no apparent economic value, was assured. Following unprecedented presidential involvement in this regional controversy, the Forest Service and BLM ultimately adopted Option 9 in the President's Forest Plan (USDA Forest Service and USDI Bureau of Land Management 1994). The plan imposed a new ecosystem management regime on the region's forests and provided for a dramatically reduced harvest level to protect myriad species and other ecological features. Option 9 eventually secured the court's blessing, which included an endorsement of the concept of ecosystem management as a legally valid—and perhaps even mandated—forest management policy (***Seattle Audubon Society v. Lyons*** 1994).

A similar pattern has emerged in several other natural resource controversies. In the Southwest, a federal district judge has enjoined all national forest timber harvesting until the Forest Service prepares a management plan to address habitat needs of the Mexican spotted owl, a listed endangered species (***Silver*** v ***Babbitt*** 1995). In the Pacific Northwest, as concern has grown over the fate of salmon navigating the Columbia River system, the courts have been called upon to referee dam management, fish harvest levels, and East-side logging practices (***Northwest Resource Information Center, Inc v. Northwest Paver Planning Council*** 1994; ***Pacific Rivers Council v Thomas*** 1994; McGinnis 1995; Volkman and McConnaha 1993). Over the past twenty years, NEPA-based public rangeland grazing lawsuits have forced the BLM to review its grazing policies (***Natural Resources Defense Council v. Morton*** 1974), though the courts have been reluctant to burden land managers with allotment-specific EIS obligations (***Natural Resources Defense Council v. Hodel*** 1985). In the Northern Rockies, a series of federal court injunctions during the mid-1980s brought the Forest Service's accelerated oil and gas leasing program to a halt (e.g., ***Bob Marshall Alliance*** v. ***Hodel*** 1988), requiring forest-wide NEPA analyses before irrevocable leasing decisions were made. Judicial involvement in these natural resource controversies has, in turn, prompted

the adoption of more ecologically sensitive management policies, principally by expanding agency environmental analyses to broader spatial and temporal scales.

Judicial and Congressional Retrenchment

Extensive judicial involvement in environmental controversies has triggered a perhaps predictable backlash. In the judicial arena, the Supreme Court and other federal courts recently have employed an assortment of legal doctrines to curtail active judicial intervention into environmental policy disputes. The Supreme Court has also extended legal protection to property owners and others resisting new environmental regulations, while lower courts have refused to read ecologically sensitive statutory mandates expansively. Congress, too, has entered the fray. It has used its budgetary powers to relieve courts of their judicial review authority, and it has begun reexamining controversial environmental laws that have been used to block development proposals. As a result, the courts are playing a dual role in the new ecological policy debates, one of which is retarding progress toward a new paradigm.

Most notably, the Supreme Court has revitalized the Constitution's Fifth Amendment prohibition against uncompensated takings of property and given property owners a potent weapon against environmental regulations. The Court's view of property and ownership rights, as reflected in such decisions as ***Lucas v. South Carolina Coastal Council*** (1992) and *Dolan v. City of Tigard* (1994), effectively endorses the principle that property owners are entitled autonomously to decide how to develop or manage their land, largely unconstrained by newly identified ecological or other community concerns (Freyfogle 1993). The Court's rulings also appear to endorse the traditional view that land and public resources are appropriately managed as discrete entities rather than as part of an ecological complex (Sax 1993). Although the Fifth Amendment takings clause has its greatest impact in protecting privately owned land, it also applies in cases where Congress or state legislatures statutorily have vested public resource users with property rights, as in the case of hard rock minerals, oil and gas leases, and water appropriations. Even the threat and associated costs of takings litigation can deter government officials from extending environmental regulations or reaching ecologically sensitive decisions.

Tbe Supreme Court has also rendered a series of procedural rulings designed to constrain an interventionist-prone federal judiciary. The Court'sjusticiability rulings on standing and ripeness, namely the ***Lujan v. National Wildlfe Federation*** (1990) and ***Lujan v. Defenders of Wildlfe*** (1992) decisions, are intended to deter federal courts from intervening into policy disputes or programmatic matters. Relying upon these access limitation decisions, several lower courts have refused to review legal challenges to forest plan decisions, concluding that the matter was not ready for judicial review until site-specific project decisions were reached (e.g., ***Sierra Club v. Robertson*** 1994a; Tuholske and Brennan 1994). In ***Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*** (1978), the Supreme Court ruled that federal courts cannot impose procedural requirements on agencies beyond those mandated in the Administrative Procedures Act or governing organic legislation. In ***Chevron, USA, Inc. v. Natural Resources Defense Council*** (1984), the Supreme Court held that courts must defer to an agency's legal interpretation of its own organic legislation, which has kept courts from second guessing how agencies interpret legal requirements. Courts have relied upon the ***Chevron*** principle to interpret environmental statutory requirements narrowly. In ***Sierra Club v. Marita*** (1995), for example, the Seventh Circuit Court of Appeals refused to read conservation biology principles into the National Forest Management Act's biodiversity conservation provision, deferring instead to the Forest Service's scientific judgments in the challenged forest plan.

Other laws have been invoked by the courts to thwart federal ecological management efforts. Courts have legally extracted protected rights from older laws like the General Mining Law of 1872 (30 U.S.C. §§ 21-42) and the Taylor Grazing Act of 1934 (43 U.S.C. §§ 315-315r), and relied upon these rights to invalidate government regulatory initiatives. A Wyoming federal district court recently invoked the Taylor Grazing Act's preference right provisions to invalidate key provisions in the Department of the Interior's ecologically based range reform regulations ***(Public Lands Council v. US. Dept. of the Interior Secretary*** 1996). Courts have interpreted Federal Advisory Committee Act ***(5*** U.S.C. Appendix 2, § 1 et seq.) requirements to prohibit natural resource agencies from using scientific information developed by an illegally constituted advisory committee ***(Alahama-Tomhighee Rivers Coalition v. Department of Interior*** 1994; Lynch 1996). The Tenth Circuit Court of Appeals, in litigation initiated by a local group resisting an endangered species listing, recently ruled that NEPA requires preparation of an EIS before the US. Fish and Wildlife Service can designate critical habitat (*Catron County Board of Comm'nrs. v. US. Fish and Wildlfe Service* 1996). In sum, as the courts have assumed a more prominent role in ecological policy disputes, a retrenchment has occurred to curtail judicial involvement and to shift the focus of power from the courts back to the legislative and administrative arenas.

In addition, Congress has actively sought to curtail judicial involvement in ecological policy disputes. Congress bas used the appropriations process to modify environmental laws and to limit federal judicial review of environmental claims ***(Robertson v. Seattle Audubon Society*** 1992). The most notable recent example is the 1996 salvage timber appropriations rider, which included legal sufficiency and jurisdiction stripping language that precluded any meaningful judicial review of timber sale decisions (1995 Recissions Act § 2001, Pub. L. No. 104-19, 109 Stat. 194). Thecourtsrejectedaseries of challenges to timber sales covered by the rider, finding that the sales were "not subject to any federal environmental or natural resources laws" ***(Inland Empire Public Lands Council v. Glicksman*** 1996; ***Idaho Sporting Congress v. US. Forest Service*** 1996). Significantly, the courts also found that

Congress intended the rider to extend beyond salvage timber to include previously scheduled "green" timber sales that had been withheld for ecological and other reasons *(Northwest Forest Resources Council v. Glickman* 1995). In addition, the courts concluded that the judicial review prohibition extended to timber sales on lands previously placed off-limits in Option 9 to protect spotted owl habitat *(Oregon Natural Resources Council v. Thomas* 1996). The lesson is that Congress has the power to override existing laws; it also has the authority, under Article III of the Constitution, to limit federal court jurisdiction (Gunther 1984). And Congress can, based solely on political considerations, choose to exercise this power and thus remove the courts from the ecological policy debate.

Congress also has signaled its dissatisfaction with various ecologically based administrative initiatives and judicial decisions by moving to amend or modify existing environmental laws. Various congressional coalitions have sought to reform the Endangered Species Act to curtail its regulatory impact on private lands, to adopt takings legislation mandating government compensation for any significant impact on property values, and to revise NFMA as well as range policy. Permanent forest health legislation is also under consideration, as are proposals to transfer public lands from federal to state ownership. Although none of these proposals passed the 104th Congress, they are expected to resurface in the next Congress. Moreover, Congress has employed recent budgetary reductions along with oversight hearings to slow administrative movement toward ecosystem-based management policies. Plainly, the constitutional checks and balances system means that the judiciary will not always have the last word in the ecological policy arena.

Assessing the Future

What conclusions can be reached regarding the judicial role in the evolution of ecological policy? Are there clear winners and losers? Are the courts a major institutional player in the formulation and definition of ecological policy? Should the courts play a central role in this policy debate? What changes and developments might be expected in the foreseeable future? Because natural resource policy appears to be in a transitional phase, conclusions about the judicial role and the future direction of natural resource law only can be tentative at best. Nonetheless, some conclusions can be firmly reached, while others are more speculative.

First, the courts are likely to continue playing a significant role in the development and formulation of ecological policy. For the environmental community, the courts often have been the only available forum for challenging or blocking ecologically tenuous natural resource policies and decisions. In recent years, however, private landowners and natural resource users have turned to the courts with takings and related claims, seeking judicial relief from ecologically based regulations and policies. In addition, the Wise Use Movement and its adherents have had some litigation success invoking environmental and other administrative requirements to deter or slow ecological initiatives *(Catron County Board of Comm'nrs v. US. Fish and Wildlife Service* 1996). All parties, however, confront similar standing and ripeness arguments against judicial review of their claims, as well as arguments urging judicial deference to administrative expertise and prerogatives. In other words, the procedural and other legal doctrines that govern judicial access and authority are neutral and can be employed by any party to challenge judicial review requests. But it is precisely because the courts present an alternative neutral forum that those who "lose" in the legislative or administrative arenas will continue to seek judicial review to invalidate objectionable policies.

Second, the courts can play only a limited role in formulating ecological policy. Because the judiciary is not a lawmaking institution, its powers are principally negative: it can only ensure governmental accountability under the law and enforce its rulings through the negative prescription of an injunction. While judicial rulings often influence policymakers, the courts cannot affiatively make natural resource policy In the spotted owl rulings, the court did not dictate the type of forest plan that would be sufficient to meet various statutory requirements; rather, its rulings served as a catalyst for the agencies cooperatively to develop what became an ecosystem management plan, which the court eventually validated (Seattle *Audubon Society v Lyons* 1994). Of course, that judicial stamp of approval is important; it confirms that the agencies have the legal authority—and perhaps even the legal obligation—to pursue ecosystem-based management policies (Keiter 1994). Nonetheless, as the Seventh Circuit's *Marita* ruling indicates, the courts will ordinarily defer to agency judgments and legal interpretations, rather than intervene in natural resource policy disputes.

Third, the agencies can be expected to continue lamenting legal challenges to their management prerogatives. Judicial intervention is still seen as a sign of failure and as a threat to administrative authority (Sax and Keiter 1987). However, the days of total judicial deference to agency expertise are long gone; current laws were designed intentionally to impose explicit standards and procedural requirements to promote more environmentally responsible management decisions (Wilkinson and Anderson 1985). This fact alone virtually assures continued judicial oversight of natural resources policy Farsighted agency administrators might even perceive that judicial rulings can be helpful in advancing a new ecological policy agenda and reforming a reluctant bureaucracy. To the extent the bureaucracy wishes to avoid litigation, the emerging trend toward consensus-based, collaborative public processes should help deter litigation while advancing an ecological agenda sensitive to local environmental, economic, and social concerns (Keystone Center 1996; Interagency Ecosystem Management Task Force 1995).

Finally, Congress will continue to play a key role in the formulation and implementation of ecological policy. As demonstrated by the appropriations riders, Congress has the power to override environmental laws and to block judicial review, which it bas been willing to exercise to achieve political rather than ecological objectives. Furthermore, Congress

can use its vast legislative powers to reduce the impact of existing environmental laws, or it can use these same powers to pass legislation validating new ecological management policies (Haeuber 1996). Because ecological legal protections are rooted in congressional legislation, Congress is an important institution in the evolution of new policies or programs. A congressional stamp of approval on new ecosystem management or biodiversity legislation would fully legitimize these concepts in law, provide a firm basis for judicial intervention, and consolidate the progress that bas been made through on-the-ground administrative initiatives (Keiter 1996).

In sum, the law has plainly shaped current ecological policy debates, and the courts have moved the agenda forward. However, owing to constitutional and institutional limitations, the courts have played an uneven and shifting role in these developments. Judicial intervention into environmental disputes to advance ecological objectives is a two-edged sword: Both proponents and opponents have powerful legal arguments that can be invoked to support quite different results. An intervention-prone court cannot ignore judicial restraint doctrines, and a court inclined to interpret environmental laws expansively cannot overlook countervailing property rights arguments. Ultimately, therefore, Congress likely holds the key to whether a new era of ecologically sensitive natural resource policy has arrived.

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