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Proponents of environmental protection have recently turned to the courts as a forum for their views. Based upon his experience in litigation, the author contends that the mere filing of a complaint in these environmental lawsuits effectively enjoins further progress on the particular project, regardless of the suit's legitimacy. The author concludes that such obstruction often unnecessarily undermines economic development.

ISAJAHS AT THE BAR: ENVIRONMENTALISTS AND THE JUDICIAL PROCESSES

*James P. Rogers**

THE cry of "Woe, woe, woe unto thee for thy sins!" was heard in the streets during the days of the Old Testament prophets, particularly the prophet Isaiah. We again have the same cries, but with a new set of prophets who, for lack of a better term, can be called "ecological activists," telling us that the wrath of God is again upon us.

If these prophets of doom kept to the streets and to their oral lamentations or even came before the administrative and executive agencies which have the expertise to understand and withstand them, our dangers of real economic decline in the nation would not be too great. However, they have found a new forum—the courts. Herein lies vast trouble indeed.

It is the thesis of this paper that the judicial processes, particularly of the federal courts, have been used and abused in the name of "ecology" or "environmental degradation" to the extent that those processes themselves, the national

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health and welfare, and the division of our government into legislative, executive, and judicial confines, are all in danger.

Joseph L. Sax, professor of law at the University of Michigan, has, more articulately than any other of the group he represents, given public expression to the objectives of the environmentalists in enlisting judicial aid in their enterprises. In his recent book, *Defending the Environment—A Strategy for Citizen Action*, he assigns to Chapter 4 the title “A Role for the Courts.” In it he makes a case for preferring the judicial process, which he trusts, to the administrative process, which for some reason he distrusts.

After differentiating between the functions and processes of the courts in ecological affairs as compared to the administrative agencies, Professor Sax explains:

[T]he principal function of courts in environmental matters is to restrain projects that have not been adequately planned and to insist that they not go forward unless and until those who wish to promote them can demonstrate that they have considered, and adequately resolved, reasonable doubts about their consequences.¹

Professor Sax thus stipulates, in open court as it were, the environmentalist court objective of halt and delay, not resolution, of environmental matters where the environmentalists disagree with the course to be followed.

Professor Sax in his Chapter 4 recognizes, however, the problems involved in opening up the courts for these environmental cases to anyone having a grievance, legal or otherwise, and the features of delay inherent in all litigation. He says:

The merits of judicial action must necessarily be tested against customary fears that the lawsuit engenders interminable delay, acts as an invitation to cranks, and is, at best, a two-edged sword by which those who wish to impede rational planning will be empowered to the same degree as those who desire to advance it.²

1. SAX, *DEFENDING THE ENVIRONMENT—A STRATEGY FOR CITIZEN ACTION* 113 (1971).

2. *Id.* at 115.

The Professor follows this language by pointing out that most people do not understand, or misunderstand the problem of excessive time involved in the invocation of judicial action. He reassures the reader that delay, by preventive injunction,

is never imposed simply because some dissatisfied citizen desires it. Only a judge can convert a plaintiff's desire for an injunction into an enforceable order. And judges, as noted above [he says], do not simply grant injunctions because they are sought; they must be persuaded that important issues are at stake and that there is a reasonable likelihood of ultimate success by the plaintiff.³

Otherwise, guesses the Professor, the project can go forward, litigation or no. Again, he says:

The granting of preliminary relief . . . by a respected federal judge must never be confused with the notion of citizen-extremists on their own delaying important public projects. . . . As we shall see, if there is any one quality which predominantly characterizes the usual courtroom proceeding, it is judicial cautiousness.⁴

This oversimplification of the problem is, of course, errant nonsense and will be recognized as such by anyone who has ever had the responsibility of deciding whether or not to go ahead with a project while some aspect of it is being litigated, whether or not a temporary injunction issues.

There are many examples of the fallaciousness of Professor Sax's reassurance on this point. One of the best is a case entitled *Sierra Club v. Hardin*,⁵ which was brought by the Sierra Club seeking to prevent the performance by the Forest Service and a contract timber purchaser of a contract calling for the construction and operation of a pulp mill and related facilities immediately north of Juneau, Alaska. The contract, dated September 12, 1968, which involved a sale by the Forest Service and the manufacture by U.S. Plywood-Champion Papers Inc. of 8.75 billion feet of timber over a 50-year period, required of the purchaser an investment per-

3. *Id.* at 118.

4. *Id.* at 119.

5. 325 F. Supp. 99 (D. Alas. 1971).

haps in the range of \$100,000,000. After the contract was signed, the purchaser in initial performance and planning expended some \$3,000,000 before the Sierra Club brought its action some fourteen months later on February 10, 1970, attacking the validity of the contract on several grounds, most of them novel and of first impression in any court.

No temporary injunction was issued by the court. Nevertheless, the pendency of the lawsuit caused the company in all prudence to halt the beginning of construction work on the project, a condition which may exist until a final resolution on appeal of the merits of the case.

Obviously, unless counsel could give the timber purchaser's management absolute assurance that there was no merit to any of the plaintiffs' contentions and that the plaintiffs could not possibly prevail on trial or appeal, management was not likely to take the risk of proceeding with expenditures of this kind while there was any uncertainty whatever of the validity of the contract the Sierra Club attacked. If any one or more of the Sierra Club's contentions, however novel, prevailed below or on appeal, the purchaser could have spent in the area of \$100,000,000 on a pulp mill and related facilities, but would have no timber to process.

Another better known and certainly more spectacular case disclosing the unreality of Professor Sax's assurances that projects of consequence are not delayed simply because of the bringing of a lawsuit, unless an injunction issues, is the *Storm King* case,⁶ where Consolidated Edison of New York has been held up for years in the construction of a major electrical project on the Hudson river. From the issuance of the required authorization by the Federal Power Commission in 1965 the Sierra Club and others appealed to the Court of Appeals for the Second Circuit, and in the same year that Court sent the case back to the FPC for further hearings and a new decision,⁷ which was rendered in 1970.⁸ Once again the plaintiffs have appealed, and any final resolution of the environmentalists' objections to the project seems fairly remote,

6. *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965).

7. *Id.*

8. *Consolidated Edison Co. of New York, Inc.*, 1 ENV. REP. 1526 (FPC 1970).

since an appeal to the Supreme Court is likely if the plaintiffs lose in the Second Circuit this time. Professor Sax would have the reader of his book understand that the plaintiffs' action could not have brought this delay since the court did not enjoin Consolidated Edison.

There is many another case in the same category as these, but they are sufficient to illustrate the utter unreality of a concept that only a cautious federal judge, after due consideration, can bring to a halt important public projects environmentally attacked in court. These are rarely, if ever, actions against a government agency only; what usually triggers them is a contract, license, or permit by the federal government to some private company in the development of a project often running into many millions of dollars of private capital. Only the inexperienced and the naive would imagine going forward at this financial risk until the proceedings in court had been disposed of, however novel or flimsy the grounds of environmental attack.

In the second quotation above cited from his book⁹ Professor Sax has suggested that the judicial protections are also sufficient to deter cranks from entering court. What the Professor means by "cranks" is not stated, but apparently he would suggest as his definition those who the court can see are bringing patently frivolous and irresponsible lawsuits. In those instances no harm can come because the court will not enjoin the conduct complained of, and at the end when the court sees through the scheme, either by appropriate motions or after trial, the case will be dismissed.

It would be nice if this were so, but hard experience has demonstrated that it is not.

If these were the usual types of litigation which involved judicial precedents on matters frequently litigated, the courts might be able to see through "crank" cases brought for nothing but harrassment and delay. But in such cases as these the courts are usually asked to decide issues of first impression, of great novelty to the law, under statutes never or rarely before challenged.

9. SAX, *supra* note 1, at 115.

For example, an action was brought in the United States District Court for the District of Oregon on June 2, 1971 entitled *Family Clan, Inc. v. Philbrick*.¹⁰ Family Clan, Inc. on investigation turned out to be a communal group of what are frequently termed "hippies" who were purchasing land lying next to a portion of the Umpqua National Forest. The defendants were officials of the Forest Service who had made a contract of sale of certain timber, within view of the plaintiffs' commune, to a processor of timber. Some 25 percent or less of the sale area, which was not large to begin with, was to be clearcut, an accepted cutting practice in the Douglas fir and other limited areas of the national forests. The plaintiffs thought that such timber harvesting on the national forest slopes visible to them would decrease the value of their property and sought an injunction against the performance of the sale. Obviously their acquisition of the communal property had been made with full knowledge that the wooded slopes they liked to look at were national forest timberlands, which might well be the subject of a timber sale contract by the Forest Service, so they alleged that clearcutting on those slopes was unlawful under the terms of the Organic Act of 1897.¹¹

On June 29, 1971 the action was dismissed, but the case is now on appeal to the Ninth Circuit. Though not enjoined, performance of the contract has for the sake of prudence been suspended by the Forest Service and the purchaser.

In the history of the forest reserves, which began in 1897, and the Forest Service, which was created in 1905,¹² no challenge has ever been made to any court over the validity of clearcutting in appropriate areas of the Douglas fir region, where it is most predominant, or concerning any other area or species of national forest timber where clearcutting is the best silviculture. Clearcutting has always, heretofore, been considered a forestry, not a legal matter.

Even more recently, in the month of this writing, another commune brought an action in the United States District

10. Civil No. 71-378 (D. Ore., June 2, 1971).

11. Act of June 4, 1897, ch. 2, 30 Stat. 35, 16 U.S.C. § 475 (1970).

12. Act of February 1, 1905, ch. 288, 33 Stat. 628, 16 U.S.C. §§ 472, 524, 554 (1970).

Court for the Northern District of California,¹³ again to enjoin cutting of national forest timber under a timber sale contract. The primary thrust of the complaint is the contention that the timber sale contract should be preceded by the filing by the Department of Agriculture of an environmental impact statement under the National Environmental Policy Act of 1969¹⁴ because, it is claimed, it involves a "major Federal [action] significantly affecting the quality of the human environment."¹⁵

Needless to say, these cases involve questions of judicial novelty, completely unprecedented in character. As lawyers, we might say that, after some 70 years of the Forest Service selling national forest timber where in certain areas the method of harvesting was clearcutting, the legality of that method under the 1897 Act would be fairly established. We could also say that it seems unlikely that a national forest timber contract sale involving a relatively few dozen acres of national forest land in the Klamath National Forest constitutes a "major Federal [action] significantly affecting the quality of the human environment."¹⁶ Yet neither the identity of the plaintiffs nor the subject matter of either of these cases would safely identify them to most courts as "frivolous" or "crank" litigation, which the defendants could safely count on to be dismissed out of hand and that they could therefore safely proceed with performance of these contracts before a final order terminates them.

In a similar vein, the "Alaska case" of *Sierra Club v. Hardin*,¹⁷ previously mentioned, involved eleven legal issues, of which six were completely novel to any prior judicial controversy and four involved matters unique to litigation because of the circumstances of the case. Only one issue of the eleven, "standing," had been sufficiently litigated in other courts that there was some certainty of judicial precedent to determine its outcome, and that, of course, was only the threshold issue.

13. *Black Bear Ranch v. United States*, Civil No. C-71 1890 SC (N.D. Cal., 1971).

14. 42 U.S.C. §§ 4321-47 (1970).

15. 42 U.S.C. § 4332 (C) (1970).

16. *Id.*

17. *Supra* note 5.

There are many other cases in the field of environmental litigation where it is impossible to determine whether it is a "crank" case brought for the purpose of delay, obstruction, the satisfaction of the plaintiff's ego, or simply ill will and mischief-making. How would one classify a case, brought in the United States District Court for the Western District of Washington, Northern Division,¹⁸ involving an action by a "preservationist group" to enjoin the Forest Service from widening a trail across national forest lands from two feet to three feet, for example?

One further protection against frivolous or "crank" litigation normally available to a defendant is the sufficiency of a bond if injunctive relief is asked for at the beginning of litigation, to stay action pending its course. In many cases, as we have seen, simply the filing of the complaint has been the equivalent of an injunction as a practical matter. In others, an injunction has been granted. However, in no case known to this writer has the amount of the bond, when an injunction has been granted, been large enough to have any relationship to the amount of money involved to protect the private party affected by the litigation or to recompense the United States for the vast amounts of time, effort, and cost involved in the defense of these actions.

The sum total of the practical effects of the scores, if not hundreds, of environmental cases, which have suddenly been thrust upon the national community in a bare six years, is that there simply are no available protections of consequence against inordinate delay or "crank" litigation. The assurances of the intellectual community, as exemplified by Professor Sax, that the processes of the law by themselves can weed out the harmful effects of these resorts to the court, are simply not borne out by practical experience.

The harm from this situation arises from the fact that, faced with the prospect of such inordinate delay in litigation which in normal circumstances might be considered frivolous, the business whose project is attacked may decide to abandon it, whether or not the defendants prevail in the end. Since

18. *Alpine Lakes Protection Soc'y v. Hardin*, No. 8885 (W.D. Wash. 1971).

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1965, when the Federal Power Commission authorized Consolidated Edison's Storm King development, its costs must have risen very substantially beyond the Company's 1965 estimate. Whether by the time a final order of a court of last resort is entered the project will then be possible, may well be doubtful. (And if it is not then possible, this lawsuit augurs ill for the citizens of New York and *their* environment.)

When the Walt Disney Enterprises' plans for development of a large project for the recreation-starved citizens of Southern California within the Sequoia National Forest and National Park was enjoined at the behest of the Sierra Club in July of 1969,¹⁹ the estimated cost of the project was approximately \$35,000,000. Inflation's course, the opening of Disney World in Florida, and other considerations relevant to their board of directors by the time this case is finished, which could be some several years hence, may involve abandonment of the project. A similar situation to these two, we assume, could well obtain in a number of other cases.

One cannot escape the suspicion that these are the real objectives of this type of litigation, that is, they are brought not to win but so to delay a project of importance that in the end it will be dropped and victory will come simply from the passage of time, not on the merits of the case.

It is fruitless to argue now the protection against these results the doctrine of "standing to sue" once gave. That doctrine, judge-made and complex though it was, would have prevented most of these harms but for its swift erosion since the decision in *Storm King* in 1965.²⁰ It appears that the protection of the national welfare, and even of the courts themselves, must now lie in the hands of the Congress.

In the early 1900's and through the early years of the Great Depression the courts had become their own worst enemies with the excesses of judicial power they allowed themselves in enjoining virtually all rights to strike in disputes between labor and management. In 1932, in the Norris-LaGuardia Act,²¹ the Congress took away the jurisdiction of

19. *Sierra Club v. Hickel*, No. 51464 (N.D. Cal., July 1969).

20. *Scenic Hudson Preservation Conf. v. FPC*, *supra* note 6.

21. 16 U.S.C. § 101 (1970).

the federal courts to issue injunctions in labor disputes, except under the most stringent conditions. It is becoming apparent today that, if the courts are not similarly to over-extend themselves in the environmental litigation field as they did in the labor litigation field 50 years ago, a similar limitation of the federal judiciary's jurisdiction must be Congressionally imposed.

This is not to say that in this field, as in strikes, *all* jurisdiction to hear and determine the right of injunction should be removed. However, as in the Norris-LaGuardia Act of 1933, severe conditions precedent should be attached by the Congress when the federal courts' equity powers are invoked in such cases as these. One qualification should be that where administrative review is provided for, the federal courts may not take jurisdiction until the right of administrative appeal has been exhausted. Concomitantly, review of such action should be not *de novo* but on the record made before the administrative agency, and then only to the appropriate United States Court of Appeal, as in FPC²² and FCC cases²³ for example. Only thus, it appears, can judicial, legislative, and administrative chaos ultimately be avoided; the cases where environmental plaintiffs have simply disregarded administrative agency procedure and sought (and received) *de novo* consideration are far too many for comfort. Allowing the environmental Isaiahs into the courtroom has simply opened a Pandora's box which only the Congress can now close, obviously.

22. 16 U.S.C. § 8251 (b) (1970).

23. 47 U.S.C. § 402 (b) (1970).