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Book Review

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BOOK REVIEWS

FEDERAL ENVIRONMENTAL LAW. By Erica L. Dolgin and Thomas E. P. Guilbert. St. Paul: West Publishing Co., 1974. Pp. 1600. $25.00.

Environmental law, a creation of the 1970's, has reached the stage where it is now possible to attempt an analytical and comprehensive description. Since Earth Day, in April 1970, a host of new federal, state, and local, judicial, legislative, and administrative initiatives have created this new body of law from component parts of natural resources, nuisance, and administrative law, and developed new legal doctrines for technology assessment and protection of public health. Much, if not most, of the action has been in the federal courts because of an expanding body of federal statutes and agency actions. *Federal Environmental Law,* a publication of the Environmental Law Institute, surveys these developments in a one volume compendium of twenty-one essays on current major topics in the field. It is not a treatise or a hornbook in the conventional sense, but a series of essays on such leading issues as water pollution, land use planning, and pesticides. The essays, while not exhaustive, are well written and serve both as an excellent introduction for those unfamiliar with a particular subject and as an easily accessible restatement of where federal environmental law was in 1974.

In this fast moving field, no synthesis remains stable for long. Recent events have already dated certain statements as the law moves beyond its 1974 state. But, the flux of environmental law not only provides the risk of writing in the field, but also offers a compelling rationale for this particular volume. In a fast changing, confusing area, the writers have made a major contribution by publishing what will no doubt serve as the introductory treatise for some time to come. The editors have made a fortuitous choice of authors, most of whom are identified either with landmark cases or important reports in their field of expertise.

The chapter on national land use policy was prepared by William K. Reilly, president of the Conservation Foundation and reporter for the Rockefeller Brothers Fund Task Force Report on the Use of Land. Reilly traces the development of a federal land use planning process through the national government's concerns with assessment of the impacts of its diverse development projects such as highways, dams, and urban renewal projects to current attempts in Congress to enact national land use policy legislation. The

American Law Institute's Model Land Development Code is presented as a contemporary statutory device capable of dealing with some of the more persistent land use problems: protecting areas of critical environmental concern, encouraging regionally needed development, and controlling growth-inducing projects and large scale developments. Reilly's article, coupled with an earlier piece by Phillip Soper on the constitutional framework of environmental law tracing the impact of the fifth amendment's taking clause and substantive due process jurisprudence, serves as a good introduction to current land use law issues.

The chapter on transportation written by John W. Vardaman, Jr., counsel in the U. S. Supreme Court's most important case involving highways and parks,[1] is primarily an outline of federal highway law and does not touch on the environmental ramifications of our current national transportation policy which heavily favors the private automobile.[2] No mention is made of the environmental aspects relative to the issue of revitalizing the nation's railroads which polute less, conserve more energy, and use less land than other competing modes of transport.[3] The Interstate Commerce Commission's rate making policies are mentioned in a passing discussion of tariffs on recyclable materials.[4] The aviation component of transportation policy is discussed only in terms of controlling aircraft and airport noise.[5] However, as Vardaman remarks, the Federal Highway Administration has been predominant, not only in the reach of its programs, but also as a defendant in environmental litigation. Accordingly, the focus on highway law is understandable, although tools exist to work toward a coherent national transportation policy.[6] The author outlines the statutory requirements for comprehensive transportation planning which, more often than not, have been honored in the breach. He also discusses the mass of litigation arising

1. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

2. In the thirteen years between 1957-1970, the federal government spent $66 billion for transportation of which 71% was spent on highway programs, 15% on aviation, and 13% on inland waterways. The growth of the nation's public transportation and rail systems has been stunted as a result of this intensive government subsidization of competing modes of transportation. *See* the discussion of the U.S. DEPARTMENT OF TRANSPORTATION'S 1972 NATIONAL TRANSPORTATION REPORT *cited in* A. REITZE, ENVIRONMENTAL PLANNING, 434-44 (1974).

3. It is estimated that trucks use four to six times as much fuel as railroads per ton mile of freight carried, with a corresponding differential in air pollution. Although railroads could carry more freight traffic without congestion, most truck bearing highways operate at close to capacity. The favored position of automotive over rail freight thus has profound land use implications. *See* Commoner, *Trains Into Flowers*, HARPER'S MAGAZINE, Dec. 1973.

4. E. DOLGIN & T. GUILBERT, FEDERAL ENVIRONMENTAL LAW 1301 (1974).

5. *Id.* at 1151.

6. A congressional statement of the national transportation policy is found at the beginning of the Interstate Commerce Act, 49 U.S.C. § 1 (1959). For a discussion of modifications of the national transportation policy see Futrell, *Working on the Railroads*, SIERRA CLUB BULLETIN, Oct. 1975; Hall, *Straightening Out the Rails*, ENVIRONMENT, Vol. 17, Dec. 1975.

under section 4(f) of the Department of Transportation Act of 1966, which seeks to protect parklands and historical areas, and under the National Environmental Policy Act. As in other fields of environmental regulation, NEPA has become the means of checking on agency performance in fulfilling the mandates of other environmental protection laws. A disproportionately high percentage of NEPA lawsuits have been filed against the Secretary of Transportation seeking to enjoin highway projects which allegedly do not comply with environmental protection laws. Vardaman gives an excellent synopsis of the unique public hearing requirements for federal aid highways which can be built only after a two-tier system of hearings, one on location of the road and the other on its design and mitigation of its environmental impact.

The article on federal pesticide law by William A. Butler, the Environmental Defense Fund's counsel in the marathon litigation against the chlorinated hydrocarbon pesticides, DDT, Aldrin, and Diedrin, is a excellent introduction to this complex subject and the new Federal Environmental Pesticide Control Act of 1972 (FEPCA) which amended the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).[7] While Butler acknowledges that FEPCA is a flawed piece of legislation with inconsistent turns and varying standards as a result of its drawn out and controversial passage through Congress, he claims that it is a major improvement over previous attempts to control pesticide misuse. The new law retains and strengthens the labelling requirements which seek to identify and eliminate potential problems with pesticide use by a thorough system of testing prior to the chemical's "registration." The new law sets up a classification system of pesticides, using two distinct categories, general and restricted use. Those with a restricted label are to be applied only by trained operators subject to special controls. The Environmental Protection Agency's authority to monitor and regulate the intrastate use and sale of pesticides is a major extension of federal authority by FEPCA. The new law establishes a complex system of administrative appeals and judicial review unlike any found in other fields of environmental regulatory activity. Butler identifies the key legal issues in fleshing out FEPCA in practice. The article concludes with a helpful outline of other federal statutes bearing on chemicals in the environment such as the Delaney Amendment to the Federal Food, Drug and Cosmetic Act[8] forbidding carcinogens in food.

Federal Environmental Law has the expected major expositive chapters on federal air and water pollution control programs as well as an excellent discussion of the National Environmental Policy Act

7. 7 U.S.C. §§ 135 *et seq.* (1970), *as amended*, 7 U.S.C.A. §§ 136 *et seq.* (Supp. 1975).
8. 21 U.S.C. § 348(c)(3)(A) (1970).

by Fred Anderson, author of a single volume treatise on that statute, *NEPA In The Courts*. Other chapters discuss the federal law of water resource development, coastal development, managing the public lands, wildlife protection, energy policy, radiation, population, and historic preservation. The book is aided by placing several chapters on basic administrative law and institutional arrangements at the beginning along with an overview of the federal government's role in technology assessment.

When so much is done so well, one hesitates to point out gaps in the structure. Yet, at least one serious omission deserves comment. The treatment of forestry law, which is subsumed in the chapter on the public lands, is highly unsatisfactory, not only because of the importance of the forest resource to the economy and to environmental health, but also because a series of recent cases have given substance to the federal forestry statutes. In *Parker v. United States*,[9] the court gave full force to the promise of the Wilderness Act of 1964 as a serious attempt to preserve a portion of America's natural heritage and in *West Virginia Division of Izaak Walton League, Inc. v. Butz*,[10] the court banned clearcutting as an acceptable means of harvesting timber on national forest lands pursuant to the Organic Act. The debate on forestry practice and law sharpened with the detailed planning now being carried out under the Forest and Rangeland Renewable Resources Planning Act of 1974, which calls for the most serious resource inventory and planning for the nation's forests yet attempted.

Federal Environmental Law is the most useful volume for any student of the field, who, undoubtedly will annotate and supplement its valuable observations with his own notes. Such personal annotation is even more necessary because the book lacks an index and a table of cases. The sharply detailed table of contents is helpful in locating topics for those who know what they are looking for, but it does not fill the user's need for a good index. Annotation is also necessary to update the material in this fast changing field. In the twelve months between publication and the writing of this review, one-fourth of the chapter on institutional arrangements has been invalidated by internal restructuring at the Environmental Protection Agency and by a fundamental reorganization of the agencies dealing with energy matters, including the abolition of the Atomic Energy Commission and the establishment of two new agencies, the Nuclear Regulatory Commission and the Energy Research and Development Administration.

But such failings are insignificant compared with the usefulness

9. 309 F. Supp. 593 (D. Col. 1970), *aff'd.*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).
10. 367 F. Supp. 422 (N.D. W. Va. 1973), *aff'd* ——F.2d—— (4th Cir. 1975).

of *Federal Environmental Law* for any citizen concerned with environmental questions. The book's bulk is misleading; most of the individual articles are a fast read and are surprisingly well written for essays which, it is claimed, present comprehensive overviews of the subject matter. While most of the pieces are reformist in bent, the tone is not strident. Students using *Federal Environmental Law* as a supplementary text to their class materials will find it helpful, while those who have worked and written in the field for a longer period of time will value the fresh insights of its authors.

J. WILLIAM FUTRELL*

REPRIEVE FOR THE IRON HORSE: THE AMTRACK EXPERIMENT—ITS PREDECESSORS AND PROSPECTS. By William E. Thoms. Baton Rouge: Claitor's Publishing Division, 1973. Pp. 136. $12.50.

The last time I rode a U.S. passenger train was during Christmas break in 1964. Given the distance, my financial circumstances and the weather it appeared perfectly logical to me to go by rail. It took 17½ hours to travel from Fargo to Chicago (the following year I got smart and took the 15 hour bus ride). During this trip I was kicked in the head by a drunk (who, incidentally, was later literally ejected from the train by another victim, a well-seasoned Marine), and was shuttled off on a sidetrack two miles from the St. Paul terminal for three hours without engine and therefore without heat. I'm personally convinced that the quality of rail passenger service was a contributing factor to college student uprisings in the mid and late 1960's.

Being a wide-eyed first year economics student it was difficult for me to envision this type of service being offered by any other than a pure monopolist. Recognizing that there were viable transportation alternatives to rail, the customer treatment I received appeared to me to be very inconsistent with the quality product supposedly generated in a competitive system.

Professor Thoms restored my confidence in the "free enterprise" system by explaining that this inconsistency was due to the fact that providers of rail passenger service were "at war with the public."[1] The combative tactic used by the rails was to concentrate their management capabilities on encouraging carload freight traffic and discouraging the use of trains for travel. Professor Thoms relates that this was accomplished "by allowing facilities to become so decrepit and inconvenient that they [would be] avoided by anyone with

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1. W. THOMS, REPRIEVE FOR THE IRON HORSE 13 (1973).

2. *Id.* at 2.

good sense. . . ."[2] It is with little comfort that I now realize that I was but a tool and a plaything for the railroads and a casualty of the war to end all rail passenger service in the United States. A basic principle of Galbraithian economics is that American business, primarily through its consumer manipulative practices such as advertising, can literally create a market for its product or service. Professor Thoms' treatment of the passenger train is an excellent example of "what American business giveth, American business can taketh away." *Reprieve For The Iron Horse* is a blow by blow account of when, how, why, and where rail passenger service became an endangered species in the United States.

Chapter I, "The Railroads vs. the Passengers" provides a useful review of the various ways in which the railroads began to slough off the responsibilities of common carriers of passengers. Professor Thoms explains that this responsibility was more than just implied, in that "railroad corporations received charters from the state in which they operated. . . [t]hese charters usually vested the railroad with a public mission and some public responsibility."[3] The true culprit in this whole saga was technological innovation: The movement of freight traffic by railroad was not practical until the development of more powerful locomotives. Coincident with this development was the opening of the West and its long distances, vast natural resources, agriculture and absence of manufacturing. The author concludes that "passenger service became conspicuously less important to rail revenues,"[4] and quotes the Scottish rail titan, James J. Hill, as proclaiming that "the passenger train is like the male teat—neither useful nor ornamental."[5] Professor Thoms, in fairness, quotes P. Lyon, a rail passenger advocate, as concluding that the demise of American rail passenger service can be laid at the feet of the railroad president and "his natural greed for profit."[6] The battle lines were drawn: the public good vs. the profit motive.

Unfortunately it is at this point that Thoms begins to "sell" rail passenger service and form his arguments in justification of Amtrak. No attention is given by the author to the idea that allocation of resources to their most profitable use within the firm was (and incidentally still is) a very natural business objective. It must be recalled that in the mid and late 19th century American railroads were justifiably fighting for their free enterprise lives. Given the economic philosophy upon which this nation was founded it was very natural, expected, and encouraged that entrepreneurs have a "natural greed for profit." Whether the railroad should have won the war or not is de-

3. *Id.* at 1.
4. *Id.*
5. *Id.*
6. *Id.*

batable, but they had the right—and the obligation in my opinion—to fight. While the tactics used by the railroads were deplorable and, in the end, not in their best interests, it must be emphasized that the railroads did not set the rules and conditions for service discontinuance, the public did.

One would assume that the intended purpose of Chapters II, "The Era of State Regulation (until 1958)" and III, "The Era of ICC Regulation (1958-1970)," would be to deal with historic developments surrounding the problem of regulatory jurisdiction over rail passenger service discontinuance. The student in search for such a treatment would be generally satisfied. But the war blazes on with Thoms accusing the railroads of "finagling,"[7] "skulduggery,"[8] "active hostility,"[9] "ploys,"[10] "gambits"[11] and "other strategems"[12] to rid themselves of a service they no longer wished to perform.

I could (and probably will) argue with the author ad infinitum regarding the content of his fourth chapter, "Governmental Subsidy Programs." Perhaps I define subsidy too narrowly, but I would not consider the High-Speed Ground Transportation Act of 1965 as a subsidy program. The act, as Professor Thoms points out, was a research and development measure. It led to the development and demonstration of the TurboTrain and MetroLine and contributed to at least the planning phase of Auto-Train concept. Since the research and development for the TurboTrain was contracted out to an aircraft manufacturer it could be argued that the effect of the act was to subsidize the aerospace industry, not the rail industry. After a considerable amount of R&D—admittedly some bad R&D—the Auto-Train concept was picked up by a former Department of Transportation aide and is currently a very successful non-railroad company enterprise. The only involvement on the part of the railroads in Auto-Train is in the providing of right-of-way on a contract basis. A subsidy program? Perhaps, but to whom? One could argue that anything government does could represent a subsidy to somebody at sometime in some indirect or direct fashion. But to imply that the development of the TurboTrain, MetroLiner and Auto-Train was a subsidy to private rail interests is, in my opinion, a bit unfair.

A fine summary of the Canadian rail passenger experience is provided by Thoms in Chapter IV. The author goes into considerable detail (train by train) regarding the problems associated with international train operations.

Thoms' treatment in "Enter Railpax," Chapter V, and "From

7. *Id.* at 16.
8. *Id.*
9. *Id.*
10. *Id.* at 20.
11. *Id.*
12. *Id.* at 16.

Railpax to Amtrak," Chapter VI, is excellent! The war is over and now it is a matter of defining and describing the terms of peace.

Chapter VII, "No Homeymoon for Amtrak," and Chapter VIII, "Congress Takes a Second Look," graphically depict the initial results of putting the iron horse in the public stall. Just one point here: In March, 1972, the author relates, Amtrak closed the Illinois Central station in Chicago and consolidated all its operations in the Windy City into Union Station.[13] This event is described by Professor Thoms as an "economy move."[14] One is almost forced to speculate as to how this service revision might have been described had private rail management been the innovator; perhaps "skulduggery."

Believe it or not there are still some privately owned railroads in the United States who want and do provide passenger service. This point is ably presented by Thoms in Chapter IX, "The Independent Roads." As a matter of fact, Thoms highlights several situations in which private, regulated rail firms are actually able to compete with unregulated Amtrak trains.

In the concluding chapter, "The Future of Amtrak," one finds that discontinuing a passenger train is not, after all, immoral or even un-American but might even be rational: "the massive discontinuance of trains in 1971 [by Amtrak] was in some ways a blessing. . . ."[15] Thoms remarks that "[a] fundamental defect of the legislation was Congress' insistence that Amtrak operate on a for profit basis."[16] The author continues: "We submit that it would be more realistic for Amtrak to be established as a public, tax-exempt corporation with a clear mandate to establish modern passenger routes on an expanded system."[17] I can't help but read into this statement at its end "regardless of what it costs."

Clearly, private business—and railroading is still, as of this writing, private business in the United States—cannot sustain this type of philosophy. Amtrak, in my opinion, was inevitable and not the fault of money-grubbing, bumbling, rail management.

My only major argument with Professor Thoms concerns his perpetution of the "railroad be damned" theory which very unfortunately is used much too often to justify Amtrak. The existence of Amtrak, in my opinion, should, can, and most assuredly will, be justified on its need.

The iron horse is now at the public trough not only in the form of Amtrak but also Conrail (a federalized restructuring of the bankrupt railroads in the Northeast). There is little doubt that American

13. *Id.* at 60.
14. *Id.*
15. *Id.* at 75.
16. *Id.*
17. *Id.*

railroading is currently going through a transitional phase requiring massive economic, political, regulatory and even social adjustments on the part of all Americans. In addition, there is little doubt regarding the dependency of our economic survival on America's railroads. I am personally confident that America needs and, therefore, will have its railroads.

An historical and legal description and documentation of events and circumstances prior to and during this transition period is extremely important. Professor Thoms' work is well documented and, in this regard, is a positive contribution to the understanding of the birth of Amtrak. Professor Thoms meticulously provides insights into the questions of who, when, how, where and what, but is incomplete in his treatment of "why?".

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