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Mr. Shelley actually provided a nice segue into my remarks, which will dovetail with his. I am curious, how many people in the audience are lawyers? How many of you work for the federal government or a federal agency? Are there biologists as well in the room? It looks like we have everybody covered. I remember when Jimmy Carter first thought about running for the presidency back in 1976. He made a list of his chief political assets and the number one asset that he identified for his candidacy was that he was not a lawyer!

The reality is that there are currently over a million lawyers in this country, and there probably will be another million by the time I die. We have decided, rightly or wrongly, that America makes a lot of its public policy through litigation. As we have seen with respect to these environmental laws, when laws are passed they are sometimes deliberately ambiguous or deliberately vague. Congress knows that that is the only way they can get the necessary compromise to pass Magnuson-Stevens-type legislation. It is the reason the Magnuson-Stevens Act has been amended eighteen to twenty times since its passage just twenty-five years ago. It is an invitation to litigation.

The reality is that these environmental laws, namely the Magnuson-Stevens Act, the Endangered Species Act[37] (ESA), the Clean Water Act[38] (CWA), and NEPA are laws that are relatively new. These laws coincide with a real upsurge in the interest of the American citizenry in environmental protection in this country. The reality is we need to go through the very process that we are going through to both flesh out what these laws mean and what we as a country want to see these laws do.

Recently, within the last ten years or so, the environmental movement has really turned its interests seaward. For a long time, we concentrated our efforts on the land, and so if you look at the history of environmental litigation in this country, you will see that for the first twenty years there were very few lawsuits that dealt with our aquatic resources. This phenomena has changed in recent years, and it is particularly changing now. Many of the foundations and environmental grantmakers have undertaken large efforts not only to fund litigation, but also to fund

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37. 16 U.S.C. §§ 1531–1544 (1994 & Supp. 1999).
38. 33 U.S.C. §§ 1251–1387 (1994).

education and outreach efforts in order to make the public more aware about the state of our aquatic resources.

As Mr. Shelley noted, there was an enormous concern, not just on the part of a handful of lead environmentalists, but also on the part of anybody who really examined the fishery council process that this council process was deeply flawed, because it really involved decisions made by people who were interested in maximizing the amount of fish caught. Inevitably, the political pressure, despite the constraints within the Magnuson Act, led to overfishing.

In 1996, we finally saw a major amendment to the Magnuson Act in the form of Senator Stevens. The provisions that now require us to denominate it the Magnuson-Stevens Act, for the first time, identified the prevention of overfishing as a need under the Magnuson Act. Prior to these amendments, one of the reasons that there was very little effort made to litigate under the Magnuson Act was that you could not win as a plaintiff. There really was not very much within the Magnuson Act in the way of a conservation mandate. That has now changed, and we have started to see lawsuits being filed. Of course, these suits were almost a necessity, because we simply did not have any interpretation of the Magnuson Act by the courts. We really did not know what it meant, which resulted in an explosion in litigation.

The Magnuson-Stevens Act is still a very poor vehicle for addressing a lot of these ocean conservation and fishery conservation issues. The biggest, most powerful weapon is the EPA. The EPA is a very blunt and uncompromising tool to be sure, but it is still a very successful one.

One must also keep in mind the reasons for litigation and some of the benefits that have accrued as a result of this litigation. A lot of times the motivation in bringing these suits is very different than, or much larger than, what the law really contemplated when it was passed. For example, if you go back to the first wave of ESA lawsuits: the spotted owl days. The spotted owl lawsuits were brought not out of a huge concern about the state of the spotted owl, but rather because of the state of old growth forests and a perceived need to protect these ancient forests. The spotted owl provided a useful surrogate to get at what was really the larger concern of the environmental community. Those lawsuits, of course, awakened the country to the state of the tremendous loss of biodiversity not only in this country, but globally. I see that as a benefit for this country and for society, and I suspect most of you in this room do as well. The reason the American Fisheries Society's membership has mushroomed and why many of you are in this room is because of the growth in the awareness of the need to protect our environment and our resources. This growth in awareness has been driven by litigation.

The lawsuits over the spotted owl are a useful model because out of that come, as my friend Bill Arthur from the Sierra Club has noted, the notion of suing early, suing often, and nationalizing the issue. That certainly worked well in the ESA context for the spotted owl. The next wave of lawsuits addressed another charismatic figure, the salmon. Salmon are now used as the charismatic, totemic endangered species to address broader concerns in ocean and riverine habitats. Although I appreciate their perspective, it is important to look at litigation not solely from the perspective of Professor Hanna and others who believe that litigation has simply wreaked havoc and caused devastation, not only to the litigants, but also to communities and to the industry as a whole.

There are ways to look at litigation as providing an opportunity to address the larger issues that need our attention, particularly with respect to the fishing industry. One of these larger concerns is tremendous overcapitalization. Overcapitalization results in more and more boats with more and more fishing power going after fewer and fewer resources. In addition to this, the Capital Construction Fund essentially encourages this overcapitalization.

This overcapitalization is displayed in my mind when I see, for example, these groundfish lawsuits that have just been brought recently in the Northern District of California.[39] It seems that the west coast is the hotbed for this sort of litigation. There are some very specific legal concerns that these lawsuits address, one of which is the need to have greater specificity within the framework plan themselves about the need for the standards that we are going to use to govern the groundfish fishery, in addition to, the need for observers. There is also the larger concern and that is that a lawsuit, if looked at properly and from a perspective that simply did not look to the winners and losers that must inevitably result from a court decision, is an opportunity to address the issue of the overcapitalization in the groundfish fishery. I have tried to concentrate my practice of law over the last several years on figuring out ways to use litigation as a method to address some of the larger concerns of the environmental community.

Now to do that, you have to almost necessarily involve yourselves in the lawsuit. If you are not named in it, you have got to intervene, because you can become a player overnight simply by being in the lawsuit. Oregon Trout, for example, who filed the first ESA petition for the Snake River salmon was this little, obscure group of ten sports fishermen ten or twelve years ago. In the last ten or twelve years, Oregon Trout has become one of

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39. *See, e.g.*, NRDC v. Evans, 168 F. Supp. 2d 1149, 2001 WL 1246622 (N.D. Cal. 2001).

the pre-eminent environmental fishing organizations in the Northwest, because it became a player. So in order to have a seat at the table you need to think about involving yourself in the lawsuit.

We have talked about publicizing the issue, that is making it newsworthy, because media attention brings political attention. As a result, one of the strategies in the lawsuit is to make it newsworthy. Saul Alinski[40] used to say, "if you don't have a crisis, create one." The reality is that this is the way these larger problems that we have discussed actually get resolved. For instance, look at the Klamath River sucker. In Oregon, we have a fairly recent development involving an endangered species listing for the sucker fish in the upper Klamath River. The sucker fish is not particularly charismatic or popular, but to protect it, we have simply got to give the sucker more water. The reality is that this has come at a time when drought conditions exist in the Klamath River area and hundreds of farmers have now clamored to the government, to their political leaders, and to the media to explain their plight. Thankfully, cooler heads prevailed and they have seen this litigation over the ESA as an opportunity to solve a larger problem.

The situation involved Oregon farmers who had very marginal operations, who wanted simply an opportunity to have their land bought out, or to have, if they were going to have productive land taken out of use, some vehicle of the government come in and regulate the amount of water they could use. At the same time, they wanted to develop some basis of hope for a long-term solution. What we are seeing right now in Oregon is that the politicians, the governor, the Senators, and the congressional delegation have all made this a priority. A crisis certainly exists and the parties are using the courts as the forum for resolution. The parties are all attempting to think outside the box. For the first time, we are getting significant federal dollars thrown at the problems of insufficient water and too many farmers chasing too many unprofitable crops, which results in a lack of adequate water left over for the fisheries and incidentally for the sucker fish. The Indian tribes, who have concerns about this issue, have also been brought on board.

I think the ultimate upshot of this is going to be the preferred solution, which is that you are not going to have a judge become the manager of the fishery, and you are not going to have a judge decide winners and losers so that you have this bitterness and enmity that can exist and polarize

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40. Saul D. Alinski (1909–1972) is considered to be the father of modern American radicalism. He developed strategies and tactics to transform tremendous human spirit and momentum of grassroots organizations into effective anti-establishment activism.

decision-making for a long time to come. Instead, you are going to have relationships that are forged out of this mediation process, where people begin to trust one another, and where these parties begin to understand the other party's point of view. Through the process of negotiation, bargaining, and working with the congressional delegations and local leaders, these parties will forge a common solution that should become the proverbial win-win.

You see this scenario played out in other forums as well. I am involved with the Rogue River in Oregon, where we have a situation involving the Savage Rapids Dam, which was constructed in the early 1900s, and which everybody acknowledges is a tremendous barrier to fish passage. You have ESA listings. While it took a lawsuit and some initial bad feelings and court decisions to get people to realize what was at stake, we now have a process in which all of the participants, the dam owner, sportfishing interests, community interests, and environmental interests, are all working together to forge a common solution. There is a recognition that the dam must come out. There is also a recognition by the conservation community that no one wants these farmers and other landowners, who are dependent upon the water, to suffer. So we need to figure out a way that we can get pumps installed in order to get farmers water. We can get our congressional delegation to do its job by devoting federal dollars toward putting in these pumps, installing them, and doing the engineering work that is necessary to get the dam removed properly. At the same time, we realized we could figure out creative ways in which we could preserve recreational opportunities for the community that existed because of the lake created behind the dam, in addition to, providing for fish passage conditions.

This is the model that I suggest we should be looking at when we think of litigation. There are many other examples that come to mind. One thing we have seen generally is that the institutions that have existed for a long time, and which attempt to address the regulation of these fisheries are simply outdated. If you look back fifteen years ago to the fishery management council system, for example, you will see a system that is far different than it is today. The reason, in large part, is litigation.

The tribes were not players until the Boldt decision,[41] and the decisions that followed in its wake. Now the tribes, as sovereigns, are major players at the table. I remember when Rod Fujita from the Environmental Defense Fund first showed up at the Pacific Fishery Management Council and this wave of anxiety flooded over the room, as everyone realized that the environmentalists had finally arrived. Now the environmentalists are

41. United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

recognized as an interest group that must be consulted if we are going to have decisions in which all of the stakeholders, including the larger community, are represented. The fisheries managers themselves recognize that they too have a larger mandate. They realize that they have got to look at larger interests and not simply the fishing interests and processors.

There is a lot of cost involved in litigation, and it is a distorted system. Nonetheless, it is a system that if viewed properly, if given enough time to play itself out, and if looked at as an opportunity rather than as a devastating loss, can bring about the common preferred benefits that I think we all seek, including improved management of our fisheries, long-term sustainable fisheries, and above all a feeling that the public is involved in an accountable decision-making process. I think litigation plays an extremely important and useful role in this process, which could also play a more important role in the future if viewed in this context.