



1976

## Future Case Note: The Economy versus the Environment

Myron H. Bright

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Bright, Myron H. (1976) "Future Case Note: The Economy versus the Environment," *North Dakota Law Review*. Vol. 53 : No. 3 , Article 2.

Available at: <https://commons.und.edu/ndlr/vol53/iss3/2>

This Introduction is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact [und.common@library.und.edu](mailto:und.common@library.und.edu).

## PREFACE

### FUTURE CASE NOTE: THE ECONOMY VERSUS THE ENVIRONMENT

THE HONORABLE MYRON H. BRIGHT  
JUDGE, UNITED STATES COURT  
OF APPEALS, EIGHTH CIRCUIT

*This preface is a portion of the commencement address delivered by Judge Bright at the Chicago-Kent Law School on Sunday, June 13, 1976.*

I know of no law school graduate in recent times who has not expressed concern for the future—a concern that is not without foundation. The recent past has been a period of enormous social and political upheaval in our society. We have witnessed the assassination of our highest leaders, the forced resignation of a president and vice president, the tragic war in Vietnam, the recurrent crises in the Middle East, oil embargoes, riots in the streets of our major cities, and a soaring crime rate. Today the economy is struggling to recover from the most serious depression we have experienced since that of the thirties. Once again we find ourselves in troubled times, economically and socially. Yet given the similarities between the thirties and today, I would like to point out a crucial difference between then and now—a difference which I believe is going to play a large role in shaping the future of young lawyers. That difference is the newly-emerging concern for the environment and the recognition that our resources are not without limit.

In proposing solutions for today's problems, we must be cautious about prescribing uninhibited economic growth as a solution. It is clear that we cannot follow the unrestrained expansionist policies of the past. Instead, in each case we are going to have to weigh the costs of a particular development against the benefits. Lawyers, whether in private practice, industry, or government, are going to play an increasing role in helping to make these decisions.

In the last few years, the court of which I am a member—the United States Court of Appeals for the Eighth Circuit—as well as other federal courts, has had to grapple repeatedly with this prob-

lem of the economy versus the environment. Since these cases raise issues similar to those you will have to face and decide, I should like to discuss a few of the cases and the problems they portend for the future.

One case with which many of you are likely to be familiar is *Reserve Mining Co. v. United States*,<sup>1</sup> decided by our court in March of 1975. Reserve Mining Company is located on the north shore of Lake Superior. It processes huge quantities of low-grade iron ore, called taconite, into relatively high-grade ore pellets usable in blast furnaces for the smelting of iron and steel. The remaining waste material, called tailings, is dumped into Lake Superior under a state permit issued in 1947.

Eventually it was discovered that the waste from Reserve's mining process contained microscopic particles similar to asbestos used in building construction. Scientists felt that the emission of these particles into the air and into the water of Lake Superior created both aesthetic and health problems. The mining company denied the charges.

As often happens, the issue was brought to the court. The scientific evidence was extremely complex. In addition, the legal issues were both novel and difficult. As a result, the trial lasted nine months.

The case presented a conflict between two important interests of our society. On the one hand, the government introduced some scientific evidence of a possible threat to the health of the residents of the area. On the other hand, the mining company directly employed 3,500 local residents and indirectly supported about 20,000 others. In addition, there were the interests of the stockholders and the national economy as a whole—the iron ore produced by Reserve accounted for approximately twelve percent of our entire domestic steel production.

The case was further complicated by the difficulty in finding anyone to blame for this situation. The economy-environment problem developed in a most innocent manner. Our court wrote as follows:

In retrospect, it must now be painfully clear to all who participated in the original decision to permit the discharge of tailings into Lake Superior, that such a decision amounted to a monumental environmental mistake. The actors in that decision, 25 years ago, included leading citizens and governmental officials of Minnesota as well as officials of Reserve, Armco, and Republic Steel. That decision obviously was made in good faith to create jobs, to provide other economic opportunities in an economically depressed area of northern Minnesota, and to utilize the almost unlimited supply of hitherto unusable, low-grade, taconite ore found in that area.

---

1. 514 F.2d 492 (8th Cir. 1975).

To us there are neither heroes nor villains among the present participants in this lawsuit, nor among their predecessors in government, business, and society who were once allies in encouraging and creating a taconite industry in northern Minnesota. Nevertheless, the pollution of Lake Superior must cease as quickly as feasible under the circumstances.<sup>2</sup>

A case involving a similar conflict between the environment and the needs of our economy arose that same year in *Union Electric Co. v. Environmental Protection Agency*.<sup>3</sup> In that case, the federal Environmental Protection Agency (EPA), under its regulations as approved by the State of Missouri, directed the Union Electric Company, a public utility serving St. Louis, to cease emitting high levels of possibly health-harming sulfur dioxide into the air from its coal burning electric generating plant. In essence, the utility contended that it could not afford to comply with the EPA regulations and that the public interests would be best served by not requiring Union Electric to close its coal burning plants. Our court rejected Union Electric's contention. We held that the regulations had been promulgated and adopted without objection and could no longer be reviewed by the courts. That case has recently been affirmed by the United States Supreme Court.<sup>4</sup>

These two cases were special in that they involved a degree of danger to human life itself. Other cases before our court have involved not life itself, but things that help make life worth living.

For example, in *Minnesota Public Interest Research Group v. Butz*,<sup>5</sup> a nonprofit group sought to have the court prohibit the cutting of virgin timber in the Boundary Waters Canoe Area in northern Minnesota.

As is often true in the law, the central issue was procedural. The land in the Boundary Waters Area is owned by the government. For many years the government had permitted private industry under contract to cut timber in that area. The question presented to us was whether the continued cutting of timber under existing contracts required the filing of an Environmental Impact Statement under the National Environmental Policy Act of 1969.<sup>6</sup> We concluded that the cutting of virgin timber constituted a major federal action significantly affecting the quality of the human environment. Therefore, we directed that further cutting be postponed until an Environmental Impact Statement was filed as required by law.

---

2. *Reserve Mining Co. v. United States*, 498 F.2d 1073 (8th Cir. 1972).

3. 515 F.2d 206 (8th Cir. 1975).

4. 96 S. Ct. 2518 (1976), *rehear. denied*, 97 S. Ct. 189 (1976).

5. 508 F.2d 892 (8th Cir. 1975) (*per curiam*).

6. Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified in 42 U.S.C. §§ 4321-4347 (1970), *as amended*, (Supp. V 1975)).

In another case, *Sierra Club v. Froehlke*,<sup>7</sup> a nonprofit organization interested in the environment sought to prohibit the construction of various dams in the State of Missouri. The Club's primary argument was that construction of the dam would flood the cave occupied by the Indiana bat, an endangered species.

The case had potential for raising a really interesting question. I don't know exactly how you balance the value of preserving a species of bat against the claimed benefits of a series of dams proposed in Missouri. Fortunately, we didn't have to decide that issue. A review of the records submitted on appeal demonstrated that the continuance of the dam project would have no more than an infinitesimal effect upon the Indiana bat population.

Eight years ago when I joined the court, coming directly from a private law practice, environmental cases such as these were practically unheard of and yet today, in the federal courts, the conflicts between the demands of the environment and the needs of the economy represent one of the most important challenges of your generation, as well as mine.

In particular, a most important and, to the country, crucial environmental-economic conflict has now emerged in the political arena. This country faces a serious problem in obtaining adequate energy supplies. Domestic oil supply has been considerably depleted. At the present time we must import forty percent of our oil. In 1975, this cost our economy something in the vicinity of twenty-seven billion dollars. That is 900 percent over what this country paid for imported oil five years ago.<sup>8</sup> The cost keeps going up, and our needs keep increasing. The great amount of foreign oil imported represents a drain upon our domestic economy, but we must recognize that the prosperity of this country depends on an adequate supply of energy not only to run our factories but to heat our homes and run our automobiles, buses, trains, farm tractors, and to generate electricity. Because of this, in many ways we are at the immediate mercy of the exporting oil-rich countries.<sup>9</sup>

In April of 1976, the Fiftieth American Assembly on Nuclear Energy reported as follows:

The use of rapidly dwindling oil and natural gas for power production is in most cases a wasteful act.

The peaceful uses of nuclear power offer us at this time a significant possibility of moving in the direction of a world with an improved quality of life for all people. The cost to mankind of not pursuing the nuclear option could be tragic.<sup>10</sup>

---

7. 534 F.2d 1289 (8th Cir. 1976).

8. FEDERAL ENERGY ADMIN., 1976 NATIONAL ENERGY OUTLOOK xxi-xxii (1976).

9. *Id.* at xxi-xxiv.

10. FIFTIETH AMERICAN ASSEMBLY, NUCLEAR ENERGY 8 (Apr. 22-25, 1976).

Yet there is great concern in the expansion of the use of nuclear energy because of the danger in safely storing nuclear waste products. Citizens have banded together to oppose increasing use of nuclear materials to generate electrical power. An anti-nuclear movement has spread throughout many areas of the country. The concerns of these citizens are genuine and serious. Yet Edward Teller, perhaps the Nation's most distinguished nuclear physicist, has warned that blocking atomic development in this country could plunge the world into poverty while causing a critical energy shortage.

Coal can be substituted for oil and natural gas in some forms of energy production. This country possesses three times more coal reserves than all of the oil reserves in the Middle East.<sup>11</sup> Considerable resistance has, nevertheless, developed to the exploration of these coal lands, particularly through strip mining. The energy issues for the most part still remain in the political arena. But the rights of contending parties will soon be in the courts, and to a great extent, in the federal courts.

As a result, lawyers, particularly the younger, well-trained lawyers in environmental law and economics, must assist the courts in arriving at fair and just decisions in the case of the economy versus the environment. Now and in the future, as in the past, lawyers must provide leadership and service to this country. Your obligation and your challenge is to serve the public, the courts, your community, and your country.

---

11. FEDERAL ENERGY ADMIN., *supra* note 8, at xxi-xxiv.

