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Pioneers of Environmental Law

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John Copeland Nagle

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Pioneers of Environmental Law

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Pioneers of Environmental Law

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Pioneers of Environmental Law

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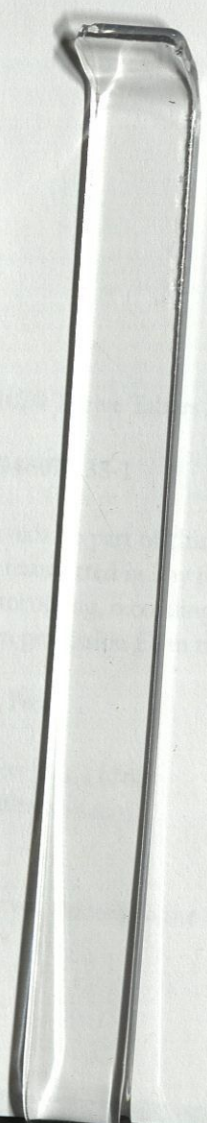
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To all the Espritmenes Parents
part present and in our future



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Acknowledgments

By the time this book was sent to the publisher, John Nagle was no longer with us. But Jan Laitos would like to state for the record what a delight it was to work with John as this book was being planned and written.

Jan Laitos also wishes to recognize a number of individuals who helped make this book possible. At the top of the list would be Steve Errick, the legendary uber-publisher of so many law books over the past 30 years, who is now heading up Twelve Tables Press, which is publishing this book. Steve had the foresight and patience to sign up John and I to develop this book, long ago. After some starts and stops, it has finally emerged. Thank you, Steve, for staying the course with us. Jan Laitos wishes also to thank Sharon Ray for her terrific work in copy-editing this entire book. She was both patient and competent in dealing with all of us.

I also must point out the extraordinary depth of talent who agreed to do the actual writing about the Pioneers of Environmental Law. The chapters of this book were written by a pantheon of the best and brightest academic and legal minds. These authors have roamed the halls of leading law schools throughout the United States, and some have led careers as distinguished jurists. As such, they have taught and enlightened generations of law students and lawyers. And now they seek to educate the readers of this book about some prime examples of environmental law pioneers. John and I remain grateful to the authors of the chapters of this book, for delivering such a worthwhile, readable summary of those who first helped to jumpstart and grow environmental law.

Jan Laitos would like to also acknowledge the considerable help of Schyler Gilman from the University of Denver Sturm College of Law. She helped to proof, copy edit, and organize this book. And she was always there to ensure that the finished product was, indeed, a quality finished product.

Jan Laitos wishes to acknowledge that Prof. Fred Cheever from the University of Denver Sturm College of Law was also to be an author in this book. But he passed away before he was able to begin his chapter. He too will be missed.

And, Jan of course wants to recognize Juliana, for being the ever-loving and always supportive Juliana while this exercise was occurring.

Introduction

This is a book intended to introduce readers to a sampling of those individuals who can be called "Pioneers of Environmental Law." A "pioneer" is among the first to explore a new area. And a pioneer of *environmental law* may be one who (1) first recognized the importance of the natural environment, or (2) helped to invent the relatively new doctrine of environmental law and then ensured that it would survive, or (3) once the new law was accepted, took new and creative approaches to established principles and applied these ideas to environmental law. The pioneers discussed in this book represent these three types, or classes, of pioneers—"True Pioneers," and "Creators and Saviors" and "Innovators."

When John Nagle and Jan Laitos first hatched this idea of launching a book about some representative pioneers of environmental law, they decided that the two of them would not decide who the pioneers would be. Instead, John and Jan turned to some preeminent academics, scholars, and jurists, and asked them to determine who they thought would and should qualify as a featured pioneer in environmental law. And then each expert wrote a short essay on the pioneer they had selected. In some cases, the pioneer chosen was a single person; in other cases, these authors selected a group of people who collectively were deemed to be pioneers. The 10 chapters of this book reflect the choices of the authors. So, this book is really the collective product of some of the most prominent and respected minds in the world of environmental law.

The chapters of this book are not meant to be an exhaustive list of all the various pioneers of environmental law. Rather, the book's chapters are intended to introduce the reader to examples of some of the persons who helped (along with many others not discussed in the book) to invent and develop the field of environmental law. Some of these pioneers are well known; some are more obscure, but still have played critical roles in field of environmental law. The book is meant to be either a companion book to survey courses in law schools on Environmental Law and Natural Resources Law, or a book to be used in college/university Environmental Policy courses.

It is important to recognize that this area of law—environmental law—is relatively new; it really did not exist before the 1960s. Many of the pioneers in this book helped policymakers, long ago, to see the crucial importance of environmentalism. Some of these pioneers also advocated for new laws and doctrines

and perspectives to protect and preserve our natural environment. John and Jan thought it might be useful, and interesting, especially to those readers who were new to the field of environmental law, to learn about certain influential figures who were sufficiently creative and far-sighted to help shape this area of law.

John and Jan found a broad minded and innovative publisher—Steve Errick and Twelve Tables Press—who was willing to produce a book that was outside the mainstream of standard environmental casebooks and textbooks. And the result is this book—*Pioneers of Environmental Law*.

Sadly, John Nagle is not here with us to enjoy and appreciate this book. He passed away in 2019, just as the authors were submitting to John and Jan their chapters on their pioneer. John was a kind, intelligent, and dedicated law professor, respected and loved by many. Jan Laitos had the pleasure to work with John in initially brainstorming, organizing, selecting authors, and then putting together this book. We all will miss John, and hopefully what follows in these chapters reflects John's good will, good head, and good heart and spirit.

* * * * *

Here is a too-short summary (excerpted from the Notre Dame Law School website) of John's many professional accomplishments.

John Copeland Nagle was a professor at Notre Dame Law School for more than 20 years. He passed away on May 18, 2019.

Nagle was named the John N. Matthews Professor in 2005. He joined the law faculty as an associate professor of law in 1998 and became a full professor in 2001. He was the law school's inaugural Associate Dean for Faculty Research from 2004 to 2007.

Nagle was the co-author of casebooks on "The Practice and Policy of Environmental Law," "Property Law," and "The Law of Biodiversity and Ecosystem Management." His book "Law's Environment: How the Law Shapes the Places We Live," was published by Yale University Press in 2010. His other writings explored such topics as the relationship between environmental pollution, cultural pollution, and other kinds of "pollution;" the role of religion in environmental law; Chinese environmental law; the scope of congressional power to protect endangered species; alternative approaches to campaign finance reform; and the competing roles of Congress and the courts in correcting statutory mistakes. His articles were published in journals such as the *Yale Law Journal*, the *Columbia Law Review*, the *Michigan Law Review*, the *University of Pennsylvania Law Review*, and the *New York University Law Review*.

Prior to joining the Notre Dame faculty, Nagle was an associate professor at the Seton Hall University School of Law from 1994 through 1998. He also worked in the United States Department of Justice, first as an attorney in the Office of Legal Counsel where he advised other executive branch agencies on

a variety of constitutional and statutory issues, and later as a trial attorney conducting environmental litigation. Nagle served as a law clerk to Judge Deanell Reece Tacha of the United States Court of Appeals for the Tenth Circuit, and he was a scientific assistant in the Energy and Environmental Systems Division of Argonne National Laboratory. He was a graduate of Indiana University and the University of Michigan Law School.

Nagle participated in numerous activities outside of the law school. He served as a member of the executive committee of the Section on Legislation of the American Association of Law Schools, and as a vice chair on the Endangered Species Committee of the American Bar Association's environmental section. He helped organize the annual meeting of the Law Professors' Christian Fellowship. He served as an elder in the Presbyterian church and was a member of New City Evangelical Presbyterian Church. He was the faculty adviser for the Christian Law Students, the Environmental Law Students, and Young Life.

Jan G. Laitos

Part I

The True Pioneers

We begin with three visionaries who can rightly be considered among the “true pioneers” of environmental law. Before there was “law,” there needed to be some recognition of the status, and tenuous sustainability, of the natural “environment.” The individuals summarized in Part I were among the first to realize, in the 19th century, that natural resources were not inexhaustible, and not perpetually regenerating. These prescient observers also realized that environmental goods, like air, water, and land, could become polluted, and damaged, and poisoned, and degraded by excessive human exploitation.

There were many true pioneers of environmental law who first pointed out that existing laws served to use and abuse natural resources, leading to their eventual depletion and contamination. Part I focuses on just three of these, who in different ways supplied a necessary condition precedent that had to be in place before environmental law could be invented. And that condition was a realization, and then an articulation, of the fact that human-caused threats to the natural environment could adversely affect, and forever alter, that environment.

These three pioneers discussed in Part I were among those who founded American conservation. Of course, the pantheon of environmental founders includes more than just the three featured in this book. To review all of them would be worthy of a multi-volume treatise, and such a weighty tome would have to include both the well-known (e.g., Aldo Leopold and Rachel Carson) and the lesser-known (e.g., George Bird Grinnell and Mardy Murie). This book instead offers a short “sampling” of three other pioneers of environmental law. These true pioneers were prominent among those who first took up the cause of all that a hyper-expanding 19th Century America was destroying—vast tracts of untrammled land, wildlife, virgin forests, and endless waterways.