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## Recollections of the Origins of the Natural Resources Journal

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# Recollections of the Origins of the *Natural Resources Journal*\*

It is true that I was there at the conception of the Journal, so I suppose you can analogize me to a biological father (or reputed father).

I was generously called the “father of the *Natural Resources Journal*” in its 20th anniversary issue, but others have reared and educated the child to sturdy maturity and, of course, the continuing parent is Al Utton who has done an exceptional job as editor-in-chief. The international dimension, for example, only vaguely in our sights 25 years ago, is all to his credit. It was proper, if not obligatory, for him, as a former Rhodes Scholar (and *puro nuevo mexicano*), to become an active participant in international matters.

Now, explaining how the Journal was conceived may be like trying to separate cause and effect (this was always fun with first year law students who had just heard of *proximate cause*, which some did not understand and went on to work for banks). Of course, all of you know that more than causality is involved; cause (or more often *causes*) *plus* consequences is what we examine, *i.e.*, events in the physical world and the human values the law recognizes and protects (pretty poorly sometimes).

Publication of the Journal in 1961 and the establishment of the UNM Law School in 1947 are closely related in the chain of causation. Yet, there are persons who think that but for my eccentric interests the Journal would not have been started, at least not in its present form and coverage; that there would have been just another law review. This may have merit—viz, that my law interests are eccentric. But I have no shame in admitting it, or in telling you as I have others, in print, that I became a lawyer by accident and a law teacher entirely by chance as you may discover in these comments, although I do not regret any of the thirty-two years as a teacher. Here, I emphasize the element of chance in relation to the Journal’s origins.

I started these notes by outlining chronologically the conception, gestation, birth, and survival of the Journal; subtitles you could rename prejudices, quasi-history, Freudian slips, and fond memories. I also tried a couple of other titles, *e.g.*, “An Oral History of the Journal Including the Erratic Forces Behind its Birth and Continued Success,” or, simply,

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\*Excerpted unedited from comments made before editors, staff, students, and friends, July 24, 1984.

“Reminiscences” (this despite my grandfather’s admonition to his friends that a man should not know the meaning of the word *reminisce* until he had passed 70; I have until September of this year). Under this title, it is clear that chance and particular events influenced the Journal, for example: the reading of *Shaw v. Kellog*, 170 U.S. 312 (1898), all about the Baca floats—100,000 acres each; *The Maxwell Land Grant Cases*, 121 U.S. 325 (1887); Reports of the Court of Private Land Claims; old cases on the Partido contract; litigation over the buried town of San Marcial; the ruins in Chaco Canyon; the funeral, over 40 years ago, of the Governor of Isleta Pueblo; and months in the Veterans’ Administration hospital with Navajo friends who went home to die.

These comments could also be called “Remembrances” of persons, living or dead, who did not always know they were furthering my education and also the gestation of the Journal when they expressed various attitudes about the New Mexico landscape—the surface of the earth—our home, our granary, and our graveyard, as an anonymous poet has said. I assume that you know the official history of the Law School, although not the connection with founding our special kind of journal. You know that a law school for the University was recommended in 1935 by then President Zimmerman, years before I was an undergraduate. The prime mover over many years in establishing the Law School was Judge Sam Bratton of the U.S. Court of Appeals. While I was his clerk, he had me read much of the correspondence that had led to the founding of the Law School. We remained close friends until his death in 1963.

Perhaps you have read that the first law class of about 50 entered in 1947 in the old Stadium Building (*not* Carlisle Gym). Any talk of a law review at that time was vague and suspect. The second class entered in 1948, which was my direct connection with the school. I was hired parttime as a last minute replacement for someone who did not come out from the East. I thought the job would help my own education—learning by teaching, as you know, is at least as old as Socrates. I was in practice at the time and had been out of the hospital for about one year. The third class entered in 1949, the faculty expanded again, and the following May the first class graduated, a class I remember as well or better than any later one. I moved their admission to the Bar in August 1950: George Harris, Avelino Gutierrez, Paul Robinson, Ben Traub, and others will never be forgotten, along with Joe Wood of the Court of Appeals who led the class (I will not name those at the bottom of the class).

The period was exciting. I probably read and studied more than my colleagues, especially the journals, because of my continuing uncertainty about my own qualifications. My colleagues had all of the “right” credentials. I had gone to UNM which, at that time, did not have Phi Beta Kappa, and attended the University of Arizona Law School which had

no law review during my student days. Perhaps you can imagine my feelings. They may have helped promote the gleam in my eye, or lust for a special kind of journal. Dean Gausewitz, Henry Weihofen, and my other colleagues had law review experience; I tried to get mine by reading the journals and writing for law reviews. Here, chance played a major part in what happened and finally led to the Journal.

During this formative period over 30 years ago, when I did my best in the classroom while remaining convinced it was not good enough, other events outside of academia began to generate the idea of a journal, events that paid attention to land, water, trees, mountains, and their future, as well as our use of them.

In 1951, Texas sued New Mexico over the Rio Grande Compact. Joe Martinez, then the Attorney General of New Mexico, was asked what he was going to do about it; his reply was that he was going to hire the best goddamn lawyer in the water law field. Without question, that man was Fred Wilson. Later I became his researcher and assistant. If you follow that case through its six years in the United States Supreme Court, you will recognize that Wilson was a masterful lawyer to be able to have the case dismissed in a 24-word *Order* on the ground of indispensability of the United States, 352 U.S. 991 (1957) (there was nothing about Indians in it).

During this same period, another event influenced the idea for a resources journal. In October 1951, Arizona sued California, for the third time, over the Colorado River. Nevada was joined, and the United States intervened. Arizona petitioned to join Utah and New Mexico. Fred Wilson made every effort to keep New Mexico out of the litigation but Utah and New Mexico were joined as limited parties because of their lower basin interests. That case was decided 11 years later in 1963. But in the meantime, in 1957, Fred Wilson had been dismissed by the newly reelected Governor Mechem, for reasons not relevant here.

Long before this, Wilson, my associates downtown, and my law school colleagues encouraged me in my plan to spend a year at a recognized law school writing and attending classes. I was told very candidly by Harvard that no one there knew or cared much about water law. This was not true at Yale. As a result, I spent 1955–56 on a Sterling Fellowship, and the seed of the Natural Resources Journal began to germinate and swell in the stacks of the Yale Law Library where I had a cubicle.

It was a good year. I made new friends, and old colleagues encouraged me to return to fulltime teaching, not to practice. I came back with the idea for the Journal and an outline, or prospectus, that covered engineering, economic, planning, and environmental subjects. During the year at Yale, a New Mexico case had aroused my interest, and belongs in the origins of the Journal. *Bliss v. Dority*, 55 N.M. 12 (1950) was an

effort to relitigate New Mexico's groundwater legislation, going back to 1927. I made up an outline based on the case and hoped to write an article; in the end I wrote on *Public Control of Groundwater in the Western States* (all of them) for the Yale degree received in 1960. A summer teaching job at Boulder had enabled me to finish the research. Meanwhile, developments at the UNM Law School had taken a new turn.

In the spring of 1958, Dean Gausewitz retired a year early (65 was the mandatory retirement age) partially for health reasons, but primarily as a result of anger over the law school budget. The faculty elected me acting dean. This gave me a chance to promote the Journal idea during 1958-59. I also undertook to improve the budget situation while we searched for a new dean. I had a man in mind, Vern Countryman, who had been unfairly released from Yale during the McCarthy era for his strong stand on civil rights and the First Amendment. He left a large Washington law firm to return to teaching. He was dean at the UNM Law School for four years before going directly to Harvard where he has taught ever since. He liked the Journal idea and, along with a majority of my colleagues on the faculty, gave it strong support. But the big question was, where would the money for the Journal come from?

Resources for the Future provided a small grant for three years, and extended it for two more. President Popejoy, by this time more secure in his tenure, approved funds in the University budget. We persuaded Jack Kroner, a teacher and writer at NYU, to join the faculty and he was the first editor of the Journal. He did not stay long and, when he returned to New York, Al Utton took over in Volume 2. He is the one who has made the Journal a success.

When Dean Countryman received his leave of absence to visit at Harvard, the faculty again chose me to be acting dean. This never led to a permanent position, which I consider a blessing in disguise. It let me make up my mind about accepting a position at the University of Arizona, and made it possible for me to concentrate on publication of WATERS & WATER RIGHTS over the next 15 years.

I want to leave you with some unfinished business, questions, and suggestions for you as researchers, writers, lawyers, and, I hope, inquiring citizens.

1. Why is there no study of the Elephant Butte Irrigation District? That will raise questions about the Rio Grande Project, which will raise further questions about the building of the Elephant Butte Dam and Caballo, and the 1906 Treaty with Mexico, and the fact that the Elephant Butte District is a part of Texas for the purposes of the Project and the Rio Grande Compact.

2. Where is there a good article on the origins of the Middle Rio Grande District? And what has happened to its nature and functions

in over 50 years? This will lead you to questions about the origin of the legislation, and the man who was the principal engineer and his previous role in the Miami Flood Control District in Ohio.

3. A thorough analysis of the effects of the Treaty of Guadalupe and the Gadsden Purchase does not exist. What did the United States do and *not* do in connection with the lands and property rights under the Treaty? Here you will want to compare the Texas experience. You may want to ask, what responsibility does the United States have today under Article IV of the Constitution toward the public lands we acquired from Mexico and still hold in trust for all Americans?

4. You may want to ask questions about the Timber Acts. You may even want to follow up on particular developments that have resulted from the report of the Public Land Law Review Commission in 1970. What is happening to the Public Domain?

There are a hundred more questions that could be explored in the Natural Resources Journal. I hope you will leave a long list for your successors.

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