CONTENTS

Preface ix

Acknowledgments xix

1 “To Think Like an Environmental Lawyer”: Making American Environmental Law Throughout the Postwar Era 1

2 Seed-Time: Planting Environmental Law in the Postwar Years 17

3 Fertilization: Environmental Lawmaking in the Postwar Administrative State 40

4 Harvest Home: Environmental Lawmaking and Postwar Federalism 61

5 The People Out of Doors: Popularizing Postwar Environmental Law 93

6 Across the New Frontier: Nationalizing Environmental Law 123

7 From the Files of Bruce Bowler, Postwar Environmental Lawyer 144

8 “A Field So Varied and Rapidly Changing”: American Law Schools Discover Environmental Law 178

9 Conclusion: Environmental Law’s Unstable Legacy 194

Notes 211

Bibliography 237

Index 251
While actively practicing law in my hometown of Boise, Idaho, between 1983 and 1996, I rarely had time to think about what I was doing, or why. I was too busy worrying about how I was doing to ponder law's what or why. For nine of those fourteen years, I lawyered in some out-of-the-ordinary ways. I represented 30,000 of my neighbors for six years as a state legislator and then crisscrossed the Gem State for three years on behalf of its biggest grassroots environmental group. Even then, as my legal work brought me every day right up against law's embrace of the natural world, the how of politics and advocacy consumed me. The what of environmental law, or its why? No one paid, elected, or tasked me to worry much about them.

I began studying for a history doctorate in 1996 at the University of Kansas, only one time zone east of my home state but a world away from Idaho's white-hot environmental politics. In the Wheat State, environmental controversy was hardly even "below the fold." Journalistic ignorance and popular indifference hid environmental law from public view. The field lay where it had come to rest by the late 1970s: a specialized province inhabited mostly by public administrators, corporate lawyers, and law teachers. Gaining some personal distance and intellectual perspective on my idled law practice helped me appreciate what I had been doing. I had, in fact, spent fourteen years of my young adulthood making law. Journalistic jargon classifies elected members of the legislative branch as "lawmakers," so service in the Idaho senate between 1986 and 1992 clearly qualified me. But the more I read and wrote and thought and talked about environmental and legal history during graduate school, the clearer I became about what I—and my colleagues in practice, politics, and public-interest labor—had been doing. All of us had been making law. That was the what of it.

Nearly as soon as I began writing my dissertation in 1998, under my dear friend Donald Worster’s guidance, I realized lawmaking about American nature enlisted more than attorneys, legislators, and lobbyists. Lawyers represent clients, so they make the law, too. Legislators serve at constituents’ pleasure, so my neighbors, in their sovereign capacity as voters, made environmental law. Lobbyists and activists speak and write on behalf of their organizations’ members: Idaho Conservation League’s 3,000 dues-paying members were thus lawmakers. And so were the Idaho Mining Association’s
corporate founders, and Idaho Power Company’s ratepayers, and so on through the infinite directory of organized and unorganized American citizenry.

James Willard Hurst had well understood this many-handed work of making American law. His legal histories in the postwar era broadened our field’s focus beyond appellate judges’ published opinions, governors’ executive messages, and administrative agencies’ rules, beyond even the printed texts created by people officially invested in some fashion with lawmaking authority. Willard Hurst showed me how clients, even before they walked into a lawyer’s office, while merely being landlords or employees or patients, made law. Those voters who went to the polls in 1986, 1988, and 1990 to mark their ballots for my three Republican opponents in Legislative District 20 were lawmakers, too. Their demands and preferences and prejudices influenced my legislative speeches, bill drafts, and floor votes.

The dissertation that became my first book, Public Power, Private Dams: The Hells Canyon High Dam Controversy, impelled me to consider another lawmaker’s contributions to postwar administrative law change in the Snake-Columbia Basin of the American Northwest. The Snake River’s waters determined whether sugar beets or Chinook salmon, or some of each species, would live or die along the watershed’s high desert banks. Those now-rushing, now-silent rivers of the postwar Northwest, whether pounding loud or pooling still, were making and remaking law simply by doing and being. Americans struggled to remodel their rules about owning, using, and valuing rivers because the waters kept changing—and changing us—as we owned, used, and revalued them. By 1957, when my book about the Hells Canyon controversy closes, the rivers’ lawmaking agency had empowered corporations, resisted administrators, perplexed biologists, and divided citizens. Thus divided, citizens had fiercely contested their sovereign right to make new and remake old laws to cope with the rivers’ own sovereign, lawmaking power. Historians term the Snake’s own power to make change across time as “agency.” Lawyers might recognize natural agency as a form of “sovereignty.” By whatever label we use to describe the waters’ power, it deserved more careful consideration, just as environmental and legal historians study human actors to assess their historical agency.¹

By trying to explain how natural features and forces interacted with people to make the postwar Northwest’s history, I pointed myself toward this
book’s subject: the origins and emergence of American environmental law. Much of the earlier thinking, reading, and writing that enabled me to write Public Power, Private Dams imaginatively outlined the techniques, tools, and evidence I now use to answer the big question at this book’s heart. What happened before 1970 to create environmental law? As late as 1967, the evidence indicates that no American legal professional—whether scholar or practitioner—wrote or spoke the simple label, “environmental law.” After 1970, not only legal professionals but the lay public recognized something new had emerged. All spoke easily of “environmental law” as that new something. An entirely new legal discipline and way of thinking about law, one of the most stubbornly conservative and gradually evolutionary of human constructs, doesn’t just happen in three years. This book therefore explores how changes underway before 1970 among the American people and amid the natural world they inhabited transmuted older forms of legal thought and practice into environmental law.

With my first book’s manuscript safely in its publisher’s hands, I turned to answering this deceptively simple but quite important question. Luckily, the University of Virginia Law School presented me the ideal opportunity to move from wondering about environmental law’s emergence to actually offering some tentative first thoughts. Professors Jon Cannon of the Law School and Willis Jenkins of Virginia’s Environmental Studies Program invited me, in the summer of 2004, to join a panel of distinguished environmental and legal historians at a conference dedicated to seeing what law and the humanities had to say to one another. My good fortune multiplied when the conference organizers asked me to present some helpful commentary about papers delivered in Charlottesville by the University of Wisconsin Law School’s Arthur McEvoy and UVA’s own Edmund Russell. In 1986, McEvoy had written The Fisherman’s Problem, a powerful, provocative study about nature’s effects on legal history. Ed Russell had carefully interrogated the American state as war-maker and lawgiver in his 2001 book, War and Nature.2

My October 2005 Virginia conference comments suggested some ways in which historians could come to grips with the problem of environmental legal change after World War II. And I enjoyed a double helping of good luck when writing up my informal comments for publication by the Virginia Environmental Law Journal. The Charlottesville conference gave me the privilege of listening to Georgetown law professor Richard Lazarus’s funny, wise talk
about how gingerly the United State Supreme Court had handled the new field of environmental law during the 1970s and 1980s. I then enjoyed the pleasure of dining with Lazarus, during which meal he graciously answered my questions about his masterful new book, The Making of Environmental Law.³

Lazarus has written a superb legal history, but listening and talking to him convinced me of two things: explaining the origins—the invention, actually—of American environmental law remains very important, and by closely focusing on the period after 1965, Lazarus actually made even more imperative the task of understanding the two prior decades. The book you are now reading contends that the entire quarter-century between 1945 and 1970 composes a unified period of legal creation, one deserving integrated analysis that combines approaches rooted in environmental as well as legal history. Although I do not concur with all of Making of Environmental Law’s conclusions, its author’s good sense, hard work, and vast experience in teaching, practicing, and studying law immeasurably benefited my work. I wrote this book more quickly and surely because I got a chance to debate hypotheses and compare research with Richard Lazarus at the University of Virginia Law School’s innovative conference.⁴

Our encounter vindicated—as if further vindication were needed—the judgment of Thomas Jefferson, the University’s founder, who believed spirited conversation among curious people offered the best chance to spread light into corners previously dark. For the privilege of beginning that Jeffersonian conversation about environmental legal history, I thank Art McEvoy, Ed Russell, and Richard Lazarus, who all got me thinking. And I offer my warmest appreciation to Jon Cannon and Willis Jenkins, who invited me to share a table while Mr. Jefferson’s community did its work.

McEvoy and Russell proposed in Charlottesville that environmental and legal historians should both closely attend to the American state’s two supreme, complementary expressions of sovereign agency: declaring law and making war. Throughout the twentieth century in America, war made both environmental law and environmental history. McEvoy and Russell suggested war-making’s exigencies caused the state and its agents, public and private, to transform existing laws. Both contended that old wars have left new legal institutions in their wake. Persuaded by their insights, I begin this history of environmental law’s creation at World War II’s end. Rules
made and enforced by war-fighting institutions continued to reshape America’s natural world, and citizens’ relationships to it and to each other, long after the global emergency had ended.

President Franklin D. Roosevelt declared his New Deal a “war on want.” Indeed, many New Deal institutions facilitated mobilization when real war erupted. I think this was not entirely fortuitous, especially after 1938, when Roosevelt came to believe that a general war in Europe was likely to erupt at almost any time. By focusing on World War II and its aftermath, therefore, we will better appreciate how key features of the New Deal’s legal legacy fertilized environmental law’s genetic inheritance.

Two quite different American places suggest answers to a question central to tracing environmental law’s emergence. How did law and nature respond to war? In the Pacific Northwest and on the High Plains during World War II the national state used law to impress nature into military service. Service for the war-fighting state, a role Edmund Russell has termed “nature as ally,” transformed rivers and grasslands. What then happened to law and nature after peace came in 1945?5

Wartime and postwar control of natural resources in the Columbia River Basin illuminate environmental law’s link to New Deal legal regimes. Six weeks after the Japanese attacked Pearl Harbor, the United States government ordered all private and public electricity providers in Washington, Oregon, Idaho, and Montana to create the Northwest Power Pool. Mobilization for global war accomplished in days what more than forty years of political agitation and trust-busting litigation had not. With a few pen strokes in Portland, Oregon, and publication of a few Federal Register pages in Washington, D.C., the national state took control over generating, distributing, and selling all electricity in the region. As hydropower supplied nearly all Northwestern electricity, the federal government thus became the region’s water-master as well as its powerbroker.

In the Northwest during World War II, federal administrative agency discretion—the New Deal’s primary legal innovation—supplanted traditional common law and state statutory regimes. Wartime natural-resources managers turned smoothly toward postwar economic and social planning. Broad statutory grants to manage water—the Northwest’s principal power source—empowered federal experts to deploy vast administrative discretion largely free from judicial scrutiny or citizen input. Even when political liber-
PREFACE

alism waned rapidly in the Northwest after 1950, legal institutions and practices established during the New Deal and perfected during World War II influenced the region’s economy and shaped its society until the 1970s.⁵

Today, however, the shaky status of a regime based on attempts to control nature through administrative expertise dramatizes environmental law’s unstable legacy. No Northwesterner offers much allegiance to federal resource planning. Comprehensive river basin development, a New Deal/Fair Deal mantra, survives only on ancient blueprints and flickering educational films. Judges watch the federal waterpower agencies like hawks. Litigious Native peoples and activist anglers keep the once-mighty agencies on short leashes. The twenty-first-century Northwest epitomizes the decrepitude of environmental law founded upon political expediency and intellectual inconsistency: agencies distrusted, experts ignored, gridlocks over water, power, and fish tightening each day.⁷

However, another wartime legal innovation on the High Plains cautions against writing environmental law’s premature obituary. In late summer 1942, the War Department divested ranchers and farmers of some 50,000 acres—nearly half a county—in Kansas’ Flint Hills. There, government and industry collaborated to prove the airworthiness of a new generation of heavy bombers. By 1944, the Smoky Hill Bombing Range was absorbing daily poundings from B-29 Super Fortresses built in Wichita for the air war against Japan. Planes tested in Kansas ultimately dropped the two atomic bombs that ended the Pacific War. The national state’s war-fighting and law-making powers not only transformed Smoky Hill. They tied this pock-marked piece of the High Plains to the damp, green Columbia Basin. Each atomic bomb dropped on Japan by planes tested in Kansas contained radioactive materials created using cheap hydroelectricity that the Northwest Power Pool delivered to the Hanford Works in Washington State.⁸

Kansas’ Smoky Hill Bombing Range complicates a straight declension story about environmental law’s trajectory after the 1970s. It has become a place covered by a thick residue of environmental law. After national rules shouldered aside common law and Kansas statutes during World War II, environmental law’s forms and values still shape the range’s management. Amid a state with the nation’s smallest proportion of public lands and one of its most environmentally indifferent polities, Smoky Hill stands apart. Defense Department regulations governing the range stress biodiversity
over production agriculture. This small space on the vast Great Plains bears thousands of bomb scars. Yet, seen as a legally defined place, Smoky Hill reminds us how legal forms can toughen over time, growing resilient and durable through repetition despite criticisms of their coherence and doubts about their legitimacy.9

Taken together, the Columbia Basin and Smoky Hill incite hard thinking about American environmental law’s origins and agents. To trace the life of American environmental law requires asking some basic historic questions. What dates mattered? Which places deserve study? What people working within which institutions made and resisted change? Did crises confronted at crossroads form more law, their heat and pressure producing new alloys from simpler materials? Or did environmental law grow incrementally, like a coral reef, as the gradual, almost imperceptible unfolding of doctrines produced a new structure?

My answers to these questions portray environmental law’s history as partly declensionist, partly whiggish, and part simply accretive, as one decision settled atop another precedent until something distinctive enough drew people’s attention to the emergence of a new field of law.

Environmental and legal historians, as well as legal academics, have often taken the easy way out, ritually intoning that “Environmental law began in or around 1970, shortly after the first Earth Day.” McEvoy’s older book, The Fisherman’s Problem, along with Paul Milazzo’s new one, Unlikely Environmentalists: Congress and Clean Water, 1945–1972, remind us environmental law has a past, too. It did not spring fully formed from Edmund Muskie’s furrowed brow along an arc traced by Rachel Carson’s golden pen.10

My book begins presenting what I believe is a truer, albeit messier, history of environmental law’s origins and emergence by addressing the following questions:

1. Why do so many law teachers still date the advent of environmental law to the years 1969–1974?
2. What happened in the twenty-five years before 1969 that stimulated important legal change during the next five years?
3. What traditional legal rules—property, procedure, contract, tort, administrative and municipal law, statutory construction, remedies—underwent decisive change during that period, or even before?
4. How—and how much—did existing legal institutions change these traditional legal fields, and what new institutions appeared to accelerate the pace of change?

5. Which legal rules and institutions persisted, and even resisted change, their inertia impelling development of different responses to long-standing concerns?

6. What mutual, reciprocal influences between 1945 and 1970 drove change through actions by these lawmaking pairs: lawyers and clients, litigants and judges, politicians and constituents, administrators and the regulated, law schools and practitioners?

7. And, to do the fullest justice to a story literally rooted in humans’ dependence on nature, what was occurring in the natural world itself that stimulated legal change after 1945?

My answers indicate environmental law began emerging earlier than we think, and well before 1969–1970. Postwar lawmakers largely elaborated administrative and statutory innovations that New Dealers had borrowed from their Progressive Era predecessors. More happened in states and specific local places than previously understood. And despite the new evidence I present, environmental law’s history, truly told, requires much more study of individual lawyers, judges, clients, and elected officials responding to specific encounters with natural features and forces at work in specific places.

Over forty years ago, Willard Hurst told legal historians to spend more time watching the lumber market and less time reading appellate opinions if they wanted to know why Wisconsin’s pine forests nearly vanished in the second half of the nineteenth century. He pried open what had been, until then, something of a “black box” approach to legal history, one that posited law as a product uniquely grown within a legal system largely impervious to economic, political, and cultural forces. The field of legal history has never been the same.¹¹

I have tried to follow Hurst’s advice to show how, when, and where American environmental law emerged after World War II. I have imaginatively leaned against the walls in legislative hearing rooms, pulled up a chair to lawyers’ conference tables, slipped into administrators’ cubicles to look over their desks, and stood just inside corporate boardroom doors. And I have sometimes visited another environmental law forge, a place known somewhat from my past life. I try settling the reader onto metal folding chairs in
poorly ventilated high school auditoriums to listen as aspirants for elective office sought to enlist local people to endorse their campaigns.

By visiting these human places, I have tried to describe law being made by being used: tested, tossed away, and reinvented. Importantly, I think, this book also visits the riverbanks and freeways, the duck blinds and airsheds where natural features and forces have always been making Americans change their rules. By spending time in all these places, we will begin to better understand the various processes by which the dynamic, unceasing process of legal change created environmental law.
ACKNOWLEDGMENTS

Hanging behind my office desk is a grainy color snapshot, taken in 1977 in Idaho’s Sawtooth Wilderness Area, during a particularly cold, wet Fourth of July backpacking trip. I stand with two college-age friends, Steve Edquist and Mitch Anderson, smiling jauntily atop Nahneke Peak’s broken granite, as a third Boise pal, Drew Noack, snaps our picture. Sitting on my office desk is a better color picture, taken in 2004, on southern Idaho’s Owyhee Desert, just above Battle Creek. During a brief splash of sun that brightened an otherwise cold, wet early June backpacking trip, my children, Jenni and Dylan, smile bravely at me and another longtime Boise bud, Jeff Swanstrum.

Propped against the wall in my home office is an old black-and-white print, taken in Boise’s North End on Christmas Eve 1945. Five duck hunters and two wet but noble retrievers pose behind their impressive bag of mallards. My dad, on his eighteenth birthday, three days before he left home to join the United States Army Air Corps, proudly grips his shotgun barrel while, to his left, Army veteran Ernie Day grins broadly behind wire-framed glasses. To these Idaho outdoor inspirations, I offer my sincerest thanks. They, along with dozens of others too numerous to name, have unknowingly helped me write this history of environmental law’s emergence after World War II.

No work of history gets written by a busy college professor without generous financial support from his employer. The University of Kansas materially aided my work with a New Faculty General Research Fund grant, a Self Fellows Society Innovation grant, sabbatical leave, and numerous College of Liberal Arts and Sciences travel grants. KU also kindly granted me a year’s leave to accept a United States Supreme Court Fellowship in 2001–2002. During that momentous year in Washington, D.C., I began weaving together the threads that became this book.

Nancy Scott Jackson first saw this book’s potential and brought me into the University Press of Kansas’ fold. Fred Woodward’s patience kept me there, despite tribulations and delays that must have taxed even his editorial patience. Kalyani Fernando’s and Susan McRory’s energy and encouragement finally brought my project through to print. Indexer extraordinaire Mary Brooks has always offered so much more than a busy reader’s best friend at the back of the book.
Environmental and legal historians in the Missouri Basin are fortunate to enjoy the proximity and largesse of two neighborhood Presidential Libraries. Materials from the Eisenhower Library in Abilene, Kansas, and Truman Library in Independence, Missouri, enlivened this work as their dedicated archivists brightened my days. I particularly thank Mike Devine and Ray Geselbracht of the Truman Library for inviting me to present early sketches of this work at a 2003 summer teaching seminar and appointing me to chair the 2007 Truman Legacy Conference about postwar environmental history, held in the salubrious surroundings of the president’s second favorite place, Key West, Florida.

Like all historians, I depend on libraries’ conscientious, thorough professionals. I have been fortunate to work with some of the best, starting with my University of Kansas colleagues who staff Watson and Anschutz Libraries, Spencer Research Library’s Kansas Collection, the Robert J. Dole Institute’s Archives, and Wheat Law Library in Green Hall. Special thanks go to Wheat’s Su Johnson, who made me feel like family by ignoring the boxes I kept accumulating. Farther afield, Denver Public Library staff introduced me to the wonders of its Conservation Collection. The Idaho State Historical Society’s Linda Morton-Keithley and Judy Austin opened to my eager gaze the inestimably valuable Bruce Bowler Papers, where Carolyn Bowler shared not only her encyclopedic knowledge of her former father-in-law’s legal files, but warm recollections about the man and his time and place.

A work of such breadth (and inadequacy) owes so much to historian friends and colleagues who have read and thoughtfully critiqued early versions. As always, Don Worster gave me the benefit of sharp insights, most of which I have probably not fully appreciated in these pages. The Nature and Culture Seminar, which he founded at the University of Kansas’ Hall Center for the Humanities, gave me a last chance to subject my arguments to pungent criticism. Hall Center director Victor Bailey and seminar co-chair Gregory T. Cushman earn my thanks for maintaining this superb ongoing conversation about environmental history. Across the country, at various conferences, Paul Hirt, Sara Dant, Dale Nimz, Adam Rome, Ed Russell, Art McEvoy, and Bill Cronon critiqued various studies that now, much improved, compose part of this work. And Eric Freyfogle, Rob Glicksman, Mark Harvey, Adam Rome, Paul Milazzo, and William Rodgers, Jr., graciously read drafts of multiple chapters while busy with their own writing.
Anything of value reflects their good sense, while its many weaknesses are all my own. Late in every book’s writing, as all authors probably know, you begin to doubt the whole enterprise, but two delightful conversations with real environmental law pioneers, Idaho’s Scott Reed and Washington’s Bill Rodgers, convinced me I was “getting it,” at least sort of.

For eight years, I have enjoyed the privilege of trying out ideas about environmental and legal history with hundreds of students at the University of Kansas. Their questions and answers vindicated my conviction about the scholarly value of writing a book to integrate my research interests with varied professional experiences as a practicing lawyer, elected politician, and citizen activist. Thanks to my departmental chairs, especially Bill Woods of the Environmental Studies Program, for annually indulging my fascination with introducing environmental law to undergraduates. Special thanks go to three research students—Alvar Ayala, Michael Martin, and James Roberts—whose energy and results confirm my prediction that they will become valued professionals in their own right.

Early in my fourth career as a historian, KU law professors Francis Heller, Michael Hoeflich, and George Cameron Coggins taught me about studying legal history and environmental law. In their graduate classes, I first glimpsed the possibilities of writing an environmental history of environmental law, though none probably knew I had begun forming such a conceit. During my first two careers as a trial attorney and state legislator, a wonderful cast of Idaho lawyers, judges, politicians, journalists, and administrators encouraged me to think hard about law’s intersection with politics. Even, and especially, when we disagreed, they taught me lessons that shape my work still. And every day, as I pursued my third career with the Idaho Conservation League, brave and funny environmental activists reminded me about citizenship’s blessings and burdens.

Which brings me back finally to those pictures that surrounded me as I worked. When you are young, ambitious, and busy, you seldom take time to listen—really listen—to older people who have learned a few things about the topic that becomes the heart of a book. I regret not paying more attention to older conservationists, good citizens like Ernie Day and Bruce Bowler. If I have introduced their work and causes to posterity’s respectful consideration, then I have partly made up for youthful indifference. I have no regrets for over forty years’ worth of trips afield in the company of family and
friends. My father and mother, Monte Brooks and Marti Brooks, know this, because they made it all possible. The children in my life—Jenni, Dylan, and Jud—someday will.

My wife, partner, and friend Mary knows how hard I worked to write this book to begin discharging the debt I will forever owe to the lawyers and citizens who always truly subscribed to the principle that we must care, every day in all we do, for the natural world as a public trust.
BEFORE

EARTH DAY
“TO THINK LIKE AN ENVIRONMENTAL LAWYER”
MAKING AMERICAN ENVIRONMENTAL LAW THROUGHOUT THE POSTWAR ERA

“It is only within the last year or two that the term ‘environmental law’ has come into common usage. . . . At the same time there is actually very little new law in the field of environmental law.”

“Today both state and federal legislatures have the authority they need to protect the environment. . . . Courts are powerful enough so long as they are enabled to build a common law for the environment, remand dubious proposals to the legislatures, and declare moratoria.”

“These materials [in our book] are designed to explore traditional questions of law and politics which have assumed heightened significance in a society increasingly influenced by science and technology and increasingly concerned with the quality of its natural environment.”
—Louis L. Jaffe and Laurence H. Tribe, Environmental Protection (1971)

Start this search for American environmental law’s origins at the drinking fountain outside my office in the quiet university town of Lawrence. The water I drink tastes better because in July 2003 an ambitious project expanded and modernized the city’s Kansas River Water Treatment Plant. City engineers in smudged hard hats scuffed through thick dust beneath the humid summer sun to certify that the contractors’ work complied with state and federal water-quality laws. Their colleagues in City Hall sent me a pamphlet celebrating the project. The Water We Drink reminded 80,000 Lawrence homeowners, landlords, and renters that “water is one of the most vital elements in our
lives, [so] we must have confidence in its safety and quality.” To “ensure customer satisfaction by consistently delivering high quality water today and in the future,” the Utilities Department announced that its new Water/Wastewater Master Plan would spend over $18 million during the next three years to keep expanding infrastructure and installing newer technology.1

I couldn’t get to Wichita, 200 miles southwest of Lawrence, that summer, so I missed its annual Arkansas River Festival, “the state’s largest party centered on a natural resource.” Officials in Kansas’ biggest city, halfway between the Arkansas’ source in the Colorado Rockies and its confluence with the Mississippi, hoped beer and barbecue would inspire new civic activism to clean the turbid river, officially known only in Kansas as the “Ar-kan-sas.” Wichita’s mayor and city council president joined nongovernmental organizations to unveil the lime-green T-shirts that “river ambassadors” would sport during the Arkansas Festival. In bold white letters, the ambassadors’ uniform asked, “Why isn’t the river blue?” and “Are there fish in the river?”2

News that same summer told me “river experts and managers” from seven states—stretching nearly two thousand miles from Montana to Missouri—were convening in Atchison, Kansas, for the Missouri River Natural Resources Conference. Project leader Rosemary Hargrove explained why revising the Army Corps of Engineers’ Missouri River Master Operations Manual was taking such a long time. The Manual, which “dictates priorities and policies for the river,” was sparking political controversy the breadth of the Missouri Basin. Hargrove pleaded for “better communication” between all the interests that cared about the river, but, she admitted, “We don’t have that yet.”3

Problems with rivers a half-century before, half a continent away, carried this search for environmental law’s beginnings to my home state of Idaho, where ordinary people grappled with many of the same environmental challenges Kansans faced in 2003. In January 1954, the Idaho Wildlife Federation’s (IWF) annual meeting in Boise resolved to oppose any new power dam in the Hells Canyon of the Snake River, or on the Snake’s principal tributaries, the Salmon and Clearwater. Dams proposed by the Army Corps of Engineers for north Idaho’s Clearwater River would “be the worst possible example of butchering fish and game on the altar of power,” charged Lewiston forester Mort Brigham. Boise lawyer Bruce Bowler, who had been doing the federation’s legal work for almost a decade, smoldered as he recounted his November trip to testify against the Clearwater dams. After a 300-mile drive on icy mountain roads to Orofino, Idaho, he found the army’s “public
fact-finding” hearings were neither. Sounding a little like new Secretary of State John Foster Dulles, Bowler told IWF that the Corps hearings were “undemocratic dupes,” contaminated by “arbitrary and unfair procedures” that encouraged “factual misrepresentations.” Flawed legal procedures ensured bad environmental decisions, Bowler believed, because government agencies would use biased testimony to act “without consideration of wildlife values involved.”

Three months later, in Wenatchee, Washington, the Washington Sportsmen’s Council and Oregon Wildlife League resolved to join their Idaho neighbors’ fight against new Clearwater dams. New political alliances that ignored state lines to span watersheds encouraged Bruce Bowler to take an unprecedented legal step. His March 1954 Protest on behalf of the Idaho Wildlife Federation urged the Federal Power Commission to block Clearwater dams because Section 10 of the Federal Power Act protected ecological, cultural, esthetic, and recreational values. “Eighty organizations functioning within the State of Idaho... which have a total membership of 20,000 persons make this protest on behalf of the public interests involved in the wildlife and its habitat.” Citizen-conservationists’ first legal intervention in regulatory decisions claimed a new procedural right to participate fully in FPC decisionmaking. IWF’s Protest also articulated a novel redefinition of the “public interest” in water. Section 10, Bowler told the commission, precluded “destruction of magnificent natural resources and facilities so affected by said project.”

Idaho conservationists’ legal innovations paralleled political strategies aimed at linking urban recreationists with small-town wage workers. IWF joined the state AFL-CIO in summer 1954 to launch a two-front campaign for better hunting and stable wood-products employment. IWF and the unions lobbied Idaho’s congressional delegation to back bills dedicating a fixed percentage of United States Forest Service timber-sale receipts “to improve wildlife and recreational facilities in our national forests.” And the federation tasked Bowler to write a questionnaire, to be printed and sent with union funds, probing all state legislative candidates about their views on restoring the state’s Fish and Game Commission’s independent nonpolitical status.

The IWF’s new Stream Pollution Committee, chaired by Bowler, pressed Idaho legislators in 1957 to toughen the state’s new statute controlling dredge mining. And the federation began lobbying the federal government
to build water-pollution control muscle to complement state regulations. Resolutions drafted by IWF’s Fish Committee in 1958, also chaired by the indefatigable Bowler, urged the Eisenhower Administration and Congress to renew the Federal Water Pollution Control Act and to double appropriations “for municipal aid for sewage treatment.” IWF asked the president’s new Health, Education, and Welfare Department to appoint “an undersecretary . . . fully devoted to water pollution problems.”

Five years before Silent Spring appeared in 1962, IWF members, like outdoors enthusiasts elsewhere in the 1950s, were raising alarms about DDT. In late summer 1957, Bowler buttonholed the Boise National Forest supervisor on the street to quiz him about chemical spraying in the mountains north of the city. Meant to kill weeds around newly planted seedlings, the DDT “had resulted in the complete elimination of fish life” in streams downhill from the pine plantations, according to outfitters’ reports that reached Bowler. Forest Supervisor K. D. “Ken” Flock immediately wrote to Idaho Fish and Game Department Director Ross Leonard, assuring him that Bowler’s questions raised legitimate concerns. Flock and the supervisor of the adjoining Payette National Forest pledged their agency’s cooperation should Fish and Game want “to work together . . . to investigate thoroughly to find out what the facts might be.”

Idahoans’ search for practical solutions to problems already present in the 1950s signals environmental law originated in the years just after World War II. Kansans’ use of environmental law in summer 2003 confirms the persistence of an environmental lawmaking process that enlisted millions of Americans during three postwar decades. Many legal professionals—attorneys, judges, and administrators—played an important part in making new law. And much lawmaking occurred purposefully in legislative chambers, courthouses, and agency offices, the traditional venues dedicated to the legal process. Most environmental lawmaking, however, simply happened as people used water, breathed air, and turned soil. American environmental law kept evolving in the opening years of the twenty-first century much as it had been created during the quarter-century following World War II. Less a designed philosophical system than a necessary social product, environmental law emerged daily, fashioned by people who needed rules to help them live sociably, productively, and peaceably in the natural world they did not make.

American environmental law reflects the many rules citizens have im-
posed on themselves to govern their complex relationships with the natural world. Historian Richard Andrews has broadly framed environmental lawmakers’ task as one of “managing the environment by managing ourselves.” More precisely, environmental law expresses the purpose of those rules humans have adopted to prolong their survival within the nonhuman natural world. Law teacher William H. Rodgers, Jr., defined the field a generation ago as “the law of planetary housekeeping, . . . concerned with protecting the planet and its people from activities that upset the earth and its life-sustaining activities.” Even more strictly speaking, Americans have made environmental law since 1945 to ensure a modicum of human health, to guarantee roughly equal political access to natural resources, and to afford nonhuman life forms a basic level of protection against human demands. Leading contemporary legal commentator Richard J. Lazarus recently observed, “Environmental law regulates human activity in order to limit ecological impacts that threaten public health and biodiversity.”

Kansans in 2003, like Idahoans in the fifties, demonstrated one way ordinary people made environmental law: by continuously reworking their multiple, dynamic relationships with water. Ecological, economic, political, and cultural imperatives express these relationships. In revising any of their environmental relationships with water, Americans necessarily readjust their social relationships with each other. Law reflects one important, although not exclusive, means they use to order their ever-evolving relationships with water and with their fellow citizens. And human action has contributed one important, although not the only, lawmaking impetus. Incessantly and inevitably, natural features and forces—water flowing downhill, chemistry unfolding molecular structures, microorganisms living and dying—have stimulated legal change. The natural world has exercised sovereignty’s prerogative by posing challenges to some humans and presenting opportunities to others. Kansans, like Idahoans a half-century before, were always scooting their chairs over to make room at the table for nonhuman environmental lawmakers, their not-so-silent partners in legal change.

Bold in its creators’ aspirations yet modest in restructuring the world their successors have inherited, environmental law and its origins deserve a hard look. Most histories have conventionally dated American environmental law’s emergence to the “environmental decade” of the 1970s, triggered by a handful of publicized events that occurred late in the 1960s. During the decade that began with the first Earth Day in April 1970, Congress did enact
many new federal environmental laws that have since significantly affected American life. “The years 1969 through 1979 saw the passage of 27 [federal] laws designed to protect the environment, as well as hundreds of administrative regulations,” Nancy Kubasek and Gary Silverman have calculated. Between 1969 and 1980, citizen activism and mass-media coverage intensified political pressure on public officials at all governmental levels, who responded by elevating environmental protection into a higher policy priority. However, John Adams’s retrospective judgment about the long march to American Independence suggests environmental law originated through a process of legal change operating throughout the entire postwar era. The quarter-century before 1970, as well as the years just before and after Earth Day, must figure into a satisfactory explanation of a social phenomenon so complex in form but limited in substance.

Adams the old revolutionary, writing more than a generation after the thunderous days of 1775–76, believed fighting at Bunker Hill and adoption of the Declaration of Independence ratified more than they initiated. The American Revolution, he concluded, “was effected before the war commenced. The Revolution was in the minds and hearts of the people.” Americans made a revolution when they changed their way of thinking, Adams argued, not when their representatives in Philadelphia approved parchment pronouncements. Like American independence and revolution, the most fundamental changes in legal thought and action that created American environmental law had been effected before elected representatives ratified them in formal statutory enactments. Major federal statutes passed in response to the intense political pressure cresting between 1970 and 1976 reflected legal principles already being applied by citizens and legal counsel. Even as scholarly analysis and teaching about environmental law were still in their formative stages, American environmental law had emerged before the first Earth Day, before the first law-school classes in the late 1960s or the first environmental law books of the early 1970s. Its central features had appeared even before 1962, when Rachel Carson’s Silent Spring galvanized citizens into a new political consciousness of their environmental peril.

Environmental law did not appear in a revolutionary moment of intense national creativity after 1969. A slower, more complicated, evolutionary process of legal change laid down environmental law’s foundation before the first Earth Day. By using various lawmaking methods in diverse settings millions of Americans had already established modern environmental law’s
basic principles by 1970. Environmental law emerged steadily, over more than a quarter-century, in the most ordinary, commonplace ways, its birth less spasmodic than episodic. Its makers were citizens seeking desired outcomes to actual disputes, lawyers representing clients, judges deciding cases, and representatives expressing constituents’ views. Recovering environmental law’s seed-time in the postwar years puts popular politics and culture into necessary context. The environmental decade accelerated the process of legal change that citizens and their advocates had set in motion before 1970. Like American law as a whole, environmental law developed contextually and sequentially, a series of responses to serve concrete needs and to attain specific goals.

Environmental law teacher John-Mark Stensvaag declared in 1999 his chief purpose for writing textbooks and teaching was getting students to “think like an environmental lawyer.” Millions of Americans, among them a few trained environmental lawyers, had already begun to think like environmental lawyers before the first Earth Day. They had been translating their thoughts into actions by making environmental law well before the “environmental decade” opened in 1970. From their thoughts expressed in words and made tangible in deeds, throughout a quarter-century after World War II, emerged a new field of law rooted in the felt necessities of life in the postwar United States.

In jurisdictions from California to Massachusetts, citizens and clients pursuing goals on their own initiative and through their attorneys’ advocacy secured recognition of five basic environmental legal doctrines between 1945 and 1970. Citizens established their right to participate in public decisionmaking before governmental agencies altered nature. Courts, especially at the federal level, affirmed their constitutional duty to scrutinize citizen complaints about administrative-agency actions that promised to disorder natural systems. Legislatures circumscribed owners’ use of their property within lawmaking’s legitimate realm. Political boundaries no longer inherently impeded regulation of human acts that degraded vital natural environments. And national standards, expressed by statute and regulation, slowed the rate of environmental damage by setting baseline relationships between healthy environments and human pollutants. New statutes, regulations, and judicial decisions after 1970 mostly ratified and regularized these broad rules.

The popular impulse indispensable to making these five basic environ-
mental legal principles had been building throughout the postwar years. Americans after 1970 did not invent popular passions for securing a healthy natural environment and ameliorating the consequences of environmental damage. They powerfully amplified demands that activist citizens had been voicing for a quarter-century. Frustrated by traditional legal rules that favored rapid environmental transformation and impeded citizen participation in those changes, clients and lawyers after 1945 innovated new rules and eroded existing precedents. Where they could, activist clients and counsel forced changes in state and local laws. Where local legal cultures had proven too resistant, activists resorted to federal politics.

Law teachers, having always considered nature a worthy topic, should have seen environmental law coming. Unruly nature had always thickly sown their casebooks with legal problems that dim-witted human clients brought to harried attorneys for fumbling solutions. Hadley v. Baxendale, my first problem in my first Contracts class on my first day of law school (Fall 1980) posed a classically “natural” legal question: When heavy rains delayed delivery of a new shaft to a mill during the peak of harvest, could the impatient miller or his frustrated farmer-customers sue the dilatory freighter for the lost value of unmilled grain? Disputes like this, arising among people who worked in nature, fill pages of the law texts written to instruct future attorneys.

Law schools’ professional presentism, however, impedes historic analysis. Instead of trying to trace environmental law’s origins, most legal academics write as if developments before 1970 happened someplace else, in a very different country, somewhat like the Victorian England where mud-spattered Baxendale the carter futilely whipped his heaving horses toward Hadley’s fog-shrouded mill. “Environmental problems were addressed primarily by courts, exercising their common law power to decide controversies in litigated cases,” according to law teacher John-Mark Stensvaag. “Environmental law’s common law roots remain important,” another contemporary law school textbook declares, because “they articulate principles that have been highly influential in the development of public law, and they retain considerable vitality in their own right.” Despite long experience teaching subjects rife with nature’s agency—contracts, property, corporations—law teachers usually reduced older precedents to quaint curiosities instead of contextualizing environmental law by historicizing its connections to their customary classroom subjects.

Law teachers’ appreciation of nature’s historical agency receded before
their foreshortened sense of time. Employed to teach (usually) the law as it is or (occasionally) might be, but rarely the law as it came to be, legal academ-ics privileged the contemporary at the expense of the historic. Their duty to educate future practicing attorneys precluded law professors from showing their students, both in the schools and among the profession, how environmental law unfolded and emerged across comparatively long reaches of American time. The obligatory introductory casebook chapter about envi-
ronmental law’s “sources and origins” typically leaps from common-law classics to Earth Day, offering little that helps the student see how the field developed between 1945 and 1970.21

Environmental law textbooks’ conclusory, repetitive contention that envi-
ronmental law began in 1969 or 1970 invites historical interrogation. Stensvaag’s 1999 Materials on Environmental Law retail ed this chestnut as plainly as any. “In 1969,” he observed, “scarcely anyone perceived that a separate body of law even existed” and thus “a law school course in the subject of environmental law would have been most unusual.” Then seemingly overnight, “this previously unrecognized field” yielded its harvest, the outcome perhaps of spontaneous intellectual generation. “Environmental law—as we now know it—first took shape in those opening months of 1970,” Stensvaag asserted. A president and a people ignited “an extraordi-
nary surge of activity” when Richard Nixon signed a congressional bill into federal law and the first Earth Day’s celebrants took to the streets in hopeful protest. Since these “two events in early 1970 [that] marked [its] begin-
n ing,” environmental law “has exploded in scope and importance.”22

Even a multiauthor 1992 casebook, Environmental Regulation: Law, Science, and Policy, which offered a more detailed, leisurely account of its topic’s birth, perpetuated the overly simplified “moment of heroic conception” ac-
count. Perhaps because a climate scientist and citizen activist helped two law teachers write Environmental Regulation, it did remind readers that the “nature and sources of environmental concern” and “the roots of environmental values” shaped “how the legal system has responded to environmental con-
cerns.” Even so, the authors asserted environmental law grew “from a sparse set of common law precedents and local ordinances to encompass a vast body of national legislation in the space of a single generation.” After 1970, “the federal role in environmental policy changed dramatically” as “within a six-year period, 1970–1976, the United States Congress enacted nearly all of the basic environmental legislation.”23
Environmental law textbooks’ usual accounts of their field’s origins have mistaken topicality for novelty. The law teacher’s duty is to instruct aspiring professionals how to use rules and methods that have immediate value in practice. Legal academics should of course feature law that became topical because it was instrumental. But written this way, conventional accounts of environmental law’s origins unfairly stint the field’s historic origins.

Presentism’s shiny lure has diverted environmental law teachers’ attention from environmental law’s rich past, while anthropocentrism’s gravitational pull has constrained legal historians’ field of vision. The best legal histories agree “we, the people” include more than attorneys and judges, but they still explain American law as solely the people’s product. J. Willard Hurst’s seminal postwar legal histories first demonstrated the basic principle that law and legal systems reflect all facets of American social life, not just that rarified slice found within the courtroom or attorney’s office. Criminals and cops, buyers and sellers, lobbyists and legislators have all shaped the American legal system as they strove to accomplish their varied, often contradictory, and occasionally illegal goals. Hurst’s “external” method of writing legal history can help explain environmental law’s growth, although its originator only sketched the general outlines of how that should be done.

Hurst, at the apex of his career, pointed the way toward writing an environmental history of environmental law. His masterful 1964 study of North Woods logging in the nineteenth century, *The Legal History of the Wisconsin Lumber Industry*, used trees and forests primarily as historical blackboards on which an array of humans inscribed their greed, hope, and pride. People, Hurst thought, first had to turn trees into wood to make law. To be sure, the law they made reflected many distinctive goals, befitting its multiple agents. Sawyers and timber-cruisers, investors and engineers, builders and developers—not just attorneys and judges—combined to create the law that structured the Upper Midwest’s Gilded Age wood-products industry. In Hurst’s vivid account of busy people at work, however, forests simply supplied merchantable trees. Complex forest environments, watersheds teeming with macro- and microscopic life, remained mute and inert, their capacities to impel human behavior wholly divorced from human motives. The North Woods served as historic objects par excellence: they lived only to die, proto-commodities ready to be felled, bucked, and sawed. Once toppled by the sawyer and planed by the mill-hand, the forest ceased to influence people and, by extension, the law.
In Hurst’s North Woods, lawmaking depended almost exclusively on human acts. People’s deeds changed basic legal relationships expressed in such principles as property, contract, agency, tort, and employment. Hurst’s legal histories established the value of studying how many kinds of people acting through their varied social organizations made law change over time. His “external” model of historic causation revolutionized legal historiography by revealing the sterility of “internal” legal histories long mired in judges’ and scholars’ specialized activities. Hurst showed law was the product of society, not simply the preserve of lawyers.²⁶

Explaining how and where and why American environmental law emerged in the postwar years encourages reevaluating legal history’s tools and methods. Landmarks mapped by other travelers through this legal landscape offer some guidance, but can also mislead the environmental-legal historian. Legal historians since Hurst have seconded his fundamental explanatory principle: a genuine history of law must interpret the civic, commercial, and cultural life of the people who made the law to be used.

Yet Hurst’s Legal History of the Wisconsin Lumber Industry really did not incorporate those most “external” of historic causes—forces and features of nature. Living forests expressed multitudes of chemical, physical, and biological influences that acted on people, opening some opportunities for choice while foreclosing others. Even after Michigan, Wisconsin, and Minnesota people mined the North Woods by cutting down their biggest trees, forests did not cease to affect humans. Hurst did recognize how the grim specter of cut-over pine barrens influenced the rise of Progressive-era conservation politics. Lost forests stimulated states to invent what would, after 1891, become a new legal relationship: the public forest reserve. By extending Hurst’s explanatory model to include natural forces as well as humans’ many ways of using law, this environmental history of environmental law tries to offer a more complete but more complex account of its creation. Endless encounters between the American people and natural features and forces have generated numberless opportunities and crises, conflicts and accommodations. Those encounters fertilized the growth of American environmental law.²⁷

American environmental historical scholarship should enrich American legal history. Environmental history can infect legal history with a good dose of biology, broadening its vision of agency to incorporate all forces that make legal systems within human culture. An environmental history of envi-
ronmental law thus extends Hurst’s model by expanding the boundaries of agency beyond human society. Environmental law’s environmental history encompasses the sovereignty exercised by natural features and forces that operated upon Americans after World War II.

Legal historians’ generous definition of the basic term “law” establishes a useful tool environmental historians should use to analyze a problem as complex as environmental law’s emergence. Lawrence M. Friedman’s *History of American Law* observed simply, “Law is an organized system of social control.” An environmental history of American environmental law therefore seeks to explain why distinctive patterns of restraint emerged dedicated to controlling Americans’ actions that altered nature. By borrowing legal historians’ working definition of law, this environmental history aims to broaden their field of vision. Friedman, like most legal historians, limited his evidence to that generated by people. Historians of the environment, by contrast, show people’s actions have rarely occurred in an anthropocentric vacuum, but instead operated amid a complex world inhabited by other life forms. An environmental history of environmental law establishes how, in crucial respects, legal change depended on natural processes other than those summed up by the customary equation “brain + hand = act.”

Friedman’s authoritative American legal history also considered “law . . . a mirror held up against life.” Environmental historians should enlarge this basic principle by showing that “life” encompasses vastly more than our own species’ doings. Nothing in Friedman’s *History of American Law* impedes application of this principle to an environmental history of environmental law. Friedman himself recognized “a full history of American law would be nothing more or less than a full history of American life.” Environmental historians have for some time now tried to reveal more of the past by giving agencies other than human their historical due. The field’s achievement now enables environmental historians to accept the imperative task of explaining how American environmental law emerged after World War II. A political, intellectual, and social phenomenon that has exerted considerable force over the American environment in the second half of the twentieth century not only merits the closest scrutiny, it needs little defense.

Environmental historians have started emboldening legal historians to apply their inclusionary instincts to more evidence than just that generated by humans. Arthur McEvoy’s important 1986 study of California fish regulation, *The Fisherman’s Problem*, began fusing legal and environmental history.
McEvoy’s work plainly informed Theodore Steinberg’s 1995 Slide Mountain, a brace of funny, often mordant, essays about law’s uncertain relationship with nature. Richard Lazarus deftly related legal to social change in 2004. Still, his Making of Environmental Law emphasized human responses to environmental influences in trying to explain how, when, and where American environmental law emerged as a distinctive field. With this first-rate historical problem yet unsolved, this book—an environmental history of environmental law—borrows and complicates Lazarus’s approach, updating an older model of legal history to offer a solution.30

Environmental history identifies and illuminates the many ways law binds together nature and the American people. Environmental history tells us more about both nature (the American environment) and culture (the people who have inhabited it). Attentive to natural as well as cultural agents, an environmental history of environmental law tries to explain how this distinctive field, rooted in the relationship between people and nature, emerged over the past half-century. Environmental law, created out of individual and social encounters with the natural world, illustrates important features of American life. A history of its appearance will also expose distinctive aspects of American law.

The quarter-century following World War II especially deserves close study. That decisive generation not only birthed environmental law in America, but those years continue to pose historical problems of the first magnitude about the politics of the environmental movement, the profound economic and geographic changes unleashed by suburbanization, and why Americans changed personal values and social norms. This modest effort to write an environmental history of environmental law tries to explain these twin central problems: how did environmental law appear as a distinctive sphere or field within the American legal system between 1945 and 1980; and what does environmental law’s emergence tell us about American life during those years?

I contend natural features and forces themselves exercised historical agency, with environmental law’s emergence best understood as a product of dialogue between human society and natural environments. Contingent at best and frequently downright dependent, Americans’ environmental law-making reflected distinctive influences exerted by the postwar natural world in which they lived and on which they ultimately had to depend for survival. This environmental-legal history thus accepts Friedman’s definitional stan-
standard: social control, expressed by organized systems of restraints, is its proper subject. But I contend a proper study of social controls, especially those fashioned by humans living in a world they mostly did not create, must consider both people and nature because both agents shaped the outcome.

This environmental history of environmental law abandons the arbitrary habit of dating the field’s birth in 1970. Its more complicated historical account rejects simple “heroic origins” explanations, what might be called the “divine conception” account. It instead asks what the evidence reveals about environmental law’s roots and trajectories. By the same token, since historical evidence about law comes from everything reflected in “the mirror of American life,” this environmental history of environmental law treats federal statutes and national actions as indicative rather than authoritative. This history goes beyond Washington and behind national movements to identify and explore the many places where American people had to make choices about changing nature and adapting to its constant influence on human life.

This environmental history of American environmental law emphasizes the continuous interplay of human action, natural response, and legal change. It smudges the orderly lines usually demarcating the 1970s from what came before, though the “environmental decade” remains interesting and important, even as historical context diffuses its epochal luster.

Environmental law, even accepting the qualifier “as we now know it,” had already appeared in broad but unmistakable outlines before 1970. Law schools and their teachers were cautious about identifying it as a “separate body of law” that warranted its own distinctive semester-long course before then. Nevertheless, clients and their attorneys and citizens and their representatives were, after 1945, pursuing objectives that had, before 1970, established environmental law’s most important doctrines.

After that année zéro law teachers began condensing into syllabi and casebooks the rules that had been established or at least identified with some confidence. Legal scholars began to systematize the output of various lawmaking actions carried out in various places. Law teachers usually insisted Congress, the president, and federal courts in Washington, D.C., were doing the most noticeable things: proposing and enacting statutes, promulgating regulations, resolving disputes about their meaning. Their initial academic emphasis on federal environmental lawmaking obscured a longer-term development central to the emergence of modern American environmental law: a decisive shift in how people thought about problems involving society
and nature. This environmental history of Americans’ efforts to devise “an organized system of social control” to handle their complex contact with the natural world after 1945 reveals how clients’ new goals and citizens’ evolving dreams were, over time, training their advocates and representatives to think like environmental lawyers and lawmakers.

Environmental law appeared in rudimentary form during the immediate postwar years almost everywhere in the United States. Chapters Two through Four show how rising public pressure on natural resources, coupled with intensifying concerns about public health, accelerated the pace and scope of environmental lawmaking in the fifties. Having established some of environmental law’s primary features and objectives at the state level by the mid-1950s, citizens came to recognize environmental forces and features spanning state boundaries required more comprehensive regulation. Environmental lawmakers therefore nationalized key features of the emerging system in the early and mid-1960s, a development traced in Chapters Five and Six. Legal professionals contributed their skills and perspectives to environmental lawmaking, and Chapter Seven shows how one practicing lawyer forced the pace of legal change during the postwar decades. Chapter Eight analyzes the work of legal academics just before and after 1970 to show how even the field’s intellectual pioneers acknowledged their debts to earlier lawmakers.

The rate of environmental lawmaking attained its zenith in the early 1970s, propelled by a spasmodic surge in public pressure, then subsided to a level more characteristic of other systematized legal fields, such as labor law. The pace of environmental lawmaking at the national level decelerated after the late 1970s as public clamor diminished. Chapter Nine measures the transition from spasm to system, concluding that environmental law’s original circumstances rendered it susceptible to traditional economic assumptions and political pressures that have undercut many of its founders’ hopes.

During the quarter-century following Ronald Reagan’s presidential election in 1980, environmental law has lost media charisma. Its political momentum has lessened. Yet Americans—with and without professional legal training—still encounter natural systems’ daily, dynamic sovereignty. Their encounters occur socially, as numbers of people seek both sustenance and pleasure from the natural world. Americans therefore have continued to remodel the complex, unstable environmental legal system they have assembled piecemeal over six decades. Their work appears unending because the
edifice rests atop unstable foundations. Kansans’ one characteristic summer of lawmaking, at the dawn of the twenty-first century, reveals how environmental law’s roots, deeply sunk into the postwar era’s cultural soil, have constrained the field’s capacity to adapt to new challenges. Kansans’ political strife and unremitting economic demands highlight the unstable legacy bequeathed by more than a half-century of environmental lawmaking.

Lawmaking about nature moved across broad ranges of American history and life during the three decades after World War II. Draining vast watersheds of culture, economics, science, and politics, legal change resembled the Arkansas and Missouri Rivers pouring off the Continental Divide across the Great Plains. Like these great American rivers that embrace my adopted state of Kansas, American environmental law sprang from many sources across long time spans before coming together. Environmental law, like waters running from the Rockies toward midcontinent, gained energy by moving through time across space. Sometimes environmental law emerged with a rush, barreling headlong and carving new channels across the legal landscape after flowing steadily between familiar banks. Yet at many other times since 1945, American environmental law has emerged steadily, slowly, incrementally, gathering force as it grew in volume. By emphasizing the flood of environmental lawmaking that crested in the 1970s, most histories have unfairly diminished the significance of the upstream gathering. This work seeks to treat environmental law’s headwaters with respect. The Americans, like Boise lawyer Bert Bowler, who first tried to use law to live better along the headwaters deserve no less.