

NATURAL RESOURCES EXAM

Monday, December 14, 2009

Professor Houck

INSTRUCTIONS

1. This is a three-hour examination. The questions are weighted as indicated. The total points are 100; I may add points for an outstanding answer.
2. This is a closed book exam. You may use no outside materials of any type. Relevant statutory materials are provided in an appendix attached.
3. In your answers please:
 - Write, type/print on one side of a page only; if writing, legibility matters.
 - Accept the facts as given. If you feel an additional fact is necessary, please state what you are assuming and why.

NATURAL RESOURCES EXAM

FALL 2009

I. BACKBONING NEPA [20 points]

At a Tulane-sponsored meeting last year at Mount Vernon, Virginia, a group of former Council on Environmental Quality chairs, general counsel and staff joined several academics and other environmental leaders to make recommendations to the incoming President on improved implementation of the National Environmental Policy Act. The decision was made to focus only on changes within the authority of the President, short of seeking legislative amendments that might invite unintended consequences. At the table was a book on NEPA by Lynton Caldwell, whose testimony you will remember before a Senate Committee in 1969 guided the creation of the statute. The thrust of Caldwell's book was that NEPA, despite its intent, had been reduced to a "paper exercise," avoiding its larger goals.

While the degree to which this conclusion is true was debated at the meeting, all agreed that it was in significant part true and the discussion then centered on the potential of Section 102 (1) of NEPA to help steer NEPA in a more substantive direction and produce more substantive results. At issue were the questions whether this could be done, how it could be done, and with what possibilities and legal difficulties.

Question 1 [20 points]: Please address these questions. Do NOT consider political difficulties in this answer, although you are encouraged to be reasonable.

II. THE PEETREEFIED FOREST (per Jim Bridger, Mountain Man) [40 points]

Western Wyoming, east of Yellowstone Park, tapers off quickly from the Rocky Mountains to flat plains that extend east for a thousand miles to the Mississippi River. The immediate interface between the mountains and the plains is rich in deposits of gold and silver that drew their own gold rush in the late 1800's and left names like Leadville and Cripple Creek behind. This interface is largely managed by the Bureau of Land Management. Over the past decade, uncertainties in currency markets have brought a new rush on gold, and mining companies from around the world have staked more than 2,000 claims right to the border of the Park. A few of the claims have received patents, but the great majority are at earlier stages of location and development. The Bush Administration issued environmental assessments for the development plans of each claim, finding no significant impact. Park administrators, while expressing fears in private over the impacts of gold mining on the Park, did not oppose the mining (for fear of losing their jobs.)

The basic method of extracting gold from these claims is the "cyanide heap-leach process," which consists of excavating the "overburden", extracting the ore-bearing rock, crushing the rock and leaching a cyanide solution through it; particles of gold are released into the solution, and then recovered from it; the remaining rock and soils are then placed back into the pit which is lined according to federal waste standards. This technique is the only commercially viable means of obtaining the gold in this region, which is present in quantities too small to extract in other ways.

Question 2 [10 points]: Towards the end of the Bush Administration, the Yellowstone Coalition, an environmental group, was considering a lawsuit against this development. Please assess its possible claims, their difficulties, and likely outcomes.

Question 3 [20 points]: Assume now that the Obama Administration wants to take more protective action. The mining industry, rattling its sabers, says that it will fight any limits and require full compensation for those imposed. What are the Administration's possibilities, and what legal (set aside political) difficulties does it face?

Question 4 [10 points]: Assume now that the Park, in order to accommodate still-burgeoning tourism, has decided to divert part of the Yellowstone River, which flows through the

Park, in order to support guest facilities, including a swimming pool, and related amenities for Park visitors. This diversion will limit the water exiting the park, which has been claimed by mining companies under Wyoming appropriation laws for more than a century. Although these appropriation rights were granted for other locations, the industry intends to divert this water to new locations nearer the Park for gold mining purposes. Evaluate the rights of the Park and the mining industry to this water.

III. FISH AND DAMS [25 points]

Starting in the 1950's, the Corps of Engineers constructed a series of dams across the Columbia and Snake rivers in Idaho and Washington for electricity and agricultural water supply. Shortly thereafter, the great runs of salmon and steelhead trout that had characterized the region, supporting a strong commercial fishery and the cornerstone of Native American cultures, began to crash. By the 1980's, several salmon species had gone extinct, others were endangered, and all were significantly reduced in number.

In the 1990's, Congress passed the Northwest Power Act that, among other things, required a Corps-led Northwest Power and Conservation Council to:

“promptly develop and adopt a program ... [that] shall consist of measures to protect, mitigate, and enhance fish and wildlife affected by the development, operation, and management of such facilities [e.g. dams and related works] while assuring the Pacific Northwest an adequate, efficient, economical and reliable power supply. Enhancement measures shall be included in the program to the extent that such measures are designed to achieve improved protection and mitigation.”

In 2009, the Council finally released its program, which identified such measures as fish hatcheries and transporting migrating salmon around the dams by barge. These measures had been recommended by the National Marine Fisheries Service (the biological agency in this instance) during consultation with the Corps on the operation of its dams, and adopted as Reasonable and Prudent Alternatives under Endangered Species Act. The Council explained that its compliance with the ESA constituted compliance with the Northwest Power Act as well. After long litigation, the ESA RPA plans have recently been approved by a federal district court.

Question 5 [20 points]: Native Tribes and environmental groups remain unhappy with this outcome. They want some of the dams to come down, or at the least major modifications in their flow regimes to reduce fish mortality. They approach you to evaluate a law suit against the Power and Conservation Council. Please do so. However, please do NOT consider ESA challenges in this answer; you have already shot that arrow and lost.

Question 6 [5 points]: Assume now that no ESA litigation has yet taken place, and that your clients would also like to challenge the NMFS and the Corps over the RPAs based on fish hatchery production and barging the salmon around the dams under the ESA. It is incontrovertible that these measures will in fact increase salmon stocks and reduce mortality. Do you have a case on this issue?

IV. FISH AND COWS [15 points]

The oceanic fish stocks of the planet, once looked on as feeding a post-World War II world, have been badly overharvested, some species barely hanging on. One factor in the overharvesting is the “open commons” phenomenon, identified by Garret Hardin in his famous essay, *The Tragedy of the Commons*. Even within United States waters (which extend 200 miles out into the ocean and within which most commercial fish stocks live), and even with the imposition of overall harvest limits by the NMFS, overfishing has decimated fish stocks and fishing communities alike. And yet, the fisheries and their communities resisted lower catch limits to their dying breath. Such is the nature of the human being.

One response to overfishing now being initiated in the US (and New Zealand and a few other countries) is for the government to set overall harvest caps for each commercial species

and then assign within that cap “individual transferrable quotas” to each fisher, or fishing company, (based on historical use), for a particular species. That fisher/company has the right to harvest the fish up to his/her/its quota, over the duration of the season, reducing the frenetic “derby fishing” race to the fish on opening day and the feast-or-famine nature of the exercise. The quota holder may use the quota in whole or in part, or sell or transfer it to another individual or company.

- Question 7 [15 points]:**
- A.** Would such an approach work for grazing on public lands?
 - B.** Would an alternative approach to grazing permits, short of granting full title to the land, do better?