

TIME

Conservation: A New Say in Court

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“On behalf of all the people of the U.S.,” a militant housewife named Carol Yannacone last week filed a federal court suit against five major manufacturers of DDT. Charging that the pesticide has gravely damaged the nation’s natural resources, she claims that the companies have violated both antitrust laws and the citizenry’s constitutional rights. Mrs. Yannacone, a Long Island conservationist, proposes a remarkable remedy. She seeks not only an injunction against further advertising of DDT without a warning but also the payment of \$30 billion in reparations to local, state and federal governments. Whatever its fate in court, the Yannacone suit exemplifies a new conservationist passion: using the law as a weapon to help save the environment.

Until recently, conservationists generally lacked standing in the courts. Judges leaned toward litigants whose tangible property rights were threatened. But in 1965, an appellate court ordered the Federal Power Commission—for environmental reasons—to reconsider its approval of a power plant at Storm King Mountain on New York’s Hudson River. The case stressed that federal regulatory agencies had a duty to seek out public interest in cases before them. It was a major step in opening the courts to conservationists.

Formidable Problems. Now the nation’s rising awareness of ecology has moved scores of judges to listen. In the past summer alone, a federal judge delayed Walt Disney Productions’ ski-resort scheme in California’s Mineral King Valley until conservation groups can have their say in court. A six-lane highway planned to

run along the Hudson River was stopped when conservationists cited an obscure law requiring congressional approval of any project involving a dike on an interstate navigable waterway.

Even so, formidable problems remain. For one, existing local laws that protect the environment are often poorly drafted and administered—making it especially important, as Chicago Lawyer Joseph Karaganis puts it, “to light a fire under public law-enforcement officials.” Beyond that, conservationists’ suits tend to be underfinanced, a handicap in fighting both large industries and the many small ones that contribute to regional air and water pollution. In addition, a court injunction against potential as well as present polluters still requires proof that irreparable damage is likely, a difficult task when it comes to such highly technical puzzles as last January’s Santa Barbara oil spill.

The biggest problem of all, says Malcolm Baldwin, a lawyer for the Conservation Foundation in Washington, “is getting a legal handle on the things that are happening all around you and that you know are wrong.” In short, there is still little precedent for most conservation cases, though some broad legal avenues are now being explored. > The “trust doctrine,” which holds that public and private lands are subject to a “trust” held by the state for the benefit of the people. In the past, this doctrine has formed the basis of cases concerned with submerged lands (where the public interest involves navigation, commerce, fishing rights). Washington Lawyer Anthony Roisman believes that the doctrine can be expanded to include a clean environment. Indeed, it has prevented the filling of several lakes around Madison, Wis.

Nuisance law traditionally covers invasion of another’s property rights, and is increasingly being applied to environmental pollution. “In air pollution,” says Chicago Law Professor David Currie, “you may very well show that the value of your property was diminished because of the effects of smoke.” General damage

to the environment is harder to assess. Nuisance law is rarely applicable until after the damage is done.

Antitrust law is being invoked by two Chicago aldermen in a \$3 billion air-pollution suit against General Motors, Ford and Chrysler. An estimated 60% of Chicago's air pollution is caused by automobile exhaust, and Lawyer Jerome Torshen plans to attack "the heart of the problem." He hopes to use the results of a special federal investigation prepared by the Justice Department for a similar antitrust suit in California, which charged that the auto companies conspired to keep anti-pollution devices off their cars. The Government recently allowed the companies to settle that case out of court after they agreed not to block any development of the devices. But Lawyer Torshen is sure that he can apply the Government evidence to his case.

The creation of a new body of law is the aim of the New York-based Environmental Defense Fund, organized in 1967 by Mrs. Yannacone's lawyer husband, Victor. Suing on behalf of all Americans, E.D.F. brings in expert witnesses, mainly scientists, to testify about environmental dangers, such as hard pesticides like DDT. The cases are always based on the idea that the public has the right to a healthy environment.

Intolerable Conditions. Such public airing of environmental problems has produced some important results. In New York, the legislature has adopted a proposed state constitutional amendment that guarantees every resident the right to a clean environment. Even more significant, the U.S. Senate recently passed bills introduced by Senators Henry Jackson and Edmund Muskie (now being reworded in House-Senate conferences) that would oblige all federal agencies to protect the environment and make that protection a new constitutional right.

Meanwhile, court cases are carving new legal ground. Says Vermont Lawyer (and ex-Governor) Philip Hoff: “Business has learned that it can’t go ahead, carte blanche, because it can be delayed for years by a lawyer committed to saving the environment.” Adds E.D.F.’s Victor Yannacone: “Every piece of enlightened social legislation that has come down in the past 50 or 60 years has been preceded by a history of litigation. It is the highest use of the courtroom—even when we lose—to focus public attention and disseminate information about intolerable conditions.”

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