

# GETTING TO “LET’S TALK”: LEGAL AND NATURAL DESTABILIZATIONS AND THE FUTURE OF REGIONAL COLLABORATION

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In a provocative 2004 law review article,<sup>1</sup> Chuck Sabel and Bill Simon advanced the thesis that public law litigation is moving away from the model of “command-and-control” style judicial intervention, toward what they call a “destabilization rights” approach.<sup>2</sup> From the 1960s forward, Sabel and Simon argue, crusading lawyers in civil rights, civil liberties, and other public law litigation cases succeeded (at least sometimes) in persuading courts to step in with structural injunctions, ordering sweeping overhauls of schools, prisons, police departments, public welfare agencies, and other institutions that were found to be in violation of constitutional or important statutory norms. But over time, both plaintiffs and interventionist judges came to realize that the highly prescriptive remedies that came out of these cases did not always work very well. Crafted by judges lacking expertise in the necessary subject matter, some remedies were overinclusive while others were underinclusive. Often the remedies themselves proved rigid, inflexible, inefficient, and ineffective in achieving their intended ends. Sometimes they hobbled the affected agencies’ ability to carry out their core missions. Sometimes they devolved into mere formalities, court-erected procedural obstacles to be circumvented by crafty bureaucrats. In short, able judges proved to be clumsy social engineers and inept agency CEOs, in over their heads in attempting to refashion public institutions.<sup>3</sup>

More recently, Sabel and Simon argue, judges in public law litigation cases have attempted to manage with a defter touch. Employing what Sabel and Simon call a “destabilization rights” approach, judges do not presume to prescribe in detail the precise changes that must be made in failing institutions. Instead, their response is to blow the whistle on the constitutional or statutory violation, pull the plug on—or “destabilize”—the offending institution, and then in effect remand the matter to the state to reform or reconfigure the institution in ways that cure the violation.<sup>4</sup> Meanwhile, however, the court retains

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<sup>1</sup> Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

<sup>2</sup> *Id.* at 1019-20. The term “destabilization rights” was coined by Roberto Unger. See ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 530 (1987).

<sup>3</sup> See Sabel & Simon, *supra* note 1, at 1052-53.

<sup>4</sup> *Id.* at 1055-56.

jurisdiction over the matter, to allow it to determine down the road whether the government's self-devised institutional reform or reconfiguration is adequate to cure the constitutional or statutory defect.

This remedy, Sabel and Simon argue, puts pressure on the state as the defendant to go back and devise novel and often surprisingly creative new institutional reforms, typically in consultation and collaboration with the plaintiffs to the original suit.<sup>5</sup> The state—now in partnership with the very parties who were aggrieved by the constitutional or statutory offense—is much better positioned than an inexperienced court to devise creative and effective solutions that both cure the constitutional or statutory wrong, and yet serve the institution's underlying mission effectively and efficiently.

In the Sabel-Simon model, potential plaintiffs in public law litigation cases are said to hold a “destabilization right”—the right to go to court to secure an order to destabilize an institution that is in serious violation of an important constitutional or statutory norm, and force the state to go back to the drawing board and design a new institution to take its place.

Elsewhere, I have argued that the “destabilization rights” model has many applications in environmental and natural resources law.<sup>6</sup> Part I of this Paper recounts several examples.

Part II advances the thesis that legal destabilization rights are not the only destabilizing forces that drive the development of environmental and natural resources law. Equally important are natural and anthropogenic “destabilization events”—disasters and crises of such severity that they force destabilization of existing legal and institutional arrangements, and compel parties to go back to the drawing board to draw up new assignments of rights, duties, and institutional arrangements.

Part III argues that a combination of legal destabilization rights and natural (or perhaps better, part natural and part anthropogenic (or “anthropo-natural,” as I shall call them)) destabilization events are conspiring to overturn established legal and institutional arrangements on the Colorado River. The coming destabilization, I venture to predict, will provoke fierce and sometimes cutthroat competition, but also a new round of collaboration. Indeed, I would argue that when it comes to prospects for collaboration on the Colorado, the question is not “Whether,” but “When?” The answer, I suspect, is not until legal and natural (or “anthropo-natural”) events bring the situation to the brink of disaster, and a major destabilization moment occurs. At that point all bets are off, and bargaining from the ground up must begin anew.

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<sup>5</sup> *Id.* at 1073-80 (stating that the legal destabilization opens the door to collaboration because, inter alia, it increases uncertainty within the defendant institution, reverses the usual presumption in favor of the status quo, forces deliberative reason-giving, increases public scrutiny, and legitimizes and empowers stakeholders).

<sup>6</sup> See, e.g., Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861 (2006).

I. DESTABILIZATION RIGHTS IN ENVIRONMENTAL AND NATURAL RESOURCES LAW

The Sabel-Simon destabilization rights thesis was developed in the context of public law litigation—primarily civil rights and civil liberties cases involving either constitutional or statutory causes of action, or similar kinds of cases brought under state constitutional provisions guaranteeing educational “adequacy” or “efficiency.”<sup>7</sup>

The specific causes of action Sabel and Simon discuss are rare in the environmental and natural resources law context. Important parallels to Sabel and Simon-type destabilization rights can be found, however, in both common law and statutory contexts in environmental and natural resources law.

Perhaps the clearest example is the California Supreme Court’s application of a broad Saxian version of the public trust doctrine in the *Mono Lake* case.<sup>8</sup> In a pioneering contribution to environmental and natural resources law in 1970, Professor Joseph Sax argued for updating and expanding the traditional common law public trust doctrine,<sup>9</sup> which held that the sovereign holds title to the lands beneath the tidal waters in trust for the public generally, for use in navigation, commerce, and fishing.<sup>10</sup>

American courts had already stretched this traditional doctrine somewhat, most importantly in the 1892 case of *Illinois Central Railroad Co. v. Illinois*.<sup>11</sup> In that case, the Supreme Court held that the non-tidal, freshwater Great Lakes were subject to the public trust<sup>12</sup> and that the State of Illinois’s public trust obligation was sufficiently robust to justify the State’s unilateral rescission, without compensation, of a grant of the submerged lands beneath Chicago Harbor to the Illinois Central Railroad, which had been effected through an earlier act of the state legislature.<sup>13</sup>

<sup>7</sup> See Sabel & Simon, *supra* note 1, at 1022-52 (citing examples of public law litigation in the areas of school reform, mental health services, prisons, police abuse, and housing).

<sup>8</sup> Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709 (Cal. 1983).

<sup>9</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

<sup>10</sup> See Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 351-52 (1998); see also, e.g., *Shively v. Bowlby*, 152 U.S. 1, 13 (1894) (“In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing.”) (citations omitted).

<sup>11</sup> Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

<sup>12</sup> *Id.* at 435 (stating that the “same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes,” which “possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide”).

<sup>13</sup> *Id.* at 453 (“A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation” because “[t]he State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers.”).

In a highly influential 1970 law review article,<sup>14</sup> Professor Sax argued that the public trust doctrine should be further expanded and updated by extending the public trust “corpus”—the property subject to the trust—to include all manner of common pool environmental and natural resources, such as clean air, water (whether navigable or non-navigable), wildlife, scenic views, and so on. Sax further urged expanding the list of judicially cognizable public trust purposes beyond the traditional categories of navigation, commerce, and fishing to include environmental benefits like public health, recreation, ecological, and aesthetic benefits.<sup>15</sup> This move, Sax argued, would establish in the public generally a cause of action against the sovereign for failing to protect these public trust resources adequately, thus laying the groundwork for a common law of the environment.<sup>16</sup>

Although Sax’s creative proposal stirred a great deal of subsequent academic commentary and debate, it has generally been less influential in the courts of most jurisdictions.<sup>17</sup> But there have been a few important exceptions, including California.

The *Mono Lake* case<sup>18</sup> is the paradigmatic example of a judicial application of the Saxian vision of an expanded and up-to-date public trust doctrine. In that case, the National Audubon Society sought to enjoin Los Angeles’s plan to increase its water diversions from freshwater tributaries of Mono Lake, a saline lake on the eastside of the Sierra Nevada east of Yosemite, over which Los Angeles had long held appropriative water rights recognized by the state Board of Water Resources. The California Supreme Court held that as a navigable body of water, Mono Lake was subject to the public trust doctrine,<sup>19</sup> which in previous cases the court had extended to include environmental purposes such as fish, shellfish, and wildlife habitat, as well as recreational and aesthetic benefits.<sup>20</sup> To the extent diversions from Mono Lake’s non-navigable

<sup>14</sup> Sax, *supra* note 9.

<sup>15</sup> *Id.* at 556-57 (arguing that “the principle of the public trust is broader than its traditional application indicates” and could be extended to “controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling”).

<sup>16</sup> *Id.* at 474 (“Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems” insofar as it meets three essential criteria: it “contain[s] some concept of a legal right in the general public,” is “enforceable against the government,” and is “capable of an interpretation consistent with contemporary concerns for environmental quality.”) (footnote omitted)).

<sup>17</sup> See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 691 (1986) (stating that “the apparent litigation achievements of the public trust doctrine dim considerably, if not diminish altogether, when studied in light of independent developments in more generally applicable areas of the law, such as standing, nuisance, the police power, and administrative law,” which collectively marginalize the public trust doctrine’s role).

<sup>18</sup> *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

<sup>19</sup> *Id.* at 720 (“Mono Lake is . . . a navigable waterway” and consequently the “beds, shores and waters of the lake are without question protected by the public trust.”).

<sup>20</sup> See, e.g., *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (holding that the state’s public trust in tidelands extends to “preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments

tributaries impaired this public trust resource, the court reasoned, they too were subject to public trust limitations.<sup>21</sup>

But the *Mono Lake* court refused to impose specific limits on Los Angeles’s water diversions.<sup>22</sup> Instead, it remanded the question to the California Water Resources Board with instructions to reconsider Los Angeles’s water rights in light of the State’s ongoing public trust obligation, which the court said had not received adequate consideration in earlier Water Board proceedings.<sup>23</sup> The courts, however, retained jurisdiction to oversee subsequent developments.<sup>24</sup>

The *Mono Lake* case, then, has the posture of a pure “destabilization rights” play: the court refrained from a “command-and-control”-style judicial intervention, but it did destabilize existing legal and institutional arrangements, namely Los Angeles’s appropriative water right, which had been thought well settled under longstanding water law doctrines, but which the court declared to be incompatible with equally important public trust norms. Just as in the Sabel-Simon model, the destabilization appears to have worked to foster ongoing collaboration between the State, the City of Los Angeles, and the original plaintiffs, as well as other interested parties. Although the process was not without friction, the ultimate outcome was the emergence of a rough kind of collaborative “new governance” arrangement under which Los Angeles is entitled to variable water withdrawals compatible with current hydrological and ecological conditions in Mono Lake, as negotiated through an ongoing collaborative process involving the other parties, including conservation organizations, local governments, and key state agencies.<sup>25</sup> Indeed, this process has worked sufficiently well that some commentators have proposed it as a model for collaborative and adaptive management of water resources in other water basins in the American West, a region where water is often the critical limiting resource for

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which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area”).

<sup>21</sup> *Nat’l Audubon Soc’y*, 658 P.2d at 721 (“We conclude that the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries.”) (footnote omitted)).

<sup>22</sup> *Id.* at 732 (“We do not dictate any particular allocation of water.”).

<sup>23</sup> *Id.* at 728 (stating that under its ongoing duty to safeguard the public trust, the state “has the power to reconsider [water] allocation decisions even though those decisions were made after due consideration of their effect on the public trust,” and is under an even greater obligation to do so when, as in the present case, “that decision failed to weigh and consider public trust uses”).

<sup>24</sup> *Id.* at 729-31 (holding that the California courts and the Water Board have concurrent jurisdiction over challenges to water allocations predicated upon the public trust doctrine).

<sup>25</sup> See Craig Anthony (Tony) Arnold & Leigh A. Jewell, *Litigation’s Bounded Effectiveness and the Real Public Trust Doctrine: The Aftermath of the Mono Lake Case*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 1, 23 (2001) (stating that in the aftermath of the Mono Lake litigation, the parties elected to reframe the issue, not as a zero-sum rights-based legal conflict, but as a “multi-faceted problem to be solved cooperatively, or at least by negotiation,” leading to an arrangement that simultaneously stabilized water supplies and ecological values); Craig Anthony (Tony) Arnold, *Working Out an Environmental Ethic: Anniversary Lessons from Mono Lake*, 4 WYO. L. REV. 1 (2004) [hereinafter Arnold, *Anniversary Lessons*] (describing in greater detail the collaborative problem-solving arrangement that emerged in the aftermath of the *Mono Lake* case).

human subsistence and economic development, as well as for the survival of non-human species.<sup>26</sup>

Although not conceived as a “destabilization rights” law, the Endangered Species Act (“ESA”) has also been used at times in a manner compatible with the Sabel-Simon thesis. Here, two examples will suffice.

The first example comes from Southern California, where rapid urbanization (or suburban sprawl) in San Diego, Orange, and Riverside Counties was threatening to eliminate the last vestiges of the region’s unique coastal sage scrub habitat, vital to the survival of a number of species endemic to the area.<sup>27</sup> Listing these species as threatened or endangered under the ESA threatened to bring development in the region to a screeching halt. Hoping to forestall that development, California adopted a voluntary Natural Communities Conservation Planning (“NCCP”) scheme, hoping to bring together developers, landowners, conservationists, and state and local officials to devise voluntary regional, landscape-scale plans to steer development into configurations that would preserve important habitat preserves and corridors.<sup>28</sup>

By most accounts, however, the voluntary NCCP planning process was going nowhere until federal Interior Secretary Bruce Babbitt proposed listing the California gnatcatcher, a small songbird indigenous to the sage scrub, under the Endangered Species Act.<sup>29</sup> At that point, all bets were off. Because listing threatened to destabilize existing local planning and land use regulatory regimes, landowners, developers, and local officials suddenly had urgent new incentives to take the NCCP process seriously in hopes of avoiding the heavy-handed hammer of the federal ESA prohibition on “take” of listed species. They joined together with state and federal conservation officials and local and national conservation groups to hammer out far-reaching regional NCCP plans, setting aside large core habitat reserves and wildlife corridors, and setting tough mandatory development limits, incorporated into local land use codes, in a “buffer” area surrounding the protected core.<sup>30</sup> Developers found that new residential developments in the vicinity of the habitat reserves could command an aesthetic and environmental premium, substantially offsetting any losses attributable to density limitations and non-development of some lands. In return for their participation, Interior Secretary Babbitt agreed to subject the California

<sup>26</sup> See Arnold, *Anniversary Lessons*, *supra* note 25, at 48-55.

<sup>27</sup> Marc J. Ebbin, *Is the Southern California Approach to Conservation Succeeding?*, 24 *ECOLOGY* L.Q. 695, 696 & n.3 (1997) (noting Fish and Wildlife Service estimates that ninety percent of the coastal sage scrub habitat had disappeared in a five-county region in Southern California under pressure from suburban sprawl).

<sup>28</sup> See Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 *COLUM. J. ENVTL. L.* 45, 98-99 (2002).

<sup>29</sup> See DeAnne Parker, Comment, *Natural Community Conservation Planning: California’s Emerging Ecosystem Management Alternative*, 6 *U. BALT. J. ENVTL. L.* 107, 129-30 (1997); Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 *N.Y.U. ENVTL. L.J.* 279, 335-36 (1998) (noting that most environmental groups were dissatisfied with the purely voluntary NCCP approach, and some pursued legal avenues to force ESA listing).

<sup>30</sup> Fischman & Hall-Rivera, *supra* note 28, at 105-09 (describing features of the San Diego Multiple Species Conservation Program, one of several subregional plans in the Southern California NCCP).

gnatcatcher to a special ESA section 4(d) rule,<sup>31</sup> under which any incidental harm to the species resulting from developments compatible with an approved NCCP plan would not be held actionable.<sup>32</sup>

Some subsequent reports suggest that the Southern California NCCPs have not worked as well as anticipated, due largely to lack of funding for land acquisition and monitoring, inadequate oversight, overemphasis on plan development at the expense of science and implementation, and lack of any clear enforcement mechanism.<sup>33</sup> But that is beside the point for our purposes. The key point here is that in the Southern California case, the mere threat of ESA listing and legal enforcement of the ESA's prohibition on "take" or "harm" to a listed species proved to be the triggering event, setting off a destabilization of the existing regime of land use and development law. And once that regime came crashing down, all parties had an interest in genuine collaboration toward a new bargained-for solution that would allow some development to occur, but in a manner consistent with species and habitat protection.

My second example comes from Florida. By the latter half of the twentieth century, South Florida's unique Everglades ecosystem was in sharp decline as the result of radical reengineering of its hydrology by the Army Corps of Engineers, aimed at "reclaiming" most of the north half of the Everglades for agricultural development and buffering the coastal cities of southeast Florida against the periodic flooding that had historically pounded the area during hurricanes and tropical storms.<sup>34</sup> A complex network of drainage canals, pumps, levees, and surface impoundments had "compartmentalized" the Everglades, allowing the Corps and a companion state agency, the South Florida Water Management District, to control and redirect flows throughout the system, and to channel millions of gallons of "surplus" water out to sea.<sup>35</sup> As a consequence, Marjory Stoneman Douglas's celebrated "river of grass" had been reduced to a murky trickle, imperiling numerous species of birds and wildlife in and around Everglades National Park at the south end of the system.<sup>36</sup>

<sup>31</sup> Under section 4(d), the Secretary of the Interior (or Secretary of Commerce in the case of marine species) is authorized to promulgate "such regulations as he deems necessary and advisable to provide for the conservation of" listed threatened species. Endangered Species Act § 4(d), 16 U.S.C. § 1533(d) (2000). The Fish and Wildlife Service has promulgated a general section 4(d) rule extending the ESA section 9 prohibition on "take" of endangered fish and wildlife species to threatened species, unless the Secretary promulgates a special section 4(d) rule for the species in question. 50 C.F.R. § 17.31(a), (c) (2005).

<sup>32</sup> 50 C.F.R. § 17.41 (providing that "[i]ncidental take" of the California gnatcatcher shall not be considered unlawful if it results from activities allowable under the NCCP Plan); see also Ebbin, *supra* note 27, at 696.

<sup>33</sup> See DANIEL POLLAK, CAL. RESEARCH BUREAU, THE FUTURE OF HABITAT CONSERVATION? THE NCCP EXPERIENCE IN SOUTHERN CALIFORNIA 1-3 (2001).

<sup>34</sup> See Mary Doyle & Donald E. Jodrey, *Everglades Restoration: Forging New Law in Allocating Water for the Environment*, 8 ENVTL. LAW. 255, 259-61 (2002).

<sup>35</sup> *Id.* at 260.

<sup>36</sup> *Id.* at 260-61 (stating that the natural Everglades ecosystem has been reduced to about half its original area, and the remaining half has suffered from radical alterations in the timing, quantity, and quality of freshwater flows, leading to a ninety percent reduction in wading bird populations and listing of sixty-eight indigenous species as threatened or endangered).

Enter a crusading U.S. Attorney, Dexter Lehtinen, who filed suit against the State of Florida alleging violations of the State's own laws governing water quality, largely as a consequence of polluted run-off from large sugar plantations in the Everglades Agricultural Area south of Lake Okeechobee.<sup>37</sup> Although the federal Endangered Species Act was not directly at issue in the case, the federal lawsuit was predicated upon allegations of widespread disruptions of the Everglades ecosystem, implicating endangered species concerns.<sup>38</sup> The State fiercely resisted the legal claims until then-Governor Lawton Chiles made a dramatic appearance in a Miami courthouse and offered to "surrender his sword," promising to cooperate with the federal government in developing a plan to restore water quality and a regime of nature-mimicking water flows to what was left of the Everglades system.<sup>39</sup> Thus was born the first stage of what would eventually become an \$8 billion joint state-federal Everglades restoration effort, seeking to restore seasonal sheet flow to the south Everglades, reduce polluted runoff by retiring some agricultural lands and constructing a buffering network of storm water recovery areas where excess nutrients could be taken up by wetland vegetation, and implement other measures aimed at restoring water quality and the system's hydrology.<sup>40</sup> Of equal importance in Florida's view is that over and above the ecological benefits of Everglades restoration, the plan is expected to secure a sufficiently large supply of fresh water to sustain South Florida's projected population growth well into this century.<sup>41</sup> Essentially, the state and federal governments have concluded that the massive amount of water currently diverted to the sea is an ample source for both ecological restoration and projected human consumption purposes.

<sup>37</sup> See *United States v. S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1567-68 (11th Cir. 1994).

<sup>38</sup> *Id.* at 1568 ("The [Everglades National] Park provides sanctuary to rare, threatened and endangered species of wildlife. The Park has diverse and complex ecosystems that require non-polluted, low nutrient waters for their ecological integrity.").

<sup>39</sup> See *Chiles Admits Everglades Polluted*, ST. PETERSBURG TIMES, May 21, 1991, at 5B ("'I'm here with my sword,' the governor said after the pretrial hearing. 'I want to give the sword to someone, I want to surrender.'").

<sup>40</sup> See Cynthia A. Drew, *Storm Water and the Consent Decree: The Life or Death of the Everglades*, NAT. RESOURCES & ENV'T, Spring 2007, at 30, 31-32 (describing how the consent decree enabled by Governor Chiles' "surrender" led to enactment of state legislation mandating aggressive new water treatment and stormwater management programs, compliance with water quality standards, and restoration of the historic hydroperiod, setting the stage for congressional enactment of an ambitious Everglades restoration program predicated upon a 50/50 federal-state cost sharing arrangement).

<sup>41</sup> The federal Everglades restoration law, included in the 2000 Water Resources Development Act, identifies as the "overarching objective" of the Everglades restoration plan the "restoration, preservation, and protection of the South Florida Ecosystem while providing for other water-related needs of the region, including water supply and flood protection." Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572, 2687. The plan contemplates that recapture of the 1.7 billion gallons of water per day currently diverted to the sea should provide ample water for both ecosystem restoration and public water supply needs. See Andrea K. Gerlak & Tanya Heikkila, *Comparing Collaborative Mechanisms in Large-Scale Ecosystem Governance*, 46 NAT. RESOURCES J. 657, 665, 670-71 (2006) (stating that diversion of 1.7 billion gallons per day to the ocean has contributed to saltwater intrusion in the groundwater aquifers supplying water to South Florida's coastal cities, and restoration of these freshwater flows through the Everglades is expected to secure public water supplies).



In this case, it was litigation predicated upon water quality and, indirectly, endangered species protection norms that operated as the instrument of destabilization, forcing state and federal agencies to go back to the drawing boards and rethink the hydrology of South Florida from the ground up. The parties themselves concluded that a course of cooperation and collaboration would be more fruitful than continued confrontation, and the ambitious, multiparty, affirmative effort now going into Everglades restoration is very likely something that never would have occurred had not the destabilizing threat of litigation been hanging over the State’s head.

Neither the Southern California nor the Everglades case resulted in an injunction—the remedy contemplated by the Sabel-Simon “destabilization rights” model. Instead, in Southern California the mere threat of ESA enforcement and costly, protracted litigation was enough to bring the parties to the table. In the Florida case, litigation was initiated but it resulted in a settlement, backed by a consent decree countenancing the complex bargaining that ensued. Note also that in neither case was it citizen-initiated litigation that brought about the result—in Southern California it was an administrative action, Secretary Babbitt’s decision to list the California gnatcatcher as threatened, and in Florida it was a suit filed by the U.S. Attorney for South Florida. To that extent, these cases represent variants on, and extensions of, the Sabel-Simon model, which we may label “intergovernmental destabilization rights”—in both cases, rights held by the federal government to destabilize the status quo and force structural change at the state and local level, exploiting the Constitution’s Supremacy Clause and existing environmental statutes.<sup>42</sup>

## II. NATURAL AND ANTHROPOGENIC “DESTABILIZATION EVENTS”

This Part seeks to extend the Sabel-Simon “destabilization rights” model further, arguing that legal interventions are not the only “destabilization events” that can trigger the downfall of existing legal and institutional arrangements and lead to collaboration in the crafting of creative and innovative solutions to environmental problems.

Perhaps at one level there is nothing new here. It is commonplace in the environmental law and policy literature to observe that it often takes a crisis or some kind of dramatic, unsettling event to bring about major changes in environmental law and policy. Thus, the Santa Barbara oil spill was very much on the minds of the legislators who voted to enact NEPA in 1969.<sup>43</sup> CERCLA was enacted in the wake of the Love Canal incident, when it was discovered

<sup>42</sup> Citizen suits arguably would have been available in either case. In the Southern California case, the ESA listing decision was a necessary predicate to any litigation, but once the species was listed, any citizen meeting standing requirements could have filed suit to enjoin developments that resulted in “take” or “harm” to the listed species. In South Florida, the citizen suit provisions of the Clean Water Act and the Endangered Species Act might also have been invoked.

<sup>43</sup> See Dan Rothbach, Note, *Rigs-to-Reefs: Refocusing the Debate in California*, 17 DUKE ENVTL. L. & POL’Y F. 283, 285-86 (2007) (stating that the “calamity” of the Santa Barbara oil spill “had the immediate impact of spurring the passage of the National Environmental Policy Act of 1969 (NEPA),” its legislative history specifically noting lack of knowledge of effects on the ocean ecosystem).

that an elementary school in Niagara Falls, New York had been built on the site of a former chemical plant where hundreds of rusting, leaking barrels of chemical wastes were contributing to a toxic soup in the soil and groundwater.<sup>44</sup> The Emergency Planning and Community Right-to-Know Act, including its Toxic Release Inventory provision, was enacted largely in response to the Bhopal disaster in India, in which some forty tons of deadly methyl isocyanate gas leaked from a Union Carbide pesticide factory, killing an estimated 20,000 persons and causing severe illness or injury to another 120,000.<sup>45</sup> And so on.

In all the examples cited, however, the disaster triggered a *political* response. Gripping coverage in the news media generated a tidal wave of public opinion that political leaders rode to enact new legislation, thus positioning themselves to claim credit for taking action to address issues that had assumed high salience with the voting public.

Sometimes, however, natural disasters—storms, earthquakes, tsunamis, droughts, fires, volcanic eruptions, landslides, and the like—can also trigger powerful *community* responses. We have all observed, at least from a distance, communities pulling together in times of crisis, in extraordinary bursts of civic-mindedness, volunteerism, and collaboration. Indeed, it has become a common theme in the disaster management and prevention literature that this spirit of community collaboration is all too often an underappreciated and underutilized but potentially invaluable resource.<sup>46</sup> Government agencies, relief organizations, and sympathetic individuals looking at the situation from the outside are conditioned to think of members of the adversely affected communities as passive, helpless victims, on whose behalf the delivery of externally generated relief becomes the paramount task. But relief alone cannot heal communities broken by natural disasters. Communities must ultimately heal themselves by rebuilding, sometimes from the ground up, and ideally on a more sustainable, resilient, and less disaster-prone basis. These kinds of community rebuilding efforts cannot be supplied or directed from the outside, or from the top down. The initiative must come from local participation, cooperation, and collaboration.

Nor does the effort need to be confined to restoring the status quo ante. As the UN Inter-Agency Secretariat of the International Strategy for Disaster

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<sup>44</sup> See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 691-98 (1999) (describing how the events of Love Canal led to CERCLA's enactment).

<sup>45</sup> See Robert J. Klee, Note, *Enabling Environmental Sustainability in the United States: The Case for a Comprehensive Material Flow Inventory*, 23 STAN. ENVTL. L.J. 131, 154-56 (2004) (describing the Bhopal incident and its role in EPCRA's enactment).

<sup>46</sup> See, e.g., Loretta Pyles, *Community Organizing for Post-Disaster Social Development: Locating Social Work*, 50 INT'L SOC. WORK 321 (2007) (describing the beneficial but often neglected role of community organizing as a strategy for post-disaster recovery and redevelopment); Rajib Shaw & Katsuihiro Goda, *From Disaster to Sustainable Civil Society: The Kobe Experience*, 28 DISASTERS 16 (2004) (describing the role of community self-help in recovery after the Kobe earthquake in Japan, and urging creation of similar support systems elsewhere).

Reduction puts it, "Disasters are opportunities for change and community development."<sup>47</sup>

In short, natural disasters can be a kind of natural "destabilization event" that not only destroys physical infrastructure but also destabilizes the status quo in local social and institutional arrangements. In the process, it can clear the way for new forms of community collaboration and problem-solving to emerge, and thereby create opportunities for communities to rebuild themselves on more sustainable lines.<sup>48</sup>

A similar dynamic may be at work with respect to what I will call here "anthropo-natural disasters"—disasters that take a physical or "natural" form, but trace their origins in whole or in part to anthropogenic causes. So, for example, the forest fires now plaguing much of the American West are partly a natural phenomenon and take a familiar "natural" form, but they are caused in part by many decades of misguided fire suppression policies that resulted in the accumulation of unnaturally high levels of fuel (forest floor litter, downed or dead trees, understory vegetation, etc.), causing naturally occurring fires to burn hotter and to spread farther and faster than in a pre-suppression regime.<sup>49</sup> In addition, growth of the urban-forest interface has both increased the opportunities for accidental anthropogenic forest fires to get started, and raised the cost of such fires in property lost or damaged and human lives lost or threatened.<sup>50</sup> Finally, to the extent global warming may be contributing to hotter and dryer summers in the American West, it would represent an additional anthropogenic cause.<sup>51</sup>

Other examples of anthropo-natural disasters include desertification of deforested or overgrazed areas;<sup>52</sup> climate change-induced droughts, storms, floods, and heat waves;<sup>53</sup> and, most salient to this discussion, the failure of river systems to deliver sufficient water due to climate change-induced patterns of precipitation, temperature, and evaporation, including loss of storage capac-

<sup>47</sup> INT'L STRATEGY FOR DISASTER REDUCTION, UNITED NATIONS, *LIVING WITH RISK: A GLOBAL REVIEW OF DISASTER REDUCTION INITIATIVES* 178 (2004).

<sup>48</sup> *Id.* at 187 (listing benefits and limitations of community participation in disaster management, as observed by the International Federation of Red Cross and Red Crescent Societies).

<sup>49</sup> See Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation*, 36 ENVTL. L. 301, 308-13 (2006) (describing changing fire policies in response to new understandings of the effects of prior fire suppression efforts and complexities added by the growing urban-wildlands interface).

<sup>50</sup> William G. Bradshaw, *Fire Protection at the Urban/Wildland Interface: Who Plays What Role?*, 24 FIRE TECH. 195 (1988).

<sup>51</sup> See Donald McKenzie et al., *Climatic Change, Wildfire, and Conservation*, 18 CONSERVATION BIOLOGY 890 (2004) (stating that increased temperature due to climate change is likely to extend the fire season in the American Southwest and may increase the amplitude and duration of extreme fire weather).

<sup>52</sup> See, e.g., Asma Ali Abahussain et al., *Desertification in the Arab Region: Analysis of Current Status and Trends*, 51 J. ARID ENV'TS 521 (2002) (identifying overgrazing, deforestation, and overcultivation as possible causes of desertification).

<sup>53</sup> See CTR. FOR HEALTH & THE GLOBAL ENV'T, HARVARD MED. SCH., *CLIMATE CHANGE FUTURES: HEALTH, ECOLOGICAL AND ECONOMIC DIMENSIONS* 16-25 (Paul R. Epstein & Evan Mills eds., 2005) (documenting observed trends toward increased severity and frequency of "extreme weather events" including storms, droughts, flooding, and heat waves, and citing projections that such trends will intensify as the planet warms).

ity in the winter snowpack.<sup>54</sup> Indeed, we may be approaching a world in which exclusively “natural” disasters are largely a thing of the past, with the exception of seismic and volcanic events. So radically are we altering global climate that perhaps no storm, flood, drought, heat wave, or other hydrologic or temperature event can be said any longer to be wholly an “act of God” or an act of Nature. Our hands, too, are now implicated.

If the science of global climate change is right (and I have no reason to think otherwise), these anthropo-natural destabilization events may become more frequent, more widespread, and more intense in the years and decades to come. Some may prove highly disruptive. Some observers warn of the severe competition and conflict that could ensue, as desperate populations seek to seize (or retain) control of the resources they need to maintain their standard of living and way of life in a chaotic, climate-disrupted world.<sup>55</sup> These fears may be overstated, but there is some risk.

But climate-induced anthropo-natural destabilization events may also represent a moment of “creative destruction,” to borrow a phrase from the economist and political scientist Joseph Schumpeter<sup>56</sup>: a moment when long-standing and long-ossified legal and institutional arrangements over natural resources are destabilized, opening the door to new, creative, problem-solving approaches. In short, it may take a train wreck, but the day for collaborative problem-solving in natural resources management may be fast approaching.

### III. LEGAL AND ANTHROPO-NATURAL DESTABILIZATION AND THE PROSPECTS FOR COLLABORATION ON THE COLORADO

That brings us to the topic of this conference—the prospects for collaboration on the Colorado River.

I claim no special expertise on the “law of the river,” or on the river’s hydrology, ecology, chemistry, climate, demographic trends, or any other social, physical, or biological factor touching upon the river’s management. I approach this question as a detached observer, from a distance. From that perspective, however, the question is not so much whether we are likely to see collaboration on the Colorado. The questions are, “When?” and “How much?”

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<sup>54</sup> See Niklas S. Christensen et al., *The Effects of Climate Change on the Hydrology and Water Resources of the Colorado River Basin*, 62 CLIMATIC CHANGE 337 (2004) (projecting significant degradation of performance of the Colorado River water resources system relative to historical conditions); Nathan T. VanRheenen et al., *Potential Implications of PCM Climate Change Scenarios for Sacramento-San Joaquin River Basin Hydrology and Water Resources*, 62 CLIMATIC CHANGE 257 (2004) (projecting significant volumetric and temporal shifts in water flows under most climate change scenarios).

<sup>55</sup> Jon Barnett, *Security and Climate Change*, 13 GLOBAL ENVTL. CHANGE 7 (2003).

<sup>56</sup> JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84-85 (3d ed. 1950) (describing capitalism as a process of “creative destruction” in which “the new commodity, the new technology, the new source of supply, the new type of organization” command “a decisive cost or quality advantage . . . which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives,” impelling long-term economic growth while producing locally painful dislocations).

In prior work, I have expressed optimism about the possibilities for collaborative solutions to complex environmental and natural resources problems.<sup>57</sup> But here I perhaps depart company a bit from some of the most enthusiastic among the alternative dispute resolution crowd, who tend to see opportunities for negotiated “win-win” solutions behind every bush.<sup>58</sup> There may indeed be more of such opportunities than is commonly supposed—but not always.

Especially when the game is perceived by the players to be zero-sum, some parties will not have an incentive even to begin bargaining, for fear of losing their present entitlement. In such situations, the challenge is not “Getting to Yes,” in the felicitous phrase of Roger Fisher and William Ury.<sup>59</sup> Instead, the challenge lies a stage further back, in simply “Getting to ‘Let’s Talk.’”

That, in many ways, is the present situation on the Colorado River. We have here a badly oversubscribed resource.<sup>60</sup> With states’ entitlements based on over-optimistic projections of how much water would be available, made at a time when we were considering neither the needs of fish and other aquatic wildlife nor the downstream needs of our international neighbor Mexico, some parties—“the haves,” or “them that’s got”—have no incentive to engage in serious bargaining with “the have-nots,” or “them that’s not got.” Even if the “haves” recognize the present situation is unsustainable, they calculate they are likely to be better off standing on their rights than opening up zero-sum bargaining over an oversubscribed resource of fixed or diminishing quantity—bargaining that is likely only to result in a diminution of their existing rights. Better to accept a shortfall in their legal entitlement than to open a can of worms that will likely shrink the size of that entitlement. Consequently, we do not even get to “Let’s Talk,” at least not in a serious way. What discussion does occur is likely to be pro forma and dilatory, essentially window dressing.

This is where destabilization rights may be invaluable—and where even anthropo-natural destabilization events may also play a useful role. Something is needed at this point to destabilize the existing institutional arrangements and

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<sup>57</sup> See, e.g., Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189 (2002).

<sup>58</sup> See, e.g., Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 139-40 (1985) (stating that in “integrative” bargaining situations in which two or more issues are on the table, “all sides can come out ahead by trading across issues or items that they value differently—the classic ‘win-win’ situation”). Not all alternative dispute resolution theorists emphasize “win-win” solutions, however. Carrie Menkel-Meadow, for example, avoids the term because she believes that in many disputes and most legal conflicts it will be impossible for both parties actually to “win” something; instead, she argues, the goal is to avoid “lose-lose” outcomes as much as possible. See Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Foundations of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 31 n.126 (2000).

<sup>59</sup> See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 1981).

<sup>60</sup> See generally NAT’L ACAD. OF SCIS., COMM. ON THE SCIENTIFIC BASES OF COLO. RIVER BASIN WATER MGMT., *COLORADO RIVER BASIN WATER MANAGEMENT: EVALUATING AND ADJUSTING TO HYDROCLIMATIC VARIABILITY* (2007). This assertion is notwithstanding the recent 2006 letter of agreement between basin states and the Secretary of the Interior on drought management, a welcome but limited step.

assignment of entitlements before bargaining and collaboration can even become a serious possibility.

What might that destabilizing event be? Here I invite you to be creative. It might be an Endangered Species Act lawsuit that throws a legal monkey wrench into one or more states' ability to use their water entitlements. In an ideal world, it might be an international adjudication of a claim by Mexico, based on the failure of the U.S. to deliver a sufficient quantity of water, or water of adequate quality—though in fact, such international adjudications are extremely rare and generally require the consent of the defendant state. It could be an administrative action by an aggressive Secretary of the Interior, acting in the capacity of “river master” with broad discretionary powers over Lower Basin allocations,<sup>61</sup> perhaps ordering drastic cuts in water withdrawals and triggering countering lawsuits by the states in an open legal brawl. It could conceivably be an interstate suit by one or more plaintiff states against one or more defendant states, alleging a violation of the existing Compact or other applicable sources of law, and throwing the matter back into the lap of a Supreme Court that has been happy not to be responsible for sorting out the “law of the river” for a long time now. Any of these eventualities might be enough to shatter the enforced stability of the legal status quo, set off a Hobbesian all-against-all scramble, and open the door for cooler heads to argue for negotiations leading to collaborative solutions.

Alternatively, it may not be a legal destabilization but an anthro-po-natural destabilization event that opens the door. I will not hazard a prediction as to exactly what that event might be—as I said at the outset, I am not an expert on the relevant science. But just for purposes of a thought experiment, imagine something like the following scenario:

Several years of drought and record hot temperatures have left the American Southwest parched. In-stream flow in the Colorado River and its tributaries is at the lowest levels ever recorded, as is storage in the region's reservoirs. Groundwater aquifers are being drawn down rapidly. Back-to-back record-mild winters result in record-low winter snow accumulations in both the Rockies and the Sierra Nevada, resulting in a sharply reduced spring runoff. Drawdown of reservoirs has reached a critical stage. California is forced to curtail deliveries of water from the Sacramento-San Joaquin system to Southern California, leaving that populous region more dependent than ever on Colorado River water. California announces that it is unable to meet its timetable for reducing withdrawals beyond its legal allocation from the Colorado, and in fact is requesting the Secretary of the Interior to declare a “surplus” to allow it to increase its withdrawal to meet emergency needs in the Los Angeles basin. When the Secretary turns down the request, California enacts emergency legislation to curtail water deliveries to Imperial Valley farmers, diverting that water to Los Angeles. In a replay of the Owens Valley wars, the farmers resort to self-help, sabotaging California's Colorado River aqueduct and reopening

<sup>61</sup> Construing the Boulder Canyon Project Act of 1928, the Supreme Court held in *Arizona v. California* that the Secretary of Interior had broad discretionary authority to determine state-by-state allocations of Colorado River water and to contract to deliver water to individual users free of the law of prior appropriation. See *Arizona v. California*, 373 U.S. 546, 580-85 (1963).

pumps and canal gates to move water through the Imperial Valley’s irrigation system. Armed vigilante gangs stand sentry to prevent the state police from rounding up Imperial Valley farmers. A new industry appears overnight—“water pirates” who converge on unprotected water supplies and siphon the water into stolen tanker trucks, to be sold to the highest bidder on the black market. Hijackings of legal tanker trucks delivering emergency water supplies to desperate communities are rampant. Conditions are no better in other states. In Nevada, the Las Vegas metro region is desperate as groundwater sources continue to dwindle. Backs against the wall, Nevada officials begin to purchase water from black market suppliers, further fueling a Roaring Twenties-style wide open flouting of a legal regime that has become effectively unenforceable. Seeing the huge profits to be made, organized crime moves to take over the illegal market. Chaos ensues.

In this nightmare scenario, legal “rights” are destabilized not by court action but by a combination of natural forces (extreme drought and climate disruption) traceable in part to anthropogenic causes (greenhouse gas emissions), together with extreme, extra-legal self-help measures borne either of desperation or of opportunism in the face of the collapsing legal regime.

Let us hope it never comes to this. But in this or in some other, less extreme form, anthro-natural destabilization events could lead to a breakdown of the existing system of entrenched legal entitlements. What follows is up for grabs, but the potential exists in such a moment of destabilization for the principals to come together to attempt to forge a new set of institutional arrangements and a new assignment of entitlements—a creative, collaborative, “constitutive moment,” to borrow and adapt a concept from Bruce Ackerman’s constitutional theory.<sup>62</sup> In short, failure of the existing legal regime to cope with extreme anthro-natural stresses may be enough to force even the most entrenched parties to rethink their position and seek a new round of cooperation and collaboration to restore order to the broken system.

Even short of this extreme nightmare scenario, however, anthro-natural destabilization events of lesser severity can often be contributing, or even triggering, causes of legal destabilization. Let us revisit for a moment our earlier examples of legal destabilization rights in environmental contexts, which were described at the outset as a purely legal matter. Consider again the *Mono Lake* case.<sup>63</sup> Surely it was an anthro-natural eventuality—the dramatic shrinkage of Mono Lake and the ecological crisis that ensued, all as a consequence of Los Angeles’s water withdrawals on Mono Lake’s freshwater tributaries—that triggered the decision by the National Audubon Society and other parties to seek legal destabilization by filing a public trust doctrine lawsuit, aimed at destabilizing Los Angeles’s apparently well entrenched appropriative water rights. Similarly, in the Everglades case<sup>64</sup> it was a gradually unfolding but severe

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<sup>62</sup> See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 23-75 (1998) (advancing the theory that constitutional change can occur either through the formal mechanism of Article V amendment, or through an episodic mobilization of the citizenry in a transformative constitutional politics that alters constitutional understandings through informal and unconventional means).

<sup>63</sup> See *supra* notes 8, 19, 21-24 and accompanying text.

<sup>64</sup> See *supra* notes 37-38 and accompanying text.

anthropo-natural event—drastic reductions in populations of endemic species and degradation of their habitats in the South Everglades, all as a consequence of Florida’s benighted water management policies—that prompted the U.S. Attorney to seek a legal destabilization of the entrenched water management regime by filing a lawsuit. In both cases, the legal destabilization succeeded in part because of the severity and salience of the environmental crisis, and in part because the court (in the *Mono Lake* case) or the defendant itself (in the Everglades case) recognized that simply allowing entrenched institutional arrangements to stand was simply untenable in the face of such severe environmental harm.

Perhaps a more complete story, then, is that in environmental and natural resource management contexts, entrenched institutional arrangements and assignments of legal entitlements generally have the upper hand, and in situations in which the game is perceived to be zero-sum, the “haves” are unlikely to cooperate in reconsidering those institutional arrangements and entitlements. But severe anthropo-natural destabilizations may force reconsideration. In many cases, however, it may require the instrumentality of legal action—a lawsuit leading to a court judgment (as in the *Mono Lake* case) or a settlement under the shadow of a threatened court judgment (as in the Everglades case)—to bring the anthropo-natural destabilization issues to a head and force the legal destabilization to occur. And once such a legal destabilization does occur, it clears away the entrenched bargaining positions of the status quo ante, shifts the parties’ incentives to cooperate, and opens the door to fresh reconsideration, from the ground up, of the appropriate institutional arrangements and the nature and scope of subsequent entitlements.

Now let me introduce one final variant on the model. Understanding just how disruptive both anthropo-natural destabilizations and legal destabilizations can be, and how costly they are likely to be in needless transaction costs, parties blessed with cool heads and foresight may sometimes short-circuit this process and achieve the same endpoint through prophylactic action. That, I submit, is a fair characterization of the Southern California Endangered Species Act/NCCP negotiation, the third example of environmental “destabilization rights” presented at the outset of this Paper.<sup>65</sup> Recall that in Southern California we had already witnessed a partial anthropo-natural destabilization—loss and degradation of a large fraction of the California coastal sage scrub habitat. But it was only a partial loss: good habitat remained, in sufficient quantities and of a sufficiently high quality that no species endemic to the area had, in fact, been listed as endangered or threatened. But the handwriting was on the wall. Secretary Babbitt rolled the dice and listed the California gnatcatcher as threatened, in part because the underlying science justified that determination, but partly in anticipation that unless drastic action were taken soon, more habitat would be lost, and more endemic species would become threatened or endangered. Consequently, a legal destabilization was needed, and an Endangered Species Act listing decision gave the Secretary the tools he needed to force one. But the critical action here was (uncharacteristically for the Endangered Species Act) prophylactic, not reactive—the goal was to stanch the loss

<sup>65</sup> See *supra* notes 27-31 and accompanying text.



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of habitat and prevent even more serious environmental harm than had already occurred.

For their part, landowners, developers, and state and local officials were also clear-eyed and cool-headed in response. They might resist the Secretary's listing decision on judicial review or resist ESA enforcement actions on a case-by-case basis if the listing determination stood. But that looked like a losing strategy: the transaction costs would be high, and the legal odds were probably not in their favor. So rather than letting the matter be adjudicated by the courts, or even letting the matter proceed to ESA enforcement, they elected to retreat from their heretofore entrenched institutional arrangements and legal entitlements, and accept that a legal destabilization had already occurred *de facto*. From that point forward, the goal was to strike the best deal they could, collaborating with the federal government to develop legally enforceable Natural Communities Conservation Plans and to incorporate those plans into local land use plans. That two-step process would allow development to proceed in San Diego, Orange, and Riverside Counties, but only to the extent and in a place and manner compatible with conservation of a substantial and sustainable reserve of coastal sage scrub habitat, sufficient to protect not only the California gnatcatcher but also other endemic species that had never been listed under the ESA. This, then, was a forward looking, prophylactic action all around, made necessary by the threat of severe anthropo-natural destabilization, and made possible by the all-too-real threat of legal destabilization.

That, finally, brings us back to the Colorado River. If I am right that a new round of collaboration is needed on the Colorado to redesign its institutions and assignment of entitlements from the ground up, it seems to me there are four ways it might happen.

First, we might simply appeal to the good will of the parties, suggesting that the present system is unsustainable and that as rational actors they should simply set aside their existing entitlements and reopen everything for reconsideration. For reasons I have stated, that course seems unlikely, mainly because the "haves," those currently holding the greatest legal entitlements, will perceive they have too much to lose.

Second, we might simply wait and do nothing until a severe anthropo-natural destabilization, perhaps resembling the nightmare scenario described above, intervenes to force the parties to the bargaining table in an effort to build a new, workable system to replace the one that has been broken. That course seems dangerous. Destabilization costs may be exceedingly high, and it may be extremely difficult to retrieve order out of such extreme chaos.

Third—and perhaps it will come to this—we might wait not quite so long, until a serious but not catastrophic level of anthropo-natural destabilization has set in, just enough to trigger an Endangered Species Act lawsuit, or a suit by one or more states against one or more others, or an administrative action by an impatient Secretary of the Interior that is so disruptive it shatters the status quo. Any of these, given the right set of circumstances, might be enough to set off a controlled legal destabilization that disentrenches established institutional arrangements and entitlements, and opens the door to new collaboration and cooperative reconstruction of our regime for managing the Colorado River. We might not need to wait very long; the day may be close at hand.

Fourth, and finally, perhaps cooler heads and foresight will prevail. Anticipating the possibility of either extreme anthropo-natural destabilization, or legal destabilization triggered by some less extreme but nonetheless serious anthropo-natural destabilization, the parties might come to see that the wiser course here, as in the Southern California case, is to avoid destabilization costs and transaction costs, and voluntarily (albeit under threat) agree to set aside their entrenched rights and bargain in good faith toward new institutional arrangements and collaborative solutions. This is the preferred outcome, but it depends upon the parties having the necessary wisdom and foresight—always a lot to hope for. It also depends upon the degree to which the threats of anthropo-natural and legal destabilization might be made to appear substantial, plausible, and likely.

Now skeptics might suggest that scenario number four comes round more or less full circle to scenario number one: bargaining triggered by the good will of the parties, which we initially rejected as unlikely. I want to resist this suggestion, however. There is a difference. Again, the Southern California experience is instructive. The State of California originally enacted its Natural Communities Conservation Planning Act to provide for purely voluntary collaborative conservation planning among landowners, developers, state and local government agencies, conservationists, and others, hoping to obviate the need for additional ESA listings by putting in place regional conservation plans that would protect the habitats of species not yet eligible for listing.<sup>66</sup> By most accounts, however, the voluntary phase of the NCCP program was not very successful,<sup>67</sup> for predictable reasons: parties with entrenched legal rights had inadequate incentives to surrender any part of those rights voluntarily. It took the decision to list the California gnatcatcher under the ESA, triggering potentially legally enforceable obligations that threatened to destabilize existing entitlements, to inject the sense of urgency that drove the collaborative process and led to development and implementation of substantial and meaningful conservation plans. This illustrates, I think, the crucial difference between bargaining simply on the basis of an appeal to good will, on the one hand, and bargaining under the threat of destabilization on the other.

#### CONCLUSION

I hope I have persuaded you that the “destabilization rights” concept developed by Sabel and Simon is transferable to the environmental and natural resources law and policy context, where both legal and natural or “anthropo-natural” destabilizations, as well as the mere threat of such destabilizations, may operate as a powerful spur to bargaining and creative, collaborative reconstitution of institutional frameworks and reassignments of legal entitlements. Such a “re-constitutive moment” is, I believe, long overdue in the context of Colorado River management. I am of the opinion that sooner or later it will happen, precisely because the risk of an anthropo-natural destabilization of extreme magnitude is so great. This threat is likely either to trigger a destabi-

<sup>66</sup> See *supra* notes 27-31 and accompanying text.

<sup>67</sup> See *supra* note 29 and accompanying text.

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lizing legal intervention before the anthro-natural destabilization reaches its full magnitude or, in the most optimistic scenario, to trigger a voluntary reconsideration of entrenched legal entitlements even before a full-scale legal intervention is undertaken. Either way, the day for reconstituting institutional arrangements and legal entitlements on the Colorado along broadly collaborative lines is fairly near at hand. The question that remains is just how much we will need to absorb in dislocation costs and transaction costs before that day arrives.