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*Thirty Years Before the Mast:
Watching the Evolution of Environmental Advocacy
in Fishery Management*

Brad Warren⁵⁸

I guess I really got involved in fisheries issues, because I grew up in one of those families that got screwed when they built the dams on the Columbia River, and I got mad. What I knew how to do was write, so I decided to write about the issue and to try to change the world. I do not notice that it has made any big difference. I think that is how environmentalists tend to feel about their work as well. It is one of the reasons why, as the years have gone on, there has been a real evolution. There is this historic perspective that I want to try and bring to this forum, and then I will try to put in what I think is some perspective on where we are presently, and finally possibly identify where some of the ripe spots for problem-solving exist.

I would have said in the early years of the environmental movement's engagement with fisheries that marine mammals were the centerpiece of it. It sort of began with Sam Behrans' analysis of how many dolphins were getting killed in the Eastern Tropical Pacific tuna fishery. Behrans went and did that work at the invitation of fishermen, who were worried about their "fishfinders." These fisherman caught dolphins as bycatch, and a lot of the dolphins would die. However, the fisherman knew that they needed the dolphin to be there in the future. Behrans published a report, which said that there was a bunch of dolphins dying, maybe even in the hundreds of thousands every year. This spawned the modern marine environmental movement in 1969. It was an era when the model for leadership in the world was basically military in nature. If you looked at who ran big countries, they were almost all veterans with many of them being officer-level people. Their idea about how you get change is that you invoke force and you force change. You defeat your enemy. This was mirrored in the activity of the left in the anti-war movement and in the birth of the environmental movement. You had to wear khakis and have a poster of Che Guevera on your wall. It was a time when military leadership and insurgency were models for social change and for environmental work.

That was a fairly persistent idea through the 1970s. We got some laws on the books that I think we are all kind of glad to have, but in retrospect, they do look a little simplistic. To say, as we said in the early 1970s, that all species are sacrosanct and that it is bad and wrong to ever wipe a

58. Editor-in-Chief, *Pacific Fishing* and a former activist for Greenpeace.

species out, so we must protect them, I think is morally a beautiful position and maybe not too closely related to the reality that, in fact, people have always lived in.

The gradual maturation of this environmental movement from one that believed that you took absolutist positions, and that you defeated your enemy, has evolved into a civic model. By the early 1990s, it was possible for things to happen like the Forest Summit in Portland, Oregon, where Clinton and his team brought together the environmental community and the timber community. Everybody sat at the table and talked about restoring some kind of problem-solving approach to the forest problems in the Northwest.

As a writer and a person who personally cares about the sustainability of salmon resources, I was inspired by the Forest Summit. I thought it was great. I was discouraged that it went nowhere. In the end, the attempts of the Clinton administration to carve out a safe, civic ground where problem-solving could occur in a civil way, as opposed to, a sort of dominance, military-model kind of way was essentially defeated because of the early history of America's engagement with creating a legal infrastructure for environmental protection. We created the ESA, and it is very absolute. The ESA does not allow compromise.

The Clinton administration created Habitat Conservation Plans, wherein if a company is willing to protect a piece of forest for fifty years, the government agreed to let them off the hook over ESA litigation issues filed against them at that period of time.⁵⁹ The government believed that if the companies did what the government believed was right, then groups could not sue these companies. It was a beautiful theory, and it was illegal.⁶⁰ In case after case, these Habitat Conservation Programs have been ruled illegal in the courts.⁶¹ We have laws that do not allow that kind of civil problem-solving process. So by the mid-1990s, we had begun to enter a period where, instead of a hand-shake and negotiation where we try to work something out, it became evident that you actually could make a big difference by playing the old military model, where I play to win and to defeat you.

When the emphasis is on winning, attention is not adequately paid to problem-solving. This is the frustrating thing to me about what has happened in the late 1990s, and is still going on today with this tide of

59. 16 U.S.C. § 1539(a)(2)(A).

60. *But see* 16 U.S.C. § 1339(a)(2)(A).

61. *But see, e.g.*, *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (9th Cir. 1985) (permit authorizing incidental take of endangered mission blue butterfly during development on San Bruno Mountain, CA not invalid despite differing expert opinions on development's impact).

environmental litigation in fisheries management. If the whole game is about building a case that you can then take to court, how you participate in the fishery management council process is designed to undermine the record that your adversaries are trying to build. This is clearly borne out in what I observe in the council meetings that I attend.

So we have come to this place where it is more advantageous to play the dominance model instead of the problem-solving model, and it pays in more ways than one. If as an environmental group you enter the fray, work with people, and try to enfranchise them into becoming part of the solution, you expose yourself to attack from your left flank. Essentially, you expose yourself to an attack from anybody who is out there that sees a good opportunity to win, regardless of whether they have ever been part of the problem-solving process or not.

There are some lawsuits on the table now from some groups who have never had any history in environmental problems in fisheries, but they have come to the table with lawsuits. What they have done is to marginalize the historic players who have worked for years, and sometimes even through Marine Mammal Protection Act processes.

Does everybody here know about take reduction teams? I think the work of the take reduction teams was an important example of the attempt in the early 1990s to create a civic problem-solving environment where you could get together with people you disagree with, find some common ground, and determine how each party could become part of the solution.⁶² It was a very interesting idea and we have seen in some pretty important cases a marginalization of that effort.⁶³ Personally, I find this very frustrating, because it means the real problems are not being dealt with. It means the game theory is about how do I win.

In the 1980s, and I think Mr. Shelley did a good job of outlining something with CLF as a good example, the history of engagement of environmental groups with fisheries issues and with ocean issues largely entailed a kind of partnership with fishing groups, and those kinds of partnerships are still going on today. Mr. Tienson mentioned the Klamath water lawsuits that are pending now and the negotiations going on over these issues. That lawsuit was brought by a fishing group in tandem with environmental groups, and it has brought into national headlines a set of conservation problems that I think are very real.

I do not know what the outcome is going to be. I am less sanguine than Mr. Tienson in thinking that negotiation can happen in good faith. I do not

62. See 16 U.S.C. § 1387(f).

63. See generally testimony of Sharon Young, The Humane Society of the U.S. before House Subcomm. on Fisheries, Wildlife & Oceans, Oct. 11, 2001, 2000 WL 19302225.

think there is power parity, which is the point that Mr. Shelley was raising. I think the farmers in that case have essentially no power and, therefore, cannot negotiate in good faith. They can be expected to undermine the process and will look for ways to make sure that those negotiations lead to further confrontation and ways for them to game their way out of the mess they are in since they feel that, and I think they are right, that they do not have any real power. What develops is the powerlessness that leaves you with game theory. I think that is a position a lot of the environmental community has felt themselves to be in and their behavior shows it. It does not turn me on to see people playing just to win and not to solve problems.

I wanted to deal a little bit with the Steller sea lion lawsuit,⁶⁴ and I am going to go to a few slides here that sort of show some of the aspects of this. That suit arose out of an initial objective, which was to kill the factory trawlers. Greenpeace got into it, and it became very interesting.⁶⁵ Greenpeace followed into that campaign that they launched in 1996 to eliminate factory trawlers in the United States on the heels of an organization called Fish Forever. Fish Forever launched that campaign really with, interestingly enough, money from adversaries of factory trawlers in the allocative battles in the fishing grounds.

These were the boats [referring to slide] that they thought they were going to get rid of, and, as the case evolved, the Steller sea lion lawsuit was how Greenpeace thought they were going to get rid of factory trawlers. I think it turned out that they did not. Here are the guys [referring to slide] who I think they are really winding up getting. This is a herring seiner in southeast Alaska. The smaller vessels have turned out to be the vessels that have been the fall guys in that lawsuit and in a variety of fisheries.

Greenpeace's idea was to get rid of the big factory trawlers, however, you often cannot go after the direct target. You cannot sue the councils. You have to sue NMFS, and sometimes the lawsuits allow you to target an issue that is not exactly the one you wanted, but it gets you close. This is the nature of the law. The law is a tool. The law is not an end. The law is a means. Greenpeace's objective was to get rid of the large factory trawlers, which was not really a conservation agenda, rather it was a social policy agenda. Greenpeace wanted to show that there was a problem in the fishery and that factory trawlers were the problem. Greenpeace came up with the hypothesis of localized depletion, which there was a little evidence for and no real way to rebut. Since there was no real way to rebut the localized

64. *Greenpeace v. NMFS*, 106 F. Supp. 2d 1066 (W.D. Wash. 2000).

65. See, e.g., D. Batker & K. Stump, *Sinking Fast: How Factory Trawlers are Destroying U.S. Fisheries*, Aug. 1996, available at <http://www.greenpeaceusa.org/media/publications/sinkingfast/sinkingfast.htm>; Brad Warren, *Factory Trawlers Under Siege*, 17 *PACIFIC FISHING* 52-59 (Nov. 10, 1996).

depletion theory and because NMFS had done an abysmal job of its legally obligatory environmental disclosure under NEPA and the ESA, it was a pretty easy case.

Under NEPA, NMFS went into the case admitting that they had blown it. NMFS had a pretty good attorney defending them and a pretty good attorney managed to avoid embarrassing himself. Under the ESA, they had an attorney representing them, who was assigned from the Department of Justice. I felt a combination of pity and horror to see an attorney stumble that badly, mumble, incur the wrath of the judge, fail to read the homework that came down, and fail to read her mail as letters came from the court and from the other side. It was just astonishing. I think the judge was left with no choice but to say that this case is going to Earthjustice with whom Greenpeace had sued, and the judge held that localized depletion of the resource is the problem.

Greenpeace and Earthjustice wound up shutting down large areas of the Bering Sea and, in particular, the Gulf of Alaska. This mostly affected places where small boats fish, and with their limited range they really could not get out safely to the far offshore grounds to fish. The decision also created a precedent that will very soon affect salmon and herring, because it said that the area where fish aggregate is where predators need to feed on them. If you catch fish where they aggregate, then you are very likely depriving predators of their food, which results in localized depletion. So salmon fisheries and herring fisheries are next in line to take a big hit under the localized depletion theory. This is why I picked out some of these pictures, because they represent the fisheries that are next in line. The big factory trawlers were able to go offshore and sail off toward the Navarin Basin and get into areas that are really beyond the closed areas. The unintended consequences are pretty serious. Greenpeace and Earthjustice did not get who they really wanted, instead they got a lot of people they hoped would view them as allies. They did not really address what many of us think are the real conservation problems in the fishery.

There are other examples of unintended consequences that are also very major. I would say in the Earth Island lawsuit over dolphins,⁶⁶ which is still going on thirty years later, we have recently gotten a ruling that is absolutely contrary to the interests of not only the dolphins, but to many of the other species that are caught as bycatch in the Eastern Tropical Pacific tuna fishery.⁶⁷ The government lost that one again essentially for failing to do their homework on a pretty minor point. In this case, it was that they

66. See *Earth Island Inst. v. Brown*, 28 F.3d 76 (9th Cir. 1994), *cert. denied*, 513 U.S. 999 (1994).

67. See *Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001).

had not done some of the research they were supposed to have done on the results of repeated capture on stress and possible injury to the dolphins.

There was very clear evidence that the populations of dolphins were recovering and that the fishery's mortality had been lowered enormously under a very successful international system, which the United States had finally begun to recognize. Earth Island declared that this was not good enough. Earth Island wanted the practice of encircling dolphins as a fishing technique ended, and they managed to accomplish this goal. The court's decision clearly undermines what is recognized as probably the most successful dolphin conservation program in the world in any fishery. Currently, the Mexicans are reacting to this. They are saying that they are going to drop out of this international program, which has done such a great job. They are going to kick the observers off their boats and stop participating altogether. They feel that they have far-surpassed any environmental performance in any U.S. fishery for protecting marine mammals, and we still refuse to allow their fish into the country and certify it as dolphin-safe.⁶⁸ Why should Mexico play? We are not playing in good faith. Why should they?

The *Brower* decision is not good for tuna and it is not good for the dolphins. We have large bycatches of juvenile tuna that result from this fishery when you do not fish on dolphins, and we have very low mortalities of dolphins because they have worked so hard at achieving this goal, so I think we are in a time of real trouble.

If winning is the objective, and if we continue to allow a game structure instead of a problem-solving structure, we are going to get deeper and deeper in trouble. I do not know the way out. I guess I can only hope that sooner or later this bites back at the groups that really, I think, are abusing the law in the interest of their own fund-raising efforts in some cases. While I do not want to raise this issue as a red flag, the mission of an environmental group is not its only purpose in taking an action. Environmental groups have a business to run just like fishermen do. They have mortgages to pay, just as fishermen do. If winning is going to be allowed to be the paradigm, we are not going to get ultimate wins, we are going to get very situational. I win advantage over you, and the resource loses.

68. In *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1446 (CIT 2001), the court upheld NMFS's decision to lift the embargo on Mexican yellow-fin tuna imports.