WILLIAM O. DOUGLAS AND THE ENVIRONMENT

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Without question, Mr. Justice Douglas, of all who have been members of the United States Supreme Court, deserves the title of premier environmentalist. His life and his writings mark his dedication to the protection and preservation of nature. It has been suggested that Mr. Justice Douglas' sensitivity to environmental protection developed from a youth spent in those parts of the Northwest where the forces of nature are rugged and unyielding but the balance of nature is precariously fragile.

Those who have written about nature most knowledgeably and understandingly seldom describe, except superficially, those parts of the earth where the environment is readily usable and difficult to damage in any permanent way. Underlying Willa Cather's Nebraska tales, Ole Rolvaag's *Giants in the Earth*, and Thomas Hardy's novels is the struggle of man to live with difficult, unconquerable, and recalcitrant nature and the need to work with, rather than against, natural forces and the environment. In *Wuthering Heights*, Emily Bronte, with a compelling transcendental mysticism, personifies the harsh and grim moors of Yorkshire as a living force. It is as if those who live successfully in what the generality of men may consider a difficult and even dangerous environment, learn to appreciate it deeply and learn to cooperate rather than to destroy. A respect for nature often generates a love of it, as can be witnessed in the writings of Thoreau and McKaye.

Few people have been as sensitive as Mr. Justice Douglas to the great values that come to man from contact with the unpolluted and natural environment. While opinions of the United States Supreme Court on environmental issues have only recently become numerous, the Douglas opinions are consonant with his civil libertarian decisions. He values man as an individual and, therefore, places primary emphasis on those aspects of life that assure the strength-

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ening of man's individuality and his ability to expand his spiritual and intellectual as well as his physical life.

As is well known, Mr. Justice Douglas accepted, in his dissent in *Sierra Club v. Morton,*[1] Professor Stone's proposal[2] that inanimate objects should have standing to sue for their own preservation.[3] Thus, "[t]hose who hike. . . [Mineral King], fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many."[4] He shared the distrust which those persons who find great value in the natural environment, harbor for the official government agencies whose presumed function is to represent the public interest, but whose tendency is to interpret it in economic, rather than in broad social terms.[5]

Mr. Justice Douglas' sensitivity to environmental injury was also responsible for his opinions for the Court in *United States v. Republic Steel Corp.*[6] and *United States v. Standard Oil Co.*,[7] in which he found violations of the Rivers and Harbors Act of 1899.[8] These cases required close consideration not to the technical language of the statutory provisions, but to their underlying and critically important environmental purposes.

In *Illinois v. City of Milwaukee*[9] Douglas found for the court that the federal common law permitted the abatement as a nuisance of the discharge of raw and inadequately treated sewage into Lake Michigan. He held that the statutory remedies set out in various federal anti-pollution legislation were not the only federal remedies and standards available. The holding of the case remitted the parties to an appropriate district court, the Court acting within its discretionary power to refuse cases under its original jurisdiction

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[1] 405 U.S. 727 (1972).

[2] Stone, Should Trees Have Standing?—Toward Legal Rights for Natural Objects, 45 S. CAL. L. REV. 450 (1972). See also Burr, Toward Legal Rights for Animals, 4 ENV. AFF. 205 (1975).

[3] 405 U.S. 727, 741-42 (1972).

[4] Id. at 744-45.

[5] Id. at 745-50. See also Mr. Justice Douglas' opinion (dissenting in part) in United States v. SCRAP, 412 U.S. 669, 701-03 (1973), in which he reiterated his belief that the members of SCRAP, who claimed an injury in fact from the allegedly discriminatory railroad rates set by the Interstate Commerce Commission on the shipment of recyclable materials, had standing to sue as persons injured by administrative action that affected the environment. *Cf.* McDonald, The Relationship Between Substantive and Procedural Review under NEPA: A Case Study of SCRAP v. U.S., 4 ENV. AFF. 157 (1975).

[6] 362 U.S. 482 (1960), noted in 1960 U. ILL. L. F. 469.

[7] 384 U.S. 224 (1966).

[8] Sections 10 and 13, 30 Stat. 1121, 1151-52, as *amended,* 33 U.S.C. §§ 403, 407 (1970).

[9] 406 U.S. 91 (1972).

when that jurisdiction is not mandatory. But, in so doing, the opinion established the legitimacy of a valuable environmental protection remedy under federal non-statutory law.

Perhaps the most misunderstood environmental opinion that Mr. Justice Douglas has written is *Village of Belle Terre v. Boraas*.[10] Its very limited impact on exclusionary zoning concepts has been noted.[11] But fears, which are noted in the dissents, have persisted that the opinion encourages communities to prevent the development of low-cost housing under the guise of protecting the quality of life, aesthetics, and the environment. Yet any fair reading of the Douglas opinion will reveal that he says nothing of this sort, as he carefully excludes from the effect of the case those types of suspect classifications that raise critical equal protection arguments. The opinion represents a variation of his earlier opinion in *Berman v. Parker*,[12] in which he stated that protection of the spirit was as important as protection of the body, and that a state could take action under its police power for these spiritual purposes without hindrance of federal constitutional limitations of due process. This does not mean that Mr. Justice Douglas will overlook a taking without due process when governmental action deprives a person of the use of his property.[13] But he does believe that the government, when regulating or taking, must consider spiritual as well as economic interests. *Belle Terre* resulted in a loss of substantial profits to landlords leasing to a group of unrelated students and in some inconvenience to the students themselves. It is well within reason to decide as the dissenters did that the restrictive local zoning was unconstitutional. But Mr. Justice Douglas, finding no fundamental rights at issue, accepted as constitutional local regulations that provide for an attractive and spiritually living environment. It is unwise to read the opinion as saying more than it did. It merely restated his belief, in a suburban rather than wilderness area, that people can protect their environment if the fundamental rights of others are not violated. This is also the basis of his dissent in *Sierra Club v. Morton*,[14] that man is entitled to an environment that lifts and gives strength to the spirit, and this is a value of sufficient importance not to be discarded for other speculative and noncritical values. Many people

[10] 416 U.S. 1 (1974).

[11] E.G. Margolis, Exclusionary Zoning: For Whom Does Belle Terre Toll?, 11 CAL. WEST. L. REV. 85 (1974). See also 60 CORNELL L. REV. 299 (1975); 19 VILL. L. REV. 819 (1974).

[12] 348 U.S. 26 (1954).

[13] See Griggs v. Allegheny County, 369 U.S. 84 (1962).

[14] 405 U.S. 727, 741 (1972).

disagree with the weight he gave these values in *Belle Terre*, but the values are those Mr. Justice Douglas has championed in his private and public, as well as his judicial life.

A deep affection for nature, and recognition of the compelling need for using it with care, consideration, and respect, represent the best of America's environmental spirit. Refreshment comes from nature, even at and perhaps particularly at, its most harsh and unforgiving, and often in its most fragile state. Man is the beneficiary of this environment and it is for man that it must be protected. Economic forces must often bend to the need to protect the natural environment. Even a development, such as Mineral King in *Sierra Club v. Morton*,[15] that brings more people into the type of contact with nature that a huge winter sports complex would provide, should not be permitted without a thorough and discerning consideration of its effect on the present environment and the values people who live in that environment find in it. Even if few people would use Mineral King in its undeveloped state, their values and aspirations represent the best of man's spiritual goals and developments. This is a formidable and compelling philosophy of man's relation to nature, and Mr. Justice Douglas has not only expressed it in his writing and opinions but has lived it. No life can have a nobler theme.

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[15] Id.