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The Legacy of *Reserve Mining*

Daniel A. Farber[†]

In *Reserve Mining Co. v. EPA*,¹ the federal courts first confronted one of the central dilemmas of environmental law. Often, the magnitude or very existence of a threat to public health or the environment is shrouded in scientific uncertainty. In the face of this uncertainty, how much of a burden should society be willing to bear to eliminate the risk? Judge Bright's answer to this question on behalf of the Eighth Circuit has become a lodestar for later judges and scholars.

As usual in environmental cases, both the procedural history and the facts are complex, but a brief overview will suffice for present purposes.² Reserve Mining produced large quantities of "tailings" as a byproduct of its taconite operations, resulting in some local dust problems and, more importantly, in massive dumping of the tailings in Lake Superior. The litigation began with a focus on ecology, but shifted dramatically on the eve of trial when the tailings turned out to contain asbestos. At the high levels found in occupational settings, asbestos was known to cause respiratory illnesses including cancer. The small town of Silver Bay was exposed to some airborne tailings at a barely detectable level. The people of Duluth were also exposed to asbestos because the city got its water supply from Lake Superior. No one knew, however, whether ingested asbestos was even absorbed into the body, let alone whether it could cause cancer. A distinguished expert witness, called by the trial court rather than by the parties, was unable to draw any firm conclusion whether the asbestos exposures were harmful. Speaking as a physician rather than a scientist, however, he believed that reasonable ground for concern existed.

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1. 514 F.2d 492 (8th Cir. 1975).

2. For a complete exploration of the facts, see DANIEL FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* ch. 2 (forthcoming 1999).

In short, as is so often true in environmental law, the case involved issues on the frontiers of scientific knowledge. The evidence of harm was neither as speculative as the company claimed nor as serious as the government alleged. One of the virtues of Judge Bright's opinion is that it frankly confronts this uncertainty, resisting the temptation to make the case look easier by shading the evidence.

As is also quite often true in environmental law, solving the problem would not be cheap. Angered by the obstructive tactics of the defendant, the trial judge had ordered an immediate shut-down, which would have thrown thousands of people out of work and crippled the local economy. A less stringent remedy would involve switching from water to land disposal for the tailings, at a cost of \$243 million. So, in stark terms, the question was this: should the company be forced to spend \$243 million (or perhaps even shut down) in order to avoid the possible but unproven risks to public health in Silver Bay and Duluth?

Judge Bright's answer to this knotty question was that an immediate shut-down was too draconian, but that the company could not be allowed to continue indefinitely to place the public's health at risk. Hence, the company was ordered to make the conversion to land disposal expeditiously and to implement new air pollution controls. In reaching this conclusion, Judge Bright's opinion combined sensitivity to environmental values with a sense of proportion about the economic burdens of regulation.

Reserve Mining is broadly recognized as a leading case on environmental risks. As of this writing, the opinion has been cited seventy-two times by federal courts and at least 252 times in the law reviews.³ And I am not the only commentator to take note of its importance: others, too, have described *Reserve Mining* as a "leading case[],"⁴ "important,"⁵ and "influential."⁶

3. Westlaw search on Sept. 16, 1998.

4. A. Dan Tarlock, *Safe Drinking Water: A Federalism Perspective*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 233, 259 n.189 (1997).

5. Robert F. Blomquist, *The EPA Science Advisory Board's Report on "Reducing Risk": Some Overarching Observations Regarding the Public Interest*, 22 ENVTL. L. 149, 153 (1992); Frank Prager, *Apportioning Liability for Cleanup Costs Under CERCLA*, 6 STAN. ENVTL. L.J. 198, 205 (1986/1987); Gregory B. Heller, Book Review, 87 MICH. L. REV. 1401, 1404 (1989).

6. Alyson C. Flournoy, *Legislating Inaction: Asking the Wrong Questions in Protective Environmental Decisionmaking*, 15 HARV. ENVTL. L. REV. 327, 377 n.191 (1991).

Nor is its virtually universal coverage in casebooks any surprise.⁷ Few casebook editors can resist a case that combines legal significance, arresting facts, and a thoughtful appellate opinion.

This is enough to show that *Reserve Mining* has been significant, but we have now had more than two decades for further consideration of the issues. One might well wonder whether Judge Bright's opinion, which was written over twenty years ago in a rapidly evolving area of the law, retains its vitality today. How well has Judge Bright's solution survived the test of time?

Today, as in 1975, more extreme positions than Judge Bright's are vocally proclaimed. Just as they were rejected by Judge Bright, however, they find little support today. Some industry advocates continue to argue that no action at all should be taken without definitive scientific evidence of harm. But, like Judge Bright, most of us prefer not to wait until people start dying or until the ice caps start melting before taking preventive action. At the other end of the spectrum are absolutists like the trial judge in *Reserve Mining*, who give no weight to economic burdens in their quest for environmental purity; but again, those extremists have little support. Like Judge Bright, American society still continues to find itself somewhere in the middle.

Putting aside these extreme positions, the major alternative to Judge Bright's environmentally sensitive approach today is cost-benefit analysis, which seeks to quantify uncertain environmental harms in monetary terms. This approach has strong support in the academy from economists and their law-school sympathizers, and in public life from important figures in the Republican Party. But the dominant approach in American environmental law remains quite similar to that

7. See, e.g., FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 529-53 (2d ed. 1990) (main case plus textual discussion); *Reserve Mining* has "decisively influenced" later decisions.; ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW: CASES AND MATERIALS 386-95 (4th ed. 1995) (main case); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 451-52 (1992) (textual discussion); ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 92-99 (1992) (main case); THOMAS J. SCHOENBAUM & RONALD H. ROSENBERG, ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES AND READINGS 755-56 (3d ed. 1996) (one page excerpt). The second edition of the PLATER book reduces *Reserve Mining* to note status but describes it as a "classic" case. PLATER ET AL., *supra*, at 140 (2d ed. 1998).

pioneered by Judge Bright: determine whether a risk should be considered significant and then eliminate the risk to the extent feasible. Indeed, although demanding greater efforts at quantification than were possible in *Reserve Mining*, the Supreme Court would later follow just this approach.⁸

In my own view, this combination of sensitivity to environmental risks with realism about economic costs best fulfills our profound national commitment to the environment.⁹ In short, I believe that, although we have learned more about environmental law and policy since Judge Bright's opinion in *Reserve Mining*, we have done well to follow down the path he opened in 1975.

It has been said that hard cases make bad law. This is sometimes true; but as *Reserve Mining* illustrates, what is sometimes true instead is that a hard case can make for a pioneering judicial opinion.¹⁰

8. See *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 653 (1980) (requiring that agency find a "significant risk"); *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981) (finding that "feasibility," not cost-benefit analysis, determines appropriate level of regulation).

9. See FARBER, *supra* note 2, ch. 4 (discussing a defense of this approach and some suggested refinements).

10. *Reserve Mining* was not Judge Bright's only significant contribution to environmental law. Although space does not allow for a discussion of the case here, I would be remiss if I did not also mention Judge Bright's decision in *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), which expansively construed the federal government's powers to protect wilderness areas.