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Local Control of Nature: Collaboration to Compensation

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BOOK REVIEWS

THE STATE OF THE NATURAL RESOURCES LITERATURE

Jason F. Shogren on Local Control of Nature: Collaboration to Compensation

Terry Anderson & Donald Leal, *Free Market Environmentalism* (Palgrave Macmillan 2001)

Philip Brick, Donald Snow, & Sarah Van De Wetering, eds., *Across the Great Divide: Explorations in Collaborative Conservation and the American West* (Island Press 2001)

Richard Epstein, *Principles for a Free Society: Reconciling Individual Liberty With the Common Good* (Perseus Book Group 2002)

Daniel Kemmis, *This Sovereign Land: A New Vision for Governing the West* (Island Press 2001)

Charles Sabel, Archon Fung, & Bradley Karkkainen, *Beyond Backyard Environmentalism* (Beacon Press 2001)

Samuel Western, *Pushed Off the Mountain: Sold Down the River: Wyoming's Search for its Soul* (Homestead Publishers 2002)

Julia Wondolleck & Steven Yaffee, *Making Collaboration Work: Lessons from Innovation in Natural Resource Management* (Island Press 2000)

Many people see local control and place-based collaboration as the next wave in managing natural resources that fall on private property in the western United States. Recent books by Wondolleck and Yaffee, Sabel et al., and Brick, Snow, and Van De Wetering (2001), among others, illustrate this view on how to use collaboration to protect critical habitat and open spaces that rest in private hands. These collaborative processes encourage local stakeholders to resolve disputes on private and public lands through bargaining and negotiation, rather than through litigation or federal mandate. Devolution of regulation allows communities to try and develop and enforce consensus management plans that adopt specific place-based strategies complementing federal legislation. In principle, such collaboration offers the potential for an efficient Coasean bargaining-type construction of local development and protection of natural resources in which private property rights exist.

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Collaboration groups trying to capture these potential gains from exchange now number in the hundreds in the west, ranging from informal grassroots meetings to government-mandated advisory councils.

Local control and place-based collaboration for private property questions is also being promoted at the federal and state levels. At the federal level, Congress enacted the Alternative Dispute Resolution Act of 1990, which moved environmental protection activities away from relying on the federal agencies to a more balanced approach to engage local citizen groups. The implication is that Congress found these alternative means of dispute resolution to produce faster, cheaper, friendlier decisions than existing dispute resolution procedures such as litigation. This legislation authorized and encouraged federal agencies to use alternative dispute resolution techniques for the prompt and informal resolution of disputes and recognized the benefits of negotiation.

At the state level, more local control and collaboration is reflected in the Western Governors Association's environmental doctrine called *Enlibra*. The first and second *Enlibra* principles are "national standards, neighborhood solutions—assign responsibilities at the right level"; and "collaboration, not polarization—use collaborative processes to break down barriers and find solutions." The idea behind these principles is that locals who own or use the land also understand local conditions, including landowners, local resource organizations, and state or local governments. The federal government is asked to help locals develop their own plans to define, implement, and enforce accountable targets of conservation.

Several reasons explain why collaboration has worked to help promote effective solutions at a local level on both private and public lands. Collaboration reduces the risk that local net benefits will be downplayed relative to national concerns, encouraging local support for the final decision. Locals included in a decision to make a local change are more likely to support or at least understand the suggested policy. Collaboration can also take a broader perspective by promoting cooperation across the fence lines of private landowners. Collaboration tries to signal respect for indigenous and anecdotal knowledge that exists in the people most familiar with specific problems and tries to promote information sharing between people who might not necessarily trust each other's motives.

In his book *This Sovereign Land*, Dan Kemmis has taken the idea of local control in the interior west to an extreme. Kemmis, the director of the Center of the Rocky Mountain West at the University of Montana, defines his vision on how local control might actually be codified into a larger and more formal institutional structure. He argues that perhaps the time is right for the west to govern the west. He contends that the

Mountain West could recapture its democratic roots through authentic self-determination similar to the semi-autonomous relationship that Scotland and Wales have with the United Kingdom. He calls for a "progressive, bipartisan, regional solidarity among western governors and within the Senate...for a West-wide compact to transfer responsibility for public lands to western institutions" (Kemmis, p. 231). This ambitious vision most likely will appeal to many westerners, especially those who support the Western Governors' ideal of *Enlibra*.

Essentially, such an extreme form of local control would give a lot more final authority over natural resource use to westerners. But whether such a powerful final authority should or could be allowed depends on whom you ask. Some people believe it is a necessary condition for more effective local control and collaboration. They fear that stakeholders take their negotiation duties lightly if they think their recommendations are advisory rather than binding. Former EPA Administrator William Ruckelshaus, for example, is a prominent supporter of final authority. He stressed, "it is best if the relevant governmental authority signals in unambiguous terms...that what comes out of the [collaborative] process will likely prevail as public policy." U.S. Senate Minority Leader Tom Daschle, for whatever motive, also recently promoted final decision-making authority on locals. He added an amendment to legislation that gave final authority through force of law to a consensus agreement struck between the U.S. Forest Service, the logging industry, and two major environmental groups to allow thinning in the Black Hills National Forest. Daschle's amendment maintains final authority for the agreement by shielding it from any future appeal or legal challenge.

A well-known example of final authority is the Quincy Library Group's forest management plan. The Quincy Library Group is a local collaborative group in northern California that asked for final authority for a five-year forest-management experiment developed by their coalition. They sought support for their plan on the national political arena after the Forest Service failed to adopt key aspects of the plan. The forests in their plan were the Plumas, Lassen, and Tahoe National Forests in northeastern California. Despite the efforts of national environmental groups like the Wilderness Society, the Quincy group eventually was successful. Congress passed the plan by a 429-1 vote, President Clinton signed it into law in 1998, and since then they have received nearly \$25 million in federal funds to help implement their plan. The Herger-Feinstein Quincy Library Group Forest Recovery Act was signed into law in 1998 and authorizes a five-year pilot project mandating the U.S. Forest Service to manage the three national forests under the plan developed by the Quincy Library Group.

Others disagree. While noting that collaboration makes sense in theory, they argue that final authority by local groups does not. Michael McCloskey, former executive director and chairman of the Sierra Club, makes the point that delegating final authority "would effect a massive transfer of power, a repudiation of the progress of the past century, a collapse in environmental gains, and a grievous wound to the practice of democracy." They fear both local vested interests and outside industries will dominate ordinary citizens in negotiations, leading to either no agreements or to binding, watered-down agreements that promote status quo wealth preservation.

In his book *Pushed off the Mountain, Sold down the River: Wyoming's Search for Its Soul*, Samuel Western makes this point about Wyoming. He argues that local control in Wyoming has turned into an issue of wealth preservation versus wealth creation. Western focuses in on Wyoming but his points apply more broadly. He identifies two myths about final authority and local control: Wyoming could prosper if the federal government would only let us, but we cannot live peaceably with the federal government and keep our sense of honor. Western argues that the best solution is for locals to find the cure for Wyoming Alzheimer's (we forget everything but the grudges) and then look inward and accept outside competition as a way of life. He thinks locals should see Wyoming and its resources as in the center of the nation, not a century-old throwback priding itself on "Wyoming, the way the West was."

Consensus through local control might work in some cases; it might not in others. If final authority cannot be guaranteed and private landowners see the collaboration process as a risky venture, a different commitment device is needed to make an agreement stick—and that tool might just be *compensation*. In the 1930s, for instance, Aldo Leopold pointed out that conservation "ultimately boil[s] down to reward the private landowner who conserves the public interest." The relevant Western Governors' Enlibra principal is that collaboration works better with incentives: "markets before mandates—pursue economic incentives whenever appropriate." The Farm Security and Rural Investment Act of 2002 is another example. Title II of the Farm Bill budgeted \$17 billion for incentives for conservation on agricultural lands, including the newly created Conservation Security Program (CSP). The CSP pays producers who adopt and maintain conservation practices on private lands. Contracts run from five-to-ten years, and annual payments range from \$20,000 to \$45,000, with an extra "Secretary's" bonus to encourage people to sign on.

While the call for compensation is not new, it still remains controversial. Compensation for private landowners in local collaboration has its critics and supporters from both side of the fence.

Landowners who are wary of compensation-for-collaboration see the funds as a wedge that could be used to further open the door for more federal control over their property. Conservationists who oppose compensation see it as unable to fulfill targeted conservation goals such as creating larger habitat reserves and as a backdoor way to sabotage resource policy through federal under-funding. There is also the romantic, conservation ethic mindset toward land conservation promoted by people like Ralph Waldo Emerson, Henry Thoreau, and John Muir. These preservationists believed land had other uses than just for human financial gain. Landowners are free to pursue private profits provided they behave as responsible social citizens too, because by definition land is already in public service. Land uses should be viewed as "harm-preventing" rather than as "public good providing."

Conservationists who support compensation see it as a practical way to buy cooperation. Landowner proponents argue that it is only fair to compensate property owners who are restricted in their ability to protect their investment. They view laws that restrict their autonomy to protect obscure nature as a threat to both the economic system and broader social order (see for example Epstein). They view land as capital, and believe capital is the key ingredient that allows people the ability to create, store, and share the wealth necessary for national prosperity. These landowners believe their land ethic is valid and would like their ongoing stewardship appreciated. This classical liberal viewpoint takes a Hamiltonian perspective—the government should abdicate to market forces that create wealth by allowing for resources to move freely from low valued to high valued uses. Rightly or wrongly, they fear that restricting private land for species protection without just compensation is another step down a slippery slope toward collectivism.

But getting the cooperation of private landowners is vital to the protection of natural resources in the west. About half of the listed endangered species have eighty percent of their habitat on private land. The question is to find a tool that would respect landowner privacy, acknowledge their prior stewardship efforts, and allow some flexibility in how they protect their investments. One tool that might bring both sides together could be to create an explicit bioeconomic market for critical habitat that goes beyond collaboration and compensation. Formal markets allow for both collaboration and privacy. A market exchange still implies consensus. Landowners can be provided the opportunity to sell private shares of critical habitat rights on the open market without opening themselves up to public access. Some observers discount market-based solutions because they require too much information, and too much flexibility with too little information is dangerous.

But markets respect privacy and can help overcome major constraints facing consensus. Markets can accommodate where

consensus fails—specifically a landowner's desire to keep private what has been private for years. Collaborative efforts face a real constraint if explicit consensus is required, but a market can work. Markets protect a landowner's desire to keep private what has been private for years. A shared feature of most models of consensus building is to even out power imbalances by "sharing information." But landowners who do not want to share information for whatever reason have little incentive to sit down and cooperate at the bargaining table.

In their classic and recently revised book *Free Market Environmentalism*, Anderson and Leal point out that such markets are used around the globe and are being proposed for use in climate change as a cost-effective mechanism to get more protection at lower cost. But how would this market be constructed? Similar to the real estate market, private-sector bio-economic appraisers would assess the biological quality of the critical habitat rights offered up for sale. The appraiser would certify the habitat as four-star, three-star, etc. quality. Sellers would then post their offer to sell a given habitat right for a given price subject to private appraisal. Negotiating fair market value for habitat rights will require independent and confidential biological/economic appraisals of habitat. Duration of the contract would be negotiated. Inspections and non-performance could be standard rules or open for discussion. Most importantly, information that was not essential for the public enforcement of the transaction would remain confidential.

There will be challenges. Finding landowners willing to sell habitat rights will be a task. Deciding where and how money should be spent to get the biggest ecological bang for the buck will take energy. Conservation contracts will have to be well specified because property rights are often complicated, especially for water rights. Determining which acquisition option is best for the circumstances—lease, purchase, or donation—must be thought through.

And what might a private-land bioappraisal look like? An example of a bioappraisal process requires one to describe and document land characteristics and attributes that affect the conservation value of the land, including a description of the property and the types and frequencies of habitat and species, how the land parcel's habitat relates to the habitat on surrounding properties, and the extent that habitat quality and species viability can be enhanced through active management. Like real estate appraisals, property owners could initiate bioappraisals and conduct them under a contract. The bioappraisal process would have to establish a common language, a species- and region-specific certification process, and a professional association for which standards and information can be transferred and defined by contract law. An effective bioappraisal would include a description of the property and resources of interest; the spatial context to understand

whether the populations and habitats on the property are contiguous with larger ones or isolated; the potential species and habitats; the actual species and habitats, including diversity, distribution, and abundance; and the carrying capacity and non-habitat factors like predators, prey, competitors, and disease-causing organisms. The open political economy question is whether the agricultural community would or could open up their value assessment surveys to include questions aimed at bio-assessment.

Healthy local control through collaboration in exchange for stricter accountability is a trade-off many westerners might make. More formal bio-economic markets for better natural resource conservation is not a pie-in-the-sky idea. Such a market would complement or replace already existing programs that use a bilateral negotiation landowner-by-landowner approach. The search for who and how to control western natural resources on public and private lands requires that we use the best tool for the task at hand. There is no universally preferred tool. Sometimes consensus works, but other times compensation through explicit bioeconomic markets can work better, especially when voluntary actions and privacy are issues. You might not want to go this far, but as the prominent PBS commentator Bill Moyers recently pointed out, "If you want to fight for the environment, don't hug a tree; hug an economist."

REVIEWS

International Law and the Environment: Variations on a Theme. By Tuomas Kuokkanen. The Hague: Kluwer Law International, 2002. Pp. xxxiii, 412, Index. \$124.00 hardcover.

International law has over the last century or so struggled with issues relating to the protection of the environment and the utilization of natural resources, seeking to develop functional methods and techniques to solve various problems that have arisen in these fields. Although the efforts of countries and international institutions in the law-making arena have been continual, the solutions have not always been prompt and easy, in particular for two reasons. First, due to the nature of international law itself, which, as a dynamic institution, is subjected to perennial change. Second, due to the subject matter—environment—*itself*, which, because of its inherently transcendent nature, triggers continually renewed demand for change of regime. The rapid scientific and technological development continues to further delay resolutions on the matter. Indeed there is little reason for doubt that the planet is undergoing significant change of environment that requires continuous regime adjustments. Also consequently, environmental law has become