

## CONTESTED LANDSCAPES AND LOCAL VOICE

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### I. INTRODUCTION: CONTESTED LANDSCAPES AND INADEQUATE LOCAL VOICE

The landscape of the western United States is both rich in commodities as well as in beauty and amenity. This unique landscape's future is bitterly contested by at least three groups with competing visions of its future. Environmentalists want to preserve and restore the landscape to pre-human contact baselines. Commodity producers want to continue to exploit the soils, timber and minerals under the government subsidy regimes put in place to encourage western settlement. Increasing numbers of people, both young and retired, want to settle in its major cities and rural areas. This third group is now the dominant force in the region. The "new" West is growing rapidly; the reasons which originally deterred settlement- the region's harsh climate and rugged, often bleak, non-European landscape- are now the its most valuable "commodities." These "new commodities" include its climate, mountain and desert wilderness areas, scenery, free-flowing rivers and open space, combined with the public and private infrastructure to support what millions perceive as a high quality of life. In the past twenty years, Western states grew by about 32 percent, compared with a 19 percent rate in the rest of the nation.<sup>[1]</sup> From 1990 to 1995, ten of the nation's fifty fastest growing counties (including the fastest) were in one state, Colorado.<sup>[2]</sup> Until World War II, the federal government viewed the West, with the exception of the Pacific Coast, as a region that required federal subsidies to attract and retain a sustainable population-base.<sup>[3]</sup> Today, geographers characterize the region, with the exception of the Great Plains, as a series of "urban archipelagos"--areas of high population density surrounded by large rural areas with sparse and declining populations. In contrast to the older, and initially more confined "urban oases" such as Denver, Salt Lake City, Phoenix and Albuquerque<sup>[4]</sup>, each of the new western archipelagos is characterized by a number of central cities typical of a metropolitan area surrounded by a ring of (often quite extensive) suburbs.

Many small, rural communities in this region consider themselves at risk from the rapid physical and social changes that growth produces and are seeking ways to avoid or at least moderate the changes. The primary risks are the loss of long established landscapes and the cultural and social patterns associated with them.<sup>[5]</sup> Land use law can be a way to moderate rapid change, but this law is inadequate response for three related reasons.

The first problem that at risk communities face is the inability to control the crucial determinants of rapid growth. The growth is market-driven rather than directed by government subsidies as it was in the past. Thus, it is difficult if not impossible to control through the political process. Communities also lack the power to influence public resource allocation decisions that influence growth. Much of the land in the region is federal public land, and most of the critical decisions about the landscape have been made at the highest levels of government to the exclusion of communities and other units of local government. The federal Constitution allows the federal government to preempt most state and local land use laws.<sup>[6]</sup> Water allocation decisions are equally crucial to the future of this largely arid region, but these decisions have been traditionally made by state officials or by individual water right holders or water service providers rather than the communities in the watershed.

The second problem is that most communities have been reluctant to exercise available local land use controls to define the landscape that they are seeking to conserve and thus must accept the landscape created by the market. Decisions have not been based on ecosystem or bioregional perspectives, although this is changing. Non-government organizations and local governments are seeking a greater role in federal and state decisions about the future of local landscapes, but landscape preservation remains difficult to accomplish through traditional land use control laws for three primary reasons. First, such claims are primarily aesthetic and they are at the margins of the law's recognition of aesthetic interests.<sup>[7]</sup> The common law gave almost no recognition to aesthetic interests because they were not mainly. Aesthetic interests are now recognized, but they are confined largely to the control of aesthetic nuisances such as signs. There is a very limited tradition of affirmative aesthetic regulation, especially of built rural landscapes because there is very limited recognition of longstanding human emotional connections to the landscape.<sup>[8]</sup> In the United States, land has been money. Second, the problem is exacerbated because communities face a culture of individualism and resistance to land use regulation that is difficult to overcome. The third major problem is the citizens of at risk communities are not perceived as minority groups entitled to special protection from "progress." Community landscape conservation claims often involve some form of group rights to traditional cultural practices, but these rights are reserved for indigenous people not small sub-sections of the minority culture.<sup>[9]</sup>

Throughout the western United States, local communities are seeking to overcome these barriers to landscape control to define landscape units in a more holistic fashion than do current federal, state and local laws that control landscape use. These efforts are widespread

but often ad hoc and thus follow no consistent pattern. This paper seeks to present a more systematic analysis of these efforts to find an effective local voice to assert alternative landscape visions to the current vision of land as an endless subdivision plat. The paper identified four common elements in the many ad hoc efforts that are underway. These elements are not exhaustive, but taken together they suggest that United States land use controls are evolving in a new and important direction. The first element is pre-legal because it is the formulation of a new vision of a community not recognized in the existing legal structure. The second and third are legal actions that extend existing land use and other local regulatory options to increase local community voice in all the determinants of landscape change. The fourth element is post-legal. Communities are turning to new consensus-based governance processes to overcome some the obstacles of the existing legal system.

## II. THE PROCESS OF COMMUNITY CONTROL OVER ITS LANDSCAPE

### *A. Reenvisioning the Landscape and One's Place In it*

The first step toward community empowerment is the development of a new landscape standard or vision and a new understanding of the place of established communities in it. America has two visions of non-urban landscapes. We have either fenced off landscapes from development under public land laws or through public and private acquisition of open space or we have tolerated (encouraged) endless low density development. Landscapes have traditionally been seen as canvases to be improved upon by human intervention.<sup>[10]</sup> European planning has had a more static, integrated view of the built landscape. European planning has proceeded from a vision of a compact and dense city surrounded by a tranquil and well-ordered countryside. As Professor Guido Martinotti has written, "most European urban thought just assumes that the countryside is there with the characters of the medieval paintings . . . [w]ell-ordered fields like one can see in a Brueghel painting . . . stay . . . in the back of our consciousness as some kind of reassuring landmark."<sup>[11]</sup> In contrast, in the United States, we have primarily defined our cultural heritage as our rugged, isolated wilderness landscapes,<sup>[12]</sup> not human settlements.<sup>[13]</sup> The net result is that all land use have been seen as a transitional stages in an endless process of dynamic change.<sup>[14]</sup>

The United States has long venerated local control as the most appropriate level for decision making, but, in fact, we have undermined this control by the enlightenment legacy that the rational organization of society requires the simplified, uniform administration of laws. Thus, local variations in practice, for example, to preserve local cultures, cannot be tolerated.<sup>[15]</sup> Many new western scholars such as Charles Wilkinson have long advocated that uniformity be tempered by place-based solutions to resource use conflicts to bridge the commodity production-environmental protection gap.<sup>[16]</sup> For example, imitating the Chinese practice of policy by aphorism, the Western state governors have adopted a series of "Enlbra (stewardship and balance) principles; the first is "national standards, neighborhood solutions."<sup>[17]</sup> However, this call for place-based solution illustrates just how radical the idea in fact is. As applied to landscapes, it means that we generally accept the landscape produced by uniform rules. Recent scholars have shown that the drive for uniformity has substituted artificial for natural landscapes and has detached the meaning of community from its original geographical basis. Local cultural practices based on specific environments are ignored when simplified, abstract and artificial landscapes are constructed to manage resources.<sup>[18]</sup> Since the Enlightenment<sup>[19]</sup>, we have been conditioned to appreciate the value of altered and managed riverine landscapes.<sup>[20]</sup> Environmental historians such as William Cronon<sup>[21]</sup> detail how the imposition of the common law of real property on Native American occupation and use practices displaced ecosystem practices to create a landscape of individually owned and physically distinct tracts of land.

These historic attitudes are eroding, due in part to the environmental movement which has deepened society's appreciation of the "natural," however ambiguous this construct is. Natural originally meant areas unsullied by human contact, but we recognize that natural systems are dynamic systems and that human intervention is an integral part of these systems. Further, the new emphasis on landscape recognizes that large areas such regional landscapes and watersheds must be seen not only as physical maps to be "read", but as modified natural systems to be protected and actively managed. This requires a delineation of the landscape and the construction of baselines against resource use patterns can be measured. The goal is not necessarily to preserve a natural system but to manage the process of change in actual landscapes to strike a balance between the maintenance of natural system functions and human use of the system.

These new ideas of the landscape as the product of natural and human evolution are finding some recognition in the law. For many years, we limited landscape protection to the preservation of historically or architecturally significant areas. This excluded the preservation of large areas devoid of a mass of buildings representing a unique architecture style, non-

dominant culture or national historical association.<sup>[22]</sup> There is, however, precedent to integrate architectural and landscape preservation on a community scale; landscape preservation is moving beyond the idea of amassing scattered open space areas to the idea that larger ecosystems should be sustained to support historic human and system functions. For example, in Vermont, legal protection has been extended to the state's landscape which represents a unique, and increasingly valuable, blend of natural and human features.<sup>[23]</sup> The Columbia Gorge Scenic Area seeks to preserve a build-natural environment along an area that rivals the Rhein (absent castles) in inspiring vistas.<sup>[24]</sup> The recognition that landscapes are special objects of legal protection can be completed by the idea that its inhabitants are entitled to special protection. Historically, United States law only recognized a special connection between land and people for its aboriginal peoples, Native Americans. We have given them limited sovereignty over reservation homelands. There is increasingly recognition that farmers and ranchers and those who occupy small communities have a similar culture worth of protection.<sup>[25]</sup>

### *B. The Reinvigoration of Growth Management Options*

Rapid growth has traditionally been posed as a growth management or regional planning issue.<sup>[26]</sup> The usual response to rapid growth is to confine it to urban service boundaries to minimize the presumed social costs of suburban sprawl. The resulting growth control or management strategies<sup>[27]</sup> seek growth patterns with higher densities and less reliance on the automobile<sup>[28]</sup> than the market would supply. Concern about growth in the West and the consequences for traditional economies and life-styles is not new.<sup>[29]</sup> There is a history of attempts to control the pace and scale of the reallocation of land and water resources. Various local governments and states have experimented with growth management since the 1970s to curb the direct and indirect costs of urban sprawl and to protect the agricultural and rural landscape<sup>[30]</sup>. However, until relatively recently, outside of the Pacific Coast<sup>[31]</sup> and enclaves such as Boulder, Colorado, the idea of growth control was rejected as heresy because it was contrary to the region's manifest destiny, and the natural order of United States development, as well as to the enjoyment of God-given property rights. However, the growing concern over the fiscal and social costs of the current boom has put the issue on the western political agenda throughout the region.<sup>[32]</sup> The primary problem with growth management is not with the available options but with the traditional purpose of growth management. Cities generally accepted growth levels as a given and seek only to accommodate it by channeling it within urban growth boundaries and by using subdivision exactions to force new residents to pay directly the costs of new public services. A recent

analysis of their use concluded that "growth management efforts remain acceptable only if they are limited to programs designed to channel growth to appropriate locations or minimize negative impacts associated with on-going growth."<sup>[33]</sup>

Some communities are seeking to build on the traditional idea of growth management to develop plans and regulatory programs specifically designed to preserve the community landscape and character. These plans still accept the inevitability of growth, but they seek to impose much more stringent controls on its character and location. These include renewed efforts to delineate realistic urban boundaries, increased densities in built up areas and reduced densities on the periphery of urban growth boundaries. For example, Jackson Hole, Wyoming, a rapidly growing resort and post-industrial "life style" community, has adopted an ordinance that rigorously controls future resort expansion and requires that all future developments incorporate natural features and the area's cultural heritage into their design.<sup>[34]</sup> Other mountain communities, such as Santa Fe, New Mexico, are limiting development along ridge lines to preserve their most important asset, scenic vistas.<sup>[35]</sup> One of the biggest problems that at risk communities face is the conversion of large ranches and forest tracts into small "ranchettes" or small rural blocks. For over three decades, land use planners have experimented with land use development densities consistent with the carrying capacity of the land. The applied science of conservation biology has taken this a step further and posited that biodiversity conservation requires the preservation of large habitats reserves, around which land development can be clustered with appropriate buffers.<sup>[36]</sup> This analysis has been applied to cluster land development in ways that preserve large blocks of habitat and scenic land or functioning agricultural areas.<sup>[37]</sup>

### *C. New Leverage Points: Deconstructing Preemption and Subordinating*

#### *Utility Service to Growth Management*

The biggest barrier to local voice is crucial decisions such as water or public land management is often the legal doctrine of preemption. Preemption silences local voice by confining the decision to a higher level of government. Preemption reflects the preference for rational hierarchies and the exclusive delineation of regulatory functions. Preemption jurisprudence is therefore highly abstract and discounts the efficacy of local regulation. Water

allocation is an example state preemption of local control that can have a major impact on local landscapes. Local control of water has been strongly resisted by state water administrators. The political reasons are varied, but the legal theory is based on the assumption, seldom articulated in the cases or commentary, that water law is an exclusive state function. Water allocation an exclusive statewide function because it a branch of property law and regulates civil relationships. This follows either from state constitutions, which withdraw the power to directly regulate civil relationships from local governments, the constitutional or judicial rule that local government power is limited to the territorial boundaries of the unit or from the express or implied preemption of local laws by legislation of statewide application. As Frank I. Michaelman and Terrance Sandalow observed in their path-breaking local government casebook,<sup>[38]</sup> "[w]hether from want of interest or because of a general understanding that private law is beyond the scope of the power conferred, local governments have rarely attempted to enact laws that directly regulate traditional Roman law based civil relationships." Preemption assumes that the enactment of a statewide water code administered by a state official is good evidence of express intent to displace local regulation in home and non-home rule states. Courts seldom had to apply these principles since local governments had little incentive to limit the exercise of state water rights<sup>[39]</sup> because the assumption that the state had the exclusive authority to allocate the resource was so widely shared.

State water law grew out of local practices and irrigation district management, but by the end of the nineteenth century, states had assumed control of local communities and districts by insuring that local districts operated pursuant to delegated state powers<sup>[40]</sup> supervised by a state agency, the state engineer. Local control remained powerful, especially where it was exercised by irrigation districts<sup>[41]</sup>, but for most of this century federal and state water officials set western water policy. The result was often to move water out of the basins of origin. Western water law is based on the understanding that human needs often require water to be removed from streams and transported over long distances. This idea is expressed as a policy of capture, "which allows water to be removed completely out of its natural watershed, sometimes leaving little or none for those who may have need for it later."<sup>[42]</sup> One of the more notorious instances of this policy in practice occurred early this century, when the growing city of Los Angeles acquired land and water rights through surreptitious means in the rural Owens Valley, 250 miles to the east. The city's aqueduct all but drained the Owens River, leading to serious environmental problems downstream and hampering the valley's agricultural economy. Years later, rural areas throughout the West have looked at the Owens Valley story as an example of the dangers of out-of-basin water transfers.<sup>[43]</sup>



Many at risk communities face the possible loss of local water resources because of water markets or municipal transbasin diversions and seek to surround the control barrier posed by the doctrine and practice of preemption. Rural communities that have a steady or declining population face another sustainability problem from the lack of control over water allocation, the loss of an important segment of its economic base. For example, the town of Fallon, Nevada's historic economic and cultural base, an irrigation district, is being squeezed by the Pyramid Lake Paiute Tribe which has succeed in reallocating some district water to restore a fishery in Pyramid Lake and a wildlife refuge being restored by Congressionally funded water transfers.<sup>[44]</sup> State law does not provide much of a form for community interests. All applications for new appropriations and transfers are reviewed by a state agency. States have loosened their standing rules to allow non water-rights holders to participate in water rights proceedings, but there is little substantive protection for community concerns. Most states have the power to subject new appropriations and, in some instances, proposed transfers to a "public interest" review.<sup>[45]</sup> Public interest review can be supplemented by the public trust doctrine, which permits a court to balance the environmental and consumptive values of a water use and, in some states, to require that consumptive uses of navigable waters be subordinated to ecosystem maintenance.<sup>[46]</sup> This rule could invalidate rural to urban water transfers that are ruled inconsistent with the public trust use of water. However, the doctrine has not been extended beyond the protection of fragile ecosystems to the protection of rural communities.

The fate of efforts to capture community values in state law is illustrated by a celebrated New Mexico litigation. Northern New Mexico with its long- but dying- tradition of communal use and management of *acqueias* would seem to be the ideal place to implement this idea, and a trial judge did by refusing to approve a transfer even though there was no proof of any injury to vested rights. The opinion held that a proposed change of water use from livestock and early season flood irrigation to a ski resort was contrary to the public interest because "[t]he Northern New Mexico region possesses significant history, tradition and culture of recognized value, not measurable in dollars and cents; the relationship between the people and their land and water is central to the maintenance of that culture and traditions and the imposition of a resort-oriented economy in the Ensenada area would erode and likely destroy a distinct local culture that is several hundred years old. However, the case was reversed on appeal because the New Mexico transfer statute at the time did not allow public interest considerations in transfers and the New Mexico Supreme Court refused to hear an appeal.<sup>[47]</sup> New Mexico law now allows the public interest to be considered in transfers. This case has led some to suggest that communities be given a veto over major water rights transfers,<sup>[48]</sup> but this would be potentially inefficient and is not on the agenda of any state.



The preemption barriers are not insurmountable. Urban suppliers and local communities are becoming more involved in water issues, and some of this localism is being reflected in legislation and judicial decisions. The traditional assumption of western water allocation that control should not be shared between different levels of state government has been questioned by environmental interests and advocates of greater watershed control over the resource. The statewide interest in water rests on the entrenched policy that water should be put to its highest economic use. However, the traditional equation of value with demand neglects other components of the resources' value. The core principle is that water has place and community values which are submerged by state recognition and administration. Water law scholars have argued that water has extra-market or community values. In their study of water conflicts in northern New Mexico, F. Lee Brown and Helen Ingram concluded that "water has an emotional and symbolic meaning for the West that transcends its commodity value."<sup>[49]</sup> Local control is a way, although not an exclusive one, by which these in place values can be recognized. Once these values are recognized as legitimate, the case for preemption diminishes. Professor Daniel Rodriguez has written, "[w]here the issue is ecosystem management, the case for field preemption is not strong. . . . That ecosystem issues raise matters of statewide concern need not mean that same issues are not simultaneously matters of local concern."<sup>[50]</sup> For example, pollution regulation is much less centralized compared to surface pollution and local communities are taking an active role in regulating land use to protect drinking water sources from contamination.<sup>[51]</sup>

Western water cases are starting to reevaluate the traditional preference for exclusive state control by providing opportunities for communities to argue that there is in fact no conflict between local regulation and state law or by defining conflict more narrowly than in the past. California has long refused to enact statewide regulate ground water extraction regulation. The state's conscious refusal to regulate has opened the door to counties which want to control the export of ground water. Potential exporters challenged these ordinances as outside the scope of local authority, but a California intermediate court of appeals refused to find field preemption and upheld the power of counties to prohibit the export of groundwater because the state had not effectively occupied the field of ground water regulation.<sup>[52]</sup> A Colorado court reached a similar conclusion construing the ambiguous delegation of land use authority to local governments. Colorado long sanctioned the export of water from the western to the eastern slope of the Rocky Mountains, but it has begun to grant west slope counties more of a voice in water diversion issues as these counties have gained population and developed major tourist economies. Legislation allows counties to designate activities, such as transbasin diversion, a matter of state interest and to develop permitting procedures for these activities.<sup>[53]</sup> A west slope county did so and denied a permit for a transbasin diversion because the diversion structure would impair a wetland. The water right holder argued that

state water law preempted the local regulation, but the state court of appeals held that an entitlement to divert water "should not be understood to carry with it absolute rights to build any diversion project."<sup>[54]</sup>

Growth management can also be enhanced as cities take control over the determinants of growth. Water service is crucial to much urban growth. Cities have historically assumed that, as public utilities, they have a duty to serve all entrants and thus they must locate adequate water supplies. The basic principle is premised on the assumption that the public interest required courts to police monopoly under production.<sup>[55]</sup> The duty remains an important limitation on utility service, especially as gas and electric service are deregulated. However, the primary beneficiaries of the doctrine should be captive consumers<sup>[56]</sup> not new entrants into a community.<sup>[57]</sup> Communities that wish to define growth and non-growth areas have articulated a public interest in limiting utility service to confined areas. Courts initially suggested that this conflicted with the duty to serve.<sup>[58]</sup> The subordination of growth management to utility service ignores the fact a new public interest has been articulated by a local government. A city should not be required to undermine its own growth management policy simply because it is also a water supplier, and more recent courts have so held.<sup>[59]</sup> Non municipal suppliers should be subordinate to this policy so long as the policy does not impair their constitutionality guaranteed fair rate of return. Consistent with this analysis, the Nevada Supreme Court has held that a county may deny a subdivision permit because it inconsistent with a county water-use plan.<sup>[60]</sup> To preserve the hydrologic balance in the southern part of Washoe County (Reno), the County's plan prohibited five acre or less subdivisions "until a new water source is available." The developer argued that the county's action impaired his state water rights, but the court held that the power to define rational growth "includes the ability of county government to determine water availability for itself."<sup>[61]</sup>

Recent legislation in Idaho and California imposes increased water planning duties on cities, lessens the duty to serve and opens to the door to alternative growth scenarios based on the limited availability of water supplies. This legislation assumes that the duty to serve is not absolute. Idaho strikes the balance more in favor of rural areas and thus potentially limits rural-urban water transfers to growing areas. The statute gives the Director of the Department of Water Resources to deny a transfer from agriculture to municipal use because the city does not need it. As the previous discussion of Colorado's attempts to subject municipal water planning to the anti-speculation doctrine, local governments have almost but not quite unlimited discretion to make population growth projections. Idaho recently limited municipal

discretion to provide some basis to address the water resources impacts of land conversion around Boise.<sup>[62]</sup> Idaho now authorizes the Department of Water Resources to determine the planning horizon for municipal retention of water rights. Planning horizon is defined as "the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs."<sup>[63]</sup> Such needs are calculated by population and other planning data but "shall not include uses of water within areas overlapped by conflicting comprehensive land use plans."<sup>[64]</sup> This standard is used to evaluate transfers. The Director must decide that the municipal change of use application is necessary to serve reasonable anticipated future need and will not significantly affect the agricultural base of the area.<sup>[65]</sup> This provides a basis for the state to use a local agricultural preservation plan as a basis to deny an agricultural to municipal and industrial use transfer.

California has linked water supply and land use planning objectives in a way that gives local governments some ability, if they take advantage of it, to control the use of local water resources. Bay Area growth has spilled into Central Valley, one of the world's most productive agricultural districts. The case, problematic as it is, for farm production preservation<sup>[66]</sup> is stronger here than in many other parts of the West along with the Central Snake River Plain in Idaho. In 1995, California enacted legislation, primarily in response to the rapid and dispersed urban growth and conversion of prime agricultural land in the San Joaquin Valley. The Valley is growing faster than the state average and may triple its population to 12.24 million in 2040.<sup>[67]</sup> One half of the projected farmland conversion is classified prime farmland by the Natural Resources Conservation Service (formerly the Soil Conservation Service).<sup>[68]</sup> The legislation requires cities to have a firm water supply plan in place before large, new developments are approved. This legislation reflects the end of the Reclamation era because cities can no longer assume that either the state or the federal government will build and finance the necessary supply augmentation project. Unlike Arizona, the statute does not impose a de facto duty on city to acquire sufficient water rights, but it limits the power of cities to approve new growth and defer the issue of actually providing an adequate water supply until a later date.

#### *D. Private Public Partnerships and Collaborative Governance*

Throughout the western United States, many communities are turning to two solutions to control their destiny that seek to overcome many of the legal barriers outlined in the first

section of this paper. These efforts are stakeholder collaboration and the use of mixed public-private policy instruments. Many stakeholder collaboration efforts are driven by the fear of federal mandates such as the Endangered Species Act. However, more generally these efforts reflect a desire of local communities and interests to craft responsive local solutions consistent with federal and state control. They also reflect the paradox that federal and state governments possess great regulatory powers but less and less political power to employ them. As a result, resource management is evolving toward multi-stakeholder processes characterized by (1) efforts to involve local interests in federal and state management decisions, (2) a greater willingness to plan and manage on a larger scale than existing laws mandate, and (3) a more flexible accommodation between human use and preservation and restoration efforts. New resource management laws are emerging to facilitate greater local voice in landscape definition.

There is a significant effort to recomunitize land in the West through the use of land trusts and the purchase or gift of land conservation servitudes. Many areas of the west have turned to land conservation trusts to preserve the traditional landscape. There are many options available to a land owner who decides to donate or sell land for the purpose of maintaining the status quo.<sup>[69]</sup> Individual owners transfer the development rights, in the form of a conservation easement or fee simple title, to a trust. In the first case, the owners and their successors in interest continue to use the land as restricted; in the second case, the land can be managed by the trust, resold subject to restrictions or sold to raise cash for other land acquisitions. More generally, these land trusts reflect a desire to integrate public and private land use, including commodity production, into biodiversity conservation. Transferrable development rights (TDRs) can also be used to balance development and preservation of the status quo.<sup>[70]</sup> Water trusts could be created to achieve the same purposes. Water entitlements could be pooled in an entity. In return each right holder would receive a perpetual entitlement to receive a fixed supply. The rights could either be held by a trust or in common among the rights holders.<sup>[71]</sup> Existing users would be able to enjoy their entitlements- subject to the usual risks- but would be able to take the water rights out of the market. TDR schemes have not been applied to consumptive water rights because the full development potential of the right has already been applied to beneficial use, but they could be used to shield unappropriated water from use outside the watershed or to protect the waste assimilative capacity of streams and aquifers.<sup>[72]</sup> Collectively, these efforts preserve the status quo but incorporate the element of community interest into private land rights which is missing in the common law theory of exclusive, individual ownership.

### III. CONCLUSION

Small communities which wish to preserve their traditional landscape and the cultural values associated with it are finding new methods to achieve this objective. The idea that change can be substantially moderated is alien to United States thinking but the environmental movement and the recognition that there are a variety of non-traditional cultures worth preserving are changing our ideas of "progress." Ultimately, these communities will have to recognize that all property has a community interest and find ways to incorporate this interest into both the institution of private property and its regulation. This can be done through the more aggressive use of traditional land use powers, by finding local leverage points to participate in higher level resource allocation decisions that impact local communities and by tying private land conservation efforts to a broader community vision of the future.

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<sup>[1]</sup> Pamela Case and Gregory Alward, *Patterns of Demographic, Economic and Value Change in the Western United States: Implications for Water Use and Management* 7 (August 1997)(Study Prepared for Western Water Policy Advisory Review Commission).

<sup>[2]</sup> William E. Riebsame, ed., *ATLAS OF THE NEW WEST* 55 (1997).

<sup>[3]</sup> Federally financed water resources projects were a crucial element of the subsidy package. The orthodox view that federal water resources projects were essential to the West's economic growth was articulated and questioned in a pioneering 1968 National Academy of Sciences committee study chaired by the great water geographer, Gilbert White. National Academy of Sciences, *WATER AND CHOICE IN THE COLORADO RIVER BASIN: AN EXAMPLE OF ALTERNATIVES IN WATER MANAGEMENT* (1968).

<sup>[4]</sup> In spite of the image projected by tobacco and automobile advertising, the coastal and interior West has long been characterized by the highest percentage of urban as opposed rural population in the country, but it tended to be concentrated in oasis cities that had marshalled sufficient water supplies to sustain themselves. See Gerald Nash, *THE AMERICAN WEST TRANSFORMED: THE IMPACT OF THE SECOND WORLD WAR* (1985) and *THE AMERICAN WEST IN THE TWENTIETH CENTURY* (1977).

<sup>[5]</sup> The shift to the new West is painful for many individuals and communities. Many conflicts in the West center on tensions within local communities between those which perceive themselves as dependent on traditional commodity production and those who argue that non-commodity resources such as the natural landscape will help sustain the community economically in the future. For a thoughtful analysis of the traditional and new economics of

community development see Thomas Michael Power, *LOST LANDSCAPES AND FAILED ECONOMIES: THE SEARCH FOR A VALUE OF PLACE* (1996).

<sup>[6]</sup> The issue is complicated because the leading Supreme Court case, *California Coastal Commission v. Granite Rock Co.*, 480 U.S.572 (1987) draws a curious distinction between land use controls, which are presumptively preempted, and environmental controls, which may not be. See George Cammeron Coggins and Robert Glicksman, *PUBLIC NATURAL RESOURCES LAW* § 5.03 (1990).

<sup>[7]</sup> The common law did not recognize interference with aesthetic sensibilities as an actionable nuisance, but police power may be used for "solely aesthetic" regulation. Aesthetic regulation remains primarily concerned with prevention of aesthetic blight rather than the promotion of beauty and form. We remain concerned about the arbitrary nature of aesthetic regulation. See John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 *Mich. L. Rev.* 355 (1982).

<sup>[8]</sup> The modern environmental movement seeks to institutionalize this connection through new concepts such as natural resources damages. My colleague, Katherine Baker, has explored the relationship between emotional landscape connection and legal protection in *Consorting With Forests: Rethinking Our Relationship to Natural Resources and How We Should Value Their Loss*, 22 *Ecology L. Q.* 677 (1995). One of the leading examples of judicial recognition of the emotional connection between community residents and a specific landscape is *Landmark v. City of Denver*, 728 P.2d 1281 (Colo. 1986). In upholding an ordinance to limit the height of buildings in Denver, Colorado to preserve view of the Front Range of the Rocky Mountains, the court noted that the city's "civic identity is associated with its connection with the mountains."

<sup>[9]</sup> I have explored this problem at great length in *Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants*, 1999 *Ariz. State L. J.* \_\_\_\_.

<sup>[10]</sup> See Simon Schama's fascinating discussion of the didactic functions of 16th and 17th century palace gardens. *LANDSCAPE AND MEMORY* 268- 281 (1995).

<sup>[11]</sup> *The Sustainable City* at 41.

<sup>[12]</sup> Joseph L. Sax, *Mountains Without Handrails* (1981).

<sup>[13]</sup> There is a long tradition of growth management in the United States which reflects the European preference for compact, orderly development which results in a clear urban- rural demarcation. See Timothy Beatley and Kristy Manning, *THE ECOLOGY OF PLACE: PLANNING FOR ENVIRONMENT, ECONOMY, AND COMMUNITY* (1997). One of the most powerful arguments for this policy is that compact growth costs much less than widely dispersed, leap- frog growth. David L. Callies, Robert H. Freilich and Thomas E. Roberts, *CASES AND MATERIALS ON LAND USE* 555- 558 (1994). The root problem is that compact landscapes are alien to the American experience. The settlement patterns of



Central Europe produced clustered villages surrounded by individual fields and common pastures. Urban centers developed around the old Roman centers and the *Koeringsburgen*. (royal cities) Cities were walled religious and commercial centers with well defined limits which grew slowly until the 18th century. The rise of the nation-state after the Peace of Westphalia gave rise to the modern theory of city planning and the model of the orderly city remains the dominant vision in Europe and among American planners. Many buildings were destroyed in the 30 years war and theories of the ideal town emerged. E. A.

Gutkind's *URBAN DEVELOPMENT IN CENTRAL EUROPE* 197 (1964) sets out the theory: City planning became an instrument of state policy . . . Since the state was omnipotent (allmacht) , it had not only the right but the duty (pflicht) to be an active agent of city planning. "The critical ideas were (1) defense, (2) display or pageantry and (3) perspective. This led to "the layout of homogeneous squares surrounded by on all sides by uniformly designed buildings, to wide uninterrupted streets, to the extension of towns in accordance with definite plans under the supervision of the state or by private contractors who were commissioned by state authorities. In contrast, the United States was settled as a series of rapidly moving frontiers with very low population densities has meant that only the cities on the Atlantic coast grew organically or were planned in the European tradition. The history of pre- 20th century history of city planning is a history of platting. John Reps, *TOWN PLANNING IN FRONTIER AMERICA* (1965), Cities were laid out to encourage real estate speculation and each city was to be a metropolis. In Europe plans extended existing settlements; on the United States frontier, plans were intended to attack urban growth. The history of city planning is filled with beautifully platted new "paper towns that failed to live up to the inflated claims of their sponsors. Thus, cities grew rapidly and chaotically in the 19th century. The dominant pattern in the United States from the Allegheny mountains to the Pacific Ocean is the grid or gridiron and low density occupation of land. We carved up the public lands in square sections and by the beginning of the 19th century the endless pattern of right angle streets became the model of urban development. The low density tradition has been carried out as people move further and further out from the city center in what a leading historian has called the Crabgrass Frontier. Kenneth T. Jackson, *THE CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985).

[\[14\]](#) My colleague Fred Bosselman has characterized Illinois land use law as the product of nineteenth century attitudes "which caused its residents to view land itself simply as another form of capital that could be made `abstract, standardized and fungible' through the `alchemy' of commodification." Fred P. Bosselman, *The Commodification of `Nature's Metropolis: The Historical Context of Illinois' Unique Zoning Standards*, 12 Northern Ill. L. Rev. 527, 531 (1992).

[\[15\]](#) See Harding, *Value, Obligation and Cultural Heritage*, 1999 Ariz. St. L. J. \_\_\_ at \_\_\_ for a discussion of the debate within liberal theories of culture over whether distinctiveness is worth preserving.

[\[16\]](#) e.g., *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (1992).



[\[17\]](#) 1282 Western States Water, December 11, 1998.

[\[18\]](#) For a brilliant exposition of the link between modernity and local knowledge and practice see James C. Scott, *State Simplifications: Nature, Space, and People*, Nomos XXXVIII 42 (Ian Shapiro and Russel Hardin eds. 1996). See also Simon Schama, LANDSCAPE AND MEMORY (1996).

[\[19\]](#) See Simon Schama's fascinating discussion of the didactic functions of 16th and 17th century palace gardens. LANDSCAPE AND MEMORY 268- 281 (1995).

<sup>20</sup> See I.G. Simmons, ENVIRONMENTAL HISTORY: NEW PERSPECTIVES ON THE PAST 29- 41 (1993) for a brief survey of the principle forces of the counter-environmental transformation.

[\[21\]](#) William Cronon, CHANCES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983).

[\[22\]](#) See Joseph L. Sax, *The Trampas File*, 84 Mich. L. Rev. 1389 (1986).

[\[23\]](#) The evolution of the idea of landscape protection is traced in Norman Williams, *Scenic Protection As A Legitimate Goal of Public Regulation*, 38 Washington University J. Urban and Contemp. L. 3 (1990).

[\[24\]](#) 16 United States Code § 554h et seq. The Columbia River Gorge National Scenic Area Act requires a management plan for the gorge that limits and residential and commercial development to structures that do not adversely affect "the scenic, cultural, recreation, or natural resources of the scenic area."

[\[25\]](#) See A. Dan Tarlock, *Can Cowboys Become Indians?*, *supra* Note 9 and Richard L. Knight, *Field Report From the New American West*, in WALLACE STEGNER AND THE CONTINENTAL VISION 181 (1998).

[\[26\]](#) See e.g., STATE & REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT (Peter A. Buchsbaum & Larry J. Smith eds. 1993).

[\[27\]](#) The objective of growth control is to limit the amount of growth in an area; the objective of growth management is to distribute the "inevitable" growth in a fiscally responsible and environmentally sensitive manner. Gabor Zovanyi, GROWTH MANAGEMENT FOR A SUSTAINABLE FUTURE: ECOLOGICAL SUSTAINABILITY AS THE NEW GROWTH FOCUS FOR THE 21ST CENTURY 53 (1998).

[28] The case for less reliance is made in Moshe Safdie, *THE CITY AFTER THE AUTOMOBILE: AN ARCHITECT VISION* (1997). Most urban planners in both Europe and the United States are not sanguine about the ability to create less-automobile dependent urban environments. See European Foundation for the Improvement of Living and Working Conditions, *PERCEIVING, CONCEIVING ACHIEVING THE SUSTAINABLE CITY 55* (1997).

[29] See Richard White, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 560- 571 (1992) for a history of efforts to control the rapid growth that began in the late 1960s.

<sup>30</sup> Growth control emerged as a major state and local political issue in many states due to a combination of rapid post-World War II suburban growth and the rising environmental movement which linked open space protection and the costs of sprawl to larger environmental goals. One of the best surveys of the early initiatives is John M. DeGrove, *LAND GROWTH & POLITICS* (1984).

<sup>31</sup> See Madelyn Glickfeld and Ned Levine, *REGIONAL GROWTH: LOCAL REACTION: THE ENACTMENT OF LOCAL GROWTH CONTROL MANAGEMENT MEASURES IN CALIFORNIA* (Lincoln Institute of Land Policy 1992). Oregon, Ore.Rev.Stat. § 197.010 et seq., and Washington state, Wash.Rev.Code § 36.70A.010, have the state wide planning processes that require local governments to delineate urban growth boundaries and to channel development with targeted areas. See Edward J. Sullivan, *Oregon Blazes a Trail*, in *STATE AND REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT 51* (Peter A. Buschsbaum and Larry J. Smith eds. 1993) and Larry J. Smith, *Planning for Growth, Washington Style*, *id.* at 137. *Snohomish County v. Anderson*, 868 P.2d 116 (Wash. 1994) gave a boost to growth management by holding that once a Washington state county adopts a growth management plan consistent with the Growth Management Act, the plan is not subject to a referendum because allowing referenda would undermine the goals of the Act.

[32] Gayla Smutny, *Legislative Support for Growth Management in the Rocky Mountains: An Exploration of Attitudes in Idaho*, 64 *J. of the American Planning Association* 311 (1998) explores the complex reasons for this interest in conservative areas.

[33] Zovany, *GROWTH MANAGEMENT FOR A SUSTAINABLE FUTURE* *supra* Note 27 at 37.

[34] Fred P. Bosselman, Craig A. Peterson and Claire McCarty, *MANAGING TOURISM GROWTH: ISSUES AND APPLICATIONS 88- 90* (1999).

[35] See Lisa Healy, *Trophy Homes and Other Alpine Predators: The Protection of Mountain Views Through Ridge Line Zoning*, 25 Boston College Env'tl. Affairs L. Rev. 913 (1998).

[36] See J.B. Ruhl, *Taming the Suburban Amoeba in the Ecosystem Age: Some Do's and Don'ts*, 3 Widener Law Symposium J. 61, 666- 67 (1998).

[37] Timothy P. Duane, SHAPING THE SIERRA: NATURE, CULTURE AND CONFLICT IN THE CHANGING WEST (1998) is an excellent survey of the both the theoretical literature and efforts to apply it to a stressed ecosystem.

[38] MATERIALS ON GOVERNMENT IN URBAN AREAS 314 (1970). This analysis is developed at greater length in Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 Minn. L. Rev. 643 (1964).

[39] Occasionally courts have had to remind powerful irrigation districts that they are subject to water law. See *Imperial Irrigation District v. State Water Resources Control Board*, 275 Cal.Rptr. 250 (Cal.App. 1990), *cert. denied*, \_\_\_ U.S. \_\_\_ (1991)(IID not immune for anti-waste requirements of beneficial use).

[40] For a history of this development in New Mexico see Ira G. Clark, WATER IN NEW MEXICO: A HISTORY OF ITS MANAGEMENT AND USE 100- 114 (1987).

[41] See Barbara T. Andrews and Sally K. Fairfax, *Groundwater and Intergovernmental Relations in the Southern San Joaquin Valley of California: What are All These Cooks Doing to the Broth?*, 55 U. Colo. L. Rev. 145 (1984).

[42] Bates, Getches, MacDonnell & Wilkinson, SEARCHING OUT THE HEADWATERS: CHANGE AND REDISCOVERY IN WESTERN WATER POLICY 137 (1993).

[43] The history of the Los Angeles' water and land grab has been told in the movies, *Chinatown*, and in several excellent histories. Abraham Hoffman, VISION OR VILLAINY: ORIGINS OF THE OWENS VALLEY- LOS ANGELES WATER CONTROVERSY (1981); William Kahrl, WATER AND POWER: THE CONFLICT OVER THE LOS ANGELES' SUPPLY IN THE OWENS VALLEY (1982); John Walton, WESTERN TIMES AND WATER WARS: STATE, CULTURE AND REBELLION IN CALIFORNIA (1992)

[44] See A. Dan Tarlock, *The Creation of New Risk Sharing Water Entitlement Regimes: The Case of the Truckee Carson Settlement*, 25 Ecology L. Q. 674 (1999).

[45] Douglas Grant, *Public Interest Review in Water Allocation and Transfer in the West: Recognition of Public Values*, 1987 Arizona State Law Journal 681.

[46] *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3rd 419, 658 P.2d 709, *cert. denied*, 464 U.S. 977 (1983).

<sup>47</sup> *Sleeper v. Ensenada Land & Water Association*, 107 N.M. 494, 760 P.2d 787 (1988), *cert. quashed*, 107 N.M. 413, 759 P.2d 200 (1988). See *The Milagro Beanfield War Revisited in Ensenada Land & Water Association v. Sleeper: Public Welfare Defies Transfer of Water Rights*, 29 NAT. RESOURCES J. 861 (1989).

[48] See Charles T. DuMars & Michele Minnis, *New Mexico Water Law: Determining Public Welfare Values in Water Right Allocation*, 31 ARIZ. L. REV. 817 (1989).

[49] Brown and Helen Ingram, WATER AND POVERTY IN THE SOUTHWEST 187 (1987).

[50] Daniel B. Rodriguez, *The Role of Legal Innovation in Ecosystem Management: Perspectives from American Local Government Law*, 24 Ecology L. Q. 745, 767 (1997).

[51] George Homsy, *Liquid Gold*, 63 Planning, No. 5, p. 10, May, 1997.

[52] *Baldwin v. County of Tehema*, 31 Cal.App.4th 166, 36 Cal.Rptr.2d 886 (3d Dist. 1994), *review denied*.

[53] Colo. Rev. Stat. § 24-65.1-501,

[54] *City of Colorado Springs v. Board of Commissioners of Eagle County*, 895 P.2d 1105 (Colo.Ct.App. 1994), *cert. denied*, 1995 Colo. Lexis 443 (Colo. 1995), *cert. denied*, 116 S. Ct. 564 (1995).

[55] Cf. the dissenting opinion of Justice Cardozo in *Interstate Commerce Commission v. Oregon Washington Railroad and Navigation Co.*, 288 U.S. 14 (1932).

[56] See James Rossi, *The Common Law "Duty to Serve" and the Protection of Customers in an Age of Competitive Retail Public Utility Restructuring* (forthcoming).

[57] This assumes that new entrants to a community do not have an absolute right to enter, and thus communities have the discretion to decide the rate and spatial distribution of new entrants. A municipal timing scheme was upheld against a right to travel argument in *Construction Industry Ass'n v. City of Peteluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 112 S.Ct. 934 (1976), but cities may be subject to equal protection, *Beck v. Town of Raymond*, 394 A.2d 847 (N.H. 1978), and statutory, e.g. Cal.Gov.Code § 65302.8, duties not to discriminate against new comers. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L. J. 385, 455- 457 (1977).

[58] The leading case is *Robinson v. City of Boulder*, 547 P.2d 228 (Colo. 1976).

[\[59\]](#) Dateline Builders, Inc. v. City of Santa Rosa, 194 Cal.Rptr. 258 (Cal.App. 1983).

[\[60\]](#) Serpa v. County of Washoe, 111 Nev. 1081, 901 P.2d 690 (1995).

[\[61\]](#) 901 P.2d at 692.

[\[62\]](#) Riebsame, *Western Land Use Trends and Policy*, *supra* Note 1 at 94- 95 reports that officials are concerned about the maintenance of canal distribution systems as canals are rerouted and ground water recharge.

[\[63\]](#) Idaho Code §42-202B(5).

[\[64\]](#) Idaho Code §42-202B(6).

[\[65\]](#) Idaho Code §42-202B(5).

[\[66\]](#) In 1981 the United States Department of Agriculture published the NATIONAL AGRICULTURAL LANDS STUDY which identified a farmland "crisis." However, agricultural economists have discounted any food or fiber threat from farmland loss, but Riebsame, *Western Land Use Trends and Policy*, *supra* Note 1 at 75- 76 argues that farmland conversion can be an important local issue because of the combination of crop losses, local economic and cultural disruption and the loss of open space and valuable wildlife habitat and other potential ecosystem losses.

[\[67\]](#) Riebsame, *Western Land Use Trends and Policies*, *supra* Note 1 at 108.

[\[68\]](#) *Ibid.*

[\[69\]](#) Itzchak E. Kornfeld, *Preserving Natural Resources and Open Spaces: A Primer on Individual Giving Options* 23 *Envtl. L.* 185 (1993).

[\[70\]](#) TDRs separate the right to develop from ownership of a specific tract and allow the development incident of ownership to be transferred for use on another parcel. In return for a restriction on environmentally sensitive lands, for example, the development increment may be used on other land in the area. State TDR schemes are in existence, but doubts about the constitutionality of the concept remain. The Supreme Court appeared to hold that TDRs were a constitutionally adequate just compensation substitute in the 1970s, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) and *Fred H. French Investing Co., Inc. v. City of New York*, 350 N.E.2d 381 (N.Y. 1976), *cert. denied*, 429 U.S. 990 (1976), but at least three members of the current Court seem to have rejected this reasoning. *Suitium v. Tahoe Regional Planning Agency*, 117 S.Ct. 1659 (1997)(Scalia, J. concurring).

[\[71\]](#) A private pooling arrangement would have to include a covenant not to partition. The arrangement is similar to concurrent estate property held in an homeowner's association, and non-partition covenants have been upheld as reasonable restraints on alienation.

[\[72\]](#) See Ann Louise Strong, *Transfer of Development Rights to Protect Water Resources*, 50 Land Use Law & Zoning Digest 3, September, 1998.