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Legal and Political Complexities of Ecosystem Management

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Abstract

With differing legislative mandates, federal agencies will have difficulty sharing authority to further transboundary EM although BLM and Forest Service heads Dombeck and Thomas aver that there will be renewed effort at cooperation and communication. State jurisdiction over lands complicates the problem further, and Stewart contends that the state should take the lead in EM. The agencies have no authority to impose ecosystem management on private land, and the challenge is to convince property owners of the benefits of EM. According to Coggins, private property rights are not absolute, are subject to the rights of other community members, and the Supreme Court has generally favored social interest. However, in recent years the judiciary has moved more toward a property-rights position.

Coggins stressed that much of public input will be adversarial and antagonistic to public agencies. He believes that new legislation will be needed to define the level of public participation. While stressing the importance of collaboration between agencies and other groups, Thomas pointed out the impediments posed by the Federal Advisory Committee Act. A number of speakers commented on the need for legislative change.

INTERAGENCY RELATIONSHIPS

George Coggins outlined out some of the potential difficulties inherent in the present system of federal land management. Federal lands are managed by different agencies with differing legislative mandates. They have often been at odds with one another and will probably resist giving up or sharing authority in order to further transboundary EM. However, while agencies do have the authority to practice EM within their jurisdictional boundaries, they have limited authority to practice it outside their borders.

Mike Dombeck agreed that there were agency jurisdictional issues to work out, but felt that since all agencies should have the common goal of protecting the health of the land, effective communication between agencies would be the key to reaching that goal. He pointed out that communication

should be present anyway. As one step toward improved communication, he proposed employee exchanges between agencies. Jack Ward Thomas supported this as well. The general theme of interdisciplinary cooperation was expressed throughout the symposium. Thomas commented that the President would like to see combined agencies. This would encourage EM or at least facilitate EM on federal lands by alleviating some jurisdictional problems between agencies.

Interagency cooperation is a key component of successful EM. From Chris Risbrudt's call for better interaction among landowners, state, and federal agencies, to Louisa Wilcox's views on ownership and management, to the final panel discussion with various agency heads discussing movement of personnel among their respective departments, the need for collaboration and teamwork among parties was apparent throughout the symposium.

The range of interagency interactions in the past has been quite broad. Agencies all have their own legal mandates and institutional biases. However, as Coggins discussed, even though every agency has its own defined management objectives, governments have sometimes implemented transboundary agreements. These have included managing flood plains, controlling hydropower, and enforcing such regulations as the Migratory Bird Treaty Act and the Endangered Species Act (ESA). But beyond the implied provision of such laws as the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), the National Forest Management Act (NFMA), and the Clean Air and Water Acts, no explicit statutory directive for transboundary management oversees or enforces such programs. For example, although NFMA asserts that coordination by the USFS with outside agencies should be part of decision-making processes, the USFS rarely extends this coordination beyond consultation (Keiter 1989). This issue was also addressed during congressional oversight hearings in 1985 that focused on the lack of interagency interaction. The result was Congress applying more pressure on the agencies to cooperate and implement EM (Goldstein 1992).

Current interactions among agencies need to be examined on a case-by-case basis. The number of involved coalitions can be quite high. For example, more than 40 organizations and numerous additional individuals make up the Greater Yellowstone Coalition (Clark and Zaunbrecher 1987). As Coggins pointed out, each different unit may retain the belief that it is a sovereign entity. Although current law does legitimize putting transboundary EM into practice, adjacent parties have worked together only when circumstances have forced them to (Keiter 1989). Examples include interagency cooperation on issues such as pollution (acid rain), migratory animals (Yellowstone elk herds), and outside impacts (upstream mining or logging).

The emphasis on agencies and parties coming together to discuss common interests was evident throughout the symposium. The Colorado Plateau break-out session discussed a bottom-up approach of gathering the involved parties to formulate concerns, goals, and objectives. This approach was endorsed by Oregon ranchers Doc and Connie Hatfield. Connie's description of ranchers and biologists coming to a realization that they shared similar goals with regard to stream erosion was an elegant case in point. Thomas described another approach of facilitating communication through agency personnel interchange. He provided numerous illustrations of people at various management tiers working together to further EM goals.

The Colorado Plateau group discussed an approach to formulating interagency cooperative management plans similar to those used in such emergencies as wildfires or searches and rescues. This type of coordination would supersede existing intra-agency regulations and would be overseen by a non-agency council (e.g., the National Wildfire Coordinating Group). Such interaction has already been demonstrated in areas such as the Greater Yellowstone Ecosystem (GYE) with such issues as exotic species control and endangered species management (Varley 1993). The attitude was recently reinforced by the U.S. Fish and Wildlife Service's plan

to implement EM by establishing partnerships with other agencies and private interest groups (U.S. Fish and Wildlife Service 1994). Such agreements are not limited to national interests, as evidenced by the United Nations' establishment of biosphere reserves encompassing numerous jurisdictions (Sax and Keiter 1987).

Numerous speakers (Dave Roberts, Mike Ruggiero, Ted Stewart, Louisa Wilcox, and Mike Dombeck), also mentioned the idea of data sharing. This is seen as a way of facilitating transboundary management, especially when significant cumulative effects need to be considered. Agencies would have to map and collect data cooperatively, thus ensuring a standard format. Information would then be made available to all land managers, including state agencies and private property owners. GIS was mentioned as a way to map and share data and to monitor long-term effects.

STATE LANDS

State jurisdiction over lands also complicates the proposition of EM. Ted Stewart mentioned that states should take the lead in implementing EM, but the requirements associated with School Trust Lands complicate the issue. Managing these lands for both public school funds and EM will be no easy task. The Book Cliffs initiative was just one of many examples given that show that the State of Utah has been practicing EM to some extent.

PRIVATE PROPERTY

A number of speakers discussed the complexities of extending EM to private lands. The main challenge is convincing private property owners of the benefits of EM. Coggins commented that agencies have authority to practice EM, but only within their own boundaries. The organic legislation for federal land-management agencies only allows for consensual agreement with adjacent landowners, and agencies lack true coercive powers. Coggins also stated that western landowners will resist federal- government coercion. Thomas, on the other hand, stressed that the U.S.D.A. Forest Service (USFS) seeks no additional authority over private property. He feels there are better ways of encouraging EM practices. The job of the USFS is to provide technical help and guidance. Doc and Connie Hatfield reiterated this by saying that agencies can influence and educate property holders much like extension specialists and can also help in monitoring. Agencies help people understand that EM does not mean an adverse change in lifestyle but may in fact improve their chosen lifestyle.

Louisa Wilcox opined that the original Greater Yellowstone Coordination Committee failed because private landowners did not understand what they were trying to accomplish. She stated that agencies need to take the lead in helping people understand what EM is and how it can benefit them. She also believes that economic incentives would have to be used to compensate land owners for some regulatory land-use restrictions. Bret KenCairn also reiterated the importance of agency-directed education and incentives for

rural communities. Examples of compacts and land swaps were given by many speakers as ways to simplify jurisdictional problems related to private lands.

Several issues related to private property rights may complicate the implementation of EM. Specifically, private landowners are likely to react negatively to any actual or perceived increase in land and resource regulation. There is also the question as to when government regulation of private land constitutes a "taking."

Private landowners, especially in the West, have little tolerance for government interference. As noted in the symposium, "In the West, private landowners have the best lands and the worst attitudes (toward EM)." According to Maughn and Nilson (1993), "Reactionary movements against federal land policy have been a recurring phenomenon in the publicland states of the West where the federal government typically owns at least half of the land." Movements such as the Sagebrush Rebellion and the Wise-Use Movement are clearly indicative of some western landowners' attitude toward federal-government involvement.

Coggins emphasized that private property rights are not absolute and are subject to the rights of other community members as expressed through regulations. Yet, private property rights are protected in the fifth amendment of the U.S. Constitution, which states that "private property shall not be taken for public use without just compensation." The contradiction between private property rights and the government's right to regulate private land leads to the "takings issue."

Regulatory takings may occur "when government regulation restricts what owners may do with private property." Regulatory takings occur when "government regulation lowers the value or interferes with the use of property interests without actually taking physical possession or usurping property title" (Coggins et al. 1993). Yet, regulatory takings remain difficult to define. Legal precedent has placed regulatory taking of property on a continuum with the power of eminent domain (physical taking of property). Lawyers attempt to ascertain whether a regulation goes "too far" and warrants compensation.

The Supreme Court has generally favored social interests over property rights, except in the early 1900's and during the conservative renaissance of the Reagan and Bush years. However, even with the support of conservative politics, takings compensation has been supported only when the value of private property has been severely diminished. For example, two cases supporting compensation for regulatory takings in 1990 found 95% and 99% reductions in value. During the symposium, Coggins reiterated that legal support for regulatory-takings compensation was unlikely. He noted that takings compensation was improbable unless all value was taken or if property itself was taken.

COLLABORATIVE PARTNERSHIPS BETWEEN AGENCIES AND THE PUBLIC

An important ingredient in the EM decision-making process, as indicated by many of the speakers at the sympo-

sium, is the role of the private citizen. According to Steve Daniels' presentation, affected people should have a voice, and agencies should practice a politics of inclusion, balancing public participation with opinions of scientific expertise, and characterizing a voluntary rather than coercive or adversarial process in land-management and environmental policy making. Such a process would stress social learning as a means of working through problems. Since EM currently is more vision than actual practice, there exist only legal precedents, actual agency behavior, and personal opinion as limited examples from which to determine what level of public participation has been or will be included, and to what degree these inputs will be allowed to influence the direction of EM.

From a legal standpoint, George Coggins stressed that the main direction of public input has been and will continue to be through the adversarial, rather than voluntary, process. A clash between agencies and private landowners or interest groups over unwanted government intrusion or undesirable land-management policies is the most likely result. This tension will continue if agencies approach EM in the same bureaucratic tradition of the past. Agencies are perceived as believing that they must convince the private property owner and public that their concept of land management is the correct and beneficial solution to resource problems, rather than including the private individual in the management process as an active participant in determining the goals and directions of any EM strategy. This perception of agency behavior was mentioned in presentations by Doc and Connie Hatfield and Louisa Wilcox.

If agencies are to include private land owners and affected interests in the process of creating EM goals and practices, thereby giving dispute-resolution strategies a chance to work, Coggins suggested that additional legislation may be needed to define the level of public participation that will be allowed, and what legal recourse individuals will have to force agencies to allow public input, including collaborative commissions.

Thomas discussed the role of the Federal Advisory Committee Act of 1972 (FACA) which details the extent to which advisory commissions can be created, their powers, and who has the authority to form these commissions (P.L. 92-463, 86 Stat. 770). Specifically, advisory commissions are not empowered to force agencies to comply with their recommendations except under special acts of Congress or charter by the President. According to FACA, all matters under the consideration of advisory commissions should be determined by the official, agency, or officer involved and any actions taken or policies resulting from committee recommendations will be made solely by the President or other officer of the federal government (P.L. 92-463, 86 Stat. 770; s.9). Essentially, FACA limits the power of private influence expressed through advisory or collaborative commissions. Any advice coming from such commissions may or may not be acted upon.

A working example of agency collaboration with private interests that includes private and community concerns in resource management is the Applegate Partnership described by Bret KenCairn. Collaborative resource-management strategies are still the exception rather than the rule, as agency collaboration with private interests is a voluntary process,

done usually in response to previous legal gridlock over a resource conflict. A good example was provided by Louisa Wilcox. Resource dialogues in the GYE are usually crisis driven, implying that agencies and private interests come to the table as a last resort rather than risk giving up their individual autonomies. She also characterized agency administrative behavior as having few incentives to enter into such cooperative collaborations.

Obstacles to the creation of agency partnerships with private interests stem from the autonomy that agencies have in the exercise of their management strategies within agency boundaries. Agencies are just as loathe to give up their autonomous jurisdiction within agency reservations as private land owners are on their lands. One must question what power if any these partnerships will be allowed to have over actual agency policies and management decisions, considering the limits imposed by FACA. Unless an act of Congress gives more power to advisory commissions, private land owners and communities involved will only have the power to advise agencies, with little other means within commissions to compel agencies to act on their interests.

THE LEGAL COMPLEXITIES OF IMPLEMENTING EM

As Steve Daniels noted, one of the major challenges of implementing EM is the underlying legal complexity. The legal complications arise because the statutes which provide direction for federal natural-resources management were enacted prior to the official acceptance of EM as a guiding directive. Many symposium participants addressed the issue of whether or not the existing statutes are a sufficient base upon which to build the emerging concept of EM.

According to Thomas, attorneys have told the USFS that in trying to implement EM, the USFS is "diligently pounding square pegs into round holes. The law was not designed for it exactly." He further stated that the USFS "operates under a number of natural-resource laws that are somewhat confusing and conflicting to say the very least, not only the legislation itself but the evolving case law." As a result, he said that the USFS is working with the Office of General Counsel to determine if there is a way the agency can use existing laws to implement EM more effectively.

Thomas' viewpoint was generally shared by Coggins, yet Coggins stated that existing statutes are adequate to apply EM within agency borders. However, due to the lack of specific legislative guidance, if EM is to become a transboundary reality, Coggins believes that additional legislation will be required. Nevertheless, he stressed that the constitutional basis for extending federal influence beyond federally reserved lands is "beyond reasonable challenge," referring to the Property Clause, the Treaty Clause, and the Commerce Clause. Although a constitutional basis for transboundary management exists, he said that the agencies themselves have no authority to coerce land owners to comply with EM even though they may advise them to do so. Agreeing with Thomas, Keiter (1990) says that evolving case law has inconsistently dealt with transboundary EM, so the legal questions are far from settled at this time.

Wilcox mentioned an example of a statute which may inhibit EM. The 1872 Mining Law is a "critical enemy to EM." She then mentioned that the Wilderness Act of 1964 has been instrumental in building up the GYE by providing a means to set aside core areas around which less restricted lands can be used to further EM. Legislation that has promoted land exchanges, such as the recent Gallatin Range Consolidation and Protection Act of 1993 (Public Law 103-91), has also been important for consolidating core areas. That law was enacted in part to consolidate grizzly bear habitat in the GYE.

According to Jack Stanford, ESA requirements have been used as a springboard to implement EM in Montana's Flathead Basin. However, in order for the greater community to accept those requirements, reliable science must support all related management decisions. Equally as important, the research must be presented clearly to the local people. In his view, if this is done correctly, local people are likely to support EM.

CONCLUSION

The issues discussed here demonstrate the legal complexities of EM. Strong relationships, both legal and informal ones, will be necessary for its implementation. Cooperative relationships are crucial for managing across political and legal boundaries. By reviewing various agencies' views and the laws defining those views, this symposium has helped to pave the way towards better cooperation among all parties interested in EM.

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