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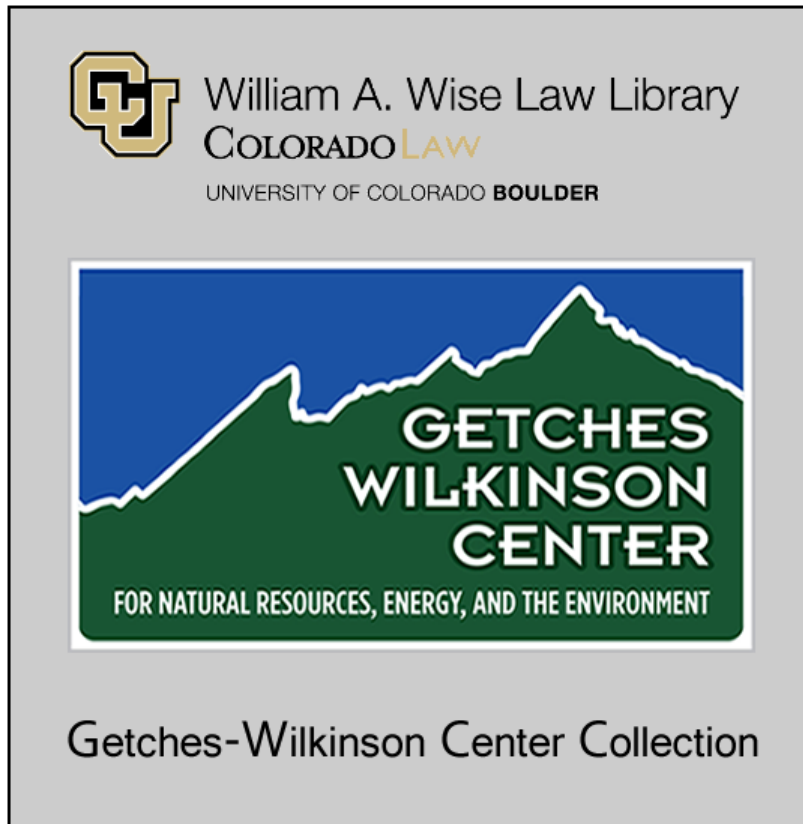


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**COLLABORATIVE APPROACHES TO CONSERVATION:
A CRITICAL LOOK**

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Strategies in Western Water Law and Policy:
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June 8-11, 1999

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Collaborative Approaches to Conservation: A Critical Approach

by
Larry MacDonnell

Webster's defines collaborate as "to work together, esp. in some literary, artistic, or scientific undertaking." Its second meaning is "to cooperate with the enemy; be a collaborationist." In my discussion of collaboration I include both meanings--working together and, sometimes, cooperating with the enemy.

A friend of mine once told me that cooperation is an unnatural human act. There are times when I think she's right.

As a culture and a society, we value individual freedom more than social responsibility, private property rights more than public welfare, written law more than morality and custom. We have empowered the individual, unleashing the initiative of self interest. Bolstered by an abundance of natural resources, this nation of individuals has built a powerful economy and a stable, functioning democratic system of government.

In a nation of individuals we depend heavily on laws and legal agreements rather than custom and consent to order our relationships. We seek to imbue those things of special value to us with legal protection, describing them as "rights" and characterizing them as absolute. While we benefit as individuals from the protection of these "rights," we pay a cost as a society. Mary Ann Glendon, in her stunning book *Rights Talk: The Impoverishment of Political Discourse* (1991), puts it this way:

Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations. In its relentless individualism, it fosters a climate this inhospitable to society's losers, and that systematically disadvantages caretakers

and dependents, young and old. In its neglect of civil society, it undermines the principal seedbeds of civic and personal virtue. In its insularity, it shuts out potentially important aids to the process of self-correcting learning. All of the traits promote mere assertion over reason-giving. [p.14]

I have spent what is now approaching a thirty year career focused on the broad field of natural resources law. At its core this subject traditionally has been property law, beginning with the basic elements of ownership and rights to develop and use land and other resources. Ownership of land carried with it exclusive rights of possession and use of the land surface including those naturally occurring attributes of value occurring on or under the surface such as timber, forage, wildlife, water, or minerals. Property rights carried the common law limitation that they could not be used in a manner causing harm to the property rights of others. Otherwise they were regarded as absolute.

As the law giveth, so too does the law taketh away. Increasingly during this century the field of natural resources law has grown to include rules that qualify and restrict property rights in land and natural resources. Broadly speaking, these laws attempted to build in to our property rights system elements of our evolving notions of conservation.

At the national level, this process began by placing not yet claimed lands containing substantial timber into permanent public reserves and then putting the forest and grazing uses of these lands under professional, scientifically based management intended to assure long-term sustained yields from these resources. It provided national-level protections for migratory birds. It subjected private river development for hydropower on navigable rivers to federal supervision.

At the state level, it included establishing seasons in which hunting of certain animals would be allowed and setting limits on the numbers of fish and wildlife that could be harvested. It included establishing permit systems for water rights in the western states, requiring water users to document their intended uses. Later it involved setting standards for timber harvesting on private lands, including provisions for reforestation.

At the local level, it focused on land use regulation. The notion of organizing compatible land uses into “zones” meant that certain uses of land were simply not allowed and that even allowable uses had to meet certain publicly described standards.

In the 1960s and 1970s, a new era of conservation began. Government supervision of land and resource development and use was extended to control of pollution. After some initial experimentation with approaches at the federal and state level, Congress determined that direct regulation of certain pollution discharges was necessary. It established national standards of performance and asked the states to implement these requirements through permit systems. Moreover, it imposed on all federal agencies the obligation to evaluate the environmental consequences of their actions, to consider alternatives that would be less environmentally damaging, and to disclose their evaluation results to the public.

This outpouring of new law brought with it the development of an even larger amount of implementing regulation as agencies attempted to carry out Congress’s “command and control” objectives. In turn, the laws and regulations themselves became the subject of a phenomenal litigation boom as those being regulated challenged the authority on which they were based, their meaning, their feasibility, their application, and just about anything else on which they could base a legal challenge. As well, national level environmental organizations sprang up with the primary purpose of lobbying for additional laws and assuring that these laws were interpreted and applied to their fullest extent in controlling environmentally harmful activities. They found that litigation was their most effective strategy, and they used the courts with great success in achieving their objectives.

The first real test of our commitment to public regulation of certain activities to achieve environmental protection came with the election of a conservative president in 1980. Despite his general popularity his administration was largely unsuccessful in rolling back the regulatory programs established in the 1970s. By 1988, when George Bush ran for president as pro-environment, it was clear that environmental protection had gone mainstream--at least, at the broad policy level.

The emergence of collaborative approaches to achieve conservation objectives is hardly new. The federal Reclamation program represents the use of federal financial and technical resources working with local districts to help conserve water resources for more complete human use. The Soil Conservation program that began in the 1930s represents another long-standing collaborative effort between a federal agency and local districts.

Collaboration turned, however, on the availability of federal assistance to accomplish state and local objectives deemed also to be in the national interest. Money made collaboration possible while it also made it necessary. Irrigators who wanted a secure and cheap water supply had to work things out with the Bureau of Reclamation and among themselves and their political representatives.

We are in a very different situation today. Conservation objectives articulated in national law increasingly require land and resource owners to alter or limit their uses or to manage their lands and resources for noneconomic benefits. So long as these objectives related directly to controlling releases of pollutants created as byproducts of economic activities, government regulation has been generally accepted. Perhaps as an extension of the long-established principle that one cannot use his property to the harm of another, there has been widespread agreement that there is no right to pollute in a manner that causes harm.

As our conservation objectives move beyond human health-threatening pollution control to things like ecological protection, however, as they focus more on activities on private lands by individuals rather than on businesses operated by corporations, the use of law and regulation to require them loses considerable public and political support.

The leading case in point is the Endangered Species Act. In concept, the commitment expressed in this law not to allow human activities to cause the extinction of plant and animal species seems fundamental and supportable. In practice, its application has had profound consequences for our traditional uses of lands and resources in many places. It directly challenges our Reclamation

vision of water conservation. It reminds us that we share our lands and resources with other living species and forces us to examine the degree to which our historical and present uses of natural resources disregards the needs of these species. It is not a happy picture.

Unlike our fight over pollution control, however, this battle goes on unabated and is probably growing as we increasingly attempt to come to grips with the extent to which our human practices have transformed our natural systems and the things that depend on those systems.

It is growing as we attempt to apply the absolute ban on the “taking” of a protected species that applies to every individual and to the things they do on their private lands.

Another good example is provided by our efforts to deal with nonpoint sources of water pollution. Even while we now widely acknowledge that most of our remaining water quality problems come from nonpoint sources, we continue to be reluctant to use regulation to control them. We have moved slowly toward more careful documentation of nonpoint sources and we have increased the amount of federal money available to those who will take certain actions to reduce their nonpoint pollution. We are now debating the extent to which Section 303(d) of the Clean Water Act with its requirement to identify water quality impaired waterbodies and to develop TMDLs for these segments will move us. But it seems clear enough that 303(d) is not a direct source of regulatory authority over nonpoint source pollution.

Features that the endangered species and nonpoint pollution problems have in common are:

- they generally involve relatively small individual responsibility but with potentially large cumulative effects;
- they are, at least in part, the result of private property uses--many of which are longstanding;

- the geographic scope of the problem often exceeds the jurisdictional boundaries of entities with land use regulatory authority;
- their solution is likely to impose nonrecoverable costs on individuals and entities while producing generally nonpecuniary benefits; and
- they are often complex problems and our understanding of effective solutions is far from complete.