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From “Winners and Losers” to New Authority Structures in Ecological Policy

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Introduction

The papers prepared for this Colloquium on “Emerging Ecological Policy: Winners and Losers” devote strikingly little discussion to who actually wins or loses as a result of new policies. While this may be good, it bears some critical reflection, especially since environmental policy has more than once been caught up short on the problem of distributive justice (e.g., Schnaiherg, et al. 1986; Bullard 1990). No doubt part of the explanation is the sheer difficulty of accurately measuring costs and benefits and connecting them to specific individuals and groups. However, the larger reason may be that ecological policy has moved from being marginalized as either an economic or an aesthetic issue, to being a central arena for the ongoing construction of governance institutions. Thus, the Colloquium papers do attend to winners and losers, but largely in terms of their institutionalized ability to shape environmental decisions, rather than the direct benefits or losses they may experience.

This comment focuses on key points about the distribution of authority in ecological policy. First, the existing distribution is considerably more dispersed than most of the Colloquium authors tend to assume. Second, current natural resource policy scholarship suffers from two key shortcomings: an inability to analyze the cumulative effects of systems of rules and a serious lack of attention to the policy roles of non-governmental, nonmarket international organizations.

Ecological Authority

Although it is common and intellectually convenient to conceptualize authority over any given action as held by an individual actor, law and other social control mechanisms typically share authority out among plural agents (Walker 1995; Meidinger 1996). Thus, both public and private landowners may have formal authority to decide how many animals to graze on their land, or how many trees to harvest—but they must also take due account of effects on neighbors, mineral owners, future owners, water quality, taxes, endangered species, creditors, shareholders, employees, customers, and a host of other interests. Traditionally, law has been used to institutionalize those interests in the form of rules and procedures. The best justification for using law in this way is that it can protect the interests of many actors while eliminating the need to negotiate with them over every individual decision. Rules have a way of accumulating over time, however, and recent years have seen growing complaints that their combined

effect is to overburden action, stifle creativity, foster inefficiency, etc. While these complaints have a cyclical history, and hark back to a mythic Anglo-Saxon freedom that probably never existed (e.g., Meidinger 1993), they may also indicate that we have crossed a threshold of legal complexity and need to develop less complex and burdensome institutional guidance systems.

Institutional Change

Although the judicial retrenchment documented by Keiter (1996) promises to be an important institutional adjustment, the Colloquium papers advocate several others. One of the most common, discussed by Hess (1996) and Randall (1996), is simply to lop off certain rule-defined claims and convert the remaining ones into marketable property rights held by particular actors. This approach limits deposed claimants to bidding for resources in the market, and is thus critically dependent on defining property rights that adequately protect essential social values for which there will be no bidders.

A second approach, advocated by all the Colloquium papers, is to hold a new round of negotiations among relevant interests in hopes of working out a new set of policy parameters. As in the property rights strategy, important substantive policy decisions are often made in deciding which interests to include in the negotiations. Lee (1996), for example, advocates the superiority of local or “community” organizations for ecological management, whereas Merchant (1996) advocates inclusion of a more expansive, open-ended set of interests. Although negotiating groups can be convened by either private or governmental actors, governments are often important in ratifying and enforcing outcomes. Governments increasingly institute negotiation processes when problems are especially complex or their capacity to handle them is uncertain (e.g., Perritt 1986).

A third approach is simply to develop *new rules* (such as the “outcome-based” form advocated by Hess 1996) to adjust or displace old ones. In principle, this could be pursued at any or all of three levels: local, national, and international. In practice, the local watershed management efforts discussed in the other Colloquium papers have led to some changes in rules and are likely to lead to more. They are inevitably constrained, however, by the fact that many of the key U.S. rules were made by the national government, and are difficult to affect from the local level.

At the national level, there has been relatively little effort to achieve comprehensive revisions in rules. Private organizations have occasionally suggested the general outlines of general statutory revisions, but have not put significant resources into producing comprehensive new rule systems. The federal government recently concluded a comprehensive review of existing laws, but, for reasons discussed below, did not propose any comprehensive legal change (Interagency Ecosystem Management Task Force 1995).

Some of the most sweeping efforts to create new rules and institutions for natural resources are occurring not only at the international level, but in the private and quasi-private sphere. The most prominent, the Forest Stewardship Council and the International Standards Organization are described in a separate article (Meidinger 1997). The remainder of the present paper addresses the current research gaps in the areas of the cumulative effects of rule systems and of private international natural resource policy making institutions.

Research Needs

Comprehensive Federal Environmental Law Reform. Despite countless calls for integrating, streamlining, or harmonizing federal environmental laws (e.g., Guruswamy 1992), there have been strikingly few efforts to actually do so. The recent report by the Interagency Task Force on Ecosystem Management (1995) concluded that existing federal laws do not seriously inhibit the development of cross-jurisdictional, coordinated ecosystem management and that no significant legal reform is called for. While this report was prepared entirely by federal officials and could be seen as reflecting a fear of undermining core structures of government, it more likely reflects the enormous intellectual difficulty of dealing with cumulative effects of rules. Considered individually, as is the custom in legal scholarship, most existing rules make sense and can be dealt with. Because legal scholars have not developed widely accepted methods for analyzing whole systems of rules, however, we and our students find it difficult to develop shared diagnoses of systems. A key need in future scholarship, therefore, is to develop a stronger capacity to analyze the cumulative effects of rules.

Scholarly Inattention to Private International Policy-making. A more puzzling shortcoming, given this decade's focus on domestic private policy-making systems such as marketable property rights and alternative dispute resolution processes, has been the striking inattention to non-governmental policy-making processes at the international level. This research deficit is likely to reduce both the contributions scholars can make to those processes and our ability to analyze them critically. Although there are probably many reasons for this neglect, several can be noted here. First, private international natural resource organizations rarely hire policy scholars, and when they do, it is generally to address a fairly narrow question rather than to perform comprehensive reflective work. Conversely, those organizations generally have sufficient resources not to depend on scholars for the kind of gratis work

that often leads to on-the-side policy research in local domains. Second, the conventional assumption of the policy disciplines that governments make policy and markets do not continues to hold broad sway in the natural resources field. The policy-making roles of business firms and associations come into cognizance primarily in their efforts to influence governments, and those of a third category of non-governmental/nonmarket institutions have hardly been noticed. Like our failure to study the cumulative effects of legal rules, this is a critical shortcoming. The role of these "third stream" institutions is an area in urgent need of research.

Endnote

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References

- Bullard, R. 1990. *Dumping in Dixie: Race, Class and Environmental Quality*. Boulder, CO: Westview Press.
- Guruswamy, L. 1992. Integrated pollution control: the expanding matrix. *Environmental Law*. 77: 118-152.
- Hess, K. 1996. Political rights and policy wrongs: The ecology of conflict on America's Western public lands. Paper prepared for the Colloquium on Emerging Ecological Policy: Winners and Losers, Corvallis, OR, September 23.
- Interagency Ecosystem Management Task Force. 1995. *The Ecosystem Approach: Healthy Ecosystems and Sustainable Economies*. Washington, DC: U.S. Government.
- Keiter, R.B. 1996. Ecological policy and the courts: Of rights, processes, and the judicial role. Paper prepared for the Colloquium on Emerging Ecological Policy: Winners and Losers, Corvallis, OR, September 23.
- Knight, P. 1996. Forests for life. Ecolabel: The mark of good management. *The Observer* (September): 16.
- Lee, R.G. 1996. Are our tenure and resource management institutions ecologically rational? Paper prepared for the Colloquium on Emerging Ecological Policy: Winners and Losers, Corvallis, OR, September 23.
- Merchant, C. 1996. Fish first! The changing ethics of ecosystem management. Paper prepared for the Colloquium on Emerging Ecological Policy: Winners and Losers, Corvallis, OR, September 23.
- Meidinger, E.E. 1993. The Changing Legal Environment of Northern Forest Policy Making. In *Sustaining Ecosystems, Economies, and a Way of Life in the Northern Forests*. Washington, DC: The Wilderness Society.

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- . 1996. Organizational and Legal Challenges for Ecosystem Management. In Kathryn A. Kohm and Jerry F. Franklin, *Creating a Forestry for the 21st Century: The Science & Ecosystem Management*. Covallo, CA and Washington, DC: Island Press.
- . 1997. Look who's making the rules. Paper prepared for the Colloquium on Emerging Ecological Policy: Winners and Losers, Corvallis, OR, September 23, 1996.
- Perritt, H.H., Jr. 1986. Negotiated rulemaking before federal agencies: Evaluation of recommendations by the Administrative Conference of the United States. *Georgetown Law Journal* 1625-1735.
- Randall, A. 1996. Ecological policies for an age of political and social fragmentation. Paper prepared for the Colloquium on Emerging Ecological Policy: Winners and Losers, Corvallis, OR, September 23.
- Schnaiherg, A., N. Watts and K. Zimmerman, eds. 1986. *Distributional Conflicts in Environmental-Resource Policy*. Aldershot, Great Britain: Gower.
- Walker, V.R. 1995. Shared management of reasonable risk: Implications for environmental assessment and monitoring. *Journal & Natural Resources and Environmental Law* 11:1-37.