Contested Landscapes and Local Voice

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I. INTRODUCTION: CONTESTED LANDSCAPES AND INADEQUATE LOCAL VOICE

The legal landscape of American (and comparative) land use law has been greatly enriched by the work of Professor Daniel R. Mandelker. His prolific scholarship has influenced generations of law students, legal scholars, planners and courts. During his illustrious career, there are few areas of land use law and policy that Professor Mandelker has not investigated with great insight. His career roughly coincides with the rapid post-World War II suburbanization of the country's metropolitan areas, and he has been a careful student of how communities cope with rapid growth. Since the late 1960s, suburban "growth" management has been a major local, statewide and now a national political issue. Many communities have adopted growth management strategies, but these efforts rest on the self-defeating assumptions that growth and the accompanying physical and cultural change that it brings are inevitable and thus the most that communities can do is to moderate the timing and to distribute the growth within the community. This view of growth management is captured in the American Planning Association's current Growing Smart initiative. Because growth management is about the distribution of growth within a community, land use law thus gives little support to communities who wish to retain their traditional land use forms and culture. This article examines the possibility that smaller communities can match growth rates to desired land forms and a cultural base.

Many western communities are trying to find ways to challenge

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the common assumptions about the inevitability of growth and change. The landscape of the western United States is rich in commodities, beauty, and amenities. 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 or a close substitute.[1] Commodity producers want to continue exploiting soil, 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 high-amenity cities and rural areas. This third group is now the dominant force in the region. The "new" West is growing rapidly; the reasons that originally deterred settlement—the region's harsh climate and rugged, often bleak, non-European landscape—are now the its most valuable "commodities."[2] 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.

From 1972 to 1997, Western states grew by about thirty-two percent, compared with a nineteen percent growth rate in the rest of the nation.[3] From 1990 to 1995, ten of the nation's fifty fastest growing counties (including the fastest) were in one state, Colorado.[4] 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.[5] Today,

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1. The appropriate baseline is at the heart of debates about the future of Yellowstone National Park. *See* PAUL SCHULLERY, SEARCHING FOR YELLOWSTONE: ECOLOGY AND WONDER IN THE LAST WILDERNESS 217-47 (1997); THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE (Robert B. Keiter & Mark S. Boyce eds., 1991).

2. For a good summary of the economic forces that stakeholders in the western landscape see GERALD R. NASH, THE FEDERAL LANDSCAPE: AN ECONOMIC HISTORY OF THE TWENTIETH-CENTURY WEST (1999). For an on-the-ground view of the integration of the old and new west see PETER R. DECKER, OLD FENCES, NEW NEIGHBORS (1998).

3. PAMELA CASE & GREGORY ALWARD, PATTERNS OF DEMOGRAPHIC, ECONOMIC AND VALUE CHANGE IN THE WESTERN UNITED STATES: IMPLICATIONS FOR WATER USE AND MANAGEMENT 7 (1997). *See generally* PETER WOLF, HOT TOWNS: THE FUTURE OF THE FASTEST GROWING COMMUNITIES IN AMERICA (1999).

4. ATLAS OF THE NEW WEST 55 (William E. Riebsame ed., 1997).

5. Federally financed water resources projects were a crucial element of the subsidy

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,[6] 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 risk of growth is the loss of long established landscapes and the cultural and social patterns associated with them.[7] These communities face the daunting task of trying to arrest a process of landscape definition whose one constant has been change.[8] Land use law can be a way to moderate rapid change, but the current law is an inadequate response for three related reasons.

The first problem that at-risk communities face is their inability to control the crucial determinants of rapid growth. Today, 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 growth

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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. COMMITTEE ON WATER OF THE NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, WATER AND CHOICE IN THE COLORADO RIVER BASIN: AN EXAMPLE OF ALTERNATIVES IN WATER MANAGEMENT (1968).

6. In spite of the image projected by tobacco and automobile advertising, the coastal and interior West long has been characterized by the highest percentage of urban as opposed rural population in the country. However, the West's urban populations tended to be concentrated in oasis cities that had marshalled sufficient water supplies to sustain themselves. *See generally* GERALD D. NASH, THE AMERICAN WEST IN THE TWENTIETH CENTURY: A SHORT HISTORY OF AN URBAN OASIS (1977); GERALD D. NASH, THE AMERICAN WEST: THE IMPACT OF THE SECOND WORLD WAR (1985).

7. 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 who 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. See THOMAS MICHAEL POWER, LOST LANDSCAPES AND FAILED ECONOMIES: THE SEARCH FOR A VALUE OF PLACE (1996), for a thoughtful analysis of the traditional and new economics of community development.

8. *See* SCHULLERY, *supra* note 1, at 215-16.

through the political process. Communities also lack the power to influence public resource allocation decisions that affect growth.[9] Much of the land in the western United States is federal public land. Consequently, 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 Constitution of the United States allows the federal government to preempt most state and local land use laws.[10] Although water allocation decisions are crucial to the future of this largely arid region, these decisions have been traditionally made by state officials, individual water right holders, or water service providers rather the communities in the watershed.

The second problem for at-risk communities is that most communities have been reluctant to exercise available local land use controls to define the landscape that they are seeking to conserve. Thus, these communities must accept the landscape created by the market. Market-driven decisions traditionally 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. Aesthetic interests are now a legitimate subject of police power regulation, but landscape preservation is at the margins of the law's recognition of aesthetic interests.[11] The common law gave almost no recognition to

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9. The growing impotence of governments will fundamentally affect the politics of landscape change and management. The New York Times quoted a Sierra Club representative, fighting logging in a temperate rainforest in British Columbia, as saying "[t]he government is irrelevant. It is the marketplace. We give Home Depot 25,000 post cards. Home Depot responds." James Brooke, *In the Canadian Rainforest: A Fight Over Logging*, N.Y. TIMES, Oct. 22, 1999, at A8, cl.3.

10. 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 CAMERON COGGINS & ROBERT GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 5.03(1)(d)(iv) (1990).

11. The common law did not recognize interference with aesthetic sensibilities as an actionable nuisance, but the police power may be used for "solely aesthetic" regulation. Aesthetic regulation remains primarily concerned with prevention of aesthetic blight rather than

aesthetic interests because they were not manly. Aesthetic interests are now recognized, but they are confined largely to the control of aesthetic nuisances such as signs. Second, there is a limited tradition of affirmative aesthetic regulation, especially of built rural landscapes, because there is limited recognition of longstanding human emotional connections to the landscape.[12] Traditionally in the United States, land has been money. Third, 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 of using law to moderate growth in the West is that citizens of at risk communities are not perceived as minority groups entitled to constitutional or statutory protection from "progress." Community landscape conservation claims often involve some form of group rights to traditional cultural practices. However, these rights are reserved for indigenous people, not small sub-sections of the minority culture.[13]

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the promotion of beauty and form. The arbitrary nature of aesthetic regulation remains a concern. *See* John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1982).

12. The modern environmental movement seeks to institutionalize this connection through new concepts such as natural resources damages. My colleague, Katharine K. 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) (en banc). In upholding an ordinance to limit the height of building in Denver, Colorado, to preserve the 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 . . . ." 728 P.2d at 1285. Occasional examples of judicial respect for more subtle measures of community character can be found. To prevent "box superstores," a "tony" suburb of Cleveland defined a local retail business as a retail and service establishment that normally employ less than 10 people and requires less than 10,000 square feet. The city refused to grant a conditional use permit to a proposed 98,000 square foot Wal-Mart. The trial court invalidated both restrictions on substantive due process grounds. On appeal, the city defended the ordinance as the prevention of traffic congestion, excessive noise and other objectionable influences and the maintenance of town character. The appellate court rejected traffic control justification because the objectives were not the advanced either by restricting either employee number or building size, but it held that the city could distinguish among businesses based on the character of the area. Lorreto Development Co. v. Village of Chardon, 695 N.E.2d 1151 (1996).

13. I have explored this problem at great length in A. Dan Tarlock, *Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants*, 31 ARIZ. ST. L.J. 539 (1999). Most at risk communities in the West consist of a majority of non-traditional minorities, blacks, hispanics and Native Americans, and thus they do not fit within the

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 the current federal, state, and local laws that control landscape use. These efforts are widespread, but generally 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 that will assert alternative landscape visions to the current vision of land as an endless subdivision plat. This paper identifies four common elements in the many ad hoc efforts currently being pursued. 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 obstacles in 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 vision and a new understanding of the place of established communities in it. America has two visions of non-urban landscapes. On one hand, America has fenced off landscapes from development under public land laws, such as the wilderness system,[14] or through public and private acquisition of open space. On the other hand, we have tolerated, if not encouraged,

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traditional toleration rationale for minority protection. In addition, in some communities, the opposition to change can take the form of a violent rejection of the basic principle of constitutional government in the United States. CATHERINE MCNICOL, RURAL RADICALS: RIGHTOUS RAGE IN THE AMERICAN GRAIN (1996).

14. *See* Michael McCloskey, *Changing Views of What the Wilderness System is All About*, 76 DENVER U. L. REV. 369 (1999); Robert L. Glicksman & George Cameron Coggins, *Wilderness in Context*, 76 DENVER U. L. REV. 383 (1999).

endless low density development. Americans traditionally have seen landscapes as canvases to be improved upon by human intervention.[15] In contrast, 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 wrote, "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."[16] This is not the case in the United States; we have primarily defined our cultural heritage as our rugged, isolated wilderness landscapes,[17] not human settlements.[18] The net result is that all land use law has been seen as a

15. See SIMON SCHAMA, LANDSCAPE AND MEMORY 268-81 (1995), for a fascinating discussion of the didactic functions of 16th and 17th century palace gardens.

16. EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, PERCEIVING, CONCEIVING ACHIEVING THE SUSTAINABLE CITY 41 (1997) [hereinafter SUSTAINABLE CITY]. *See* Note, Matthew A. Light, *Different Ideas of the City: Origins of Metropolitan Land-Use Regimes in the United States, Germany, and Switzerland*, 24 YALE J. INT'L L. 577 (1999).

17. JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS (1981).

18. The long tradition of growth management in the United States reflects the European preference for compact, orderly development that results in a clear urban-rural demarcation. *See* TIMOTHY BEATLEY & 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, CASES AND MATERIALS ON LAND USE 555-58 (1994). The root of the 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 *Koeingsburgen* (royal cities). Cities were walled religious and commercial centers with well-defined limits that grew slowly until the Eighteenth 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 Thirty Years War and theories of the ideal town emerged. E. A. GUTKIND'S URBAN DEVELOPMENT IN CENTRAL EUROPE 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." E.A. GUTKIND, URBAN DEVELOPMENT IN CENTRAL EUROPE 197 (1964). In contrast, the United States was settled as a series of rapidly moving frontiers with very low population densities and only the cities on the Atlantic coast grew organically or were planned

transitional stage in an endless process of dynamic change.[19]

Although the United States has long venerated local control as the most appropriate level for decision making, this goal of local control is undermined by the Enlightenment legacy that the rational organization of society requires the simplified, uniform administration of laws. Thus, local variations in land use practice, for example, to preserve local cultures, cannot be tolerated.[20] This rationality is under serious reexamination. Many new western scholars such as Charles Wilkinson advocate that uniformity of laws should be tempered by placed-based solutions to resource use conflicts to bridge the commodity production-environmental protection gap.[21] For example, imitating the Chinese practice of policy by aphorism, Western state governors adopted a series of "Enlibra" (stewardship and balance) principles; the first is "national standards, neighborhood solutions."[22] However, this call for a place-based solution is a truly radical one because it departs from centuries

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in the European tradition. The history of pre-Twentieth Century history of city planning is a history of platting. Cities were laid out to encourage real estate speculation and each city was to be a metropolis. JOHN REPS, TOWN PLANNING IN FRONTIER AMERICA (1965). In Europe plans extended existing settlements; on the United States frontier plans were intended to attack urban growth. *Id*. 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 Nineteenth 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 Nineteenth 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. *See* KENNETH T. JACKSON, THE CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985).

19. My colleague Fred Bosselman characterized Illinois land use law as the product of Nineteenth Century attitudes that "caused its residents to view land itself simply as another form of capital that could be made 'abstract, standardized and fungible' through an 'alchemy' of commodification." Fred P. Bosselman, *The Commodification of "Nature's Metropolis": The Historical Context of Illinois' Unique Zoning Standards*, 12 N. ILL. U.L. REV. 527, 531 (1992).

20. See Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291 (1999), for a discussion of the debate within liberal theories of culture over whether distinctiveness is worth preserving.

21. *See, e.g.*, CHARLES WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST (1992). *Cf.* WILLIAM OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY (1977) and WILLIAM OPHULS & A. S. BOYAN, JR., ECOLOGY AND THE POLITICS OF SCARCITY REVISITED: THE UNRAVELING OF THE AMERICAN DREAM (1992) for interesting, and inconsistent, explorations of the question whether environmentally governance is best done by top down or bottom up institutions.

22. WESTERN STATES WATER COUNCIL, WESTERN STATES WATER (1998).

of centralizing rationality. 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.[23] Since the Enlightenment,[24] humans have been conditioned to appreciate the value of altered and managed riverine landscapes.[25] Environmental historians such as William Cronon detail how the imposition of the common law of real property on Native American occupation and use displaced ecosystem practices to create a landscape of individually owned and physically distinct tracts of land.[26]

This new thinking has deepened society's appreciation of the "natural," however ambiguous this construct. It has also eroded the historic preference for uniform governance and the physical consequences that it produces. Natural originally meant areas unsullied by human contact, but we now 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 as 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 which 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 in order to strike a balance between the maintenance of natural system functions and human use

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23. For a brilliant exposition of the link between modernity and local knowledge and practice see James C. Scott, *State Simplifications: Nature, Space, and People*, *in* NOMOS XXXVIII 42 (Ian Shapiro & Russel Hardin eds., 1996). *See also* SCHAMA, *supra* note 15.

24. See Simon Schama's fascinating discussion of the didactic functions of 16th and 17th century palace gardens. SCHAMA, *supra* note 15, at 268-81.

25. 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.

26. *See, e.g.*, WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983).

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.[27] 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.[28] The Columbia Gorge Scenic Area, in Oregon and Washington state, seeks to preserve a build-natural environment along an area that rivals Europe's Rhein River (absent castles) in inspiring vistas.[29] America's recognition of landscapes as special objects of legal protection can be completed by the idea that the landscape's inhabitants are also 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. Increasingly, United States law is recognizing that

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27. *See* Joseph L. Sax, *The Trampas File*, 84 MICH. L. REV. 1389 (1986). For a penetrating argument that the post-modern tourist economy is yet another centralizing force and will displace all vestiges of the native West and good parts of its landscape see HAL K. ROTHMAN, DEVIL'S BARGAINS: TOURISM IN THE TWENTIETH-CENTURY AMERICAN WEST (1998).

28. The evolution of the idea of landscape protection is traced in Norman Williams, *Scenic Protection As A Legitimate Goal of Public Regulation*, 38 WASH. U.J. URB. & CONTEMP. L. 3 (1990). For a good discussion of the role that visions of the western landscape have played in the formation of western towns see DYDIA DELYSER, AUTHENTICITY ON THE GROUND: ENGAGING THE PAST IN A CALIFORNIA GHOST TOWN, 1999 ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS 602.

29. 16 U.S.C. §§ 554-544p (1994). The Columbia River Gorge National Scenic Area Act requires a management plan for the gorge that limits residential and commercial development to structures that do not adversely affect "the scenic, cultural, recreation, or natural resources of the scenic area." 16 U.S.C. § 544(a).

farmers, ranchers, and those who occupy small communities have a similar connection and culture worthy of protection.[30]

B. The Reinvigoration of Growth Management Options

Control of rapid growth has traditionally been posed as a growth management or regional planning issue.[31] 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[32] seek growth patterns with higher densities and less reliance on the automobile than the market would supply.[33] Concern about growth in the West and the consequences for traditional economies and lifestyles is not new.[34] Specifically, 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.[35] However, until relatively recently, outside of the Pacific Coast[36] and enclaves such as Boulder,

30. *See* Tarlock, *supra* note 13, at 553-66; Richard L. Knight, *Field Report From the New American West*, in WALLACE STEGNER AND THE CONTINENTAL VISION 181 (Curt Meine ed., 1997).

31. *See, e.g.*, STATE & REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT (Peter A. Buchsbaum & Larry J. Smith eds., 1993).

32. 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).

33. The case for less reliance on the automobile 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* SUSTAINABLE CITY, *supra* note 16, at 55.

34. See RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 560-71 (1991), for a history of efforts to control the rapid growth that began in the late 1960s.

35. 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).

36. *See* MADELYN GLICKFELD & NED LEVINE, REGIONAL GROWTH . . . LOCAL REACTION: THE ENACTMENT AND EFFECTS OF LOCAL GROWTH CONTROL MANAGEMENT

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. Now, the growing concern over the fiscal and social costs of the current boom has put the issue on the political agenda throughout the western region.[37] 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 sought only to accommodate growth by channeling it within urban growth boundaries and 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."[38]

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 seek to impose much more stringent controls on its character and location. These controls 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

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MEASURES IN CALIFORNIA (1992). The states of Oregon, ORE. REV. STAT. § 197.005, and Washington, WASH. REV. CODE § 36.70A.010, have 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 & Larry J. Smith eds., 1993); Larry J. Smith, *Planning for Growth, Washington Style*, *in* STATE AND REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT 137 (Peter A. Buschsbaum & Larry J. Smith eds., 1993). *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.

37. Gayla Smutny, *Legislative Support for Growth Management in the Rocky Mountains: An Exploration of Attitudes in Idaho*, 64 J. AM. PLAN. ASS'N 311 (1998), explores the complex reasons for this interest in conservative areas.

38. Zovanyi, *supra* note 32, at 37.

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.[39] Other mountain communities, such as Santa Fe, New Mexico, are limiting development along ridge lines to preserve their most important asset, scenic vistas.[40]

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 habitat reserves, around which land development can be clustered with appropriate buffers.[41] This analysis has been applied to cluster land development in ways that preserve large blocks of habitat and scenic land or functioning agricultural areas.[42]

III. NEW LEVERAGE POINTS: DECONSTRUCTING WATER ALLOCATION PREEMPTION AND SUBORDINATING UTILITY SERVICE TO GROWTH MANAGEMENT

A. The Limited Erosion of State Control Over Water Allocation

The biggest barrier to local voice in 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. The jurisprudence of preemption reflects our society's preference for rational hierarchies and the exclusive delineation of regulatory functions. Preemption

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39. FRED P. BOSSELMAN ET AL., MANAGING TOURISM GROWTH: ISSUES AND APPLICATIONS 88-90 (1999).

40. *See* Lisa Healy, *Trophy Homes and Other Alpine Predators: The Protection of Mountain Views Through Ridge Line Zoning*, 25 B.C. ENVTL. AFF. L. REV. 913 (1998).

41. *See* J.B. Ruhl, *Taming the Suburban Amoeba in the Ecosystem Age: Some Do's and Don'ts*, 3 WIDENER L. SYM. J. 61, 66-67 (1998).

42. See TIMOTHY P. DUANE, SHAPING THE SIERRA: NATURE, CULTURE AND CONFLICT IN THE CHANGING WEST (1998), for an excellent survey of the both the theoretical literature and efforts to apply it to a stressed ecosystem, the Northern Sierra of California.

jurisprudence therefore is highly abstract and discounts the efficacy of local regulation. Water allocation is an example of how state preemption of local control can have a major impact on local landscapes.

State water administrators have strongly resisted local control of water. 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 is an exclusive statewide function because it is 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, "[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.[43] Preemption assumes that the enactment of a statewide water code administered by a state official is good evidence of an 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[44] 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. States began

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43. FRANK I. MICHELMAN & TERRANCE SANDELOON, 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).

44. Occasionally courts have had to remind powerful irrigation districts that they are subject to water law. *See* Imperial Irrigation Dist. v. State Water Resources Control Bd., 225 Cal. App. 3d 548 (Cal. Ct. App. 1990), *cert. denied*, 502 U.S. 857 (1991) (holding Imperial Irrigation District not immune from anti-waste requirements of beneficial use).

insuring that local districts operated pursuant to delegated state powers supervised by a state agency, the state engineer.[45] Local control remained powerful, especially where it was exercised by irrigation districts, but for most of this century federal and state water officials set western water policy.[46] The result was often to move water out of the basins of origin. Water law in the western United States 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, leaving no return flows for those who may later wish to use water downstream."[47] 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 partially 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.[48]

Many at-risk communities face the possible loss of local water resources because of water markets or municipal transbasin diversions. Consequently, these communities seek to surround the control barrier posed by the doctrine and practice of preemption. Rural communities with steady or declining populations face an additional sustainability problem from the lack of control over water allocation, the loss of an important segment of its economic base. For

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45. See IRA G. CLARK, WATER IN NEW MEXICO: A HISTORY OF ITS MANAGEMENT AND USE 100-14 (1987) for a history of this development in New Mexico.

46. *See* Barbara T. Andrews & 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).

47. SARAH F. BATES ET AL., SEARCHING OUT THE HEADWATERS: CHANGE AND REDISCOVERY IN WESTERN WATER POLICY 137 (1993).

48. The history of Los Angeles' water and land grab has been told in the movies, such as CHINATOWN (1974), and in several excellent histories. *See, e.g.*, ABRAHAM HOFFMAN, VISION OR VILLAINY: ORIGINS OF THE OWENS VALLEY—LOS ANGELES WATER CONTROVERSY (1981); WILLIAM L. 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).

example, the reallocation of district water is squeezing Fallon, Nevada's historic economic and cultural base. Through Endangered Species Act litigation, the area lost its water to the Pyramid Lake Paiute Tribe's restoration of a fishery in Pyramid Lake. More water will be lost through congressionally funded water transfers for the restoration of a wildlife refuge.[49] State law does not provide an adequate forum for community interests. State agencies review all applications for new appropriations and transfers. 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.[50] The public trust can supplement public interest review, thereby permitting a court to balance the environmental and consumptive values of water use and, in some states, to require that consumptive uses of navigable waters be subordinated to ecosystem maintenance.[51] This rule could potentially 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 acquifers would seem to be the ideal place to implement community values in state law. This occurred when a trial judge refused to approve a water transfer even though there was no proof of any injury to vested rights. The court 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

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49. *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, 679-80 (1999).

50. *See* Douglas L. Grant, *Public Interest Review of Water Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. L.J. 681 (1989).

51. National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).

> 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.[52]

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.[53] 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.[54] However, this idea is potentially inefficient and is not currently on any state's agenda.

These 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. Statewide interest in water rests in 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 water's value. The core principle is that water has place and community values which are submerged by state recognition and administration.

Water law scholars argue that water has extra-market or community values. In their study of water conflicts in northern New

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52. Ensenada Land & Water Ass'n v. Sleeper, No. RA 84-53(C), slip op. (D. N.M. 1985), *rev'd*, 760 P.2d 787 (N.M. Ct. App. 1988), *cert. quashed*, 759 P.2d 200 (N.M. 1998).

53. Sleeper v. Ensenada Land & Water Association, 760 P.2d 787 (N.M. Ct. App. 1988). *See* Shannon A. Parden, Note, *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).

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

Mexico, F. Lee Brown and Helen Ingram concluded that "water has an emotional and symbolic meaning for the West that transcends its commodity value."[55] Local control is one way, albeit not exclusive, by which these place and community values can be recognized. Once these values are recognized as legitimate, the case for preemption diminishes. Professor Daniel Rodriguez wrote, "[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 these same issues are not simultaneously matters of local concern."[56] 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.[57]

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 ground water extraction regulation. The state's conscious refusal to regulate has opened the door to counties that want to control the export of ground water. Potential exporters challenged these ordinances as outside the scope of local authority. However, a California intermediate court of appeals refused to find field preemption and upheld the power of counties to prohibit the export of groundwater because California had not effectively occupied the field of ground water regulation.[58] A Colorado court reached a similar conclusion when 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. Now, Colorado has begun to grant west slope counties more of a voice in water diversion issues as these counties gain population and develop major tourist economies. State legislation allows counties to designate certain activities, such

55. F. LEE BROWN & HELEN M. INGRAM, WATER AND POVERTY IN THE SOUTHWEST 187 (1987).

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

57. George Homsy, *Liquid Gold*, 63 PLANNING 10 (1997).

58. Baldwin v. County of Tehama, 31 Cal. App. 4th 166 (Cal. Ct. App. 1994).

as transbasin diversion, a matter of state interest and to develop permitting procedures for these activities.[59] 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 and operate any particular water diversion project."[60]

B. Subordinating Utility Service to Growth Control

Growth management can also be enhanced as cities take control over the determinants of growth. Water service is crucial to urban growth. Cities historically have assumed that, as public utilities, they have a duty to serve all entrants and thus they must locate adequate water supplies. This basic principle is premised on the assumption that the public interest requires courts to police monopoly under production.[61] This duty to serve remains an important limitation on utility service, especially as gas and electric service are deregulated. However, the primary beneficiaries of this doctrine should be captive consumers,[62] not new entrants into a community.[63] Communities that wish to define growth and non-growth areas have articulated a public interest in limiting utility service to confined areas. Courts initially

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59. COLO. REV. STAT. § 24-65.1-501 (1998).

60. City of Colorado Springs v. Board of Comm'rs of the County of Eagle, 895 P.2d 1105, 1116 (Colo. Ct. App. 1994), *cert. denied*, 1995 Colo. Lexis 443 (Colo. 1995), *cert. denied*, 116 S. Ct. 564 (1995).

61. *Cf.* Interstate Commerce Comm'n v. Oregon Wash. R.R. & Navigation Co., 288 U.S. 14 (1932) (Cardozo, J., dissenting).

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

63. 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). However, cities may be subject to equal protection, Beck v. Town of Raymond, 394 A.2d 847 (N.H. 1978), and statutory duties not to discriminate against newcomers. *See, e.g.*, CAL. GOV. CODE § 65302.8 (West 1997); *see also* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 455-57 (1977).

suggested that this conflicted with the duty to serve.[64] The traditional subordination of growth management to utility service ignores the fact a new public interest has been defined by local government. As more recent courts have held, a city should not be required to undermine its own growth management policy simply because it is also a water supplier.[65] Nonmunicipal suppliers should be subordinate to this policy so long as the policy does not impair their constitutionally guaranteed fair rate of return. Consistent with this analysis, the Nevada Supreme Court held that a county may deny a subdivision permit because it is inconsistent with a county water-use plan.[66] To preserve the hydrologic balance in the southern part of Washoe County (Reno), the county's plan prohibited subdivisions that are five acres or less "until a new water source is available." Although the developer argued that the county's action impaired his state water rights, the court held that the power to define rational growth "includes the ability of county government to determine water availability for itself."[67]

Recent legislation in Arizona,[68] Idaho and California imposes increased water planning duties on cities, lessens the duty to serve, and opens 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 the power to deny a water transfer from agriculture to municipal use because the city does not need it. Like Colorado's attempts to subject municipal water planning to the anti-speculation doctrine, the Idaho statute gives local governments almost unlimited discretion to make population growth projections. Idaho recently limited municipal discretion to provide some basis to

64. Robinson v. City of Boulder, 547 P.2d 228 (Colo. 1976), *overruled by* Board of County Comm'rs of Arapahoe County v. Deaer Bd. of Water Comm'rs, 718 P.2d 235 (Colo. 1986).

65. Dateline Builders, Inc. v. City of Santa Rosa, 194 Cal. Rptr. 258 (Cal. Ct. App. 1983).

66. Serpa v. County of Washoe, 901 P.2d 690 (Nev. 1995).

67. 901 P.2d at 692.

68. ARIZ. REV. STAT. § 9-461.05 and § 11-821 (large counties must include a water supply acquisition element in their general plans).

address the water resources impacts of land conversion around Boise.[69] 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."[70] 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."[71] This standard is used to evaluate transfers. The Director must determine 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.[72] This balancing 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 water transfer.

California has linked water supply and land use planning objectives in a way that gives local governments some ability to control the use of local water resources. Bay Area growth has spilled into the Central Valley, one of the world's most productive agricultural districts. Problematic as it is, the case for farm production preservation is stronger here than in many other parts of the West.[73] 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 by 2040.[74] One half of the projected farmland conversion is

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69. WILLIAM E. RIEBSAME ET AL., WESTERN WATER POLICY REVIEW ADVISORY COMMISSION, WESTERN LAND USE TRENDS AND POLICY: IMPLICATIONS FOR WATER RESOURCES 94-95 (1997), reports that officials are concerned about the maintenance of canal distribution systems as canals are rerouted and ground water recharge.

70. IDAHO CODE § 42-202B(4) (1990).

71. *Id.* § 42-202B(5).

72. *Id.*

73. In 1981 the United States Department of Agriculture published the NATIONAL AGRICULTURAL LANDS STUDY which identified a farmland "crisis." Although agricultural economists have discounted any food or fiber threat from farmland loss, one economist 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 loses. RIEBSAME, *supra* note 69, at 75-76.

74. *Id.* at 108.

classified prime farmland by the Natural Resources Conservation Service.[75] 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 water supply augmentation project. The statute does not impose a de facto duty on a city to acquire sufficient water rights, but it limits the power of cities to approve new growth while deferring the issue of adequate water supply until a later date.

IV. PRIVATE PUBLIC PARTNERSHIPS AND COLLABORATIVE GOVERNANCE

Throughout the western United States, many communities are turning to two innovative solutions—stakeholder collaboration and the use of mixed public-private policy instruments—to control their destiny. Stakeholder governance and new land tenure sharing regimes have the potential, which is yet untested, to overcome many of the legal barriers outlined in the first section of this paper. 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. Stakeholder collaboration efforts involve combinations of public and private groups which seek consensus solutions to complex resource management conflicts.[76] These efforts are driven by the fear that federal mandates, such as the enforcement of the Endangered Species Act, will foreclose resource use options.[77] More generally these efforts reflect a desire of local communities and interests to craft

75. *Id.*

76. *See* Mark Sagoff, The View From the Quincy Library: Civic Engagement in Environmental Problem Solving (1999) (unpublished manuscript) (on file with author).

77. The best introduction to collaborative governance is Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

responsive local solutions consistent with federal and state environmental protection and related mandates. The rise of these experiments also reflects the paradox that federal and state governments possess great regulatory powers but less and less political power to employ them.

Collaborative governance is complemented by the growing "recommunitization" of land in the West and throughout the country through the use of land trusts and the purchase or gift of land conservation servitudes.[78] Property rights scholars are generally skeptical of shared ownership because it promotes inefficiency.[79] However, the efforts to create blended public private-public property regimes or regimes that permit greater shared control over the use of property are consistent with the recent work of some property rights scholars, such as Robert Ellickson, who recognize that limited group control can play a positive role in resource management.[80] Many areas of the West have turned to land conservation trusts to preserve the traditional landscape. There is a growing recognition that commodity production, biodiversity conservation, and the preservation of low density landscape forms and scenic vistas are not always incompatible.

A landowner who decides to donate or sell land for the purpose of maintaining the status quo has many options.[81] Individual owners can 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. These land trusts reflect a desire to integrate public and private land use, including commodity production, into biodiversity conservation.

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78. For a fascinating account of a successful effort to operate a community farm in a Boston suburb see BRIAN DONAHUE, RECLAIMING THE COMMONS: COMMUNITY FARMS & FORESTS IN A NEW ENGLAND TOWN (1999).

79. Excessive recognition of individual claims can also lead to inefficiency. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163 (1999); Michael A. Heller, *The Tragedy of the Anticommoms: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

80. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1388-92 (1993).

81. Itzchak E. Kornfeld, *Conserving Natural Resources and Open Spaces: A Primer on Individual Giving Options* 23 ENVTL. L. 185 (1993).

There are several other options that communities can use to balance development and preservation of the status quo such as transforceable development rights ("TDRs") or water trusts.[82] Additionally, water entitlements could be pooled in an entity. In return, each right holder would receive a perpetual entitlement to receive a fixed supply of water. The rights could either be held by a trust or in common among the rights holders.[83] 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.[84] Collectively, these efforts preserve the status quo while incorporating the element of community interest into private land rights that is missing from the common law theory of exclusive, individual ownership.

V. CONCLUSION

Small communities are finding new methods of preserving their traditional landscape and its associated cultural values. Although the idea that change can be substantially moderated is alien to United States thinking, the environmental movement and the recognition that there are a variety of nontraditional cultures worth preserving are

82. TDRs separate the right to develop from ownership of a specific tract in order to 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 constitutionally of the concept remain. The Supreme Court appeared to hold that TDRs were a constitutionally adequate just compensation substitute in the 1970s. *See* Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); 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). However, at least three members of the current Court seem to have rejected this reasoning. *See* Suitium v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) (Scalia, J., concurring).

83. 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.

84. *See* Ann Louise Strong, *Transfer of Development Rights to Protect Water Resources*, 50 LAND USE L. & ZONING DIGEST 3 (1998).

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.