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#### Recommended Citation

10 Wyo. L. Rev. 1 (2010)

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# WYOMING LAW REVIEW

VOLUME 10

2010

NUMBER 1

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## SUSTAINABILITY STARTS LOCALLY: UNTYING THE HANDS OF LOCAL GOVERNMENTS TO CREATE SUSTAINABLE COMMUNITIES

*Jerrold A. Long\**

*All, then, are agreed on the pressing nature of this problem, all are bent on its solution, and though it would doubtless be quite Utopian to expect a similar agreement as to the value of any remedy that may be proposed, it is at least of immense importance that, on a subject thus universally regarded as of supreme importance, we have such a consensus of opinion at the outset.<sup>1</sup>*

After a recent contentious, and thus completely normal, faculty meeting, a colleague referred to the famous and widely-attributed criticism of academia that the intensity of our disputes is only matched by their inconsequence. So when I see the recent influx of scholarship discussing the role of local governments in promoting or ensuring environmental protection, battling climate change, or attaining sustainable development, I wonder if the intensity of these discussions is similarly matched by their inconsequence.<sup>2</sup> But when Wal-Mart<sup>3</sup> and the

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<sup>1</sup> EBENEZER HOWARD, GARDEN CITIES OF TOMORROW 13 (2d ed. 1902). The “problem” at issue was the overcrowding allegedly caused by citizens abandoning the countryside to move into the cities.

<sup>2</sup> See, e.g., NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW (John Nolan ed., Env'tl. Law Inst. 2003); Philip R. Berke, *Integrating Bioconservation and Land Use Planning: A Grand Challenge of the Twenty-First Century*, 10 VT. J. ENVTL. L. 407 (2009); Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231 (2008); John Nolan, *Climate Change and Sustainable Development: The Quest for Green*

International Trade Union Confederation,<sup>4</sup> the United Nations<sup>5</sup> and the State of Idaho,<sup>6</sup> and even the Republican<sup>7</sup> and Democratic<sup>8</sup> parties, can all agree on the 'pressing nature' of a specific problem, then maybe it is time to begin thinking more seriously about how we might finally resolve the problem on the ground.

In this article, I accept that local governments have a potentially significant role to play in defining and attaining social, economic and ecological sustainability.<sup>9</sup> Sustainable communities must emerge from a *local* exercise in creating an imagined future and developing the means to achieve that future. In order to implement their visions of sustainable community effectively, individual communities—cities, towns and counties—must possess the land-use or other natural resource management authority to build the places they imagine. Without that authority, the act of imagining a sustainable place is largely meaningless, as the tools do not exist to get there.

Notwithstanding the substantial literature suggesting they can do something about creating sustainable places, many local governments lack the legal authority to implement place-based initiatives—including local land-use plans, and the land-use ordinances crafted to achieve the goals in those plans—that will get them to the sustainable future they desire. This article will identify one relatively simple, but potentially overlooked, legal impediment to the creation of sustainable communities. Other impediments exist, but by identifying this single impediment, and considering the negative consequences that it can engender, I hope to contribute to a discussion that might ultimately lead to the granting of authority to local governments that is sufficient to enable them to achieve their own visions of sustainability.

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*Communities*, 61 PLANNING & ENVIRONMENTAL LAW 3–10, n.7 (2009); Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 FORDHAM URB. L.J. 537 (2009).

<sup>3</sup> See Andrew C. Revkin, Wal-Mart's New Sustainability Push, Dot Earth, <http://dotearth.blogs.nytimes.com/2008/10/23/wal-mart-china-ethics-environment/> (Oct. 23, 2008, 8:14 EST).

<sup>4</sup> See Trade Union Sustainable Development Unit, <http://www.tradeunionsdunit.org/> (last visited Nov. 4, 2009).

<sup>5</sup> See UN Department of Economic and Social Affairs: Division for Sustainable Development, <http://www.un.org/esa/dsd/index.shtml> (last visited Jan. 6, 2010).

<sup>6</sup> See IDAHO DEP'T OF ENVTL. QUALITY, IDAHO ENVIRONMENTAL GUIDE: A RESOURCE FOR LOCAL COMMUNITIES 1 (2009), available at [http://www.deq.idaho.gov/ieg/ieg\\_entire\\_0309.pdf](http://www.deq.idaho.gov/ieg/ieg_entire_0309.pdf).

<sup>7</sup> See GOP Goes Green in Minneapolis—St. Paul, <http://www.gopconvention2008.com/features/greenfactsheet.pdf> (last visited July 3, 2008).

<sup>8</sup> See The Democratic Party, Environment & Climate Change, [http://www.democrats.org/a/national/american\\_leadership/clean\\_environment/](http://www.democrats.org/a/national/american_leadership/clean_environment/) (last visited Jan. 6, 2010).

<sup>9</sup> In other work, I argue although local governments can contribute to reducing the effects of global climate change, a number of significant obstacles must be overcome first. Jerrold A. Long, *From Warranted to Valuable Belief: Local Government, Climate Change, and Giving up the Pick-up to Save Bangladesh*, 49 NAT. RESOURCES J. (forthcoming 2010).

The seeds of this discussion germinated, as perhaps they should, when I witnessed the on-the-ground effects of separating land-use authority from the unique characteristics of different lands, and the people and communities that live on and best understand those unique lands. This past winter, on an unseasonably warm Saturday afternoon, I spent a few hours wandering around the hills east of Moscow, Idaho on my bicycle. A couple of weeks before, a substantial rainstorm and 50 degree temperatures had melted much of our early-winter snowpack. On a bicycle, the effects of water on the land are readily apparent, particularly where water and roads intersect and interact. Every ditch or depression showed signs of substantial water flow—flattened grass extended well above the apparently typical high-water marks, new undercuts adorned ditch and stream banks, new channels cut across pastures, and a few areas had even pulled the road graders out of their winter hibernation (leaving behind the temporarily forgotten, but now unnecessary, “water over road” signs).

Early in the ride, I was both astonished and impressed by the effect of rapidly melting snow on the landscape, but as I continued to ride, the different examples of flooding and erosion triggered a series of memories of rain storms and snow melt, and the consequences of both on the landscape. In my early years of law practice, my wife and I lived on a treeless hillside between Cheyenne and Laramie, Wyoming. Over the years, I waged a constant battle with the water that collected on and flowed across our driveway, forming an ever deepening gully that removed what little topsoil we had. As a law student in Colorado, I saw how the ground below popular climbing boulders or cliffs changed as the bare soil washed away with summer thunderstorms. But most significant, as a very young child, I spent one rainy Sunday morning watching my father and our neighbors try to control the rising waters of the open storm sewer that flowed across the back boundary of our yard. These memories are not particularly unique, as water flows across and changes land wherever both occur. In fact, it was precisely what I perceived as a lack of uniqueness in my own memories and experiences that initially struck me that afternoon on my bicycle.

But upon reflection, it was the precise, place-specific effect of water on land that continued to trouble me long after my ride ended. Without an inopportunistically placed cedar fence in my neighbor's yard, the stormwater would have caused little trouble on that long-ago Sunday morning. The specific and attractive shapes and textures of those Colorado boulders determined the level of erosion at their feet. And but for my peculiarly contoured and routed driveway, combined with an astonishing lack of topsoil (and vegetation), I might have had no troubles with my eroding Wyoming hillside. But for the basic laws of physics governing the effect of running water on an erodible substrate, these examples of the interaction of water and land share little in common.

A few weeks after my winter bike ride, I sat in a small seminar room with eleven law students discussing potential new approaches for addressing non-

point source water pollution. A few students suggested, perhaps half-heartedly, a more aggressive state-wide (or maybe even federal) regulatory regime, in which agency personnel could walk a region's waterways looking for pollution sources to be regulated (and perhaps prosecuted). My own thoughts returned to my bike ride, and I suggested that rather than being a waterway issue—which could be approached by focusing on individual lakes, streams and rivers—this was a *landscape* issue, requiring a much broader and more holistic approach that climbs out of the streambeds and walks the upland farms, fields and roadways.

This insight is nothing new, of course, and Congress recognized early on that a national program might not address non-point source pollution in an effective fashion that would also be accepted, however begrudgingly, by landowners or the state and local governments accustomed to regulating land use. More to the point of this article, neither is this insight about a landscape approach necessarily about sustainability in any obvious sense, particularly given its typical presentation as primarily a jurisdictional question. But I believe, to the contrary, that it is specifically, and perhaps exclusively, about sustainability, precisely *because* it is a jurisdictional question. Achieving sustainability requires that we rethink our approach to regulating our western landscapes.

Given the complexities in bringing economic, ecological, and equitable concerns together in the management of a single resource—let alone an entire community, region, state or country—successful implementation of sustainability principles will require multiple experimentations, failures, re-envisionings and new experimentations. And this process will necessarily vary with the context of specific places, as different communities identify different economic, ecologic and social values that are worth sustaining. In other words, attaining sustainable communities (with an emphasis on the plural) will require allowing each community to identify its own pathway toward sustainability.

This article will make that argument, in the context of the communities of the western United States, in the following fashion: First, I will address very briefly the concept of sustainability generally, as the idea has developed worldwide. The article will then provide an example of how those principles have been implemented—not always successfully—on the ground in the American West, with the specific intent of demonstrating the difficulty of applying an apparently simple and straightforward, but very general and not context specific, definition of sustainability to a specific place with a specific problem. The article will then argue that over the coming century, creating and maintaining sustainable western communities will require a changed focus onto the West's *private* lands. I will describe a single example of the legal impediments that might exist to creating sustainable western communities, with suggestions for how to overcome those impediments.

In making these arguments, I make the following two assumptions: First, and most significant, we have yet to engage in a real discussion—or better said, series of discussions—about what a sustainable West might look like. Second, not yet knowing the end we hope to achieve, we are necessarily unable to create a pathway—including, specifically, the legal tools or approaches—that will take us there. I intend this article to contribute toward a discussion about how we might resolve both of those problems.

## I. SUSTAINABLE DEVELOPMENT

In 1983, the United Nations convened the World Commission on Environment and Development, chaired by Gro Harlem Brundtland (and subsequently referred to as the “Brundtland Commission”).<sup>10</sup> The Commission’s report to the U.N. General Assembly, titled *Our Common Future*, provides what has now become the widely accepted definition of “sustainable development”: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>11</sup> The Report characterizes sustainability as containing three components, each of which is equally important: ecology, economy and social equity. The first of these tends to receive the most attention, perhaps for the seemingly obvious reason that it is relatively easier to regulate the preservation of a specific ecological resource (e.g., a national park) than to simultaneously protect ecological resources while ensuring socially-equitable economic development. But the Brundtland Commission recognized that “our inability to promote the common interest in sustainable development is often a product of the relative neglect of economic and social justice within and amongst nations.”<sup>12</sup>

The Brundtland Commission’s definition is beguilingly simple and easily understood, at least in the abstract. But applying the definition on the ground requires posing and attempting to answer a wide range of additional questions, the most simply formulated, if not simply answered, of which is, ‘what does sustainability look like in *this* place?’ The difficulties inherent in this exercise are perhaps best demonstrated by the efforts to describe sustainable development as a concept in academic literature. A popular sustainable development reader—described by the Journal of the American Planning Association as “a comprehensive . . . compendium of the state of the art knowledge” of sustainability—combines forty-eight articles from a wide variety of disciplines to create a “foundation for understanding” approaches to sustainability.<sup>13</sup> The articles include Leopold’s *The*

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<sup>10</sup> U.N. World Comm’n on Env’t & Dev., *Our Common Future: Report of the World Commission on Environment and Development*, U.N. DOC. A/42/427 (May 21, 1987) [hereinafter “the Report”].

<sup>11</sup> *Id.* at 43.

<sup>12</sup> *Id.* at 49.

<sup>13</sup> THE SUSTAINABLE URBAN DEVELOPMENT READER (Stephen M. Wheeler & Timothy Beatley eds., 2d ed. 2009).

*Land Ethic*,<sup>14</sup> *Waste as a Resource* by John Tillman Lyle,<sup>15</sup> and *The LEED® Green Building Rating System* by the U.S. Green Building Council,<sup>16</sup> among many other articles and topics. Each of the forty-eight articles is related to the Brundtland Commission's definition in some relatively obvious fashion, but the combination of the various articles in a single text makes equally obvious how difficult it is to capture sustainability in any single place, work, or perhaps most important, regulatory approach.

On that point, over the past two decades, a body of legal scholarship has arisen discussing potential legal approaches to attaining the sustainability goals identified by the Brundtland Commission. Notwithstanding that ongoing discussion in legal circles, we have reached little consensus on how to implement sustainability principles on the ground in real, workable legal regimes. J.B. Ruhl overstated (admittedly) this problem as follows:

[S]peaking as a practicing environmental attorney, I am sick to death of hearing about sustainable development. What is it? What do I do about it? How do I make it happen? What am I supposed to tell my client to do, or not to do? I need answers to those questions, and I am not finding them in law review articles, policy papers, and engineering journals. Don't talk to me about sustainable development until you have the answers.<sup>17</sup>

A. Dan Tarlock made a similar point in the title of his essay *Ideas Without Institutions: The Paradox of Sustainable Development*.<sup>18</sup> Professor Tarlock suggested that implementation of sustainability principles requires the embodiment of sustainability "in a set of legal principles that constrain behavior, in order that it may be integrated into existing legal systems," as well as an institutional infrastructure to implement those legal principles.<sup>19</sup> Unfortunately, both individual and institutional expectations and patterns of behavior prevent, or at least make more difficult, sustainability's implementation.<sup>20</sup> When the *Tulsa Law Review* dedicated its Fall 2008 issue to a symposium on environmental sustainability—notably leaving out economic and social sustainability—Professor Ruhl introduced the issue by noting:

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<sup>14</sup> *Id.* at 23.

<sup>15</sup> *Id.* at 165.

<sup>16</sup> *Id.* at 273.

<sup>17</sup> J.B. Ruhl, *The Seven Degrees of Relevance: Why Should Real-World Environmental Attorneys Care Now About Sustainable Development Policy?*, 8 DUKE ENVTL. L. & POL'Y F. 273, 274 (1998).

<sup>18</sup> See A. Dan Tarlock, *Ideas Without Institutions: The Paradox of Sustainable Development*, 9 IND. J. GLOBAL LEGAL STUD. 35 (2001).

<sup>19</sup> *Id.* at 40.

<sup>20</sup> See *id.*

It would be nice if we could know that an action or policy actually would be sustainable in this euphoric sense in which the term has come to be used. But we cannot. In fact, it is quite simply and absolutely impossible for us to know that anything is this sustainable.<sup>21</sup>

Interestingly, in referring to “sustainable in this euphoric sense,” Professor Ruhl is referring to his own definition (or his own characterization of the definition) of sustainable development.<sup>22</sup>

Rather than seek to overcome these problems, this article embraces this confusion regarding both the definition and implementation of sustainability. It is precisely those difficulties that most recommend identifying the specific communities of interest best able to envision a sustainable place, and then granting those communities the legal authority to implement that vision.

#### *A. Sustainability in the Western United States*

Arguably unlike other areas of the country,<sup>23</sup> conflict over land use has long been considered an integral part of the public’s understanding of the western United States, particularly the Intermountain West. The West gave rise to the “Sagebrush Rebellion,” the county-supremacy movement, the wise-use movement, and the modern property rights movement.<sup>24</sup> These conflicts are not merely recent developments, as the West’s history of land-use conflict extends over a century before the Sagebrush Rebellion.<sup>25</sup> But for much of its history as a place

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<sup>21</sup> J.B. Ruhl, *Law For Sustainable Development: Work Continues on the Rubik’s Cube*, 44 TULSA L. REV. 1, 1 (2008).

<sup>22</sup> J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 STAN. ENVTL. L.J. 31, 39 (1999).

<sup>23</sup> Western literature is replete with references to the West’s regional exceptionalism. The most famous of these is Wallace Stegner’s reference to the West as the “native home of hope.” WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* 38 (1969). In focusing on the Intermountain West, this article necessarily accepts that there might be something to learn by looking at the region as a distinct place. That assumption is based, however, more on what I view to be the similarities between the modern West and the rest of the country, rather than any particular western exceptionalism. But in using “arguably” in this specific context, I do not intend to refute necessarily or call into doubt the statement that follows it. To the contrary, on this particular point at least, the West is perhaps (or at least was) a bit different.

<sup>24</sup> See, e.g., Harvey M. Jacobs, *The “Wisdom” but Uncertain Future of the Wise Use Movement*, in *WHO OWNS AMERICA?: SOCIAL CONFLICT OVER PROPERTY RIGHTS* 29 (Harvey M. Jacobs ed., 1998); Nancie G. Marzulla, *Property Rights Movement: How it Began and Where it is Headed*, in *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE* 39 (Phillip D. Brick & R. McGreggor Cawley eds., 1996); Scott Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525 (1994).

<sup>25</sup> See, e.g., TERRY L. ANDERSON & PETER J. HILL, *THE NOT SO WILD, WILD WEST: PROPERTY RIGHTS ON THE FRONTIER* (2004); Char Miller, *Tapping the Rockies: Resource Exploration and*



where people live on and fight over land, the locus of those battles has been the public lands.<sup>26</sup> From the beginnings of the public lands West, with the creation of Yellowstone National Park and subsequent initial forest reserves on its boundaries, through the “movements” noted above, and current battles over roadless rules,<sup>27</sup> winter use plans and oil-and-gas development, the West’s personality has largely been defined by opposition to a federal landlord. This personality is largely one of entrenched disagreement over the appropriate use, and control, of the public’s land. In attempting to understand how any notion of “western sustainability” might emerge, it seems useful to begin a discussion of western sustainability with a few thoughts about how that concept has played out on those public lands. The West’s approach to sustainability on the federal lands might provide insight into how it might implement sustainability on its private lands.

Although the Intermountain West is the nation’s last settled and thus youngest region, sustainability is not a new concept. Particularly in the public lands context, we have created a variety of legal tools to approach sustainability with respect to specific resources. Perhaps most famous of these sustainability approaches is in the National Park Service Organic Act, which provides that the parks shall be managed in a fashion “as will leave them unimpaired for the enjoyment of future generations.”<sup>28</sup> Given that direct language, and the relatively simple purpose of the national parks, at least relative to other regulated public lands, it might seem like some version of sustainability—perhaps a version focusing primarily on ecological sustainability, if nothing else—would emerge readily in the national parks. But that is not necessarily the case.

The language quoted above from the Organic Act is not complete.<sup>29</sup> The complete relevant portions of the purpose provision of the Act provide:

The [National Park Service] *shall promote and regulate the use* of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to

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*Conservation in the Intermountain West*, in REOPENING THE AMERICAN WEST 168 (Hal K. Rothman ed., 1998).

<sup>26</sup> I use the phrase “public lands” in this article to refer to all lands managed by the federal government, rather than simply those managed by the Bureau of Land Management. See 43 U.S.C. § 1702(e) (2006).

<sup>27</sup> See Ray Ring, *Roadless-less: The Campaign to Protect Unroaded Forests Gets Torn Apart by a Wyoming Judge in “Half-Assed Retirement,”* HIGH COUNTRY NEWS, Nov. 9, 2009.

<sup>28</sup> 16 U.S.C. § 1 (2006).

<sup>29</sup> *Id.*

*provide for the enjoyment* of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.<sup>30</sup>

This mandate suggests something of an internal contradiction. The National Park Service (NPS) must “promote” the use of the national parks in a manner consistent with the purpose of those parks. The sentence describing that purpose contains two verb phrases: to conserve *and* to provide for the enjoyment of. It is only after this second verb phrase that the “sustainability” language identified above occurs; although the verb “conserve” might also be considered to include concepts of sustainability, even if it is not necessarily the sustainability we would recognize today.

This subtle contradiction in what otherwise seems to be relatively straightforward language regarding how the national parks should be managed has been interpreted to provide for two conflicting mandates—“the dual mandate of recreation (‘promote the use’ and ‘provide for the enjoyment’) versus conservation (‘regulate the use,’ ‘conserve,’ and ‘leave unimpaired’) . . . .”<sup>31</sup> The point here is not to contribute to an ongoing debate regarding whether the NPS has been given a mandate with two conflicting purposes (other than to suggest perhaps that this ‘conflicting mandate’ is no more internally conflicting than the concept of sustainable development). Sustainability necessarily concerns these two components—use *now* and use in the future. In fact, use of the word “conserve” alone suggests the same interpretation.

In 1905, Gifford Pinchot suggested the following regarding the management of the nation’s new national forests: “Where conflicting interests must be reconciled, the question shall always be answered from the standpoint of the greatest good of the greatest number in the long run.”<sup>32</sup> Pinchot used this notion from utilitarianism to define the term “conservation,” and thus, for Pinchot at least (who had some influence in public policy matters in the first decades of the twentieth century) the verb “to conserve” would have incorporated these allegedly conflicting notions of present enjoyment and leaving unimpaired. But Pinchot took his understanding of the role of *present* use in conservation a bit further. In *The Fight for Conservation*, Pinchot articulated the principles of conservation, in part, as follows:

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<sup>30</sup> *Id.* (emphasis added).

<sup>31</sup> Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 851, 862 (2009). See also Robin W. Winks, *The National Park Service Organic Act of 1916: “A Contradictory Mandate?”*, 74 DENV. U. L. REV. 575 (1997).

<sup>32</sup> This statement is generally attributed to a February 1, 1905, letter of instructions to Gifford Pinchot from Secretary of Agriculture James Wilson that is considered to have been drafted by Pinchot. See, e.g., *Forest Transfer Act of 1905*, WHAT’S NEW? (U.S. Forest Serv.), June 15, 2009, available at [http://www.fs.fed.us/global/wsnew/fs\\_history/issue15.pdf](http://www.fs.fed.us/global/wsnew/fs_history/issue15.pdf) (part of a series on the history of the Forest Service).

The first great fact about conservation is that *it stands for development*. There has been a fundamental misconception that conservation means nothing but the husbanding of resources for future generations. There could be no more serious mistake. Conservation does mean provision for the future, but it means also and first of all the recognition of the right of the present generation to the fullest necessary use of all the resources with which this country is so abundantly blessed. Conservation demands the welfare of this generation first, and afterward the welfare of the generations to follow.<sup>33</sup>

In the specific context of water resource development, Pinchot added: “Conservation stands emphatically for the development and use of water-power now, without delay.”<sup>34</sup>

It is, of course, impossible to know with any certainty whether Congress had Pinchot’s definition of conservation specifically in mind when it inserted the verb “to conserve” in the NPS Organic Act of 1916. But it does seem that Congress was focused more on the use of the parks than their preservation:

[T]he legislative history of the Organic Act provides no evidence that either Congress or those who lobbied for the act sought a mandate for an exacting preservation of natural conditions. An examination of the motivations and perceptions of the Park Service’s founders reveals that their principal concerns were the preservation of scenery, the economic benefits of tourism, and efficient management of the parks. Such concerns were stimulated by the boosterism prevalent in early national park history, and they in turn greatly influenced the future orientation of national park management.<sup>35</sup>

Given that apparent motivation, it is notable that the “unimpaired for future generations language” only qualifies the “provide for the enjoyment of” purpose of the parks. The “unimpaired” language does not, therefore, require a *preservation* approach to managing the national parks.

But whatever Congress’s intent in establishing the National Park Service, this story begins to suggest some of the difficulty that might arise in trying to implement just a single component of the Brundtland Commission’s

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<sup>33</sup> GIFFORD PINCHOT, *THE FIGHT FOR CONSERVATION* 42 (1910) (emphasis added).

<sup>34</sup> *Id.* at 43–44.

<sup>35</sup> RICHARD WEST SELLARS, *PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY* 29 (1997), available at [http://www.nps.gov/history/history/online\\_books/sellars/chap2.htm](http://www.nps.gov/history/history/online_books/sellars/chap2.htm).

definition of sustainability.<sup>36</sup> While the concept of managing a national park to protect its resources for future generations seems straightforward, the NPS has struggled mightily in attempting to implement this limited notion of ecological sustainability, even in just a single park with respect to a single type of use. Since December 2000, the NPS has issued multiple temporary or final rules regarding the use of snowmobiles in Yellowstone National Park and has had those rules considered and overturned in eight separate decisions by two different (and we might say, competing) federal district courts.<sup>37</sup> It's been almost ten years since the Clinton Administration issued the first winter use plan that would have phased out snowmobile use in Yellowstone, but the NPS might now be further from reaching closure on this issue than when it started. What level of snowmobile use allows for current enjoyment of the park? What level ensures that snowmobiles not impair the park in such a way that it cannot be enjoyed by future generations?<sup>38</sup>

Of course, the NPS Organic Act is not the only public lands statute to incorporate sustainability principles. The Multiple Use and Sustained Yield Act of 1960 included the concept in its title, and defines "sustained yield" as: "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land."<sup>39</sup> The National Forest Management Act also contains multiple references to renewable resource management and sustained yield of forest resources.<sup>40</sup> Even the Federal Land Policy and Management Act states it is the policy of the United States that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition."<sup>41</sup> These are all impressive statements

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<sup>36</sup> Although it might be more accurate to say that this story suggests some of the difficulty that might arise in trying to establish that ecological sustainability is even the goal to begin with.

<sup>37</sup> See also Hillary Prugh, *To Sled or Not to Sled: The Snowmobiling Saga in Yellowstone National Park*, 11 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 149 (2005). See generally NATIONAL PARK SERVICE, WINTER USE TECHNICAL DOCUMENTS, <http://www.nps.gov/yell/parkmgmt/winteruse/technicaldocuments.htm> (for a thorough analysis of the first 5 years of the controversy).

<sup>38</sup> The United States District Court for the District of Wyoming suggests we ask a third question: what level of snowmobile use protects the economies of gateway communities that surround the park? See *Int'l Snowmobiler Mfrs. Ass'n v. Norton*, 304 F. Supp. 2d 1278, 1288–89 (D. Wyo. 2004) (finding that the potential harm to businesses in communities surrounding the Park caused by eliminating snowmobiles outweighed the potential harm to the Park by allowing snowmobile use to continue).

<sup>39</sup> 16 U.S.C. § 531(b) (2006).

<sup>40</sup> See generally 16 U.S.C. §§ 1600–1687 (2006).

<sup>41</sup> 43 U.S.C. § 1701(a)(8) (2006).

of federal policies directed toward achieving sustainability on the West's public lands, but as the previous abstract mentions of "conflict" over the public lands suggest, these policies are only implemented with some difficulty, if at all.<sup>42</sup>

What the public lands controversies demonstrate, more than any other factor, is the difficulty that arises when the people who live in a place, and feel they know that place best, are not allowed to control the future of the place. The problems the United States District Court for the District of Wyoming found with the various snowmobile plans were less in the substance of the plans and more in the fact that those plans failed to take into account, in the judge's determination, the desires or input of the Wyoming communities surrounding the park.<sup>43</sup> This is perhaps best demonstrated in the most recent snowmobile related decision to be issued by the Wyoming court.<sup>44</sup> The United States District Court for the District of Columbia had already invalidated the Park Service's most recent winter use plan,<sup>45</sup> causing the Wyoming judge to note: "Initially, this Court finds it unfortunate that a United States District Court sitting over 2,000 miles away from the actual subject of this litigation feels compelled to hand down a rule affecting land that lies in this Court's backyard."<sup>46</sup> Notwithstanding this Wyoming judge's complaint, where the resource at issue is a national treasure like Yellowstone National Park, it may be entirely appropriate to "ignore" local feelings to implement a national good. But when the resource is a single community, with little national or state-wide importance, taking authority away from that community and placing it in the hands of individuals who do not know that place might lead to some justifiable anger and frustration.

The conflicts over the use of the West's public lands emerge from differing ideas about the purpose of those lands. While the problems born out of those differing ideas of purpose are largely resolved outside of the West, those conflicts provide insight into how the West might approach its own, apparently exclusively local, disputes. Because the same differing ideas about the purpose of land arise in the context of the private lands, we see similar themes emerge. What are the rights of the individual versus the broader public? To what extent can a community restrict an individual's ability to develop his or her own land? The same "development v. conservation v. preservation" arguments that arise regarding the national forests, public lands, or even national parks are now, increasingly, a part of the West's understanding of its private lands. And we are forced, in this

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<sup>42</sup> See generally CHARLES WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (1993).

<sup>43</sup> *Int'l Snowmobiler Mfrs. Ass'n*, 304 F. Supp. 2d at 1288–89.

<sup>44</sup> *Wyoming v. U.S. Dep't of the Interior*, Civ. No. 07-CV-00319-CAB (D. Wyo. Nov. 7, 2008).

<sup>45</sup> *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183 (D.C. Cir. 2008).

<sup>46</sup> *Wyoming*, Civ. No. 07-CV-00319-CAB, slip op. at 7.

context, to take the complaint about non-local decision makers “messaging with” Wyoming’s backyard a bit more seriously, given that in the private lands context, the use of the word “backyard” is often literal.

*B. Moving Between the Public Lands: Emerging Beliefs about the Purpose of Private Lands*

As the West emerges from its prolonged adolescence, its private lands, and the conflicts and conversations about how to use and manage those lands appropriately, contribute increasingly to the West’s twenty-first century personality. Over the past two decades, both the West’s population and the size of its urbanized or developed landscape have increased dramatically. Formerly unknown communities like Driggs, Pinedale, Livingston, or Moab are now arguably on a “first-name” basis with a broader portion of the country.<sup>47</sup> As new residents are attracted to these formerly unknown and perhaps unwanted places, the personalities of these communities change. These changes occur not because of changed management regimes on neighboring public lands, but rather because of changing ideas about the purpose of *private* lands. While the western United States are unlikely to continue the same dramatic growth indefinitely, some growth will necessarily continue. And with it will continue, or arise anew, conflicts over land.

Over the past few decades, the rate of population growth in the interior western states has far outpaced population growth in the rest of the country. Between 1970 and 2000, the counties that make up the central spine of the Continental Divide grew in population by 94.3%; the eight Rocky Mountain States<sup>48</sup> grew by 119.9% over the same period.<sup>49</sup> In contrast, the United States as a whole grew by only 38.5%.<sup>50</sup> Between 2000 and 2008, the United States grew in population by 8.0%.<sup>51</sup> The eight states of the Intermountain West, including the slow-growing eastern plains of Montana and Colorado, grew by 20.1% during the same period. Although certain areas of the interior West demonstrate high birth rates, most of the West’s recent and current growth results from migration from other areas of the United States.<sup>52</sup> And although the majority of the West’s inhabitants reside

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<sup>47</sup> To suggest that a substantial percentage of the country knows where, or what, “Driggs” is would be a significant overstatement. Adding “Idaho” likely only increases the confusion, as on hearing “Idaho,” most American citizens think of corn and a rural state somewhere near Illinois. But the fact that *any* percentage of the country has heard of Driggs, outside of the Greater Yellowstone Region, represents a very significant change in status of the town.

<sup>48</sup> Idaho, Montana, Wyoming, Nevada, Utah, Colorado, Arizona and New Mexico.

<sup>49</sup> THE 2004 COLORADO COLLEGE STATE OF THE ROCKIES REPORT CARD (Walter E. Hecox & F. Patrick Holmes III eds., 2004).

<sup>50</sup> *Id.*

<sup>51</sup> See generally United States Census Bureau, <http://www.census.gov/>.

<sup>52</sup> Samuel M. Otterstrom & Matthew Shumway, *Deserts and Oases: The Continuing Concentration of Population in the American Mountain West*, 19 J. OF RURAL STUD. 445 (2003).

in urban areas,<sup>53</sup> the rapid growth of the last few decades did not limit itself to the interior West's large cities and urban areas. Although many rural areas of the country are experiencing population growth, the non-metropolitan West grew three times faster than other non-metropolitan areas of the country between 1990 and 1997, with two-thirds of this growth resulting from in-migration.<sup>54</sup>

This rapid population growth has not been without consequences. Between 1980 and 2000, the U.S. population grew approximately 24%.<sup>55</sup> Over a shorter period of time—1982 to 1997—developed urban areas of the United States increased 34%.<sup>56</sup> The most recent Natural Resource Inventory data indicate that the developed area of the United States increased 48% between 1982 and 2003.<sup>57</sup> During that same period, the U.S. population increased approximately 25%.<sup>58</sup> Developed land area in the United States will continue to increase, with some estimates indicating it could increase by 79% for the period from 1997 to 2025.<sup>59</sup> Rural areas in the western states have experienced even greater disparities between population growth and developed area. Between 1970 and 1997, the population of the Greater Yellowstone Area in Montana, Wyoming and Idaho increased by 55%. Between 1975 and 1995, the developed urban area increased 348%, and the number of rural homes increased more than 400%.<sup>60</sup> Americans are not only growing individually larger, we are growing collectively larger, consuming far more space per person than ever before. Ranches and forests are now subdivisions, replacing wildlife habitat and open space with asphalt, “great” rooms with large picture windows, and swimming pools. The development has increased human-wildlife conflict (with the wildlife generally getting the short end of the deal), altered viewsheds, increased consumption of scarce water resources, and permanently altered local culture and social networks.<sup>61</sup>

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<sup>53</sup> See *id.*

<sup>54</sup> John B. Cromartie & John M. Wardwell, *Migrants Settling Far and Wide in the Rural West*, 14 RURAL DEV. PERSP. 2, 3 (Aug. 1999).

<sup>55</sup> See, e.g., Ralph J. Alig, Jeffery D. Kline & Mark Lichtenstein, *Urbanization on the U.S. Landscape: Looking Ahead in the 21st Century*, 69 LANDSCAPE & URB. PLAN. 219, 219 (2004). Census data are available at the United States Census website: <http://www.census.gov>.

<sup>56</sup> Alig et al., *supra* note 55, at 219–20.

<sup>57</sup> U.S. DEPT OF AGRIC., NATURAL RESOURCES INVENTORY: 2003 ANNUAL NRI (2007), available at <http://www.nrcs.usda.gov/technical/NRI/2003/Landuse-mrb.pdf>; Eric M. White, Anita T. Morzillo & Ralph J. Alig, *Past and Projected Rural Land Conversion in the U.S. at State, Regional, and National Levels*, 89 LANDSCAPE & URB. PLAN. 37 (2009).

<sup>58</sup> Census data are available at the United States Census website: <http://www.census.gov>.

<sup>59</sup> Alig et al., *supra* note 55, at 227.

<sup>60</sup> See Andrew J. Hansen et al., *Ecological Causes and Consequences of Demographic Change in the New West*, 52 BIOSCIENCE 151, 156 (2002).

<sup>61</sup> See *id.*

While these new residents are moving to the interior West, in part, because of the ecological amenities provided by the public lands,<sup>62</sup> they are not directly reliant on those public lands for their livelihoods, in contrast to many members of the generations of westerners that preceded them. The new economies arising in these growing communities do not rely on the extraction of natural resources, but rather develop around the services required by the new westerners,<sup>63</sup> many of who do not themselves rely on local economies for their own livelihoods.<sup>64</sup> In these evolving communities, the decisions of local public lands managers regarding timber harvests, animal unit months and road closures on national forests might recede in the face of more important issues, such as the availability of a good latte, a decent fly-fishing guide, or a nice place to have a glass of wine.<sup>65</sup>

For at least these reasons—the evolving personality of many western communities and the transition of *important*<sup>66</sup> development from the public to private lands—a sustainable West must be about more than simple federal lands sustainability. A truly sustainable West, if any such thing could ever exist, must accept and find meaning in the obvious fact that westerners primarily live and rely on the non-federal lands. Current notions of sustainability, as partly demonstrated above in the discussion of the public lands statutes, are unnecessarily limited and fail to address several potentially more important aspects of western life. For anyone with more than a very recent history in our region, the ongoing changes to the West's personality, cultures, and landscapes are increasingly obvious. Our neighborhoods, communities, and social networks “feel” the stress of our demographic transformations just as our forests, farms, ranchlands and water supplies do. All of these elements contribute to our vision of place and are worthy of sustaining. Thus, a complete western notion of sustainability requires consideration not only of timber supplies or rangelands, but also of the people and communities that live in and rely on those places. That consideration must begin in those communities.

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<sup>62</sup> Irene C. Frentz et al., *Public Lands and Population Growth*, 17 SOC'Y & NAT. RESOURCES 57, 65–66 (2004).

<sup>63</sup> Cromartie & Wardwell, *supra* note 54, at 5–6.

<sup>64</sup> See, e.g., William B. Beyers & David P. Lindahl, *Lone Eagles and High Fliers in the Rural Producer Services*, 11 RURAL DEV. PERSP. 2 (June 1996); Paul Lorah & Rob Southwick, *Environmental Protection, Population Change, and Economic Development in the Rural Western United States*, 24 POPULATION & ENV'T 255 (2003); Peter B. Nelson, *Quality of Life, Nontraditional Income, and Economic Growth: New Development Opportunities for the Rural West*, 14 RURAL DEV. PERSP. 32 (Aug. 1999).

<sup>65</sup> This is, of course, a caricature to some extent. But in many places it is much more accurate than exaggerated.

<sup>66</sup> That is to say, development that is *important* to the residents of western communities.



## II. THE AUTHORITY TO CREATE SUSTAINABLE COMMUNITIES

The authority to regulate generally—including the authority to regulate to achieve economic, ecological, and social sustainability—originates in the inherent power of government, most commonly referred to as the “police power.” The police power includes the authority to regulate to protect the public health, safety, and welfare. When representatives of the original states<sup>67</sup> met in Philadelphia to fix inadequacies in the Articles of Confederation, they crafted an agreement among sovereigns (the states) creating a new national government and granting it specific powers. Any powers not specifically granted to the new national government were retained by the states—implicitly in the granting of enumerated powers, but also explicitly in the Tenth Amendment.<sup>68</sup> While the United States Supreme Court’s interpretations of the Interstate Commerce and Necessary and Proper clauses allow for an expansive federal government,<sup>69</sup> the states retained two powers specifically relevant to the goals of creating and maintaining sustainable communities.

In the United States, both private land-use regulation and the allocation of water have been traditionally considered the province of state governments. In interpreting the reach of the Commerce Clause, the United States Supreme Court has recognized the need to avoid “a significant impingement of the States’ traditional and primary power over land and water use.”<sup>70</sup> The Court earlier recognized that even if the federal government has some ability to regulate water use, that ability is limited: “except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters.”<sup>71</sup> Congress similarly has recognized these limits on its authority.

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<sup>67</sup> Excluding Rhode Island, which did not send delegates to the Constitutional Convention in Philadelphia.

<sup>68</sup> U.S. CONST. amend. X.

<sup>69</sup> *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005). “First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.” *Id.* (internal citations omitted). In his concurring opinion, Justice Scalia suggested that Congress’s power extends beyond those articulated in this list:

the category of “activities that substantially affect interstate commerce,” is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

*Id.* at 34–35 (Scalia, J., concurring).

<sup>70</sup> *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001). In *Rapanos v. United States*, the United States Supreme Court restated this position: “Regulation of land use . . . is a quintessential state and local power.” 547 U.S. 715, 738 (2006).

<sup>71</sup> *California v. United States*, 438 U.S. 645, 662 (1978).

The 1977 amendments to the Clean Air Act included the following provision: “Nothing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land use.”<sup>72</sup> The Clean Water Act also provides that the Act will “recognize, preserve, and protect” the rights of States to exercise the primary responsibility over “land and water resources.”<sup>73</sup>

But while the regulation of water and land use are “quintessential” state powers, states generally treat the two areas differently. While all western states have established state-wide water allocation regimes, run by agencies or components of state government,<sup>74</sup> for the most part, the states do not directly implement their reserved *land-use* authority. Rather, the states delegate land-use authority to local units of governments—e.g., cities, towns and counties. In Idaho, for example, the state constitution grants the police power directly to local government: “Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.”<sup>75</sup> Wyoming grants the authority to regulate land to cities, towns and counties by statute,<sup>76</sup> as does Colorado.<sup>77</sup> The Standard State Zoning Enabling Act, published by the Department of Commerce in 1922 and still the primary influence of most state land-use enabling acts,<sup>78</sup> contains the following recommended language:

For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.<sup>79</sup>

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<sup>72</sup> 42 U.S.C. § 7431 (2006).

<sup>73</sup> 33 U.S.C. § 1251(b) (2006).

<sup>74</sup> In Wyoming, for example, water administration is entrusted to the State Engineer’s Office, and Title 41 of the Wyoming Code provides for a comprehensive regulatory regime for the state’s waters.

<sup>75</sup> IDAHO CONST. art. XII, § 2.

<sup>76</sup> See, e.g., WYO. STAT. ANN. § 18-5-201 (2009) (granting general land-use authority to counties) and § 15-1-601 (2009) (granting general land-use authority to cities and towns).

<sup>77</sup> See, e.g., COLO. REV. STAT. § 29-20-104 (2009).

<sup>78</sup> At some point, all 50 states adopted the Standard Zoning Enabling Act, and it remains in effect in basic form in 47 states. 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW § 19.1 (3d ed. 2003).

<sup>79</sup> ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT: UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS § 1 (1926).

Inherent in the grant of land-use authority from the state to local units of government is a limitation on local authority, i.e., local governments can only exercise the authority specifically granted to them by the state government. This concept is often referred to as “Dillon’s Rule.” Judge John F. Dillon first articulated what would become his “rule” in a case from 1868, where he argued:

Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.<sup>80</sup>

Judge Dillon later reiterated this argument in his influential *Commentaries on the Law of Municipal Corporations*, where he suggested that it is “a general and undisputed proposition of law” that municipalities may only exercise those powers expressly granted to them, necessarily or fairly implied in the express powers, or essential to the purposes of the municipality.<sup>81</sup> Any doubts about the extent of the municipality’s powers “is [to be] resolved by the courts against the [municipality].”<sup>82</sup>

In *Hunter v. City of Pittsburgh*, the United States Supreme Court relied on Judge Dillon’s work in holding that the state could require the union of two neighboring cities, notwithstanding the objection of one of the cities (in this case, Allegheny, which was annexed against its will by Pittsburgh).<sup>83</sup> The Court described the relationship between state and local governments as follows:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them. . . . The state, therefore, at its pleasure, may

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<sup>80</sup> *City of Clinton v. Cedar Rapids & M.R.R. Co.*, 24 Iowa 455, 475 (1868) (emphasis omitted).

<sup>81</sup> 1 JOHN FORREST DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* § 237, at 448 (5th ed. 1911).

<sup>82</sup> *Id.* § 237, at 450.

<sup>83</sup> 207 U.S. 161 (1907).

modify or withdraw all [municipal] powers, may take without compensation [municipal] property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.<sup>84</sup>

It should be unsurprising that local governments in the western United States similarly exist as creatures of pre-existing state governments.<sup>85</sup> In 1906, the Colorado Supreme Court made this point clear:

[Municipalities] are the creatures, mere political subdivisions, of the state for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government.<sup>86</sup>

A Colorado appellate court made a similar, if not more emphatic, point in an earlier case: “The power of the legislature to narrow or broaden municipal jurisdiction, save as controlled by constitutional restrictions, is practically unlimited.”<sup>87</sup> Wyoming takes a similar approach, recognizing that: “[t]he legislature has controlled municipalities granting it [sic] whatever powers they have from the

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<sup>84</sup> *Id.* at 178–79.

<sup>85</sup> In *Hunter v. City of Pittsburgh*, it might have been relevant that both Allegheny and Pittsburgh were incorporated as cities *after* Pennsylvania was recognized as its own unit of government. The United States Supreme Court did not mention this fact. While many eastern cities obviously predate the birth of the United States, and thus predate the existence of recognized states within that union, the greater age of those states means many municipalities arose after statehood. In the western United States, due to the later dates of statehood, many municipalities pre-date the creation of their state governments. In fact, many cities in Utah and the Southwest were founded before those regions became territories of the United States. For example, Santa Fe, New Mexico will be celebrating its 400th anniversary in 2010. See Santa Fe 400th Birthday, Inc., <http://www.santafe400th.com/> (last visited Nov. 26, 2009).

<sup>86</sup> *Keefe v. People*, 87 P. 791, 793 (Colo. 1906) (quoting *Atkins v. Kansas*, 191 U.S. 218, 220 (1903)). In this case, the Colorado Supreme Court addressed the powers of the city of Denver, which was established three years before the creation of Colorado Territory, and eighteen years before Colorado became a state. See Denver History, <http://www.denvergov.org/AboutDenver/history.asp> (last visited Nov. 19, 2009).

<sup>87</sup> *Warner v. Town of Gunnison*, 31 P. 238, 238 (Colo. 1892); see also *Pennobscot, Inc. v. Bd. of County Comm'rs of Pitkin County*, 642 P.2d 915, 918 (Colo. 1982) (“A county is a political subdivision of the state and, as such, possesses only those powers expressly granted by the constitution or delegated to it by statute.”).

very beginning of the existence of Wyoming.”<sup>88</sup> Even in Idaho, where the grant of police power authority to local governments exists in the state’s constitution, the limitation “as are not in conflict with . . . the general laws,” allows the state legislature to expand or limit the powers of local government as it wishes.<sup>89</sup>

The most significant consequence of viewing local authority in this fashion is that state governments can exert control over what might otherwise be local issues without concern for the specific problems or issues faced by specific local governments. It is perhaps unnecessary to note that western communities are incredibly diverse. This region—like any other region of the country—consists of a wide range of communities and interests, histories and cultures, places and landscapes. There is no single “West” with a unique set of characteristics or qualities, just as there is no single Colorado, Wyoming, or Idaho. The region contains world-class cities with millions of inhabitants, small, isolated towns with just a few residents, and many different communities between those extremes. There are world-famous mountains and quiet, unknown valleys and plains. Fertile farmlands and desolate wastelands can exist just miles apart. Areas of deep snow and sufficient precipitation might sit just over a divide from large deserts. And despite containing the headwaters of several of North America’s largest river systems, the West is known more for its aridity than the thousands of streams, rivers and creeks that flow across the landscape.

#### *A. Preventing Community Efforts to Create Unique Places*

Notwithstanding the substantial diversity obvious in any place—not just the American West—many states enforce uniform state laws across all jurisdictions, whether it is Douglas County, Colorado with its rapid urbanization, or Kiowa County and its *decreasing* population and almost complete lack of urbanization.<sup>90</sup> Teton County, Wyoming faces land-use issues that are dramatically different from the issues facing neighboring Sublette County, to say nothing of Niobrara County on the opposite side of the state. But even given the geographic and cultural differences between these places, state law might require that each take the same land use or water resource approach, regardless of the specific, place-bound issues they must face.

As noted above, the United States Supreme Court considers the authority to regulate the use and development of private lands to be a “quintessential” local power. There is reason for this, of course, as it is the combination of many

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<sup>88</sup> *Stewart v. City of Cheyenne*, 154 P.2d 355, 360 (Wyo. 1944).

<sup>89</sup> *See, e.g., EnviroSAFE Servs. of Idaho, Inc. v. Owyhee County*, 735 P.2d 998 (Idaho 1987).

<sup>90</sup> Between 2000 and 2008, the population of Douglas County increased by 60%, while the population of Kiowa County decreased 19%. The population density of Douglas County is approximately 333 persons per square mile. Kiowa County’s population density is 0.74 persons per square mile. United States Census Bureau, <http://www.census.gov/>.

diverse land-use decisions over time that create the personality of a place. A town of small lots and narrow streets laid out in rectilinear blocks is different than a similarly sized town with larger lots and wide, curving streets and cul-de-sacs. While uniform building plans for chain stores can change the personalities of our downtowns,<sup>91</sup> local communities still use their land-use authority to create unique and special places. In the context of this discussion about sustainability, this basic land-use authority allows each community to make its own determinations about what it should look like, what types of land uses it will prefer, and how it should develop over time.

Of course, communities often do not choose to exercise their land-use authority to make unique or special places,<sup>92</sup> but in some cases they do not have the choice, even if they might desire to do so. Oversimplifying to some extent, local authority over land use and development can be broadly placed into two classifications: zoning controls and subdivision controls.<sup>93</sup> These two regimes are generally authorized in separate statutes and, superficially at least, regulate distinct issues. Zoning generally regulates the use of land, including the types of uses allowed in an area, and the nature or form of those uses. Zoning uses tools like mandatory setbacks from streets or lot boundaries, floor area ratios, height restrictions, among other site, area or structural requirements. Subdivision regulations, in contrast, regulate the division of land into separate parcels for sale or development. Subdivision regulation arose initially to facilitate the conveyance and recording of lots, and later to ensure compliance with street planning.<sup>94</sup> Subdivision regulations have evolved to ensure that development pays for itself, by requiring dedication of land for roads, parks, streets, or other public uses. Planned unit developments, cluster developments, traditional neighborhood development, or transportation-oriented development are more sophisticated or creative subdivision ordinances that might create or protect specific natural or social amenities.

Zoning and subdivision regulation overlap in several ways, the most significant of which might be in the establishment of allowable lot sizes. In addition to authorizing the regulation of the *use* of land, the enabling language of the Standard Zoning Enabling Act also authorizes zoning legislation regulating “the density of population.”<sup>95</sup> Section 3 of the Standard Act, which describes the purposes of

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<sup>91</sup> Walgreens drug stores are perhaps the best example of this phenomenon, as the stores are identical—with very few exceptions—whatever town you are in. For a more detailed discussion of this issue, see JAMES HOWARD KUNTSLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA’S MAN-MADE LANDSCAPES* (1993).

<sup>92</sup> See, e.g., ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000).

<sup>93</sup> See, e.g., DANIEL R. MANDELKER, *LAND USE LAW* (5th ed. 2003).

<sup>94</sup> See *id.* § 9.02.

<sup>95</sup> ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP’T OF COMMERCE, *supra* note 79.

zoning, indicates zoning should, among other things, “lessen congestion in the streets, . . . provide for adequate light and air, . . . prevent overcrowding of land, [and] avoid undue concentration of population.” These provisions, as well as the “density of population” provision of the enabling clause, suggest the intent that zoning regulate the *size* of allowable lots, as well as the uses allowed on those lots. Subdivision ordinances, as the name implies, regulate the creation of “lots,” and thus necessarily affect “population density” and the other noted areas regulated by zoning ordinances.

These general grants of zoning and subdivision authority provide local governments with a substantial amount of discretion in determining the nature of development they will allow. However, some limitations obviously do exist. Consistent with the preceding discussion, any local ordinances regulating land use or development must be consistent with state enabling legislation. For example, all subdivision-enabling statutes contain a definition of the terms “subdivision” or “subdivide.” If a specific division of property does not fit within the provided definition, it is not considered a “subdivision” subject to the requirements of the statute, and is, thus, not subject to the requirements of any local ordinances authorized by that statute.

*Black’s Law Dictionary* defines “subdivision” as “[t]he division of a lot, tract or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale or development.”<sup>96</sup> Idaho’s subdivision-authorizing legislation provides that subdivision is the division of a tract of land into “five (5) or more lots, parcels, or sites for the purpose of sale or building development.”<sup>97</sup> The higher threshold was apparently intended to allow farming and ranching families to divide lands among family members without complying with subdivision requirements, but the Idaho law also allows cities or counties to adopt their own, more restrictive, definitions, which many have done.<sup>98</sup> Idaho’s zoning enabling legislation largely mirrors the Standard Act, and thus allows for the regulation of land uses, as well as population density.<sup>99</sup> The Idaho enabling legislation provides a number of goals that also suggest some ability to regulate lot sizes or development density.<sup>100</sup> Other than a single exception for the “bona fide division” of land for agricultural

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<sup>96</sup> BLACK’S LAW DICTIONARY 1424 (6th ed. 1990).

<sup>97</sup> IDAHO CODE ANN. § 50-1301 (2009).

<sup>98</sup> See, e.g., ADA COUNTY, IDAHO, CODE 8-1A-1 (2009) (defining a subdivision as the division of land into two or more lots). This statutory provision might allow local governments to substantially relax the definition of “subdivision.”

<sup>99</sup> IDAHO CODE ANN. § 67-6511 (2009).

<sup>100</sup> § 67-6502 (2009). These purposes include, for example, protecting important environmental features, protecting prime agricultural and forest lands, avoiding undue concentration of population and overcrowding of land, ensuring that development of land is commensurate with the physical characteristics of the land, among others.

purposes,<sup>101</sup> the Idaho statutes contain no explicit limitations on regulation of lot sizes,<sup>102</sup> providing each individual community the authority to determine what it will look like, at least in the context of its subdivision regulation.

In contrast to Idaho, both Colorado and Wyoming contain specific limitations on local authority to determine the nature of their local developed landscapes. Like most states, Colorado authorizes county governments to implement subdivision regulations that can address a wide variety of issues, including locally important natural resources, available water resources, transportation, land for schools, parks and other public uses, storm water drainage, among others.<sup>103</sup> However, the Colorado subdivision authorization differs from the standard enabling legislation in one crucial way. Colorado's statutory definition of "subdivision" specifically excludes certain divisions of land: "The terms 'subdivision' and 'subdivided land' . . . shall not apply to any division of land which creates parcels of land each of which comprises thirty-five or more acres of land and none of which is intended for use by multiple owners."<sup>104</sup> In other words, notwithstanding the substantial ecological, public service, cultural, and other effects caused by allowing for such dispersed, "ranchette" style development,<sup>105</sup> Colorado law specifically precludes application of subdivision authority to those developments.

Colorado counties are not wholly without authority to regulate large-lot subdivisions, however. Colorado's zoning enabling legislation provides that counties may adopt zoning ordinances regulating the use of land, the location, height, bulk and size of buildings, as well as the "density and distribution of population," and more importantly, "the size of lots."<sup>106</sup> In *Boone v. Board of County Commissioners*, landowners divided a 143-acre parcel into four separate lots, each larger than 35 acres.<sup>107</sup> Upon learning of the land division, the Elbert

<sup>101</sup> § 50-1301 (2009).

<sup>102</sup> All land-use regulations are implicitly limited by the "takings" clause of the Fifth Amendment to the U.S. Constitution, as applied to the states in the Fourteenth Amendment, and adopted by most states in their own constitutions.

<sup>103</sup> COLO. REV. STAT. § 30-28-133 (2009).

<sup>104</sup> § 30-28-101(10)(b) (2009); see also *Pennobscot, Inc.*, 642 P.2d 915.

<sup>105</sup> See, e.g., Adrian X. Esparza & John I. Carruthers, *Land Use Planning and Exurbanization in the Rural Mountain West: Evidence from Arizona*, 20 J. OF PLAN. EDUC. & RESEARCH 23 (2000); William R. Freudenburg, *The Impacts of Rapid Growth on the Social and Personal Well-Being of Local Community Residents*, in COPING WITH RAPID GROWTH IN RURAL COMMUNITIES 137 (Bruce A. Weber & Robert E. Howell eds., 1982); Andrew J. Hansen et al., *Effects of Exurban Development on Biodiversity: Patterns, Mechanisms, and Research Needs*, 15 ECOLOGICAL APPLICATIONS 1893 (2005); W.E. Riebsame, H. Gosnell & D.M. Theobald, *Land Use and Landscape Change in the Colorado Mountains I: Theory, Scale and Pattern*, 16 MOUNTAIN RESEARCH & DEV. 395 (1996); D.M. Theobald, H. Gosnell & W.E. Riebsame, *Land Use and Landscape Change in the Colorado Mountains II: A Case Study of the East River Valley*, 16 MOUNTAIN RESEARCH & DEV. 407 (1996).

<sup>106</sup> COLO. REV. STAT. § 30-28-111(1) (2009).

<sup>107</sup> 107 P.3d 1114, 1115 (Colo. App. 2004).



County, Colorado planning department wrote the landowners, informing them that they had created four “illegal lots” and that building permits would be withheld until the landowners had successfully obtained a rezoning of the four new parcels. The rezoning process overlapped with the subdivision process to some extent, requiring, among other things:

proof of ownership; comment about emergency access; covenant compliance; road permit; land survey plat; and a narrative. The narrative must address subjects such as: relationship to adjacent property land uses; compliance with the Elbert County Master Plan; sources of water; methods of wastewater treatment and disposal; confirmation of service from a water sanitation district; type of fire protection; impacts on county services; impacts on existing flora and fauna, air quality, wildlife, historical lands, drainage, or mineral extraction; and a weed control and grazing plan.<sup>108</sup>

Rather than comply with the rezoning requirements, the landowners challenged the Elbert County rezoning ordinance, claiming it was inconsistent with the exemption in the subdivision statute for lots larger than thirty-five acres, and thus invalid. The Colorado Court of Appeals determined that, by its plain language, the thirty-five acre or greater exemption only applies to subdivision regulations, and that nothing in the statute or its legislative history suggest that the Colorado legislature intended to extend the exemption to the zoning regulations. Further, the court noted that the zoning and subdivision regimes are distinct, and developers must comply with them independently: “a subdivider must first satisfy applicable zoning regulations and then additionally comply with the subdivision regulations.”<sup>109</sup>

On the surface, *Boone v. County Commissioners* suggests that Colorado counties do possess some authority to control the size of lots and the density of development, as specifically authorized in the zoning enabling statute. However, Elbert County’s response to the creation of the alleged “illegal lots” provides additional insight. Rather than try to invalidate the creation of the lots, Elbert County simply required the landowners to request a rezone to a new zone consistent with the size of the new “illegal” lots. The reason for this approach is simple: Elbert County possessed no authority to do anything else. As the court noted, somewhat in passing, although “county zoning authority expressly includes the power to regulate use based on lot size,”<sup>110</sup> counties nevertheless possess no

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<sup>108</sup> *Id.* at 1117.

<sup>109</sup> *Id.* at 1116.

<sup>110</sup> *Id.* at 1117. This statement appears to be a misreading of the statutory provision. The statutory provision authorizes “the regulation by districts or zones of . . . the size of lots[.]” COLO. REV. STAT. § 30-28-111 (2009). Regulating the “size of lots” is quite different than regulating “use

authority to do anything about the creation of illegal parcels: “Initially, we note that a county’s statutory zoning enforcement powers do not include enjoining or invalidating conveyances.”<sup>111</sup>

The only significant authority possessed by the county, with respect to its *zoning* ordinances, is the authority to withhold building permits.<sup>112</sup> Consequently, if a landowner creates 35-acre lots that are inconsistent with a county’s underlying zoning designation, the county’s only option is to rezone the area to be consistent with the new, landowner-created lots, and then enforce the ordinances applicable to that new zoning designation. The landowner, empowered by state law, can override the county’s plans for the nature of development it desires to allow in its rural, undeveloped, and ecologically, agriculturally, and perhaps culturally important areas.

Given that courts often look unkindly at local government efforts to create large minimum lot sizes,<sup>113</sup> these limitations on a Colorado county’s ability to regulate lot sizes above thirty-five acres might seem unimportant. However, depending on the resources a specific place desires to protect, the ability to create 35-acre lots without any local government input or regulation might effectively invalidate local land-use plans or plans for the future of a community. Routt County, Colorado provides an example of this problem. Routt County is home to the Steamboat Ski Resort and the resort town of Steamboat Springs. Largely because of the ski resort and other natural amenities available there, Routt County has enjoyed, or suffered through, a relatively long period of the substantial population growth that often visits western resort communities.<sup>114</sup> In the face of that growth, and fearing more growth in the future, Routt County established as its primary planning goals the protection and preservation of open space values and agricultural uses that have been part of the county’s culture and personality for over a century.<sup>115</sup>

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based on lot size.” The statute as written suggests county authority to determine or limit appropriate lot sizes; the court’s language suggests that county’s can only regulate use based on pre-existing lots sizes (e.g., by authorizing uses consistent with those lot sizes), with the actual size of the lots presumably determined by the landowner (as regulated, or not, by subdivision regulations).

<sup>111</sup> *Boone*, 107 P.3d at 1117. The subdivision statute does provide this authority.

<sup>112</sup> COLO. REV. STAT. § 30-28-114 (2009).

<sup>113</sup> See MANDELKER, *supra* note 93, §§ 5.30–5.32.

<sup>114</sup> Routt County more than doubled in population during the 1970s. While its post-1990 population growth does not match other resort communities in the Intermountain West, its rate of growth still far outpaces the national average. United States Census Bureau, <http://www.census.gov/population/cencounts/co190090.txt> (last visited Nov. 19, 2009).

<sup>115</sup> Routt County’s planning goals largely promote the protection of the county’s “rural character,” seek to avoid sprawl and focus development near the county’s urban areas. Where rural development occurs, the county prefers “clustered development with protected parcels of open land.” See Routt County, Colo., Routt County Master Plan, § 1.2 (Apr. 3, 2003), available at <http://www.co.routt.co.us/planning/plans/Master%20Plan.pdf>.

To achieve these ends, Routt County created a sophisticated “Land Preservation Subdivision” approach. This approach provides for density bonuses and substantially simplified administrative procedures in exchange for clustered development and the protection of significant areas of open space, while still protecting property rights and landowner expectations. In the face of the state’s prohibition on regulating larger lot sizes (passed, incidentally, in 1973),<sup>116</sup> Routt County has been required to create a land-use regime that makes concessions that would be arguably unnecessary absent the state provision allowing, by right, the creation of 35-acre lot developments.<sup>117</sup> For example, approval of a Land Preservation Subdivision (LPS) follows a dramatically simplified process.<sup>118</sup> Where a traditional subdivision in Routt County must survive three approval stages—sketch subdivision, preliminary subdivision, and final subdivision—the LPS requires a single approval. The traditional subdivision has public meetings and public hearings in the first two stages, with the potential for a public hearing in the final stage. An LPS has a single public hearing. A traditional subdivision can be appealed at all three stages; the LPS can be appealed once. This simplified administrative process is notwithstanding significant design standards and other requirements for an LPS, which are intended to achieve the county’s planning goals, but which obviously do not receive the same administrative attention as a traditional subdivision.<sup>119</sup> Local citizens who might oppose a specific development have both reduced access to information and limited ability to appeal, if that development is an LPS. While simplified administrative procedures in exchange for achieving local goals for protecting natural, social or cultural amenities might be a wise policy choice, it is a choice that should not be mandated by a state government with little to no detailed knowledge of or concern for the issues facing a specific community.

Colorado is not alone in using state law to override local decisions about the structure of their communities. In July 2009, Carbon County, Wyoming completed a final draft of its new land-use plan.<sup>120</sup> The county’s goals, as

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<sup>116</sup> See, e.g., *Pennobscot, Inc.*, 642 P.2d 915. This provision originated before the periods of rapid population growth during the 1970s and 1990s.

<sup>117</sup> See Kurt Culbertson, Derri Turner & Judy Kolberg, *Toward a Definition of Sustainable Development in the Yampa Valley of Colorado*, 13 MOUNTAIN RESEARCH & DEV. 359 (1993) (recognizing this problem and recommending the creation of agricultural ‘commons’ where operators could pool their 35-acre parcels to create a single commons parcel large enough to function as a viable operation).

<sup>118</sup> See, e.g., ROUTT COUNTY, COLO., SUBDIVISION REGULATIONS § 2 (2007), available at <http://www.co.routt.co.us/planning/plans/Subdivision%20Regulations.pdf>.

<sup>119</sup> See, e.g., ROUTT COUNTY, COLO., SUBDIVISION REGULATIONS § 5 (2007).

<sup>120</sup> The draft is apparently awaiting final approval by the County Planning and Zoning Commission and the Board of County Commissioners. The Planning and Zoning Commission held a “Carbon County Land Use Plan Joint Workshop” during its November 2, 2009 meeting. See Carbon County Land Use Plan, <http://www.mmpianning.com/cc06/cc06.htm> (last visited Nov. 29, 2009).

articulated throughout that plan, include the protection of rural areas and agricultural operations, including establishing minimum lot sizes that are large enough to ensure sustainable agricultural operations.<sup>121</sup> Carbon County's existing zoning regulations include a "Ranching, Agriculture, Mining" (RAM) zone, with a minimum lot size of 640 acres (one square mile).<sup>122</sup> The RAM zone exists to "preserve historic uses and open space areas of the County while at the same time permit ranching, agriculture, animal husbandry, forestry and mining in a manner that attains this purpose."<sup>123</sup> The RAM district applies to all lands in the county not otherwise zoned, and apparently covers a substantial portion of the county. Carbon County has two other large-lot zones—the Agriculture Exclusive and Agriculture General zones—with 160-acre minimum lots sizes.

However, Wyoming state law effectively overrides this local decision by allowing, with some recently adopted limitations,<sup>124</sup> the creation of 35-acre lots by right. Wyoming's subdivision-authorizing legislation defines subdivision as "the creation or division of a lot, tract, parcel or other unit of land for the immediate or future purpose of sale, building development or redevelopment, for residential, recreational, industrial, commercial or public uses."<sup>125</sup> The next section in the statute provides exemptions to the subdivision definition, including: "this article shall not apply to the sale or other disposition of land where the parcels involved are thirty-five (35) acres or larger . . ." <sup>126</sup> Until 2008, this provision only required that lots larger than thirty-five acres be guaranteed utility and access easements.<sup>127</sup> In 2008, the Wyoming legislature amended this exemption by making it subject to a new provision that authorizes counties to adopt subdivision regulations applicable "where the subdivision creates parcels that are thirty-five (35) acres or larger and up to one hundred forty (140) acres."<sup>128</sup> However, any legal parcel existing on or before July 1, 2008 is exempt from this provision (allowing the application of subdivision regulations) and can be subdivided by right, without county approval or involvement, into ten lots of at least thirty-five and no more than 140 acres.<sup>129</sup>

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<sup>121</sup> See, e.g., Carbon County, Wyo., Carbon County Land Use Plan, Ch. 8 (Aug. 2009), available at [http://www.mmipanning.com/cc06/planning\\_process/docs/Draft2/8-20-09%20CCLU%20PLAN%20FINAL.pdf](http://www.mmipanning.com/cc06/planning_process/docs/Draft2/8-20-09%20CCLU%20PLAN%20FINAL.pdf).

<sup>122</sup> CARBON COUNTY, WYO., CARBON COUNTY ZONING RESOLUTION OF 2003 ch. 4, § 4.2 (amended Jan. 6, 2004), available at [http://www.carbonwy.com/images/CARBON\\_COUNTY\\_ZONING\\_RESOLUTION\\_BOOK\\_OF\\_2003\\_AMENDED-01-06-2004.PDF](http://www.carbonwy.com/images/CARBON_COUNTY_ZONING_RESOLUTION_BOOK_OF_2003_AMENDED-01-06-2004.PDF).

<sup>123</sup> *Id.*

<sup>124</sup> See WYO. STAT. ANN. § 18-5-316 (2009).

<sup>125</sup> WYO. STAT. ANN. § 18-5-302(a)(vii) (2009).

<sup>126</sup> WYO. STAT. ANN. § 18-5-303(b) (2009).

<sup>127</sup> See *id.*

<sup>128</sup> § 18-5-316.

<sup>129</sup> See *id.*

Unlike the grant of authority in Colorado's zoning legislation to regulate the "size of lots," Wyoming's zoning enabling statute is limited to regulating the *use* of land. The Wyoming enabling legislation for county governments provides:

To promote the public health, safety, morals and general welfare of the county, each board of county commissioners may regulate and restrict the location and use of buildings and structures and the use, condition of use or occupancy of lands for residence, recreation, agriculture, industry, commerce, public use and other purposes . . . .<sup>130</sup>

In *Pedrol/Aspen, Ltd. v. Board of County Commissioners for Natrona County*, the Wyoming Supreme Court considered an attempt by Natrona County to regulate the creation of lots larger than thirty-five acres.<sup>131</sup> The court considered the authority granted in the zoning legislation, quoted above, and determined that although "the authority granted by this provision is broad," it does not extend to regulating the size of the lots: "by express statutory language, this broad authority is limited to regulation of the *use* of land, not the division of it into parcels."<sup>132</sup> Consequently, the only authority to regulate the size of parcels is contained in Wyoming's Real Estate Subdivisions Act, which specifically limited (at the time of this dispute) county authority to regulating the creation of parcels that are smaller than thirty-five acres in size.

Rather than representing isolated or distinct institutional approaches to defining subdivisions, Colorado and Wyoming are instead largely representative of their neighbors in exempting from subdivision requirements the creation of parcels larger than a certain size. Montana is not quite as permissive, defining a subdivision as "a division of land or land so divided that it creates one or more parcels containing less than 160 acres."<sup>133</sup> Arizona similarly limits application of its subdivision rules to the sale of lots smaller than 160 acres.<sup>134</sup> New Mexico law exempts from subdivision regulation the creation of new parcels of land that are larger than 140 acres, or the creation of parcels larger than thirty-five acres, where the land has been used continuously for agricultural purposes during the preceding three years.<sup>135</sup> Nevada exempts the creation of new parcels larger than 640 acres, and has simplified subdivision requirements for creating parcels larger than forty acres, or larger than ten acres if the local government so elects.<sup>136</sup> Only

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<sup>130</sup> WYO. STAT. ANN. § 18-5-201 (2009).

<sup>131</sup> 94 P.3d 412 (Wyo. 2004).

<sup>132</sup> *Id.* at 419.

<sup>133</sup> MONT. CODE ANN. § 76-3-103(15) (2009).

<sup>134</sup> ARIZ. REV. STAT. ANN. § 32-2181.02(A)(2) (2009).

<sup>135</sup> N.M. STAT. § 47-6-2(M) (2009).

<sup>136</sup> NEV. REV. STAT. § 119.110 (2009).

Utah joins Idaho among states in the Intermountain West in statutorily allowing the application of subdivision requirements to land divisions irrespective of size.<sup>137</sup>

While these exemptions from subdivision requirements—which *prohibit* local governments from regulating these activities—might not seem initially to impede achieving sustainability, just the opposite is in fact the case. “Exurban development”—characterized by widely-dispersed, large-lot development outside the boundaries of incorporated municipalities—is the fastest growing type of development in the United States,<sup>138</sup> and covers five times more land than urban and suburban development combined.<sup>139</sup> The creation of, for example, thirty-five-acre ranchettes—again, without any significant regulation on the local level<sup>140</sup>—is one of the most significant contributors to dispersed exurban development, and consequent ecological and social harm occurring across much of the interior West.<sup>141</sup> One of the ironies of exurban development is that these new country dwellers often move to formerly-rural areas, seeking out specific visions of ecological amenities, open-space and undisturbed “nature,”<sup>142</sup> which those new residents then play a large role in diminishing.<sup>143</sup> While it may seem somewhat counterintuitive, operating ranchlands—including lands grazed regularly—can host higher levels of biodiversity than either exurban subdivisions or protected lands.<sup>144</sup>

The state laws discussed above prevent local governments from considering—and more importantly, from regulating—the substantial effects of large-lot exurban development, even as those communities go about the process of envisioning what

<sup>137</sup> UTAH CODE ANN. § 17-27a-103(54) (2009).

<sup>138</sup> Jeff R. Crump, *Finding a Place in the Countryside: Exurban and Suburban Development in Sonoma County, California*, 35 ENV'T & BEHAV. 187 (2003).

<sup>139</sup> David M. Theobald, *Land-Use Dynamics Beyond the American Urban Fringe*, 91 GEOGRAPHICAL REV. 544 (2001).

<sup>140</sup> To clarify, local governments retain the authority under principles of zoning to regulate the *use* of the newly created thirty-five acre parcels. The local governments can establish setback requirements, or only allow certain uses. But the local governments have no control over the *creation* of the parcels. Once the parcels are created, the local government must allow for some development or face regulatory takings challenges.

<sup>141</sup> See Riebsame et al., *supra* note 105, at 395; see also Hansen et al., *supra* note 105, at 1893.

<sup>142</sup> See, e.g., Andrew J. Hansen et al., *Ecological Causes and Consequences of Demographic Change in the New West*, 52 BIOSCIENCE 151 (2002); see also Christy Dearien et al., *The Role of Wilderness and Public Land Amenities in Explaining Migration and Rural Development in the American Northwest*, in AMENITIES AND RURAL DEVELOPMENT 113 (Gary P. Green et al. eds., 2005).

<sup>143</sup> Esparza & Carruthers, *supra* note 105, at 23.

<sup>144</sup> See, e.g., Jeremy D. Maestas et al., *Biodiversity Across a Rural Land-Use Gradient*, 17 CONSERVATION BIOLOGY 1425 (2003) (finding that ranchlands in northern Colorado had higher native plant species richness than either exurban developments or state-protected nature reserves); see also Jaymee T. Marty, *Effects of Cattle Grazing on Diversity in Ephemeral Wetlands*, 19 CONSERVATION BIOLOGY 1626 (2005) (finding that ephemeral wetlands that were grazed regularly supported more native species and fewer exotic species than wetlands where no grazing occurred).

might be a future and then establishing the institutional regimes that will enable them to achieve that imagined future. As noted above, western states are large and diverse. In Wyoming, Carbon County's vision of a sustainable place likely differs substantially from Teton County's vision, even if both are subject to the same state laws. What might work in Carbon County might seem unwise, or impossible, in Teton County. In Carbon County, a 640-acre minimum lot size might in fact be too *small*;<sup>145</sup> Teton County, in contrast, has only a single remaining private lot larger than 640 acres.<sup>146</sup>

I do not present this specific limitation on the exercise of traditional local land-use authority as the only example of how state governments might limit the ability of local communities to envision and attain sustainable place. Nor is it necessarily the best example. But it is a relatively obvious and easily understood example and that fact alone warrants its discussion in this fashion. The purpose of this article, and the examples contained within, is to identify and describe the simple idea that state law can and does prevent the application of community-based decisions and visions on the community's future. Understanding the basic potential for generic state-law to conflict with local visions for a place might sensitize law and policy makers to the necessity of allowing state-wide management regimes to evolve, as the places and people they regulate evolve. A final example demonstrates both the current lack of that necessary sensitivity, as well as the thorough institutionalization of these impediments in state governments.

### *B. Changing Communities: From State-wide to Local Concern*

In contrast to their powers to regulate land, the western states *have not* delegated their authority to regulate the use of water to local units of government. States justify this distinction, if at all, by identifying the allocation and use of water as being a matter of state-wide, rather than local, concern.<sup>147</sup> But as noted

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<sup>145</sup> In his *Report on the Lands of the Arid Region of the United States, with a more detailed account of the lands of Utah*, John Wesley Powell recommended that the homestead laws allocate 2,560 acres for non-irrigated farms or ranches in the arid West, which would include Carbon County, Wyoming. See WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* 225 & n.19 (1954).

<sup>146</sup> I base this assessment on a review of private lots in Teton County's Geographic Information System database, *available at* Teton County Map Server, <http://www2.tetonwyo.org/mapserver/> (last visited Nov. 19, 2009).

<sup>147</sup> See, e.g., IDAHO CODE ANN. § 42-101 (2009) ("Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved."). See also WYO. CONST. art. 8, § 1 ("The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.").

in the introduction to this article, water and land are inherently intertwined. In many areas, one of the most significant landscape features of the changing rural West is the ongoing transformation of agricultural lands to subdivisions, and the consequent loss of farms, farmers, and the culture and traditions that have been part of western communities for over a century.<sup>148</sup> Agriculture remains the single largest consumer of the West's water resources.<sup>149</sup> As agricultural lands are converted to uses that do not require such substantial water quantities, the possibilities exist for local communities—as they regulate that change in land use—to restore the rivers, streams, wetlands and riparian habitats that might have suffered from long years of water withdrawals and the complete dewatering of western streams. But state law often prohibits any local efforts to address the restoration of locally important water resources.

As one example, as farm fields are converted to exurban subdivisions, the water formerly used for irrigation is often re-tasked to provide fishing ponds and ornamental water features for private use.<sup>150</sup> The nature of local subdivisions, the use of locally important natural resources, and the physical and social structure of a community are all issues of local concern. Consequently, we accept a variety of land-use controls—including design standards, water body setbacks, view-protecting height restrictions or skyline ordinances, restrictions on development in wildlife habitats, parkland exactions—that address natural resource concerns and build that specific community's understandings and visions about the purpose of place into the physical landscape of that place. But as soon as those ordinances address the *use* of water—e.g., by attempting to require restoration of stream flows in exchange for subdivision authorization—those efforts run into state pre-emption problems, whatever the public interest served, or not, by requiring that pre-emption.<sup>151</sup> The question of whether a specific subdivision, in a specific place,

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<sup>148</sup> See generally Riebsame et al., *supra* note 105, at 395.

<sup>149</sup> See, e.g., JAMES J. ROBB, ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION 83 (William E. Riebsame ed., 1997).

<sup>150</sup> While this fact is readily apparent to anyone who has spent any time studying the development of the rural West, there is very little discussion of this issue in the academic literature. Hopefully this will change, given that the practice raises a number of interesting questions, including whether the policy considerations that justified the dewatering of western streams in support of agriculture also justify dewatering streams for completely private use as ornamental or fishing ponds. Given the changing economies of many rural communities, the public interest might be best served now by restoring natural stream flows.

<sup>151</sup> See, e.g., *Eagle Creek Partners, L.L.C. v. Blaine County*, Case No. CR 2007-670 (5th Jud. Dist. of Idaho, May 6, 2008) (overturning a county ordinance regulating the construction of "irrigation ponds" in a small subdivision as preempted by state law); see also *Naylor Farms, L.L.C. v. Latah County*, Case No. CV 2005-670 (2d Jud. Dist. of Idaho, May 9, 2006) (overturning a county ordinance prohibiting certain activities on a "groundwater management overlay zone" as preempted by state law). The Idaho Supreme Court considered an appeal of *Naylor Farms* on the limited issue of whether attorney fees were appropriate. In considering whether the county had acted without a "reasonable basis in fact or law," the court indicated that although the question of the validity of the



should be allowed to use the state's water resources to construct a private fishing pond, or whether that specific place should be able to regulate its subdivisions in a manner that protects or restores locally important natural resources, is not a matter of state-wide concern in the same way that the original decisions to promote agriculture, at a time when agriculture was a primary component of the state's economy, served the state-wide public interest.

The idea that the control of water resources is vital to a state's overall well being is so engrained in western institutions that any local incursions into restoring local water resources are often summarily invalidated, whatever the balance of state and local interests. Private "rights" in water might be protected irrespective of the social costs, notwithstanding the fact that water is generally owned by the state and held in trust for the benefit of its citizens. Although the Idaho Constitution provides, for example, that the use of water is a "public use . . . subject to the regulations and control of the state"<sup>152</sup> and specifically allows the state to place limits on its use whenever necessary to satisfy competing demands,<sup>153</sup> contemporary courts might still find that "[t]he right to divert and appropriate water in Idaho to its beneficial use appears almost sacred, and all else secondary."<sup>154</sup> It is precisely this institutional ossification that must be overcome if we are to create sustainable communities.

### III. CREATING A SUSTAINABLE WEST

Communities and neighborhoods change, and perceptions of place and purpose evolve with those changes. The sustainable region westerners seek today is not necessarily the region of 1950, 1970 or even 2000. And perhaps more significant, there is no *single* sustainable West. Mackay, Idaho has a different vision of its purpose and future than does Summit County, Colorado, just as Taos imagines something different for itself than Las Vegas. What is sustainable in these places should not be decided in Boise, Denver, Santa Fe or Carson City anymore than it should be decided in Washington, D.C. A community's *purpose*, and the vision of how that community might be sustainable into the future, is discovered as that community works through the process of creating itself, neighborhood by neighborhood. Purpose emerges as each community imagines its future, and it is not until the community creates its own visions of what is possible that it can determine what it wants, and thus what it can and should sustain.

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original ordinance was not before it, "it appears that the major thrust of this Ordinance is to regulate land use, a power clearly reserved to the local governing boards." *Ralph Naylor Farms, L.L.C. v. Latah County*, 172 P3d 1081, 1086 (Idaho 2007).

<sup>152</sup> IDAHO CONST. art. XV, § 1.

<sup>153</sup> IDAHO CONST. art. XV, § 5.

<sup>154</sup> *Eagle Creek Partners, L.L.C.*, Case No. CR 2007-670 at 13.

Returning to the story that introduced this article: How does this relate to my January bike ride? And more important, how does it relate to the legal community working out western land-use conflicts on the ground? After discussing my bike ride, and the general issue of non-point source pollution with my class, I returned to my office and spent a few moments reviewing the structure of the Water Quality Division of the Idaho Department of Environmental Quality. There are 13 regional water quality managers in Idaho responsible for Idaho's approximately 107,000 miles of streams and rivers and approximately 522,000 acres of lakes. That's an approximate average of 8,300 river miles, 40,000 acres of lakes, and 6,365 square miles for each of those water quality managers, who despite being assisted by committed and capable assistants, understandably might feel overwhelmed by the landscapes before them. In contrast, Latah County, Idaho, where I live, is 1,077 square miles. If Latah County wanted to create a water quality manager with a similar level of responsibility, on a land-area basis, it would need just one sixth of one person to provide the same level of attention allowed at the state level. Latah County, like every western community, has potentially hundreds of individuals interested in, and committed to, finding creative solutions to the problems in *their* place. A community-based, or even a watershed-based, water quality program could incorporate those ideas of purpose and place that are unique to each community.

But water quality is merely one component of a sustainable West. Westerners, new and old alike, desire healthy ecosystems, vibrant neighborhoods, stable and growing local economies, and real *places* to belong and return to. And those individuals and communities are in the best position to discover how to achieve those goals and create those places. The crucial task is to provide western communities the freedom to imagine their own purpose and discover what sustainability means in their own neighborhoods and communities, and then more importantly, to grant them the *legal authority* to implement that vision. As each city, town, county, or even watershed or organic region creates its own purpose, and then goes about the process of implementing that purpose, *all* residents will share in the successes and failures of these many different laboratories, increasing the chance that each separate community will achieve its own vision of sustainable place. But the creation of hundreds of sustainability laboratories across the West faces a single, significant obstacle: local communities often lack the legal authority to regulate in the areas most closely related to sustainability.

State law can, and does, inhibit the creation of sustainable communities. In case the point has been too subtle so far, achieving a sustainable West may—and in fact, likely will—require western state governments to change their approaches to resource management and land-use regulation in order to allow specific communities to achieve their own visions of sustainable place. In the small snapshot of land-use laws and cases discussed here, state legislatures have limited—perhaps unnecessarily—the ability of local communities to experiment with new approaches to protect their own valued resources and create and achieve

a community vision of sustainability. These limitations—whether dealing with water quality or quantity, the use of land, ecosystem preservation, or more generally the creation of place—present unfortunate and unnecessary roadblocks on the pathway toward a sustainable West.

There is nothing radical about suggesting that Challis, Idaho might be better situated to understand itself than Boise is; or that Saratoga, Wyoming might approach its landscape differently than Cheyenne. In fact, maybe Boise or Cheyenne have something to learn from Challis or Saratoga about protecting their communities, neighborhoods and natural resources. Until we allow each *community* the freedom and legal authority to develop its own vision, we cannot know if any single vision is the best vision for that place—particularly a single vision imposed by a somewhat distant and potentially disconnected decision maker. A western democracy of communities—in this case a democracy allowing each community an equal voice and equal authority in our collective quest to achieve sustainability—is the necessary precondition to the full application of our individual and collective intelligence and creativity to the task of creating a sustainable West.