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RETHINKING REGULATIONS: LOCAL LABORATORIES INVENTING A SUSTAINABLE IDAHO

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This essay argues that before Idaho can approach sustainability – of its natural resources as well as its neighborhoods, communities and culture – the state government must be willing to allow for increased experimentation at the local level, including in areas currently pre-empted by state-wide programs.

This past January, on an unseasonably warm Saturday afternoon, I spent a few hours wandering around the hills east of Moscow on my bicycle. A couple of weeks before, a substantial rainstorm and 50° 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 (complete with temporarily forgotten “water over road” signs).

A few weeks later, I sat in a small seminar room with 11 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 the state’s waterways looking for pollution sources to be regulated (and perhaps prosecuted). My own thoughts returned to that January 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 — not always a paragon of wisdom in these matters — 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 essay, 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 Idaho landscapes.

UNSUSTAINABLE NOTIONS ABOUT SUSTAINABILITY

“Sustainability,” or its more focused cousin “sustainable development,” is approaching cliché status in some circles. Even Wal-Mart, generally not considered a leader on these issues, is attempting to incorporate sustainability principles into its operations. Here at the University of Idaho, the University President hosts an annual Sustainability Symposium; we have a student created, funded and staffed Sustainability Center; and a newly established “Building Sustainable Communities” initiative. These are worthy endeavors, and sustainability — in the abstract — finds few detractors. If anything, recent economic conditions have intensified the public’s desire to discover more sustainable approaches to a variety of issues. But that last point — suggesting that we desire sustainability on a “variety of issues” — raises a few

largely unaddressed questions about how we might achieve a truly sustainable Idaho. First, and most significant, we have yet to engage in a real discussion about what a sustainable Idaho might look like. And 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.

Sustainability is not a new concept, and we have created a variety of legal tools to approach sustainability with respect to specific resources, particularly in the public lands context. 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.” 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.” The National Forest Management Act also contains multiple references to renewable resource management and sustained yield of forest resources. And even the Federal Land Policy & Management Act states that 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[.]”

These notions of sustainability are relevant to Idaho because so much of the state falls within the purview of these federal statutes. Decisions regarding national forest management can affect Idaho communities in significant ways, even when those decisions only directly address lands in neighboring states. Agency decisions in Yellowstone National Park can have substantial effects on land-use patterns in southeast Idaho; even the approval of a ski area expansion entirely in Wyoming can affect the culture and personality of Idaho towns.

But a sustainable Idaho is about more than federal lands sustainability, and not only because Idaho citizens primarily live and rely on the non-federal lands. The current federal notion of sustainability, as articulated in the public lands statutes, is unnecessarily limited and fails to address several potentially more important aspects of Idaho life. For anyone with more than a very recent history in our state, the ongoing changes to Idaho’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 an Idaho notion of sustainability requires consideration not only of timber supplies or rangelands, but of the people and communities that live in and rely on those places.

AUTHORIZING IMAGINATION, ACHIEVING VISIONS OF PLACE

Communities and neighborhoods change, and perceptions of place and purpose evolve with those changes; the sustainable Idaho we seek today is not necessarily the Idaho of 1950, 1970

or even 2000. And perhaps more significant, there is no single sustainable Idaho. Mackay has a different vision of its purpose and future than does Ketchum, just as Sandpoint imagines something different for itself than Preston. What is sustainable in these places should not be decided in Boise 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 what is possible that it can determine what it wants, and thus what it can and should sustain.

How does this relate to my January bike ride, and more importantly, how does it relate to the Idaho legal community? 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 who are responsible for Idaho's ~107,000 miles of streams and rivers and ~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, for example, 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 1/6 of one person to provide the same level of attention allowed at the state level. But Latah County, like every Idaho county, 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 would incorporate those ideas of purpose and place that are unique to each of Idaho's communities.

But water quality is merely one component of a sustainable Idaho. Idaho's citizens and communities desire healthy ecosystems, vibrant neighborhoods, stable and growing local economies, and real places to belong and return to. And those communities are in the best position to discover how to achieve those goals and create those places. The crucial task is to provide Idaho cities, towns and counties 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 Idahoans will share in the successes and failures of these many different Idaho laboratories, increasing the chance that each separate community will achieve its own vision of sustainable place.

In case the point has been too subtle so far, achieving a sustainable Idaho may – and in fact, likely will – require the state to change its own approach to resource management and land-use regulation in order to allow specific communities to achieve their own visions of sustainable place. In a few recent cases, Idaho courts 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 road blocks on the pathway toward a sustainable Idaho.

CONCLUSION

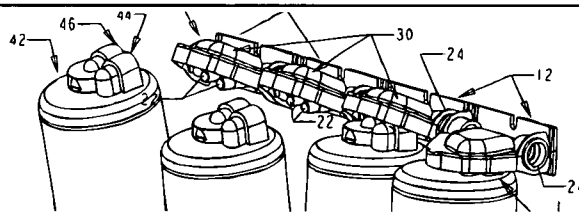
There is nothing radical about suggesting that Challis, for example, might be better situated to understand itself than Boise is. In fact, maybe Boise has something to learn from Challis about protecting its own communities, neighborhoods and natural resources. Until we allow each community the freedom 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. An Idaho democracy of communities – in this case a democracy allowing each community an equal voice and equal authority in our collective quest to achieve a sustainable Idaho – is the necessary precondition to the full application of our individual and collective intelligence and creativity to the task of creating a sustainable Idaho.

ABOUT THE AUTHOR

Jerrold A. Long is an associate professor of law at the University of Idaho College of Law in Moscow, specializing in land use and environmental law. He was hired by the College of Law as part of its commitment to the Waters of the West Strategic Initiative. Professor Long grew up in Rexburg where he graduated from Madison High School. He received a B.S. in Biology from Utah State University and a J.D. from the University of Colorado-Boulder. After practicing for several years in the Cheyenne, Wyoming office of Holland & Hart LLP, Professor Long returned to graduate school at the University of Wisconsin-Madison, where he recently received a Ph.D. in Environment and Resources.

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