

June 1994

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Recommended Citation

William H. Rodgers Jr., *Adaptation of Environmental Law to the Ecologists' Discovery of Disequilibria*, 69 Chi.-Kent L. Rev. 887 (1994).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol69/iss4/5>

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ADAPTATION OF ENVIRONMENTAL LAW TO THE ECOLOGISTS' DISCOVERY OF DISEQUILIBRIA

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INTRODUCTION

Professor Judy Meyer's splendid paper on the "new ecology"¹ shows how thoroughly concepts of equilibria have been discarded by scientists who study the physical world and its inhabitants. It is my job to show how this revolution in thinking has undermined a legal superstructure that was built on a reality now exposed as nine parts myth. The ideas in the paper are derived chiefly from a recent study by the National Research Council on the conservation land acquisition practices of four federal agencies—the Bureau of Land Management, the Forest Service, the Fish & Wildlife Service, and the National Park Service.²

I. ASSESSING THE LEGAL DAMAGE

Professor Meyer's presentation can be recast as an indictment of contemporary conservation law, calling for a reassessment of five bedrock practices and doctrines held dear by lawyers and lawmakers: (1) the methodology of comprehensive rationality; (2) the idea of the fee simple absolute; (3) the practices of condemnation; (4) the "ark" theories of land conservation; and (5) the parcel-by-parcel approach to acquisitions.

A. *Wrong Model #1: Comprehensive Rationality*

Frequently, theories of comprehensive rationality presume that the authorities can identify all pertinent policy options, calculate with some reliability the costs and benefits associated with each one, and set up a top-to-bottom list of options ranging from best to worst. In an ideal world, then, all the policymaker must do is to read from the top of the list. This methodology of comprehensive rationality has

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1. Judy L. Meyer, *The Dance of Nature: New Concepts In Ecology*, 69 CHI-KENT L. REV. 875 (1994).

2. COMMISSION ON SCIENTIFIC & TECHNICAL CRITERIA FOR FED. ACQUISITION OF LANDS FOR CONSERVATION, COMMISSION ON LIFE SCIENCES, SETTING PRIORITIES FOR LAND CONSERVATION (1993) [hereinafter SETTING PRIORITIES].

many implications and they are played out in environmental law in arenas ranging from forest policy planning to Superfund cleanups to NEPA analyses. Three difficulties deserve mention in the present context. First, Professor Meyer shows how presumptuous it is to believe that we can peer into this indeterminate future and discover durable answers that are worthy of our reliance. Second is the familiar problem that any policy comparison game requires inventions of numerical rankings associated with various outcomes; the numbers invariably hide the policy preferences behind them. In the land acquisition business as practiced by the federal government, higher numbers mean higher rankings, and the way to get higher numbers is to assign a few more uses to the acquisition parcel.³ Thus, a property that offers protection for an endangered species earns a mere "40" but if room can be found for motorcyclists too the value of the parcel jumps to "75."⁴ Third, apart from these problems of valuation, this comparison compulsion puts all properties with enormously disparate values into a single free-for-all competition with one another. The Academy confronted this homogenization tendency by recommending a disentanglement of acquisitions into discrete categories under major headings such as outdoor recreation, natural resources protection, and cultural resources protection.⁵

B. Wrong Model #2: The Fee Simple Absolute

Why government agencies generally prefer to buy the "whole thing" in the form of a fee interest is an interesting story with multiple explanations.⁶ But an acceptable general account is that land managers believe that their goals can be achieved more easily if they can exercise the strong authority of a fee owner over properties whose uses they seek to influence. What Professor Meyer demonstrates, however, is that management goals that embrace protection of species and perpetuation of ecosystems rarely can succeed by exercising the sovereign rights of a fee simple owner over scattered parcels and even over broader territories once thought sufficient to sustain most management contingencies. When one factors finite resources into the equation, which is highly recommended these days, the conservation strategy of limited but decisive fee purchases is exposed in all its weaknesses. In an effort to extend the restricted reach represented by

3. *See id.* at ch. 8 (discussing OMB land acquisition priority procedure).

4. *See id.* at 238 app. B.

5. *Id.* at 9.

6. *Id.* at ch. 7.

a strategy of fee simple purchase, the Academy study recommends that the agencies resort to the whole range of acquisition, retention, and exchange techniques.⁷ Implicit in this choice is the expectation that management objectives often can be realized short of the fee owner's iron hand of control.

C. Wrong Model #3: Condemnation

The strong assumption of the fee in conservation land acquisition practice is reinforced by the power of condemnation, which is everywhere in the law of parks and wildlife management.⁸ The deep history of government acquisition of properties gives a hint of why the twin principles of compulsion and ouster of the resident population were deemed indispensable. The operation of bombing ranges, highways, and reservoirs leaves no room for unwilling sellers and stubborn holdouts. And the governments that undertake these projects have assumed ownership of vast tracts of land and moved millions of people out of the way.⁹ It is the condemnation authority that makes these ambitious endeavors possible.

More surprising is why the condemnation model is extended so readily to the acquisition of lands for park and wildlife refuge purposes where the conflict between management goals and a resident human population is not nearly so evident. Yet, experience shows that this highway condemnation model has been enthusiastically applied to land conservation endeavors not only in the United States but all over the world. For the most part, parks are established with the same rigorous intolerance for inholders as are highways. In its ugliest iteration, residents are ousted from the new park, moved to hostile lands in the environs, and asked to behave charitably towards the enterprise that has made their lives miserable.

The extent of compatibility between resident inholder and conservation goals is a subtle subject that cannot be explored fully here. It is sufficient to say that recognition of *Homo sapiens* as part of the landscape is an indelible aspect of working reality in even the most fragile of wilderness lands.¹⁰ Frequently, conservation goals can be

7. See *id.* at 10.

8. See *id.* at 60-61 (explaining that the Secretary of Interior is given eminent domain powers under 41 separate statutes).

9. See, e.g., Charles C. Geisler, *Adapting Social Impact Assessment to Protected Area Development*, in *THE SOCIAL CHALLENGE OF BIODIVERSITY CONSERVATION* (Shelton H. Davis ed.) (Global Env'tl. Facility Working Paper No. 1, 1993).

10. See DONALD WORSTER, *NATURE'S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS* (Cambridge Univ. Press 1985)(1977).

achieved by dealing with willing sellers of essential lands and tolerating the continued presence of unwilling sellers. This recognition counsels abandonment of the authority to oust in all but the most emergent circumstances. The Academy study recognizes that people are there to stay by counseling a more enthusiastic resort to social impact assessment techniques in the course of acquisition strategies.¹¹ Undoubtedly, the privilege of remaining in the preserve will be accompanied by relinquishment of some of the hard edges of fee simple entitlement.

D. Wrong Model #4: The "Ark" Configuration

Many of the world's conservation lands have been set aside on the assumption that management in isolation will allow protection in perpetuity of the protected resources. For the reasons elaborated by Professor Meyer, this convenient belief has been thoroughly shattered by empirical reality: the reserve is never big enough, its boundaries are not impermeable, its conditions and residents are always in flux.¹² To mention but one example, global warming alone might mean that to achieve anything approaching ecological stability, Yellowstone National Park would have to travel northwards at a rate of about three kilometers per year. Posing the issue in terms of a mobile park presents nicely the management challenges that must accompany realization of hopes to preserve biodiversity. The natural systems resist the law-sanctioned boundaries between jurisdictions, between private and public property holders, and between historically sanctioned entitlements and future needs. Either the law will bend, or nature will break, and continuation of past patterns means that we will abandon the ark rather than find a substitute for it.

E. Wrong Model #5: Parcel-by-Parcel Evaluation

In yesterday's world, real property was close to a fungible commodity, taking into account the obvious differences of location and configuration that could be differentiated readily in the open market. The "new ecology" of which Professor Meyer speaks adds layers of complexity to this world, distinguishing properties further on grounds of ecological function, location, and service. There is bad news and good news in this elevated account. The bad news is that a land acqui-

11. Compare *id.* at ch. 4 with SETTING PRIORITIES, *supra* note 2, at 10.

12. WORSTER, *supra* note 10, at ch. 5.

sition strategy that must evaluate regional and even global¹³ realities is surely a more challenging enterprise than trying to decide between parcel A or parcel B within the boundaries of the Mount Rainier National Park. Yet, decisionmakers hardly can turn a blind eye to the empirical knowledge of the day; the good news is that they enjoy techniques (such as the extraordinary Geographical Information Systems)¹⁴ that permit the assimilation and presentation of knowledge in ways undreamed of a few short years ago. So, too, there are regularities in the ecological systems of which Professor Meyer speaks and pockets of opportunity buried in the complexities. Those in the business of acquiring land for conservation purposes have been helped, not hurt, by the explosion of information on corridors, connections, pathways, and greenways.¹⁵ Here is a chance to repair and protect natural systems with strategic and sporadic intervention, which is the immediate foreseeable future for government conservation land purchases. Parcels of strategic significance certainly exist, but they can only be seen by stepping back and looking at the bigger pictures of context, of region, and of ecological service.

CONCLUSION

The world described by Professor Meyer has made a shambles out of what used to be tried-and-true stable and static legal conservation techniques. The systems of change she describes require a flexible and adaptive legal response. It is time to redesign the ark, equip it for a rough voyage, and make it ready for contingencies that now tease the limits of our recognition.

13. *Cf. id.* at 185 n.1 ("If USFWS were instructed by Congress to 'maximize the preservation of biological diversity' with its acquisition funds, the agency conceivably might be tempted to make strategic purchases of land in Latin America or elsewhere outside of North America.")

14. *See id.* at ch. 5.

15. *See id.* at ch. 5. *See also* ECOLOGY OF GREENWAYS (Daniel S. Smith & Paul C. Hellmund eds., 1993); THE ECOLOGY OF NATURAL DISTURBANCE AND PATCH DYNAMICS (S.T.A. Pickett & P.S. White eds., 1985).

