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Private Rights and Collective Governance: A Functional Approach to Natural Resources Law

Eric T. Freyfogle *

Natural Resources Law Center
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Natural resources law is the body of law that manages our collective interactions with the natural world. For various reasons, we've found it useful to divide nature into pieces, to craft use rights in the pieces, and then to integrate these use rights into governance regimes of one sort or another. Some of the use rights are individually owned; others are held by groups, including government bodies.

The common way of studying natural resources law is to examine resources one by one—timber, grazing, mining, water, wildlife—while distinguishing pretty clearly between public lands and private lands. State and federal laws are also kept mostly separate, and laws defining use rights are viewed as somehow different from regulatory schemes that limit how people can exercise their private rights. My aim is to offer a new way of approaching the field; a new way to think about natural resources and to describe and respond to today's challenges.

Natural resources law largely assumed its current shape between 1850 and 1950. Key assumptions guided its formation: assumptions about nature, ecology, and ethics; about how people might best use nature; about the key functions of private property; and about the relative roles of various governments. This law reflected the dominance of American liberalism, classically defined, as well as our growing belief that life was divided between public and private spheres. Most of all it reflected a widely held that our nation was best served by the rapid, private exploitation of nature, with government used chiefly to get resources into private hands, to require fair play, and to resolve disputes.

For decades these assumptions have been under siege. Natural resources law, in consequence, has faced strong pressures. For instance, we see now better than before the need to integrate resource uses at landscape scales. Ecological interconnections are better known, and we're gradually recognizing the benefits of restoring and protecting basic ecological functions. While we've known all along that individual resource uses don't occur in isolation, only recently have we seen starkly that resource-based goals quite often require coordinated action at large scales. Furthermore, private actions frequently clash with the public good, even when they're economically efficient, while resource allocations that made sense a century ago now seem distinctly out of date. And there are other pressures as well: new parts of nature are gaining value; concerns about future generations are rising; and the cry has gone out for more

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“privatization” even while strident voices are reminding us that power over nature means power over other people—power, too often, that’s unfair and oppressive.

In my new casebook, I set forth a different way of approaching the field, a rather fundamental rearrangement of how we might understand and describe what natural resources is about.

Whenever we divide nature into pieces, we need law to perform various particular functions. Rather than study law on a resource-by-resource basis, we can approach it instead in terms of these functions and the varied ways the law has performed them. Regardless of the part of nature involved, the law needs to define the terms of a resource use right, or tell private parties how they can do so. The law needs to allocate the resources in some way and prescribe rules on their duration. It needs to explain how the rights of conflicting resource and landowners will be resolved. It needs to provide mechanisms that foster resource reallocation over time, given the inevitability that we’ll want changes in patterns of use. And it needs to prescribe governance mechanisms to resolve disputes, to respond to change, and to keep ownership rules up to date. These are the law’s basic functions, and it performs them in pretty much every resource setting, in the United States and elsewhere.

When the law’s functions are explored, one by one, we can readily see how the same challenges arise in various resource settings, in terms of defining rights, allocating them, setting their duration, and the like. Cases involving different resources are put side by side, to see how the experiences in one setting might inform our thinking about others. Consider, for instance, the use of first-in-time as a resource-allocation method, employed in cases involving wild animals, water flows, valuable mineral deposits, and recreation use rights. What a study of these cases shows is that first-in-time allocation methods pose the same particular issues, regardless of resource. First in time to do what? How do we date the act of being first, when the relevant action extends over a period of time? What protection does a resource gatherer enjoy while engaged in the search and capture? And what happens when too many people are first, or when the reward for the labor of finding and capturing the resource appears excessive?

For a second example, consider the various ways that resources law resolves conflicts between adjacent owners or between a resource owner and a landowner. Again, when we bring materials together involving various resources we see that there are, in fact, only a limited number of conflict-resolution rules that we might use, alone or in combination. And we can see more clearly the difficulties of applying them. Similar insights come when we consider comprehensively the various legal provisions that set the duration of resource use rights, and the various means that the law uses in various settings to promote resource reallocation over time. We also see linkages among the issues—for instance the close links between the issues of resource duration and resource reallocation. Just as starkly, there’s the reality that public-interest limits on resource allocation inevitably require limits on resource transfer, which means nonmarket mechanisms need to be used, supplementing the market, to foster needed reallocation over time. If they are not, resources get stuck in increasingly inappropriate uses.

My proposed approach to natural resources law spends considerable time on a preliminary issue—what parts of nature are attached to land so that a landowner acquires them automatically and what parts instead are available for separate acquisition. To confront this issue directly is to see that the law’s answers have little to do with logic and more to do with culture and politics. It is also to see the recurring problems that arise when the law does sever a part of nature from the larger ecological web. Nature doesn’t divide easily, and line-drawing causes

headaches. Here, again, a comparative study offers insights. What becomes apparent, too, is that “land” as we understand it is perhaps best understood simply as a bundle of resource rights that have been allocated together, rather than one by one. Indeed, we may be approaching the day when land law and natural resources law are viewed as a single field, with natural resources law the larger, more encompassing category.

Most of what I’ve talked about so far has to do with distinct resource use rights, whether on public or private land, and the challenges of defining those use rights. Along with this large issue is the related one of governance methods. In my book, I directly challenge the presumed divide between public and private land, noting their many similarities and proposing that we study them together. Similarly, I challenge the presumed divide between the private and public entities that exert control over the ways nature is used. Indeed, I argue, perhaps the most vital and engaging field of work for natural resource scholars, looking ahead, is to craft new ways for people to get together to oversee and govern their various resource-use activities—new governance mechanisms that blend or transcend the public and private as we know them. One lesson that’s learned, once we give thought to governance mechanisms, is that we’re overly prone to distinguish between the laws that prescribe private rights and the mechanisms that we use to enforce them. Many resource rights are defined in vague terms, and they gain clarity only through the governance processes that we tend to view as mere enforcement. Put otherwise, the governance mechanisms that enforce private rights often are involved in clarifying the substance of those rights; they make the law, that is, even as they enforce it. To see this is to realize that we can often do a better job improving resources law by improving governance mechanisms and giving them overt roles in defining private rights and redefining those rights over time.

In many ways this functional approach offers fresh benefits and insights. Most evidently, it facilitates comparative study, allowing us readily to use experiences in one resource setting to improve the law in another. It also puts contentious issues in new, more useful light. Private condemnation, for instance, has a long history in natural resources law—though most property lawyers seem not to know it. Why for generations we allowed private condemnation, and why it might be good to continue allowing it, becomes more clear when we see it as one of many alternative methods of resource reallocation; one of several methods of responding to the market’s many limits. Is private condemnation fair or necessary? How can we know unless we identify and make comparisons with its functional alternatives. And to offer a final brief lesson, there’s the much-lauded right of landowners to exclude, viewed by some today as perhaps the key landowner right. What a functional study reveals is that, in fact, natural resources law offers many examples in which the landowners’ right to exclude is curtailed so as to facilitate the beneficial use of discrete resources.

One of the aims of my book, in terms of student learning, is to enable students to craft a natural resource regime for some part of nature that we have not heretofore viewed as valuable. Once the law’s functions are all known, and once the familiar approaches in each functional area are set forth with their pros and cons explored, it then becomes rather easy to take on this task, or at least to set forth what the law needs to do and how it might go about doing it. A related virtue of this approach is that it greatly helps students understand the natural resources law regimes of other countries. Lawmakers elsewhere can and do prescribe rules governing natural resources that differ substantially from those in the United States. But their laws necessarily perform the same functions, and they necessarily choose from the same suite of legal options. The student who knows the law’s key functions can readily ask questions in another country and synthesize

the answers. Similarly, foreign students studying American natural resources law acquire a framework of understanding that is more readily transported into other legal systems.

As our landscapes become more crowded, and as we push ever harder against our continents physical capacities, we need to find sound ways to tailor our resource-uses to the land's physical features. We need to find better ways to accommodate multiple resource-uses in the same place at the same time. We need to think clearly and flexibly about the ways we define and redefine resource use rights, drawing upon the enormous wisdom embedded in our legal history. And we need to craft new, better mechanisms of collective governance at various spatial scales, drawing upon the experiences of resource users themselves and helping people see how good governance can improve their lives.

My prediction is that natural resources law is at the beginning of an extraordinary new phase of development. We've done our best to tinker with and repair the natural resources system that arose in liberal, frontier America when exploitation was the unquestioned goal. The system, though, is merely clunking along today, causing frustration. We need a new design. Our land-use goal now is quite different from what it was a century and more ago. It is to find ways of living collectively on land that can endure; ways that keep our lands ecologically healthy and pleasant as places for us and our descendants to dwell. It is a vastly different goal. We'll need new legal tools to achieve it.