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**LAW AND THE AMERICAN WEST:
THE SEARCH FOR AN ETHIC OF PLACE***

CHARLES F. WILKINSON**

The making of public policy in the Intermountain West is accompanied by regular flashes of contentiousness that exceed those in any other region in the country. One can see this on many levels. Looking at the long sweep and fusion of past and present, western historians properly emphasize the region's boom-and-bust economy; the continuing quest to remake nature; and wars over range, water, Indian-white relations, and Mexican land and immigration. Those struggles live with us today. University of Colorado historian Patricia Nelson Limerick has said this in her brilliant book, *The Legacy of Conquest*:

[T]he history of the West is a study of a place undergoing conquest and never fully escaping its consequences. . . . Conquest basically involved the drawing of lines on a map, the definition and allocation of ownership (personal, tribal, corporate, state, federal, and international), and the evolution of land from matter to property. The process had two stages: the initial drawing of the lines . . . and

* © Copyright 1988 Charles F. Wilkinson. This essay is adapted from the Fourteenth Annual Austin W. Scott, Jr. Lecture, presented by Professor Wilkinson at the University of Colorado School of Law on April 21, 1988. It is based on research prepared in connection with Professor Wilkinson's collected essays, *BEYOND THE DISTANT RIDGE: SEARCHING OUT AN ETHIC OF PLACE IN THE AMERICAN WEST* (forthcoming 1989), and his current book-in-progress, *THE LORDS OF YESTERDAY: NINETEENTH CENTURY RESOURCE RIGHTS IN THE MODERN AMERICAN WEST*.

** Professor of Law, University of Colorado. I would like to acknowledge the helpful comments of Karen Lewotsky, Don Snow, Ed Marston, Ed Lewis, Will Barnes, and Britt Banks. I also owe a special debt to the Northern Lights Institute, which gave me the occasion to think about an ethic of place in connection with an address I gave at an NLI symposium entitled "Boundaries Carved in Water: A Symposium on the Future of the Missouri River Headwaters," held in Billings, Montana in October 1986.

the subsequent giving of meaning and power to those lines, which is still underway. . . .¹

She went on:

The contest for property and profit has been accompanied by a contest for cultural dominance. Conquest also involved the struggle over languages, cultures and religions; the pursuit of legitimacy in property overlapped with the pursuit of legitimacy in way of life and point of view. . . .²

A person can see the essential conflict in the American West in other ways. One can see it personified in great public issues such as the furious hearings on Colorado's proposed Two Forks Dam now being conducted in various locales around that state and in Nebraska. One can see it in the zealous faces of Earth First! activists, who talk of, and maybe accomplish, the spiking of the old trees in order to plant the equivalent of land mines for those who would log deep into the ancient forests and, too, in the angry faces of the members of the grass-roots organization Women in Timber of Dubois, Wyoming, who are struggling to save the jobs at the Louisiana Pacific mill from the perceived excessive demands of local environmentalists.

The fiction of the region also brings to life the way in which policy is made at loggerheads, by confrontation. One of Edward Abbey's early novels is *Fire on the Mountain*,³ where a cantankerous old rancher, John Vogelin, holds out when the Army wants to condemn his ranch and BLM grazing leases and add them to the White Sands Missile Base in New Mexico. Vogelin, who, as Ed Abbey grows ever older and ever more cantankerous, sounds more and more like a surrogate for the utterly unreconstructed Abbey, said this:

"The Box V is not for sale!" Grandfather thundered. . . .
"The Box V is not for sale. The Box V never was for sale. The Box V never will be for sale. And by God no pack of brass hats and soldier boys and astro — astronauts or whatever you call 'em is going to take it away from me. I'll die first. No — they'll die first. Why I never heard of such a thing. Every citizen of Guadalupe County, every mother's son in New Mexico, should be loading his guns right now.

. . . .

"I am the land," Grandfather said. "I've been eating this dust

1. P. LIMERICK, *LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 26-27 (1987).

2. *Id.* at 27.

3. E. ABBEY, *FIRE ON THE MOUNTAIN* (1962).

for seventy years. Who owns who? They'll have to plow me under."⁴

And the contentiousness plays out in tragic ways that are not even remotely fiction. *The New York Times* reports that the rates of violent death in numerous rural western communities exceed those in the inner cities of the nation's urban areas — New York, Chicago, Detroit.⁵ *The Denver Post* recently did a piece on an extraordinary spate of juvenile suicides — it amounts to an epidemic — that has been recurring for years in two central Wyoming towns.⁶

I am not suggesting that these incidents, alone or in the aggregate, are representative of contemporary life in the American West. In no sense am I trying to tell the whole story of the whole West through these vignettes. But each incident is important in its own right, each is tied in a reasonably direct way to distinctive regional characteristics, and each hints at fundamental regional problems.

Let me give some examples. The boom and bust cycles are due in large part to the West's role as primary storehouse for the nation's mineral deposits. Thus Denver's current twenty six percent vacancy rate for office space traces to the optimism generated by the explosive growth in the minerals industry in the late 1970's and the subsequent plummeting of demand for energy fuels. Two Forks Dam is in the front part of our consciousness because of the central role that water has always played in the Intermountain West. Timber disputes in Du-bois and federal project development at John Vogelin's ranch near White Sands reflect the fact that fifty percent — think of it, fifty percent — of all land in the eleven western states is owned by the federal government. The violence in our rural towns, social scientists believe, is linked to our longtime reliance on extractive resource development, where jobs are often dangerous and where rootlessness is common. Even the outbreak of suicides is tied to distinctive regional qualities, for the victims were young Indian people, members of the Wind River Tribe in Wyoming, people who had to face up to the gut-ripping tug and pull between the traditional ways and a larger society that at once lures them with its television glamour and spurns them with its racism.

All of these things lead to policymaking by confrontation. To quote Patricia Nelson Limerick again: "Indians, Hispanics, Asians,

4. *Id.* at 26, 40.

5. Applebome, *Some Say Frontier Is Still There, and Still Different*, *The New York Times*, December 12, 1987, at 13, col. 3.

6. Simpson, *Winning Became Solace at School Hit By Tragedy*, *The Denver Post*, September 7, 1987, at 12F, col. 3.

blacks, Anglos, business people, workers, politicians, bureaucrats, natives, and newcomers, we share the same region and its history, but we wait to be introduced."⁷

THE NEED FOR AN ETHIC OF PLACE

The problem, I believe, traces not so much to western people as it does to western laws. One dynamic in particular encourages adversarial encounters. A great many natural resources laws operating today have their genesis in the mid- or late-19th century, a time when westerners held extreme laissez-faire attitudes toward public resources such as water, wildlife, timber, minerals, and rangeland. The legal solutions of the time — mostly rules of capture — reflected the attitudes that nature was to be conquered and that natural resources were commodities only. There are also things the law did not do, such as promote respect for the special circumstances of Indian and Hispanic communities. Essentially, 19th-century whites denied the humanity of Indian and Hispanic people, and saw no real wrong in taking their land, their natural resources, or even their lives.

Although these perceptions have changed, the laws that embody the old beliefs remain in force. Environmentalists, in particular, have repeatedly come into collision with these antiquated laws — these lords of yesterday — and have had little choice but to engage in pitched battles that are more often directed at the outmoded laws than at the westerners who espouse them. Still, the result is personal hostility and shallow solutions, caused in part by the environmentalists' intrinsic difficulty in making affirmative proposals that take economic interests into account when the lords of yesterday, still on the statute books, are so radically tilted toward extractive interests.

The process of achieving results through combat will not change completely, and the changes that do come will not come easily. These are inherently tough problems due to cultural differences, resource scarcity, and economic pressures. There is a certain level of contentiousness that will never entirely go away. We are not about to enter an era of immediate, deep, and permanent bonding between the drivers of Volvo station wagons sporting "Babies can't be cuddled with nuclear arms" bumper-stickers and the owners of Ford pickups insured by Smith & Wesson.

Still, over time we can ameliorate these problems. We deserve and can achieve more stable, tight-knit communities, communities bound together by the common love of this miraculous land, of this

7. P. LIMERICK, *supra* note 1, at 349.

region the likes of which exists nowhere else on earth. We can do much better.

We need to develop what I will call an ethic of place. It respects equally the people of a region and the land, animals, vegetation, water, and air. An ethic of place recognizes both that western people revere their physical surroundings and that they need and deserve a stable, productive economy that is accessible to those of modest incomes. An ethic of place ought to be a shared community value and ought to manifest itself in a dogged determination of the society-at-large to treat the environment and its people as equals, to recognize both as sacred, and to insure that all members of the community not only search for, but insist upon, solutions that fulfill the ethic.

This is a broad formulation and, like all such generalities, there is an inherent difficulty in moving it down close to the ground. But our broad policies have always mattered in the West, whether they have been Manifest Destiny, conservation, multiple-use, or the Sagebrush Rebellion. Such concepts provide us with points of departure in our continuing struggle to define our society and what it stands for. Further, in spite of its inevitable generality, this ethic of place calls for reasonably concrete approaches to specific problems and it has a hard edge. The ethic of place attempts to pull out the best in us but it does not purport to be all things to all people.

My purpose in this talk is to expand upon the ethic of place — to define the places, people, and ideas it encompasses — and to apply it to five discrete situations.

THE ETHIC OF PLACE WEST OF THE CULTURAL FAULT LINE

The most relevant boundary lines for an ethic of place in the American West accrue from basin and watershed demarcations. The region is marked off by water or, more accurately, by the lack of it, at the dry line that weaves north to south between the 100th and 98th meridians. Walter Prescott Webb called it a "cultural fault line."⁸ West of there; people instinctively keen to ridgelines and to the tilt of the land. It is not always easy, nor necessary, to define precisely the relevant watershed — to resolve whether people living in, say, Bozeman find definition from the Upper Missouri, the Three Forks country, or the Gallatin. The point is that Bozeman's cultural and economic identity is as likely to be perceived of in relation to one of those watersheds as it is to the state of Montana or the Upper Great Plains.

8. W. WEBB, *THE GREAT PLAINS* 8-9 (1931).

This is in no sense a suggestion that we rework our angular state lines to conform to river basins — that is not going to happen, nor would the transaction costs make it worthwhile. I suggest only that we can better understand our society by appreciating that in the West our sense of place — that subtle, intangible, but soul-deep tie to local landscape, community, and history — is powerfully shaped by the course of water.

My approach is linked in some degree to the emerging theory of bioregionalism, which, among other things, attempts to identify the natural geographic regions within which human beings can best assess the effects, and achieve the promise, of their work. Such a region must be the right size — small enough to understand, large enough to allow diversity and growth — and a logical configuration. If the scale is right, a watershed is an especially appropriate unit because, as Kirkpatrick Sale wrote in *Dwellers in the Land*, “a watershed — the flows and valleys of a major river system — is a particularly distinctive kind of georegion, . . . with aquatic and riverine life usually quite special to that area and with human settlements and economies peculiar to that river.”⁹

An ethic of place looks to more things than the geography of water for definition. The legitimate governments and societies in a region must also be identified. State, local, and tribal governments hold established places, as do ranching, farming, logging, mining, and Hispanic communities.

Perhaps most notably, we have a great distance to go in recognizing the just place of American Indian tribes. It is one of the terrible ironies of our time that so many non-Indians see tribal rights as hyper-technical or anomalous — that they view tribal sovereignty as some convoluted fiction spun out by lawyers’ trickery. In fact, the legitimacy of modern tribal governments follows from pure and forceful strains of logic and history. Before contact with white societies, all the tribal people in the Missouri Basin had political organizations. Some were defined by tribe, others by band or clan. But all of the aboriginal tribes had law ways: they set norms, decided disputes, and rendered punishments.¹⁰ Every European government, whether the English, Spanish, or French, acknowledged the existence of those governments. So did the new United States, which entered into treaties with tribal governments.

The treaties fortified tribal national existence rather than diminishing it. As Chief Justice John Marshall put it, Congress “exhibit[ed]

9. K. SALE, *DWELLERS IN THE LAND: THE BIOREGIONAL VISION* 57 (1985).

10. See E. HOEBEL, *THE LAW OF PRIMITIVE MAN* (1967).

a most anxious desire to conciliate the Indian nations."¹¹ Federal statutes "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries which is not only acknowledged, but guaranteed by the United States."¹² The United States has not always been faithful to those guarantees as to tribal lands, but the national government has always acknowledged the political existence of Indian tribes. Tribal sovereignty has persevered for thousands of years and has been continuously recognized by European and American governments for no less than four centuries.

Real societies exist in Indian country. Non-Indians can go there and learn that, aided by the generosity that is the talisman of the Indian way. Or we can read of vibrant, creative tribal societies in the works of authors like Vine Deloria, Jr., James Welch, Leslie Marmon Silko, and Louise Erdrich, whose recent novel, *Love Medicine*,¹³ dealt with life on the Turtle Mountain Chippewa Reservation in North Dakota. They write candidly of poverty, unacceptable educational levels, and alcoholism, the disease that seems to hold a grudge against Indian people. But within the reservations you will also find warmth, humor, love, and traditionalism all bound together. The smoke from the chimneys on those barren flats, as non-Indian eyes may see them, rises from fires surrounded by extended families pushing on in a changing and uncertain world as best they can, just like the rest of us. They possess individuality as people and self-rule as governments, but they are also an inseparable part of the larger community, a proud and valuable constituent group that must be extended the full measure of respect mandated by an ethic of place.

The idea that the ethic of place requires that elements of a community respect other constituent parts of the community, and that communities respect each other, in no sense means that the ethic tends toward a homogeneous society. On the contrary, the ethic of place is founded on the worth of the subcultures of the West and thereby promotes the diversity that is the lifeblood of the region.

This ethic recognizes that western communities have the right to grow and prosper, and that right should be espoused by all of us. Development should be primarily from within, activity that utilizes the talents, labor, and resources of the basin and its residents. We have seen development that fails to meet this ethic, that has led to well-

11. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 549 (1832).

12. *Id.* at 557.

13. L. ERDRICH, *LOVE MEDICINE* (1984).

documented charges that the rural West has been treated as a colony. In some sectors this has led to a drain of capital resources and to cultural scars when the booms die out. But westerners need to go beyond that, look inward, and recognize that the idea of Eastern colonization has been overdone. Ask the residents of California's Owens Valley or Colorado's Blue River Valley who are the colonizers and their answers are likely to be, respectively, "Los Angeles" and "Denver."

Economic development must also reflect the idea of sustainability of resource use, which cries out from the classic writings of Aldo Leopold and John Muir who, to our celebration, was born 150 years this very day.¹⁴ Sustainability also is the linchpin of the work of Colorado's greatest contemporary resource philosophers, Gilbert White and Amory Loving. Their work is premised on a community's obligations to its own land and its own succeeding generations and, as well, on its obligations to other communities and to land outside of its watershed.

These human aspects of the ethic of place are coupled with a concern for the land and animals that also exist in these places staked out by watershed boundaries. In the scholarly literature, there is a sharp and enlightening debate over homocentrism (the belief that things ought to be interpreted according to human values) and biocentrism (the idea that animals and land systems have an independent right to exist entirely separate from any relationship to human beings). Why, in other words, should an animal species or a land mass be protected — because the animals or land are inherently entitled to protection or because humans would benefit from it? Aldo Leopold, who was powerfully influenced by biocentrism, said that a land ethic would require that such things "should continue as a matter of biotic right, regardless of the presence or absence of economic advantage to us."¹⁵ Several current theorists, including Devall and Sessions in their book, *Deep Ecology: Living As If Nature Mattered*,¹⁶ argue for a biocentric approach to the environment.

Applying such thinking, of course, would have extraordinary ramifications for natural resources policy. For example, grizzly bears and wolves at the upper end of the Missouri Basin require large areas of uninhabited land for survival. Recognizing that grizzly bears and wolves have inviolable, independent rights would stall development of even minor projects on many fronts.

An ethic of place, as I propose it, borrows from biocentric reason-

14. April 21, 1838.

15. A. LEOPOLD, A SAND COUNTY ALMANAC 211 (1949).

16. B. DEVALL & G. SESSIONS, DEEP ECOLOGY: LIVING AS IF NATURE MATTERED (1985).

ing without adopting it wholesale. We should accept these and other animals as part of the community within which we live. Even if we stop short of recognizing rights in these animals, we should nevertheless accord them independent respect. An honest concern for their dignity and welfare ought to be one aspect of developing a policy approach toward basin management.

There are also valid homocentric reasons for a respect toward wolves and grizzly bears. Lee Bollinger's recent book on free speech, *The Tolerant Society*,¹⁷ argues that the ultimate justification for free speech is not the traditional view, that allowing self-expression by minorities furthers the search for truth. Rather, Bollinger concludes that the first amendment makes the majority stronger by requiring of it tolerance and self-restraint. Recognition of such minority rights thus furthers "the genuine nobility of society."¹⁸

Laws such as the Endangered Species Act, it follows, fulfill the ethic of place in diverse ways. The Act grants respect to the independent existence and integrity of other species, but also benefits the human race, and not just by achieving pragmatic objectives such as preserving gene pools for scientific research. Such an approach pulls out the best in us and, like the first amendment, elevates us by its proof that our unique ability to develop technology is coupled with the capacity and will to exercise a humane restraint in the name of a high calling, like the honest respect for other species that exist with us in the same watershed. Such considerations may not always control but such obligations to our environment ought to matter to us profoundly.

We will always have disputes over land, water, wildlife, minerals, and power. Such raspings are inevitable and ultimately healthy in a colorful, dynamic, and individualistic society. Nevertheless, the dissenting parties often leave angry, determined to undercut the temporary solution bred of combativeness. Perhaps worse, the process tears at our sense of community; it leaves us more a loose collection of fractious subgroups than a coherent society with common hopes and dreams. The overarching concern, therefore, is not to deny that conflict will occur, but rather to acknowledge an ethic that sets standards and, as importantly, provides a method for dealing with disputes. Disputants need to recognize that they exist within a community and that consensus is the preferred method of resolution. Litigation is expensive. It is also inflexible: no judge can craft a settlement in these complex public disputes as well as the parties themselves. Furthermore, a

17. L. BOLLINGER, *THE TOLERANT SOCIETY* (1986).

18. *Id.* at 248.

voluntary agreement reached by consent draws groups into joint cooperation during the implementation stage that follows.

It is not always possible to complete an accord at the basin level. Federal agencies or even Congress may become involved as a matter of necessity if public lands are at issue, if federal funding is required, or if interstate issues are substantially implicated. But federal action should be the product of agreements that come from the ground up. The preferred role of the agencies and Congress should be to ratify local accords among the affected elements of the basin community.

Consensus dispute resolution involving all affected basin parties has a core value, one separate from the worth of ending a confrontation for the time being. An agreement can glue former adversaries together in a continuing process jointly conceived. Consensus builds trusting communities. Agreements heal and strengthen places.

I would like now to apply the notion of an ethic of place to current situations arising in five western places: the Crooked River Valley in Oregon; the Yellowstone Ecosystem in Wyoming, Montana, and Idaho; the Big Horn Basin in Wyoming and Montana; the Eagle River Valley in Colorado; and the Rio Chama Valley in New Mexico. In discussing current disputes, I do not presume to offer solutions to these complex problems. I do believe, however, that the ethic of place can offer both a context for analysis and specific elements of policy that ought to be included in the equation but that are largely missing from the current structure of law and policy.

APPLYING THE ETHIC OF PLACE

The Crooked River Valley

The Crooked River Valley lies at the geographical center of Oregon. The valley floor sits at about 4000 feet and is bounded by unprepossessing, rounded mountains rising to about 7000 feet. Like the majority of land in the West, it is sparsely-populated ranching country. Prineville, the largest town and the county seat of Crook County, has a population of about 6000. This is the arid eastern two-thirds of Oregon, not really of the Pacific Northwest, but of the high plains country found throughout the Rocky Mountains. Average annual precipitation in the drainage is just twelve to fourteen inches.

Ranchers have traditionally exercised extraordinary political influence in the BLM. One result is that grazing fees remain well below market value. Although comparisons are somewhat difficult, the most recent statistics show that BLM permittees pay an average of \$1.35

per animal unit month (AUM) compared to a West-wide appraised market value of \$6.53 per AUM.¹⁹

The ranchers of the Crooked River Valley benefit society in many ways, some tangible, others not. They help meet the continuing market demand for beef and lamb. They provide jobs and preserve the awesome space that helps give the western range its identity. Although increasingly much is made of corporate control over vast domains of rangeland, ranchers still contribute a way of life that commands our respect, even our awe. In her wonderful portrait of ranch life in Wyoming, *The Solace of Open Spaces*, Gretel Ehrlich said this:

On a ranch, small ceremonies and private informal rituals arise. We ride the spring pasture, pick chokecherries in August, skin out a deer in the fall, and in the enactment experience a wordless exhilaration between bouts of plain hard work. Ritual — which could entail a wedding or brushing one's teeth — goes in the direction of life. Through it we reconcile our barbed solitude with the rushing, irreducible conditions of life.²⁰

For these and other reasons, Walter Prescott Webb called the ranch cattle industry "perhaps the most unique and distinctive institution that America has produced."²¹ Webb wrote that in 1931, before our invention of television or McDonald's, but he made a point that still deserves to be honored and that is a palpable thing in the Crooked River country.

But the range at Crooked River, as it is across most of the West, is in chronically poor condition. One can see this vividly by looking at Camp Creek, one of the tributaries of the Crooked River.

Peter Skene Ogden, the intrepid British fur trapper for the Hudson's Bay Company, led a hunting party to the area in December 1825. In his journal, the first written account of the region, he observed that "[t]he soil on this Fork [is] remarkably rich in some parts [and] the Grass seven feet high."²² A half a century later, in 1875, the Surveyor General of Oregon examined Camp Creek and described the valley floor as "an ungullied meadow, with several marshes."²³ In 1905, just one generation after the Surveyor General's report, Israel Russell of the United States Geological Survey had this to say of the

19. See STAFF OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS, 99TH CONG., 2D SESS., *FEDERAL GRAZING PROGRAM: ALL IS NOT WELL ON THE RANGE* 1-2 (1986).

20. G. EHRLICH, *THE SOLICE OF OPEN SPACES* 103 (1985).

21. W. WEBB, *THE GREAT PLAINS* 224 (1931).

22. P. OGDEN, *SNAKE COUNTRY JOURNALS* 106 (1850).

23. See PRINEVILLE DIST., BUREAU OF LAND MANAGEMENT, *CAMP CREEK WATERSHED REVISED ACTIVITY PLAN* (June 1985).

"ungullied meadow" that so recently had been the Camp Creek Valley:

The main trench [of Camp Creek], which follows the longer axis of the valley, ranges from 60 to 100 feet in width, is approximately 25 feet deep, and has several vertical walls throughout the greater portion of its course.²⁴

A "trench" twenty five feet wide and up to 100 feet across. If you stand on Camp Creek's rocky creek bottom today, you can visualize the immense amount of earth that was driven downstream during the radical down-cutting of the last two decades of the 19th century. You will be standing between the sheared-off banks, fifty feet away on each side. The banks rise up twenty or twenty five feet. You can imagine the former meadow surface at the tops of the cut-banks high above your head, at the roof-level of many houses. If you fix on a point upstream, say, 100 yards away, you can begin to comprehend the volume of soil and rock that was driven down-stream — the equivalent of several neighborhoods of houses full of material — just on that one short, 100-yard stretch of stream.

The erosion at Camp Creek continues. Topographical maps show forty-acre "Severance Reservoir" on Camp Creek about seven miles up from the Crooked River. Severance Reservoir is now a meadow, completely filled up with one million tons of silt, right up to the top of the dam. Prineville Reservoir, a major federal project on the Crooked River, has been one-quarter filled by erosion from Camp Creek and other tributaries.

All of this is due to cattle or, much better put, to the poor management of cattle by human beings. In the 1880's and 1890's, ranchers took over the public domain rangeland and introduced hordes of cows, and significant numbers of sheep, into the Camp Creek Valley. Understandably, when cows see green and smell water, they head for it. If you simply turn them loose, and don't manage them, those cattle will pound down the banks, crush the beaver dams, root out every last stalk of forage, and then wallow in the mud that is left. When this happened at Camp Creek and the vegetation in the riparian zone was virtually eliminated, the big spring flow gouged out the exposed stream bottom, and the process snowballed as rocks and boulders tore down the channel. In many stretches, the scouring effect continued until the stream bottom cut down to bedrock. The top of the aquifer declined, dropping below the reach of stream-side trees. Valuable willows, whose root systems helped stabilize the soil, died out. The flow

24. I. RUSSELL, *GEOLOGY AND WATER RESOURCES OF CENTRAL OREGON* 62-63 (1905) (U.S.G.S. Survey No. 252).

pattern radically changed. The snow melt, much of which was once stored by the marshy riparian zone, flushed down the rocky chute in a rush, leaving little or no flows for the dry months of summer and fall.

Camp Creek, therefore, was once an elaborate holding and filtering system. The broad, marshy meadowlands trapped sediment. The vegetation also slowed, cooled, and caught water in its matrix of meanders, soil, and plants. The water seeped into the groundwater table, the top of which blended with the root systems of the plants. The blue ribbon of Camp Creek was only the visible tip of a vast, interconnected aquifer.

A healthy riparian system, such as existed in the Camp Creek Valley before the 1880's, produces a range of economic benefits. It cools and purifies water. It is a deep and efficient reservoir — much like a great sponge — that stores water without evaporative loss and feeds it back into the stream conveyance channel, assuring a reliable supply of water to downstream users during summer and fall and in dry years. Further, if proper management practices are followed, cattle can graze in these extraordinarily nutritious areas.

A riparian zone can also be a festival of wildlife species, and Camp Creek once was exactly that. Ducks and geese nested there. The ungainly-yet-graceful great blue heron coasted in on its seven-foot wingspread to feed on the bugs and minnows. Native rainbow trout lived in the water all year, and salmon and steelhead pushed up several hundred miles from the ocean to spawn. Raccoons prowled the stream bottom, and deer and elk stole down from the uplands at the close of day to drink. Beaver, which Peter Skene Ogden found so plentiful, were exceedingly important to the integrity of the old Camp Creek system. The pools behind the beaver dams stored water and spread it out, expanding the reach of the riparian zone.

There are Camp Creeks all across the American West — thousands of them. To be sure, the factors that determine the amount of erosion — soil types, vegetation, gradient, and volume and regularity of streamflow — will differ from locale to locale. General regional differences also can be drawn — the ravages of overgrazing tend to be somewhat less severe, for example, in Montana and somewhat more severe in New Mexico. Nonetheless, Camp Creek fairly represents the current state of the western range.

An ethic of place, with respect both for natural resources and for the ranching community, might call for these range issues to be handled in the following manner. First, the real issue must be identified. Although the longstanding subsidy for grazing fees is an electric political issue for environmentalists in these Gramm-Rudman days, they

must recognize that the subsidy is not the overriding problem. At an estimated \$33 million per year, the grazing subsidy is modest compared to other governmental subsidies and is a drop in the bucket of the overall federal budget. Low grazing fees may not be desirable, but they are not decisive as to the real issue, which is soil and watershed protection.

In addition, there is increasing evidence that poor range conditions are not attributable to the number of cows on the public lands. Allan Savory, an independent ranch consultant who runs Holistic Resource Management out of Santa Fe, has built an impressive case that range quality can actually be improved if the numbers of cattle are increased.²⁵ Savory points out that the native grasses in the Great Plains, and in the Crooked River Valley as well, co-evolved with buffalo. Large ungulates perform numerous functions essential to a healthy range. Their hoofs chip up the earth, giving seeds an opportunity to germinate and keeping the soil loose and absorbent. Light grazing of the plants promotes growth, much like pruning does. But whereas the wild buffalo kept moving across the range, cows need to be managed so that they do not congregate and stay put, especially in riparian zones but also in upland areas.

Both environmentalists and ranchers must make major perceived concessions in order for the Savory method to be adopted. Environmentalists distrust to their depths the idea of increasing the number of animal unit months on the public range. But environmentalists should not insist on stock reductions if, after objective consideration of the Savory method, they are satisfied that existing or increased AUMs can improve the range. Environmentalists ought to support this lessening of the burden on an already-stressed ranch economy.

Ranchers also need to bend to accommodate the needs of the basin. Like the environmentalists, they should study the Savory method and, if it works, should adopt it. Early, voluntary readjustment of this kind is the best route. But the BLM must also actively promote progressive range management and see that Savory's innovative approaches, or similar ones, are put in place. In this manner, the real evil in range policy — not the subsidies, not too many cows, but the lack of good range management — can be squarely addressed. Ranchers can no longer simply turn the cattle loose in May or June, but they can achieve a better end product through slightly altered practices.

25. Savory, *Saving the Brittle Lands: Holism and the Health of the Commons*, 1:4 NORTHERN LIGHTS 18 (July/Aug. 1985). Another leading proponent of this general philosophy of range management is Wayne Elmore. See Elmore & Beschta, *Riparian Areas: Perceptions in Management*, 9:6 RANGELANDS 260 (Dec. 1987).

This approach requires respect on all sides: from the ranchers for the very real damage that has been done to the western range and watercourses, and from environmentalists for the very precarious financial situation that ranchers face today. But all members of a basin community should be willing to take chances. We must assume the risk of departing from old and deeply-ingrained stereotypes in order to pursue a course that has every promise of making a basin a better place from every point of view.

The Yellowstone Ecosystem

The Greater Yellowstone Ecosystem consists of more than 13 million acres in Wyoming, Montana, and Idaho. Of course, the heart of the ecosystem is Yellowstone National Park, encompassing the high, serene Yellowstone Plateau, the storied place where the United States made history in 1872 by creating the world's first national park as a "pleasuring-ground for the benefit and enjoyment of the people."²⁶ The use of the phrase "Greater Yellowstone Ecosystem" recognizes that the mostly arbitrary lines creating the park do not respect the migration routes of grizzly bears, elk, and other wildlife. Proposed geothermal development outside park boundaries may threaten the geysers. Road systems, erosion, habitat disturbance, and noise from timber and mining operations in areas adjacent to the Park impact on the Park and ecosystem as a whole. Development activities have negative impacts on the already substantial, and growing, recreational economy in the Greater Yellowstone Ecosystem area. As a general matter, habitat destruction and fragmentation in the surrounding areas threaten the integrity of the whole ecosystem. Thus the region, which in this case is not defined by watersheds, is best understood as encompassing, not just the first park, but also Grand Teton National Park, three wildlife refuges, some BLM lands, and, perhaps most critically, the seven national forests that girdle the park.²⁷

There is also an established economy that depends upon extraction of the natural resources of the Ecosystem. For our purposes, I would like to focus upon timber harvesting, which helps drive the economies of several towns in the area, notably Belgrade and Livingston at the northwest end of the ecosystem and Dubois at the south-

26. Act of March 1, 1872, ch. 24, § 1, 17 Stat. 32.

27. On the Greater Yellowstone Ecosystem, see generally SUBCOMMS. ON PUBLIC LANDS AND ON NAT'L PARKS AND RECREATION, HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 99TH CONG., 2D SESS., GREATER YELLOWSTONE ECOSYSTEM, AN ANALYSIS OF DATA SUBMITTED BY FEDERAL AND STATE AGENCIES (Comm. Print 1986); GREATER YELLOWSTONE COALITION, GREATER YELLOWSTONE CHALLENGES 1986, AN INVENTORY OF MANAGEMENT ISSUES AND DEVELOPMENT PROJECTS IN THE GREATER YELLOWSTONE ECOSYSTEM (1986).

east end. In all, the seven national forests produce about 130 million board feet of timber annually, a figure that the Forest Service apparently intends to increase by about twenty percent.²⁸ The Wilderness Society estimates that most of these sales are below-cost sales, in which the government's expenses exceed revenues, and that losses from the seven forests exceed \$7 million per year.²⁹ The question of defining below-cost sales, and of how much money is lost on a given sale, remain complex and in dispute, but I, at least, find it hard to refute the conclusion that there are a significant number of subsidized sales in this region.

An ethic of place would provide structure by setting out the following kinds of guidelines. First, the Greater Yellowstone Ecosystem ought to be recognized as a basic unit for management and policy making. Right now there are four separate federal agencies involved and, in the case of the Forest Service, management authority is exceedingly diffuse. The seven forests report to three separate regions with headquarters in Denver, Missoula, and Ogden. I am not suggesting that some kind of single "super agency" be established, but coordinated management among the federal agencies is essential. The agencies have made some beginning strides in that direction³⁰ and, by moving quickly down that path, they will be serving the best interests of the West well.

The second way in which an ethic of place might be applied deals with the level of annual timber harvest — the cut — and the resulting roads, which are pressing and divisive matters all across the West. From the standpoint of the conservation movement, those businesses oriented toward recreation, and, increasingly, the public-at-large as well, the nation-wide timber harvest from the national forests is simply too high. They raise three separate kinds of objections — economic, scientific, and social — to the excessive cut. First, economically, many timber sales in the Intermountain West are below cost. Second, scientifically, some cuts destroy wildlife habitat; are made in areas that can-

28. THE WILDERNESS SOCIETY, *FORESTS OF THE FUTURE? AN ASSESSMENT OF THE NATIONAL FOREST PLANNING PROCESS* 52 (1987).

29. *Id.* Another study concludes that the annual deficit will be about \$23 million if the current Forest Service plans are allowed to go into effect. R. O'Toole, *Economic Database for the Greater Yellowstone Forests 6* (Cascade Holistic Economic Consultants Research Paper No. 18) (May 1987).

30. The Forest Service has issued a document displaying the seven individual forest plans. GREATER YELLOWSTONE COORDINATING COMM., *THE GREATER YELLOWSTONE AREA: AN AGGREGATION OF NATIONAL PARK AND FOREST MANAGEMENT PLANS* (1987) (cooperative project of the National Park Service and the U.S. Forest Service). In addition, the Forest Service has opened an office in Billings, Montana to address management activities relating to the Greater Yellowstone Ecosystem. Conversation with James L. Hagemeyer, Regional Planning Director, Region I, United States Forest Service, May 16, 1988.

not regenerate properly; or take place on steep, unstable slopes where logging operations and roads cause unacceptable levels of erosion into streams. Third, socially and aesthetically, some cuts should not be made because they destroy a ridgeline, take out some stand of old trees that is a favorite of locals, or otherwise destroy a forest as a forest.

The timber industry and many citizens of timber-dependent towns, of course, raise another set of concerns. They, too, worry about social and economic effects, but their emphasis is on lunch-pail issues. Recreation is bringing in more and more benefits each year to Dubois, but many old-time citizens remain skeptical about whether this new kind of business might not be soft in the long run. Perhaps the recreation economy will also turn out to be boom-and-bust. Both industry and local citizens who are dependent on the timber economy — and it is important to note that those are separate interest groups — have predictability as a primary objective. They want the future cut to be stable, level, and reliable. Most basically, they want to be free from the timber sale appeals and other objections that create cost, delay, and uncertainty.

All across the West, the Forest Service has been working through the comprehensive forest planning process mandated by the National Forest Management Act of 1976.³¹ The Act calls for an open, interdisciplinary process, with broad public participation. So far, the results have been varied. In some forests, the planning process has been cold, hyper-technical, and, despite appearances, closed. In other forests, this planning process has had elements of town meeting participation at its best.

This form of decision-making ought to be encouraged and expanded. In the case of the Yellowstone Ecosystem, the Forest Service ought to invite further participation from all sectors, including local environmental groups and local pro-harvest groups, such as Women in Timber. All sides ought to act with the respect mandated by an ethic of place. The environmental groups ought to recognize that — however much leverage they have established through the issue of below-cost sales — their real objections are scientific and social, not economic. As with the grazing situation, environmentalists ought not to begrudge subsidies to fellow westerners: these timber-dependent towns grew up around the harvest levels provided by the national forests and those historical and economic developments created equities in favor of pro-timber citizens in those communities. On the other hand, the pro-timber sector ought to recognize that the American

31. Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600-1614 (1982) and other scattered sections of 16 U.S.C.).

West has undergone deep changes, nowhere exemplified better than in the Yellowstone Ecosystem. Forests provide society with many benefits, economic and otherwise, other than board feet. Changes are in the wind and they almost inevitably will result in a reduced cut from the national forests.

In broad terms, then, the parties ought to search out a consensus agreement whereby the allowable cut would be lowered, perhaps by as much as a third, but whereby environmentalists would actively support a steady, reliable, annual harvest at the new level. The parties, knowing their local area, ought to get out maps, get out on the ground, and identify those sites most amenable to timber production from both sides. To take an easy example, a level tract of forest in an accessible area will be economical to log, and such logging will have relatively few negative environmental consequences, such as erosion.

I well understand that not all of the areas will be easy ones, but both sides ought to work cooperatively to find them. All of this will come incrementally — federal forest policy is complex almost beyond the saying — but the national forests are so crucial to the economy and spirit of the West that we ought to be resolute in insisting upon solutions.

The Big Horn Basin

Wyoming's Wind River, the major tributary of the Big Horn, heads at the northwestern end of the Wind River Range, flows south-east, and swings north at about the town of Riverton. The river then gains the name Big Horn and trends north into Montana, where it flows mostly within the Crow Indian Reservation before joining the Yellowstone River at the small town of Bighorn. It drains about 4000 square miles of land area in Wyoming and a somewhat lesser amount in Montana.

The Wyoming Supreme Court recently handed down its long awaited opinion in the Big Horn adjudication, which decided water rights on the Wyoming portion of the Big Horn River.³² This case is one of the leading pieces of natural resources litigation pending anywhere in the West. It is the first decision handed down by a state court under the newly-recognized power of states to adjudicate Indian water rights pursuant to the McCarran Amendment of 1952.³³ The litigation involved all users on the Big Horn River, but focused on the

32. *In re The General Adjudication of All Rights to Use Water in the Big Horn River and All Other Sources*, State of Wyoming, 750 P.2d 681 (Wyo. 1988).

33. Act of July 10, 1952, ch. 651, Title II, § 208(a-c), 66 Stat. 560 (codified at 43 U.S.C. § 666 (1982)).

Wind River Tribe, whose reservation totals about 1.8 million acres on the east side of the Wind River Range. This is an area, it might be noted, larger than Delaware and about two-thirds the size of Connecticut. The case, for which the state of Wyoming alone has already appropriated close to \$12 million³⁴ and which will likely be taken up to the United States Supreme Court, awarded the Tribe reserved rights totaling about 477,000 acre-feet of water, apparently the largest single water right in the Basin.

Traditionally, allocation of interstate waters has been accomplished by interstate compacts or, failing that, by equitable apportionment in the Supreme Court. While the waters of the Big Horn River have been allocated by the Yellowstone River Compact as between the states of Wyoming and Montana,³⁵ tribal rights were expressly excluded from the compact's coverage.³⁶ Water use is increasingly tight throughout the reach of the Big Horn, as is the case with most major river systems in the West, especially if coal production in the Basin again surges as it did during the 1970's. As a result, most knowledgeable observers agree on the need to reexamine the interstate allocation of the river in light of these tribal water rights.

But an ethic of place would call for a different kind of compact than those used in the past. One of the most remarkable developments in the American West during the last generation has been the tribal litigation offensive, which ultimately has established this central proposition: Indian tribes are sovereign governments, one of three sources of sovereignty, along with the states and the federal government, in our constitutional system.³⁷ Today, vital, forward-looking tribal governments have taken on a whole range of regulatory, revenue-raising, and judicial activities, often involving non-Indians subject to tribal jurisdiction. In modern times, the Supreme Court has both recognized the concept of tribal sovereignty and affirmed the great majority of its specific applications. Given the nature of the obstacles, this rise of the tribes from the ashes of the termination era of the 1950's has been perhaps the single most inspiring series of public events that has ever

34. Telephone interview with Jane Caton, Wyoming Asst. Att'y Gen., June 24, 1988. The state of Wyoming has already paid over \$3 million in attorney's fees and at least \$5 million for outside consultants. If the funds appropriated for the State Engineer's Office and for the court are included, the total approaches \$12 million. These figures will increase should the case go to the United States Supreme Court. *Id.* See also Comment, *Wyoming's Experience with Federal Non-Indian Reserved Rights: The Big Horn Adjudication*, 21 LAND & WATER L. REV. 433, 453 (1986).

35. Yellowstone River Compact, art. V, 65 Stat. 663, 666-67 (1951).

36. Yellowstone River Compact, art. VI, 65 Stat. at 668. The appearance of this type of clause is standard in interstate river compacts. The compact also contains standard language excluding federal reserved water rights from its coverage. Art. XVI(a), 65 Stat. at 670.

37. See C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 99-106 (1987).

touched my life, and I know that many of my colleagues who have seen this progression first-hand would agree.

There is no legal barrier, constitutional or otherwise, to including the governments of the Wind River and Crow Tribes in the compact re-negotiations and to providing them with seats on a reconstituted compact commission so long as Congress were to approve the compact, as it must with every compact. This would be a full recognition of the tribes' status as sovereign governments within the constitutional system.

There is precedent for such an approach in the sweeping U.S.-Canada Pacific Salmon Treaty of 1985.³⁸ Indian tribes participated in those negotiations and were allocated one of four United States seats on the International Pacific Salmon Commission established by the Treaty.³⁹ At the moment, Tim Wapato, a Colville Indian and executive director of the Columbia River Intertribal Fish Commission, is the head of the United States delegation to this important international commission. It is, of course, not for me to suggest how these concepts would be employed in the Big Horn Basin. But, whatever the specifics, the tribal presence on water matters is so significant that no basin-wide compact or management plan will be finally workable until the tribal governments sit side-by-side with the state governments at the tables where decisions are made. When that occurs, the ethic of place will have been fulfilled in the Big Horn Basin in an historic and profound way.

The Eagle River Basin

The Eagle River in Colorado rises near Tennessee Pass, just north of Leadville. The river flows north and west past Vail and through Eagle before meeting the main Colorado at Dotsero just east of Glenwood Springs. The river is bounded on the northeast by the Gore Range. In the headwaters area lies the Mount of the Holy Cross and the Holy Cross Wilderness.

Two cities from the Eastern Slope, Aurora and Colorado Springs, want to build the Homestake II Project within the wilderness area. The cities would divert 20,000 acre-feet of water from four creeks in the wilderness and tunnel the water ten miles under the Continental Divide for storage in Eastern Slope reservoirs. The cities would be allowed to divert most of the water in those streams — apparently up

38. Treaty Concerning Pacific Salmon, Jan. 28, 1985, United States-Canada (Senate Treaty Doc. No. 99-2) (unpublished and unnumbered). See generally Jensen, *The United States-Canada Pacific Salmon Interception Treaty: An Historical Overview*, 16 ENVTL. L. 363 (1986).

39. See 16 U.S.C. § 3632(a) (Supp. IV 1986).

to ninety percent — during the spring runoff season. The Holy Cross Wilderness Defense Fund and other environmental groups oppose the project because of its destructive effects on wildlife and on the wetlands ecosystem and because of the aesthetic impacts of the diversion dams and intake facilities on the wilderness area.

In February of 1988, the Eagle County Commissioners denied necessary permits to the cities. The commissioners acted under so-called House Bill 1041,⁴⁰ which creates areas and activities of state interest that are designated and administered by local governments. It is not finally clear whether water projects are covered under H.B. 1041 — Aurora and Colorado Springs point to authority that local governments can place no limitations on water diversions — and the decision is being appealed. If H.B. 1041 cannot be invoked by regions of potential export, the commissioners can look to precious few other provisions under existing Colorado law. The Front Range cities are not covered even by the state's minimal protections afforded to natural basins when water is exported.⁴¹ But one thing is clear: Homestake II is no more popular on the Western Slope than is Two Forks.

Leaving aside environmental concerns, the social component of an ethic of place would require that precise and hard questions be asked about this proposed diversion from the Eagle River Valley. Since the single greatest source of water and energy is conservation, could the cities achieve sustained supplies of water from within their own watersheds by adopting conservation methods? If they can show that they cannot, what is the need for the water — projected new development many years hence? And if that is the need, why exactly is it that such a need should stunt the fulfillment of other communities in another watershed? The ethic requires us to ask even other questions, ones that must trouble every resident of Colorado. What will it finally take for us to wean ourselves from a pace of development on the Front Range that cannot be acceptably maintained for another forty years at the rate it has proceeded since World War II? What sort of places will there be in Colorado if we allow that to happen? Are we willing to leave it to our starry-eyed children and grandchildren to live with the stark consequences of the answers?

The Rio Chama Valley

The Rio Chama arises in Colorado's San Juan Mountains, but almost all of its run is in New Mexico. It enters the mainstem of the

40. COLO. REV. STAT. §§ 24-65.1-106 *et seq.* (1982 Repl. Vol.).

41. See COLO. REV. STAT. § 37-45-118(b)(IV) (1973). This provision on area-of-origin protection applies only to transfers of water from the Colorado River basin by state water conservancy districts.

Rio Grande near Espanola. Part of the Jicarilla Apache Reservation occupies some of the high country along the Continental Divide in the northwest part of the basin and, of course, numbers of Anglos live in the valley, but from the top to the bottom of the Rio Chama the overwhelming presence is of Hispanic people, and their ranching and farming communities.

One of the most intriguing recent judicial decisions in western water law is an April 1985 trial court ruling by District Judge Art Encinias, sitting in Rio Arriba County in the Rio Chama Valley. The State Engineer had granted an application to change the diversion point, and the purpose and place of use, of surface rights. The existing use was for irrigation and the purpose of the proposed changes was to provide water for a ski resort and guest ranch. There was no transfer out of the basin, so the area of origin statutes did not come into play. The rarely-invoked New Mexico public interest statute in force at the time provided that new appropriations may be disapproved by the State Engineer if "approval thereof would be contrary to the public interest."⁴² The statute relating to changes of existing appropriations, however, contained no such language.⁴³ Nevertheless, the trial judge set aside the administrative action because in his view it was contrary to the local public interest. Judge Encinias wrote this, in a spirit reminiscent of *The Milagro Beanfield War*,⁴⁴ the novel (and now movie) about water that cannot be called fiction:

Northern New Mexicans possess a fierce pride over their history, traditions and culture. This region of northern New Mexico and its living culture are recognized at the state and federal levels as possessing significant cultural value, not measurable in dollars and cents. The deep-felt and tradition bound ties of northern New Mexico families to the land and water are central to the maintenance of that culture.

....

I am persuaded that to transfer water rights, devoted for more than a century to agricultural purposes, in order to construct a playground for those who can pay is a poor trade, indeed. I find that the proposed transfer of water rights is clearly contrary to the public interest and, on that separate basis, the Application should be denied.⁴⁵

42. This statute was amended in 1985, substituting "public welfare" for "public interest." See 1985 N.M. LAWS ch. 201, § 4 (codified at N.M. STAT. ANN. § 72-5-7 (1985 Repl.)).

43. This statute was amended in 1985, after the dispute arose, to allow the State Engineer to disapprove the transfer of an existing water right if approval would be contrary to the "public welfare." See 1985 N.M. LAWS ch. 201, § 5 (codified at N.M. STAT. ANN. § 72-5-23 (1985 Repl.)).

44. J. NICHOLS, *THE MILAGRO BEANFIELD WAR* (1974).

45. *In re* Howard Sleeper, Rio Arriba County Cause No. RA 84-53(C) (April 16, 1985).

Perhaps Judge Encinias reached the wrong result. Indeed, earlier this year the opinion was reversed by the Court of Appeals on narrow grounds⁴⁶ and the New Mexico Supreme Court may agree with the Court of Appeals. But, whether or not this particular ruling stands up, I think there is something quintessential in the opinion, a melding of tradition, economics, and outrage that may ultimately find a secure place in the law of New Mexico and many another state.

This is because Judge Encinias knew his place, the valley of the Rio Chama. He knew the land and the economy. And he knew the long drama of his people, for he wrote from the same stolid stucco courthouse in Tierra Amarilla that Reies Tijerina and his men had besieged just a generation earlier, in 1967, in their quest to enforce the old Mexican and Spanish grants of land and water, supposedly protected by the United States in the Treaty of Guadalupe Hidalgo.

Cultural considerations play a much greater role in law generally than we commonly realize. In New Mexico, for example, the state provides tax credits for preservation of cultural property; has an extensive statutory procedure for designating cultural properties; has strong statutory provisions for bilingual multicultural education; promotes Indian arts and crafts by statute; recognizes Indian pueblos; and, in the area of water law, recognizes acequias, the traditional Hispanic associations for allocating water.⁴⁷

Western water law assumes *a priori* that cultural factors have no place in allocating water. But most sensible people not steeped in prior appropriation would think that an old culture's tie to the land must figure in the equation in some way as a matter of course. One can easily imagine that if some sage outside observer — say, a de Tocqueville of the late twentieth century — came through the Rio Chama Valley, spent some time there, and read Judge Encinias's opinion, such a visitor would say, "Of course, of course." And that would be because a sense of place is a powerful thing and ought to be reflected in a people's laws.

THE ETHIC OF PLACE AND THE INTELLECTUAL LANDSCAPE OF THE AMERICAN WEST

The single greatest ally of those who would wreck the West is the idea that the West is homogeneous. If there is nothing special and distinctive about a silver current twining down a back canyon; or the

46. *Ensenada Land & Water Ass'n v. Sleeper*, No. 8782/8830 (N.M. Ct. App. March 1, 1988).

47. See N.M. STAT. ANN. § 7-2-18.2 (1986 Repl.); N.M. STAT. ANN. §§ 18-6-1 to -17 (1987 Repl.); N.M. STAT. ANN. §§ 22-23-1 to -6 (1986 Repl.); N.M. STAT. ANN. §§ 28-12-1 to -9 (1987 Repl.); N.M. STAT. ANN. § 53-9-1 (1983 Repl.); N.M. STAT. ANN. § 73-2-1 (1978).

hard-caked ruts that you can see today and that were, really were, made by the wagons of the women and men who came over the Oregon Trail; or a wolf or an eagle; or a rancher putting up fence; or a tribal judge trying to blend the old and the new, and many different cuts of conscience, when he or she rules on whether the Navajo child should remain with her white adoptive parents or be awarded to a Navajo family; or yet another aspen grove on yet another forty five degree canyon wall; or an old Hispanic mayordomo going out to clean out the acequia, the community ditch — if none of these things is special, then we might as well do away with them, each of them.

We westerners tend to sell ourselves far too short. We fail to aspire high enough. This is surely due, in some part, to the residue from the concentration of publishing houses and national news organizations on the east coast. But it goes deeper than that. We fail to ask the hard but right questions. How great a society can we build? Should greatness be denied to us because our sophistication is of a different kind than Paris of the 1920s or ancient Rome or Athens? Are we somehow disqualified from greatness because we tend to build our philosophies around deep back canyons and the sweep of high plains vistas? Is the quality of our personal relationships less because we draw our sustenance, not from rapid-fire intellectual head-banging, but from putting brakes on things, from toeing at the ground or pausing at the pass to look back over where we have been?

Another undercurrent involves romanticism. Although an ethic of place is solidly positioned on economics, ecology, several physical sciences, law, and the psychology of interpersonal relationships, one can also find a streak of what fairly can be called romanticism. But I refuse to allow that to be a conversation-stopper. Romanticism — or, put somewhat differently, beauty, imagination, cultural conservatism, and a love of history — is as real as youth, the market, the environment, or art. All are part of the landscape of the mind and we deny something fundamental in ourselves if we deny the tangible existence of any of them.

We are taught by sophisticated people that regionalism is passé. Let us not participate in that and let us not permit our children to participate in it. Let us take the emotional and intellectual chance of saying that this is not the leftover sector of our nation; that, rather, this is the true soul of the country, the place that cries out loudest to the human spirit; that this place is exalted, that it is sacred — mark down that word, sacred. And whatever kind of ethic it is, use the word ethic, because the word properly connotes high things. And let us be sure to say these things to all of the people, for the contentious-

ness really can wane when we realize, and act upon, our common melded past and future. For it is through cooperation, as Wallace Stegner has said, that we westerners can create a society to match our scenery.⁴⁸

Last, do not doubt that all of this comes back to law, for our society lodges its best dreams in laws. Too few of our laws call out the highest in us, too few call out the highest in the many sacred places that make up the American West, and we would do ourselves and our children proud by insisting with all of our worth that our laws be worthy of this wondrous place.

48. W. STEGNER, *THE SOUND OF MOUNTAIN WATER* 38 (1969).

