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Conference

Creating a Society to Match Our Scenery: Resolving Natural Resource Disputes in the 21st Century

Keynote address by former Governor of Oregon John A. Kitzhaber.

Presented at the 27th Annual Public Land Law Conference, sponsored by The University of Montana School of Law's Public Land & Resources Law Review and the O'Connor Center for the Rocky Mountain West; Missoula, Montana, October 2, 2003.

The Honorable John A. Kitzhaber*

Angry as one may be at what heedless men have done and still do to a noble habitat, one cannot be pessimistic about the West. This is still the native home of hope. When it fully learns that cooperation, not rugged individualism is the quality that most characterizes and preserves it, then it will have achieved itself and outlived its origins. Then it has a chance to create a society to match its scenery.¹

This evening I would like to address the growing and seemingly intractable conflict between economic activity and environmental stewardship here in the West. I am concerned about this conflict because of the values at stake: the majestic beauty and spirituality of our natural lands, the powerful landscapes which help define us and the jobs and economic activity which depend on these same natural resources.

But I am also concerned at a deeper and more fundamental level because this conflict and acrimony are disrupting the important relationships that underlie strong, vital communities. People are labeled in this debate—labeled as environmentalists or ranchers or timber operators—labels which define only our differences and none of our common goals and aspirations.

I believe that thriving, prospering communities depend on the ability and the willingness of the members of the community to recognize the fundamental interdependence between their economic, environmental and com-

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1. Wallace Stegner, *The Sound of Mountain Water* (1st ed., Doubleday 1969).

munity needs; to see these needs as integrated parts of a larger whole, rather than as separate and mutually exclusive values.

Imagine, if you will, three overlapping circles, one representing our economic needs, one representing our environmental needs and one representing our social or community needs. The area where the three circles overlap is what I call the area of sustainability—the area through which run all the elements of a good quality of life: a healthy, functioning natural environment; a strong economy with jobs and job security; and safe, secure communities where people have a sense of belonging and purpose, a commitment to one another.

These elements—these threads, which together weave the fabric of sustainable community life—are things we hold in common, no matter where we live or how we earn our livelihood. They represent a common set of desires and aspirations that add value and quality to our lives.

The challenge in this new century is to motivate and enable individuals to discover and act on these areas of sustainability. To identify and remove the barriers and obstacles that prevent people from acting in concert for their mutual benefit.

My thesis is a simple one. The problem here lies not so much with the people engaged in the debate, but rather with the institutions and organizational structures through which they are seeking to resolve their disputes.

This year, the thirtieth anniversary of the passage of the Endangered Species Act, seems a fitting time to pause and to take stock of our land and of each other. It gives us the opportunity to reflect on how we got here, to consider our past and what it might teach us about how best to meet the future.

A century ago, America was engaged in a debate brought about by the enormous changes overtaking the country. Industrialization was displacing an agrarian economy and people were moving from farms to the cities, creating a whole new set of problems, challenges and opportunities. The debate centered on the role of government in responding to these changes.

On one side of the debate were the populists who wanted to limit the power of government which they believed was acting in favor of powerful industrial and urban interests. On the other side were the progressives who wanted to expand the power of government to protect individuals from the ravages of the industrial age.

The progressives ultimately prevailed, primarily because they sought to deal with the world as it was, not as it had been. While the populists wanted to return America to its past, the progressives wanted to connect it with its future. Teddy Roosevelt, who became president in 1901 following the assassination of William McKinley, led the effort to revise our governance structure to address the new challenges created by urbanization and the growing industrial economy.

Today, America stands at a similar time in its history. We have undergone an enormous transition from an industrial manufacturing economy to

an information based economy. Our problems have become extremely complicated and we are faced with limits, both natural and fiscal, that were unimaginable at the turn of the nineteenth century. And yet we cling tenaciously to a set of tools and governance structures, created in an earlier era to address a very different set of problems.

As Albert Einstein once said, "We can't solve problems by using the same kind of thinking we used when we created them." It is my purpose this evening to attempt to move our collective thinking forward; to make the case that our current governance structure, and the political system through which it operates, has reached the limit of its capacity to respond in a timely and effective manner to the complex social, economic and environmental challenges we face in the twenty-first century. It is my purpose to motivate you to embrace the possibility of creating a society to match our scenery here in the West.

Dan Kemmis, in his remarkable book, *Community and the Politics of Place*, points out that the word "politics" derives from the Greek word "polis," meaning "city," or in more modern terms, "community." That is to say, a group of individuals, functioning together as a whole for their mutual benefit. Today, it would be hard to apply that definition to many communities in the West.

Consider, for example, the town of Klamath Falls, Oregon, located in the Klamath River Basin. The water in that basin, which straddles the Oregon-California border, is like many river basins in the West, heavily over-appropriated through a combination of irrigated land, wildlife refuges, tribal trust obligations and ESA listings.

Although for years the competing water users in the basin have been fully aware that there was no margin for drought, they chose to plan through litigation, with some 15 lawsuits filed over the past decade. When the drought came in 2001, the entire basin was out of balance from an environmental, economic and community standpoint.

The resulting conflict produced no winners, only acrimony and bitterness. Farmers lost water and livelihoods; wildlife refuges lost water and biologic function; tribes lost support for habitat improvement and reservation land restoration; state and federal agencies lost credibility and partnerships; and environmental interests lost support for the ESA and species recovery.

Yet, Klamath Falls is typical of many communities in the West. Its citizens are not, in fact, functioning together for their mutual benefit. On the contrary, they have lost the capacity to see the mutual benefit of acting for a common purpose. They view the world in fragments: an environmental piece, an economic piece, a social piece; yet none of the pieces are being integrated into a larger, interconnected whole.

This problem, of course, is not a new one. Every community is made up of individuals whose views and needs do not always coincide and, indeed our system of governance grew out of a recognition of this reality and of the

need to find some way for individuals to arrive at their mutual benefit—to define the common good, if you will—precisely because their views, needs and interests will not always coincide. In fact, this was a central point of contention during the drafting of the United States Constitution.

The debate pitted Thomas Jefferson against the Federalists, led by Alexander Hamilton, James Madison and John Jay. Jefferson espoused what has been called the "politics of engagement," a model in which people work together in a spirit of cooperation to find common ground and solve problems for their mutual benefit. In this model, people relied on one another rather than on a centralized bureaucracy.

The Federalists, on the other hand, espoused a "politics of disengagement," wherein the common good was determined and social stability achieved, not by cooperation among individuals; but rather by a strong central government, which carefully balanced private interests, one against the other.

The important difference between these two viewpoints lies where the responsibility for taking action is vested. Under Jefferson's model, individuals assume the primary responsibility for taking action. They engage with one another to find the common good to solve their own problems. By contrast, under the Federalist model, people are disengaged from one another and the responsibility for taking action and solving problems is assumed by a third party—in this case the federal government—or in more modern times, the courts.

It is also worth noting that the West, or perhaps more accurately, the existence of a western frontier, was central to both of these competing philosophies of governance, albeit for very different reasons.

Jefferson's view depended upon individuals repeatedly interacting, or being engaged, with one another. He believed this was more likely to occur in small rural communities than in larger urban settings. Thus, the continued existence of open land into which agriculture could expand was central to his philosophy. The answer was the western frontier. By contrast, the Federalists wanted people dispersed, disconnected, out of touch with each other. Again, the answer was the western frontier.

Throughout the nineteenth century and the first half of the twentieth century, this westward expansion was actively promoted. The doctrine of Manifest Destiny was used by politicians in the 1840s as a justification for continental expansion. And, in 1862 President Abraham Lincoln signed the Homestead Act, under which some 270 million acres of land were claimed and settled.

Thus, the extraction and exploitation of natural resources, and the development of the land west of the hundredth meridian, has been a part of our history and of our western culture for 150 years. There is a reason we came to be here.

The nineteenth century, in many respects, represented a fulfillment of Jefferson's politics of engagement. The American economy was agrarian

and rural, made up of small, independent farmers and businessmen. People were not beholden to or dependent on a strong, central government. They did for themselves. The challenges of the frontier demanded both cooperation and self-sufficiency.

By the end of the 1800s, however, two events occurred which were to fundamentally alter both the structure of governance in America and the relationship between the people and their government: the closing of the western frontier and the Industrial Revolution.

The closing of the western frontier meant an end to the free land and the wide open spaces into which a growing nation could expand. And, although no one recognized it at the time, it was also the first signal that there were natural limits.

The impact of the Industrial Revolution was more immediate. America was undergoing a dramatic shift from a rural agrarian economy to an urban industrial economy. More and more people were living in cities rather than in the countryside. And the measure of success in the new order was far different than the measure of success on the frontier.

The Industrial Revolution demanded not self-sufficiency and independence, but conformity and subordination. Unlike the family farm, the new workplace was regimented, hierarchical and centralized. Mass production was valued over craftsmanship, muscles were valued over brains.

As the Industrial Revolution overtook America, this Federalist viewpoint eclipsed that of Jefferson. What emerged was a strong central government, which, in many respects, reflected what was happening in the workplace. Like American industry, this new governance structure was also hierarchical and was designed to manage conflicts among individuals. Along with it came the politics of disengagement and a dependence on third party decision-making, a dependence which would continue to grow throughout the twentieth century.

This change in governance structure, however, did not change the policies which encouraged the development of the West. In the nineteenth century, the focus was on moving settlers westward, using as the lure, the seemingly inexhaustible supply of land and natural resources. In the twentieth century, the focus shifted to water, starting with the 1902 Reclamation Act, which set the stage for the huge federal water projects, one of the first of which was the Klamath Irrigation Project, developed by the Bureau of Reclamation in 1905.

In 1928, Congress authorized the Boulder Canyon Project which resulted in Hoover Dam. Between 1938 and 1976, no fewer than twenty-nine dams were constructed in the Columbia River basin—twenty-five on the main stem and four on the lower Snake.

At the time these policies were put into place, they made sense; they were defensible; they helped to advance a larger national purpose. It was a time of perceived abundance and of expanding horizons. It seemed unimaginable that the resources of this vast nation could possibly be exhausted or

that there could be a dark side to the significant economic benefits that these activities brought to the region and to its people.

But these policies made sense only if viewed in isolation—only as long as they could be disengaged from their consequences on other values, only as long as they did not have to be integrated into a larger whole. And for many years, this fiction of disengagement guided our efforts.

By the 1970s, however, it was becoming increasingly apparent that the benefits of economic development and natural resource extraction came at a price: these activities were having a detrimental impact on the environment. There was a growing public concern and this collision of legitimate values led to an escalating conflict. The primary battlegrounds for this conflict were the U.S. Congress, state legislatures and the courts.

Our governance structure responded in exactly the way it had been designed to respond—by trying to manage this conflict through a framework of federal statutes and regulations. Among them were the Clean Air Act passed in 1970, the Clean Water Act passed in 1972 and the Endangered Species Act passed in 1973.

Now, some 30 years later, it is worth noting that the objective of these laws was not to resolve the underlying conflict, but rather to manage it by attempting to balance the competing interests. The politics of disengagement. And precisely because the objective was to manage rather than to resolve the conflict, conflict has not surprisingly continued.

Environmental interests sue the natural resource industries and governmental agencies for failing to meet federal standards and regulations. They strive to strengthen environmental laws through legislative action. In return, economic interests subject to federal regulation challenge these regulations in the courts and seek to repeal or weaken them through legislative action.

And these issues are becoming more and more intractable as stakeholders and community leaders align themselves with increasingly polarized positions. Each side tends to look for opportunities to advance their agenda when the Administration in Washington, D.C. is in their favor, while the other side relies on the courts to form a defensive front against changes that might imperil their interests. What is clear is that this approach will only perpetuate the problem and do little or nothing to move us toward long-term resolution.

First of all, our dependence on third party decision makers has taken individuals and communities out of the problem solving loop. We have abdicated our responsibility to the federal bureaucracy and to the courts, leaving us at the mercy of decisions made by someone else. This, of course, gives us license as stakeholders—regardless of which side of the debate we are on—to pursue our own narrow interests at the expense of the larger community. It fosters an “us versus them” mentality, a sense of separateness and a politics of scarcity, which inevitably creates winners and losers, but does not resolve the underlying problem.

Second, the primary tools of this third party governance structure—law, regulation and enforcement—are simply incapable of solving the problems they are being asked to solve. They were designed to address a different set of challenges in an era of perceived abundance. They were designed to manage problems by compelling behavior.

What they were not designed to do is to bring people together to actually solve problems, to operate in an era of limits which creates a tension between environmental, economic and community values; or to respond to complex problems which cannot be resolved without the participation of many people.

To illustrate this point, consider the challenge of maintaining water quality. At the time our current governance tools were developed and for many decades thereafter, the major threat to water quality was caused primarily by point source pollution: discharge from pipes going into the river from factories, municipal sewage plants, and other easily identifiable sources. Point source pollution lends itself well to the traditional tools of government: regulation and enforcement.

Today however, the major threat to water quality is “non-point” source pollution, in other words runoff, not just from farms and fields, but from lawns, rooftops streets and highways. It is affected by what people put on their lawns and gardens in our cities and suburbs. It is affected by whether or not people wash their cars in their driveways and, if they do, whether they use biodegradable soap.

Reducing non-point source pollution requires a long-term commitment to change behavior—by everyone living in the watershed—most of them living in the city, and that may be hundreds of thousands of people. That cannot be achieved through legislation, regulation, enforcement or litigation. It can only be achieved through a place-based consensus process in which people share a common stake in the problem and gain some ownership in the solution.

Certainly regulation has an important role to play, but there are limits to its effectiveness. Regulation can help keep people from doing the wrong thing by penalizing them if they do, but it provides no incentive for them to do the right thing.

The listing of the Oregon coastal Coho salmon under the Endangered Species Act offers an illustration of this point. Nearly seventy percent of the habitat of this species lies on private land. And while this law is intended to prevent landowners from engaging in activities that result in an intentional or unintentional kill, or “take,” of a listed species—it cannot easily compel them to do more.

Yet, recovery of this species, and the watersheds on which they depend, require that private landowners undertake restoration activities that go well beyond what can be compelled under the ESA. To put it bluntly, we cannot recover coastal Coho by relying on the old model of regulation and en-

forcement to which the environmental community has been wedded since its inception.

It is this difference between preventing behavior harmful to the Coho and inducing action to benefit the Coho that exemplifies the limits of regulation to accomplish the stated goal of recovering these native fish runs.

Another example is the recovery of the salmon in the Columbia River Basin. The federal government writes plans, in the form of biologic opinions, for management of the Columbia River and its dams. The environmental community sues the federal government, claiming that the biologic opinion is inadequate to recover the endangered species on the river. The courts agree and overturn the opinion. The federal agencies go back and write a new opinion, and the process starts all over again. This has been going on since the early 1990s, and yet nothing has changed on the ground. The environmentalists have won every round and yet we are no closer to recovering the endangered species in the Columbia than we were a decade ago.

We need new structures, new tools, new approaches. Yet we cling tenaciously to the old ones in spite of the overwhelming evidence all around us that they are not doing the job, that they are no longer working, and that they are disenfranchising people who otherwise could and would find a common interest in moving forward together.

The structure of western water law, for example, the doctrine of “first in time, first in right,” was originally developed for the hard rock mining industry in the 1800s. Now, over 150 years later, it allows us, through litigation, to manage the water rights, but not the water resource. Lawsuits do not create resolution, they create winners and losers, and they do not create more water. Yet we continue to cling to this antiquated management tool, even as the last drop of water disappears into the parched earth.

How long would Microsoft last if Bill Gates clung to an operating system that was even ten years old? Yet we cling to operating systems that are over a century old and wonder why we cannot resolve the challenges of today. We sue each other, we label each other, we battle it out in the halls of Congress while our rural mills close, our forests burn, ever more species edge toward the brink of extinction, and water flows to historic uses without regard to current needs and values.

If, in the words of Wallace Stegner, the West is to remain “the native home of hope,” we must indeed outlive our origins. We must find the wisdom and the courage to move beyond the governance structures and problem-solving tools we inherited from the past and create new ones for the future.

First, we must create the places and the opportunities for people to come together to solve problems—not through a third party, but by engaging each other directly. Indeed, this is already happening. Watershed councils are examples of this. So is the Eastside Forest Health Advisory Committee, which was a part of the effort to restore the health of the forests in Eastern

Oregon. Other examples include the Applegate Partnership, the Quincy Library Group and the Grand Canyon Forest Trust. All of these efforts are built on collaboration at the local level among people working together to solve shared problems on behalf of a shared place.

But bringing people together is only the first step. The challenge of moving beyond gridlock to sustainable solutions depends on finding a common policy objective which helps define the area of sustainability. For example, in our work to restore the health of the forests of Eastern Oregon, for example, a healthy, functioning forest ecosystem—as measured by watershed health—served as the common objective that everyone could agree on.

It is important to recognize that, given the multiple values which are represented by our forests—economic, environmental, recreational and aesthetic—focusing on watershed health does not mean that we are elevating the importance of one value above another. Rather, it serves as a common denominator for all the values, and acts as a guidepost by which we can shape our management efforts in the context of these other values.

We cannot provide sustainable forest products, assure clean water and provide habitat for species unless we first have a healthy functioning ecosystem. The three legs upon which the strategy stands—social, environmental and economic—are all interwoven and are dependent first on a healthy, functioning watershed.

Furthermore, by having a single overarching policy objective, all of the stakeholders are held accountable to the same standard. To return to the forest health example, trees would be removed based not on their commercial value, but rather on the ecological needs of the forest as dictated by good multidisciplinary science. By the same token, the environmental community could not arbitrarily set a diameter or age limit for harvest. They would be compelled, for example, to demonstrate the difference between a twenty inch tree and a twenty-three inch tree from the standpoint of forest ecosystem health. Both sides would be measured by the same yardstick.

Creating a place for people to come together around a common objective, however, is not enough. These local collaborative efforts often end in frustration because they attempt to solve problems within the constraints of our existing governance structure—a structure that resists allowing the local collaborators to actually make decisions on the ground.

Dan Kemmis, in his book *This Sovereign Land*, characterizes this phenomenon as the inevitable collision between local collaborative problem solving and third party decision makers—in this case, the complex administrative processes which seek to manage conflict by trying to ensure that all stakeholders have equal access to federal decision makers. As Kemmis points out, local collaboration “is an inherently decentralized, democratic form of governing,” while the federal process “is inherently centralized and hierarchical.”

Thus, we must challenge the current structure in an effort to empower and enable these local efforts and to invest in them meaningful decision-making and management authority.

One of the principal objections to this concept is the fear that citizens at the local level will not do it right, that they will act inconsistently with the greater good—that we would be abandoning the management of our natural resources to local politics. Let me respond to that concern in two ways.

First, I am not suggesting that local management decisions be made in a vacuum. While I believe that the tools of law, regulation and enforcement are inadequate to meet the challenges of today's complex problems, I also believe that we must have both a framework of strong federal environmental standards and the ability to enforce them.

National environmental standards set the benchmark for our environmental stewardship, and local collaborative efforts must be held accountable to them. So my argument here is not with our environmental standards themselves, but rather with processes and procedures by which they have traditionally been applied.

We need not lower the bar. But we do need to recognize and empower local efforts to exercise flexibility and creativity in getting over it. We need recognition of the fact that the way Clean Water Act goals are met in the John Day Basin will be different than what must be accomplished in the Umpqua Basin. Not lower or different standards, but flexibility to solve the problem.

Second, any course of action, including this one, involves some risk. But we must weigh the risk of turning over some real management and decision-making authority to local collaborative entities against the risk of continuing to rely solely on our current governance structure.

For example, with over 1,000 species listed, the lengthy, complex and contentious process of actually developing recovery plans under the ESA will doom many of these species to extinction long before anything happens on the ground. Likewise, the processes that guide and shackle our federal land management agencies are leading to similar results in terms of the health of our forest ecosystems. Empowerment at the local level, accompanied by targeted investment, produces the capacity to act on behalf of the goals of our federal environmental legislation without sacrificing the regulatory baseline and the assurances it brings.

Of course, one of the major challenges in proposing a new order of things is overcoming the tendency on the part of the inevitable critics of change to compare the proposals to some theoretic ideal rather than to the status quo. The salient question, however, should not be whether the changes are perfect, but rather, whether they are an improvement on the status quo.

For this approach to work, however, we must make a commitment to adaptive management and to developing good science and accurate monitoring. This is absolutely necessary. And while the science will never be

perfect, establishing a credible and transparent process by which the best available science can be evaluated and disseminated, will provide us with a powerful tool for balanced and sustainable natural resource management.

If we are to hold the stakeholders in any given effort accountable to a single overarching policy objective, then the scientific evidence will give us the ability to measure the extent to which the local efforts are moving us toward or away from the national standards.

Doing what I am suggesting will not be easy. This approach requires leadership. In the short term, however, I do not see this leadership emerging from our current political or organizational establishment. Why? Because both are mired in what I call the “culture of conflict.”

Today, the purpose of our legislative institutions at both the state and federal level have increasingly become the acquisition and retention of power, rather than the exercise of that power for some larger public purpose.

Today there are fewer and fewer people who are willing to lose an election, or even risk losing an election over an idea or a principle. As a consequence, we rarely debate ideas and principles anymore in the public arena—grinding our public discourse down to the lowest common denominator. We lose sight of the bigger picture, clinging to the past when all the evidence around us suggests that it is failing us.

In addition, we have national organizations, both environmental and trade organizations that need conflict and crisis in order to survive. Organizations that put institutional survival above problem-solving. This is indeed a “culture of conflict.”

On one hand we have, an Administration trying to play on peoples’ fear of wild fire as an excuse to weaken national environmental laws. And on the other hand, we have environmental organizations ready and willing to file suit on any timber sale whatsoever. And all the while, we are losing habitat, we are losing jobs and we are losing communities to polarization and dysfunction.

No, I believe that the leadership must emerge from other quarters—from those of you here in this room and in communities throughout the West. This leadership must emerge from those willing to take risks and to get out in front of their own constituencies. From those with the courage and vision to recognize what is happening. Leadership must emerge from those who are willing to acknowledge that it is not somebody else’s responsibility to resolve this conflict, that the responsibility is our own.

Ron Heifetz, a former surgeon and now a professor at the Kennedy School of Government at Harvard, has a powerful medical analogy for the kinds of problems that beset us today and the way in which we have been trying to solve them. He classifies medical problems into three basic types.

A ‘Type I’ problem might be someone with bacterial pneumonia who comes to the physician and receives a prescription for an antibiotic. In this

case, the responsibility for solving the problem rests solely with the physician.

A 'Type II' problem might be someone with hypertension and coronary artery disease. The physician can prescribe medication to lower both the cholesterol and the blood pressure, but if they do not change their diet, begin to exercise regularly and stop smoking, they are not going to get better. In this case, the responsibility for solving the problem rests with both the physician and the patient.

A 'Type III' problem might be terminal cancer where the cancer is not really the problem, but the condition. The only solution is for the physician and the individual to work together to decide how best to deal with the reality of a situation neither of them can change.

Today, lured into complacency by third party decision-makers, we tend to view the challenge of managing our natural resources in concert with sustainable environmental stewardship as a Type I problem that does not require shared responsibility to solve. We just need Congress or the Administration, or our legislature or the courts to do something. It is someone else's responsibility.

The fact is however, that the challenges we face today are Type II and Type III problems that cannot be resolved without shared responsibility and joint action—without the engagement and the assumption of responsibility by the stakeholders and the citizens in the communities where these problems are manifesting themselves.

Unless those of us *outside* Congress are willing to assume that responsibility, the political establishment in statehouses and in our nation's capitol is simply not going to take this on—and we will see a continuation of the hollow, partisan debate that leads only to the next election, and not to a meaningful resolution of this pressing problem that puts us all at risk.

If we choose to do nothing, we are by default, allowing the future of the West to become a matter of chance, rather than a matter of choice. I believe that we are better than that.

Is it going to be easy? Absolutely not. It is going to be difficult; it is going to be uncomfortable; and it's going to require that people in communities throughout the West start leading instead of just reacting. I appreciate that leadership is often seen as dangerous work, and it is. Leadership involves change, it involves risk it puts you in conflict with others, it means standing up and pushing back.

But even with all of its downsides, I submit to you that leadership beats simply accepting the status quo. It is far better than keeping our heads down and allowing ourselves to become victims. Because we are not victims. To be a victim is to acknowledge that there is nothing we can do to change our circumstances.

And I simply refuse to accept that. It is contrary to my entire life experience. After twenty-four often frustrating, years in the political process, nothing, absolutely nothing has happened to shake my faith in the ability of

individuals acting from conviction and principle, to change the world in which we live.

This is our home. This is our challenge. This is our responsibility.

