NATURAL RESOURCES LAW

Private Rights and Collective Governance

Eric T. Freyfogle

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Preface: The Functional Approach

For many years, natural resources law has been a mainstay of the law school curriculum, and with good reason. The physical things of daily life begin as elements of the natural world. Our food, heat, shelter, clothing, cars, computers—all start as natural resources, which someone, somewhere, has severed from the natural fabric and reshaped for human use. Nature's elements provide recreational opportunities and pleasing surroundings. They sustain the ecological processes upon which all life depends.

The approach typically used in studying resources law is to consider natural resources one by one—minerals, water, timber, wildlife, and the so on. These resources, in turn, are divided between the publicly owned and privately owned. Over the years, public resources have received heightened attention as has federal law generally, particularly the legal questions that reach the United States Supreme Court. With that focus has come a heavy dose of federal administrative law and constitutional jurisprudence.

This book employs a different approach.

At its base, natural resources law is about (i) dividing nature into pieces (use rights); (ii) defining the elements of these use rights; (iii) allocating or making them available to people in some way; (iv) resolving the conflicts that inevitably arise among users; (v) integrating these use rights into landscapes; and (vi) providing mechanisms to adjust the use rights and reallocate them over time. These six tasks are the basic functions that natural resources law performs or makes possible. And it performs them, necessarily, in pretty much every resource setting.

These functions provide the framework for this casebook. The book explores the law of natural resources on a function-by-function basis, assembling and drawing upon legal materials from an unusually wide array of resource settings. With this approach, it's possible to see clearly the tasks that the law is called upon to perform. It is also possible to perceive the similarities that exist in the laws dealing with various specific resources. These similarities are hardly surprising. The law's assigned tasks are largely the same from resource setting to resource setting. So are the practical problems that lawmakers encounter.

Consider, for example, the laws that make resources available to people on a first-in-time basis. First possession (as it is sometimes termed) is used to allocate water, wild animals, mineral deposits, recreational—use rights, and other resources. When we compare cases drawn from these resource settings, we see that first-in-time encounters the same practical difficulties whenever it is used. It also (although not always) yields similar legal resolutions. Armed with these lessons, we can anticipate the

problems likely to arise when first-in-time is put to use in a novel resource setting. Similar insights emerge when we examine other basic resource issues: for example, (i) how long use rights endure (chapter 6), and (ii) what powers an owner has to transfer them (chapter 7). Reallocating resources is an important functional task in all resource settings, necessary to accommodate endless economic and social change. How has the law addressed this need to reallocate, and what do we learn by comparing its answers?

One question that arises early in any resource-governance regime is deciding which resources are attached to land (and thus allocated along with land), and which resources are, instead, severed from land and made available for separate acquisition. Chapter 2 takes up this topic. One benefit of addressing the topic so early (and by examining little-known resources such as ice and seaweed) is that we see more readily that land is really just a *bundle* of natural-resource use rights, differing in degree rather than kind from other private rights in nature. In short, the law of land use might rightly be viewed as a subset of the more general topic of natural resources law! To include land use in this study also helps in another way: It provides the beginning point for deciding how an owner of a discrete resource can use what she owns. Laws that govern the uses of discrete resources (chapter 5) build upon, and are largely variants of, the basic rules that govern land use (chapter 4).

Because rights to use nature are the focus of this book, we shall deal at length with the law of private property. We'll thus spend more time examining state law than federal law—and appropriately so, given that state law resolves the vast majority of resource-use disputes. As for the federal law that does appear, it is intermingled with state law according to functional issue. In similar fashion, federal-lands questions are not separated from questions involving private lands.

Indeed, a basic theme of the book is that the categories of public land and private land are far from distinct. The public has legitimate interests in the ways private lands are used, while private actors often possess secure, enduring property rights in public lands. The federal government is indeed a powerful sovereign, but it is also a major landowner. Consequently, the federal government encounters the same problems and opportunities that other landowners face.

As this book's subtitle suggests, another issue shares center stage with private use rights in nature, and that is the whole matter of collective governance. Law comes from lawmaking bodies, which are constantly tinkering with it. Private use rights, moreover, are intermingled and interdependent, so much so that mechanisms are regularly required to coordinate or dovetail the private uses to reduce conflicts and increase overall benefits. The materials here highlight the need for ongoing governance and illustrate how the law has addressed it. On this topic, too, the book pushes readers to rethink assumptions. Just as we're prone to consider private and public land as distinct, so too we readily distinguish private

from public governance methods. In truth, these categories also overlap. Looking ahead, perhaps no natural resource topic deserves more careful attention than the need for better-integrated, public-private methods to coordinate resource activities at varying spatial scales.

As we'll see, the inevitable conflicts that arise among land and resource users can be diminished (though not entirely avoided) in various, quite different legal ways. The law can try to define private use rights so precisely that all foreseeable conflicts are resolved in advance (much like drafters of contracts try to foresee problems and resolve them in the contract). Alternatively, the law can define private rights more vaguely and deal with future conflicts by creating governance methods by which the affected parties can get together more readily and work out their differences. American law has tended to favor the first of these approaches (for instance, in dealing with prior appropriation water rights), but the cost of that approach can be high in terms of inflexibility in resource-use patterns. (When rights are defined in great detail it becomes much harder to change patterns of resource use and shift resources to more highly valued uses.) Perhaps the time has come to lessen reliance on that approach and to consider more seriously an approach that relies more on process and structured negotiations rather than on clear substantive rights. As for that possibility, we'll see instances of it in various corners of natural resources law.

In the course of this study we'll have occasion to take backward glances into the law's past. We'll see that today's most contentious issues are little different functionally from legal issues addressed by lawmakers long ago. Indeed, hardly any "new" legal issue is without significant historical precedents. History is also worth studying because the past weighs so heavily upon this legal field, as it does on property law generally. One can hardly understand current law without knowing at least the rough outline of its trajectory to the present. There are some resource-use issues—such as the public's right to use waterways—where the law has become so confused that only an historical inquiry can make sense of it. With regularity courts still turn to old precedents for guidance. Nowhere is this more true than in wildlife law. (Witness one of the Note cases in the materials that follow, a judicial decision from late 2004 that employs an English precedent from the reign of Queen Elizabeth I.) In the law relating to nature, the past remains alive.

When approaching natural resources law in this manner—function by function—particular ideas crop up regularly, much like fictional characters who leave a story's scene only to return repeatedly. Four ideas appear most often: (i) *reasonable use* as an evolving limit on the exercise and scope of private rights (and the tension that reasonable use creates with such competing ideas as first-in-time and nature-as-baseline); (ii) *accommodation*, or the need for one user, when feasible, to adjust her activities for the benefit of another resource user; (iii) *ancillary rights*, or the add-on entitlements required by an owner to make efficient use of a particular resource right; and (iv) *shared governance*, or the need for resource users

somehow to work in concert for their mutual benefit. Many of the Notes in the book use sequential titles—Reasonable use I, II, III, and so on—to highlight these issues and help readers track them.

Several of the Notes draw repeated attention to two further issues. These receive prominence, not because of their practical importance, but because they're likely to conflict with the reader's expectations. A common presumption (strengthened by rulings of the United States Supreme Court) is that the preeminent entitlement of land ownership is the *right to exclude* outsiders. As we'll see, however, natural resources law features many instances where this right is curtailed to promote efficient resource exploitation. To study the various limits on the right to exclude is to question how important this particular right really is. (Lawmakers two centuries ago placed greater emphasis on the related but distinct right of quiet enjoyment, which allowed owners to halt actual interferences with their activities.) Natural resources law has long embraced the notion that multiple people can securely use the same tract of land at the same time.

Also highlighted in this text is the long history of *private condemnation* in natural resources law. The widely held presumption on this issue is that condemnation has always been about takings of property for *public* use. Yet, beginning in the colonial era and gaining frequency in the nineteenth century, courts and legislatures authorized resource owners to make use of landed property rights possessed by others—to convey water to a mine or farm, for instance; to carry drainage water away; to flood a field; to gain physical access to a land-locked resource; to construct a transportation corridor; to impose dust or fumes on a neighbor, or in other ways to make resource exploitation more efficient. Sometimes the taking was acknowledged and landowners got paid. Other times (continuing still today—see the 2002 *Park County* case in chapter 2), courts chose to redefine landed property rights without compensation to facilitate the favored resource-use arrangement.

This book's final chapter includes three detailed discussion problems. These problems invite readers to consider resource challenges of the type so prevalent today—not challenges involving single resources on individual parcels, but the knottier challenges that arise when we try to integrate multiple resource uses in fragmented landscapes while sustaining the land ecologically. By the end of this text, students should be able to propose their own resource-use regimes to meet the needs of these landscapes and their fictional residents: defining the appropriate use rights, formulating governance regimes, and providing mechanisms for adjusting resource uses over time. These concluding problems could aid in a course review; they could provide topics for in-class presentations; they could serve as terminal writing assignments.

Two final comments for instructors.

This book is short enough to use in its entirety in a 3-hour, one-semester course, although it is possible, of course, to cut (particularly some of the readings in the final chapter). Because of the book's tight integration,

the material is best covered in the order presented and with no major parts completely omitted (although the final chapter can be dealt with quickly if needed).

As for the specific resources studied, students will learn most about the laws governing water (including surface uses), wildlife (including inland fisheries), and subsurface land rights (oil and gas, hardrock mining, and caves). They'll receive also a basic introduction to grazing rights on federal lands and recreational land uses. Necessarily, there are omissions. Uses of federal lands are covered but not federal land planning or relations among the branches of federal government; state wildlife law is covered in its basics but not the many federal statutes; the uses and ownership of minerals are covered but few issues involving leases; and except incidentally, little is said about federal-state relations or Indian tribes, save for a brief comment on tribal reserved water rights.

While this book was in manuscript Michael Blumm was courageous enough to use it in a course and to send detailed comments on it. I'm particularly grateful for his help.

*

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NATURAL RESOURCES LAW

Private Rights and Collective Governance

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