

Commentary

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When I hear the question, "How do we change water institutions for better decision making?" I always add the phrase, "better for whom?" Institutions can make a difference for whose preferences count. Thus, we can't say that one decision-making system is better, more efficient, or more equitable (as opposed to equal) without first asking whose interests we want to serve. I have selected several questions from Trelease's paper for comment. First, where should policy be made? This includes legislature, courts, or administrative agency as well as the level of government. Second, should the institutional vehicle be tied to water law or to other laws relating to land use planning? And third, can benefit-cost analysis be a guide to public decision making?

Let us first consider what branch of government we should use. Trelease makes a case for using administrative agencies. Compared with the legislatures, agencies have to apply statutory standards, are more flexible, and have the complicated technical expertise. This all sounds good, but let's ask, good for whom? Where do those statutory standards come from? That puts us back to the assertedly incompetent, emotional legislatures again, since they are the source of these standards, both those of substance as well as administrative procedure. The existence of any substantive legislative guidelines in the enabling legislation is in fact uneven and often provides only the useless slogan that decisions are to be taken in the public interest. Theodore Lowi in his book, *The End of Liberalism*, demonstrates the paucity of statutory criteria for administrative agencies. In some areas the legislature holds tightly to its control of policy, and in others it is happy to escape the political heat by throwing the

ball to the agencies whose decisions they can sympathetically lament with an outraged constituent without doing anything about them.

One person's frustration with inflexibility is another's protection against unwanted change. The point is that the cost of change is part of the ability of different groups to pursue their interests. The same point can be made about technical information. Information is power. The ability to withhold, dramatize, and subsidize the learning of others is part of the assets of parties to influence public policy. It is true that if the legislature gets too detailed in matters involving technical design, they may make some stupid mistakes that benefit no one. On the other hand, there is no clear demarcation between policy making and administration. The person in charge of details can affect performance, especially if it is hard for others to monitor and understand until it is manifest and too late for change. By necessity the expert knows a great deal about a few things. But, the big questions in public policy are matters of relative priorities and this by necessity requires a generalist. There is a lot of presumed value judgment of whose interests should count masquerading as technical expertise.

In any case, each branch of government differs in the ease of access by different groups. Some can get standing before a court that would receive very little hearing before a legislative committee. It is not just a matter of flexibility, standards, and expertise—it is a matter of access. While there are important access differences between branches of government, there can be as much difference within as between depending on the detailed rules and procedures of each. For example, how does an administrative agency get public input? Does it hold public meetings (where), have a citizen advisory committee (how selected), utilize opinion surveys, or prepare detailed plans of a single alternative (or document several alternatives)?' What is the agency's jurisdiction; is it single function or a consolidated department of natural resources?' All of these details add up to give more ability for some groups to participate than others.

Much the same thing can be said about level of government. Some groups count for more if the decision is made at the local level, while others are more effective at the state or national

level. Trelease recommends a larger role for zoning controls. While some states have expanded their role in zoning, it is historically a local matter. There is a strong ideology supporting continuation of this local role and to advocate the zoning tool is to advocate the local level of government. In the case of the impact of coal development that spreads to a large area, local land use controls may shut out many who would like to participate in the decision.

All of the above discussion of branch, level, and jurisdiction of government can be conceptualized as boundary issues that affect who can make their demands effective by affecting the cost of participation, who is in the minority, and the formation of winning coalitions. Boundaries are just a special sort of fence, and we know that fences are meant to keep selected people out (or others from getting away).

Trelease's major argument is that water law is the wrong tool (wrench) for the job of allocating resources to coal development. He prefers "growth controls, boom.town control, rural zoning, and land use planning." What experience have we had that suggests the ability of these institutions to prevent major land use changes desired by profit-making firms? The experience in other coal regions is not encouraging. But the experience is perhaps hard to interpret since the performance of an institutional structure (as opposed to alternative structures) is hard to trace to the institution itself versus the depth of political support of its objectives. In the case of coastal zone management, we are now seeing some experiments with an enlarged state role in zoning. But this is after there is precious little undeveloped shoreline left. California law began with a large state level (commission) presence but subsequent legislative modification have returned much of the power to the local units.³

The role of zoning in shaping the pattern of urbanization is a mixed bag. My impression is that nonavailability of sewers and public water supply have done more to affect the direction of land development than has zoning.

Trelease puts a great deal of faith in benefit cost analysis to guide us to resource allocations in the public interest. This is why he seems to accept coal development and slurry shipment. He suggests that if the coal companies can find a willing seller,

there should be a transaction. This would be subject to administrative control to prevent harmful spillover. But, the issue is, harmful to whom? Who gets to decide? The question is not just to find a willing buyer and willing seller, but to decide just what it is that anyone has to sell. Law that decides property rights is an antecedent to exchange. You can't sell what you don't have. Benefit-cost analysis follows from the givens of the laws of property rather than being a guide to institutional choice.⁴

Instead of the environmental protection agencies fighting for amelioration in the face of coal development favored by benefit-cost analysis, what if the people (or neighbors) were granted property rights in the environment that the coal developers had to purchase just like they now have to purchase the mineral rights? The issue is who has to buy out whom. Do the people affected have a real right, which they can voluntarily sell or not, or is it only a nominal right to be mostly given away by a regulatory agency bowing to the exigencies of benefit-cost analysis? What would the benefit-cost analysis of coal slurry look like if the coal developer had to buy out the newly declared owners of Marlboro Country? I repeat: there are as many outcomes of benefit-cost analysis as there are different distributions of the antecedent property rights that the analysis implicitly adopts and often hides.

Trelease makes a good point when he suggests that outright prohibition via water law is heavy handed. If you think that some developments, in some places, and with some designs are O.K., then you want a more judgmental process. But the basic objective is up for debate. Indeed, if we want to preserve Marlboro Country, it may be impossible to maintain just a few exceptions. I think the oil situation is instructive. If we want to substantially reduce our dependence on foreign suppliers, then strict import quotas and gas rationing may be the only surefire institutions. Other more marginal changes (even a doubling and tripling of price) have not done much.

Trelease's point about "don't bust the monkey wrench" is also well taken. Those who want coal development may turn to federal water projects where state interests may not be dominant. Even if the president and Congress refuse to preempt

state water law, it is possible that the federal courts may overturn state attempts to control growth via laws regulating a necessary input like water. Trelease does not argue that land law would be immune from similar review. While some local attempts to control the volume of land development via absolute growth limits have been allowed to stand,⁶ other attempts to control land use have run afoul of the interpretation of the commerce clause of the U.S. Constitution.⁶

Trelease's message to the states is that the power of coal developers is dominant via their access to higher levels of government. Preservation of Marlboro Country is impossible, only amelioration via land use controls can be envisioned. Trelease is probably right. Any time there is a conflict between the opportunity of large profits by a few corporations and small environmental losses by many people scattered over the landscape, the smart money must go with the concentrated interests. So while part of the paper is about choice between land use planning and restrictive water laws, the choice is empty if you prefer preservation to the amelioration of development. The relevant institutional choices lie elsewhere. They are not matters of resources law but of fundamental rules for making rules that might change access to government. It is not easy to find political rules to offset the power of concentrated interests, but rules for financing elections might be a start.

How to change the development philosophy of the unrepresentative courts is a different matter. But, if majority public opinion actually changes, the courts often respond. If the same philosophy exhibited by the voters of Colorado in rejecting the winter Olympics begins to grow and the congressional representatives of western states do not get automatic applause every time they announce a new federal water project, it may be possible to envision preservation.

It is difficult to distinguish whether a given performance emanates from widespread agreement with that performance or if present institutions are barriers to the expression of a demand for change. Is there a problem in finding institutions to transmit a widespread demand for a new concept of the good life or is it that we retain our fascination for what Boulding has called the cowboy economy with emphasis on material throughput?

While it uses the same simile, the cowboy economy and preservation of Marlboro Country are not the same thing.

Notes

1. For a review of the literature on some of these issues, see Joseph DiMento, "Citizen Environmental Litigation and the Administrative Process," *Duke Law Journal*, no. 2, 1977, pp. 409-448.

2. For a review of these organizational issues, see Schmid, *Federal Decision-Making for Water Resource Development*, Springfield, Virginia National Technical Information Center, PB 211 441, 1971.

3. Lenard Grote, "Coastal Conservation and Development: Balancing Local and Statewide Interests," *Public Affairs Report, University of California Institute of Governmental Studies*, vol. 19, no. 1, February 1978.

4. For development of this theme see my *Property, Power and Public Chocie* (New York: Praeger, 1978).

5. For a discussion, see Michelle J. White, "Self-Interest in the Suburbs: The Trend Toward No-Growth Zoning," *Policy Analysis*, Spring 1978.

6. In addition to the cases Trelease cites, a notable example is the recent Supreme Court ruling against New Jersey in its attempt to avoid the use of its resources for the disposal of solid waste from New York City.