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As if Equity Mattered - Common Themes and Enduring Issues in the Symposium

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As If Equity Mattered—Common Themes and Enduring Issues in the Symposium***

ABSTRACT

This essay introduces the major themes of the symposium by first exploring the importance of equity as a sensitizing principle that compels policy scholars and the public to become aware of the consequences of our actions on the environment, natural resources, and the people dependent upon them. After conceding that equity remains a largely unrealized ideal that, like democracy, imposes a high standard for evaluating the outcomes of policies and their impacts on society, we then review five major themes shared by the 11 articles in the symposium: (1) equity cannot be separated from other ethical concerns, such as community, public interest, and freedom; (2) resolution of equity conflicts requires a sense of injustice and even outrage to motivate people to take action to correct a perceived inequity; (3) effectively resolving disputes over equity requires spatial proximity, power, and access to those having authority over natural resource and environmental decisions; (4) how we view equity is tied to culturally shaped perceptions and “socially constructed” views; and (5) what we view as equitable with regard to natural resource allocation, protection, and use is shaped by our own station in life and by our capacity for empathy. The empathy factor, we argue, is one that can be expanded to embrace our regard for other species—as well as other persons—as we become more aware of their intrinsic importance.

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*** The symposium was held at the University of California, Berkeley, from September 30 through October 2, 2009.

We shall never achieve harmony with land, any more than we shall achieve justice or liberty for people. In these higher aspirations, the important thing is not to achieve but to strive.

—Aldo Leopold¹

I. INTRODUCTION

If there is one common characteristic of equity as a principle of environmental ethics and policy, it is the enduring notion that it is an elusive ideal that we should try, against sometimes overwhelming odds, to achieve. The authors of this diverse collection would likely agree with Leopold's quote that the concerted, conscientious effort to attain equity in the way we use, manage, allocate, and protect natural resources is comparable to achieving harmony with nature and justice for humans—it is a defining aspiration of the human condition. Moreover, however difficult the quest for equity may be, it is something that should be sought after for the sake of future generations, for the sake of nature, and for our own sake.

This symposium, "*As If Equity Mattered*" in *Natural Resources*, celebrates the careers of two renowned environmental policy scholars: Helen Ingram² and Sally Fairfax.³ Professors Ingram and Fairfax have spent their academic careers determined to keep discussions of equity in play with regard to natural resources law and policy, and have been concerned that "equity has fallen off the table as a policy focus in natural resources law and policy during the course of [their] careers."⁴ Fairfax and Ingram conceived this symposium to "contribute to the discussion of equity and to project interest in the topic to the next generation of scholars."⁵ As conference participant Mary Ann King observed, "I think the purpose of this conference, and what Helen and Sally are admonishing us to do, is to carry on in making the equity argument."⁶ And so we will.

1. ROUND RIVER: FROM THE JOURNALS OF ALDO LEOPOLD 155 (Luna B. Leopold ed., Oxford University Press 1993) (1953).

2. Helen Ingram is Professor Emeritus at the University of California, Irvine, and University of Arizona.

3. Sally Fairfax is Henry J. Vaux Distinguished Professor Emerita, University of California, Berkeley.

4. Helen Ingram, Professor Emeritus, University of California, Irvine, Opening Address at the University of California, Berkeley, "As If Equity Mattered" Symposium (Sept. 30, 2009).

5. Sally Fairfax, Henry J. Vaux Distinguished Professor Emerita, University of California, Berkeley, Address at the University of California, Berkeley, "As If Equity Mattered" Symposium (Sept. 30, 2009).

6. Mary Ann King, Remarks at the University of California, Berkeley, "As If Equity Mattered" Symposium, Panel on Water and Fairness (Oct. 2, 2009).

Striving for environmental equity makes us acutely aware of how management of the environment affects *all* people, as well as how people's actions toward the environment, in turn, affect nature's condition—for both good and ill. This sensitivity makes us *better* persons: more reflective in how we view the consequences of our actions toward nature, more careful and “precautionary” in how we govern resources, and more thoughtful in how we study resource problems. It also makes us more aware of how thinking about equity benefits environmental policy, builds a stronger sense of community and civic engagement, increases respect for individual rights, and makes us more considerate of the non-human environment.

Leopold's quote is a fitting introduction to this summary essay precisely because, as the 11 articles comprising this collection suggest, the quest to achieve environmental equity—to seek a condition of fair, equitable processes and outcomes in the management of land and water—is one that strongly resonates across many disciplines, including anthropology, ecology, economics, environmental policy, geography, history, hydrology and groundwater science, law, philosophy, and political science, among others. Environmental equity is an aspiration that is shared not only by scholars committed to the *study* of environmental policy, but also by activists committed to achieving policy *change*, many of whom are trained in these very same fields and participated in this important conference.

As an elusive, difficult to realize ideal, equity is not unlike democracy—another objective that continues to defy easy attainment. Often, questions regarding the conditions necessary for achieving equity—like those that political scientists and others ponder regarding democracy—prompt deeper questions over who is entitled to a “seat at the table” in decision-making and who has real power. And, if we had greater public and stakeholder participation in decision-making, would the result necessarily accrue towards greater fairness in decisional outcomes, consensus regarding what actions we should take to protect the environment, and better treatment of other people who depend upon natural resources?⁷

Finally, as these diverse and wide-ranging articles show, equity remains an important issue across a broad spectrum of environmental scholarship, regardless of resource areas, problems, or issues, because it requires a commitment to the notion that *how* we study environmental issues entails making ethical as well as epistemological judgments. As we shall discuss in the conclusion of our essay, the choices scholars exercise in how they study the environment's impact on people—and peo-

7. Ingram, *supra* note 4.

ple's impact on the environment—is not only a widely shared concern, but is one that has long-term equity implications of its own.

This summary has two objectives: (1) to discuss common themes that resonate across the articles from this symposium—in particular, the conditions required for equity to be brought about (and, just as important, the conditions that define *inequity*—a concept that often seems easier to define than the former); and (2) to discuss enduring lessons from these articles that suggest several intellectual and practical challenges that remain to be explored.

II. MAJOR THEMES AND THEIR SIGNIFICANCE

Five major themes are shared by these articles: (1) equity cannot be deconstructed from other ethical concerns regarding the environment; (2) resolution of equity conflicts requires a powerful motivation on the part of protagonists—often supplied by a sense of injustice leading to outrage; (3) effectively resolving disputes over equity requires spatial proximity, power, and access to legitimate authority; (4) how we view equity is tied to shifting temporal interpretations, as well as culturally shaped biases and “socially constructed” views; and (5) what we view as equitable is shaped by our own station in life, and by our capacity for empathy with other people, species, or even times and places. Each is explored below.

A. Equity Cannot Be Separated from Other Ethical Concerns Regarding the Environment

An important theme widely shared by the authors of these articles is that to intelligently discuss what is fair, just, and ethically appropriate regarding how natural resources should be managed, allocated, and utilized, equity must be viewed within a larger ethical framework. Such a framework might include, as conference participant Ann Morgan suggested, “economic, racial, gender, religious, international or political equity,”⁸ and embrace the rights and dignity of individuals and diverse cultures, as well as the moral standing of other species. Greta Goldenman articulated this theme in her introductory remarks during the conference's first panel discussion, *General Equity Questions*, in which she highlighted the centrality of a sense of place in environmental equity issues. This panel's other participants consistently emphasized the need for a larger ethical framework in which to embed equity.

8. Ann Morgan, Vice President of Public Lands, Wilderness Society, Remarks at the University of California, Berkeley, “As If Equity Mattered” Symposium, Panel on Land and Fairness (Oct. 1, 2009).

The work of Lynn Huntsinger and Lucy Diekmann, and that of Nancy Langston, focuses on mistreatment of Native Americans and the continuing ecological, economic, and public health legacies of previous patterns of discrimination. In their discussion of the fundamental harmony between the Yurok Tribe and their natural environment prior to white settler invasion, Huntsinger and Diekmann suggest that disruption of a sustainable human culture, as well as its supporting ecosystem, led to white dominion over land use and resource decisions at the expense of previously established American Indian cultural rights. Moreover, the shift from a philosophy of assimilation to one of utilitarian exploitation diminished the Yurok's opportunity to articulate the notion of equity as a vehicle for promoting and sustaining policy outcomes that could benefit both the natural environment and the welfare of the tribe's diminishing numbers.

Furthermore, systematic pauperization of the Yurok led to depletion of their resource base, fragmentation of their lands and habitat, and decline of a stable ecology—all of which diminished economic opportunities and degraded regional environmental quality and sustainable yields of timber and other resources. Ironically, everything done to the Yurok in the name of "improvement" (whether assimilation of tribal members into the larger culture or exploitation of the Yurok's resources in order to hasten economic benefits accruing to whites) was justified by reference to equity.

Langston underscores the importance of viewing equity within a larger ecological framework in her discussion of the Shoalwater Tribe's exposure to endocrine-disrupting substances and the ensuing absence of concern by those in authority toward the former's complaints and concerns. Langston's analysis focuses on the health needs of women—especially Native American women—who were victims of involuntary toxic exposures. Equity regarding women's health, she contends, must be viewed within a larger social context that acknowledges how organisms act upon the environment, and how the environment, in turn, acts upon organisms. Langston notes that this view challenges "deconstructed" notions of women's health that promote reductive, metaphysically individualistic interpretations of wellness. Her analysis demands that we consider equity within a broader social, ethnic, and culturally holistic "ecology of health."

Dan Tarlock offers a compelling argument in favor of the view that inequities toward Native Americans are only overcome through a sense of outrage, which, in the case of many Indian tribes, has led to a "hard" property rights reform of western water law doctrine. In the context of the current discussion, however, his analysis assists in understanding the importance of placing equity considerations within a larger

ethical framework. In effect, Tarlock amplifies the view of other contributors to this symposium that sustaining land and water, as well as preserving or even restoring traditional cultures' amenities and practices, are intrinsically interconnected goals. Law can be a vehicle for giving positive voice to these interconnections (e.g., the *Winters* case⁹); or, as has often been the case, law can be used to diminish and downgrade the importance of these interconnections (e.g., the doctrine of prior appropriation in the American West that subverted the traditional water rights of native populations and nearly exhausted natural stream flows).¹⁰ Reed Benson, while presiding over another discussion panel, reduced this concept to its simplest terms: "What is legal and what is ethical are sometimes different."¹¹

During a later panel, entitled *Land and Fairness*, Mrill Ingram and Sarah L. Thomas considered equity's place within the context of other ethical issues regarding environmental policy. Among the larger issues they addressed were: whether concerns over fair and equitable treatment should apply to other species (including species that may or may not be sentient, as Ingram noted); whether other species have inherent rights; whom we recognize as having moral standing; and the sorts of ethical dilemmas that arise when ecological goals of species preservation and diversity clash with, say, societal goals for access to a resource's benefits, regardless of one's socioeconomic status or rank in that society.

Thomas's article discusses this clash in the context of conservation easements and public access, while Mrill Ingram's work examines this issue in the milieu of whom we choose to recognize as having a moral stake in debates over equity and fair treatment. Thomas is troubled by the fact that conservation easements, which are intended to protect fragile, sometimes irreplaceable resources, limit public access so sharply that even reasonable and socially desirable recreational and educational opportunities may be denied—particularly to groups that might otherwise not have access to natural environments. For her part, Ingram questions the very notion of what constitutes the ethical boundaries between humans and the natural world. The same microorganisms that, in one context, may threaten human health by exposing us to disease, may, in another setting, enable human nutritional, medicinal, or environmental benefits that we have only begun to recognize and appreciate.

9. *Winters v. United States*, 207 U.S. 564 (1908).

10. See, e.g., CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (1992).

11. Reed D. Benson, Professor of Law, University of New Mexico, Remarks at the University of California, Berkeley, "As If Equity Mattered" Symposium, Panel on Water and Fairness (Oct. 2, 2009).

In sum, because equity cannot be deconstructed from other ethical issues facing environmental and natural resources management, one of the challenges confronting students of environmental policy is identifying some integrated notion of justice that can furnish a means to sustain ecological integrity, human health, and traditional cultural rights within a coherent framework. In recent years, the search for such a comprehensive framework has become a major preoccupation of numerous authors who have written on environmental equity.¹²

There is a closing irony worth noting when considering the range of ethical concerns that must be embraced in order to properly frame environmental equity issues: Do these other ethical concerns afford a means to ensure that the equity concerns we failed to properly acknowledge in the past be effectively addressed today? Tarlock discusses a set of legal remedies for restoring and protecting Native American rights over water; remedies that not only afford tribes some semblance of equity, but provide them with legally defensible rights regarding property ownership and authority over their own welfare.

By contrast, the Yurok and Shoalwater tribes (noted by Huntsinger and Diekmann, and Langston, respectively) lost not only the control of their lands, but collective responsibility for property stewardship. In the process, they experienced the loss of something far more important—sovereignty over their own bodies and their personal health. Equally tragic, they were left with few, if any, resources to leverage the means to reacquire them. All of this serves to remind us how actions taken in the distant past continue to shape and influence present and future generations' health, livelihood, or even (as Langston notes) their chances of being born without birth defects. This effect of previous injustices on present-day equity conflicts is another common preoccupation of the articles in this symposium issue.

B. Equity Conflicts Are Effectively Addressed Only When Protagonists Are Motivated by a Strong Sense of Injustice

The political motivation to resolve equity conflicts is usually generated by a sense of outrage precipitated by the failure on the part of dominant groups to acknowledge that legally sanctioned arrangements for managing a resource are inequitable. Such motivation can also be precipitated by outright refusal of some economically and politically powerful groups to acknowledge a need for change where conventional

12. See, e.g., HOLMES ROLSTON, III, ENVIRONMENTAL ETHICS: DUTIES TO AND VALUES IN THE NATURAL WORLD (1988); VANDANA SHIVA, EARTH DEMOCRACY: JUSTICE, SUSTAINABILITY, AND PEACE (2005); DEEP ECOLOGY FOR THE TWENTY-FIRST CENTURY (George Sessions ed., 1995).

resource allocation and governance systems suit the interests of the status quo.

Dan Tarlock characterizes this condition of outrage as a form of “Old Testament” justice: indignation or anger followed by a policy response on a geographically far-flung scale.¹³ Ironically, while Indians may have felt outrage regarding the loss of their water rights, Tarlock explains how the *Winters* case actually exemplified the continuation of a pattern of legal and political paternalism first manifested in their subjugation by white settlers. In *Winters*, “enlightened” white lawyers and judges granted reparations to tribes, acknowledging the legitimacy of their previous cultural practices and subsequent needs for water. While it is not entirely clear that Native Americans themselves were in a position to demand policy change, as Tarlock notes, once reform was instituted, *Winters* became a potent tool for vigorously exercising tribal water demands in subsequent eras (e.g., during the 1980s through the 1990s).

Tarlock points out that the *Winters* case is novel and important precisely due to the fact that it recognizes a “hard” place-based property right with regard to water that empowered a previously disempowered minority group. In so doing, it reveals the power of law as a tool for rectifying injustice. *Winters* also reminds us that law, like social convention, can evolve as conditions change. Tribes can now exercise their rights in ways that not only protect their use of water for a variety of economic purposes, including marketing it to others, but that also empower them to transcend their previously inferior legal status.

Tendai Chitewere discusses how the adoption of environmental justice principles by peoples of color has failed to attenuate the injustices they suffer, and affords important insights into the paradox of motivation. The environmental justice movement has articulated the notion, now widely accepted in policy circles, that no community should be unjustly burdened or deprived of benefits or amenities. As a result of this demand, many environmental justice leaders share a powerful motivation for policy change: exasperation over the failure of middle class, mainstream, largely suburban environmental groups to seriously weigh the injustices suffered by urban people of color as equally compelling to

13. Examples of what are often referred to as “Old Testament” justice, particularly in regard to using natural resources as an object of reward or punishment, include the story of Noah’s Ark, *Genesis* 9:9–16 (New Int’l), and the “perpetual covenant” between the Hebrews and Yahweh consummated after the deliverance from Egypt, as told in *Deuteronomy* 7:11–15: “If you pay attention to these laws and are careful to follow them, then the LORD your God will keep his covenant of love with you, as he swore to your forefathers. He will love you and bless you and increase your numbers. He will bless the fruit of your womb, the crops of your land—your grain, new wine and oil—the calves of your herds and the lambs of your flocks in the land that he swore to your forefathers to give you.”

their own causes. Despite this motivation, achieving environmental equity remains an uphill battle. In part, as Chitewere argues, this is because people of color are often excluded from mainstream environmental debates, either in the context of environmental group lobbying or environmental amenity decision-making. Moreover, she argues, too many academic analyses of environmental justice objectify and thus, dehumanize the subjects of their study—the victims of environmental discrimination.

Nancy Langston also contributes ideas vital to the discussion regarding the motivation to address inequities. She reminds us of the importance of empowerment in questions regarding public health. Women and minorities have often been denied the opportunity to identify their own public health problems, or to seriously influence the research agenda that defines, marshals resources to address, and legitimizes recognition of these problems. Without this ability to affect the levers of scientific and medical authority, whatever motivation women, minorities, tribal nations, or other groups have to act on behalf of reform may all come to naught in the political arena. This is because there is little inducement to become an activist without the ability to influence the research that supports an agenda for action to address health and environmental problems. A research agenda that can establish responsibility and blame provides a legitimate scientific basis for defining the severity of risk and the seriousness of a hazard to which people are exposed. Such a research agenda also provides a knowledge base for establishing the extent to which exposures to risk not only are inequitable, but also are deliberate, willful, or the result of negligence. The frequent inability to draw these connections clearly and unambiguously is an important dilemma that has long faced the environmental justice movement, as other scholars have noted.¹⁴

Henry Vaux's article explores a little known but massive energy development operation—the Alberta tar sands project—and shows how this highly disruptive enterprise is threatening aboriginal cultures and sub-arctic habitat. The project also poses an indisputably huge and well-documented hazard to vital water supplies and other environmental assets on a continental scale. Vaux's analysis provides insight into another aspect of the motivation to address inequities in land and water resources—the dilemma of visibility. Despite the inequities imposed on these aboriginal populations—including systematic disregard of treaty obligations—a lack of international interest and outrage toward the

14. See, e.g., CHRISTOPHER H. FOREMAN, JR., *THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE* (1998); *ENVIRONMENTAL INJUSTICES, POLITICAL STRUGGLES: RACE, CLASS, AND THE ENVIRONMENT* (David E. Camacho ed., 1998).

plight of native peoples exists. Such inequities in more visible contexts would precipitate calls for multi-national action by countries and non-governmental organizations (e.g., boycotts). Apathy, exacerbated by the energy-intensive lifestyle of Americans (the largest consumers of the energy produced in the tar sands), diminishes the motivation of Canadian officials to protect aboriginal interests or to reconsider the titanic scale of ecological disturbance wrought by this project.

There are three preliminary lessons worth reflecting upon regarding the motivation to overcome inequities. First, however equity is defined—as the right to equal treatment, the ability to control one’s own destiny, or the power to seek redress for prior wrongs—discussions of the motivation to address *inequity* often begin from a base of cultural conquest, subjugation, or discrimination. Second, this base of discrimination constrains efforts to reverse inequities because of the low importance the larger society places on the needs of these suppressed groups. Suppressed groups often carry the burden to prove they have suffered harm, even though these same groups are frequently denied legitimate forums in which to effectively lodge such claims. African Americans and Native Americans, in particular, did not even have a legal right to define their own environmental aspirations for generations. In effect, the legacies of paternalism, racism, and discrimination serve to discount how we treat certain groups, and may subconsciously influence the lenses through which we view the harms they endured. Third, personal health and well-being, ecosystem health, and economic welfare are all intrinsically connected: this is not only a foundational principle in discussions of the meaning of sustainability, widely documented elsewhere,¹⁵ but it is also an important principle that resonates throughout this symposium. To address any one of these inequities effectively, we must first find a way to address them all.

C. Spatial Proximity and Relative Power Provide Effective Means to Resolve Equity Conflicts

The theme of spatial proximity and relative power resonates across several articles and is apparent in equity conflicts involving a wide array of protagonists and controversies—from well-off landowners involved in cases of habitat protection for endangered or threatened species, to middle-income watershed activists, and even to poverty-stricken inner city residents who are objects of discussion regarding outdoor recreational amenities. However, spatial proximity among direct protago-

15. See, e.g., THE SUSTAINABLE URBAN DEVELOPMENT READER (Stephen M. Wheeler & Timothy Beatley eds., 2d ed. 2004).

nists rarely characterizes participants in the forums where such debate takes place. Both Joseph Sax and Sarah L. Thomas suggest that spatial proximity to the centers of political influence may determine the degree to which a party to an equity dispute is able to exert leverage over the outcome of a conflict. Their articles also depict markedly contrasting outcomes involving the relative power of groups involved in spatially proximate, as well as spatially remote, disputes.

Sax's discussion of land-use controversies underscores the way in which so-called "takings" cases principally occur on a sharply limited, well-defined field of engagement in which the rights of individual landowners and the presumed needs of the larger community are contested. While Sax notes that the consensus view of courts toward such controversies is that open space—like air and water—can be exhausted, by the time courts are asked to intervene to protect for past damages suffered by protagonists, the controversies are often in advanced stages of litigation, debate, or contention. At such late junctures, "fair remedies" are only those that involve some sort of monetary compensation to the landowner by the community. The good news, as Sax reminds us, is that parties are usually sufficiently equal in power and access to legal defense so as to be able to resolve their disputes more or less amicably. However, the news may not all be good.

In her article, Thomas raises the question of whether mechanisms using public funds—directly or indirectly—to compensate landowners (e.g., land trusts, conservation easements, and open space districts) may themselves be inequitable depending on the public's expectation of what benefits land preservation should provide to those who may not have legal or physical access to the land they have paid to protect. In contrast to Sax, Thomas's discussion of the open space movement of the last century and its failure to adequately capture the needs and aspirations of urban residents points to the problem of spatial proximity to the levers of decision-making. Since the early 1960s, especially during President Lyndon Johnson's Great Society, aspirations for high degrees of public access to parks and recreational lands were a strong component of national parks policy. This goal was embraced in a variety of federal commissions that supported investments to promote more parks, as well as in state implementation of the twin objectives of urban access to existing parks and development of new parks in close proximity to older urban areas, especially in the northeastern United States. Over time, struggles between commodity and recreation interests, as well as debates over geographic equity, precluded the granting of direct benefits to urban residents. Moreover, despite congressional efforts to establish high-quality, low-density wilderness experiences and to dovetail recreational land use and urban housing policy in order to protect open space in urban areas,

the outdoor recreation needs and preferences of urban minorities (e.g., greater public transit access to parks and educational opportunities for youth through park-based experiences) were too often ignored. Clearly, urban minorities have been excluded from the national levers of decision-making regarding siting and access to parks and the recreational amenities they provide.

By contrast, Andrea Olive and Leigh Raymond assess the clash between the two dominant notions of equity in implementation of the Endangered Species Act (ESA) and demonstrate that it may be possible to resolve conflicts equitably if protagonists to land-use controversies can negotiate locally based settlements. These two conceptions of equity—the norm of ownership as an intrinsic right that should be minimally regulated on the one hand, versus the intrinsic duty of society to avert species extinction on the other—have been found to be negotiable under the terms of the ESA. The ESA provides negotiating tools and economic incentives for landowners and environmentalists to bargain toward collaborative solutions. As Nancy Peluso noted, “one way of thinking about fairness is as a norm, and [Olive and Raymond’s] article has a different way of seeing the ways norms manifest in conflicts and agreements related to the ESA.”¹⁶

In the case of habitat protection planning, Olive and Raymond suggest that an equitable solution may be achievable when dealing with a small number of spatially proximate protagonists who can directly engage in some type of give and take, as opposed to large numbers of protagonists with relatively unequal power. Most ESA and takings issues revolve around site-specific conflicts where ranchers, farmers, environmental protection advocates, and even federal agency stakeholders are able to discuss and reach accord directly in regionally situated forums. All of this is not to suggest that conflict resolution is easy; as Olive and Raymond make clear, even when landowners are willing to concede a middle ground, economic incentives are still needed when property interests are high and stewardship values are low.

The importance of spatial proximity in determining equity outcomes is evident through the contrast between the situation exemplified by Olive and Raymond’s analysis of the ESA and the consequences that accrue when protagonists lack spatial proximity to critical decision-making arenas and/or when power differentials among protagonists are enormous—for example, the situation befalling the Yurok Tribe, as noted by Huntsinger and Diekmann. Not only had the Yurok Tribe lost control

16. Nancy Peluso, Henry J. Vaux Distinguished Professor of Forest Policy, University of California, Berkeley, Remarks at the University of California, Berkeley, “As If Equity Mattered” Symposium, Panel on Land and Fairness (Oct. 1, 2009).

of its lands, but it also lost authority over its traditional institutions of collective, community-based property stewardship, and thus, its ability to leverage reform.

Authors Anne Taufen Wessells and, jointly, Kelli L. Larson and Denise Lach, discuss the growth, political dynamics, and aspirations of local watershed councils, making a strong case that the idea of highly participative activist processes are not as inclined to produce equitable resource management outcomes as many others argue. These watershed councils, often dominated by white, upper-middle-class urban activists, articulate distinctly ecological goals regarding watershed management and advocate for new and different goals for urban water policies—especially greenway and recreational services. Ironically, as Wessells notes, one of the objectives of watershed councils, particularly in highly urbanized regions such as Los Angeles, is to broaden the political base of watershed participants. While the policy goals of local activists are to repair or restore rivers and riparian corridors as urban amenities (often after decades of neglect, disrepair, or where severe stream channelization has occurred), this set of goals may neither appeal to nor benefit everyone equally.

While Wessells is optimistic about the power of citizen groups to adopt place-based, eco-centric notions of identity and collective power and in their overall ability to effectively exploit the multiple points of entry possible in local water resource decision-making, Larson and Lach appear to harbor greater skepticism over the possibility that real change can occur through the efforts of such groups—or, at least, equitable change that accrues to the interests of less powerful, lower income groups. Larson and Lach point to the fact that watershed activists, because of their social, economic, and educational backgrounds, tend to hold bureaucratic biases and neoliberal economic views that inhibit inclusiveness, equity, and consideration of a broad array of possible benefits from riverfront development. As a result, rural headwaters residents rarely find their interests incorporated into restoration efforts, and riparian residents living along floodplains are poorly represented in these decision-making forums.

Finally, Larson and Lach find that top-down approaches toward decision-making tend to predominate in such arrangements—a fact that strongly tests the notion that spatial proximity to a decision may be sufficient to overcome a deficit in other sources of power and influence. Watershed councils may be local in origin, in their base of political recruitment, and even in their policy focus, but these factors do not—as both Wessells' and Larson and Lach's articles suggest—ensure that policy outcomes always accrue to the objective of equity, or that these councils' internal operations will be broadly democratic.

D. Equity in Land and Water Disputes Must Be Viewed in Light of Shifting Temporal Landscapes, Historical Legacies, and Culturally Dominant Attitudes

While some absolute principles of equity exist that can be applied across land and water cases (e.g., maximizing a social good, treating equals equally, or caring for others too weak to care for themselves), the ways in which these principles play out in different policy arenas vary enormously. Moreover, what was once viewed as fair in the past may be viewed much differently today. Such issues appear in many cases, particularly in the two watershed cases discussed by Larson and Lach, and Wessells, respectively.

Larson and Lach, and especially Wessells, implicitly recognize the fact that shifting temporal values toward rivers and toward the concept of how an environmental amenity (such as a riverfront) is defined, may strongly reflect, or even dictate, a community's sense of place. In the past, a river may have been viewed by an adjacent community as a flood hazard, a navigation channel, a solid waste disposal system, an intermittent source of public water supply, or even as something of little or no economic value, such as a repository for health hazards (e.g., thickets containing poisonous insects or plants). However, over time, as our cities have matured and undergone changes in their economic and employment bases, urban residents have become increasingly attuned to the possibility that waterways afford a focal point for defining a sense of community. Water bodies may also serve as recreational amenities that bind together groups who may have different socioeconomic characteristics, but share a common fondness for the primal force of clean, flowing water. Such a change in policy temperament reflects broader, sometimes titanic shifts in social values toward rivers.¹⁷

For Larson and Lach, while it is clear that the policy objectives of contemporary watershed activists are far removed from the views of river management advocates in the past, it is less certain that the methods of policy change utilized by these advocates are any more likely to achieve equitable decision-making outcomes. As noted previously, watershed activists may harbor bureaucratic biases, may not be fully inclusive toward other views or other protagonists, and, at least in the Johnson Creek watershed case, may have far higher income and educa-

17. See, e.g., Blake Gumprecht, *Who Killed the Los Angeles River?*, in *LAND OF SUNSHINE: AN ENVIRONMENTAL HISTORY OF LOS ANGELES* 115 (William Deverell & Greg Hise eds., 2005); Jared Orsi, *Flood Control Engineering in the Urban Ecosystem*, in *LAND OF SUNSHINE: AN ENVIRONMENTAL HISTORY OF LOS ANGELES* 135 (William Deverell & Greg Hise eds., 2005).

tion than the average residents of neighboring communities whose interests they purport to represent.

Many of the articles in this symposium issue point to ways in which struggles to achieve equity in land and water disputes are predicated, by necessity, on seeking redress for prior wrongs. Again, this impulse underscores the changing temporal landscape regarding how society, as a whole, views equity. We have already seen how longstanding baselines of subjugation and discrimination of one group by another has lead protagonists to seek a restoring, redefining, or reawakening of equity among those in power. These subjugated groups include: women (Langston), tribal nations (Huntsinger and Diekmann, Tarlock, Vaux), and resource-disadvantaged individuals living in cities (Chitewere, Thomas) or on tribal lands or in less-developed less-politically powerful nations that share a resource with a more powerful neighboring nation (Vaux).

Another dimension to this shifting temporal landscape that requires exploration is the extent to which things done in the past may irreversibly alter conditions affecting later generations. While this issue has become particularly salient in contemporary debates over climate change, the articles in this symposium remind us that this is not a new preoccupation in debates over environmental equity.

Previous decisions affecting Native Americans, as discussed in several articles in this symposium, have shaped subsequent land and water management policies that, in turn, have adversely affected the public health of entire communities, the economic opportunities afforded to later generations, and, as already noted, even the possibility that there would be future generations at all (e.g., Langston's discussion of the Shoalwater Tribe). What is less appreciated, however, is that such irreversible—or, at least, difficult to reverse—policy trajectories are characteristic of many land and water policies. This is a point amplified by a number of panel discussions at the symposium. For example, Professor Joanna Endter-Wada suggested that a significant facet of previous conceptions of equity was the preponderance of the ideology of individualism—that individual property rights are more important than duties toward the larger community.¹⁸ Moreover, as commenter Caryl Hart suggested, while *Winters* may have ensured that, over time, water became a “hard” property right for Native Americans, it would appear that rights

18. Joanna Endter-Wada, Associate Professor, Utah State University, College of Natural Resources, Remarks at the University of California, Berkeley, “As If Equity Mattered” Symposium, Panel on Equity Questions (Oct. 1, 2009).

to land remained a “soft” right that led to the erosion of tribal control and influence over preservation of their culture and their resources.¹⁹

E. How Equity Is Viewed Is Shaped by One’s Station in Life and by One’s Capacity for Empathy

A common fallacy in discussions of equity is the notion that because all policy domains are characterized by normative conflicts that seem irreconcilable or even intractable (as Olive and Raymond note), agreement upon some middle ground based on compromise is virtually impossible. Yet, as Olive and Raymond and others in this symposium point out, agreement over what constitutes equity in any given situation may still be possible if participants acknowledge the common threads that, on occasion, bind their sympathies and permit them to see the vantage point of others; value differences do not always result in politically uncompromising situations.

Olive and Raymond suggest that landowners who profit from the use of land can empathize with the principle of stewardship and may even seriously regard the need to protect threatened or endangered species. Protagonists to resource disputes are rarely as polarized or unable to appreciate one another’s views as many are inclined to believe. Landowners may have a high regard for preserving nature (in fact, such regard may drive them to become landowners in the first place) and habitat protection advocates can acknowledge the evenhandedness, in certain instances, of compensating landowners for their earnest, yet costly, efforts to achieve this goal.

As a practical matter, habitat conservation plans (HCPs)—a common policy intervention negotiated by federal agency officials, environmental groups, and landowners to enshrine such equity compromises—are not panaceas; they can only provide environmental benefits once sanctions from the ESA have been instituted. And, economic incentives to induce participation in HCPs are needed when property interests are high (and the economic burdens of property loss are severe) and stewardship values are less-strongly embraced by landowners. In short, while landowners may be, as Olive and Raymond suggest, Lockean individualists regarding private property rights, they most certainly are not, as some political theorists have characterized the Lockean contribution to

19. Caryl Hart, Chair, California State Parks Commission, and Director, Sonoma County Regional Parks, Remarks at the University of California, Berkeley, “As If Equity Mattered” Symposium, Panel on Equity Questions (Oct. 1, 2009).

modern notions of liberty, “possessive individualists” who exalt obsession with private property over all other civic principles.²⁰

Sax, meanwhile, points to conditions that must be satisfied in order to nurture this empathic bond. Like Olive and Raymond, Sax agrees that there may be a need for special forms of compensation to “late stage” parties in order to ease the pain of takings. Such compensation can only take place, however, once parties first agree to a common solution. An interesting policy question that stems from Sax’s article is the role of government in facilitating the conditions for reconciling the goals thought to require takings, with measures to compensate those whose private property is taken. Might society be entering an era in which local governments and even states will consider establishing some sort of “common pool” takings-compensation fund before developments requiring such compensated takings occur? Some rapidly growing communities have already undertaken similar arrangements to manage infrastructure by setting aside special funds, replenished with development fees imposed on builders and sometimes homeowners, which are used to support the construction of local public schools, roads, and water infrastructure, among other services.

Perhaps the most provocative analysis of the implications of empathy and one’s station in life as factors affecting equity is Mrill Ingram’s, which urges people to consider whether they have the moral capacity to regard non-sentient beings as objects to be cared for and to be regarded as having intrinsic—not merely utilitarian—value. Such regard would lead us to consider these other beings as having moral standing. Ingram’s argument prompts consideration of the following challenge: What preconditions are required to bring about human empathy with other species or forms of life?

Empathy is usually regarded as an emotional, sympathetic, and relational bond that characterizes communication between “higher” forms of life, such as humans, other mammals and (perhaps) some household pets. Mrill Ingram, however, asks humans to consider the possibility that microbial organisms are intelligent and even volitional species. The ethical implications of this claim are potentially huge. For one thing, many microbes are typically thought of as *anti-human* and *anti-social* welfare by virtue of their very existence; humans view microbial survival as antagonistic to their own. However, this conventional

20. The argument that John Locke, the father of classical liberalism, and Thomas Hobbes before him, exalted the concept of property rights is an argument most notably advanced in C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1964).

view may not only be erroneous but morally dubious; it may preclude humans from seeing microbes as having intrinsic value.

Another implication of Mrill Ingram's argument relates to the concept of risk. As a species, humans are notoriously distrustful toward phenomena they do not understand or that are viewed as outside the human span of voluntary control.²¹ According to Ingram, an extreme form of risk aversion is not only unwarranted, given the benefits of microbial organisms, but it is also an impediment to empathy because it prevents us from being able to grant moral standing to these organisms.

As a practical matter, however, even if empathy toward non-sentient beings is warranted, an important question to consider is: How do we actually communicate, negotiate, or engage in an inter-active decisional process so as to acknowledge not only the moral standing of these organisms, but also the possibility that they have "agency" (i.e., the ability to act independently)? In some respects, Mrill Ingram's article critiques contemporary environmental equity arguments predicated solely on the appropriateness of limiting our ethical horizons to "higher" life forms. Even if one quibbles with the notion that microbial organisms have moral standing, the argument is particularly useful in sharply pointing out the contradictions and facile assumptions upon which many contemporary environmental equity arguments are based.

Finally, Chitewere reminds us that the underlying meaning of environmental justice is to cultivate the ability to empathize with those less fortunate, less economically advantaged, and less powerful than ourselves. For those in the academic profession, an added admonition might be that scholars should take a more active interest in the plight of those who are so disadvantaged, and not merely display an intellectual curiosity towards their condition. For those who are economically advantaged, one of the challenges in achieving empathy is that the legacy of paternalism caused by generations of discrimination leads such people, almost subconsciously, to discount the way they treat certain groups and often continues to shape the way they view the harms that others endure.²²

It is also appropriate to note that scientists and public health professionals may inadvertently discount adverse environmental and health effects experienced by certain social groups because these groups are held in low social regard or are considered too undereducated to be cog-

21. See, e.g., *THE SOCIAL AMPLIFICATION OF RISK* (Nick Pidgeon et al. eds., 2003); Roger E. Kasperson et al., *The Social Amplification of Risk: A Conceptual Framework*, 8 *RISK ANALYSIS* 177 (1988).

22. A provocative examination of this "subconscious" form of discrimination in modern society, as well as a complicated and controversial, but worthwhile, analysis of this problem, is found in HERBERT MARCUSE, *ONE DIMENSIONAL MAN* (1964).

nizant of their own situation. This attitude not only gives rise to equity disputes (e.g., Langston's account of the Shoalwater Tribe's health issues), but it also hinders the prospect that groups suffering from these inequities may be viewed as having legitimate grievances.

As Vaux notes, such discounting may also be a function of the disciplinary biases characteristic of some fields of inquiry; for example, resource economics is often criticized in this regard. Economists have traditionally paid little attention to equity issues (defined by Vaux as a preoccupation with distributional allocation) because: (1) economists lack a formal tradition of normative theory (in contrast to, say, political science, which has a foundation in philosophy), and (2) they are preoccupied with efficiency. In this context, Professor Holly Doremus commented that "for equity to gain any ground in the field of economics it will need to be considered beyond the constraint of wealth distribution."²³ A sensitivity displayed by all the participants in this symposium is the recognition that those engaged in the academic study of environmental and natural resource issues must be more vigilant and self-aware towards implicit, as well as explicit, biases in their disciplines that may influence the way they regard the importance of equity.

III. FUTURE LINES OF INQUIRY

As noted at the beginning of this essay, equity in land and water issues is most certainly not the exclusive preoccupation of environmental and resource scholars; it is a practical issue that deeply resonates among most environmental activists, some policymakers, and increasingly, many members of the general public. We discuss here some enduring lessons from these articles that pose intellectual and practical challenges for those concerned with equity as both a scholarly issue that uncovers questions inciting the need for further illumination, and as a policy issue that compels action. The preoccupation with equity, as the contributors to this symposium agree, is an important, if elusive, policy aspiration that will demand our ceaseless attention and commitment. Four specific lines of inquiry demand our continued efforts: (1) empathy and equity; (2) reconciliation of ecological and social criteria for equity; (3) scholarly bias and the need for critical examination; and (4) reforming the decision-making process.

23. Holly Doremus, Professor of Law, University of California, Berkeley, Remarks at the University of California, Berkeley, "As If Equity Mattered" Symposium, Session on Wild and Free Roaming Conversationalists (Oct. 2, 2009).

A. Empathy and Equity

As seen in the preceding, “Major Themes,” portion of this essay, scholars and practitioners in environmental and natural resource fields are increasingly attentive to the conditions that underlie empathy with other people—and even other species—as a means of promoting a more inclusive notion of environmental equity. Empathy permits reaching accord, allows divergent interests to envision avenues of compromise that may have been previously unseen, and compels appreciation of the need for redressing inequities. Empathy is also required, as many contributors agree, if people are to appreciate the necessity of treating other species, as well as other cultures, with the consideration they deserve.

A key question remains: Can people empathically bond with those whose stations in life are different from their own in order to reach common accord regarding what is equitable? As several of this symposium’s articles have shown, empathy is difficult enough to find among people of similar social backgrounds—particularly if the stakes involved in a resource conflict are high (see Larson and Lach, Olive and Raymond, Sax, Vaux). How much more difficult is it to achieve empathy between groups with vastly divergent levels of power and influence (see Thomas, Chitewere)? And, how much more challenging is it to develop empathy with other species with whom humans do not have the means to communicate or engage in ethical discourse (see Mrill Ingram)?

Our current knowledge of nature as an interlocking community of organisms, habitats, and genetically determined—yet often environmentally triggered—influences further complicates matters; the lines between what is purely “natural” and purely “social” are frequently blurred, and contemporary research on biotechnology contributes much to this debate. Perhaps what is needed in order to fully embrace equity under the conditions prompted by this new ecological knowledge is a different kind of “precautionary principle.” This principle would be predicated not merely upon minimizing harm or averting pollution, but upon respecting all life forms and reducing our environmental footprint to the bare minimum required for our effective survival and the fulfillment of our needs. Such a principle would also acknowledge the intrinsic “right” of other organisms to exist and, as Mrill Ingram insists, view other organisms as needing our care. More research into the efficacy of such a precautionary principle is needed.

B. Reconciliation of Ecological and Social Criteria for Equity

Can conflicts between ecological and societal criteria for equity be resolved? As noted previously, Thomas demonstrates this conflict in the context of conservation easements and public access, while Mrill Ingram

speaks to the problem of how (and for whom) we choose to recognize moral standing in debates over equity.

An important starting point for further consideration of this issue is to entertain the possibility that what we see as a sharp dichotomy between the one criterion and the other may itself be a fallacy. Aside from the fact that we cannot survive without nature, when we conceive of ourselves as individuals with interests sharply distinguishable from those of nature, we may be heading toward an ethical dead end. The experiences of Native Americans, as well as other aboriginal societies, clearly show that in order to achieve a restoration of cultural equity, we must find the means to restore the ecological and economic foundations that underpin culture (see Huntsinger and Diekmann, Langston, Tarlock, Vaux). What is ecologically equitable and what is socially equitable cannot be radically separated. Similarly, in more contemporary cultures, the preoccupation with sustainability revolves around many of the same presumed inter-connections between nature and society. This preoccupation is seen, for example, in efforts to restore urban watersheds, protect endangered species, provide open space amenities, and promote “artisanal” food industries and other enterprises (see Mrill Ingram, Larson and Lach, Olive and Raymond, Sax, Wessells).

However, even by acknowledging this interdependency, it must be conceded that, as a practical matter (as Thomas and others note), policy conflicts between ecological and social notions of equity will still arise. In part, this is a failure of policy design; the tools developed to protect ecological resources are overly blunt instruments that fail to effectively capture the needs for public access and ecological protection simultaneously. Land trusts, conservation easements, protected landscapes, and parks can serve multiple purposes at the same time *if* those who use them can agree in advance on the best way to balance the various activities they are called upon to support. Further complicating the matter is the fact that land trusts and conservation easements are tied to other social and economic benefits accruing to landowners. Society has not yet developed either the patience or the political will to equally respect parklands as recreational amenities for human enrichment and as repositories of ecological diversity and complexity. In short, the polarizing tendency to view such lands as either natural “lock boxes” or amusement parks must be shunned.

A solution may lie in reconsidering the language employed to describe such equity conflicts. Instead of asserting “our rights” to access, or to reaping the benefits of “our lands,” humans need to entertain the possibility that all species are entitled to the use and benefit of these places. If humans treat other species with respect and equal consideration, people will also come to acknowledge other species’ needs for access to and

protection upon these lands. Other recent work has pointed to the importance of stewardship as a principle of virtuous conduct toward people and nature.²⁴ Such a view is in accord with both rational and spiritualistic notions of fairness and justice.

C. Scholarly Bias and the Need for Critical Examination

Can scholars overcome their own disciplinary biases, which impede a clear understanding of the distributional impacts and inequalities generated by resource policies? A number of resource decisions affecting equity discussed in this symposium address this problem (e.g., endangered species management, energy development, inter-basin water diversion, and toxic waste management). One possible area of inquiry is greater study of the extent to which scholars sell their knowledge too cheaply—or allow their knowledge and skills to enter the policymaking process far too late to affect decision-making.

Perhaps a larger issue relevant for all disciplines is that scholars often make their knowledge and expertise available to decision-makers without sufficient reflection over how decision-makers may use it. In the process, academics may inadvertently support existing power structures or, at the very least, existing policies. Are economists valued for their knowledge or experience, or because they have a ready-made set of “tools”—such as cost-benefit assessment—that can be used by agencies such as the U.S. Army Corps of Engineers and U.S. Bureau of Reclamation to evaluate the efficacy of water projects? Likewise, as discussed in these articles, epidemiological studies and risk assessments—tools developed by scientists—can be calibrated and interpreted so conservatively as to inhibit people from taking seriously the risks from toxic substances and other hazards to exposed minority groups.

D. Reforming the Decision-Making Process

A number of the cases in this symposium suggest that the process of decision-making can be restructured to favor (and have too often been structured to disfavor) equity. Equitable solutions to resource conflicts are possible when protagonists are relatively small in number, spatially proximate, relatively equal in power, and able to engage in some type of direct negotiation. Conversely, situations involving a large number of unequal protagonists who are not in spatial proximity to one another and who are unlikely to share a sense of empathy around a tractable issue are far less able to reach accord.

24. See, e.g., ENVIRONMENTAL VIRTUE ETHICS (Ronald Sandler & Philip Cafaro eds., 2005).

One can envision the means of putting together amicable solutions acceptable to parties in the first set of disputes described above where protagonists are fewer, spatially proximate, and relatively equal in power. In fact, a number of organizations that promote facilitation, negotiation, and conflict resolution in land and water disputes (e.g., the Environmental Law Institute) frequently engage in precisely this type of activity with a record of some success. However, it seems reasonable to ask: can this type of resolution occur in systemic contexts such as in demands to site more parks near urban areas or eliminate environmental hazards in minority communities—or in *any* communities? As researcher Lauren Gwin pointed out in her remarks toward the close of the symposium, it is far easier to negotiate an equitable distribution of environmental “goods” (i.e., objects and amenities that are highly desired by almost everyone) than it is to agree on a formula for distributing and allocating environmental “bads” (i.e., environmental nuisances or hazards that nobody wants “in their backyard”).²⁵

How decision-making can be structured equitably to ensure that all relevant parties have sufficient input is a question that remains to be satisfactorily answered. While a “hard” property right may provide some remedy, it may not provide access sufficient for everyone. Equally challenging is how to restructure previous arrangements in order to rectify injustices already inflicted on certain groups. As we have seen, the legacy of conquest and subjugation propels and perpetuates inequities in two ways: (1) it robs people of empowerment rendering them unable to control their own livelihoods, and (2) it affects future generations through adverse health and environmental impacts that remain unrectified.

This legacy remains one of the greatest decision-making challenges in regards to equity. On one level, it entails reforming the way decisions are made to avert a similar situation from arising in the future. On another, it involves compensating persons for injuries sustained, but doing so without generating additional animosities that future generations of decision-makers will be called upon to reform.

IV. CONCLUSION

The articles in this symposium issue share an abiding concern for the importance of environmental equity as both an unfinished aspiration and as a newly emerging preoccupation. Environmental equity remains

25. Lauren Gwin, Research Associate in Agricultural Extension, Oregon State University, Remarks at the University of California, Berkeley, “As If Equity Mattered” Symposium, Panel on Land and Fairness (Oct. 1, 2009).

an unfinished, and perhaps unachievable, aspiration, as much remains to be done to rectify the conditions experienced by past victims of environmental injustices, including native or aboriginal populations. Moreover, environmental equity remains an unfinished aspiration because many contemporary environmental disputes are, at their core, conflicts between disenfranchised or disempowered groups on the one hand (e.g., women or racial and ethnic minorities), and powerful, entrenched interests on the other. The object of these conflicts is often access—or lack thereof—to resources or environmental amenities as varied as public lands, water resources, clean air, parks, recreational lands, and even conservation easements intended to protect one set of environmental objectives (e.g., threatened or endangered species) but which may ignore other objectives (e.g., access by urban residents to amenities). All of these themes reverberate across the articles in this symposium issue.

A somewhat surprising theme that rises from this symposium is that, in some respects, environmental equity is considered a newly emerging preoccupation, as some of the articles suggest. Many natural and social scientists, as well as environmental activists who have long been concerned with the welfare and well-being of other species and resources, are beginning to recognize that the *language* associated with environmental equity (i.e., fairness, justice, empathy, and empowerment) might also serve as a useful tool for better conceptualizing how humans relate to and treat other species that have intrinsic value within the larger web of life.

In conclusion, both of these characteristics of environmental equity—as a perennial aspiration and a recent preoccupation—share a common concern with the rightness, appropriateness, virtue, and efficacy of how laws, institutions, and markets legitimize the distribution, allocation, use, management, and protection of natural resources and the people who rely on them. So long as these issues remain sources of controversy in environmental policymaking—and it is a safe bet that they will remain so for some time to come—environmental equity is certain to remain a robust topic that will inspire further analysis, reflection, and motivation for action.