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STRATEGIES FOR ZERO SUM CHALLENGES

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Strategies for Zero Sum Challenges

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Abstract:

People love to talk about the glossy world of “Win-Win Scenarios.” Battling climate change will also grow the renewables sector and create thousands of green jobs. Catch shares programs will increase the fishing community’s incomes and also conserve fisheries. There surely are plenty of examples of win-win scenarios in the environmental field, but it’s wishful thinking to assume that many, much less most, environmental conflicts can be solved with all parties better off. It is often the case that one or more parties feel trapped in a zero-sum game. This short essay, part of the Environmental Law Collaborative’s project on Zero-Sum Environmentalism, sets out the three basic strategies that environmental law has developed to manage zero-sum challenges.

Politicians love to talk about the glossy world of “Win-Win Scenarios.” Battling climate change will also grow the renewables sector and create thousands of green jobs. Catch shares programs will increase the fishing community’s incomes and also conserve fisheries. Energy conservation saves fuel bills and drives efficiency improvements. Famed Harvard Business School professor, Michael Porter, has even hypothesized that countries with stricter environmental regulations are more competitive in the global marketplace.²

To be sure, there are plenty of examples of win-win scenarios in the environmental field, but it’s wishful thinking to assume that many, much less most, environmental conflicts can be solved with all parties better off. It is often the case that one or more parties feel trapped in a zero-sum game. Farmers in the Klamath Valley see their irrigation water allocation reduced because the endangered salmon need more. Fish win. Farmers lose. In the 1990s spotted owl saga in the Pacific Northwest, logging companies lost access to old growth redwood stands that were deemed to be critical habitat for the endangered owl. Owls win. Loggers lose. One could easily provide similar examples in the pollution context.

Most environmental policies have winners and losers. One might argue that these policies benefit society overall, but it sure doesn’t feel like a benefit to the local resource-dependent communities. These are decisions with diffuse winners and locally concentrated losers. To them, they are trapped in a zero-sum conflict where they need to stand their ground against opposing interests who would have them reduce their emissions, water usage, or timber harvest. “Either I win and continue the status quo, or they win and I have to pay, or perhaps even go out of business.”

¹ Donald Bren Distinguished Professor of Environmental Law, UCLA Law School and UCSB School of Environmental Science and Management.

² Michael Porter and Claus van der Linde, *Towards a New Conception of the Environment-Competitiveness Relationship*, 9 J. OF ECONOMIC PERSPECTIVES 117 (1995).

Given the ubiquity of such zero-sum framing, it shouldn't be surprising that environmental law has developed a range of strategies to address them. They fall under three basic categories: screw them, grow the pie, or regulatory steam valves.

- The first category, **Screw Them**, recognizes the zero-sum game for what it is and lets the consequences flow. Put another way, there are some activities or actors that should lose out. This is a normative position, of course, that favors certain results over others. Companies that discharge dangerous toxics into a local stream should be forced to stop, even if it does hurt their bottom line. In the zero-sum conflict of continuing polluting versus safe waters, safe waters should win. This may seem a satisfying strategy, but keep in mind that the measure of "unacceptable" behaviors varies according to the observer. Conservation interests may well view overgrazing on public lands as a travesty that has gone on for far too long. Ranching interests take the opposite view. Which will win out in a zero-sum conflict of grazing versus range conservation? That depends on which administration is running BLM. A strategy that assumes the losers in zero-sum conflicts deserve to lose looks great if your team is in power. It can seem punitive or worse if you are on the losing side. No wonder, then, that this strategy leads to protracted litigation, overblown rhetoric, and, in the extreme, armed standoffs such as the one that occurred at the Malheur Wildlife Refuge.
- A second category seeks to **Grow the Pie**. What looks like a zero-sum game with only eight slices of pie to go around morphs into a win-win scenario if suddenly the pie is enlarged with four more pieces to go around because the government pays off the losers. We generally see this approach where the potentially losing party is politically powerful. As J.B. Ruhl has documented, agricultural interests are more often paid to protect the environment than required to do so. Some fisheries facing restrictions have benefited from vessel buyback programs. The farmers and fishers may be losing, in the sense their actions are restricted, but at least they are being paid for the sacrifice. Similarly, the 1990 Clean Air Act Amendments explicitly sought to compensate coal mining communities for the expected losses in jobs digging high-sulfur Appalachian coal. Growing the pie can be a popular strategy for the parties involved, but not so attractive to taxpayers and those concerned over budget deficits. If regulation proves politically infeasible, however, then growing the pie may be palatable. Even here, though, the parties may not all be happy. Penn Central was certainly not content to receive Tradable Development Rights for Grand Central Station in place of its lost air rights, nor do some environmental groups approve of paying farmers not to pollute.
- The third category presents the **Regulatory Flexibility** of growing the pie. Here, the losers are paid off through regulatory paths rather than through dollars. This is evident in the Clean Water Act's 404 permit program for wetlands. On its face, the program seems to prohibit dredging and filling wetlands under a wide range of circumstances. In practice, wetlands mitigation banking acts as a political steam valve, allowing much development to proceed by compensating with constructed wetlands somewhere else. We see a similar dynamic with habitat conservation plans. Developers who would have perceived the lack of a permit as a zero-sum dynamic—local economic growth versus a wetland or endangered fly—instead see, if not a win-win dynamic, at least a situation

where the costs of doing business are acceptable and the project goes forward. Similar to growing the pie, regulatory steam valves tend to be put in place when the losers are politically powerful and regulating them runs either legal or political risks.

None of these strategies is necessarily better than the other. The relative merits of Screw Them, Grow the Pie, and Regulatory Flexibility will vary depending on the politics of the actors, the nature of the harm, and the public funds available. The key point is that zero-sum games need to pay special attention to the losers, whether they warrant compensation and, if so, what type of benefit is most appropriate.