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**Incentives,  
Community  
and the  
Future  
of  
Lake  
Tahoe**

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## **Part 1. The zero-sum approach at Tahoe: Is it on its last legs?**

**A**s the latest version of the Tahoe Regional Planning Compact is submitted to the U.S. Congress for ratification, is it already obsolete?

There's little doubt that few, if any, of those who put this deal together are eager to begin cobbling together yet another effort to bring relative harmony to the Tahoe Basin.

Yet there's a solid argument that the Basin's current model of governance, even as it is being tweaked, remains, to a significant degree, an anachronism.

Indeed, evidence of this may include the very difficulty that's always characterized efforts to reconcile environmental and economic proponents in the Basin.

Consider that, ever since the 1960s, whenever issues of environmental degradation in the Basin have become prominent, the reflexive response of conventional wisdom has been to turn to government and ask it to impose a remedy.

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This has been the pattern since the earliest days — and versions — of the bi-state compact, and it has persisted almost until the present.

However, this approach has always, necessarily, had at least one built-in drawback: Because government is — essentially and as a last resort — the legally authorized use of force, state (and bi-state) “solutions” are always, ultimately, coercive. And because American government is predominately small-D democratic, its solutions nearly always impose the will of the politically stronger faction. This generally holds regardless of the venue where the con-

test takes place — legislative, bureaucratic or judicial.

This means, especially in a more-or-less polarized community such as Tahoe, that government decisions tend to take a zero-sum form: I win. You lose. Go pound sand.

Needless to say, such “resolutions” of community-wide controversies — especially where strong feelings and vital interests are involved — are less than optimal and can easily yield a sort of grudging, passive-aggressive compliance that handicaps even the nominal victors.

That has largely been the story in the Tahoe Basin for most of the Compact’s existence. A recent piece of evidence is *Nevada Journal’s* September 2013 poll of Basin homeowners. The survey showed that large majorities of those polled view the planning regulator that the states of California and Nevada imposed over the Basin, the Tahoe Regional Planning Agency, in quite negative terms and significantly more negatively than any other local government in the region.

Another piece of evidence is the progres-

sive eutrophication of Tahoe waters that continued for decades after TRPA was imposed on the Basin — even though the whole reason for TRPA had been to stop that very eutrophication.

Over two decades, until 1987, development had been made effectively illegal. Then, even when that moratorium was nominally lifted, planners remained largely intent on preventing private landowners from developing their properties. Little wonder, then, that few owners of old properties where run-off was contributing to eutrophication were eager to jump through even more TRPA hoops, in order to make major improvements to those same properties.

Only recently, on the raucous road to the December 2012 regional plan, did the inadequacy of the zero-sum approach appear to really register with significant elements of the larger Lake Tahoe community. The big environmentalist organizations finally split, publicly, over the issue of whether human beings have any place at all in the natural environment.

While the Sierra Club dug in its heels, to

later bring suit and seek one more zero-sum victory in the courts, the League to Save Lake Tahoe and the Nevada Conservation League sided with the larger Tahoe community, the human beings who seek to live in the Basin, and helped to craft, and then endorsed, the new regional plan.

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Opinions differ whether this relative amity is real or, if real, will last. But in its favor is the fact that it is entirely consonant with a larger realization that has been taking place world-wide.

And it is that realization that now raises the question: Is Tahoe's current model of governance dated not only chronologically, but also functionally?

### **TRPA: A product of its time**

To address that question, let's step back a bit and look at the context in which the Compact had its beginnings.

It was 1968, and the states of California and Nevada were in the final stage of negotiations

creating the Tahoe Regional Planning Agency.

At the same time, in *Science* magazine, Garrett Hardin, a Santa Barbara biology professor, was introducing into America's vocabulary a new and potent framing metaphor for all things environmental.

It was embedded in the title of his article, "The Tragedy of the Commons":

As a rational being [wrote Hardin], each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility to me of adding one more animal to my herd?" This utility has one negative and one positive component.

1) The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1.

2) The negative component is a function of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision-making



herdsman is only a fraction of -1.

Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another... But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit — in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

The primary anxiety driving Hardin to write the article had not been the environment, however, but been the dire need, as he saw it, for population controls. “Freedom to Breed is Intolerable,” said one of his section headings.

Hardin’s *Science* article had an immense impact, but what resonated with the public was not its advocacy for population controls. It was that haunting phrase in the title.

What Hardin had done was take Alfred North Whitehead's insight into the unique Greek sense of the word "tragedy" as the remorseless course of Fate,<sup>1</sup> and welded it onto a fact humans had known for thousands of years. In Aristotle's words: "That which is common to the greatest number has the least care bestowed upon it."<sup>2</sup>

At a critical time — when America was going through "a sea-change in how we looked at the value of natural resources," in the words of UNR Professor Derek Kauneckis — Hardin had injected a new and powerful catalyst into the public's understanding of environmental issues.

What before had been merely a dry economic fact now could carry emotion, drama and the prestige and mana of science — a highly potent mix, at a uniquely propitious moment.

Brigham Daniels detailed some of the phrase's remarkable resonance in an August 2008 Environmental Law Review article:

Scholars have applied Hardin's insight in a dizzying number of contexts to explain real-

world problems, including air pollution, water use, water pollution, fisheries, parkland and wildlife conservation, logging and other uses of forest products, grazing, and gas and oil extraction. The tragedy of the commons is increasingly used to explain diverse non-environmental problems as well, including the ability of developing countries to raise and collect taxes, the prevalence of telemarketing, administration of the criminal justice system, the provision of health care, and United States drug policy, among others. Certainly the broad application of the theory not only grows out of Hardin's piercing insight but also out of the realization that commons are almost everywhere we look. The power of the fable explains why more than one hundred anthologies in diverse disciplines have excerpted Hardin's article. Its vast application has made it a cornerstone of environmental scholarship.<sup>3</sup>

Nevertheless, for all the light Hardin's framing metaphor could bring, it also — as would become evident as environmental scholarship increased — brought darkness.

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It did so by radically simplifying the apparent alternatives. And with that done, imposing all kinds of new controls on humans appeared to be an obvious no-brainer. Indeed, the line of argument Hardin had advanced in his article had been quite explicit: Individual rights must be overridden — “redefined” — and new forms of governmental coercion introduced to make human beings more “temperate” in their behaviors.

In the Tahoe Basin, of all localities, Hardin’s phrase would perhaps have its greatest impact.

Both the bi-state Tahoe Compact and the Tahoe Regional Planning Agency were formed

and then reformed in the widening wake of Hardin's Tragedy of the Commons article. Given the enveloping frame of reference, much of their government-centric, command-and-control character is understandable.

Moreover, the simplistic analysis of the phenomenon of commons implicit in Hardin's metaphor remained dominant up through the 1980s — including the period when Tahoe's 1987 Regional Plan was being crafted and imposed.

But the conventional wisdom regarding management of a natural commons like the Tahoe Basin was soon to suffer a grievous and permanent defeat.

## **Part 2: The discrediting of Hardin's framing metaphor**

The conventional wisdom on managing natural commons like the Tahoe Basin did not run into any serious theoretical and empirical critique until 1990.

Then came the publication of Dr. Elinor Ostrom's book, *Governing the Commons: The*

*Evolution of Institutions for Collective Action.*

The book would eventually make Ostrom, in 2009, the first woman in history to win the Nobel Prize for economics.

More importantly, however, the book — through a unique body of empirical data collected from around the world, plus clear and incisive analysis — demolished the conventional wisdom. It did so by demonstrating that the dismal assumptions built into Garrett Hardin’s “Tragedy of the Commons” metaphor were not only simplistic but significantly misleading.

Ostrom herself, throughout her career, tended to avoid the word “commons” itself — choosing instead the more neutral language of “common-pool resources” or “CPRs.” She was disinclined to risk the associations that the word “commons,” post-Hardin, often elicits.

In *Governing*, those associations were her frequent target:

Much that has been written about common-pool resources, however, has uncritically accepted the earlier models and the presumption

of a remorseless tragedy...

By referring to natural settings as “tragedies of the commons,” “collective-action problems,” “prisoner’s dilemmas,” “open-access resources,” or even “common-property resources,” the observer frequently wishes to invoke an image of helpless individuals caught in an inexorable process of destroying their own resources....

The similarity between the many individuals jointly using a resource in a natural setting and the many individuals jointly producing a suboptimal result in the model has been used to convey a sense that further similarities are present...

Public officials sometimes do no more than evoke grim images by briefly alluding to the popularized versions of the models, presuming, as self-evident, that the same processes occur in all natural settings....

In the wake of Hardin’s seductive metaphor, Ostrom noted, many eager to assume a terminal ecological crisis facing mankind had rushed to uncritically agree with him. One was Wil-

liam Ophuls, who wrote, “because of the tragedy of the commons, environmental problems cannot be solved through cooperation... and the rationale for government with major coercive powers is overwhelming.”

Another — for a while — was Robert Heilbroner, author of the second-best selling economics text of all time, *The Worldly Philosophers*. In 1974 he argued that “iron governments,” perhaps military governments, would be necessary to achieve control over ecological problems.

Both Ophuls and Heilbroner were marching in lockstep with Hardin, who had continued pushing for increased coercion, writing in 1978 that, “if ruin is to be avoided in a crowded world, people must be responsive to a coercive force outside their individual psyches, a ‘Leviathan,’ to use Hobbes’s term.”<sup>4</sup>

Ostrom’s book, however, had the advantage of fine-grained institutional detail from case studies around the world — much of it revealing how people facing common-resource challenges regularly craft unique, local solutions



that work quite well, that theory-bound academics never could imagine, and that dispense with any need for a “Leviathan.”

“At the core of Ostrom’s work,” wrote Mark Pennington in *The Future of the Commons*, “is the insight that many, though not all, of the free-rider and collective-good problems that are usually presented as requiring external regulation may be better addressed by relying on the ingenuity of those most affected by them to devise an appropriate set of rules.”

Ostrom recognized that certain common-pool resource problems may require some form of external, government regulation. Her research, however, led her to generally consider such external, centrally imposed regulation as only a last resort.

“The implicit assumption of [policy analysts who recommend installing Leviathans atop CPRs],” she wrote, “is that the central agency monitors all actions ... costlessly and imposes sanctions correctly.”

Ostrom outlined a number of reasons for a presumption against central planning. One

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is the high cost of mitigating initial regulator ignorance regarding both the assets to be managed and the incentives facing resource users. There is also what Friedrich Hayek referred to as knowledge of the “circumstances of time and place.” Because this kind of knowledge is often tacit and local, and not easily codified in regulatory statutes, the experience — known worldwide — of bureaucratic ham-handedness frequently follows.

Another problem, she notes, is that bureaucrats in central agencies by and large lack a sufficient personal stake in the issues or the community to manage assets effectively. For them, actual improvement at the local level is rarely tied to their professional status and remunera-

tion. Their more natural course, therefore, is to become preoccupied with budgets and the demands of the interest groups that pressure and lobby them, seeking an advantageous redistribution of property rights.

Moreover, the fact is that regulation from central-government agencies, by its very nature, undermines success. It does so by undermining the incentive for resource users themselves to devise an appropriate and more satisfactory set of rules. When government takes over responsibility for managing an asset, individuals and groups that do not already have their own institutions in place will simply wait for the government to handle their problems for them. As Ostrom put it, "If someone else agrees to pay the costs of supplying new institutions then it is difficult to avoid the temptation to free-ride."

A related — and perhaps the most important — problem with central planning, she notes, is that it removes the opportunity for people to learn how to address common-pool resource problems more effectively. After all,

Ostrom points out, the best way to structure an institutional approach for managing a particular natural resource is not known in advance automatically. On the contrary, the kinds of rules, institutions and technologies that can be combined in order for a community to “internalize” the economic externalities that make governance of a common-pool resource challenging can only be discovered and improved through a dynamic, evolutionary process of trial-and-error learning.

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Peter G. Stillman, a professor of political science at Vassar, observes that advocates of authoritarian control have long rigged their analysis — criticizing “market failures” while ignoring the much wider universe of governmental failures — and covertly assumed that *their* authoritarian will be exempt from human frailties.

Those who see “a strong central government or a strong ruler” as a solution, noted Stillman, implicitly assume that “the ruler will be a wise and ecologically aware altruist” — even though

those same theorists presume that the users of CPRs will be myopic, self-interested, and ecologically unaware hedonists:

They conveniently overlook that their authoritarian ruler, if he is (like everyone in the society) “a rational, self-interested individual,” will not act to solve ecological problems. He will not do so because he will perceive (or quickly learn) that ecologically-sound policies (like limiting the cows on the commons) go against the rational self-interest of each individual; and thus for the ruler to impose ecological solutions would be for him to act contrary to his own rational self-interest by increasing popular discontent, undermining consent, and reducing popular obligation.

Ostrom, more generally, criticized analysts “who find an empirical situation with a structure presumed to be a commons dilemma,” and then “call for the imposition of a solution by an external actor,” saying “the ‘only way’ to solve a commons dilemma is by doing X.”

Sometimes the “X,” she noted, is to install a centralized authority empowered to make

unitary decisions for everyone involved with a particular resource. At other times the “X” is for a central authority to “parcel out ownership rights to the resource and then allow individuals to pursue their own self-interests within a set of well-defined property rights.”

Though the advocates in these cases take polar-opposite positions as to what the central authority should do, they “accept as a central tenet that institutional change must come from outside and be imposed on the individuals affected,” Ostrom notes.

However, what her research had found was that presuming that individuals who face an apparent commons dilemma are actually trapped is a mistake.

Thus, said Ostrom, “I do not argue for either of these [imposed-solution] positions. Rather, I argue that both are too sweeping in their claims.

- Instead of there being a single solution to a single problem, I argue that many solutions exist to cope with many different problems.

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*Elinor Ostrom's body of work sheds significant light on the difficulties that have accompanied the bi-state Compact and [TRPA] from the beginning.*

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- Instead of presuming that optimal institutional solutions can be designed easily and imposed at low cost by external authorities, I argue that 'getting the institutions right' is a difficult, time-consuming, conflict-invoking process.
- It is a process that requires reliable information about time and place variables as well as a broad repertoire of culturally acceptable rules.
- New institutional arrangements do not work in the field as they do in abstract models unless the models are well specified and empirically valid and the participants in a field setting understand how to make the new rules work.

## Ostrom's importance for Tahoe governance

Elinor Ostrom's body of work sheds significant light on the difficulties that have accompanied the bi-state Compact and the Tahoe Regional Planning Agency from the beginning. Fundamentally, both were largely erected upon the presumption that a remorseless tragedy was looming and some kind of Hobbesian Leviathan had to be installed to impose unitary solutions.

However, what that overlooked was an important, historically demonstrated human reality — that when nature presents people with a genuine need to protect a common resource, the individuals of a community can accomplish that goal optimally by coming up with, and enforcing, rules fair to all.

Ostrom wrote that it was when she recognized that some “individuals have broken out of the trap inherent in the commons dilemma, whereas others continue remorsefully trapped into destroying their own resources,” that she was led to ask, “What differences exist between those who have broken the shackles of a com-



mons dilemma and those who have not?”

In groups where the “shackles” have not been broken, Ostrom identified factors both internal and external. Among those internal were:

The participants may simply have no capacity to communicate with one another, no way to develop trust, and no sense that they must share a common future. Alternatively, powerful individuals who stand to gain from the current situation, while others lose, may block efforts by the less powerful to change the rules of the game. Such groups may need some form of external assistance to break out of the perverse logic of their situation.

Other factors, noted Ostrom, were external:

Some participants do not have the autonomy to change their own institutional structures and are prevented from making constructive changes by external authorities who are indifferent to the perversities of the commons dilemma, or may even stand to gain from it.

Some groups suffer from perverse incentive

systems that are themselves the result of policies pursued by central authorities.

For intelligent, community-oriented Tahoe residents who want a superior governance solution for the Basin, Ostrom's work identifies the path to daylight.

### **Part 3: Commons as rigid institutions**

Part 1 of this analysis cites Brigham Daniels' account of the powerful impact of Hardin's Tragedy of the Commons metaphor. Daniels' law-review article, however, was not celebrating that frame of reference.

The focus of the article, rather, was to highlight a logically necessary but largely ignored consequence of many plans established to protect commons — namely, that such plans introduce an element of rigidity in order to preserve or re-establish a particular, “certified,” status quo or status quo ante. These “certified” values have virtual walls erected around them, while other values that people may later come to prefer are institutionally negated.

“In many cases, far more than is generally

recognized,” writes Daniels, “the way we value the commons changes. When values change, stable institutions that once made perfect sense become rigid institutions that block change.” Focused entirely on solving the “tragedy of the commons,” they “often cause a tragedy of another sort.”

Thus the title of his article: “Emerging Commons & Tragic Institutions.”

Daniels notes that when stable institutions to manage and protect a commons are successfully installed, four sorts of barriers to emerging values are also instituted. At least three of the four are, or have been, visible under TRPA:

First, commons institutions are *intentionally myopic*. The herdsmen looked at a field and saw a pasture; salmon fishers see rivers and oceans in terms of salmon habitat; jurisdictions attempting to limit greenhouse gases look at forests as greenhouse gas sinks; wilderness advocates see remote places as areas “where the earth and its community of life are untrammelled by man.” *Our tendency to focus on one use of a commons at a time sets institutions on*

*a path-dependent course at the outset.*

Second, commons institutions are specifically built to resist change. They are inertial by design, not by accident. If commons users are going to give up specific liberties or other benefits (such as grazing as many cows as they want), they equally want assurances that the deal will stick over time. Also, *stability breeds resistance to change by enhancing a shared worldview that favors and perpetuates the values the institution serves.* In a dynamic world, stability is not only a virtue but also a vice. When we change the way we value the commons, stability transforms into rigidity.

Third, those with a stake in the status quo tend to “invest and cooperate to maintain, and ideally expand, their grip on the commons. This public choice problem amplifies the costs of institutional change. Examples are abundant: the American Petroleum Association, the National Association of Broadcasters, Trout Unlimited, and the Wilderness Society all work to assure that commons institutions work to the advantage of particular commons users. Fur-

thermore, incumbent users often form symbiotic relationships with political power brokers: interest groups provide political constituencies and governments deliver political rewards. Rent-seeking, agency capture, and symbolic politics naturally follow, and *disenfranchised stakeholders are often marginalized*. (Emphasis added.) [On this point, see the survey of property-owner attitudes, below.]

Finally, sometimes a use of a commons physically alters the commons, making other uses more difficult.

A Tahoe case in point, regarding the last, is the June 2007 Angora Fire that destroyed 254 Tahoe homes. In the ensuing investigation, the California-Nevada Tahoe Basin Fire Commission officially found that:

[Tahoe Regional Planning Agency] ordinances and standards have ... generally not been adopted with a view towards the mitigation of catastrophic fire hazards. As a result, a number of requirements and standards have been imposed by the TRPA within the Tahoe Basin for the purpose of achieving Environmental

Threshold Carrying Capacities, but *without sufficient, if any, consideration given to mitigation of hazards that may contribute to catastrophic fires.*

Another finding of the commission was more specific:

Tahoe Basin regulatory agencies state that the construction of temporary access roads is technically allowable under current codes and regulations. *In reality a functional prohibition exists regarding temporary access roads and the use of mechanized equipment as currently managed by the regulatory agencies.* It is simply impossible to address the magnitude of the forest health and fuels problems with hand crews and pile burning. Pile burning has associated impacts to air quality and with a limited number of burn days numerous piles are waiting to be burned adding further to the potential for catastrophic wildfire. (Emphasis added.)

## **Tahoe's engines of distrust**

Daniels observes that, when institutions

are formed to provide effective governance to commons, those institutions also tend to “lock in benefits for select commons users.”

Many Tahoe property owners and residents would insist this has long been characteristic of TRPA. Interviews regularly reveal a widespread perception, true or not, that the agency mission of halting development at the lake, pursued for decades, essentially was in service to the wishes of “old money” from San Francisco.

According to this view, the San Francisco wealthy who built the first vacation homes around the lake long ago have long sought to return the Basin, insofar as possible, to the days when it was, effectively, their own private preserve.

In this vision, the Old Money’s shock troops are militant, lawsuit-eager environmentalist organizations and the California politicians and attorneys general whose campaigns they fund. For members of this elite, therefore, “Keeping Tahoe Blue” constitutes a twofer — a way to at once demonstrate their environmental bona

fides, as they attend Oscar de la Renta fashion-fundraisers at the lake, while simultaneously hobbling Basin development, tourism, jobs and would-be residents.

Whether or not such an account of the intentions of certain San Franciscans can ever be documented, the account itself reveals a significant lack of trust within important property-owning elements of the Basin community.

Moreover, one undeniable fact — staring Basin property owners in the face every day — has lent emotional credence to this notion of Tahoe being governed by a distant, aloof and self-anointed San Francisco elite.

It is the simple reality that the bi-state Tahoe Compact fundamentally abrogated, within the five counties adjoining the lake, the basic American pattern of local democratic sovereignty.

Naturally, the Compact had not been sold to the public on such politically inflammatory terms. Nevertheless, where local land-use decisions in those five counties had previously been made by local boards elected by



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local people, under the Compact — and especially its 1987 iteration — those land-use policies and decisions became instead the fiefdom of 15 appointed TRPA board members, only six of whom came from a local government. It is a situation unique in the United States.

The rationale for removing those decisions from local government, of course, was the widespread belief — soon reflected by politicians in California, Nevada and Washington, D.C. — that the county governments around the lake in that era had failed — that they had proven themselves too subservient to developers and

other Basin property owners. Whether or not that was, indeed, the real nub of the problem is another story.

What is clear, however, is that engines of distrust have long operated within the Basin upon both sides. And that such distrust, therefore, constitutes a significant obstacle to the emergence of superior Basin governance.

### **Consequences for Basin homeowners ... and the lake**

Even today, the imposition of TRPA upon the Tahoe Basin counties and the manner in which it was done continues to scar the Basin community. Homeowners still have a strong sense that the bi-state compact effectively turned them into thralls of unheeding regional overlords. This is clearly evident in a survey conducted last September by the Nevada Policy Research Institute's news arm, *Nevada Journal*.

Moreover, because congressional consent to the bi-state compact turned it into federal law, Basin residents find themselves subject to fed-

eral overlords, challenges to whose policies and decisions must ultimately proceed through the federal courts. The money and the time that would involve thus necessarily means that legal defense of most Basin residents' constitutional property rights is effectively not available.

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In this context, it is instructive to examine probably the most significant legal effort to attempt to defend Tahoe property owners' rights, the *Tahoe-Sierra Preservation Council v Tahoe Regional Planning* case. Some 450 Lake Tahoe Basin property owners had joined together and filed suit, asserting that multiple land-use regulations enacted in the 1980s by TRPA constituted takings of their individual properties under the Fifth and Fourteenth Amendments, which require just compensation.

The Council won at the federal district court level, was reversed at the Ninth Circuit in 2000, and then sought judicial review by the U.S. Supreme Court, asking three different questions — each of which, “could have steered

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the litigation before the Court in a direction far more favorable to the petitioners,” according to a “celebration” of the high court’s ruling against the Council, published in 2003 by a Georgetown University law professor, Richard J. Lazarus.<sup>5</sup>

The questions were:

- Is it permissible for the Ninth Circuit Court of Appeals to hold — as a matter of law — that a temporary moratorium can never require constitutional compensation?
- Can a land-use regulatory agency escape its constitutional duty to pay for land taken for

public use by the expedient of enacting a series of rolling, back to back “temporary” moratoria/prohibitions extending over twenty years?

- Can a land-use regulatory agency purport to “protect the environment” at a major regional location ... by compelling a selected group of individual landowners to forego all use of their individual home sites, and thereby compel a de facto donation of their land for public use without compensation?

In his article, Lazarus argues that the various governments fighting the Council essentially won the case, not by any victory on the merits, but through shrewd lawyering. He details — and applauds — the tactical moves by TRPA’s legal counsel at the time, E. Clement Shute, Jr., which enabled the Supremes to sidestep the profound issues put to the court by the Basin property owners’ legal counsel:

The government’s success in Tahoe-Sierra was the product of many important factors, [wrote Lazarus] but one factor was present in Tahoe-Sierra that had been missing in prior regula-

tory takings cases: an effective brief in opposition to the petition. It is no exaggeration that TRPA's opposition [brief] likely changed the outcome of the case.

The government won Tahoe-Sierra because of the narrowness of the legal issue considered by the Court: whether TRPA's 32-month moratorium on development amounted to a per se Lucas taking in a facial challenge. Entirely removed from the judicial equation were factors that could have depicted the petitioner landowners' claims in a more sympathetic and legally defensible light. In their stead was a legal issue that effectively compelled the petitioners to propound a legal theory that had virtually no chance of prevailing before the Court, which is why the petitioners' briefs on the merits repeatedly sought to rewrite the question presented before the Court.

Normally, of course, a question presented before the Court is determined by the petition itself, and, consequently, it is the petitioner's own fault if that question does not present the petitioner's case in the most favorable light

possible. In Tahoe-Sierra, however, the legal issue before the Court was not one of the questions presented by the petition for certiorari. It was instead the question set forth in the Court's own order granting certiorari: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?" The source of that narrow question was TRPA's brief in opposition, which naturally posed the question in the light most favorable to TRPA.

E. Clement Shute, Jr., of course, is today a TRPA board member, appointed by California Gov. Jerry Brown.

### **A zero-sum 'solution' fails**

This episode related by Lazarus illustrates the Daniels thesis that commons institutions can easily become "tragic" — in this case, for Basin property owners and, arguably, their property and constitutional rights.

Yet this zero-sum victory of the self-pro-

claimed champions of Lake Tahoe clarity also turned out — via TRPA’s rigorous enforcement of the 1987 Regional Plan’s barriers to development — to be tragic for the continuing eutrophication of the lake.

As *Nevada Journal* reported in July 2013, “the bi-state regimen of control imposed on the basin for over four decades left in place for most of that time the most concentrated sources of the lake’s clarity problem.” Indeed, the TRPA regimen established negative incentives for owners of aging properties should they undertake new projects that would have benefitted lake clarity by ending fine-sediment runoff into the lake.

The *Nevada Journal* report noted that, as early as at least 1977, this very result of the new restrictions on property owners at the lake had already been seen and predicted.

“So now we have regional government (appointed, not elected) instead of regional planning,” complained the authors of a South Lake Tahoe flyer. “What has it done for us? *Prevented rebuilding of older blighted areas*



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*that downgrade our community* either because of arbitrary land coverage restrictions or massive down-zoning.” (Emphasis added.)

Later, when the 1987 Regional Plan was imposed on the Basin, property owners who sold their property or attempted a major restoration were likewise required to implement demanding, so-called Best Management Practices (BMPs) by TRPA.

The result was that, for the last quarter-century, property owners grandfathered-in by the 1987 compact faced a set of negative incentives whenever they considered remodel-

ing. Consequently, many of them apparently calculated, “Well, if I tear down my old motel and build something more modern, with better improvements, I’ll lose my rights to the coverage I already have — my parking spaces and so on. So I’ll just sit tight.”

It must be noted that TRPA, in its December 2012 regional plan, made a more serious attempt to address that issue of incentives. If a property owner does implement certain positive environmental improvements, he or she can receive permits for additional density, additional height, or development-transfer rights.

Although EarthJustice — the Sierra Club’s litigation arm — and Friends of the West Shore are currently still fighting the new regional plan in federal court, most of the Lake Tahoe Basin community appears more committed than ever to crafting a governance solution for the Basin that genuinely recognizes the concerns of all elements of the community.

## Conclusion

“It is crucial to recognize that *common property is shared private property*,” wrote Ostrom and co-author Margaret McKean in 1995. (Emphasis added.)

It is an insight that goes to the heart of the reason why common-pool resource situations are problematic: Distinct from nearly all normal circumstances, these are the rare geographic or physical situations that, by their nature, do not divide easily into individual, manageable parcels, and so do not immediately lend themselves to governance through normal, individually oriented, private-property rules.

\* \* \*

“The ‘tragedy of the commons,’” observes Pennington, “should really be described as the ‘tragedy of open access’” — an open access that must, to protect the shared resource from destruction, be controlled. And he quotes McKean and Ostrom:

Common property regimes are a way of privatizing the rights to something without dividing

it into pieces... Historically, common property regimes have evolved in places where the demand on a [common] resource is too great to tolerate open access, so property rights have to be created...

Thus arises the question of how best to govern the commonly owned, shared resource.

In the Lake Tahoe Basin, the private-property interests of local property owners in the shared resources of the Basin were clearly prior to those of anyone outside the Basin. Nevertheless, the states of California and Nevada and the U.S. Congress effectively dispossessed Basin property owners of that priority in right and awarded it to others.

It may have been unavoidable — the consequence of a particular moment in time, one when most of the primary players in the drama had only a defective conceptual framework to work with and could conceive of no other approach to Basin governance.

Today, that is no longer the case.

Thanks to the work of Elinor Ostrom, her research and the Bloomington school of insti-

tutional analysis, the possibilities for different governance models are today known to be virtually endless.

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## Endnotes

- 1 *Science and the Modern World*, p. 13, Cambridge University Press, 2011.
- 2 *Politics*, Book 2, Part III.
- 3 The excerpted paragraph in Daniels' article includes 15 different footnotes. Number 3 records that a search on the term "tragedy of the commons" within the LexisNexis database for Law Reviews, CLE, Legal Journals & Periodicals Combined on June 28, 2007 produced 1,618 results.
- 4 Hardin, G. (1978). "Political requirements for preserving our common heritage". In Brokaw, H.P. (ed.), *Wildlife and America*. Council on Environmental Quality, Washington, D.C., pp. 310-317.
- 5 Richard J. Lazarus is currently Howard and Katherine Aibel Professor of Law at Harvard Law School.

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