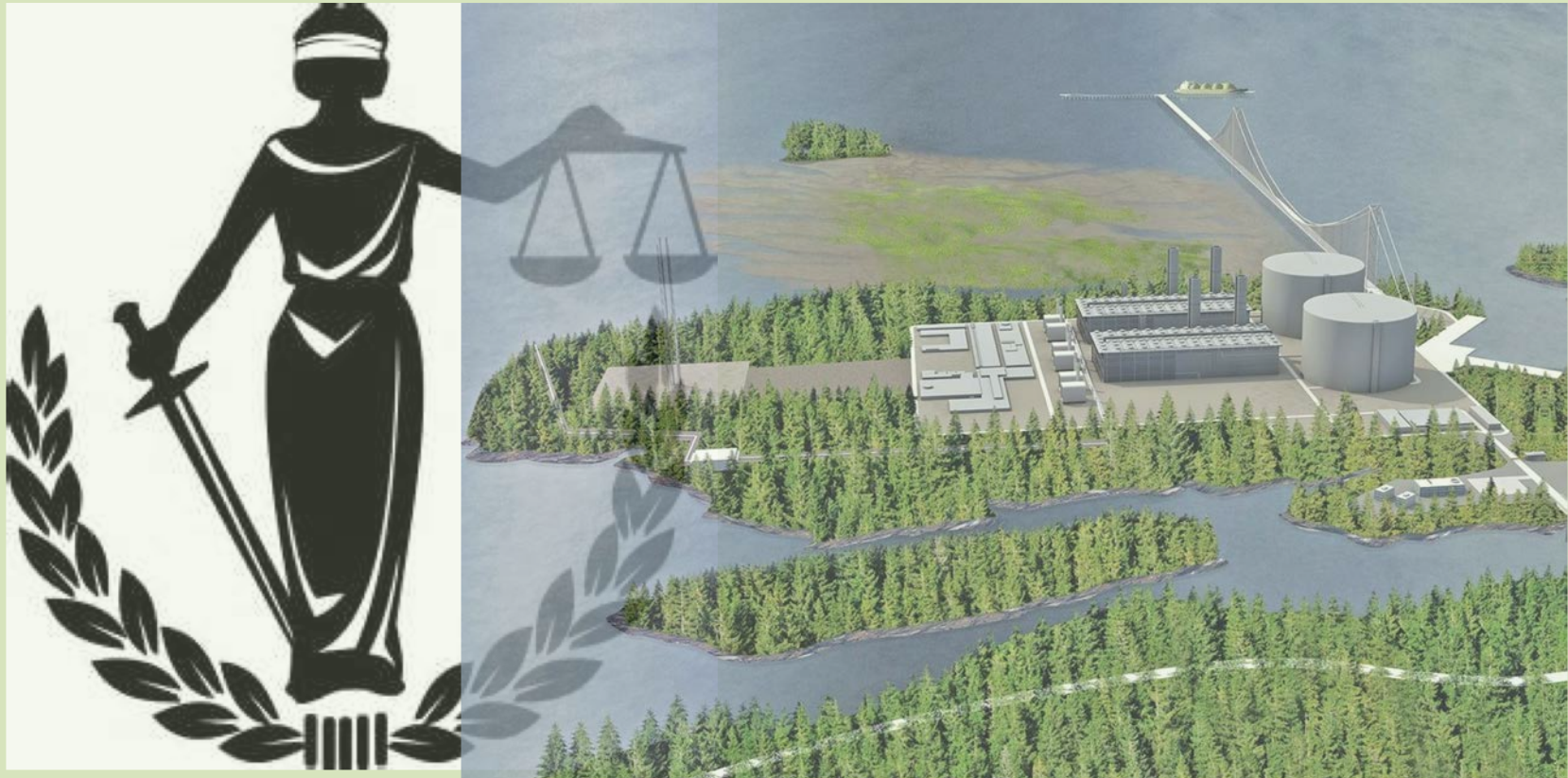


Environmental Law Case Studies

An Introduction and Illustration



2020 EL&G Webinar Series



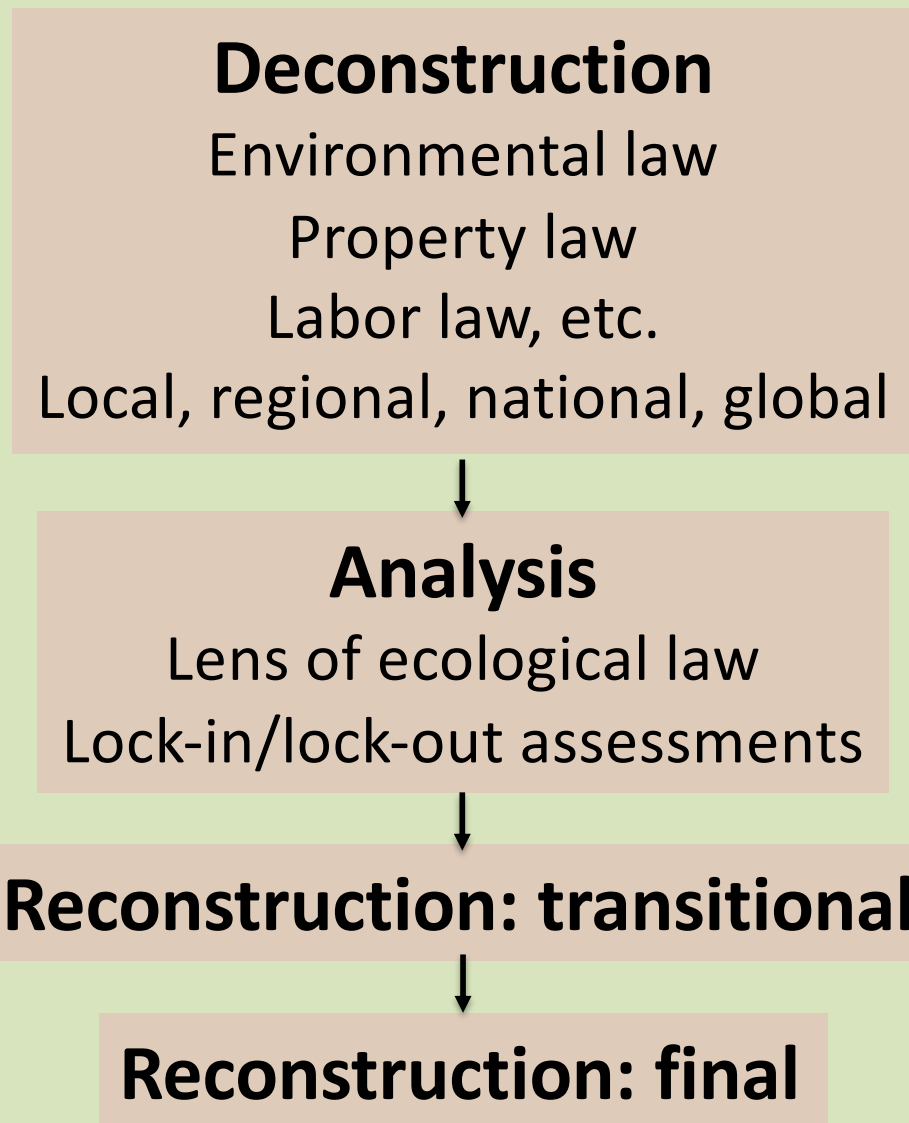
Geoff Garver, PhD
February 18, 2020

Ecological law case studies

What are they?

- Based on real-world situations: project, policy, sectoral feature (e.g. urban infrastructure, transportation infrastructure), etc.
- Deconstruction: Identify all legal and policy features of the situation, both direct and indirect, at all governance levels
- Reconstruction: describe the legal and policy features that would apply in a regime of ecological law, at all levels

Ecological law case studies



Ecological law case studies

Why do them?

- Show concretely how ecological law transforms all law, not just environmental law
- Make clear the deep inadequacy of the status quo and the nature of obstacles to overcome
- Highlight transitional reforms in the direction of ecological law
- Illustrate a clear vision of ecological law on the ground

Ecological law case studies

Who does them, for what audience, and how?

- Individual researchers or teams
- Audience: Academic community, reform-minded activists, policymakers, general public
- Methodology: Flexibility is key
- Coming up later: an illustration!

Relevant features of legal systems

- **Context:** Ecological, social, political, cultural and economic
- **Worldviews and ethics**
- **Forms of law:**
 - Constitutions, statutes, common law, regulations, decrees, policy, treaties, Indigenous legal traditions, etc.
 - legal pluralism
- **Actors, agents, institutions and power structures**
- **Arenas**
 - Rights for humans, “juridical” persons (e.g. corporations) and nonhuman nature
 - Economy, financial and monetary systems, contracts, commerce, trade
 - Property and the commons
 - Energy, food, water, transportation, “natural resources,” land use

Key features of ecological law

- Humans as part of Earth's life systems
- Primacy of ecological boundaries over socio-economic spheres
- Full integration of ecological limits in rules and policy
- Focus on reducing material and energy throughput
- Use of biocapacity and extracted materials based on real need, not on utilitarian desires (market price)
- Global, but distributed according to subsidiarity (diversity)
- Binding and supranational rules
- Fair sharing among present and future generations of life
- Greatly expanded research and monitoring
- Precaution about crossing boundaries
- Adaptive

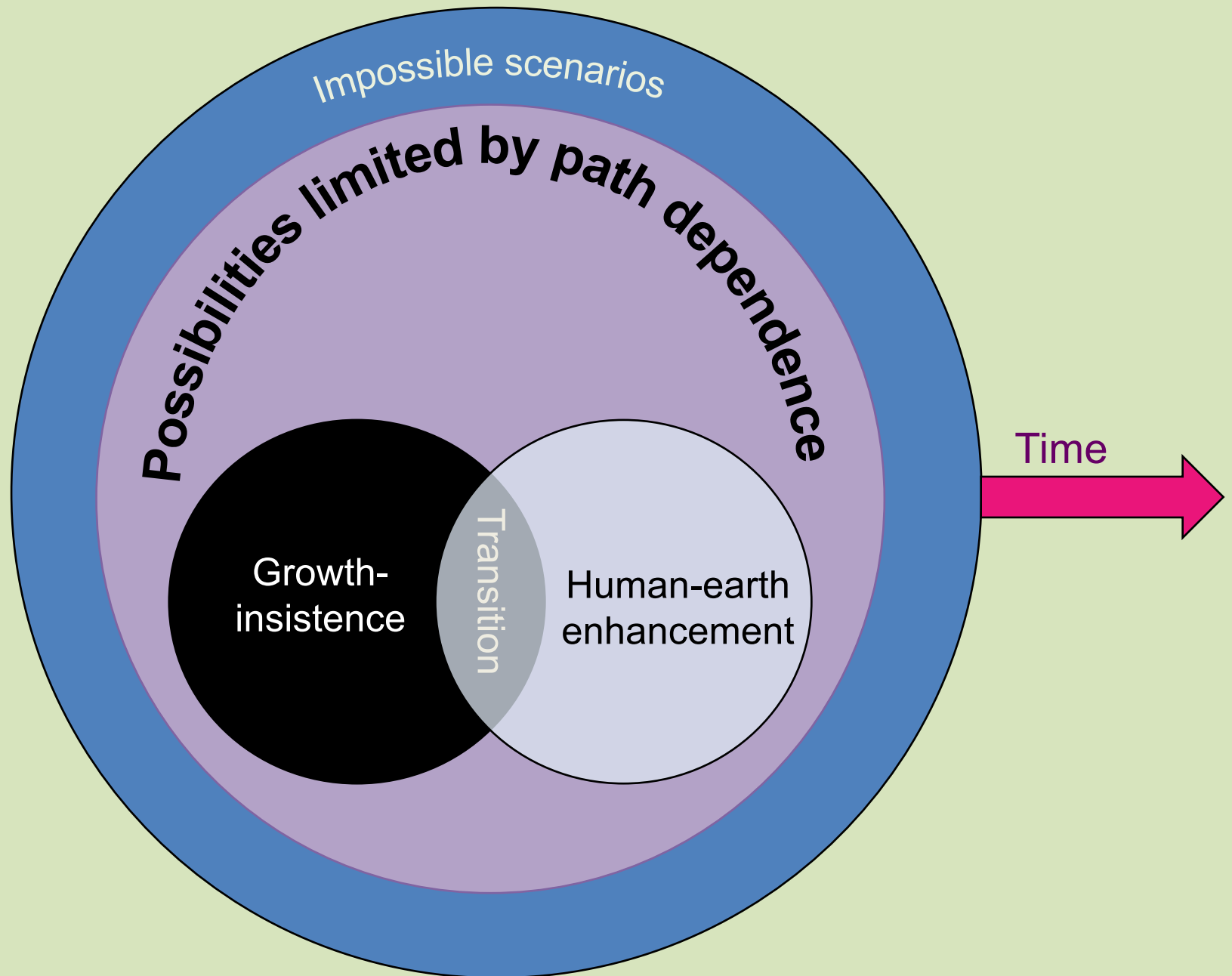
Contemporary vs. Ecological Law

Feature	Contemporary law	Ecological law
Human-nature relationship	Humans separate from and superior to nature	Mutually enhancing human-Earth relationship; humans part of nature
Enforceable enviro/eco limits	Reductionist, end-of-pipe, subordinate to economic growth, property rights, etc.	Holistic, integrated, systems-based; primacy over economic concerns; open to de-growth/steady state econ
Use of materials and energy	Promotes efficiency, core faith in decoupling of throughput from impacts	Promotes sufficiency and drastic reduction in throughput to keep economy within ecological bounds
Scale	Strong commitment to state sovereignty: weak international/global regimes, trade impedes strong domestic regimes	Core commitment to subsidiarity principle: strict global regime for global issues, respect for local regimes per Ostrom's criteria
Fairness	Core belief in fairness of markets, with some need for correction (e.g. polluter pays, externalities); tendency to monetize	Strong limits on market mechanism; bigger role for non-market decision-making; Interhuman, interspecies and intergenerational fairness
Research, monitoring and adaptation	Effects on human health paramount, environmental effects studied but not determinative; weak precautionary approach; few mechanisms to adjust rules based on monitoring	Planetary boundaries and "safe operating space" are key basis of research, monitoring and adaptation; strong precautionary approach

Analytical tools - examples

- Lens of ecological law
- Lock-in/lock-out assessments
- Methods using Planetary Boundaries, Eco-footprint, etc.
- Degrowth, “doughnut” and ecological economics methods
- Community consultations
- Interviews with knowledge holders
- Interdisciplinary approaches
- ??

Brief overview of lock-in/lock-out assessments



Points of intervention in legal systems

(Meadows 1999)

1. **Transcend paradigms:** pluralisms
2. **Paradigm:** ecocentric, anthropocentric
3. **Goals:** economic growth; Mutual human-Earth enhancement
4. **System structure:** World Environment Org.; EU
5. **Rules:** Constitution; federalism
6. **Info flows:** FOIA; mandatory labeling; legal discovery
7. **Dampen positive feedback:** Progressive income tax
8. **Change negative feedback:** Checks & balances in US
9. **Delays:** Length of trial; time to adopt/implement laws
10. **Stock & flow structures:** appeals; common law
11. **Buffers:** Cap-and-trade; sentencing discretion
12. **Parameters:** air quality standards; tax rates; # of SCOTUS justices

Levels of intervention in systems

1. Transcend paradigms
2. Change mindset or paradigm underlying the system
3. Change goals of the system
4. Adjust system structure (e.g. sensor, organization)
5. Change system rules (incentives, sanctions, etc.)
6. Change information flows
7. Change positive feedback loops
8. Change regulating (negative) feedback loops
9. Adjust delays relative to the rate of system change
10. Adjust structure of stocks and flows
11. Adjust buffers
12. Adjust parameters, e.g. subsidies, taxes, standards



**MORE FUNDAMENTAL;
HARDER TO CHANGE**

**MORE SUPERFICIAL;
EASIER TO CHANGE**

Overcoming “bad” and enhancing “good” resilience

- **Lock-in to overcome**

- Growth insistence
- Complex web of investments (e.g. stranded debt)
- Commodification, monetary valuation
- “Tragic institutions”
- Rebound effect
- Remote “ownership” of local resources

- **Lock-in to promote**

- Supranationality & subsidiarity (e.g., EU)
- Resource efficiency
- Efforts that pave the way, e.g. Ostrom’s examples, CSAs
- Ideas from the degrowth & other movements

Lock-in assessment for climate: obstacles

Obstacle	Key system level(s)	Degree of lock-in	Time horizon to overcome
Growth-insistence	1, 2	High	Long
Investments in harmful activities	1, 2, 6	Medium-High	Medium-Long
Private property rights (U.S.)	1, 2, 4	High	Medium-Long
Global trade regime (WTO, TPP, etc.)	1, 2, 4, 5	Medium-High	Medium
Weak supranational law	1, 2, 4	High	Long
Weak building codes	4, 5, 7, 8, 9	Low-Medium	Short-Medium

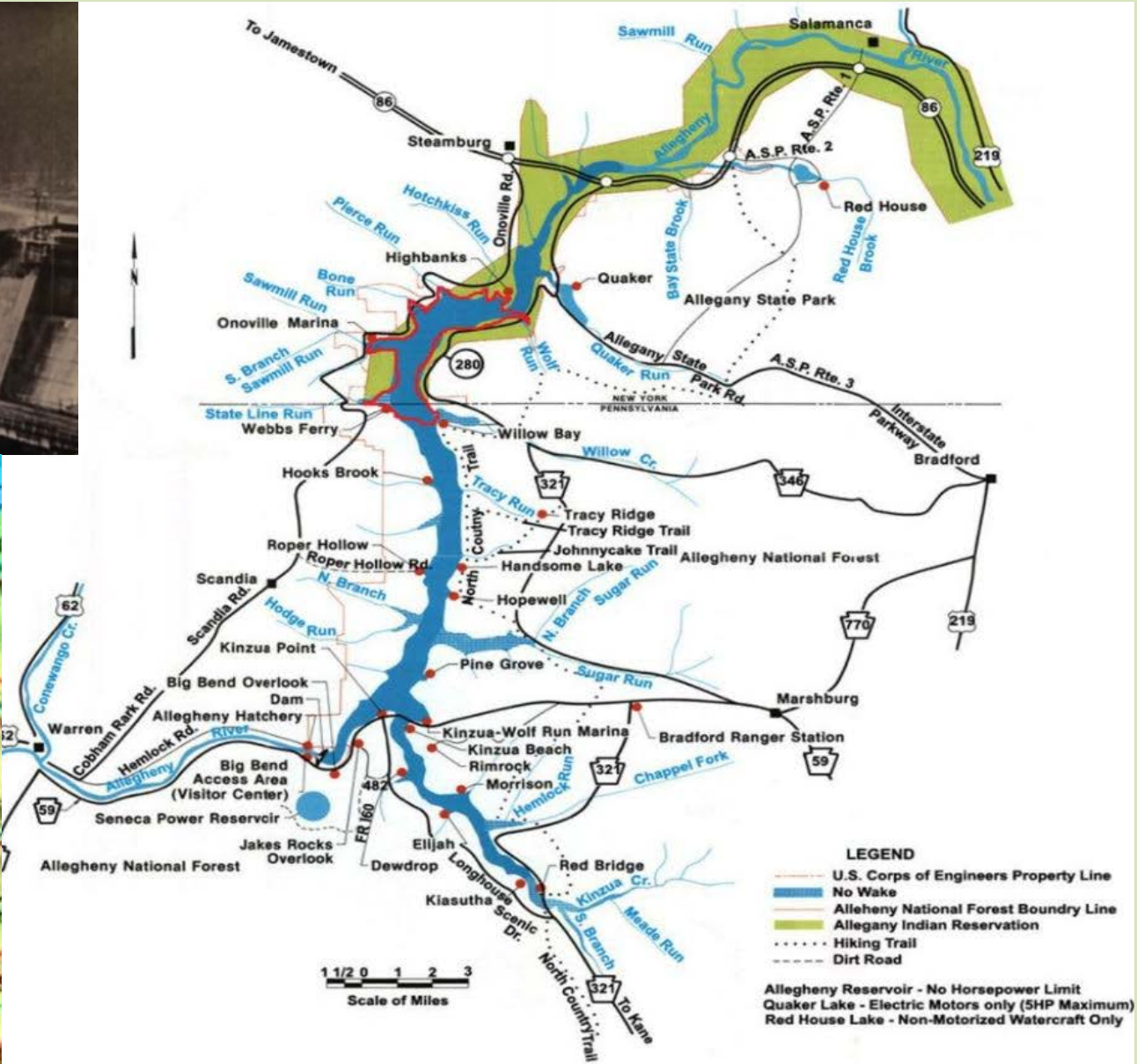
Lock-in assessment for climate: opportunities

Opportunity	Key system level(s)	Degree of lock-in	Time horizon to implement
Enforceable global GHG cap	2, 4, 8	Medium-High	Medium-Long
Expansion of common/public property	1, 2, 4	Medium-High	Medium-Long
Work sharing	2, 4, 7	Low-Medium	Short-Medium
Global carbon price	4, 9	Low-Medium	Short-Medium
Strict green building codes	4, 5, 7, 8, 9	Low-Medium	Short-Medium

A strategic approach to lock-in: Trade

Lock-in challenge	Degree of lock-in	Spatial scale	Time for resolution
Commitment to sustained economic growth	High	Local to global	Long
“Tragic institution” effect: e.g., continued reliance by US & Canada on out-dated NAFTA model	Medium	Regional to global	Short to medium
Investments in trade infrastructure: production, transport, ports, information, institutional, financial, etc.	Medium-High	Local to global	Medium
Socio-cultural (e.g. consumers like cheap goods and services)	High	Local to global	Medium
Ecological (e.g. aggregate impacts of trade are dispersed)	High	Local to global	Long

An illustration: The Kinzua Dam



Kinzua Dam

Deconstruction

- **Authorized by Congress in Flood Control Acts in 1930s, to protect Pittsburgh, PA from floods**
- **Condemnation (eminent domain) of 1/3 of the Seneca reservation**
- **Court-sanctioned breach of the 1794 Treaty of Canandaigua:** “Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneca nation; and the United States will never claim the same, nor disturb the Seneca nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof”
- **Creation and authority of Army Corps of Engineers**
- **Side effects:**
 - Hydroelectric power production and outdoor recreation
 - Dam led to highway through remaining portion of the Seneca Reservation, requiring condemnation of more Seneca land
 - Pre-NEPA, so no EIS – many ecosystem impacts not studied

Kinzua Dam

Analysis and reconstruction

- **Humans as part of nature: Seneca Nation a model of connection to place**
- **Ecological primacy:**
 - Dam project designed to enhance an industrial city: linked to capitalist economy
 - Connection to planetary boundaries unclear; loss of farmland hydrological disruption with many ecosystem impacts (pre-NEPA)
- **Reduction of material and energy throughput:** dam project part of project to expand use of material and energy
- **Consideration of true need:** alternatives that Seneca proposed rejected
- **Subsidiarity:** local governance and control superseded
- **Fairness and justice:** Seneca Nation treated unfairly
- **Precaution and adaptiveness:** Virtually irreversible

Potential book or other publication

- “Coordinated” case studies by different teams
 - Eastern Canada and/or Northeast US (L4E)
 - Brazil (UFSC)
 - Other?
- Results and Comparative analysis
- Possible TOC
 - Introduction to Ecological Law Case Studies
 - Case Study 1
 - Case Study 2, etc.
 - Comparative Analysis
 - Conclusion