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Public Land Law: The Development of Federal Policy

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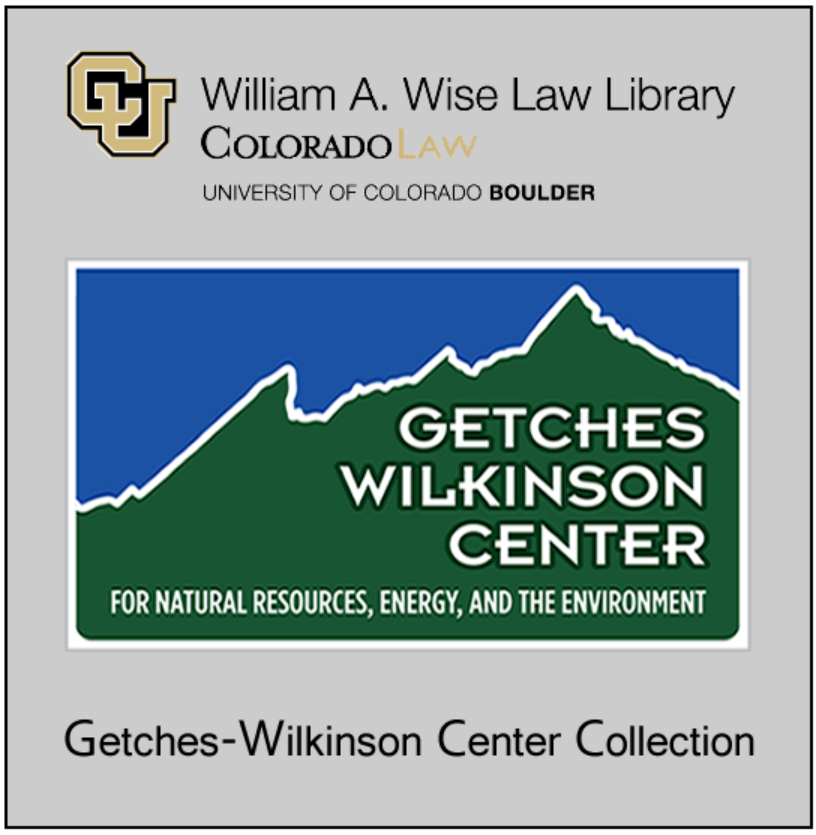

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PUBLIC LAND LAW:
THE DEVELOPMENT OF FEDERAL POLICY

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I. INTRODUCTION

A. Summary

Far more than in most fields, the historical development of public land law is of pragmatic, modern significance. Recently-enacted public lands statutes such as FLPMA cannot be fully understood without an historical context. Old statutes, long since repealed, continue to control 19th Century congressional and administrative actions that are being contested in court today. The "lay of the land"--including issues such as checkerboard ownership patterns and federal reserved mineral interests--is of continuing importance to the practicing attorney in public land law; again, land ownership patterns can best be understood by tracing the policies that created them. Finally, the land management agencies have their separate characteristics, often due to their special historical development.

B. Research Sources

1. P. Gates, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968)--This book, prepared for the Public Land Law Review Commission, remains the most thorough study of the history of public land law.

2. S. Dana & S. Fairfax, FOREST AND RANGE POLICY (2d ed. 1980)--This shorter work is analytical and is especially helpful in providing an overview of modern law and policy.

3. G. Coggins & C. Wilkinson, CASES AND MATERIALS ON FEDERAL PUBLIC LAND AND RESOURCES LAW (1981) (1983 Supplement) (1984 Statutory Supplement)--This casebook treats the development of federal policy in Chapter Two.

4. Coggins, The Law of Public Rangeland Management II: The Commons and the Taylor Act, 13 Envtl. L. 1 (1982)--This comprehensive article analyzes federal range policy from the mid-19th century through 1976. This is one of a series of articles by the same author on public rangeland. See also 12 Envtl. L. 535 (1982); 13 Envtl. L. 295 (1982); 14 Envtl. L. 1 (1983).

5. Symposium, FLPMA of 1976, 21 Ariz. L. Rev. 267 (1979)--A solid collection of articles on FLPMA.

6. W. Stegner, BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST (1953)--This colorful, accurate treatment analyzes the 19th century political and geographic forces

that continue to influence public lands policy today.

7. R. Athern, HIGH COUNTRY EMPIRE: THE HIGH PLAINS AND ROCKIES (1960)--A standard history of the western range.

8. W. Voight, PUBLIC GRAZING LANDS: USE AND MISUSE BY INDUSTRY AND GOVERNMENT (1976)--A critical account of range policy.

9. T. Watson & T. Watkins, THE LAND NO ONE KNOWS (1975); W. Wyant, WESTWARD IN EDEN (1982); P. Fradkin, A RIVER NO MORE: THE COLORADO RIVER AND THE WEST (1981); R. Lamm & M. McCarthy, THE ANGRY WEST (1982); D. Ferguson & N. Ferguson, SACRED COWS AT THE PUBLIC TROUGH (1983)--Popular, readable histories and accounts of public lands policy.

II. THE ERA OF ACQUISITION OF THE PUBLIC DOMAIN (1789-1867)

A. Foreign Nations

The Original "public domain"--all of the United States except the original thirteen colonies, Vermont, Maine, Tennessee, Kentucky, Texas, and Hawaii--was acquired by treaties with France, England, Spain, Russia, and Mexico. The largest amounts of land were in the Louisiana Purchase

of 1803 (560 million acres or 25% of all land in the United States) and the purchase of Alaska from Russia in 1867 (365 million acres or 16% of the United States).

B. Indian Tribes

Purchase from foreign nations did not give the United States complete title to the public domain, as the right of occupancy of American Indians still had to be "cleared" by treaty or otherwise. See generally Clinton & Hotopp, Judicial Enforcement of Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Maine L. Rev. 17 (1979). Today, Indians own some 50 million acres, a figure that will incrase when Alaska Natives receive the 40 million acres to which they are entitled under the Alaska Native Claims Settlement Act. Indian lands are held in trust for individual tribes and their members and thus are not public lands. On development of Indian lands, see F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.) and P. Maxfield, M. Dieterick & F. Trelease, NATURAL RESOURCES LAW ON AMERICAN INDIANS LANDS (1977).

III. THE DISPOSITION ERA (1789-1934)

In the early years of the Republic, sales of public domain lands were seen as a source of revenues for the new government. Later, transfers of the public lands and their

resources into private ownership were used as incentives to open the West for development. It was not until comparatively recently that policy developed to retain lands in public ownership.

A. Statehood

Upon admission, new states received land grants in varying amounts. Not all state selections are completed, Andrus v. Utah, 446 U.S. 500 (1980). State power over federal lands within states remains controversial, as the Sagebrush Rebellion demonstrates. In general, statehood in the Western states did this: the new state obtained an ownership interest in those lands specified in the statehood Act; existing private ownership was protected; the United States retained ownership in all remaining lands; the states generally have jurisdiction over federal lands under the Tenth Amendment and the Equal Footing Doctrine; but the federal government can preempt state jurisdiction by a valid exercise of power under the Jurisdiction Clause (Article I, section 8, clause 17) or the Property Clause (Article IV, section 3, clause 2). See generally Kleppe v. New Mexico, 426 U.S. 529 (1976); Leshy, Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands, 14 U.C.D.L. Rev. 317 (1980); Engdahl, State and Federal Power Over Federal Property, 18 Ariz. L. Rev. 283 (1976); and G. Coggins & C. Wilkinson, supra , Ch. 3.

B. Mining

Under the General Mining Law of 1872, a hardrock miner making a valuable discovery is entitled to ownership not only of the minerals but also to a fee patent of 20 acres overlying the claim. 30 U.S.C. § 22 et seq. Thus the Hardrock Act today raises major land management issues, as well as mineral development questions, since unpatented mining claims create "clouds" on millions of acres of federal lands.

C. Homesteading

A central thrust of public land law during the 19th and early 20th centuries was to promote the small family farm. Major acts were the General Homesteading Act of 1862 (43 U.S.C. § 161 et seq.) (repealed 1976), the Desert Land Act of 1877 (43 U.S.C. § 321 et seq.), and the Stock Raising Homestead Act of 1916 (43 U.S.C. § 291 et seq.) (repealed 1976).

Beginning in 1909, Congress passed a series of acts reserving in the United States the subsurface mineral estates under patented lands. Today, the United States owns reserved mineral interests under some 60 million acres, or 5% of all lands in the western states. See generally Carpenter, Severed Minerals as a Determent to Land Development, 51 Den. L.J. 1 (1974); Brimmer, The Rancher's Subservient Surface Estate, V Land & Water L.

Rev. 49 (1970). A leading case is Watt v. Western Nuclear, Inc., 103 S. Ct. 2218 (1983), finding that gravel was reserved by the mineral reservation provision of the Stock-Raising Homestead Act of 1916.

D. Railroads

Over 90 million acres were granted directly to railroads as an incentive to open the west. The grants were in a checkerboard pattern, in which the railroad was granted the odd-numbered sections of a specified amount of miles on each side of the right-of-way. In lieu selections were allowed if designated sections were already accounted for. The United States did not impliedly reserve easements to construct roads across private lands without paying compensation in order to reach checkerboard public lands. Leo Sheep Co. v. United States, 440 U.S. 668 (1979).

E. Reclamation

In 1902 Congress passed the Reclamation Act, 43 U.S.C. § 371 et seq. The act was central to homesteading policy because it provided funding for irrigation or previously arid lands. Reclamation legislation has afforded a wide range of subsidies to farmers, e.g., Sax, Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy, 64 Mich. L. Rev. 13 (1965). The "160 acre maximum"

provision has been upheld as to the Central Valley Project in California, Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958), but large land holders may continue to receive reclamation water in the Imperial Valley, Bryant v. Yellen, 447 U.S. 352 (1980). Reclamation requirements were generally loosened in the Reclamation Reform Act of 1982, 43 U.S.C.A. §§ 390aa to 22-1.

F. Timber and Stone

In spite of known widespread timber trespass, The Timber Culture Act of 1872, The Free Timber Act of 1878, and The Timber and Stone Act of 1878 all allowed public acquisition of federal timber land. Fraud was widespread and speculators obtained millions of acres of public land in spite of statutory prohibitions against speculation.

IV. RESERVATION AND CUSTODIAL MANAGEMENT (1872-1970)

In the late 19th and early 20th centuries, Congress began to reserve some federal lands for special purposes by closing them to homesteading, or entry for mining, or both. Federal management during the first half of the 20th century was a far easier matter than today because there was significantly less pressure on federal resources both from commercial and environmental interests.

A. Parks

With the establishment of Yellowstone National Park in 1872, Congress began the movement toward the setting aside of lands for recreation, preservation, and wildlife protection. The National Park Service Organic Act, 16 U.S.C. § 1 et seq., was passed in 1916. See generally J. Ise, OUR NATIONAL PARK POLICY (1961).

B. The National Forests and the Forest Service

1. Creation of the National Forests

a. The 1891 Act

In 1891, Congress reacted to the loss of public timber lands and authorized presidents to create national forest reserves. President Harrison set aside 13 million acres; President Cleveland reserved 13 additional forests that were twice the size of the Harrison reserves; and President Roosevelt reserved a total of over 148 million acres.

b. The Forest Service Organic Act of 1897

The original reserves were created pursuant to the 1891 Act, but no agency had the authority

to manage the forests. In 1897, Congress passed the Forest Service Organic Act which, among other things, granted authority "to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. § 473-78, 479-82, 551. Management authority was originally vested in the Department of Interior.

c. The "Midnight Reserves" and the 1907 Act

In 1907, Roosevelt signed the Agriculture Appopriations Act, which prohibited the President from setting aside any forests reserves in six western states. Act of March 4, 1907, 34 Stat. 1271. Roosevelt signed the bill just after executing proclamations designating new forest reserves totalling 16 million acres.

2. The Creation of the Forest Service

a. The Transfer Act of 1905

In 1905 Congress transferred the jurisdiction over the forest reserves from the Department of Interior to the Forest Service, in the Department of Agriculture. 16 U.S.C. § 472. Thus Gifford Pinchot, the Chief of the Forest Service, now had direct authority to manage the federal forests.

See generally, G. Pinchot, BREAKING NEW GROUND (1974).

b. Establishment of Authority

Pinchot and other Service officials moved quickly to establish broad management authority, using test cases involving the regulation of grazing. United States v. Grimaud, 220 U.S. 506 (1911); Light v. United States, 220 U.S. 523 (1911). The Forest Service also cracked down on the illegal use of mining claims in national forests. United States v. Rizzinelli, 182 F. 675 (D. Idaho 1910).

Pinchot was fired by President Taft in 1910--still the only instance in which a Chief has ever been removed for political reasons.

C. Mineral Reservations

Coal had long been subject to sale, not location under the Hard Rock Act, but oil, gas, and oil shale were confirmed by statute in 1897 as locatable minerals under the 1872 Act. When private companies were rapidly claiming these energy fuels, President Taft in 1909 withdrew millions of acres from mineral entry and his action was affirmed. United States v. Midewest Oil Co., 236 U.S. 459

(1915) (upheld on the basis of Congress' longstanding "acquiescence" to presidential withdrawals). The Pickett Act, 43 U.S.C. 141-42 (repealed 1976), was passed in 1910 to limit some executive withdrawals but millions of additional acres were withdrawn. See, e.g., Portland General Electric Co. v. Kleppe, 441 F.Supp. 859 (D. Wyo. 1977). The Taft withdrawals also led to the passage of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq. In 1976, FLPMA legislatively repealed the Midwest Oil decision, 90 Stat. 2792, limited presidential withdrawal authority, and provided for a congressional veto of permanent withdrawals over 5000 acres. 43 U.S.C. § 1714. The legislative veto provisions are in doubt since INS v. Chadha, 103 S. Ct. 2764 (1983). See generally Getches, Managing the Public Lands: The Authority of the Executive to Withdraw Lands, 22 Nat. Res. T. 279 (1982); Wheatley, Withdrawals Under the Federal Land Policy Management Act of 1976, 221 Ariz. L. Rev. 311 (1979).

D. Taylor Grazing Act

The Taylor Grazing Act of 1934, 43 U.S.C. § 315 et seq. resulted in the withdrawal of 142 million acres of land for grazing and effectively brought to an end the era of homesteading. See generally, L. Peffer, THE CLOSING OF THE PUBLIC DOMAIN (1951); P. Foss, POLITICS AND GRASS (1960).

E. Creation of the BLM

The BLM was formed in 1946 by merging the Grazing Service and the General Land Office. The agency was given no comprehensive mission, and from the beginning was short on funding and personnel. See generally M. Clawson, THE BUREAU OF LAND MANAGEMENT (1971).

V. MODERN LAND MANAGEMENT (1970-Present)

Historically, federal land management agencies have adminstered the federal lands with relatively few legal constraints. During the last decade, however, administrative discretion has been significantly narrowed by statutes imposing increasingly specific requirements and by stricter judicial review. See generally Wilkinson, The Field of Public Land Law: Some Connecting Threads and Future Directions, 1 Public Land L. Rev. 1 (1980).

A. General Statutes Not Limited To The Public Lands

1. NEPA (42 U.S.C. § 4321 et seq.).

2. APA judicial review provisions (5 U.S.C. § 701-06)

3. Freedom of Information Act (5 U.S.C. § 552).

4. Procedural reform in 1976: federal question

jurisdiction (28 U.S.C. § 1331); sovereign immunity waiver (5 U.S.C. § 702); naming and substitution of officials (5 U.S.C. § 703); injunctive relief (5 U.S.C. § 702).

B. Preservation Statutes

1. The Wilderness Act of 1964, 16 U.S.C. § 1131 et seq.

2. The Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1271 et seq.

3. The Wild, Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. § 1331 et seq.

4. The Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.

5. The Alaska National Interest Land Conservation Act of 1980, 16 U.S.C. § 1301 et seq.

C. Mining

See generally Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 et seq. and Federal Coal Leasing Amendments of 1975, 30 U.S.C. § 191, 201, 202, 204, 207, 208.

D. National Forest Management Act of 1976 (codified mostly at 16 U.S.C. § 1600-14).

Amounting to a new organic act for the Forest Service, the NFMA amended the Resources Planning Act of 1974 and provided general requirements for on-the-ground forest practices and clearcutting; adopted, with exceptions, the conservative non-declining even flow (NDEF) formula for determining annual harvest; required interdisciplinary planning and public participation; limited harvesting on marginal lands; and adopted other limitations on forest practices in the National Forests. See generally, Symposium: Forest Policy 8 Envt'l L. Rev. 239 et seq. (1978).

E. Federal Land Policy and Management Act of 1976 (codified mostly at 43 U.S.C. § 1701-82)

FLPMA--the "BLM Organic Act"-- is perhaps the dominant statute in public land law today. FLPMA established a policy of retaining public lands in federal ownership; repealed numerous old laws (90 Stat. 2786-94); provided general multiple-use and organic authority to the BLM; regulated withdrawals, sales and exchanges; required recordation of mining claims; adopted provisions in grazing fees and leases; instituted the BLM Wilderness study; and imposed numerous other major requirements. See generally, Symposium: The FLPMA of 1976, 21 Ariz. L. Rev. 268-597 (1979).

VI. FEDERAL LAND MANAGEMENT AGENCIES

A. The Forest Service

Located in the Department of Agriculture, the Forest Service manages 190 million acres. 15 million acres are in wilderness and most of the rest is managed for multiple-use purposes including timber harvesting, grazing, and recreation. See generally G. Robinson, THE FOREST SERVICE (1975); D. Barney, THE LAST STAND (1974).

B. The Department of Interior Agencies

1. BLM

The BLM holds some 340 million acres. In addition to managing its own lands on a multiple-use basis, the BLM administers all hard-rock mining on the federal lands and all federal mineral leasing, including leasing on the Outer Continental Shelf. See generally, M. Clawson, THE BUREAU OF LAND MANAGEMENT (1971), T. Watkins & C. Watson, THE LAND NO ONE KNOWS (1975), Comment, The Conservationists and the Public Lands: Administrative and Judicial Remedies Relating to the Use and Disposition of the Public Lands Administered by the Department of Interior, 68 Mich. L. Rev. 1200

(1970), and Strauss, Mining Claims on Public Lands, 1974 Utah L. Rev. 185. All of these sources provide valuable background information but are dated in several respects, especially on procedural issues.

2. U.S. Fish & Wildlife Service

This conservation-oriented agency manages about 89 million acres in national wildlife refuges; stocks and wildlife; administers the Endangered Species Act; and conducts research on wildlife issues. See generally M. Bean, THE EVOLUTION OF NATIONAL WILDLIFE LAW (1977).

3. National Park Service

This single-use agency manages 75 million acres in the National Park System. See generally Sax, Helpless Giants: The National Parks and the Regulation of Private Lands, 75 Mich. L. Rev. 639 (1976).

4. Other Land Management Agencies

The Bureau of Indian Affairs (about 50 million acres) and the Bureau of Reclamation (about 7.6 million acres) are also located in the Department of the Interior.

5. The Office of the Solicitor

The Solicitor's Office is a separate entity that acts as general counsel to the Department and that is not directly responsible to the land management agencies. Solicitor's opinions, an important source of public land law, are reported and indexed in Interior Decisions. Interpretations of the Solicitor are given considerable deference by the courts. Udall v. Tallman, 380 U.S. 1 (1965); Utah v. Andrus, 486 F. Supp. 995 (D. Utah, 1979). But see Wilderness Society v. Morton, 479 F.2d 842 (D.D.C. 1973). Litigation for the Interior Department is handled by the Justice Department.

6. Hearings and Appeals

Adjudication under the APA are heard by administrative law judges. Most adjudications relating to mining, disposition of land, and land use disputes are appealed to the Interior Board of Land Appeals (IBLA). 43 C.F.R. § 4.400 et seq. Appeals in contract disputes are heard by the Board of Contract Appeals. 43 C.F.R. § 4.100 et seq. Appeals from adjudications under SMCRA go to the Board of Surface Mining and Reclamation Appeals. 43 C.F.R. § 4.1100 et seq.