

University of Colorado Law School

Colorado Law Scholarly Commons

FLPMA Turns 40 (October 21)

2016

10-21-2016

SLIDES: FLPMA in Its Historical Context

John D. Leshy

Follow this and additional works at: <https://scholar.law.colorado.edu/flpma-turns-40>



Part of the [Administrative Law Commons](#), [Energy Policy Commons](#), [Environmental Law Commons](#), [Environmental Policy Commons](#), [Forest Management Commons](#), [Land Use Law Commons](#), [Natural Resource Economics Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Oil, Gas, and Energy Commons](#), [Oil, Gas, and Mineral Law Commons](#), [Recreation, Parks and Tourism Administration Commons](#), and the [State and Local Government Law Commons](#)

Citation Information

Leshy, John D., "SLIDES: FLPMA in Its Historical Context" (2016). *FLPMA Turns 40 (October 21)*. 2.
<https://scholar.law.colorado.edu/flpma-turns-40/2>

This Conference Proceeding is brought to you for free and open access by the 2016 at Colorado Law Scholarly Commons. It has been accepted for inclusion in FLPMA Turns 40 (October 21) by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact lauren.seney@colorado.edu.

FLPMA in Its Historical Context

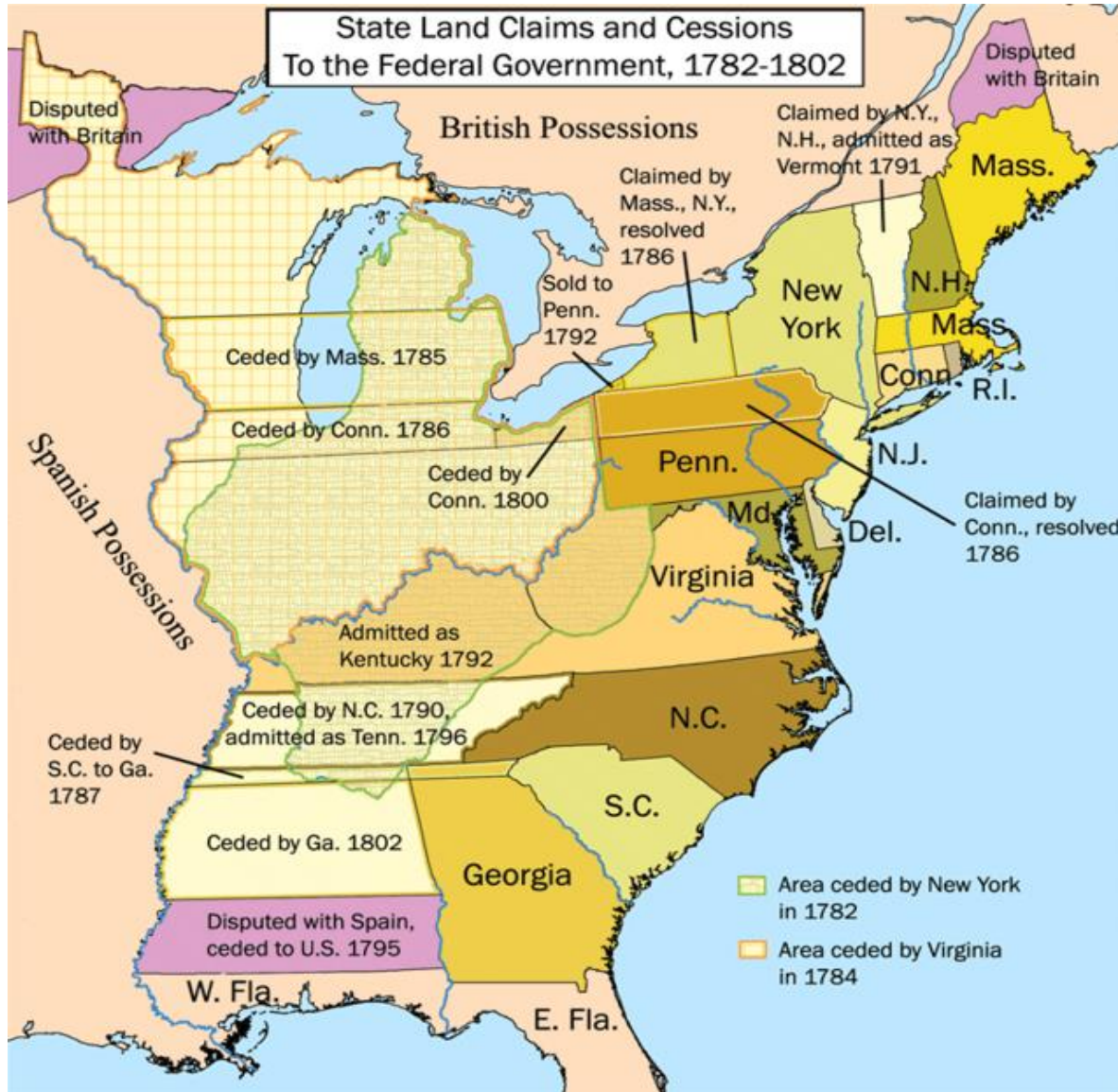
John D. Leshy

**Sunderland Distinguished Professor of Law Emeritus
U.C. Hastings College of the Law**

**Conference on the
40th Anniversary
of the
Federal Land Policy and Management Act**

University of Colorado School of Law

October 21, 2016



FOUNDATIONAL DOCUMENTS FOR THE NATION'S PUBLIC LANDS

October 10, 1780, Resolution of Second Continental Congress: Urging the states with western land claims to cede them to the United States, the Congress resolved that these lands would be “*granted and disposed of for the common benefit of all the United States,*” and be “settled and formed into” new states with “the same rights of sovereignty, freedom and independence, as the other states.” The resolution further specified that the land grant and settlement process shall proceed “at such times and under such regulations *as shall hereafter be agreed on by the United States in Congress assembled.*”

Virginia's 1784 cession of western lands to the U.S.: The lands shall be “considered as a *common fund for the use and benefit of the United States*” and the lands “shall be faithfully and bona fide *disposed of* for that purpose, and for no other use or purpose whatsoever.”

Northwest Ordinance of 1787: It specified, in providing for admission of new states in Northwest Territory, that the “legislatures of those ... new States, shall never interfere with the *primary disposal of the soil* by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide purchasers.*”

The U.S. Constitution's Property Clause: (Art. IV, § 3, Cl. 2) It gives the Congress “Power to *dispose of* and make all needful Rules and regulations respecting the Territory or other Property belonging to the United States.”

Contemporary definitions of “dispose” or “dispose of”:

The third edition of Samuel Johnson’s famous *Dictionary of the English Language*, published in 1768, lists several broad meanings of “dispose,” including “to regulate,” “to place in any condition,” “to apply to any purpose,” as well as “to transfer,” and “to give away” (i.e., to divest).

The Nation’s Founders Entrusted Public Land Policy to the National Political Process

While the general expectation of America’s founding generation was certainly that the national political process would, over time, operate to divest the U.S. of ownership of most of the public lands, there is *no evidence that the founders intended to put the national government under any legal obligation to divest itself of ownership of all the public lands, whether to states or anyone else.*

Instead, the founders were content to leave to the national political process to decide the fate of these lands, and their future ownership. This allowed Congress, or the executive exercising authority delegated from Congress, to decide to retain some public lands in national ownership for national purposes.

1796: Office of Surveyor General established in Treasury Department.

1812: General Land Office (GLO) established in Treasury Department.

1836: Office of Surveyor General folded into GLO.

1849: Interior Department created, including GLO.

Public Land Policy to the Civil War

Almost from the beginning, some public lands (or interests therein) were *retained in national ownership* for various reasons, including Indian, military, or economic policy. In the nation's first few decades, some tracts of public land containing salt deposits, minerals, hot springs, and forests valuable for naval ships were excluded from divestiture programs and retained in national ownership.

--While divestiture of public lands remained the primary objective, Congress gave or sold public lands to states, to speculators, to squatters, to railroads and assorted others.

--It was not until the late 1820s that arguments were first made that states were entitled to be given title to all public lands within their borders. The view came to be called "cession." It was offered as a third alternative as politicians debated whether to reduce the price of public lands offered for sale, eventually down to zero, with any leftover lands being given to the states (a position called "graduation") or whether to ensure that older states derived some direct value from public lands (a position called "distribution"). Newer states favored "graduation," and older states favored "distribution."

--Arguments for "cession" never gained political traction in the Congress, and by the mid-1830s ceased being made. Such arguments would periodically resurface, beginning in the late nineteenth century down to the sagebrush rebellions of the modern era, as the United States retained more public lands in national ownership.

PUBLIC LAND RESERVATIONS AFTER THE CIVIL WAR

--After the Civil War, larger amounts of public land began to be held in national ownership, off limits to divestiture.

--More than 150 million acres of public land were included in Forest Reserves established between 1891 and 1909. GLO administered these lands until 1905 when, after a relentless campaign by Gifford Pinchot, helped along by some scandals involving public land grants in OR and CA, Congress transferred to forest reserves to Agriculture, under supervision of Pinchot's U.S. Forest Service.

--In the same era, some public lands were set aside to protect wildlife and habitat, eventually resulting in the establishment of the National Wildlife Refuge System, now under the U.S. Fish and Wildlife Service.

--Upon enactment of the Antiquities Act of 1906, some public lands were included in national monuments by presidential proclamation; some were managed by the USFS and some by Interior.

--After several national parks (beginning with Yellowstone in 1872) had been established on public lands, in 1916 the National Park Service was created in Interior to manage them.

THE REMAINING UNRESERVED PUBLIC LANDS

These public lands, the so-called “public domain,” remained in the custody of the Interior Department’s GLO, and were primarily an open commons for livestock grazing. The lands generally remained open to the operation of divestiture laws and programs.

1929-1931: President Hoover appointed a Committee on Conservation of the Public Domain, chaired by former Interior Secretary James R. Garfield. Its report, issued in early 1931, called for a systematic review of all the remaining public domain to determine which lands ought to be kept in national ownership and added to existing systems like the national forests, parks and wildlife refuges. It recommended that all other public lands, then believed to be useful primarily for livestock grazing, should be offered to the states, with the U.S. retaining the mineral rights. The states, led by Utah’s Governor George Dern, spurned the offer, and Congress never seriously considered it.

Around the same time, Congressman Edward Taylor (D-CO), who, almost from the moment he entered Congress in 1909, had called the policy of keeping public lands out of private hands “un-American,” had a change of heart. He came to realize that the Congress would never support what he called the “iridescent dream” that ranchers should obtain title to the public lands their livestock grazed. He therefore proposed a leasing system to bring stability to the range, and pursued it with, in Louise Peffer’s words, “the zeal of a convert.”

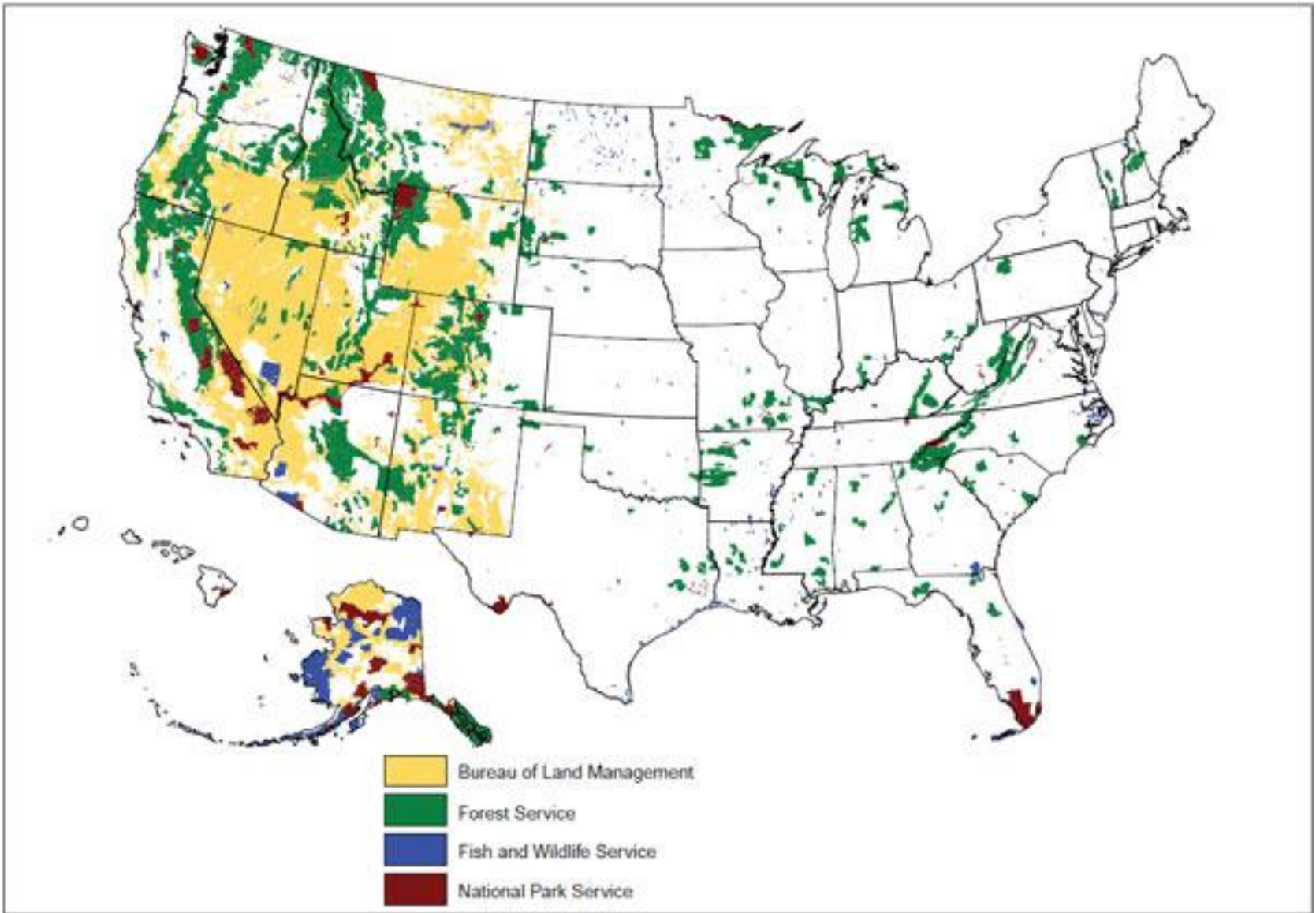
The Taylor Grazing Act of 1934 (TGA) was captioned “[a]n act to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.”

It directed Interior Secretary to manage the public domain “*pending ... final disposal*” so as to “regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury.”

A “Grazing Service” was established inside Interior to administer the system inside “grazing districts” the Interior Secretary was to form. The GLO retained jurisdiction over grazing on millions of acres of public land *outside* of these districts.

The first head of the Grazing Service, Ferry Carpenter, candidly admitted the challenge facing his agency from decades of overgrazing: The choice was between moving faster and “hammer[ing]” the ranchers “unmercifully” or going slower and “continu[ing] to hammer the public domain. Well, as the public domain range is less articulate than the stockmen, we have chosen to hammer the public domain.”

President Franklin Roosevelt followed up the TGA by issuing Executive Orders in 1935 and 1936 that “withdrew” essentially all of the remaining public domain from most divestiture laws. This ended the era of large-scale divestiture of public lands.



Source: GAO analysis of U.S. Geological Survey's National Atlas Web site data.

THE PUBLIC DOMAIN: 1940--EARLY 1960S

Nevada Senator Pat McCarran, an anti-New Deal Democrat first elected in 1932, led a fierce attack on the federal administration of grazing on the public lands. A handful of members of Congress, primarily from the intermountain west, joined him. Some of them sought divestiture of the public lands either to states or directly to ranchers.

***Harper's* editor Bernard DeVoto, who had grown up in Utah, mounted a spirited response to these attacks through a series of extended essays whose titles revealed their flavor: "The West: A Plundered Province," "The Anxious West," "The West Against Itself," and "Sacred Cows and Public Lands." These were influential nationally.**

McCarran succeeded in minimizing increases in the nickel-an-AUM grazing fee and cut the Grazing Service's budget in half, reducing its personnel from 250 to 86, with responsibility for 150 million acres. This left lasting scars.

McCarran and his allies did not, however, prevent President Truman from using his executive reorganization authority to establish, in 1946, the Bureau of Land Management. It combined the Grazing Service and the GLO.

Wayne Aspinall and the Pivotal Decisions of 1964

Aspinall (D-CO) regarded Edward Taylor as “his model and inspiration.” In 1948 he was elected to the seat Taylor once held, defeating the Republican incumbent who had served since Taylor’s death in office in 1941. In 1959 he became Chair of the House Interior Committee.

One of Aspinall’s pet projects was to establish a Public Land Law Review Commission (PLLRC). Aspinall had served on the Outdoor Recreation Resources Review Commission that Congress had established in 1958 to do a comprehensive study of those policy issues. He modeled the PLLRC after it.

Aspinall saw himself as a traditional “conservationist,” which he defined as opposing waste of natural resources but not saving them “merely for the sake of saving,” unlike what he called the “purist preservationists.” Disturbed by the increasingly influential “wilderness” movement and its implications for federal lands, Aspinall wanted to protect the ranching and minerals industries, and sought to nurture development of an oil shale industry in his district and neighboring states. He was also concerned that public lands would become an obstacle to community expansion in an urbanizing west. Most of all, he thought that Congress had, over many decades, ceded too much control over public land policy to the executive. At the same time, he believed a planning process would rationally lead to the designation of “dominant uses” of particular tracts of public land. Finally, he perceived a need to jettison or modernize some 3000 public land laws that had piled up since 1789.

In 1964, Aspinall brokered a deal to let the Wilderness Act become law, in return for Congress authorizing the PLLRC, with an informal understanding that its members, dominated by members of Congress, would elect him chair. He also acquiesced in passage of two companion laws pushed by the Johnson Administration, a so-called Classification and Multiple Use Act (CMU) and a Public Land Sales Act. Both would, by their own terms, expire 6 months after PLLRC Report was presented to the President.

The CMU Act was pushed by Interior Secretary Stewart Udall, who was already promoting a different version of “conservation” from Aspinall’s. It authorized BLM to classify public lands for “disposal” or “retention.” The terminology reflecting how, at this point, “disposal” had come to mean *divestiture* of ownership.

It authorized divestiture where public lands were required for community growth and development, or are “chiefly valuable for residential, commercial, agricultural (*exclusive of lands chiefly valuable for grazing and raising forage crops*), industrial, or public uses or development.” (emphasis added). The italicized phrase was a clear indication of Congress’s belief in 1964 that public lands chiefly valuable for grazing would be presumptively retained in national ownership.

It authorized public land to be retained (at least for “interim management” during the life of the CMU) not only for purposes of domestic livestock grazing, mining, timbering and industrial development, but also for fish and wildlife, outdoor recreation, “watershed protection,” “wilderness preservation,” and “preservation of public values that would be lost if the land passed from Federal ownership.”

It also instructed the Secretary to give “due consideration” in classifying the public lands to all pertinent factors, including “*ecology*, priorities of use, and the relative values of the various resources in particular areas.” (emphasis added)

Finally, it directed the Interior Secretary to “develop and administer for multiple use and sustained yield” the resources of the public lands deemed suitable for retention. Its definition of these terms was identical to the MUSY Act Congress had enacted for the Forest Service in 1960.

Implementation of the CMU Act

Since most of the BLM lands were then considered chiefly valuable for grazing, it was no surprise that the CMU resulting BLM classifying for retention around 150 million acres of public lands in the lower 48 states, with only a little more than 3 million acres classified for disposal. These decisions were generally made in close consultation with state and local governments, so they were a significant barometer of public opinion in the west.

Executive Designations of Conservation Areas on BLM Land

Beginning in the 1960s and continuing up to the enactment of FLPMA, a succession of Interior Secretaries formally designated more than a million acres of public lands for a variety of conservation purposes. Stewart Udall designated 130 “natural areas” in 1965, covering some 500,000 acres. He and his successors designated “primitive” or “natural” areas in such places as Aravaipa Canyon and Vermilion Cliffs in Arizona, Red Rocks in southern Nevada, and several large tracts in the California desert beginning in 1970.

The 1964 Sales Act allowed sale of public lands that were classified for disposal, in tracts up to 5120 acres each, either to qualified governmental agencies at appraised fair market value, or to qualified individuals through competitive bidding at not less than fair market value. Only a few thousand acres were divested under this provision.

Final Membership of Public Land Law Review Commission

Chair: Wayne Aspinall, lawyer and Chair of House Interior Committee, elected by Commissioners.

Presidential appointees:

Byron Mock, lawyer, Utah, former Ass't Interior Solicitor and BLM official (vice-Chair)

Robert Emmet Clark, law professor, U. of Arizona

Maurice Goddard, Secretary of Forests and Waters, Commonwealth of Pennsylvania

Philip Hoff, Governor of Vermont, lawyer

Laurance Rockefeller, NY, philanthropist

Nancy Smith, County Supervisor, San Bernardino CA

Senate appointees:

Gordon Allott (R-CO); Clinton Anderson (D-NM); Alan Bible (D-NV); Paul Fannin (R-AZ);

Henry Jackson (D-WA) (Chair of Senate Interior Committee); Len Jordan (R-ID).

Allott, Bible, and Jackson were attorneys.

House appointees:

Walter Baring (D-NV); Laurence Burton (R-UT); John Kyl (R-IA); John Saylor (R-PA); Roy

Taylor (D-NC); Morris Udall (D-AZ). Saylor, Taylor, and Udall were attorneys.

All congressional members were members of the Interior Committees of their respective Houses. Former members who were replaced before the final report was issued included Senator Thomas Kuchel (R-CA) (1965-67), and Representatives Rogers Morton (R-MD) (1965-67); Walter Rogers (D-TX) (1965-67); Ralph Rivers (D-AK) (1966-67); Compton White (D-ID) (1965-67) and Leo O'Brien (D-NY) (1965-66).

1965-1970: PLLRC deliberations eventually produce its report, *One Third of a Nation's Land*.

The PLLRC's process was exhaustive. It commissioned 33 substantial background study reports, established a liaison with each of the state's governors, had a 34-member advisory council, employed some 60 consultants, mostly from academia, and heard testimony from nearly 1000 people at 16 public meetings.

Its report, issued in June 1970, was generally clearly written, thoughtful, contained much useful information and analysis, and advanced the national conversation about public lands policy. It still repays reading.

The public members of the commission wanted to produce draft legislation as well as a report, but the congressional members refused, preferring to maintain maximum flexibility on whether and how to implement its recommendations.

Most of its 137 principal recommendations, and the hundreds of other recommendations sprinkled around its text, were unanimous.

Overall, the Report gave rather extensive consideration to environmental issues, including, for example, calling for the exclusion of livestock grazing from "frail lands where necessary to protect and conserve the natural environment," and to take into account forage necessary for the "support of wildlife."

Public Reaction to the PLLRC Report

While most of its recommendations did not elicit much opposition, a relatively few were immediately controversial. Some criticized the report as over-emphasizing economic factors in public land decision-making, including its recommendation to recognize “the highest and best use of particular areas of land as dominant over other authorized uses.”

It treated the mining industry with kid gloves, urging modest reform rather than replacement of Mining Law of 1872. This provoked a rare dissent from Mo Udall and three of the non-congressional commission members. It called for limits on Interior’s authority to withdraw public lands from mining, and for a review of all existing withdrawals.

Its perceived “tilt,” particularly to the mining industry, led the Report to be roundly criticized by a number of environmental organizations and others like Ralph Nader, as well as by such mainstream publications as *Life* and *Sports Illustrated* magazines.

Aspinall was bruised by this. He believed environmental groups had seized on a few things in the Report to unfairly paint it as unsympathetic to their concerns. He was also more generally critical of what he called the “emotional environmental binge” that continued to gain favor across the nation.

Aspinall and the King Range

A few months after the PLLRC report was released, Aspinall sketched out what he thought modern, environmentally sensitive public land management should look like. In the fall of 1970, Congress established the nation's first national conservation area, a 68,000 acre tract of public lands managed by the BLM, in the King Range along the northern California's "lost coast." The bill was sponsored by the local Republican Congressman.

Aspinall supported the legislation in a floor speech. He acknowledged that the King Range was scenic and had "outstanding" recreational potential. He emphasized that under the legislation, grazing and mining and timber harvesting might continue with "safeguards" to protect "environmental and scenic values," and noted with satisfaction that the legislation encouraged the blocking up of public lands by exchange and acquisition.

1970-1976: Congressional deliberations over what became FLPMA.

The Democrats were firmly in control of Congress, but Republicans controlled the executive branch. Despite the turmoil over the Vietnam War and Watergate, the quarter-century up to 1973 had seen the most dramatic increase in the national standard of living in the nation's history. It was an era marked by much bipartisanship and constructive deal-making on environmental and public lands issues, which produced several landmark measures besides FLPMA, including the National Forest Management Act, the Clean Air and Water Acts, and major strengthening amendment to the Endangered Species Act.

Aspinall, meanwhile, was defeated for re-election in the Democratic Primary in 1972 by Alan Merson, an attorney who had worked at EPA.

Aspinall had been named to Environmental Action's "Dirty Dozen" list that year, and was also harmed by redistricting lines drawn by the Republican state legislature in 1970, which put some front range suburbs in his district.

The state Republicans had done a good job drawing the district lines, because Merson then narrowly lost to Republican Jim Johnson in the general election.

Aspinall lived another eleven years, and supported the "sagebrush rebellion" that emerged in the late 1970s.

Signs of Bipartisanship

Excerpts from President Nixon's Second Environmental Message, Feb. 8, 1971

The Federal public lands comprise approximately one-third of the Nation's land area. This vast domain contains land with spectacular scenery, mineral and timber resources, major wildlife habitat, ecological significance, and tremendous recreational importance. In a sense, it is the "breathing space" of the Nation.

The public lands belong to all Americans. They are part of the heritage and the birthright of every citizen. It is important, therefore, that these lands be managed wisely, that their environmental values be carefully safeguarded, and that we deal with these lands as trustees for the future. They have an important place in national land use considerations.

. . . This Administration will work closely with the Congress in evaluating the [PLLRC's] recommendations and in developing legislative and administrative programs to improve public land management.

Excerpt from 1972 Republican Platform

Public lands provide us with natural beauty, wilderness and great recreational opportunities as well as minerals, timber, food and fiber. We pledge to develop and manage these lands in a balanced way, both to protect the irreplaceable environment and to maximize the benefits of their use to our society. We will continue these conservation efforts in the years ahead.

Excerpt from 1972 Democratic Party Platform

For generations, Americans have been concerned with preserving the natural treasures of our country: Our lakes and rivers, our forests and mountains. Enlightened Americans of the past decided that the federal government should take a major role in protecting these treasures, on behalf of everyone. Today, however, neglect on the part of the Nixon Administration is threatening this most valued heritage—and that of our children. Never before in modern history have our public lands been so neglected and the responsible agencies so starved of funds.

Bipartisanship on Public Lands Begins to Weaken by 1976

Excerpt from 1976 Republican Party Platform

The vast land holdings of the federal government—approximately one-third of our nation's area—are the lands from which much of our future production of minerals must come. Public lands must be maintained for multiple use management where such uses are compatible. Public land areas should not be closed to exploration for minerals or for mining without an overriding national interest. [A portent of “drill baby drill.”]

Excerpt from 1976 Democratic Party Platform

Our irreplaceable natural and aesthetic resources must be managed to ensure abundance for future generations. Strong land and ocean use planning is an essential element of such management. The artifacts of the desert, the national forests, the wilderness areas, the endangered species, the coastal beaches and barrier dunes and other precious resources are in danger. They cannot be restored. They must be protected.

There were other indications that the politics in the west were changing. In 1974 Paul Laxalt (R) replaced the retiring Alan Bible (D) in Senate from Nevada. In 1976, Orrin Hatch (R) defeated Frank Moss (D) in Utah. That same year Republicans defeated Democratic incumbent Senators in California (Tunney lost to Hayakawa), New Mexico (Montoya lost to Schmitt), and Wyoming (McGee lost to Wallop).

FLPMA finally emerges from Congress in October 1976.

FLPMA was an amalgam of PLLRC recommendations, the 1964 Classification Act, the Nixon Administration's bill, a Senate bill crafted under Scoop Jackson, and a House bill initially crafted by Aspinall.

A handful of issues nearly sank the bill in the conference committee, including grazing permits/fees/advisory boards and mining claims and administration.

The substantial influence of the PLLRC Report on FLPMA shows that the PLLRC was much more successful than its predecessor public land commissions (1879-1880, 1903-05, 1929-31) in translating its recommendations into legislation.

FLPMA, like the PLLRC, was shaped by westerners and supported by westerners.

Although the final floor votes were not recorded, votes in the Senate on earlier versions showed lopsided margins and bipartisan support. The July 1974 Senate vote on S. 424, was 71-1 with 28 not voting; the February 1976 vote on S. 507 was 78-11.

The House vote on its version (HR 13777) in July 1976 was closer, 169-155. Much of the opposition to this bill was from liberals, mostly Democrats, presumably responding to criticism by environmental groups that regarded the bill as still too reflective of Aspinall's views.

The Conference Committee that hammered out the final version was composed almost entirely of westerners. John Melcher of Montana assumed House leadership on the bill after Aspinall's defeat, and chaired the Conference Committee.

Seven of the nine Senate Conference Committee members were westerners, 6 Dems and 3 Republicans. [Scoop Jackson (D-WA), Frank Church (D-ID), Lee Metcalf (D-MT), Bennett Johnston (D-LA), Floyd Haskell (D-CO), Dale Bumpers (D-AR), Cliff Hansen (D-WY), Mark Hatfield (D-OR), and Paul Fannin (D-AZ), replaced by Jim McClure (D-ID).]

Nine of the ten House Conference Committee members were westerners, 6 Dems and 3 Republicans. [John Melcher (D-MT), Bizz Johnson (D-CA), John Seiberling (D-OH), Mo Udall (D-AZ), Phil Burton (D-CA), Jim Santini (D-NV), Jim Weaver (D-OR), Sam Steiger (D-AZ), Don Clausen (D-CA), and Don Young (D-AK).]

FLPMA: Divestiture versus Retention, and PILOT

FLPMA begins with a policy declaration that the “public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest.”

This is another reflection that “disposal” was now accepted shorthand for “divestiture,” as distinguished from “retention.”

An essential feature of Congress’s decision to confirm a strong presumption in favor of retaining title to public lands was enactment of the Payments in Lieu of Taxes Act (PILOT) that emerged from Congress the day before FLPMA, October 20, 1976. Designed to grease relationships with state and local governments, PILOT followed substantially the recommendations of the PLLRC Chapter 14.

“Multiple Use” and “Sustained Yield”

FLPMA included these concepts, derived from the Forest Service’s Multiple Use/Sustained Yield Act of 1960 and the BLM’s Classification and Multiple Use Act of 1964. FLPMA did not define them exactly the same way, however.

The 1960 MUSY Act specified five “uses: “outdoor recreation, range, timber, watershed, and wildlife and fish.”

FLPMA had an open-ended number, “including, but not limited to,” those five (though it dropped the adjective “outdoor” before “recreation”), plus “minerals” and “natural scenic, scientific and historical values.” (FLPMA’s reference to minerals reflects the 1905 statute transferring the forest reserves to Agriculture, which kept Interior in charge of minerals on national forests.)

MUSY referred to meeting the “needs of the American people,” and called for management that did not involve “impairment of the productivity of the land.” FLPMA referred to meeting the “*present and future* needs of the American people,” and called for management that did not involve “*permanent* impairment of the productivity of the land *and the quality of the environment.*” (emphasis added)

Some other key features of FLPMA:

---It made land and resource planning a central part of the BLM management process. In fact, BLM had already created a “Management Framework Planning” process years before. The PLLRC had made some ambitious recommendations regarding planning, and Congress had seriously considered legislation to encourage beefed up land use planning by state and local governments. FLPMA resembled, in general terms, the Forest and Rangeland Renewable Resources Planning Act of 1974 and the National Forest Management Act of 1976, which gave the Forest Service a planning mandate.

---It included straightforward sale, exchange, and rights of way provisions, a withdrawal process (including a mandate to review existing withdrawals), limited acquisition authority, and law enforcement authority.

---It did not repeal the Taylor Grazing Act, but FLPMA’s Title IV included some generic grazing provisions that applied to both BLM and the national forests.

---It included a general direction that “[i]n managing the public lands, the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” (§ 302(b)).

---It did not replace the Mining Law of 1872, but § 302(b) was expressly applied to all activities carried out under the Mining Law. It also, for the first time, required federal recordation of mining claims on federal lands.

---It included a provision (§ 603) requiring review of all BLM land to identify those with potential for inclusion by Congress in the National Wilderness Preservation System (NWPS). Significantly, it generally prevented BLM from impairing the suitability of such identified areas for inclusion, until Congress provided otherwise.

---It included special provisions establishing the California Desert Conservation Area.

The effect of FLPMA's repeal of some 3500 public land laws, nearly all divestiture-oriented, went beyond symbolism.

Some of these laws were truly dead letters, but some were mischievous engines of uncertainty and litigation. For example, several different rights of way laws formed an incoherent tangle. Title V of FLPMA substituted a single, uniform process, for both the BLM and the Forest Service. FLPMA was a great advance here, and on sales and exchanges and withdrawals (broadening the Pickett Act).

FLPMA did not repeal all the older laws. Some important ones remained, including the Forest Service's General Exchange Act of 1922, the Taylor Grazing Act, and the Recreation and Public Purposes Act.

Moreover, the effect of the repeals can be overstated, for FLPMA made repeal "subject to valid existing rights." A number of these old laws did not clearly establish when "valid existing rights" had been established under them. This has proved enormously productive of rancor and litigation.

The most notorious example is RS 2477. Forty years after its repeal, Utah is busily prosecuting massive litigation to establish VER under RS 2477 on thousands of miles of alleged "public highways" across millions of acres of public lands, mostly to thwart wilderness designation and other protective actions on those lands.

FLPMA and BLM's Shrinking Land Base

Since FLPMA, the total acreage of public lands under BLM's management has shrunk substantially, from nearly 500 million to less than 250 million acres.

This has happened primarily in Alaska, the result of three things.

First, ongoing state selections under the 1959 Statehood Act, which gave Alaska more than 100 million acres.

Second, Alaska Native Corporations' selections of up to 44 million acres under the Alaska Native Claims Settlement Act in 1971.

Third, the designation of more than 100 million acres of formerly BLM-managed lands as new national parks and wildlife refuges under the 1980 Alaska National Interest Lands Conservation Act.

FLPMA gave BLM permanent management authority over the remaining public lands in Alaska. (The Taylor Grazing Act did not apply there.)

The Sagebrush Rebellion.

In 1979, the so-called “sagebrush rebellion” erupted when, under the leadership of a Republican rancher and state assemblyman, Nevada enacted a statute claiming ownership of BLM lands. A few other interior western states (Arizona, New Mexico, Utah and Wyoming) followed suit, with Wyoming also claiming ownership of Forest Service as well as BLM-managed lands. Similar bills were introduced in most of the other western states, but was defeated or vetoed.

Since FLPMA’s presumption that public lands would remain in U.S. ownership was merely a continuation of a policy that had been in place for forty years, and since FLPMA was so heavily shaped and influenced by western members of Congress of both parties, why did the Sagebrush Rebellion follow on its heels?

Some possibilities

FLPMA’s reaffirmation of the presumption that most public lands would remain in U.S. ownership, combined with its repeal of thousands of laws largely aimed at divestiture, had a powerful symbolic impact that, in retrospect, made a kind of backlash inevitable.

---The West was changing rapidly, demographically as well as politically, as the urban areas boomed and the economy of many rural areas lagged.

---President Carter's water project "hit list" in 1977, and his embrace of synthetic energy based on fossil fuels development, and the proposed mobile MX missile project in 1979, disturbed disparate interests concerned with public lands.

---There was turmoil in country, which had experienced gasoline shortages owing to the Arab oil embargo, severe inflation, disaffection with Washington, growing political polarization, and strengthening of the right, as well as the lingering aftermath of the Vietnam War and Watergate.

---Some politicians, like Nevada's Jim Santini, who had voted for FLPMA, seized the opportunity to exploit the public's unease and the rural West's dismay with a gesture that was seemingly powerful yet lacked real substance. Santini and others who helped craft the legislation blamed what they called faulty "implementation" of FLPMA by the Executive. (Santini switched parties in 1986 and won the Republican nomination for Senate but was defeated by Harry Reid.)

The “rebellion” was never anything but a political protest.

No state ever filed litigation or took any other measure to enforce the “rebellion” laws. In fact, Nevada dodged a clear opportunity to litigate the issue in a case it had previously filed against the U.S. concerning public land management. See Nevada v. U.S., 699 F.2d 486 (9th Cir. 1983).

Instead, Nevada’s first step after its “sagebrush rebellion” law was enacted was to seek assurance from the Interior Department that its “payments in lieu of taxes” would not be interrupted.

Ronald Reagan, whose campaign manager was Nevada Senator Paul Laxalt, shrewdly exploited the rebellion politically, saying “count me in as a sagebrush rebel” during his campaign. His election in 1980 helped Republicans pick up Senate seats in, among others, Alaska (where incumbent Mike Gravel had lost in the Democratic Primary), Idaho (Frank Church narrowly lost to Steve Symms), South Dakota (McGovern lost to Abnor), and Washington (Magnuson lost to Gorton).

The rebellion fizzled out in the early 1980s.

Some Nevada ranchers and some rural western counties made a meager effort to revive the rebellion in the 1990s. Ranchers claimed that U.S. ownership of public lands was unconstitutional in litigation the U.S. brought against them for grazing livestock on public lands without a permit. In the litigation, the Attorneys General of Alaska, Montana, Nevada, New Mexico and Oregon, along with a few other states, filed an *amicus* brief on the side of the U.S., stating it was “well-established that the United States is the lawful owners of the public lands.” The 9th Circuit ruled for the United States. Gardner v. United States, 107 F.3d 1314 (1997).

The Sagebrush Rebellion's Latest Iteration

In 2014, the Utah legislature passed legislation claiming ownership of public lands, and commissioned a report from a group of outside lawyers (at a cost of nearly \$1 million in state funds) on legal theories that would support it. The group submitted a 150 page “legal analysis” in December 2015, concluding that “legitimate legal theories exist” to support what some were calling the “land grab.” It heavily relied on the idea that principles of “equal footing” or “equal sovereignty” supported a state claim of ownership.

On Jan. 2, 2016, the Bundy brothers and their allies engineered an armed takeover of the Malheur National Wildlife Refuge in Oregon. On January 5, Congressman Greg Walden, a Republican who represents much of eastern Oregon, spoke on the U.S. House floor about the occupation. While “not condoning this takeover in any way,” he said “I understand and hear their anger” because of what he described as “overzealous bureaucrats and agencies” which make locals feel “oppressed” by the government.

Testifying at his criminal trial in early October, Aamon Bundy said he spoke with Walden’s office four times throughout the occupation, and that Walden’s speech inspired and encouraged him. “[Walden] was articulating, in my view, how I felt,” and “I began to understand what we were doing was working. They were actually starting to listen.”

AN ASIDE ON THE MALHEUR NATIONAL WILDLIFE REFUGE—SCENE OF THE BUNDY TAKEOVER

The Malheur National Wildlife Refuge was initially established simply as a “preserve and breeding ground for native birds” by Theodore Roosevelt on August 18, 1908. It then consisted of about 100,000 acres of public lands, mostly wetlands and shallow lakes.

Much of the uplands in the vicinity had been privatized and consolidated into large ownerships in the latter part of the 19th century through manipulation of divestiture laws like the Swamplands Act and the Homestead Act. In the agricultural depression that gripped the country in the 1920s and 1930s, a local landowner was about to declare bankruptcy and petitioned the United States to acquire its land. The U.S. acquired 65,000 acres in 1935 and an additional 14,000 acres in 1942.

Meanwhile, the U.S. sued to quiet title to nearly 82,000 acres of unsurveyed submerged lands that formed the beds of several lakes that had been included in the bird reserve Roosevelt had established. Of the dry lands bordering the lakes, the U.S. had retained ownership of about 20%, and had conveyed most of the remainder to private parties, except for about 6% which was conveyed to the state of Oregon in satisfaction of statehood land grants. Oregon argued the lakes were navigable when Oregon was admitted into the Union in 1859, and thus it owned them. The U.S. Supreme Court held for the U.S. in United States v. Oregon (1935).

The Court also held that some nearby uplands claimed by the state as part of its statehood land grants were not fixed by survey until after Roosevelt’s reservation, which kept ownership in the U.S. It also held that a 1921 Oregon state statute that purported to vest title in the state to submerged lands adjacent to lakes that were shown on U.S. surveys by so-called meander lines could not apply. “The laws of the United States,” wrote Justice Stone, “alone control the disposition of title to its lands. The states are powerless to place any limitation or restriction on that control.” Citing numerous cases, he went on to reaffirm that the “construction of grants by the United States is a federal not a state question.” The 1921 statute was nothing more than an “attempted forfeiture to the state by legislative fiat of lands which, so far as they have not passed to the individual upland proprietors, remain the property of the United States”

The State Attorneys General Weigh In.

In 2014, the Conference of Western Attorneys General (CWAG) established a study team of lawyers in state AG offices to examine the legal arguments.

The team's 50 page report, completed in 2016, contained conclusions fundamentally at odds with the Utah team's "legal analysis," concluding essentially that the case for state ownership of public lands was very weak. It cited pertinent U.S. Supreme Court decisions going back a century or more that have consistently held that the U.S. has the constitutional authority to hold ownership of the public lands indefinitely. It also found that Supreme Court precedents "provide little support" for the idea that equal footing or equal sovereignty applies to public land ownership.

In July 2016, by a vote of 11-1, the member AGs voted to accept the report. Although the official vote tally was not made public, reportedly the Utah AG abstained and Nevada AG Laxalt was the sole dissenter.

Some closing observations and opinions:

FLPMA has reshaped BLM and (is Wayne Aspinall spinning in his grave?) moved it significantly in the direction of conservation.

BLM's conservation portfolio now includes wilderness areas designated by Congress, wilderness study areas the BLM has identified pursuant to Section 603's wilderness review, conservation areas Congress has established in Idaho's Owyhee Canyonlands, Oregon's Steens Mountains, Arizona's San Pedro River Corridor, and elsewhere, as well as BLM-managed national monuments by Presidents Clinton and Obama. The 2009 Omnibus public land bill gave further statutory underpinning to BLM's conservation lands, which now encompass tens of millions of acres.

While mineral development remains an important part of its mission, it has vigorously moved to accommodate renewable energy. Title V of FLPMA has so far proved to provide a supple framework for solar and wind development, most notably in the California Desert Conservation Area established by FLPMA.

On livestock, however, the jury is still out. There are a few livestock-free areas and areas of BLM land where livestock has been reduced. While the trend line has been marginally toward more healthy lands, progress much slower.

I'll leave for others to address the land use planning process, and whether it has worked effectively.

BLM = BLCRRSM

**Bureau of Livestock, Conservation, Recreation,
Renewables and Some Mining.**

Conclusion

FLPMA was a landmark in public land policy in America, although much more evolutionary than revolutionary, and it has stood the test of time reasonably well.