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Sally K. Fairfax

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**WHO GOVERNS THE PUBLIC LANDS: WASHINGTON? THE WEST?
THE COMMUNITY**

**Sally K. Fairfax
Professor
Department of Environmental Science, Policy and Management
College of Natural Resources
Department of Landscape Architecture
College of Environmental Design
University of California
Berkeley, California
94720**

**INTEREST GROUP PARTICIPATION IN PUBLIC LAND PLANNING
AND DECISION MAKING PROCESSES:**

**PARADIGM LOST,
PARADIGM FOUND?**

**Natural Resources Law Center
University of Colorado
School of Law
Boulder, Colorado**

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PARADIGM LOST, PARADIGM FOUND?

I. Introduction

A. The purpose of this paper is to use very standard analytic tools to challenge deeply held beliefs about the nature of interest group participation in public land politics.

1. "Public lands planning and decision making" is politics: who gets to participate, who gets to frame the debate, who controls the language of legitimacy, who pays, who benefits.

2. Interest group participation in public lands politics is far more textured and interesting than the dominant notion of "capture" suggests. (See, for example, Foss, *Politics and Grass*, 1960).

3. The durable conflict of public lands politics is best understood in terms described by Hays as locally defined aspirations and democratic processes versus the requirements of a centralized, national technical society. There are two components to this durable issue:

a. central/local

b. technical elite/participatory

4. Use shifting patterns of advocacy described by Kaufman to suggest that the Progressive Era coalition of interests is trying to reassert

itself. That appears to be working; however, the world is sufficiently altered to suggest that the coalition will not work as it did before. The fundamental tensions which Hays identified continue nonetheless to define the turf in which interest groups contend.

B. The paper has four sections.

1. The second section presents the deeply held beliefs in a convenient carry-all, a critique of the standard acquisition-disposition-retention triptych that colors, and I have come to believe, poisons most thinking about public lands.

a. Regarding interest group participation, the intellectual structure mis-identifies and conceals participants, foci of advocacy, modes of resolution, and goals.

b. This partial view makes it difficult to understand what did happen and, since public lands advocates and the attentive public's understanding of public lands issues are peculiarly likely to be driven by tales of ancient struggles, what is happening and what will happen.

2. The third section presents two very familiar tools of analysis from classic scholars who shed light on the peculiar eddys and backwaters of public lands scholarship. It provides some simple guidance for transcending what is obviously nonsense in our mythology.

a. Samuel P. Hay's *Conservation and the Gospel of Efficiency* (1959) puts the progressive era tale of good guy's struggle against land grabbers and robber barons into the context of the rise of science.

b. Herbert Kaufman ("Emerging Conflicts in the Doctrines of Public Administration," 50 *APSR* 1057 [1956]) puts the rise of science into the context of competing values in the American system of public bureaucracies.

c. Kaufman's analysis very easily transforms into a cycle which, perforce, has predictive potential which can help explain where we are and where we are heading. (See Kaufman, "Administrative Decentralization and Political Power," January-February 1969 *PAR* [1969]).

3. The elaboration in the fourth section pokes these analytical tools in the general direction of my assigned topic.

a. Standard discussions of interest groups in public lands policy culminate in a tedious and unfruitful preoccupation with "captured" bureaucracies.

b. This is an unnecessarily impoverished discussion.

c. A richer tale is woven from a longer sweep of history.

d. We see the standard central/technical vs local/participatory dyads torquing around on various axes, but the basic questions remain.

II. The Myths

A. Analyzing myths is tricky, but very much in fashion. I turn for guidance to William Cronon ("A Place for Stories: Nature, History and Narrative." 78 *J. American History* 1345 [1992]): how does a story begin, end, and what is its direction? .

B. Most of our mythology can be connected with the standard acquisition-disposition-retention model of public lands history and policy. (The format probably originated, in a necessarily abbreviated form in Donaldson, *The Public Domain: Its History with Statistics* [1881]. For reference to a fully elaborated relatively recent version see Culhane, *Public Lands Politics*, 1981, at 41).

1. That configuration contains a teleology and a standard cast of characters which badly misconstrue who was participating and what was at issue. Because the story serves the interests of the dominant group it continues to be shared and continues to miseducate regarding those basics.

a. Begins: with the waste, pillage, and plunder of the 19th century disposition era, dominated by local bad guys.

b. Ends: with the onset of land retention, and the technical participation of the federal government.

c. Direction: from bad waste and disposition to good federal scientific management.

d. The narrative concerns the struggle between the good conservationists and the evil, selfish, rapacious industry which is resolved when science--in the form of the federal government--emerges to trump politics and bring wisdom to resource issues.

C. What is interesting about this in terms of interest group participation?

1. The story does not begin where the time line does.

a. Most analysts until very recently have glossed over acquisition. It is standard, for example, to assert that acquisition began in 1803. (See Coggins, Wilkinson, and Leshy, *Federal Public Land and Resources Law*, 3d Ed, 1993, at 45).

b. This further inscribes the federalness of federal lands. Leaving out state cessions, the General Land Ordinances of 1785 and 1787, and the understandings regarding the public domain that dominated our first century gives the federalness of the format an air of preordained and unchallenged naturalness. (See Abernathy, *Western Lands and the American Revolution* [1937] and, more generally Jensen, *The Articles of Confederation* [1940]. See also, Onuf, "Toward Federalism: Virginia, Congress, and the Western Lands," 34 *William and Mary Quarterly Series* 3, 353 [1977] and Onuf, *Statehood and Union: A History of the Northwest Ordinance* [1992]). State, local, and private interests are, in this distorted context, a surprise or illegitimate.

2. The shift from pillage and plunder in the 19th Century to wise federal management in the 20th emerges as teleological. The centrality of federalness noted in point b is exacerbated. (See Udall, *The Quiet Crisis*, Chapter Five, for a better than average standard rendition.)

a. The focus on federalness clouds the crucial and continuing role of states and localities in both the political process surrounding public lands management, and in the actual management of the lands themselves.

b. The focus on federalness also clouds the important role, again as participants and managers, of private parties, principally lessees.

c. The supporters of conservation are badly miscast: industry is not merely a "bad guy" but an opponent of conservation which is demonstrably incorrect. Interests supporting conservation are portrayed as good guys, but also, more obviously incorrectly, as the common man. (For some insight into how this distortion took root into the literature, see Fairfax and Tarlock, "No Water for the Woods," 15 *Idaho Law Review* 509 [1979], 534,35.)

d. The story mis-casts the opposing side. In successfully dismissing conservation opponents as selfish bad guys, it also dismissed fundamental questions of distributional equity, which issues continue to be underaddressed in current environmental advocacy, democratic process and participation.

e. With all this miscasting of participants and issues, it is difficult to see the dynamics of interest group participation, which I argue, is a constant shifting of alliances around the central-local and technical-participatory framework.

III. The Analytic Tools

A. Politics and the Constitution. It is sometimes necessary to call the water to the attention of the fish. Interest group activity is defined by the structure of politics.

1. Far more than Articles I and IV, the basic structure of government shapes public lands issues and interest group participation therein. The classic reference here is, of course, Weschler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *54 Columbia Law Rev.* 543 [1954]).

2. Few issue areas are more fundamentally defined by the structure of government established, the federal system of state and national governments, and the particular manifestation of thereof in the structuring of the federal Congress into House and Senate. The central/local issues preordained by this structure--and which indeed played a central role in defining it--are immediately and continuously apparent in the public lands context.

B. The Rise of Science. In public lands politics, the most important addition to that political structure is the rise of non-partisan technical competence as the core value in newly emergent late 19th century public bureaucracies.

1. Samuel P. Hays' contribution is to unwrap the Progressive Era conservation movement from its rhetorical and historical focus on land grabbing, land holding, and monopolies, and portray it more fruitfully as an embrace of science. (*Conservation and the Gospel of Efficiency*, 1959).

The first American conservation movement experimented with the application of the new technology to resource management. Requiring centralized and coordinated decisions, however, this procedure conflicted with American political institutions which drew their vitality from filling local needs. ... Instead of recognizing the paradoxes which their own approach raised, conservationists choose merely to identify their opposition as "selfish interests." Yet the

conservation movement raised a fundamental question in American life: How can large-scale economic development be effective and at the same time fulfill the desire for significant grass-roots participation? How can the technical requirements of an increasingly complex society be adjusted to the need for the expression of partial and limited aims? This was the basic political problem which a technological age, the spirit of which the conservation movement fully embodied, bequeathed to American society. (275-76).

2. The fundamental tension is between local, participatory decision making and centralized, technically based decision making.

3. The caricature of "local selfish interests" highlights the progressive's fundamental lack of interest in distributional effects: (Note for contrast: "For progressivism, poverty in the context of fisheries results from the irrationality of open access and the attendant economic waste produced by a bio-economic tragedy. But the essence of persistent poverty is its spatial dimension. Specifically, poverty is manifest at the micro level of the household and the community. In contrast, the decision logic of progressivism operates at the macro level of the national economy pursuing geographical "efficiency" gains.": Macinko, "Property, Crises and Place: The Meaning of Theory" PhD. Dissertation in progress, 4-21).

C. The rise of science in context: Herbert Kaufman's analysis of shifting value priorities in public administration. (See "Emerging Conflicts in the Doctrines of Public Administration," *APSR* 1057 [1956]).

1. Kaufman provides the essential connection between the early days of public domain policy and the conservation era described by Hayes, the present, and the future. Kaufman asks: What Do We as a People Want From a Bureaucracy? He answers that the dominant value has changed

over time. Problems with each dominant value have led to the emergence of another theme

a. Representativeness: the bureaucracy should be representative of the people. Presidency of Andrew Jackson; Long ballots (we elected an enormous number of public officials); the spoils system (elected officials brought in their political supporters). The problem is corruption, diversion of public goods to the managers.

b. Non-partisan technical competence: technically trained experts hired as bureaucratic decision makers will insulate decision making from politics and people. The Pendleton Act (Civil Service) of 1883: bureaucrats would be hired, promoted on the basis of merit; the Progressive Era; Teddy Roosevelt's administration; Independent boards, agencies, and panels of experts will make the key decisions outside of the normal pull and haul of partisan politics. The problem is fragmentation, and a demise of leadership. Neutral competence undercut the executive's ability to lead.

c. Executive leadership: organize government so that leadership is possible. The rise of executive budget; proliferation of Hoover Commissions, executive reorganizations.

2. Timeline as Cycle. Kaufman after all did write in 1956, the full Aristotelian flavor of his insights are found when recasting it as a cycle which, perforce, has predictive potential.

a. Return to public representation via public involvement. The second environmental movement--somewhere between 1955 and 1980--marks a return to representativeness. (See Stewart, "The Reformation of

American Administrative Law" 88 Harvard Law Rev. 1669 [1975]; see also, Kaufman, [1979]).

b. The latest switch: a return to science?

IV. The Elaboration--

A. Standard recent discussions of interest groups participation in public lands policy reflects, appropriately, applications of group theories of politics (beginning with Bentley, *The Process of Government* [1908] and Truman, *The Governmental Process* [1951]) applied with specific reference to federal agencies. The basic notion is that government decisions are the result of interest group interactions. Many tedious disciplinary issues and evolutions boil down to an overwhelming preoccupation with the issue of "capture"--an agency's agenda is controlled by its constituency. Almost painlessly captured in Culhane, *Public Lands Politics* [1981] 22-27.)

1. The standard capture tales, for those who may have missed them are Selznick, *TVA and the Grass Roots* [1949] and Foss, *Politics and Grass* [1960]. Foss's discussion is unnecessarily impoverished, underdiscussed as a tautology--he only looked at grazing issues and he found that livestock interests dominated the Bureau of Land Management. A more textured discussion is Calef, *Public Grazing, Private Lands* [1960].

2. The capture tales are not inconsistent with the framework I am constructing. They are right out of the triptych mythology discussed above, portraying the contesting parties in predictable fashion: good conservationists, bad industry.

a. Note for example, that although a reasonable hypothesis is that the National Park Service has at least as monochromatic and controlling a constituency as the Bureau ever did (and certainly does not have now), NPS has not been widely recognized or analyzed as a captured agency.

b. Note also that the capture stories are different from the turn of the century mystic: the federal government is no longer a clear good guy. Note, however, that this is not a rethinking of the benefits of centralization, bureaucracy, imperialism, and technology. The Feds have simply gone over to/been taken over by the bad guys. To this we shall return.

3. A richer tale is woven in a far longer sweep of history. To show that my basic structure here is solid, I would have to present 19th century public lands policy in terms interest groups contending on issues of local versus central control. A persuasive tale might include land speculators jockeying for position around the revolution, the Articles, and the Constitution (see Abernathy, *Western Lands and the American Revolution*, [1937] and Onuf, *Statehood and Union: A History of the Northwest Ordinance* [1992]); grants for internal improvements opposed by the "common blood, sword, and purse" argument (See Fairfax, "Federalism as if States Mattered: Resource Revenues and the Public Lands." [1986] and Donaldson, *The Public Domain: Its History with Statistics* [1881]); and, most interestingly, the rise of resource revenue sharing as a quid pro quo in western acceptance of federal retention and management of public lands Fairfax, "Federalism as if States Mattered: Resource Revenues and the Public Lands." [1986].

4. The progressive era is too well documented, in specifically Hays and Kaufman's terms, to require much elaboration.

5. A more interesting effort is to view interest group participation in the context of Kaufman's return to representativeness.

1. The return to representativeness, albeit significantly modified, suggests that the nation's embrace of science as the basis of decision making and legitimacy had ended.

2. But it was different--less electoral, and arguably, therefore, far less democratic.

a. Public interest groups became directly involved in deliberative process of executive agencies. The rise of the planning process is at least in part a reflection of a renewed emphasis on representativeness inherent in the public involvement phase of the late 1960s and 1970s.

b. And, when the results did not satisfy, they became involved through the courts. (Sax, Defending the Environment, [1971], Ch. 5).

3. The modern environmental movement, beginning in about 1955, evinces an awkward straddle regarding the fundamental progressive era tenets.

1. Consistently centrist, centralizing.

2. Consistently if not completely openly elitist. (See Sax, Mountains Without Handrails). But also, notably anti-science.

3. Awkwardly inconsistent on federal management agencies.

a. Clearcutting and capture vs Sagebrush Rebellion.

D. Things seem in a bit of a hash--perhaps we need a new paradigm?

1. Popper: Thus at the heart of the nation's public land policy one finds a conceptual and operational void. It has existed for at least three generations ... nearly all contemporary discussion of the lands seems stagnant, unable to move beyond ideas that were already clichés by World War II. "A Nest-Egg Approach to The Public Lands," in Dysart and Clawson, eds, Managing Public Lands in the Public Interest. New York, Praeger, 1988, at 87.

2. Neslon: "Public land management is ripe for a new paradigm today." "Government as Theater: Toward a New Paradigm for the Public Lands," 65 *University of Colorado Law Rev.* 335 (1994).

IV. Paradigm Found?

A. The current advocacy around the general topic "ecosystem management" appears to me to best understood as another step on Kaufman's cycle. We are, the model predicts, heading for a new wave of science.

1. The environmentalists having opened up the process to let themselves in, now see infidels claiming a place at the table.

2. The result is both the vilification of many types of publics who wish to become involved and--just what Kaufman would predict--a reembrace of non-partisan technical competence.

3. The federal agencies, never pleased by the advent of a consultative, brokered approach to public land management augured by the

public involvement era, is now happily embracing the expertise and data based *ecosystem management*. Surprise!

4. The old conservationist, anti-local elite reasserts itself--having been at loggerheads for several decades, the agency and the environmentalists see their mutual advantage in the reembrace of science.

5. The agencies can perhaps take some comfort in the fact that its stock in trade, progressive era science, is, according to this analysis, coming back in fashion. However, both they, and the affected interest groups are riding an entirely different tiger.

6. How is it different

i. The federal government is no longer the federal government of yore.

--capabilities of the states and localities are radically enhanced

--money is not available to buy local compliance

--landscape level is not the same as land ownership level;
federal agencies will have to cooperate

--now we have local environmental groups, the environmentalist agenda is changing

ii. Science is not the Science of Yore

--Scientific truth is not what it used to be--Peet and Watts,

"Development Theory and Environment in an Age of

Market Triumphalism." [Special issue on Environment and Development] 69 Economic Geography 227 (1993).

--data is radically democratized

--real ecological insight is non-existent and expensive

-- very strong process on the books for challenging bogus science

Conclusion: just as the public involvement era was not a perfect replication of Jacksonian democracy, so too the second wave of science will not merely reenact the progressive era.