Who Governs the Public Lands: Washington? The West? The Community? (September 28-30) 1994

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Constitutional and Congressional Requirements Directing Public Lands Decisionmaking

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I. Reference Materials

A. The most comprehensive and up-to-date treatment of federal public lands law is GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW, published by Clark Boardman Callaghan and regularly updated. This talk draws extensively from this excellent work.

B. A useful summary of federal public lands law is Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801 (1993)

II. Scope

A. This talk deals with federal public lands. (State lands are a separate subject not addressed here.)

1. Bureau of Land Management (BLM) Lands: approximately 175 million acres in the eleven far-western states (Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming). Principal charter for administration of BLM lands is the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 - 1784.

2. National Forests: approximately 140 million acres in the eleven far-western states. Principal charters are the Forest Service Organic Act of 1897, 16 U.S.C. §§ 473 - 482 (partially repealed 1976); Multiple Use-Sustained Yield Act (MUSYA), 16 U.S.C. §§ 528 - 531; National Forest Management Act (NFMA), 16 U.S.C. §§ 1600 - 1614.

3. Other federal lands (National Parks, Monuments, and Recreation Areas, National Wildlife Refuges, Department of Defense, etc.): approximately 50 million acres in the eleven far-western states.

B. This talk will concentrate on laws affecting BLM lands and National Forests. As used in this talk, "public lands" means BLM lands and National Forests. However, some of the material here would also apply

to National Parks, Monuments, and Recreation Areas and National Wildlife Refuges.

C. "Federal enclaves," such as military bases, are a special subject that will not be dealt with here. For a discussion of federal enclaves, see G. COGGINS & R. GLICKSMAN, *supra*, § 30.03[2].

III. Issues

A. What is the division of decisionmaking authority over public lands between federal, and state/local governments? This issue can recur at three levels:

1. Constitutional: How does the federal constitution divide public lands authority between the federal government and the states? (N.B. - The federal constitution makes no reference to local governments; local governments derive their authority from the states.)

2. Statutory: Of the constitutional authority given to the federal government, how much, if any, has been left or delegated to the state or local governments, explicitly or implicitly, by federal statutes or federal inaction?

3. Administrative: To what extent, if any, may the federal executive branch delegate its statutory authority to state or local entities?

B. What constitutional or statutory direction is there as to the *interests* (national, state, local) to be served in public lands decisionmaking? Note that this is a separate question from the question of the division of *power*. For example, Congress might give decisionmaking *power* over an issue to the federal Secretary of the Interior, yet instruct the Secretary to give primary consideration to local *interests* in exercising that power. Or the Secretary might, by regulation, establish local public lands councils, yet in the same regulation instruct those councils to consider national as well as local interests.

IV. Constitutional Allocation of Power Over Public Lands

A. Property Clause (U.S. Const., art. IV, § 3, cl. 2):

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .

Note that this is a grant of authority to Congress that is separate from, and in addition to, the powers enumerated in Article I. Thus, legislation under the Property Clause need not be justified under the Commerce Clause or other Article I authority.

B. Judicial Interpretation of the Property Clause.

The overwhelming weight of Supreme Court authority holds that the Property Clause gives Congress total authority over the management of the federal public lands. *See* Goble, *The Myth of the Classic Property Clause Doctrine*, 63 Den. L.J. 495 (1986). A couple of examples:

1. *Light v. United States*, 220 U.S. 523, 536 (1911): "The United States can prohibit absolutely or fix the terms on which its property may be used."
2. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976): "[W]e have repeatedly observed that 'the power over the public lands thus entrusted to Congress is without limitations.' . . . In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain."

C. Attempts during the "sagebrush rebellion" of the 1970s and 1980s to assert constitutional state ownership or control of federal public land failed. *See, e.g., Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990); *Nevada ex rel. Nevada State Board of Agriculture v. United States*, 512 F. Supp. 166 (D. Nev. 1981). For a discussion of the "sagebrush rebellion," see John Leshy, *Unravelling the Sagebrush Rebellion: Who Should Control the Public Lands?*, 14 U.C. DAVIS L. REV. 317 (1980).

D. More recent attempts by counties to assert control over federal public lands are likely to fail similarly. *See* Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525 (1994). For a contrary view, *see* Comment, *The "Wise Use" Movement: The Constitutionality of Local Action on Federal Lands Under the Preemption Doctrine*, 30 IDAHO L. REV. 631 (1984).

E. A state trial court in Idaho recently struck down a county ordinance that purported to assert county control over management of federal public lands. *Boundary Backpackers v. Boundary County*, No. CV 93-9955 (1st Dist., Boundary Co., Idaho, Jan. 27, 1994). The decision is currently under appeal.

F. Professor Coggins has succinctly summarized the situation: "This debate is unavailing because the courts have declared without reservation that the Property Clause means what it says: Congress has unfettered discretion to do what it will with federal lands and resources." G. COGGINS & R. GLICKSMAN, *supra*, § 3.03[3].

G. Do other constitutional provisions limit federal control over public lands? The most popular candidate is the "takings" clause of the Fifth Amendment. However, despite the recent western frenzy over "takings", the clause has extremely limited applicability to public lands.

1. To be entitled to compensation for a "taking," a claimant must establish a private property interest that has been taken.
2. Private property interests in federal lands exist only where they have been explicitly created by Congress or under Congressional authority.
3. The most plausible candidates for private property interests in federal lands are mining claims and mineral leases. Nonetheless, attempts to assert "takings" related to mining claims and mineral leases have so far been unsuccessful. For a summary of the cases, see G. COGGINS & R. GLICKSMAN, *supra*, § 3.04[3][c].

4. There is no private property interest in the availability of federal public livestock forage or timber. *United States v. Fuller*, 409 U.S. 488 (1973); *Atlas Corp. v. United States*, 895 F. 2d 745 (Fed. Cir. 1990).

5. While water rights may be compensable private property interests, a water right cannot be used to turn a related public land use, such as livestock grazing, into a compensable private property interest. *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967).

V. Is there any constitutional direction concerning the weight to be given national versus local *interests* in the management of the public lands?

A. None in the text of the property clause.

B. In *Light*, the Supreme Court stated: "All the public lands of the nation are held *in trust for the people of the whole country.* . . . Congress may establish a forest reserve [National Forest] "for what it decides to be *national and public purposes.*" 220 U.S. at 536-37 (emphasis added). Do these words suggest a constitutional "public trust doctrine" for federal public lands, similar to the public trust doctrine applied to the states? *See* Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970); Charles Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269 (1980).

C. The public trust doctrine has been successfully invoked to block state giveaways of certain state lands. *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892); *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158 (Ariz. Ct. App. 1992). But giveaways of federal land (statehood grants, homesteads, etc.) are a tradition as old as the nation.

D. Even if a federal public trust responsibility exists, it may not be

judicially enforceable. *Light*: "[I]t is not for the courts to say how that trust shall be administered. That is for Congress to determine." 220 U.S. at 536.

VI. How much of its constitutional power over public lands has Congress left or delegated to the states, implicitly or explicitly?

A. Although Congress has plenary power over the public lands, state law applies on the public lands when Congress has not preempted it. *Omachaevarria v. Idaho*, 246 U.S. 343 (1918).

B. State law may be preempted by express Congressional declaration, because it directly conflicts with federal law, because it runs contrary to the purposes of federal law, or because Congress has "occupied the field." For a comprehensive discussion of preemption in public lands law, see G. COGGINS & R. GLICKSMAN, *supra*, § 4.03.

C. Most "ordinary" state civil and criminal law unrelated to natural resources applies on the public lands because it has not been preempted.

D. With respect to several natural resources on public lands, Congress has asserted its constitutional authority, to the exclusion of state law:

1. Livestock grazing. Taylor Grazing Act, 43 U.S.C. §§ 315 - 315-o-1; National Forest Grazing Act, 16 U.S.C. §§ 580c - 580l; FLPMA, 43 U.S.C. §§ 1751 - 1753; Public Rangelands Improvement Act, 43 U.S.C. §§ 1901 - 1904.

2. Timber. Forest Service Organic Act of 1897; NFMA, 16 U.S.C. §§ 1600 - 1614.

3. Coal, oil, and gas. Mineral Leasing Act, 16 U.S.C. §§ 181 - 287.

E. With respect to some other resources, Congress has left substantial control to the states:

1. Water. Congress has acquiesced to the appropriation of water on public lands pursuant to state law. Mining Act of 1866; Desert Land Act of 1877.

2. Hunting and fishing. Congress has allowed the states to authorize and regulate hunting and fishing on BLM and Forest Service Lands. *See* MUSYA, 16 U.S.C. § 528; FLPMA, 43 U.S.C. § 1732(b).

F. Even where Congress leaves or delegates control to the states, it always retains the power to selectively reassert its authority. For example,

1. although Congress has left many wildlife management functions to the states, including the regulating of hunting and fishing, Congress has forbidden the killing or capture of wild horses and burros on the public lands. Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331 - 1340; *See Kleppe v. New Mexico*, *supra*.

2. although Congress has generally left the control of water resources to the states, Congress has implicitly or explicitly reserved federal water rights on several categories of public lands. *See generally* G. COGGINS & R. GLICKSMAN, *supra*, § 4.04[4].

G. In the BLM and Forest Service planning processes, Congress has required coordination with, and consideration of, state and local land use plans.

1. BLM. FLPMA's planning provisions include the following requirements:

> In the development and revision of land use plans, the Secretary shall
>
> . . .
>
> (8) provide for compliance with applicable pollution control laws, including *State* and Federal air, water, noise, or other pollution standards or implementation plans; and
>
> (9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies *and of the States and local governments within which the lands*

> *are located . . . and of or for Indian tribes* by, among other things, considering the policies of approved State and tribal land resource management programs.
>
> . . .
>
> and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands . . .
>
> . . .
>
> *Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.*
>
> 43 U.S.C. § 1712(c) (emphasis added).

2. The Supreme Court has held that the first of the above provisions (8) allows a state to impose an environmental permit requirement on a mine on federal public land. *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572 (1987).
3. The second provision does not allow states or counties to directly impose their land use plans on federal public lands. *Granite Rock.* But it does provide strong direction for the BLM to accommodate state and county plans in its plans.
4. Forest Service. The NFMA requires that Forest Service land use plans be "coordinated with the land and resource management planning processes of State and local governments and other Federal agencies." 16 U.S.C. § 1604(a).
5. These federal statutory provisions provide a much more solid basis for state and county involvement in federal public lands management than do arguments based on the constitution or on state sovereignty.

VII. What direction has Congress given the BLM and the Forest Service regarding the *interests* to be served in the management of the public lands?

A. Congress has instructed both the Forest Service and the BLM to follow the principle of "multiple use." FLPMA, 43 U.S.C. § 1732(a); NFMA, 16 U.S.C. § 1604(e)(1). Congress gave each agency its own definition of "multiple use," but the two definitions are nearly identical.

B. The following is the definition Congress gave the BLM:

> The term "multiple use" means the management of the public lands so that they are utilized in the combination that will *best meet the present and future needs of the American people*; . . .; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without impairment of the productivity of the land and the quality of the environment[,] with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.
>
> FLPMA, 43 U.S.C. § 1702(c).

C. The nearly identical definition for the Forest Service is in the Multiple Use-Sustained Yield Act, 16 U.S.C. § 531(a).

D. The Ninth Circuit has stated that this definition of multiple use "breathes discretion at every pore." *Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979). But Professor Coggins has argued persuasively that the definition of does contain judicially enforceable standards. George C. Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. Colo. L. Rev. 229 (1982).

E. The definition of multiple use requires that the public lands be managed in the manner that will "best meet the present and future needs of the American people." This requirement suggests that, in case of conflict,

national needs should prevail over local needs. But national needs *include* local needs; so local needs should not be neglected. Nonetheless, a decision or policy that arbitrarily elevates local interests above non-local interests would violate the definition.

F. Similarly, a policy or decision that fails to give "consideration . . . to the relative values of the resources" would violate the definition of multiple use. "The values in question [must] be informedly and rationally taken into balance." *Sierra Club v. Butz*, 3 Envtl. L. Rep. 20,292, 20,293 (9th Cir. 1973).

G. Forest Service planning regulations require the Forest Service to evaluate the "suitability" of particular areas for uses such as grazing or timbering. The regulations' definition of "suitability" implements the statutory definition of multiple use:

> *Suitability:* The appropriateness of applying certain resource management practices to a particular area of land, *as determined by an analysis of the economic and environmental consequences and the alternative uses foregone.*

36 C.F.R. § 219.3 (emphasis added).

H. The following are examples of BLM or Forest Service policies or practices that would violate the definition of multiple use:

1. Authorizing timber harvests in order to keep a local mill operating without determining whether there are other resources, more valuable from a national perspective, that are being damaged by the timber harvests.

2. Rejecting a "no-grazing" alternative for a grazing allotment on the grounds that the rancher must be kept in business, without balancing the economic importance of the ranch against the environmental consequences of the grazing. *See* Joseph M. Feller, *What is Wrong With the BLM's Management of Livestock Grazing on the Public Lands*, 30 IDAHO L. REV. 555, 566-67 (1994).

3. Rejecting a "no-grazing" alternative on the grounds that multiple use requires that grazing be allowed, or that grazing is an "historic use."

I. Case law applying the definition of "multiple use" is extremely limited. However, an administrative law judge in the Department of the Interior recently held that the BLM violated the definition when it authorized cattle grazing in environmentally sensitive canyons without evaluating the environmental consequences and "making a reasoned and informed decision as to whether grazing in those canyons is in the public interest." *National Wildlife Federation v. BLM*, No. UT-06-91-1 (U.S. Dep't of the Interior, Office of Hearings and Appeals, Hearings Div., Dec. 20, 1993). The decision is currently under appeal to the Interior Board of Land Appeals (IBLA).

VIII. What authority, if any, does the executive branch of the federal government have to delegate power to state or local bodies?

A. Through FLPMA, MUSYA, NFMA, and other statutes, Congress has vested enormous authority over the public lands in the Secretary of the Interior (and his sub-agency, the BLM) and the Secretary of Agriculture (and his sub-agency, the Forest Service). May these executive agencies in turn delegate some or all of their decisionmaking power to state or local entities?

B. FLPMA instructs the Secretary of the Interior to establish "advisory councils." 43 U.S.C. § 1739.

1. 10 - 15 members appointed by the Secretary "from among persons who are representative of the various major citizens' interests concerning the problems related to land use planning or the management of the public lands located within the area for which an advisory council is established." 43 U.S.C. § 1739(a).

2. The statute does not specify the size of the geographic area to be

covered by an advisory council; nor does it specify that the members shall be residents of the area.

3. The councils "may furnish advice" to the Secretary; they have no decisionmaking authority.

4. In addition, FLPMA mandated continuance of "grazing advisory boards" consisting solely of ranchers, but the FLPMA's authority for such boards expired at the end of 1985. 43 U.S.C. § 1753(f).

C. There is no authorization in FLPMA, NFMA, or other public lands statutes for delegation of decisionmaking authority from the federal executive branch to state or local governments or to appointed state or local councils.

D. Within the federal agencies, delegation of authority without explicit statutory authorization is routine. BLM authority is delegated to State Directors, District Managers, and Area Managers. Forest Service authority is delegated to Regional Foresters, Forest Supervisors, and District Rangers. Such delegation is required by practical necessity.

E. Delegation of decisionmaking authority *outside* the agencies would likely be held contrary to Congressional intent that the agencies manage the public lands. It may also violate the Federal Advisory Committee Act (FACA). *See infra* IX.D

F. The Reagan/Watt administration attempted to delegate a substantial portion of the BLM's range management authority to ranchers. The administration established by regulation a system of Cooperative Management Agreements (CMAs) that would have allowed selected ranchers to "manage livestock grazing on [their] allotment[s] as they determine appropriate." 48 Fed. Reg. 21,823-24 (1983). A federal district court struck down the CMA program as a "naked violation of [the government's] affirmative duties under the Taylor Grazing Act, FLPMA, and PRIA [the Public Rangelands Improvement Act]." *Natural Resources Defense Council, Inc. v. Hodel*, 618 F. Supp. 848, 868 (E.D.

Cal. 1985). The court emphasized that Congress intended for the BLM, not the ranchers, to prescribe range management practices. 618 F. Supp. at 868-871.

IX. Federal Advisory Committee Act (FACA)

A. Advisory councils set up by the BLM or the Forest Service are subject to the requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix 2 §§ 1 - 15.

B. FACA applies to all "advisory committees." "Advisory committee" is very broadly defined. *See* 5 U.S.C. Appendix 2 § 3(2). It would include various advisory committees and teams proposed in the administration's *Rangeland Reform 94* proposal, 59 Fed. Reg. 14,314, 14,319-21, 14,328-29, 14,342-43 (March 25, 1944).

C. In FACA, Congress declared that "new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary." 5 U.S.C. Appendix 2 § 2(a).

D. "[A]dvisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed . . . shall be made solely by the President or an officer of the Federal Government." 5 U.S.C. Appendix 2 § 9(b).

E. FACA imposes numerous procedural requirements on advisory committees, including the following:

1. Meetings must be open to the public. 5 U.S.C. Appendix 2 § 10(a)(1).

2. Notices of meetings must be published in the Federal Register. *Id.* § 10(a)(2).

3. "Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee," subject to "reasonable rules and regulation." *Id.* § 10(a)(3).

4. Papers "which were made available to or prepared for or by" an advisory committee must also be made available to the public for inspection and copying. *Id.* § 10(b).
5. Minutes must be kept. *Id.* § 10(c).
6. There must be a designated agency officer or employee who will attend every meeting. *Id.* § 10(e).
7. Transcripts of committee meetings must be made available at cost. *Id.* § 11(a).

X. *All* public lands decisions, regardless of whether they are made or advised by local advisory or consensus groups, must conform to a number of federal statutory requirements, including, but not limited to:

A. Environmental analysis, disclosure, and consideration of alternatives required by NEPA, 43 U.S.C. §§ 4321 - 4370d.

B. Consultation and substantive protection required by the Endangered Species Act, 16 U.S.C. §§ 1531 - 1544.

C. Certification, permits, and conformance with water quality standards required by the Clean Water Act, 33 U.S.C. § 1251 - 1387.

All public lands decisions are also subject to the general requirement of administrative law that the responsible agency provide an explanation of the reasons for its decision and how that decision satisfies applicable statutory requirements. *See, e.g., Burlington Truck Lines v. United States*, 371 U.S. 156, 167-68 (1962); *Kanawha & Hocking Coal & Coke Co.*, 112 I.B.L.A. 365, 368 (1990).