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FEDERAL LANDS AND
WATERSHED BASED MANAGEMENT APPROACHES

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CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT:
PUBLIC LANDS AND PUBLIC BENEFITS

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Federal Lands and Watershed Based Management Approaches

by Teresa Rice¹

I. Summary

The idea of watershed based resource management is taking hold in many areas of the West. A watershed, in simple terms, includes all lands draining to a common point, commonly a stream. Both land and water processes and activities impact the equilibrium or balance within the watershed.

Federal lands and land management agencies are significant players in the emerging watershed approach. Through a survey, the Natural Resources Law Center identified 76 initiatives in the West to manage resources on a watershed basis. Federal land management agency representatives are participating in these initiatives in some manner in over 50 percent of the cases examined. Likewise, participants in over 50 percent of the 76 watersheds report that there are significant federal public lands in the watershed affecting resource issues generally. Federal land management issues have been identified in more than half of these watersheds as a catalyst for the watershed effort, or as among the issues to be addressed by the effort.

Watershed management is a natural development in the shift in the policies guiding public land management from a scientific approach to greater public involvement in decision making. In the early part of this Century, public land management (and other government programs) were carried out by agency experts, under the Progressivist-era climate that promoted efficiency and sustainability of resource extraction and use.

¹Valuable research assistance on topics presented in this outline was provided by Robert Barrett and Mark Held, University of Colorado School of Law, class of 1997.

The only significant exception to the Progressivist-era, scientific management approach in government programs was the growth beginning in the 1960s of statutory requirements for public participation. Public participation in federal land management agency decision making began in the 1970s with the passage of the National Environmental Policy Act. It represented an effort to involve "new" types of constituents, including conservationists and environmentalists, balancing the influence of traditional commodity users. Robert Nelson refers to this shift to public participation as a "new standard" for proper government behavior emerging in the mid-20th Century requiring the "full involvement of all affected interest groups." In Nelson's view, "social legitimacy had come to depend on having a full representation of all those significantly impacted by a government action."

With the new public participation mandates of the 1960s and 1970s, federal land management agency views on implementation differed significantly. The Forest Service expected public input to be scientifically based and expressed frustration at input directed towards value-laden preferences for management decisions. The Bureau of Land Management, in contrast, accepted the preference input, subjecting the BLM to criticism that it was allowing "layman" to participate at a stage in planning properly the realm of "professionals" -- the inventory stage of planning (Culhane). Despite this shaky beginning, public participation programs in federal land management agencies have evolved, in part due to changing statutory directives, from a position of educating the public on why agency decisions were correct to soliciting public input prior to making a decision.

Current laws and regulations governing federal land management agencies, while requiring public review of agency decisions and promoting integrated resource management, do not clearly encourage cooperation at the local level. Agency discretion is broad enough, where the management structure supports it, to *allow* agency representatives to participate in watershed efforts. There is a growing awareness among some agency officials that traditional federal agency planning

and decision making approaches will not work in today's climate. By involving people early in agency decision making processes, plans and other activities can be modified to address concerns, thus limiting vulnerability to later attack. Recent policy directives and proposed regulatory change build on this shift by encouraging cooperative management approaches.

Where federal agency officials are, within this framework, participating in watershed based efforts, they are running up against outside and internal challenges to their participation. The Federal Advisory Committee Act (FACA), with many exceptions, prohibits agencies from meeting with groups for the purpose of obtaining consensus advice without first following procedural steps including chartering the group, and providing public notice of meetings. FACA has been used as a sword by opponents to agency involvement in watershed management activities, and as a shield by federal agency officials looking for an excuse to avoid participation in such activities. Other opponents to watershed based activities emerge from the growing sentiment against government involvement in any activity that may affect private rights.

Examples of federal agency participation in watershed management initiatives in basins throughout the West offer important preliminary lessons about the role of the federal agencies, and the benefits and problems associated with their involvement in watershed management. Indeed, agency representatives and others cite many benefits over traditional management approaches. At the same time, legal and political issues add hurdles to the process. Further examination of selected case studies, to be undertaken by the Center, will help to refine these lessons.

II. Current Laws, Regulations and Guidelines

A. Congress has recognized the watershed as an important concept in managing public lands.

1. The 1897 Organic Administration Act defines the purposes of establishing National Forests to include "securing favorable conditions of water flows" (codified at 16 U.S.C. § 475).
2. "Watershed" is listed as one of five purposes to receive "due consideration" in managing public lands (Multiple Use Sustained Yield Act of 1960, 16 U.S.C. § 528).
3. The BLM is directed to manage public lands for multiple uses, including "watershed protection" (43 U.S.C. §§ 1701(a)(7), 1702(c)).
4. Timber harvests may be conducted on national forests only where watershed conditions will not be irreversibly damaged (16 U.S.C. § 1604 (g)(3)(E)).

B. Public involvement in agency planning and environmental compliance processes is required.

1. The Federal Land Policy and Management Act calls for public participation in the BLM's Resource Management Plan (RMP) planning process (43 U.S.C. § 1712 (f),(a)).
2. Even before the agency identifies issues in the RMP, it is to develop a "public participation plan" and the public, other agencies and local governments are to be given an opportunity to suggest issues that should be addressed in the RMP (BLM Manual 1614.2 and 43 C.F.R. 1610.4-1).
3. The National Forest Management Act of 1976 requires that the Forest Service, in the development of individual Forest Plans, cooperate "with local, state and other federal agencies" (16 U.S.C. § 1604 (d)). It also requires the agency to "provide for public participation in the development, review, and revision of land management plans," such as through public meetings "or comparable

processes" (16 U.S.C. § 1604 (d)).

4. Local government plans are to be incorporated into federal land management agencies' plans to extent they are consistent with agency criteria (43 C.F.R. 1610.3-2 (BLM); 36 C.F.R. 219.7 (USFS).
 5. The National Environmental Policy Act of 1969 and associated regulations require federal land management agencies to circulate to other public agencies and for general public review and comment all draft environmental impact statements (40 C.F.R. 1503.1(a)).
- C. Recent and emerging agency directions move towards more meaningful cooperation in managing public lands.
1. A 1991 policy statement issued by the Chief of the Forest Service included several goals and strategies for improving riparian management including the directive to "develop broad-based support for a strategy that energizes people, promotes innovation, supports entrepreneurial spirit, builds on success through networking, provokes appropriate change in perspective, and recognizes those that accept the challenge" (Doppelt, et al).
 2. The BLM recently adopted the Colorado Ecosystem Management Strategy which calls for "community-based land stewardship," and includes the principle of "tying the community interest to a specific landscape, often a watershed."
 3. Proposed changes to Forest Service planning procedures include authorization for Regional Foresters or Forest Supervisors to enter into Memoranda of Understanding or other forms of agreement "to guide coordination of planning efforts" (Proposed Rule, 36 C.F.R. 219.3).
 4. The BLM is revising its planning procedures to incorporate as a minimum standard NEPA's public involvement mandates, and to require an interdisciplinary approach to planning.
- D. Moving against this trend are recent directives that may limit agencies'

discretion in working in a cooperative manner with other entities.

1. The "President's Plan" for the northwest forests may in some basins narrow the discretion of the Forest Service by limiting activities in riparian areas unless a watershed analysis is first completed and supports the proposed activity.
2. The 1996 budget bill provisions for the U.S. Forest Service emphasize the agency's timber and range programs over other programs, affecting the agency's ability to devote resources to watershed activities that may fall outside the timber and range program areas (H.R. 1977).

III. A Potential Legal Obstacle For Land Management Agency Participation: The Federal Advisory Committee Act

- A. Relevant to watershed activities, the Federal Advisory Committee Act (FACA) may be triggered during NEPA compliance procedures and other agency decision making, such as planning (5 U.S.C. Appendix 2).
- B. Compliance with the requirements of FACA is required whenever there is a committee, board, commission, council, conference, panel, task force or similar group established or used for the purpose of obtaining advice or recommendations for the federal agency (5 U.S.C. Appendix 2).
- C. Meetings may fall within an exemption from FACA requirements, several of which are relevant to watershed activities.
 1. Meetings limited to full-time federal officers or employees (5 U.S.C. Appendix 2, § 3(2)).
 2. Meetings between federal agencies and elected officials (or their designated employees) of state, local and tribal governments (P.L. 104-4, § 204(b), 2 U.S.C.A. § 1534).
 3. Meetings with an existing external organization, such as a watershed based group convened by an entity other than a federal agency or official, if not in fact used as an advisory committee (GSA Memorandum).

4. Meetings for the purpose of seeking opinions of individuals rather than consensus guidance or group recommendations (41 C.F.R. 101-6.1004(i), GSA Memorandum).
 5. Meetings initiated by a federal official to exchange facts or information (41 C.F.R. 101-6.1004 (l)).
 6. Public meetings or workshops for the purpose of exchanging views and information that are open to all interested parties (GSA Memorandum).
- D. Failure to comply with the requirements of FACA has generally resulted in courts allowing the agency to go forward accompanied by a public statement of reprimand (but see *Alabama-Tombigbee Rivers Coalition v. U.S. Dept. of the Interior*, 26 F.3d 1103 (11th Cir. 1994)(injunction proper where agency action violated FACA)).

IV. Lessons From the Watershed Survey

- A. Examination of the 76 watershed efforts identified in the Center's watershed survey reveal that in many of these efforts federal lands and land management issues are critical to addressing watershed concerns.
1. The percentage of public land is high (over 50 percent) in many of the watersheds, and there is generally a mixed pattern of federal, state, tribal and privately held lands.
 2. Issues motivating the formation of the watershed effort, or identified as significant for the watershed, include several impacting or impacted by federal land management practices.
 3. Effective solutions to resource-related problems in these basins require the cooperation of the federal land management agencies as well as other landowners.
- B. Participation models vary for federal land management agencies involved in watershed efforts.
1. In some watershed efforts, federal agencies are members of a broad

based planning group made up federal, state and local agencies and others having an interest in the basin.

2. Federal agencies may alternatively be working with other agencies as members of a technical advisory group to the umbrella watershed organization, which includes no government agency representatives
3. Some watershed groups are principally agencies (local, state and federal) working together with little or no involvement by non-agency stakeholders.

C. Both internal and external factors influence federal land managers' participation in watershed efforts.

1. Land managers are more likely to participate when their immediate (District, Forest, Regional) institutional structure supports participation.
2. Agencies tend to lose interest in the watershed effort if the issues raised by the group do not relate to their lands; if they are going to meetings only for receiving information.
3. If the local agency office is distracted by litigation or another obligation taking significant time and effort, they may not participate.
4. The existing system is a catalyst for participation for some federal land managers frustrated by a lack of structure or process for working with private landowners where private lands are critical to watershed health.

C. Agency officials realize or anticipate many benefits to participation in watershed efforts.

1. Greater public understanding and political support can be gained for federal land agency activities when the activity is requested by or developed under the guidance of a watershed based group.
2. Agencies are learning valuable information about local resource management from the experiences of indigenous landowners, which

enriches and sometimes supplants scientific management.

3. Agencies are able to participate in activities on non-federal lands that may be more effective and efficient in addressing a resource concern affecting public lands as well.
4. Funding may be easier to obtain for projects on non-federal lands, with federal agencies helping to write grant proposals and contributing in-kind assistance.
5. Participation can result in a pooling of effort in a manner that promotes more efficient use of limited resources by all participants, and produces better results overall.
6. Having top level managers (private and public) involved in watershed meetings can make it easier for staff to cooperate on watershed based activities.

D. At the same time, federal land agencies have identified problems that may arise during the watershed process.

1. Agencies cannot agree to conditions or plans that obligate them to carry out activities contrary to their legal and policy mandates, so participating agencies need be clear on their management obligations; the watershed group should be aware of the parameters of each agency's discretion.
2. The budgeting process makes it difficult to make long-term commitments to the range of watershed activities because the budget is limited to one year, and because many of the activities agencies are asked to participate in by the watershed group may be outside the program areas funded for the agency.
3. Where there is no state recognition or other process for formal recognition of these local efforts, watershed based processes may be harmed by parties going outside of the effort to get their individual needs met.
4. When watershed groups develop a plan involving federal lands, the

issue of who should prepare NEPA documents arises, as well as the issue of when the documents need to be developed.

- E. Federal agency representatives offer lessons from their experiences in watershed based management efforts.
1. Resource problems will not be solved unless local communities recognize and accept the problem as their own, and participate in developing solutions. It may be a mistake to form a watershed or broad based group before the issue has matured in the public view to where it is an obvious problem needing a solution.
 2. Some representatives believe agency involvement may be on most solid ground and least subject to a challenge when requested by a local entity.
 3. Others see the proper federal agency role as one of shared responsibility, helping to identify the problems and to develop the solution, and not merely reactionaries to others' proposals.
 4. On the ground activities should be carried out while more long-term activities, like planning, are continuing, in order to provide successful experiences to the watershed effort and build trust and credibility for the process and the participants.
 5. A common interest or focal point shared by participants is critical to the success of the effort.
 6. Strong leadership is needed to effectively recognize widely divergent views while finding enough common ground to keep the group functioning together.
 7. Today's growth pressures in many parts of the West are serving as a catalyst for federal and local agencies to work together.
 8. Agency efforts in watershed based management need to be viewed by agency officials and others as a long-term investment; seeds planted today may not mature for several years.

General References

U.S. Department of the Interior, Bureau of Land Management, Colorado Ecosystem Management Strategy (April 1995).

Paul J. Culhane, Public Land Politics: Interest Group Influence on the Forest Service and the Bureau of Land Management 235-62 (1981).

Memorandum from James L. Dean, Director, Committee Management Secretariat, General Services Administration, regarding Application of the Federal Advisory Committee Act to Intergovernmental Contacts (Mar. 21, 1994).

Bob Doppelt, Mary Scurlock, Chris Frissell and James Karr, The Pacific Rivers Council, Entering the Watershed: A New Approach to Save America's River Ecosystems (1993).

Robert L. Glicksman and George Cameron Coggins, Modern Public Land Law (1995).

Scott W. Hardt, Federal Land Management in the Twenty-First Century, 32 Public Land & Resources Law Digest 47, 60 (1995).

James L. Huffman, The Inevitability of Private Rights in Public Lands, 31 Public Land and Resources Law Digest 327, 330 (1994).

Robert H. Nelson, The Rise and Decline of the Progressive "Gospel of Efficiency," speech delivered at conference on the Future of Western Water: Defining the Public Interest," Utah State University, Logan, UT, Sept. 19, 1991.

Betsy Rieke, Natural Resources Law Center, Legal Issues Surrounding Partnering, paper presented at Bureau of Reclamation Area Managers' Workshop on Partnering, Park City Utah, Sept. 6, 1995.

Donald A. Schon, The Reflective Practitioner: How Professionals Think in Action (1983).