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State Primacy, Federal Consistency or Federal-State Consensus:
Can Cooperative Federalism Models From Other Laws Save the
Public Lands?

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CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT:
PUBLIC LANDS AND PUBLIC BENEFITS

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State Primacy, Federal Consistency or Collaborative Management:
Can Cooperative Federalism Models From Other Laws
Save Our Public Lands?

By Hope Babcock

I. Summary

Few would assert that the historical institutional paradigm for managing the nation's public lands has protected the natural resource values of those lands or provided an harmonious framework for resolving conflicts over their use. Recurrent proposals to privatize public lands or to devolve their ownership to the states compete with plans to enhance the federal presence or expand federal jurisdiction. The emergence of the wise use and county primacy ("empowerment") movements directly challenge the authority of the federal government to manage its land. While this new local and state assertiveness is not without historical basis nor completely without merit, Fairfax, Andrews & Buchsbaum, "Federalism and the Wild and Scenic Rivers Act: Now You See It, Now You Don't" 59 Wash. L. Rev. 417 (1984), its proponents have yet to offer a workable solution other than complete ouster of the federal sovereign. Shanks, This Land is Your Land (Sierra Club Books, 1984).

Some worry that an enhanced state role on public lands is inconsistent with environmental protection. The courts disagree, supporting a "rejuvenated federalism," in the administration of environmental programs, in general, and on public lands, in particular. Leshy, Granite Rock and the States' Influence Over Federal Land Use, 18 Env'tl. L. 99

(1987); New York v. United States, ___ U.S. ___, 112 S.Ct. 2408 (1992); California Coastal Commission v. Granite Rock Company, 480 U.S. 572 (1987). The era of federal dominance on public lands is over, and whatever tradition of "cooperative federalism" on these lands there has been, is unraveling.

Emerging theorems in conservation biology and ecology, which are changing our view of the natural landscape and how it should be managed, are placing additional strains on the federal-state relationship on public lands. Chaos and biological diversity have replaced equilibrium and single specie restoration as biological goals; resource management has become a grand and "risky" experiment, in which human change is viewed as just one more "flux." Bosselman & Tarlock, "The Influence of Ecological Science on American Law: An Introduction," 69 Chi.-Kent L. Rev. 847 (1994). The nature of ecosystems, which transcend political boundaries, Meyer, "The Dance of Nature: New Concepts in Ecology," 69 Chi.-Kent L. Rev. 875 (1994), require transboundary consultation, coordination and even consistency in defining and managing shared resources. Keiter, "NEPA and the Emerging Concept of Ecosystem Management on the Public Lands," 25 Land & Water L. Rev. 43 (1990).

Our present "enclave strategy" for managing public lands, found in single-use designations and politically drawn boundary lines, creates barriers to ecosystem management. Sax, "Nature and Habitat Conservation and Protection in the

United States," 20 Ecology L.Q. 47 (1993). Increasing demands for recreational and residential opportunities in the once pristine buffer zones surrounding public lands is rapidly eroding the federal land manager's ability to protect the federal portion of these systems, and eliminating any protective hedge those lands once offered. Keiter, "Taking Account of the Ecosystem on the Public Domain: Law and Ecology in the Greater Yellowstone Region," 60 U. Colo. L. Rev. 923 (1989). Institutional and process harmony among the various levels of government must be achieved not only on public domain lands, but also on adjacent and intermingled private and state lands, if the goals of conservation biology and ecosystem management are to be realized.

The era of single use dominance on public lands may be over as well. Wilkinson's "Lords Of Yesterday," Crossing the Next Meridian (Island Press 1992), have been replaced by many different public lands "communities," defined by geographic boundaries, interest and occupation. Bates, "Public Lands Communities: In Search of a Community of Values," 14 Pub. L. Law Rev. 81 (1993). Conservation biology's "adaptive management" is necessary to preserve social, not just biological diversity and to respond to flux in these communities. Institutions and procedures designed to accommodate bipolar conflicts need to be readjusted to work in a polycentric, changing world.

The working premise of this paper is unless a dramatic

change in the federalism structure for the management of public lands is made, the conflict over their use and management will continue to blight the future of these lands, just as it has marred their past. Nowhere is this conflict more intense than on "public domain" lands; those lands managed by the Bureau of Land Management (BLM) principally under the direction of the Federal Land Policy & Management Act (FLPMA). 43 U.S.C. § 1701 et seq.

This paper looks at models of "cooperative federalism" found in non-public lands laws to see whether they reduce the federalism tensions inherent in the management of public domain lands, create an ecologically rational system of natural resource management and/or facilitate the development of diversified, integrated, inclusive communities. While any acceptable substitute paradigm would also have to avoid unsettling long-held expectations, creating unnecessary costs, or fostering distributional inequity, such an analysis is beyond the scope of this paper.

The paper contains several working assumptions. First, that the present federal-state balance on public domain lands is too broken to be fixed with minor changes to existing public lands laws and institutions. The current paradigm cannot be saved. Radical change is required.

Second, the debate should move forward from the question "who should own the public lands" to what process or institutions should be in place for their management. Issues

of state or county devolution and privatization, therefore, are not discussed in this paper. (On the issue of maintaining public ownership over public domain lands compare Sax, "The Legitimacy of Collective Values: The Case of the Public Lands," 56 U. Colo. L. Rev. 537 (1985) with Huffman, "Public Lands Management in an Age of Deregulation and Privatization," 10 Pub. Lands Rev. 29 (1989)). Further, since none of the models requires a change in the normative goals set out in the public lands laws, the validity of those goals is not questioned in this paper.

A third working assumption is that the Western states are more sympathetic today to national norms calling for protection of the natural resource values of public domain lands than in days past; an attitudinal shift due in part to regional demographic changes. Bates, Getches, MacDonnell, Wilkinson, Searching Out the Headwaters: Change and Rediscovery in Western Water Policy (Island Press, 1993); Cowart & Fairfax, "Public Lands Federalism: Judicial Theory and Administrative Reality," 15 Ecology L. Q. 375 (1988). Some will find this to be a dubious assumption. Slightly more problematic is whether the Western states can undertake additional responsibilities for management of these lands without an infusion of new funds. The unfunded mandates problem could doom any solution which has this result.

Although each of the models would change the current balance of power among the three levels of governments on

public domain lands by increasing the state and/or local role, none proposes complete recision of federal authority over these lands. The paper's final assumption is that a continuing federal presence is necessary to assure consistency among states and fulfillment of national norms, and to implement multi-jurisdictional management decisions.

After examining the state primacy, federal-state consensus and federal consistency models found in the federal pollution control laws, National Estuary Program and Coastal Zone Management Act, respectively, the paper concludes that the "consistency" or "layered federalism" model comes closest to a positive "coupling" of state actions and national norms. Stewart, "Madison's Nightmare," 57 U. Chi. 335, 352 (1990). The state primacy (dual regulation) model continues existing federalism tensions, while the federal-state consensus model introduces new, potentially debilitating problems for land managers. Only the consensus model, however, offers a mechanism to achieve rational ecosystem management, because, unlike the other two, it can transcend state boundaries. The consensus model also provides the only mechanism for public lands communities to participate on an equal basis with governments in resource management decisions.

II. Failure of Existing Federalism Model

A. federal legal primacy/supremacy on public domain lands historical experience. Coggins, "The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple

Use Mandates," 14 *Envtl. L.* 1 (1983).

1. FLPMA fails to adjust this balance and provide for meaningful state role in management of public lands. Beyle, "A Comparison of the Federal Consistency Doctrine Under FLPMA and the CZMA," 9 *Va. Env'tl. L.J.* 307 (1989). FLPMA's "consistency" provisions stop short of giving states and local communities a land use planning based veto over activities on public domain lands. Leshy, "Granite Rock and the States' Influence Over Federal land Use," 18 *Env'tl. L.* 99 (1987).
- B. severely degraded public resources, tragedy of the commons. Huffman, "Public Lands Management In An Age of Deregulation and Privatization," 10 *Pub. Lands L. Rev.* 9, 49 (1980).
- C. capture of federal land management agencies by "Lords of Yesterday." Wilkinson, Crossing the Next Meridian (Island Press, 1992); Coggins, "The Law of Public Rangeland Management IV: FLMPA, PRIA, and the Multiple Use Mandate," 14 *Env'tl. L.* I (1983).
- D. state environmental management capabilities (political and legal authority, institutional capacity and information-base) have improved as a result of experience administering pollution control laws and interacting with federal government under multiple-use statutes. Fairfax, Andrews & Buchsbaum, "Federalism and the Wild and Scenic

Rivers Act: Now You See It, Now You Don't," 59 Wash. L. Rev. 417 (1984).

- E. federalism tension, friction, frustration fuel country supremacy/wide use movements. Miller, "All Is Not Quiet on the Western Front: The Battle for Public Lands," 7 Inst. on Plan., Zoning & Eminent Domain 7-1 (1994); Miller, "The Western Front Revisited," 26 Urb. Law. 845 (Fall, 1994).
- F. scientific developments and demographic changes make prevailing model anachronistic and counter-productive, create opportunities (and challenges) for federalism experiments.
 - 1. conservation biology, ecosystem management and notions of "sustainability" defy utility of political boundaries. Keiter, "Beyond the Boundary Line: Constructing a Law of Ecosystem Management," 65 U. Colo. L. Rev. 293 (1994); Keiter, "Taking Account of the Ecosystem on the Public Domain: Law and Ecology in the Greater Yellowstone Region," 60 U. Colo. L. Rev. 923 (1989); Ruhl, "Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different," 66 U. Colo. L. Rev. 555 (1995); GAO, "Ecosystem Management: Additional Actions Needed to Adequately Test a Promising Approach," GAO/RCED-94-111 (August 1994).

- a. biodiversity protection requires site-specific, decentralized decisionmaking. However, this can create problems because localized jurisdictional boundaries do not conform to scientific imperatives of habitat protection, controversies at local level intense and less subject to countervailing forces, less revenue support and regulatory power at local level, and greater potential to interfere with local property use. Tarlock, "Local Government Protection of Biodiversity: What Is Its Niche?" 60 U. Chi. L. Rev. 555 (1993).
 - b. conservation biology's adaptive management practices at odds with law's need for legal boundary certainty. Noss, "Some Principles of Conservation Biology As They Apply to Environmental Law," 69 Chi.-Kent L. Rev. 893 (1994).
2. regional demographic changes (urbanization, increasing power of recreationists and preservationists, and fragmentation into many public lands communities) threaten continuing dominance of single-interest public lands users. Also providing impetus for states to affect greater interest in increasing state fiscal and

environmental controls over public lands resources. Cowart & Fairfax, "Public Lands Federalism: Judicial Theory and Administrative Reality," 15 Ecology L. Q. 375 (1988).

II. State Primacy (dual regulation) - pollution control model

A. states promulgate/enforce own regulatory programs in compliance with strict federal guidelines. On-going federal programmatic oversight of state performance. Federal government retains authority to reassert federal jurisdiction, restrict/condition state funding, independently enforce law, if state performance unsatisfactory, and to respond to interstate problems.

1. model's predicates (poor state historical record, need for national uniformity to avoid industry forum shopping, nation's size and geographical diversity, nexus between land use and pollution, federal government's limited resources) inapposite to public lands experience. Stewart, "Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy," 86 Yale L.J. 1196 (1977).

B. model offers no reduction of federalism tensions because of conflict inherent in federal oversight role.

1. although offers substantial enhancement of state role (replaces federal agency/laws/courts with federally-approved state equivalents), friction and

potential for conflict inherent in system in which one jurisdiction takes lead in developing policies another has the responsibility to implement/fund. Elliott, "Federal Versus State Environmental Protection Standards: Can a National Policy Be Implemented Locally, Keystone Presentation: Making the Partnership Work," 22 ELR 10,010 (Jan. 1992); Melnick & Willes, "Watching the Candy Store: EPA Overfiling of Local Air Pollution Variances," 20 Ecology L.Q 207 (1993); GAO, "EPA and the States: Environmental Challenges Require a Better Working Relationship," GAO/RCED-95-64 (April 1995):

- a. states excluded from policy development, state comments/concerns not given priority
 - b. inconsistent federal oversight, micro-management of state programs, duplication, delay, conflicting decisions, lack of finality/sensitivity to state concerns
 - c. states too responsive to local political pressure, too eager to accommodate local economic interests, national goals lost in balancing equities in individual cases
2. although national uniform standards and federal oversight increase parity among states while allowing for some site-specific adjustments (SIPS/SWQS) and local experimentation (variances),

political severity of oversight tools (recision of state primacy, reduction/conditioning of federal grants, cross-compliance penalties) and limited federal resources undermine effectiveness of federal oversight and willingness to allow local experimentation.

3. federal funds/technical assistance insufficient to offset burden of being primary regulatory authority

C. although model does not eliminate barriers to rational ecosystem management to extent preserves political boundaries, some features could be helpful:

1. invites regional planning and standard setting, federal agency facilitates disputes between states

D. although public participation central feature of model, participation essentially bipolar and adversarial.

1. administrative process formalism creates barriers to participation by inchoate communities; bipolar exchange between regulated industry and government

III. Federal-State Consensus - National Estuary Program Model

A. institutional framework/process for preparation of plan by multi-jurisdictional conference (states, federal agencies, regional and international authorities, educational institutions, public) to restore/maintain designated estuaries (tragedy of commons). Federal government approves plan upon state concurrence; federal actions must be consistent with plan. 33 U.S.C. § 1330.

B. although model provides for significant reduction in federalism tensions, offers no mechanism for implementation of plan, high transaction costs.

1. achieves federal-state parity (state concurrence); flexible partnership, in which partners invited to work cooperatively and federal government's role essentially that of a facilitator. State/local acceptance of final product enhanced because participated in design. However, consensus process also creates substantial transaction costs, compromised final product. New bureaucratic structure, administration costs only partially offset by federal funds/technical assistance.

2. implementation/enforcement awaits conformance of state laws to new standards/requirements; ultra-jurisdictional solution dependent upon existing enforcement authority.

C. model's ecosystem basis for governance/jurisdictional boundaries allows for rational ecosystem management.

1. planning approach (foresight) allows for adaptive management; normative guidance reduces conflicts

D. model's consensus approach allows for examination of assumptions, invites inclusive thinking and provides means for finding common ground among various interests.

Bates, "Public Lands Communities: In Search of a Community of Values," 14 Pub. L. L. Rev. 81 (1993).

IV. Federal Consistency (layered federalism) - Coastal Zone Management Model

- A. states develop/administer federally funded/approved coastal resource management programs that meet uniform federal standards. Federal activities (within/outside plan area) affecting the coastal zone must be consistent with state programs to "maximum extent practicable" unless contrary to national interest. Coastal Zone Management Act, 16 U.S.C. § 1451 et seq; Secretary of the Interior v. California, 464 U.S. 312 (1984). Coordination between various levels of government and agencies within each level key to controlling coastal development and limiting environmental damage. Rychlak, "Coastal Zone Management and the Search for Integration," 40 Depaul L. Rev. 981 (1991).
1. federal funds and power shift to states perceived as correcting past distributional inequity (nation received benefits of coastal development and states bore costs). LaLonde, "Allocating Burden of Proof to Effectuate the Preservation and Federalism Goals of the Coastal Zone Management Act," Note, 92 Mich. L. Rev. 438 (Nov. 1993). (Distributional inequities on public lands offset just by federal funds).
 2. states' ability to manage coastal areas seen as superior to federal government, because states had resources, administrative machinery, enforcement

powers, constitutional authority, and experience. Beyle, "A Comparison of the Federal Consistency Doctrine Under FLPMA and the CZMA," 9 Va. Env'tl. L.J. 207 (1989). (Contrasts with states' public lands experience.)

3. traditional federal "sticks" (threatened cutoff of needed funds, new/expanded causes of action in federal court and detailed statutory/regulatory directives) replaced by direct financial assistance and consistency provision. Wolf, "Accommodating Tensions in the Coastal Zone: An Introduction and Overview," 25 Nat. Resources L.J. 7 (Jan. 1985).

B. substantial reduction in federalism tensions, but state lead without clear national standards and effective federal oversight can create differences between states, inequity. Federal-state tensions replaced by state-local tensions.

1. although states' powers enhanced and state/local concerns elevated above federal, states' ability to impose more stringent requirements can cause non-uniform changes in regulatory burdens imposed on applicants by federal laws, regulatory differences between coastal and non-coastal states, transaction costs. Whitney, Johnson & Perles, "State Implementation of the Coastal Zone Management Consistency Provisions - Ultra Vires or

Unconstitutional?" 12 Harv. Envtl. L. Rev. 67 (1988).

2. primarily state-enforced, although federal government can restrict/condition funding and withdraw plan approval. Program's broad scope and federal resource limitations threaten to enervate program or turn it into one-issue program. Hildreth and Johnson, "CZM in California, Oregon, and Washington," 25 Nat. Res. J. ____ (Jan. 1985).
3. elevates local concerns by encouraging states to tailor plans to meet local needs; allows for state experimentation/innovation. Although states must consider federal interests in draft plans and conform to national criteria, state plans can differ significantly, inviting forum shopping and jurisdictional inequities.
4. federal consistency requirement can function as conflict avoidance mechanism (triggers multi-jurisdictional negotiation), avoid duplication by eliminating inconsistent regulatory requirements. But consistency can also cause conflict. Various levels of government operate with "tunnel vision," independent of each other. Conflicting/redundant requirements create disharmony between governmental units, resulting in less uniformity/integration, turf wars, less environmental protection. Program

battleground for conflicting philosophies over power distribution between state/local governments. Rychlak, "Coastal Zone Management and the Search for Integration," 40 De Paul L. Rev. 981 (1991).

C. ecological focus of model offers some capacity for rational ecosystem management, but still limited by political boundaries.

1. planning approach allows for adaptive management, although can be source of conflict, because no clear guidance as to how balance should be set

D. although model's planning element invites participation by diverse community interests, once plan approved process becomes less inclusive and more formal.

V. Conclusion

No single model offers a panacea to the federalism tensions, ecosystem management irrationality and lack of community inclusivity that afflict public domain lands today. The least helpful of the models reviewed in this paper is that presented by the pollution control laws. Both the Coastal Zone Management Act and the National Estuary Program models offer features that might improve the situation on public domain lands, but each of these would require adjustment to fit the political and geographic terrain to which it would be applied.