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Abdication Can Be Fun, Join the Orgy, Everyone: A Simpleton's Perspective on Abdication of Federal Land Management Responsibilities

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OUTLINE

ABDICATION CAN BE FUN, JOIN THE ORGY, EVERYONE:* A SIMPLETON'S PERSPECTIVE ON ABDICATION OF FEDERAL LAND MANAGEMENT RESPONSIBILITIES

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*Apologies to the Hair songwriters.

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I. SYNOPSIS

One consistent theme heard nowadays is the need for local control over use of the federal lands in the area. That notion seems to be common to privatization economists, tree-huggers, ranchers, timber industry employees, sociologists, small environmental groups, and even many federal land managers -- for different reasons, of course. Privatization, another currently popular nostrum, is an ultimate form of local control. If the federal land management agencies allow local groups and influences to control use, disposition, or preservation of federal lands, they arguably will have "abdicated" their responsibilities as otherwise defined by federal law.

I dissent from the abdication-is-good notion and from the premises underlying it. To the NRLC's question: "How far should we go in devolving authority to local communities?"; I answer: "not very damn far." To the cognate question: "How much authority should stay in federal hands?"; I answer: "A whole lot if not most of it." The rationale for these contrarian if not curmudgeonish conclusions is that abdication is immoral, unlawful, undemocratic, unAmerican, and often futile.

**Apologies to the Hair songwriters.

II. Beginning Premises.

A. The United States owns the federal lands in trust for all of the people -- not just for self-selected Westerners. Light v. United States, 220 U.S. 523 (1911).

B. The constitutional duty to make law is vested in the legislative branch; the power to interpret law is inherent in the judicial branch; and the duty to uphold and enforce the law is vested in the executive branch. This simplistic formula ought to have real consequences.

C. The power to make needful rules and regulations respecting the property belonging to the United States is vested in the Congress. U.S. Const. Art. IV. The United States is still the supreme sovereign when it is also a proprietor. Kleppe v. New Mexico, 426 U.S. 529 (1976).

D. In the end, all important decisions concerning the use, disposition or preservation of the federal lands are first political and then legal; Economics, political science, sociology, biology, ecology, and every other ology are immaterial except to the extent the political decisionmakers choose to adopt or rely on them.

E. The United States is a democratic republic in which politics are inherent, indispensable, and unavoidable -- "raw politics" is how we operate as a society.

F. Ends do not justify means.

G. Many if not most of the environmental problems now so prominent on the federal lands stem directly from prior federal abdication of federal responsibilities and resultant local control:

1. Overgrazing and local "advisory" committees;

2. Excessive harvesting on substandard lands and "dependent" local communities;

3. Desert destruction and local biker clubs;

4. Overabundance of ungulates and local predator control;

5. Fish endangerment and local water districts;

6. Fishing Bridge Campground and local tourism boosters;

7. Mining wastes and a century of local and state nonregulation

8. Bombing federal employees and local zealotry.

9. Et cetera, ad nauseam.

H. The notion that fundamentally opposing value choices can be reconciled to the satisfaction of all concerned through informal conciliatory mechanisms is a fantasy, and probably a dangerous fantasy.

G. The public interest is not merely the value - neutral outcome of political battles between various private interests.

H. The Newtoid Revolution is not necessarily the Apocalypse or much of anything else.

1. Chill, mon: Inertia rules.

2. The genius of our system is periodic reexamination of first principles and assumptions; for this, the neanderthal demagogues should be thanked as well as despised.

III. Abdication in Public Land Law History

A. Aside from referring to Edward and Wallis eloping, "abdication" has censorious if not pejorative overtones.

1. It generally means "to surrender a right or a responsibility."

2. In this content, abdication refers to a federal agency turning over its decisionmaking power concerning federal land use to local groups and individuals.

B. Abdication is hardly a novel practice in the sphere of federal land management. Generally:

1. The multiple use, sustained yield statutes in large part represent an abdication of legislative responsibility to unelected bureaucrats.

a. The current proposal to create a commission to axe national park system units is a somewhat similar abdication device.

b. Many other federal land laws also delegate so much discretion to agencies that there can be no good grounds to either challenge or uphold subsequent agency actions.

2. The extreme deference shown by reviewing courts to administrative agencies in many public land cases in large part represents abdication of judicial responsibility to management agencies.

a. Udall v. Tallman, 380 U.S. 1 (1965).

b. NRDC v. Watt (BLM Reno Grazing Plan), 819 F.2d 927 (9th Cir. 1987).

3. But those forms of abdication have the imprimatur of legislative and judicial acceptance; for now, and for all of the wrong reasons, it is "legal" for Congress to delegate and for courts to look the other way.

a. United States v. Grimaud, 220 U.S. 506 (1911).

b. Lujan v. NWF, 497 U.S. 871 (1990).

c. See B(2) above.

C. In the 19th century, abdication of administrative duties imposed by statute were common and often applauded.

1. The General Land Office's oversight of acreage restrictions in homestead grants was ephemeral, to put it charitably.

2. Laws forbidding stripping of timber from public lands were honored mostly in the breach.

3. Fences contrary to the 1885 Unlawful Inclosure Act were common.

4. Perhaps the most notorious abdicatory (is that a word?) incident was the abortive effort of the Illinois Legislature to transfer Chicago's harbor to a railroad.

   a. Palms no doubt were greased -- an obvious danger of current abdication proposals.

   b. But the Supreme Court, making up a public trust doctrine as it went along, decided that this legislative abdication was too flagrantly contrary to the public interest and voided the transaction. Illinois Cent. RR. v. Illinois, 146 U.S. 398 (1892).

D. The 20th Century has seen the rise of federal land management agencies and the corresponding proliferation of abdication by the new administrative bodies.

1. Enforcement of Reclamation Act acreage and residence requirements? Bu Rec: Zilch.

2. Actual discovery of valuable mineral deposits to validate mining claims? BLM: Never mind.

3. Maintaining ecological balances in national parks? NPS: Ask the wolves.

4. Observing carrying capacity limits on federal grazing lands? BLM: Is this a trick question?

5. Ensuring that national wildlife refuges are truly refuges for wildlife? FWS: Far too inconvenient for hunters, graziers, etc.

6. Conducting timber harvests with minimum ecological disruption or environmental pollution? FS: Clearcutting is far more economical (so long as the agency and the logger do not have to pay for the damage).

7. Unlike legislative or judicial abdication of responsibility, these instances of administrative abdication are not necessarily legal.

IV. Judicial Reactions to Selected Instances of Administrative Abdication.

A. National Park Service: refusal to protect Redwood National Park from adjacent logging operations; the agency instead merely appointed study committees.

1. In its first two decisions, the court ruled that the NPS inaction violated the statute and its public trust duty and issued a mandatory injunction. Sierra Club v. Department of the Interior (Redwood NP I & II), 376 F. Supp. 90, 398 F. Supp. 284 (N.D. Cal. 1974 & 1975).

2. The court dismissed the case the third time around because none of the public or private entities whose actions were necessary would cooperate. (Redwood NP III), 424 F. Supp. 172 (N.D. Cal. 1976).

3. As not infrequently happens, Congress obviated the dispute by enlarging the Park.

B. Forest Service: refusal to assert implied reserved water rights in Colorado wilderness areas.

1. The district court ruled that the agency was entitled to water rights and that the agency had a duty to protect wilderness water resources but that the public trust doctrine did not require a

mandatory injunction. Sierra Club v. Block (Wilderness Water I), 622 F. Supp. 842 (D. Colo. 1985).

2. The Tenth Circuit later dismissed the suit on a confused bouillabaisse of procedural grounds, all premised on the lack of an immediate, dire threat to wilderness water resources. Sierra Club v. Yeutter (Wilderness Water II), 911 F.2d 1405 (10th Cir. 1990).

C. Fish and Wildlife Service: refusal to control recreational activities on the Ruby Lake Refuge that harmed waterfowl (in essence, the agency conceded decisionmaking primacy to local politicians).

1. The court not only found that the FWS had a primary duty to protect the birds, it placed the burden of showing compliance with that duty on the agency and ruled that political dictates cannot override the statutory standard. Defenders of Wildlife v. Andrus (Ruby Lake I & II), 11 ERC 2098, 455 F. Supp. 446 (D.D.C. 1978).

2. The FWS also was forced to list the spotted owl as threatened, contrary to its political preferences, because it had abdicated its

statutory responsibility. Northern Spotted Owl v. Hodel (NSO I), 716 F. Supp. 479 (W.D. Wash. 1988).

D. The Bureau of Land Management: multiple abdication of grazing management responsibilities highlighted (or lowlighted) by the Cooperative Management Agreement Program.

1. The court specifically ruled that this sort of abdication is not to be tolerated: the statute gives management responsibility to the agency, not to the ranchers. NRDC v. Hodel (CMA), 618 F. Supp. 848 (E.D. Cal. 1985).

2. Contrast this result with the Reno Grazing Plan case in which the Ninth Circuit upheld a nonplan promulgated only to appease permittees; the difference is that the agency was less blatant in its abdication. NRDC v. Hodel (Reno), 624 F. Supp. 1045 (D. Nev. 1985), aff'd without good reason, 819 F.2d 927 (9th Cir. 1987).

3. These decisions should be seen against the backdrop of BLM abdication of management authority to the supposedly regulated ranchers for more than half a century.

E. Abdication on a superscale: the life and times of James Gaius Watt.

1. Secretary Watt's efforts to privatize federal lands and resources were similar in essence to current proposals for local autonomy. See G. Coggins & D. Nagel, "Nothing Besides Remains" etc., 17 B.C. Envt. Aff. L. Rev. 473 (1990).

2. The operative slogan was: "Take what you can get now, because after the forthcoming millennium, it won't matter." Sound familiar?

3. By and large, the Watt programs failed because the abdications were contrary to statutory requirements, substantive and procedural statutory requirements.

i. Land transfers and exchanges.

ii. Offshore oil and gas.

iii. Grazing management.

iv. Onshore oil and gas.

v. Hardrock miners' autonomy.

vi. Predator control.

vii. Wilderness designation.

viii. Wilderness water rights.

V. Watts Newt, Pussycat?

A. Federal lands are national assets, not local stores to be looted in the deregulatory riots.

B. Justice Scalia cannot sell his "executive nullification" theory to a majority of the Court, so administrative abdication of management responsibility will remain subject to judicial challenge.

C. Although federal land management agencies have enormous discretion and leeway, courts have imposed some limits on attempts to abdicate management prerogatives and duties, so future cases will turn on the degree as well as the type of delegation.

D. The basic disputes in federal public land law can never be finally resolved because the interests of the contestants are too opposed.

E. Sitting down together and feeling good are merely phony substitutes for real conflict resolution.

F. Instead of allowing managers to turn their responsibilities over to local citizens' councils, a better balance will be achieved if only legislators would legislate, judges would judge, and executives would execute.