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PUBLIC LAND: HOW MUCH IS ENOUGH?

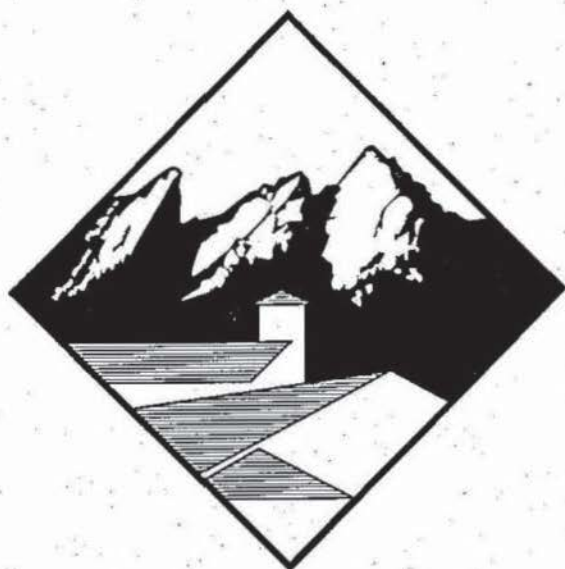
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Public Land Policy Discussion Papers Series



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PUBLIC LAND: HOW MUCH IS ENOUGH?

Dale A. Oesterle¹

I was raised in Indiana, went to college and professional school in Michigan, practiced law in Virginia and taught law in New York, until I accepted an opportunity to teach out west, in Colorado. During my time in the Midwest, South and Northeast I do not once recall the controversy over the use of public lands being a topic of conversation or concern.² One enjoyed local public parks and spoke of travelling to Yellowstone and occasionally skipped through newspaper accounts of the Sagebrush Rebellion or of the plight of spotted owls.³ But that was pretty much it.

My move to Boulder, Colorado changed that, quickly. Disputes over the use of public lands, both local and federal, provide a constant source of fodder for all types of media. Some exceptionally well-done publications, such as the bi-weekly *High Country News* from Paonia, Colorado, specialize in the area. The law school at the University of Colorado, through its nationally known Natural Resources Law Center, is a hub for information exchanges on public lands controversies. An avid reader of newspapers⁴ and itinerant conference-goer, I was exposed to and touched by the passion of all those who care about public lands. After one of my recurring requests to the acting director of the National Resources Law Center for widening spheres of academic literature, he asked for my comments

¹The Monfort Professor of Commercial Law, University of Colorado School of Law.

²I should apologize, perhaps, to people from these areas who, unknown to me, may have played a role in the public lands debate. It is safe to say, however, that during my tenure in these regions environmental law and control of pollution by private industry had center stage.

³There was discussion of ski vacations, but we did not understand, or care, that the ski slopes are often on federal land. I also vaguely remember President Reagan's present to Interior Secretary James Watt — a foot with a bullet hole in it.

⁴My favorite is the erratically edited *Fiji Times*, the "first newspaper published in the world." (Fiji is just over the date-line.)

on what I had read. With apologies to all those who have spent their lives on the issues, here is the view of a tenderfoot.⁵

1. The Economic Consequences of Public Land Ownership in the West

(a) The Vast Size of Federal Lands: Who Owns the State of Nevada?

The number of acres owned in fee by the federal government⁶ is often repeated and we are numb to it: as of 1990, federal civil and defense agencies owned and administered about 662 million acres, or about 29 percent of the total area of the United States.⁷ The federal government owns the surface or sub-surface mineral rights to another 83 million acres.

Four federal land management agencies hold 630 million acres of public land.⁸ Three of the agencies are subdivisions of the Department of the Interior; one is a subdivision of the Department of Agriculture. The primary mission of these four agencies is to allocate the use of federal land, in accordance with their respective statutory mandates. When most speak of "public lands" they are referring to the federal land held by these agencies.⁹ I will use the term "federal lands" when speaking of this acreage.

⁵This can be dangerous, as Bill McKibben found out. An easterner who is delighted over the recovery of eastern forests, he was dismayed at the western focus of environmentalists. As a consequence he wrote that the eastern recovery was the "real" environmental triumph, a more "mature mythos" than the romance of the West. He found himself cited in Gregg Easterbrook's attack on environmentalism, *A MOMENT ON THE EARTH* (1995). His friends in the West, "waging the good fight for wilderness in Utah," were not amused and he has recanted. See Bill McKibben, *An Easterner Ponders the West's Alleged Wildness*, *HIGH COUNTRY NEWS*, Sept. 18, 1995, at 14.

⁶For a history of federal lands, see BENJAMIN HORACE HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* (reprinted 1965); MARION CLAWSON & BURNELL HELD, *THE FEDERAL LANDS: THEIR USE AND MANAGEMENT* (1957); and CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (1992).

⁷The data for this and the following paragraphs on acreage of public lands are from Sarah Bates, *The Western Public Lands: An Introduction*, *WESTERN LANDS REPORT* NO. 1, Natural Resources Law Center, University of Colorado School of Law (1992).

⁸Other federal agencies also manage significant amounts of land. The Department of Defense holds about 25 million acres allotted to military uses. The Army Corps of Engineers holds 11.7 million acres for flood control and water recreation. The Bureau of Reclamation holds 6.4 million acres for irrigation. See Bates, *id.*, at 28.

⁹Western states also hold significant amounts of public land. A 1991 survey in eleven western states calculated the total acreage of state-owned lands in the West to be over 41 million acres, an average of about 6 percent of the total acreage in each state. Arizona has the highest percentage with 13 percent. See Bates, *supra* note 7, at 57.

The Bureau of Land Management in the Department of the Interior has exclusive jurisdiction over about 272 million acres, with approximately one-third of this area in Alaska. The Forest Service, in the Department of Agriculture, is the second-largest federal land manager, holding approximately 191 million acres of national forests and grasslands (12 percent of which is in Alaska). Other major land holding agencies in the Department of Interior include the Fish and Wildlife Service with nearly 91 million acres (84 percent of which is in Alaska), and the National Park Service with almost 77 million acres (71 percent in Alaska). The total budget of the four agencies for fiscal year 1988 was \$4.872 billion.

Of the federal lands, approximately 90 million acres are designated wilderness areas, and the figure could grow to over 115 million acres if Congress accepts proposals for new additions. In addition the National Wild and Scenic Rivers System protects 9,586 miles on 123 rivers (5,093 miles on 78 rivers in the western states and 3,211 miles on 25 rivers in Alaska). The National Trails System maintains 8,050 miles on 752 trails (federal agencies manage 501 of these trails).

I had heard some of the figures before, but I had no real sense for the size of this vast acreage until I had traveled some in the West. The scale of these holdings is breathtaking. The heaviest concentrations of federal lands are in the eleven western states and Alaska. *Eighty-two percent* of the State of Nevada, for example, is owned by the federal government, as is 68 percent of Alaska, 64 percent of Utah, 63 percent of Idaho, 61 percent of California, 49 percent of Wyoming, and 48 percent of Oregon. The claim that the states of Nevada and Alaska are sovereign within their boundaries is surely a jest for some.¹⁰

(b) The Federal Government Is a Major Player in the Timber, Livestock, Mineral, Oil & Gas, Recreation, Water and Electricity Markets.

For one who naively conceived of non-defense related federal lands as largely composed of parks and wildlife refuges there was a second surprise. Much of our use of

¹⁰See Charles McCoy, *Cattle Prod: Catron County, N.M., Leads a Nasty Revolt Over Eco-Protection*, WALL ST. J., Jan. 3, 1995, at 1A (describing the efforts of questionable legality by county officials to exert local control over federal land).

federal land is commodity based and the quantities produced on the land are staggering.¹¹ The federal government is a major player in the timber, grazing, mineral, oil and gas, recreation, water, and electricity businesses.

Although precise figures are elusive, even rough estimates of the government's role as commodity supplier are eye-openers. The federal government owns 50 percent of the soft-wood timber inventory in the United States. It controls approximately 12 percent of the total forage in the western states, on which 3 percent of the nation's cattle graze. Thirty percent of the United States' coal reserves lie on federal land and the production of coal from these reserves is 30 percent of the total produced in the United States.

Approximately 6 to 7 percent of national oil and gas production in any given year comes from federal land, as does 90 percent of copper production, 80 percent of silver production, and almost 100 percent of nickel production.¹² Federal lands also yield substantial amounts of phosphate, sodium, potassium, sulfur, gilsonite, asphalt, uranium, lead, zinc, sand and gravel, pumice, stone and a host of other valuable minerals.

The effect of the government participation in these various markets is both direct and indirect. The commodity-based use of federal land necessarily means that the federal government sets the price in many of these markets and heavily influences the price in the rest. Moreover, since the commodity markets involved are for raw materials or other basics (like electricity), there is a ripple effect into all the down-line markets of products that use those raw materials. The price of timber, for example, directly affects the price of homes and the price of furniture.

There is also an indirect effect on other industries not otherwise using raw materials developed on federal lands. Price affects market allocation. If timber is under-priced, at the margin, consumers will over-purchase products that use timber, such as homes, and under-

¹¹The data in this paragraph and the next come from the excellent book of teaching materials GEORGE C. COGGINS, CHARLES F. WILKINSON, & JOHN D. LESHY, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 11-26 (3d ed. 1993).

¹²E.g., OFFICE OF TECHNOLOGY ASSESSMENT, *MANAGEMENT OF FUEL AND NON-FUEL MINERALS IN FEDERAL LAND* 41-46 (R. Wright ed., 1979).

purchase timber substitutes, such as bricks, or other major purchase alternatives, such as automobiles.

Some may agree that the federal government ought not to be in the commodity supply business but argue that the solution is not to sell federal lands on which commodities are produced. The solution, they urge, is to alter the use of the land. Federal lands should be preserved as parks or wilderness, for example. But the government cannot become a neutral party in the markets by simply withdrawing its substantial assets from the fray. The owner of a substantial inventory of raw materials affects the market as significantly by choosing to withhold its assets as by choosing to sell.

If the government decided to stop all coal mining on government land, it would have a major impact on the markets for coal. The increased scarcity of coal would drive up coal prices and affect the price of, among other things, electricity. The same is true for grazing, timber and other commodities that are on federal land in sizable amounts. Home prices would reflect the withdrawal of timber resources and so on. Ownership of huge amounts of federal land by itself puts the government in the middle of a plethora of interconnected national product markets; it's as simple as that.

A good example of the effect of withdrawing federal land from commodity production came last year, when the twelve largest publicly traded forest products companies in the Northwest presented their annual reports.¹³ Profits were up a whopping 43 percent. The scarcity of timber available on federal land brought about by federal protection of the spotted owl *doubled* the value of the corporations' vast private timber holdings. But what enriched some large corporations crippled smaller, independent mills that depended on federal logs. The larger corporations not only saw their private holdings double in value, they lost many of their smaller competitors.

The federal ownership of large amounts of land, much of it with significant commodity producing potential, puts the federal government at the core of our national market system, affecting the price in nationally significant markets of raw materials and in a

¹³See Alan Pittman, *The Spotted Owl Made the Rich Richer*, HIGH COUNTRY NEWS, Aug. 7, 1995, at 5.

myriad of down-stream products. All of this alters the overall allocations of products produced and consumed within our economic system. This should give us great pause.

(c) A Fifty-Year Fire Sale on Natural Resources

How well has the federal government done in pricing its commodities? There is no surprise here — poorly.¹⁴ Grazing leases are an obvious case in point. Few doubt that federal grazing fees have been levied and continue to be levied at prices substantially below fair market value.

The federal government has not, as any private business must, priced its product to cover, at the bare minimum, its operating costs. A 1983 BLM study concluded that the direct costs of operating the federal grazing program, at \$60 million, far exceeded the revenue for the grazing fees, at \$25 million in 1983.¹⁵ And the calculation did not include a proportionate allocation of BLM overhead to the grazing program, which could add another \$60 million to costs.¹⁶ The 1983 study did not surprise, nor did it precipitate a change. A 1991 General Accounting Office (GAO) study found that BLM grazing fees were only \$1.97 per animal unit month (AUM) while the agency costs were close to double that figure at \$3.86 per AUM.¹⁷

The operating cost figures are worse when one considers not only covering costs of land management but a return on the true market value of the grazing resource that the federal government leases. In 1990 the federal government collected about \$30 million from grazing fees on national forests and BLM lands combined.¹⁸ Yet the value of grazing on national forest lands alone (at more than \$175 million), supplying about one-half of the total grazing

¹⁴For an excellent, comprehensive discussion of the old laws, still on the books, that subsidize local irrigators, ranchers, miners and loggers, see WILKINSON, *supra* note 6. My quibble with the book is that it should include recreation in its list of subsidized activities.

¹⁵See ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT (1995).

¹⁶*Id.*

¹⁷See Bates, *supra* note 7, at 46.

¹⁸*Id.* at 46-47.

value on the combined federal lands, is estimated at six times the total revenue currently collected from the combined lands.¹⁹

The government's below-market grazing fees cause grazing lessors to overuse the resource. The attractiveness of below cost grazing fees stimulates ranchers to make constant and effective demands, supported by political pressure, for the grazing resource aimed at administrative officials (usually from the BLM) who are responsible for, first, allocating land to grazing and for, second, setting limits for AUMs per acre of land so allocated. The results? Too much land is used for grazing. And land grazed is overgrazed²⁰ and an environmental mess.²¹ The sorry state of otherwise beautiful western rivers and grasslands is penalty enough. But overgrazing has other costs as well. Overuse for grazing means underuse of the land for alternative activities, fishing and recreation being the most obvious losers.²² The government also subsidizes western beef and sheep industries, at the expense of, say, chicken farming in Tennessee.

Timber sales by the United States Forest Service present a similar debacle. There are 136 million acres of timberland — commercially-valuable forest land capable of producing at least twenty cubic feet per acre per year — in public ownership.²³ In 1980, the Forest Service's own calculations showed that almost 22 percent of the volume of timber harvested in 1978 did not generate enough public revenue to cover the agency's operating costs.

¹⁹*Id.*

²⁰In 1988 a GAO study concluded that almost 60 percent of BLM's grazing allotments were in less than satisfactory condition and that the agency was taking almost no action to reduce overgrazing. *Id.* at 48.

²¹See, e.g., DAN DAGGET, *BEYOND THE RANGELAND CONFLICT* 1 (1995) ["I believe that much of the western range is in worse shape than even some of the most alarming assessments would have us believe...a significant portion of these magnificent and irreplaceable lands have deteriorated to the point where they are no longer able to rebound."]

²²See Karl Hess, Jr., *The Lesson of the Sagebluff Rebellion*, DENV. POST, Aug. 12, 1995, at 7B, col. 3:

Sagebrush rebels have done their job well. Thanks to the big government they built, and its fountain of subsidies, Western ranges now hold a third more cattle than the land can sustain and a free market would allow.... Overgrazing persists, ranges and streams degrade and deficit ranching thrives at taxpayer expense.

²³See Bates, *supra* note 7, at 52.

Fifteen years later we are no better off. A 1995 GAO study found logging in the eleven national forests of Colorado over a three-year period to cost the Forest Service \$20.53 million more than it collected in sales receipts, an \$11,100 loss for each Colorado logger employed.²⁴ The same report found logging in all national forests to cost the Forest Service \$1 billion more than it received in timber sale receipts.²⁵

Ecologists argue, with justification, that the GAO timber studies are too rosy. The studies use figures that significantly undervalue the government's timber.²⁶ Measuring the value of timber solely for the purposes of the wood products industry excludes the value of forests as the linchpins of stable ecosystems that include lichens and mosses as well as invertebrates, birds and mammals. Moreover, western forests on federal land often provide the headwaters for our western river systems.

The federal government also gives away its hard rock minerals, essentially for free. Under the Mining Law of 1872, miners can patent claims for silver, gold and other hard-rock minerals for \$2.50 an acre. It is now common for local newspapers to report on the Secretary of the Interior gnashing his teeth when he signs patents to valuable federal land over to major foreign mining conglomerates at \$2.50 an acre.²⁷ Other acquirers of patents use their right to extract "holdup" payments for others who want to put the land to other uses. Some

²⁴Adriel Bettelheim, *Logging Loss: \$1 Billion*, DENV. POST, Nov. 2, 1995, at 1, col. 1. A total of 84.6 million board feet were harvested in Colorado in 1994, enough to build about 8,400 homes. The timber industry supports about 1,850 jobs in the state. The Forest Service responded by noting that nearly \$900 million from timber sales are sent to local counties in which the forests are located. Factoring the local payments into the calculation demonstrates that the program makes a profit.

²⁵*Id.* In the Forest Service's defense, the GAO 1995 figures include as a cost payments to local communities in which the forests are located (PILT payments). If the local payments are excluded, however, the Service barely covers its administrative costs, again without allowance for basic overhead charges. The Service is, at best, selling its trees at its operating cost. No solvent business can do that.

²⁶See Michael J. Robinson, *Logging Versus an Ecosystem in Northwest Rain Forests*, HIGH COUNTRY NEWS, March 27, 1989, at 6.

²⁷*Babbitt Attacks Mining Deal*, DENV. POST., DEC. 2, 1995, at 10A, col.1 (\$3 billion in mining rights in Coronado National Forest sold for \$1,745); Adriel Bettelheim, *Babbitt Rips "Gold Heist": Feds Seek Tough New Mining Royalties*, DENV. POST, May 17, 1994, at A1 (Babbitt "angrily" signs 1,038 acres of federal land in Nevada over to Canadian mining corporation). See also Mark Obmascik, *Private Firm Mines Public Gold*, DENV. POST, Nov. 1, 1993, at 1A.

patentees, never having swung a pick, have sold their mineral claims, for example, to ski resorts, for \$100,000 an acre.²⁸

Can we justify the low prices because of stricter and more vigilant environmental controls on those who would use federal land? To the contrary, hardrock miners have left a legacy of toxic mine waste, eroded stream banks, and barren hillsides. A recent GAO report estimates that over 424,000 acres of federal land bear the scars of mining without reclamation.²⁹ Abandoned claims on BLM and National Park Service lands will require over \$320 million to reclaim.

Perhaps the most startling example of government largess is the federal government's abuse of its water resources.³⁰ For years, we have subsidized western agriculture through below-cost water sales to irrigators and we have subsidized western business development with below-cost electricity from federal water projects.³¹ In the past we have subsidized hard-rock mining operations that employed water sluices or used water pressure to remove topsoil in "hydraulic" mining.³² Indeed, one can make the point that the prior appropriation doctrine, controlling water use in most western states, *originated* with private individuals taking water off the federal lands, with a federal government unable or unwilling to resist the expropriation.³³

²⁸See NELSON, *supra* note 15, at 313.

²⁹See BATES, *supra* note 7, at 56.

³⁰See generally WILKINSON, *supra* note 6, at 219-92.

³¹A 1991 GAO report estimated that the Army Corps of Engineers' dams nationwide require a \$700-\$800 million annual subsidy. Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENV. L. REV. 405, 410 (1994).

³²See WILKINSON, *supra* note 6, at 231.

³³See *California v. United States*, 438 U.S. 645 (1978) (finding a "consistent thread of purposeful and continued deference to state water law by Congress"). Under the doctrine an appropriator obtains a vested property right in water flow superior to all later water users if the diverter has put the water to a beneficial use. The doctrine arose out of customs prevalent in the early mining camps on the public lands. See COGGINS, WILKINSON & LESHY, *supra* note 11, at 364-366 (discussion of the prior appropriation doctrine in the western states). We are now in the process of trying to reclaim water resources by state statute (which sets minimum stream flows for the protection of fish and wildlife, for example), through assertions of "implied" federal water right reservations (*Arizona v. California*, 373 U.S. 546, 1963), and by pushing the boundaries of old common law public trust doctrines. See A. Dan Tarlock, (continued...)

The United States Bureau of Reclamation charges on average *less than 30 percent* of the true cost of delivering its water to irrigators. The result is the farming of high-water-use crops, such as lettuce, on desert land.³⁴ Customers of public utilities who receive electricity from government power facilities benefit from prices that are far below market rates. The recipients of power from the Hoover Dam pay rates that are 25 percent or less of normal market prices for electric power. The availability of below-cost water and electricity has accelerated the excessive growth of population and industry in the West, beyond, perhaps, sustainable levels and at the expense of other regions.

Why are the subsidies from federal land so pervasive and so long-lived? Our federal political system, vulnerable to organized, cohesive, private interest groups, seems to spawn private grants of privilege. The Forest Service, for example, is pressured by local communities whose citizens work as loggers, by timber companies, and by the home building industry whose members benefit from higher demand when home prices reflect inexpensive raw material costs. The primary timber processing industry employed 627,000 people nationwide in 1989; nearly 24 percent of the population in the Pacific Northwest was employed in forest industries.³⁵ Federal land ownership is the vehicle, then, for federal support of the timber industry through large government sales of timber below cost.

2. Federal Land Management: The Lessons of History

The poor showing of the federal government as a manager of land resources puts in issue, among other things, whether it ought to hold such large quantities of land. There are

³³(...continued)

Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights, 1978 UTAH L. REV. 211; Charles Wilkinson, Western Water Law in Transition, 56 U. COLO. L. REV. 317 (1985). The efforts to reclaim water are running into formidable political opposition. The executive branch, for example, has refused to assert reserved water rights for wilderness. See COGGINS, WILKINSON & LESHY, *supra* note 11, at 397.

³⁴NELSON, *supra* note 15, at 350. See also Blumm, *supra* note 31, at 411 (California irrigators using Central Valley Project water have received subsidies for forty years, repaying only 1 percent of total project cost). The Bureau of Reclamation has estimated that annual irrigation subsidies in the West total \$2.2 billion. *Id.* at 411 (a 1986 estimate).

³⁵See Bates, *supra* note 7, at 52.

several possible solutions to the management problem and all have vigorous advocates. First, the government ought to turn commodity producing land over to the private sector (privatize).³⁶ Second, the government ought to price its commodities at fair market value (marketize). And third, the government ought to define its goals in broader collective value terms (preserving wildlife ecosystems, for example), which eclipse the narrower goal of seeking an economic return on its assets, and design new management structures and processes to meet these collective goals. Since the federal government has, at different times and with different resources, tried each of the three approaches, there is much to learn from our federal lands history.

(a) Disposition of Federal Land Is Problematic.

Those who view government ownership as a calamity have a pragmatic problem. Changing from government ownership to private ownership itself requires a government decision and a form of government administration. The government's record on disposing of government land is as bad as its record on managing land. Historians have documented rampant fraud, frequent caving in to intense, coalesced political groups at the expense of the public interest, and just ubiquitous poor judgment when the federal government engages in widespread land disposal programs.³⁷ An advocate of privatization must inevitably, at some

³⁶In this paper I will use the term to refer to what is also called "denationalization"—when a government divests itself of assets or businesses. Privatization is also used elsewhere to describe a government choice to delegate a public service to a private company. Many United States cities pay private firms to handle municipal garbage collection, for example. Others use the term to describe providing individuals with cash subsidies rather than with in-kind services. The United States food stamp program is a case in point.

There are a wide variety of methods to privatize. Former members of the Soviet Bloc simply give state enterprises to citizens. A common technique is to issue vouchers to the general public that can be exchanged directly for shares in a privatizing company. In other cases, the state turns over ownership directly to the workers and managers of a factory or store. In capitalist countries, privatizations tend to occur either through auction or broad public stock offerings.

³⁷The best summaries of the history of federal disposition of public lands, which largely stopped in 1936, are ROY M. ROBBINS, *OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776-1936* (1942), SAMUEL T. DANA, *FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES* (1956), and BENJAMIN HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* (reprinted 1965). Hibbard summarized the attitude of government officials and westerners alike: "they favored transferring public lands to private ownership as rapidly as possible and were not very squeamish as to how that alienation was achieved." HIBBARD, at 562.

(continued...)

level, become an advocate of sensible government action.³⁸ Without a feasible program of land disposition, put in place *by the government*, any call for privatization is inherently incomplete and suspect.

There is some recent evidence that the government may be more capable than in the past of large-scale land disposition. The Resolution Trust Corporation's (RTC) sale of the assets of bankrupt savings and loan banks³⁹ and the government's disposition of closed military bases⁴⁰ offer some hope that current land disposition by government officials may not be inherently problematic.⁴¹ The RTC, for example, had within its charge an obligation to sell undeveloped land, which included some wetlands, and has seemed to perform adequately in protecting environmental interests.⁴² The evidence from these programs is not yet all in, however. Moreover, in some matter or other, one always seems to find some reoccurrence of the old problems.⁴³

³⁷(...continued)

My favorite scandal is the swindle over swampland in 1850. Under several acts beginning in 1849, the federal government ceded swamplands to several states, with the proceeds from the sale of the lands to be devoted to reclamation by levees and drains. Agents of the states, which had agreed to sell land to dealers and speculators, would swear to federal officials that they had crossed the swampland by boat — neglecting to mention that the boat had been mounted on a wagon and pulled by horses over cultivable land. Seventy-five percent of the land reclaimed was not in any sense swampy. HIBBARD, *Id.*, at 278-87.

³⁸This point is also made well by Marion Clawson in *THE FEDERAL LANDS REVISITED* 163-65 (1983).

³⁹Congress created the Resolution Trust Corporation (RTC) in 1989 to sell off \$8 billion worth of assets left the government by failed savings and loan banks. *Final S&L Tab \$91 Billion*, Press Release, UNITED PRESS INT'L, May 16, 1995.

⁴⁰The Defense Base Closure and Realignment Act of 1990, 10 U.S.C.A. §2687 et seq. (1995).

⁴¹Widespread fraud was not in evidence, although some thought that the RTC, for example, could have used auction techniques that generated higher prices. See, e.g., *Increased Reliance on Auctions Questioned by Land Analysts*, *RTC Watch*, AMERICAN BANKER-BOND BUYER, July 13, 1992, at 1; *Buyers Making Windfalls on RTC Property Sales: Many Parcels are Quickly Resold*, THE RECORD, July 12, 1994, at C3.

⁴²*Final S&L Tab \$91 Billion*, *supra* note 39.

⁴³See, e.g., Robert W. Poole, Jr. & David Yardas, *A Shocking Approach to Privatization*, WALL ST. J., Sept. 26, 1995, at A18, col. 4 (describing President Clinton's proposed sale of several power administrations at half their worth and without an open bidding process).

A new gambit by pro-privatization forces is to declare that the government has *unwittingly* already disposed of federal land by creating a variety of private ownership rights in it.⁴⁴ Renewable grazing licenses and rafting permits "have evolved" into a form of private property that cannot be "taken" by the government (not renewed) without compensation. We do not need to privatize federal land, the argument goes, because we already have. The argument is, at its core, disingenuous. Transfers of property, with the exception of title by adverse possession or conquest, require the consent of the owner. It is a stretch to argue that the federal government has consented in any meaningful way to such transfers. Moreover, adherents urge that Congress "recognize and formalize" what exists *de facto* — that the government, for example, declare all grazing licenses permanent. The position is self-defeating. If our courts will not enforce rights to this new property (and there is no serious indication that they will)⁴⁵ without an additional express grant from the legislature, the implication is that the rights have not yet vested. This is not a formalization of what already exists.

The theoretical problem with the vested property rights position is in separating the concept of ownership from that of simple expectation. Personal decisions based on expectation of government action are not necessarily a justification for an assertion of ownership rights. One can act based on a balance of the risks, for example. At some point does the expectation become so strong that it becomes legally enforceable, even in the absence of the normal formalities? The question, in a sense, is circular; the answer will influence our judgment of what expectations are reasonable. The more extreme extensions of the new property argument unmask it for what it is, a grab for political control over federal land use. Some folks argue, with a straight face, that interested parties have a property right to roads that do not now exist through federal land, for example.

⁴⁴See NELSON, *supra* note 15, at Chapter 16, 333-64. See also Charles McCoy, *supra* note 10, at 1A (describing the property rights argument at the local level over grazing rights on federal land).

⁴⁵See Mark L. Pollot, *Property Rights and Public Resources*, paper presented at conference on REGULATORY TAKINGS & RESOURCES: WHAT ARE THE CONSTITUTIONAL LIMITS?, Natural Resources Law Center, Univ. Colo. School of Law, June 13-15, 1994. See generally *Symposium: Perspectives on Regulatory Takings*, 6 FORD. ENVTL. L. J. (1995).

(b) The Limits of Marketization: The Federal Government Is Largely Unable to Mimic the Pricing Behavior of a Private Supplier.

Can we solve our problems short of privatization by pressuring the federal government to set fees or prices that approximate what a private owner would charge (so-called fair market prices)? This is the "marketization" approach to allocation of federal land use. Can the federal government implement a workable pricing mechanism that mimics what a private supplier would charge for a similar resource? Experience with federal government management does not give us much cause for optimism.

Suppose first that the federal government attempts to set its prices to, at minimum, cover its costs of operation, a normal approach in private industry for firms that want to stave off bankruptcy. If the government set, say, its grazing fees based on its costs of administration, however, the fees could be well in excess of fair market prices charged by private land owners. There is, at present, no strong incentive for BLM officials to keep administrative expenses of grazing leases down. The BLM and government do not worry about bankruptcy. Quite the converse, higher administrative costs mean a larger agency budget, the ultimate goal of many a bureaucrat; and when a bureaucrat can dress up a budget request in the mantle of public interest by proliferating goals, so much the better.⁴⁶

Could the federal government, unable to set grazing fees based on a recovery of its costs, rely on a system that mimics fees set by private landowners? Probably not. Federal grazing land is ubiquitous in local grazing markets. Finding private grazing leases that are priced without an overriding influence from adjacent federal grazing leases may be impossible. Moreover, grazing fees ought to vary region to region and parcel to parcel, and ought to change prices quickly to reflect changing market conditions. Yet prices set by federal officials are sticky to the point of immutability. Inevitably, we would get what we have: one grazing price and land capacity decisions fixed over long periods of time.

⁴⁶An example is the old line land manager who believes "that it is morally, ethically, and professionally right to institute management practices that stop erosion, grow better forage and vegetation, and improve rangeland condition and trend. We should not have to economically justify these management practices." NELSON, *supra* note 15, at 98.

Could the government rely on an auction or competitive bidding market to set fees and prices? Some believe, for example, that the federal government should auction grazing fees to the highest bidder, parcel by parcel, to create a system of fees based on fair market prices.⁴⁷ Our experience with putative attempts at developing a competitive bidding system for coal leasing suggests that an auction system may not work.

By statute, the Department of Interior cannot accept a coal lease "which is less than the fair market value ... of the coal subject to the lease" and mandates "competitive bidding."⁴⁸ In response to the mandate, Interior has devised and used a variety of bidding systems.⁴⁹ The coal leasing program is rife with problems.

In an auction system the government must still decide on the appropriate amount of coal to lease (or land to graze) and the eligibility of individual parcels for mining (or grazing). These planning decisions will inevitably affect the prices of the leases themselves.⁵⁰ Moreover, the decisions on which coal deposits to lease present tailor-made opportunities for titanic struggles among clashing interest groups. In coal leasing, planning decisions for the past 25 years have resulted in a swirl of controversy, litigation and gridlock.⁵¹

Once allocation decisions have been set, the mechanics of an auction system have yet to be successfully worked out. In both coal and grazing leases, bidding competition for some tracts is apt to be weak because the location of the land may make it of interest to a single

⁴⁷*Marvel Considers Bid on "Disaster,"* IDAHO STATESMAN, July 11, 1995, at 1 (conservation group has bid on state rangeland and despite high bids in each of last three years, state has given leases to ranchers).

⁴⁸30 U.S.C. §201(a)(1).

⁴⁹*See National Wildlife Federation v. Burford*, 871 F.2d 849 (9th Cir. 1989) (describing Interior's shift to an entry level bid system from a prior minimum acceptable bid system).

⁵⁰Another method of allocation is by price rather than by parcel. The government sets a minimum price and accepts any offers over the minimum on designated tracts. The price determines the amount of coal leased. The issue remains, how does the government set the minimum price?

⁵¹A leasing moratorium was in place from 1971 to 1981. *See* George C. Coggins & Doris K. Nagel, "Nothing Beside Remains": *The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 527-32 (1990) (the coal leasing program is in total shambles).

firm or rancher.⁵² Federal land encircled by a private ranch,⁵³ for example, will be of interest to the ranch owner and few others. A 1976 study found that over 72 percent of the coal lease auctions had fewer than two bidders; a 1984 study found that "competition [has been] the exception rather than the rule" in coal leasing.⁵⁴

Clever auction systems for timber, designed to minimize the problem by, among other things, grouping tracts, have been blocked by both industry and environmental groups.⁵⁵ Oddly enough, these traditional opponents both believe they would be worse off under an auction system: industry believes it would have to pay more for what it already has and environmental groups believe that they would have less access to land use planning.

In short, experience with marketization shows that government efforts to mimic the behavior of private market participants in pricing its assets are not very successful. If accurate pricing of commodities is one's goal, marketization efforts by government units usually are not satisfactory — even occasional short-run successes give way to long-run problems. The simple fact of the matter is that marketization efforts will, over time, generate prices that are inferior to those produced by private markets through privatization.⁵⁶

(c) Federal Lands Are a Source of Political Pork

In the end, those who favor the retention of federal lands usually eschew marketization just as they reject privatization.⁵⁷ Those who seek to justify the government's retention of

⁵²NELSON, *supra* note 15, at 292.

⁵³This is an extreme case, but the argument is similar for the common case of remote public land in reasonable proximity to only one private ranch.

⁵⁴COGGINS, WILKINSON & LESHY, *supra* note 11, at 543.

⁵⁵For a description of the intertract bidding system see NELSON, *supra* note 15, at 292.

⁵⁶For the case for privatization, see RICHARD L. STROUP & JOHN A. BADEN, *NATURAL RESOURCES: BUREAUCRATIC MYTHS AND ENVIRONMENTAL MANAGEMENT* (1983); TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* (1991).

⁵⁷There is an important exception, discussed in the last section. A few view marketization as an alternative to privatization because land retained can later be more easily reclaimed from commodity producers. Marketization, then, is a holding position, making land available for future parks. See section 4 (c) *infra*.

federal land must find more fertile soil to till. Most who push for the retention of federal lands find the goal of marketization is easier to attack than defend. The obvious difficulty with the rejection of marketization (and privatization), acknowledged by its adherents, is the need to develop an alternative, a workable political mechanism that allocates use of a scarce resource. Thus far we have not had much success.⁵⁸

The primary lesson of our federal lands history is that those seeking and those distributing government subsidies have dominated the use and disposition of our federal lands. There are four ways to provide government subsidies to private groups within our population. In order of those that are easiest to identify and quantify to those that are the hardest to notice and most difficult to quantify, they are: cash grants, tax forgiveness, business regulations that effect monopolies, and in-kind transfers of government assets.⁵⁹ Federal lands enable the federal government to provide in-kind subsidies to any group with enough concentrated political power to access a federal political official. As a side-effect, they also create a variety of federally sponsored monopolies — park concessions are but one example.

During the first 150 years of our nation's history, the federal government disposed of public lands to subsidize railroads and canals, education, local towns, homesteading, war veterans and other recipients deemed worthy at the time, and, well, crooks. The government now retains its public lands and subsidizes groups by allocating the lands' use. Using federal land, the government effects below market cost transfers of timber, minerals, grass, electricity and water to a variety of blessed groups. At present, the fastest growing group of beneficiaries of government largess are those who use the land for recreation, both active — hiking, climbing, biking, hunting, skiing, snowmobiling, and four-wheeling — and passive — those who enjoy the scenic beauty and/or solitude of the land for contemplation, emancipation, or refreshment.⁶⁰ Often the purpose of a subsidy is simply to route federal

⁵⁸See the discussion in section 3 below.

⁵⁹Federal lands have also provided opportunities for regulatory monopolies. Monopoly grants of concession services to private industry in our national parks are an example. See note 97 *infra*.

⁶⁰No one is free from the narcotic. Some of my favorite authors and photographers access public land and chronicle its beauty, sell books for profit (blue herons charge less than super-models), and hurt the resource by encouraging more people to visit an already over-trampled area.

funds to a congressperson's local district. New parks front for regional economic development grants.⁶¹

Our federal lands have provided and will continue to provide grist for government officials dispensing favors to groups with political power. This is not all bad for some. How happy one is with this use of federal land depends on whether one's interest group is in the ascendancy or descendancy.

Political fortunes can be volatile. Environmentalists, ecstatic with the election of President Clinton, became despondent two years later with the 1994 Congressional elections. They are currently buoyed by public opinion polls that continue to show the public's concern about environmental issues.⁶² But western ranchers have shown that they continue to be formidable political opponents. Last year they defeated the Secretary of the Interior's proposal to increase grazing fees, supported by both free market and environmental advocates.⁶³

An occasionally heard rebuttal to an argument for privatization as a means of eliminating subsidies via the use of federal lands is the resigned — we subsidize private landowners too, so privatization is not a guarantee that the federal government will stay out of the subsidy business.⁶⁴ True. Private subsidies in any form seem to persist long after any legitimate reason for them survives. But the answer is to move forward on all fronts to eliminate socially wasteful subsidies, not to resign ourselves to their perpetuation.

⁶¹See Randal O'Toole, *The National Park Service*, FORBES, Nov. 20, 1995, at 160. O'Toole describes Congress's creation of parks and the misuse of the Park Service's construction budget to funnel federal money into the hands of local businesses. For example, in Scranton, Pennsylvania, Congress allocated \$65 million, and \$4 million a year thereafter, to open a small, 62-acre park holding a collection of Canadian steam locomotives. The park employs 64 full-time employees, more than those employed at Utah's Bryce Canyon National Park. *Id.* at 164.

⁶²*Like Thieves in the Night*, NEW VOICES, Sept. 1995, at 1 (describing public opinion polls opposed to both privatization and a transfer of federal land to state ownership).

⁶³The Republicans filibustered in the Senate, ending a compromise plan in legislation supported by the Secretary. The President did not take an active role in supporting the legislation. As a consequence of the defeat in the Senate, the Secretary, believing administration support of grazing fee increases was on the wane, revamped a proposed administrative rule, dropping the grazing fee increase.

⁶⁴See Randal O'Toole, *Reforming Public Land Management with New Incentives*, paper presented at CONFERENCE ON CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFITS, Natural Resources Law Center, Univ. Colo. School of Law, Oct. 11-13, 1995.

Moreover, I venture the opinion that subsidies to private owners (other than those that involve federal land) are more obvious, and less deceptive, than are subsidies that originate through the allocation of the use of federal lands, which can benefit private owners. Subsidies that involve allocation of assets — water, grass, tramping rights — are harder to cost than raw cash grants. Indeed, one of the most troublesome subsidies to identify and price, one which benefits private landowners, is low-cost water originating on federal land.

What is the most troublesome about our history of using federal land to provide in-kind subsidies to various groups is that we are now in the unenviable position of having to counteract the effects of previous subsidies with new subsidies, well in excess of the previous payments. The overpopulation of the West, which threatens its natural systems, is a direct result of the provision of below-cost resources — water, electricity, minerals, timber, and recreational areas.

Consider, for example, the picturesque town of Sheridan, Wyoming, nestled at the foot of the Bighorn Mountains. One-third of the surrounding county is federally owned.⁶⁵ The three biggest employers in town are the Veterans Administration hospital and two coal companies, which produce low-sulphur coal from shallow strip mines. Sheridan also has a saw mill that cuts studs from trees on federal land. The coal mines and the logging are profitable but ugly. Environmentally active organizations are attempting to stimulate tourism to replace the mines and the mill, but not many people in Sheridan are buying it; they do not want to eke out a living "making beds for some Californian."⁶⁶ A plea for some form of government subsidy to aid the transition seems inevitable.

The government has created, in large part, the population centers and, indeed, the *essential character* of the West. The population movement to the West and the creation of western industries in agriculture, livestock and recreation was largely the *goal* of the early federal subsidies. It is easy to sympathize with the government impulses in the early part of

⁶⁵See *When Mining Meets Golf: Development in the West*, ECONOMIST, July 1, 1995, at 21.

⁶⁶*Id.* at 22.

this century that aimed at local economic development.⁶⁷ But the early subsidies were either (pick your favorite) too effective, just wrong-headed, or have outlived their policy base. And we cannot now get rid of them.

So we now suffer requests for current government subsidies based essentially on arguments demanding a reversal of the effect of earlier federal subsidies. We need, it is claimed, to subsidize the reintroduction of wolves to counter the effect of turn of the century government bounties on wolf tails. There seems to be no way out. If the government respects current requests for subsidies aimed at preserving wildlife, for example, at the cost of local communities based on mining and timbering, we will inevitably face requests from the members of those communities for new payments or programs (relocation payments?) to counter the effect of the new subsidies. We are spiraling; the effects of yesterday's subsidies lead to today's calls for subsidies to reverse those effects, but the new calls require amounts several orders of magnitude larger. One wonders — what wolf tail bounty are we subsidizing today that will have to be reversed tomorrow?

There is unmistakable irony to the new argument that "sustainability"⁶⁸ in Western ecosystems ought to be our overriding goal and we need large government subsidies to get there. We would be better off, perhaps, going cold turkey, establishing a heavy presumption against government subsidies of all types.⁶⁹ If we put in place a presumption that we will refuse to subsidize *most anybody* through our federal lands, a more sustainable, self-supporting use of our lands with more flexibility to respond to changing political understandings would seem to be a positive result.

⁶⁷For a sympathetic treatment see WILKINSON, *supra* note 6, at 236-59 (discussing the Bureau of Reclamation's efforts to irrigate desert land).

⁶⁸There are substantial definition problems with the concept. Some believe that sustainability as a goal ought to refer only to ecosystems that exclude humans; others would include human communities.

⁶⁹Some government programs ought to be retained under this presumption. Our park system is an example. See section 4, *infra*.

3. Obscuring Abstractions in the Privatization Discussion.

Anyone opening a discussion on the merits of privatization is affected by a strong narcotic, the tendency of participants to argue passionately in lofty abstractions. Often the conversation remains entirely on this plane. Occasionally the discussion deepens into the specific, but often only to buttress an already explicit generalized position. Others have noticed and bemoaned this phenomenon using a variety of pejorative descriptions — usually that the debate is too "political," "ideological," or, the favorite of academics, "value-laden."⁷⁰

I prefer the observation that the arguments are simply too general. More attention to detail would help clear the air of much of the overused and now boring rhetoric that results from our ritualistic submission to this narcotic. Below I list a few of the currently used abstractions; not all, but the ones that seem to me to be the most harmful.

(a) References to Federal Lands as an Indistinguishable or Indivisible Resource Unit.

It is a fundamental tenet of economics, the real estate business, and even law that every parcel of land is unique. The real estate broker's well-worn axiom that the price of a parcel of land is determined by three factors — location, location and location — is familiar to most. Yet many, perhaps most, of the participants in the privatization of federal lands debate refer to federal lands as a single unit.⁷¹ The assumption is that federal lands are indistinguishable or indivisible in the context of the argument.⁷² Conservationists see federal land as rugged, unspoiled wilderness or national park areas; privatizers see federal land as a commodity (a fenced pasture or a tree farm).

Both assumptions are, of course, comical. An argument for holding federal lands to give respect to collective values sounds sensible in the abstract, but looks odd, at best, in

⁷⁰See, e.g., Richard Ganzel, *Ideology and the Politics of Public Lands* and R.W. Behan, *The Polemics and Politics of Federal Lands Management*, both in *FEDERAL LANDS POLICY* 33 and 177 (ed. Philip O. Foss, 1987).

⁷¹There are numerous examples. A widely cited article is Joseph L. Sax, *Why We Will Not (Should Not) Sell the Public Lands: Changing Conceptions of Private Property*, *UTAH L. REV.* 313 (1983). See also Joseph L. Sax, *For Sale: A Sign of the Times on the Public Domain*, paper delivered at Conference on Resources for the Future, Portland, Or., Sept. 1982.

⁷²See, e.g., SCOTT LEHMANN, *PRIVATIZING PUBLIC LANDS* (1995).

justification of the public ownership of land whose primary use is as a grazing lease allotted to one rancher, a coal mine run by a single operator, or a parcel of land in downtown Reno. The ownership of some specific parcels of federal land cannot be justified comfortably by a collective value or public goods rationale. On the other hand, an argument for selling federal land based on the fundamental advantages of capitalism over other economic systems sounds sensible in the abstract, but sounds hollow when the concern is for the conservation of a marsh used bi-annually by migrating birds.

I suspect the general arguments on privatization are a surrogate for more specific land use positions. Those who believe that federal lands give voice to collective values are often advocates for reducing the amount and type of commodities produced on federal land. Those who advocate privatization or marketization are pushing for a more commodity-oriented use of the land.⁷³ Each advocate enjoys a similar luxury, that of not tying their position to specific parcels of land.

To break the log-jam of hackneyed verbiage, perhaps we should encourage an approach to the problem from the ground up. Given a specific tract of federal land in, say, Colorado, what should we do with it? Sell it or keep it? And whether we sell it or keep it, what uses should we allow? Land that is primarily used for developing commodities — grazing livestock, mining, timber harvesting, water accumulation, or electricity generation — ought to be segregated from land that is reserved for parks, water purity, wildlife support or wilderness preservation. Moreover, we probably ought to subdivide each category by sub-purpose. The arguments about privatization are very different for land in each category and, perhaps, for land in each sub-category.

This does not seem like a radical or controversial suggestion, much less a novel one that merits the attention of an essayist. But the facts are to the contrary. When Secretary of the Interior James Watt formed a task force in the early 1980s to study the appropriateness of public ownership of selected individual tracts of land, which, as identified, constituted a very small amount of the total land held by the government, it generated a firestorm of protest.

⁷³This may not mean an increase in production. Once subsidies are eliminated, production may decrease.

The proposal, to study and evaluate, not to sell, was soon withdrawn by Watt in humiliating contrition. But more about this later.⁷⁴

When a government official *considers* the appropriateness of selling (not *decides* to sell) one tract of federal land, even if it is used only for grazing and is land-locked by private land, the debate escalates immediately into the abstract. "We'll be selling Yellowstone next ... the sacrifice of federal land is a sacrifice of civic virtuousness ..." and so on.

(b) Private Ownership Is a Loss of Public Control (and/or Access) and Public Ownership Is Public Control (and/or Access).

Implicit in the privatization debate in all but a few commentaries is the problematic assumption that the transfer of ownership from public entities to private ones necessarily means a loss of public control. The reverse assumption is also problematic: public ownership does not necessarily maximize public control. We need a more careful and thoughtful chart of the regulatory alternatives. The choice between public and private ownership is merely the first in a hierarchy of other choices, and we need to chase the alternatives into the tails of the chart before we declare our choice at the top. Government intervention to provide public goods does not require public ownership of land, nor, for that matter, does a free market in resources require private ownership in fee of the underlying land.

Consider the hierarchy of choices that begins with a decision to hold a parcel as public land. The decision to hold land in the name of government units requires a secondary decision on how to apportion the land's use. There are several major choices for each parcel. First, do we allow access or prohibit access. Second, if we allow access, do we charge for access or grant free access. Third, regardless of whether we charge for access or not, do we lease or license a tract for significant periods of time or more limited periods of time and do we lease or license for unlimited use or for specific, limited uses. And fourth, if we allow access, how do we limit access. If we charge rental and license fees how do we set them; if no or insignificant fees, how do we limit overuse.

⁷⁴See text at notes 164-174 *infra*.

A government decision to lease federal land long-term without adumbrated use limitations (and with sub-leasing permitted) is a decision to substantially divest control over the land to private parties. This is an obvious point; but government options other than unlimited leases can also in large part divest subsequent government administrations of significant amounts of public control. A government decision to grant an array of specific use leases or licenses to private parties is a decision that binds subsequent administrations. If the time periods for the leases or licenses are long or the terms renewable, the future effect is patent.

But there are more subtle ways of affecting long-term commitments. If the uses specified in an array of outstanding licenses are intertwined (water and grazing permits, for example) or if land once dedicated to a use is committed long-term to the use (a coal mine, for example), even licenses with short time periods can create significant, hard-to-alter future obligations.

On the other hand, land held in private hands is not necessarily free from public control. While I am not recommending the full use of regulatory devices, it is important to note the extent of the government's regulatory power. Land sold by the government can be sold with substantial limited-use restrictions in the title or with stipulations that other members of the public can always access the land in specified ways. The government can sell a tract with a deed covenant that the purchaser can only run a natural park on the premises, for example.

Land sold by the government in fee simple can be zoned. Within the bounds of the constitutional takings caselaw it can be, as we well understand, zoned for specific uses. The extent of zoning power, although controversial, is substantial. A parcel can be zoned to exclude all but "natural" ranching, for example (only animals indigenous to America, like the buffalo or elk, qualify). The government can also pass statutes that regulate the conduct of specific businesses and affect the use of the land. It can pass statutes regulating the conduct of those who run private nature parks (requiring minimal impact on the environment) or of those who engage in natural ranching. Finally the government can pass statutes that require private landowners to conserve and protect all wildlife or rare, indigenous flora and fauna.

The decision to sell or not to sell land itself is not exhaustive. There are hybrid public-private ownership vehicles that deserve serious consideration. In these hybrids ownership of land is deeded to a new, separate legal entity with mixed private and public stakeholders and/or claimants. There are two prominent examples: corporatization,⁷⁵ in which the new entity is a corporation with the state holding a controlling parcel of shares (or an option on a controlling parcel of shares) and private citizens the rest,⁷⁶ and public trusts,⁷⁷ in which the beneficiary is a defined subdivision of the public.⁷⁸ The aim of the hybrids is to replicate some of the organizational efficiencies of a business-style organization with an enforced sensitivity for defined public values.

In the end, the two tails of the decision tree, begun with a decision on whether to hold or sell federal land, cross on a scale that represents the degree of residual public control in the option chosen. Federal land, leased long term without use restrictions, for example, is subject to less ongoing public control than heavily conditioned and zoned privately-held land.

(c) The Federal Lands Are Public Goods.

The argument is often made that federal lands should be retained because they are a public good. If one can justify the costs of inaccurate pricing of government-owned commodities by gains in respectable *collective* values, values not reflected in market price mechanisms, then privatization of the resource or approximations of market price by government planning are beside the point.

⁷⁵See Robert Nelson, *Ideology and Public Land Policy: The Current Crisis*, RETHINKING THE FEDERAL LANDS 275, 291 (Sterling Brubaker, ed. 1984).

⁷⁶New Zealand has been the leader in the corporatization movement. See IAN DUNCAN & ALAN BOLLARD, CORPORATIZATION AND PRIVATIZATION: LESSONS FROM NEW ZEALAND (1992).

⁷⁷The beneficiaries can either be government appointees or be elected by the beneficiaries.

⁷⁸For a discussion of state land trusts, see Sally Fairfax, *Thinking the Unthinkable: States as Public Land Managers*, paper presented at CONFERENCE ON CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFITS, Natural Resources Law Center, Univ. Colo. School of Law, Oct. 11-13, 1995 (state land trusts exceed 183 million acres nationwide). See *Who Should Run the West*, ECONOMIST, Nov. 4, 1995, at 27 (discussing the benefits of state land trusts and noting that state land trusts, with one-fifth the size of federal lands, returned more revenue than the federal lands).

There are two versions of the collective value position. The moderate version of the position is that existing collective values are not furthered by market pricing mechanisms and that government action is necessary to correct certain chronic market failures (to give effect to tastes);⁷⁹ the strong version of the position is that collective ownership *aids in the development* of new and preferred collective values (it elevates tastes).

The collective values⁸⁰ argument for federal lands is powerful and is to some extent undeniable.⁸¹ As I note in section four below,⁸² I find the collective value argument persuasive when applied to the retention of land in public ownership for parks, wilderness and wildlife protection. What is troublesome about the collective value argument is, first, that most advocates seem to overplay it, applying it indiscriminately across different types of land with different uses (this is also the subject of subsection (a) above⁸³), and second, that some advocates view the point, once declared, as ending the need for any additional discussion. Both fallacies are considered in order below.

The distinguishing feature of a public good is that consumption by one does not reduce the availability of the good for others. It is often stated that passive recreational use of federal lands satisfies the public goods criterion — one person viewing a waterfall does not

⁷⁹See, e.g., John V. Krutilla et al., *Public Versus Private Ownership: The Federal Lands Case*, 2 J. POL'Y ANALYSIS & MGMT. 548 (1983).

⁸⁰Decades ago, economists recognized that some things desired by the public could not be distributed or allocated through a private market system because providing the good to any member of a referent group made it simultaneously available to all members of the group. National defense is the classic example. Consumption by one individual does not reduce the availability of the good for any other individual in the relevant group.

⁸¹For a general (too general) defense of collective management, see MARK SAGOFF, *THE ECONOMY OF THE EARTH* (1988); LEHMANN, *supra* note 72; Joseph L. Sax, *The Legitimacy of Collective Values: The Case of the Public Lands*, 56 U. COLO. L. REV. 537 (1985).

⁸²See text at notes 133-163 *infra*.

⁸³They do not make distinctions among the types of land held by the government. Moreover, a park is not a "pure" public good.

reduce the benefits available to others.⁸⁴ Even assuming that all federal lands are scenic, the argument is, well, false.

Sophisticated economists claim that federal land is, at best, a combination of private and public goods.⁸⁵ The spatial limitations of the waterfall overlook necessary for accommodating visitors creates the attributes of a private good; the space taken by one viewer at any given moment reduces the remaining space available for others. Add the problems of maintaining parking for the overlook and the problems created by heavy traffic (refuse, wildlife displacement) and one has a classic allocation problem that can be solved by capturing the resource and charging fees.

What is the public goods aspect of federal land? It is the value that *nonusers* place on the land. In other words, Yellowstone is a public good for those who will never use Yellowstone National Park but who place value on having the park for conservation, for example, or who value having *others* use the park for the positive impact it will have on their character.⁸⁶ A common version of the position is our heart-felt belief that we must preserve wilderness for subsequent generations (our unborn children). The arguments are multi-faceted and can be very spiritual: the federal land, some declare, is a core part of our national identity and culture.

These are all, beyond a doubt, important considerations. But advocates are not often careful to respect the boundaries of the position. Environmentalists and their allies routinely commingle the public goods title with a claim for a private subsidy, usually pandering to recreationists to hawk their case. The request for a private subsidy is raw interest group politics — a subsidy to passive and active recreationists who do not want to have to pay their

⁸⁴John B. Loomis, *Economic Rationales for Continued Government Ownership of Land*, paper presented at CONFERENCE ON CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFITS, Natural Resources Law Center, Univ. Colo. School of Law, Oct. 11-13, 1995.

⁸⁵Krutilla et al., *supra* note 79, at 551-52.

⁸⁶Some see land as important to our moral development, others see nature as a teacher. See, e.g., EDWARD O. WILSON, *THE DIVERSITY OF LIFE* (1992) (respect for land important to moral development).

own way for enjoying something they personally value.⁸⁷ An appeal to hikers who do not pay for their use of the federal land and use the political process to achieve this luxury is not a public goods justification. Their use is, in some large part, a subsidized private good.

The public goods justification is limited to the desires of those who want others to use parks for their spiritual or moral education (an argument also often made in support of public subsidies for art, libraries, or radio or television programs). The justification does not include, by the way, one's desire that others enjoy doing the same things so that the peer interest group expands in size, it develops political clout, and one can benefit personally from some form of below-cost access.

Once an advocate makes a *valid* public goods argument, the debate is far from over. The collective value position is just the beginning line of analysis for two major, and some would say nearly intractable, government planning problems. First, how does the federal government accurately identify values that are collectively held, distinguishing them from private interests? And second, once it identifies values as collectively held, how does the federal government choose amongst competing collective values?

The use of federal land for recreation illustrates the planning problems generated by collective decision-making on the allocation of a scarce resource. Assuming some aspect of recreation is a public good, we move to the nettlesome controversy over how much land to devote to recreation, a controversy that pits powerful interest groups against each other. The fight generated by the expiring oil and gas leases in the Badger-Two Medicine area of the Montana Rocky Mountain Front Range is one of many.⁸⁸ Should the leases be renewed or the land left to fisherpersons and hikers?

⁸⁷KCNC television of Denver, Colorado had on its ten o'clock news three separate segments during the week of Nov. 27, 1995 on the hunters' anger about the practices of the Smith ranch in Northwestern Colorado. The Smith ranch is in prime elk hunting territory and the owner charges \$3,000 a week to hunt on his ranch. The hunting pressure on the adjacent federal lands has driven elk onto the Smith ranch. In the initial segment a hunter from Missouri, having spent a week without seeing an elk on federal land, peers over the fence in amazement and disgust at an elk herd languidly grazing on the Smith ranch. "I'm a poor fellow from Missouri, I can't afford \$3,000," he laments.

⁸⁸See Gene Sentz, *Montana's Rocky Mountain Front: Sell it or Save It?*, HIGH COUNTRY NEWS, June 26, 1995, at 8.

An answer depends on the mechanism we put in place for discovering public or collective values. Our history makes these choices through a republican form of government (we elect decision-makers), complicated by federalism (a division of authority between federal and state sovereignties). Interest group politics is, of course, the result of open access to government processes. Our government occasionally identifies and provides for public goods, but it also routinely panders to special interest groups in ways that do not further the public interest, sometimes on the same subject matter.

In providing for national defense, for example, the federal government cannot resist sweetheart contracts with private industry. The federal government has a mixed record not only on national defense lands but also on its use of federal lands. As noted in subsection (d) below, we have not, and probably will not, find the perfect government process to correctly identify and deliver a defensible amount of public goods. Significant waste seems to be an inevitable by-product of the government planning process.⁸⁹

Even if we presume that government planners will favor recreation users in the Badger-Two Medicine area, our management problems have just begun. Through its ownership of parks and the like, the federal government subsidizes selected types of outdoor recreation. By subsidy I mean that people using a park do not pay the full cost of maintaining it; other taxpayers, who do not use the park, contribute as well. Hikers, mountain bikers, rafters, hunters, off-road motorcyclists, bird and wildlife watchers, fisherpersons, skiers, and those who just appreciate scenic vistas have access to federal land at bargain

⁸⁹How do we then identify and decide amongst competing public goods? A group of environmentally sensitive economists believe they have the answer: public opinion polls. *E.g.*, RAYMOND J. KOPP & V. KERRY SMITH (eds.) *VALUING NATURAL ASSETS* (1993); ROBERT C. MITCHELL & RICHARD T. CARSON, *USING SURVEYS TO VALUE PUBLIC GOODS* (1989); JOHN B. LOOMIS, *INTEGRATED PUBLIC LANDS MANAGEMENT: PRINCIPLES AND APPLICATIONS TO NATIONAL FORESTS, PARKS, WILDLIFE REFUGES, AND BLM LANDS* (1993). With clever polling they have found, for example, that people polled would pay, say, \$60 annually for Yellowstone National Park regardless of whether they intend to visit.

Polling has obvious limitations. We all know that people respond differently to questions about hypothetical expenditures than they do when they have to part with the cash. And we know that people respond differently to questions in the abstract and to those framed in terms of alternatives based on a limited budget. A general question on Yellowstone ought to be unpacked: how much would you pay to support people who use the park to mountain bike? raft? hike? hunt? camp? park recreational vehicles? use off-road motorized vehicles? sun-bathe and drink beer? Are the numbers additive?

Poll results often depend on who asks the questions. I suspect that if the polls come to have teeth, ranchers, loggers and miners would become sophisticated and adept pollsters too — as would hunters and bikers.

basement rates. The BLM estimated in 1988 that recreationists, who pay less than \$2 million in user charges on BLM land, cost the BLM \$123 million.⁹⁰ The National Park Service collects fees of about \$100 million when its *operating expenses*, not the market value of the opportunities, are over \$900 million.⁹¹

The effect of the recreation subsidy is three-fold. First, we now face an overuse of the underpriced resource.⁹² There are too many people on federal lands and there will be more.⁹³ Data show that outdoor recreation is the fastest-growing use of the western federal lands.⁹⁴ Park rangers are turning into glorified refuse collectors. People put themselves in harm's way without consideration for the costs of rescue.⁹⁵ Yosemite's central road now carries traffic equal to that in downtown Houston and park rangers report air pollution worse than that measured for the same day in Los Angeles.⁹⁶ Plans to ration the recreation resource on federal lands are inevitable. Rationing decisions will force us to face equity concerns (should only the wealthy have access?), judgments about lifestyle (should parks have high or low traffic volume?) and claims for elevated status among competing groups of potential recreational users (is hiking preferable to biking?).

Second, the creation of parks gives federal politicians control over another source of beneficence — concessions. The government has created a monopoly — single-source food

⁹⁰See Bates, *supra* note 7, at 35, 38.

⁹¹See Chip Dennerlein, *Charging Public Land Users For Recreational Uses*, paper presented at CONFERENCE ON CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFITS, Natural Resources Law Center, Univ. Colo. School of Law, Oct. 11-13, 1995.

⁹²This is known to economists as "the tragedy of the commons." See, e.g., James L. Huffman, *Public Lands Management in an Age of Deregulation and Privatization*, 10 PUB. LAND L. REV. 29, 49 (1989).

⁹³The problems of Moab, Utah are an example. Christopher Smith, *Moab Area Acts to Regain Control of Public Lands*, HIGH COUNTRY NEWS, June 12, 1995, at 6 (describing the "silly season" when visitors flock to Moab "like swallows returning to Capistrano"). The population of Moab, 6,800, climbs to 16,000 in the tourist season.

⁹⁴See Bates, *supra* note 7, at 33.

⁹⁵In 1992, eleven people died on Mt. McKinley. The National Park Service spent large sums (and risked lives) rescuing injured climbers and retrieving bodies. See Dennerlein, *supra* note 91.

⁹⁶See Bates, *supra* note 7, at 41.

and lodging accommodations in federal parks — and doles the fruits out to favored constituents.⁹⁷ A 1965 Act on park concessions serves as a barrier to competition and costs the federal government at least \$40 million and perhaps \$60 million a year in lost revenue.⁹⁸ Ski areas and other concessions earn over \$1.5 billion annually, but pay less than 3 percent of that sum to the government in fees.⁹⁹

And third, we encourage people to use federal land for recreation rather than, say, to pay to go bowling. Have we made a collective judgment to favor hikers over bowlers? Perhaps. I am more comfortable with an argument based on market imperfections (private parks are not, on average, feasible) than one based on the position held by many environmental types that people are made better by hiking than bowling (hiking elevates them, somehow).

The latter argument also generates self-serving positions on rationing the scarce resource. Hikers seem quite comfortable with the following analysis: hikers (other than those in wheel chairs and those who are out of shape) and wildlife watchers (other than those in helicopters) are more deserving than campers (other than backpackers, see hikers), who (with the exception of those driving recreational vehicles) are more deserving than mountain bikers, who are more deserving than downhill (but not cross-country) skiers, who are more deserving than hunters (but not fisherpersons, see hikers), who are more deserving than off-road motorcyclists. In other words, off-road motorcycling does not "elevate" a person's internal moral sense as much as hiking.

I regularly see pro-hiker types dressing up their positions in terms of the degree of adverse impact on the environment — low impact uses are preferred to high impact uses. But underneath is a qualitative judgment on the value of competing activities. Throw into the mix those who trump even low-impact hikers by advocating that *all* people should be kept off

⁹⁷See Christopher Palmeri, *Coddled Concessionaires*, FORBES, Nov. 6, 1995, at 74. The National Parks Concessions Policy Act of 1965 gives incumbent concessionaires advantages over rival bidders. The effect is a system in which the government is paid only \$36 million of total revenues of over \$670 million.

⁹⁸See Dennerlein, *supra* note 91, at 4.

⁹⁹See Bates, *supra* note 7, at 38.

federal land so as to preserve the land's wildness (this is usually buttressed by a reference to the welfare of children and grandchildren¹⁰⁰) and arguments on policy start taking on ugly overtones of elitism and self-righteousness.

(d) Tilting at Windmills: The Search for the Ideal Government Process (or for the Virtuous Government Official).

Public ownership of vast quantities of land requires government planning and management, which in turn requires a government decision-making process and government officials. No one seems to be content with the government's past performance on most of our federal lands. But most assume we can correct the effects of fifty years of poor government planning and management through more of the same. We just need to redesign the planning process, write better use allocations and regulations, and hire better administrators.¹⁰¹

This optimism is catching and those who have it offer moral, uplifting exhortations. "It's a difficult task but through hard work and cooperative effort, we can do it."¹⁰² There is a serious question whether this "difficult task" is humanly possible. Collective planning and management is an inherently flawed process; why do we think we can make it work for federal lands? There are answers aplenty, each grounded in a favorite government process. But the skeptic in me says that behind the process arguments swirling around the federal lands debate is something considerably less than detached, objective interest in government process.

¹⁰⁰I am always intrigued by this. The supposition is that children are better off if we preserve wild land. This, of course, presumes the existence of an ongoing political and economic system that allows them to flourish. Hungry children will not enjoy the majesty of scenic views. Our more realistic environmentalists, noting the condition of the environment in third world countries, now assert that economic prosperity is a necessary pre-condition to environmental preservation. This means, of course, that economic and government stability is the engine that drags the train for the welfare of our children. So any argument for the welfare of our children made by environmentalists assumes a viable, healthy economic community — a fragile assumption in its own right.

¹⁰¹For examples of this genre, see Blumm, *supra* note 31; George C. Coggins, *The Law of Public Rangeland Management V: Prescriptions for Reform*, 14 ENVTL. L. 497 (1984); WILKINSON, *supra* note 6, at 300-01. Coggins also advocates sales and exchanges to consolidate federal lands to make them more efficient.

¹⁰²The podium at the recent Natural Resources Law Center Conference often rang with calls to meet the challenge. CHALLENGING PUBLIC OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFIT, Natural Resources Law Center, Univ. Colo. School of Law, Oct. 11-13, 1995.

It is an old negotiating adage that one pushes the "objective" process that is the most likely to generate the outcomes one favors. Interest groups are no different; they veil self-serving arguments in arguments for an objective, neutral legal process. Our recent political history is witness to passionate arguments for a wide variety of collective decision-making processes by *the same interest groups* who pursue one legal process, find it less than satisfactory, and argue, just as ardently, the merits of another. Those who make pure process value arguments with intellectual integrity are as scarce as hen's teeth.

(i) *Environmentalists as Federalists*

Conservation groups, some years back, found political success through local action tough going, so they pushed successfully for federal legislation; the Clean Water Act and Endangered Species Act are prominent examples. They worked through Congress, usually controlled by Democrats, rather than through the agencies of the Executive Branch, which was too often controlled by Republicans. The federal legislation empowered the federal district court bench to intervene in western affairs. Conservationists could, through strategic litigation, choose the judge and, in the hands of a sympathetic judge, the new Acts proved to be a potent weapon.

Federal pressure produced a regional backlash, the "Sagebrush Rebellion." Many of the conservation groups then turned to "grass roots" environmental efforts that seemed to diffuse the surprisingly bitter local opposition. They organized consensual, Quaker-style gatherings of all interested parties to work out solutions to, for example, conflicts over watersheds. The conservationists quickly found that this gave veto power, via endless discussion, to individual interest groups, some of whom had little common ground with the conservationists.

Nothing happened quickly in these cooperative gatherings and the status quo favored those with access or expectations of access to the federal lands. Moreover, conservation representatives found themselves in an awkward position. They could not compromise, allow some timber cutting, for example, on old growth forests, without offending their

constituencies.¹⁰³ And without the power to compromise they could not bargain in good faith in these gatherings.

So most conservation groups renewed and refocused their efforts on the federal level, acknowledging that the source of their potential political power was federal; New Yorkers are pro-environment and have a right to worry about what we do with the West.¹⁰⁴ For the past fifteen years or so, at the national level environmentalists have been able to persuade representatives of states that do not have large federal land holdings to join their number and outvote local western representatives who tend to favor local business interests.

The argument for federal ownership aimed at the federal representatives of New York State, for example, is that through the federal government their constituents will have access to and some control over national land located in Colorado but no control over, and, perhaps, very limited access to state-owned public land in Colorado. Moreover, New York does not receive any significant monetary benefit if federal land is transferred to the state of Colorado. It's a no-brainer for New York congresspersons to offer some support to the environmentalists who are intent on pushing national parks (unless, of course, western business interests contribute significantly to the campaign coffers of eastern representatives). The strategy had remarkable success for a number of years.

Conservation groups were delighted over the election of a Democratic President and a particularly vocal environmentalist as Vice President in 1992. The appointment of Bruce Babbitt as Secretary of the Interior raised expectations; he had the correct sensibilities and seemed determined. But conservationists hit a new snag; they developed, myopically, a one-party constituency at the federal level and the chickens came home to roost in 1994.

¹⁰³Conservationists, whose solicitations are based on claims that we have cut 95 percent of the old growth timber and need to save the last 5 percent, will not support a compromise that permits the cutting of any more old growth timber.

¹⁰⁴The effect can be irritating. On Nov. 29, 1995, David Letterman had as a guest on his show Sam Donaldson, the well-known liberal (and self-righteous) television reporter who, among other things, used to spar with President Nixon at his press conferences. Mr. Donaldson complained about "New Yorkers ... putting wolves on my ranch" in the West and implied that he would kill them if he spotted them ("...you will see freshly spaded dirt..."). He apparently runs sheep and cattle on his ranch.

In 1994, the Democratic party lost control of Congress. Conservationists, once fans of the legislative process, became ardent supporters of the administrative process. Their pressure is now directed less at Congress than at the Executive Branch and its administrative agencies. The push is for better agency administration of federal lands. To the extent conservationists continue to lobby Congress, it is to block a Republican rollback of environmental legislation already in place. Their focus on administrative agencies has proven to be only marginally successful.

At present, conservationists are disappointed and disillusioned with the efforts of a Democratic President and his Secretary of the Interior to "claim back" the West.¹⁰⁵ Regional interests, through their national representatives and through the threat of withdrawing electoral support for the President when he is up for re-election, have led to the withdrawal of several fairly moderate environmental initiatives — the failure of the Secretary to increase grazing fees on federal land is, perhaps, the best known example.

Ironically, the conservation groups now find their President touring the West, along with those western governors who will appear with him, admiring and pushing local, multi-interest group gatherings.¹⁰⁶ Will local cooperative efforts work to further conservation objectives on federal land? Recent federal lands conferences focus on these local cooperative efforts.¹⁰⁷ Some environmentalists believe these local efforts offer their best current hope for significant advances.¹⁰⁸ Others are not so sure.¹⁰⁹

¹⁰⁵The same euphoria followed by disillusionment occurred with the election of President Carter in 1976.

¹⁰⁶*Center Roundtable: Local Coalitions Battle for More Community Input*, POINTS WEST SPECIAL REPORT, Sept. 1995, at 6 (describing several local cooperative efforts).

¹⁰⁷See the Remarks of Mary Chapman, Mike Jackson, and Jack Shipley, at the conference CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFITS, Natural Resources Law Center, Univ. Colo. School of Law, Oct. 11-13, 1995 (discussing the Delta-Montrose Partnership, the Quincy Library Group, and the Applegate Watershed Partnership).

¹⁰⁸*Id.* (describing the successes and failures of the San Juan Community/Public Lands Partnership, the Gunnison Grazers and the High Country Citizens Alliance, and the Quincy Library Group).

¹⁰⁹See *Center Roundtable: Local Coalitions Battle for More Community Input*, *supra* note 106, at 6.

Those pushing the local negotiations look to the success of one or two recent negotiations. Betsy Rieke's success with the "Bay-Delta Accord" is the most often mentioned example.¹¹⁰ The advocates admit that the successes are "fragile" and other negotiations underway seem to be bogged down, but these multi-party negotiations appear to be our "best chance."

But even the successful negotiations are not truly local. Negotiations do not exist in a vacuum. Individual negotiators agree to concessions based on their assessment of their "best alternative to a negotiated agreement" (known to trained negotiators as "BATNA").¹¹¹ Their BATNA is a projection of their position in court, usually, under the plethora of land use legislation and administrative rules currently on the books, both state and federal. This quilt of rules and legislation is the backdrop for any negotiated agreement; change the quilt and the agreement changes.

So one who believes in local negotiations cannot be neutral on the administrative rules and legislation that set the parameters for those at the negotiating table. In other words, a plea for local negotiation does not mitigate the need to marshal your political resources at the state or federal level to get the legislation you need to advance your cause. The Delta-Bay Accord, for example, was negotiated in the shadow of two federal threats, the Clean Water Act and the Endangered Species Act, both of which had a direct effect on the Accord's support from agricultural interests.¹¹²

With the conservationists' marginal record of successes on federal lands — they are often some of the severest critics of current government management practices — they have yet to explain adequately the basis for their indefatigable optimism in government ownership. They seem to believe, and want us to believe, that we are one President, or one Interior Secretary, or one perfect consensus-building process away from fixing our management

¹¹⁰See Betsy Rieke, *The Bay-Delta Accord: A Stride Toward Sustainability*, RESOURCE LAW NOTES, Sept. 1995, at 5.

¹¹¹See, e.g., ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

¹¹²See Rieke, *supra* note 110.

problems. If government management of the federal lands has been, on average, an ecological disaster for over fifty years,¹¹³ why should we believe that it can be corrected for the better, and, if corrected, stay corrected? Where is the evidence for such a proposition? How many years of failure does it take to show that hopes for better public management of land are illusory, another fifty years? Also troublesome is the question of whether current views defining success, even if implemented by a once-in-a lifetime perfect Secretary of the Interior, will be respected in fifty years.

There are breaches in the environmentalists' armor on the point. In 1990 The Nature Conservancy bought one of the most beautiful and uniquely diverse stretches of open country still intact in the West.¹¹⁴ The purchase was, at the time, the largest single private conservation acquisition in United States history. Four years later the Conservancy, finding that it could not carry an \$18 million asset, looked for a buyer. The United States Fish and Wildlife Service offered to buy it, but estimates of 65,000 recreationists a year on the rural enclave led to an intense lobbying campaign sufficient to block the federal acquisition.

The Conservancy made a controversial but courageous decision. It sold the land to a local rancher whom it trusted to preserve the essential character of the land.¹¹⁵ A Conservancy spokesman noted, "We came to think that this was the place to see if private ownership could be equal or possibly even superior to public ownership in achieving both conservation goals and rural economic goals." The transaction came with strings; the legal purchaser was a not-for-profit foundation funded by the rancher and other interested parties with a charter in which the foundation agrees to own the ranch in perpetuity, to never let it be developed and to conduct cattle operations that do not damage the land's natural ecosystems.

The political struggles of conservationists to find the process that gives them the most voice points to a very serious pragmatic problem for collective value theorists. Arguing that

¹¹³See Hess, *supra* note 22.

¹¹⁴The facts in the following paragraph come from DAGGET, *supra* note 21, at 13-23.

¹¹⁵It rejected Ted Turner and Jane Fonda's offer. Turner, already a major owner of western rangeland, offered to stock the ranch with bison rather than cattle. His offer was greeted by locals with howls of protest, however. *Id.* at 17.

government is the only vehicle for satisfying collective value choices puts at issue whether government in fact is capable of making such choices. Public choice theorists dispute the claim, arguing our political process rewards discrete, focused interest groups who easily triumph over more diffuse public interests.¹¹⁶ Federal lands have given these folks a case study as commodity-based interest groups have successfully pressured land managers to maintain historic levels of grazing and timber harvesting.¹¹⁷ So even if one agreed with all the collective value notions that ought to justify federal ownership, the argument is incomplete without a political theory that predicts that government will in fact make decisions in the public interest.¹¹⁸

(ii) *Commodity Producers as Advocates of "States' Rights."*

Groups other than conservationists exhibit similar histories of opportunism when "objective" processes are the subject of the discussion. Ranchers, proud of their "fierce independence," have long benefitted from subsidized grazing permits on federal land.¹¹⁹ As long as BLM managers were facilitative, ranchers were happy with federal administration of the federal lands.

When the Secretary of the Interior threatened to increase grazing fees and to question whether watersheds on BLM land ought to be free of grazing, ranchers became advocates of private property rights. Ranchers argue that their grazing permit rights have vested long term. In essence ranchers believe they have developed private rights on federal land. At the same time, ranchers and loggers oppose genuine efforts at privatization; they might be worse off if local lands were put up for bid. Market prices could exceed current use payments, and outsiders, non-grazers, might buy the land. There is an argument for private property, but only to a point.

¹¹⁶See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

¹¹⁷See Blumm, *supra* note 31, at 421.

¹¹⁸For the best effort I have seen at making the connection, see Krutilla et al., *supra* note 79, at 554-55.

¹¹⁹See McCoy, *supra* note 10.

Worries over the future direction of the Department of Interior also have led ranchers to become ardent states' rights advocates. The states ought to control public lands now owned by the federal government, through land trusts or direct ownership. This is not an abstract and principled argument about the merits of state autonomy in a federal system; it is an argument based on the belief that their political power, waning at the federal level, can be more concentrated and more telling at the state level in the West. An argument that state ownership will turn losing timber programs on federal land into profitable ones is a thinly veiled argument for cutting more timber.¹²⁰ (I do not agree with the concerns of some conservationists, however, that those urging that federal land be given to the states really intend the move as the first step toward ultimate privatization.¹²¹)

In this vein, there are a bevy of extraordinary rationalizations for continuing the grazing subsidy based on complete denial of any federal authority over federal lands. Some ranchers and local government officials have turned into lay legal experts: they deny that the federal government ever owned the land; assert that the Treaty of Guadalupe Hidalgo guarantees locals the right to graze free from federal interference; maintain that the federal government has violated the "equal footing doctrine" by keeping too much land in western states when they were granted statehood; or claim that locals can pass ordinances overriding federal laws.¹²² The United States Department of Justice has had to sue Nye County, Nevada to assert federal control over federal land.¹²³ The County had passed resolutions claiming state ownership of federal land, authorized the bulldozing of a national forest road,

¹²⁰See, e.g., Robert H. Nelson, *Federal Imperialism*, FORBES, Feb. 13, 1995, at 65 (in adjacent forests in Montana, the state earned \$13.7 million over a five-year period and the federal government lost \$42 million).

¹²¹See, e.g., *Like Thieves in the Night*, *supra* note 62, at 1 (political pressures at the state level might develop to give a single commercial interest title to the land and open the lands to development). My skepticism is based on the argument in section 5, *infra*.

¹²²See MCCOY, *supra* note 10.

¹²³Michele Meske, *U.S. Files Suit to Quash "Sagebrush Rebellion II"*, 3 ENV. NEWS BRIEFING 1 (March 1995).

and filed criminal charges against federal employees who attempted to do their jobs on federal premises.¹²⁴

These states' righters, however, are beginning to wake up to a real problem. Under the current system of federalism they get more back from the federal government than they give in taxes. Indeed, it is somewhat of a mystery as to why other states in our federal system have allowed the western states to be substantial beneficiaries of a positive return on their federal tax payments for so long.¹²⁵ Western states' rights advocates may find the cost of their renewed interest in federalism carries too high a price tag.

Adam F. Dahlman, a Republican commissioner in Teton County, was a big supporter of states' rights, until someone showed him the actual figures documenting the federal government's largess.¹²⁶ For every \$1 paid by a Teton County taxpayer, the federal government gives back \$2.50.¹²⁷ Teton County residents paid \$10 million in federal taxes and received roughly \$25 million in federal dollars in 1993, not counting another \$11 million of Social Security payments distributed annually in the county. The United States Forest Service, for example, paid the county \$70,870 in fiscal 1994 as part of the deal the government has made to return 25 percent of the revenue derived from timber, grazing, mineral and recreation use in national forests to counties whose borders encompass the forests. The Payments in Lieu of Taxes (PILT) is part of a \$29 million payment the Forest Service

¹²⁴*Id.*

¹²⁵For the western states to have a positive return on their tax payments, other states must suffer and allow a negative return. The northeastern states seem to be the big losers. Why do they acquiesce? The historical answer seems to lie in the structure of Congress. In the United States Senate sparsely populated states, such as those in the West, are over-represented, and a coalition among the senators of western states, concentrated on mutual issues, such as water management, for example, can marshal significant political influence.

¹²⁶See Carol Bradley, *A Montana County Unearths A Major Welfare Queen: Itself*, HIGH COUNTRY NEWS, June 12, 1995, at 6.

¹²⁷*Id.* The county had received \$2.7 million in direct loans and \$19.9 million in guaranteed loans and insurance. Much of the assistance went to farmers, whose output allows the county to claim itself to be the malting barley capital of the world. The government paid farmers \$9.3 million for reducing the size of their crops to stabilize demand and another \$3.3 million to keep erodible land from being plowed. Drought assistance came to \$300,000 and crop insurance totaled \$505,744. Medicaid channeled \$2.09 million into the county and Medicare gave another \$341,000.

distributes to forty-eight counties in the western states. When confronted with the data, Mr. Dahlman conceded, "Sure shoots my theory in the head."

Robert H. Nelson has focused on the economic effect on the states of taking ownership of BLM lands within their boundaries.¹²⁸ He compared additional revenues from the land (current federal revenue from the land minus PILTs) to the costs the states would incur by assuming the complete management responsibilities for the land. His findings? Most states are big losers. It would cost the Alaska state treasury \$103.5 million, Idaho over \$40 million, Nevada \$36 million, Arizona \$31.7 million, Montana \$29.3 million, California \$25.1 million, and Utah \$21 million. Only Wyoming and New Mexico would gain.

States, already strapped for cash, would incur a large, immediate cash drain as a result of the transfer. Even James Watt, the former Secretary of the Interior under President Reagan, is on record that most states could not afford to manage the gifted land.¹²⁹ In the end, however, Mr. Nelson favors the transfer of federal land to the states, arguing that state control would break ossified patterns of land use and facilitate greater innovation and experimentation. States, he urges, are the "laboratories" in the federal system. "Laboratories for what — more timber cutting?", the conservationists reply.

(iii) *Process Arguments Seemed Dwarfed by the Effects of Changing Demographics.*

In the end, brute political force, generated by fundamental shifts in economic and social trends, will prevail, across all the various "objective" processes. As well chronicled by astute social observers, the face of the West is changing. Demographics are changing and the political fortunes of various groups will change too.¹³⁰ The economy of the West is shifting

¹²⁸Robert H. Nelson, *Transferring Federal Land in the West to the States: How Would It Work?*, POINTS WEST CHRONICLE, Winter 1994-95.

¹²⁹See *Like Thieves in the Night*, *supra* note 62, at 2.

¹³⁰See Michael Elliott, *The West At War*, NEWSWEEK, July 17, 1995, at 24. With their gentrified new houses and chic art galleries, affluent newcomers are turning the traditional Mountain States into the nation's most fashionable — and most socially divided region. Can the cowboys coexist with the Feds, the militias — and cappuccino bars? See also Carol Chorey, *Tracking the Rapidly Growing West: Effort Pokes Fun, Takes Hard Look at Effects of Change*, DAILY CAMERA, July 15, 1995, at 1A, col. 3 (group chronicling the "modern cowboy" phenomenon by charting the small western towns in which one can buy a daily New York Times, land a Lear Jet, and get access to a fiber-optic network).

away from mining, ranching and agriculture to recreation, high-tech (communications, computers, biotechnology) and service industries.¹³¹

With the shift will come a new balance of political power that affects our use of federal land. Conservationists and recreationists appear to be gaining the ascendancy. But once they do, the uneasy alliance of these interests will unravel. The hunters will find themselves in conflict with the backpackers and the conservationists in conflict with the mountain bikers and so on.¹³² With the break-up of old alliances, we will witness a new round of self-serving arguments on what is the best government process.

4. A Proposal for Privatizing Some Federal Lands: But "Will We Lose Yellowstone?"

Having read the numbers on the vast acreage held as federal lands and noting the predominate use of some of the lands for commodity production, usually to benefit favored private interest groups, I lean towards a recommendation that we sell some of the federal lands — in particular, those parcels politicians use to subsidize commodity production. At minimum, I support a study of the matter. My proposal is counter to the current trend, in which the acreage of federal land is growing (albeit in very small amounts) rather than contracting, and, in any event, is a political dead end (the subject of the next section). This section, however, makes the argument on the merits.

The question asked by one who heard my proposal is: "Will we lose the West?"¹³³ A less sweeping question but one of similar import and of no less significance was asked by another: "Will we lose our national parks?" To the questioners, the present system provides something dear and worth keeping, the West or Yellowstone, and the risk of losing these

¹³¹In *Utah, the New West Trumps the Old*, NEWSWEEK, July 17, 1995, at 28.

¹³²See Ray Ring, *Unarmed But Dangerous Critics Close in on Hunting*, HIGH COUNTRY NEWS, Dec. 11, 1995, at 10, col. 1 ("Image of hunters as conservationists has always suffered an inherent contradiction").

¹³³Those who want to preserve the West favor its vast openness and, perhaps, the lifestyle of those who inhabit it. The latter factor may create substantial divisions among proponents. Are we thinking about preserving a Native American lifestyle? Surely not blackjack dealing. Rural ranches? Surely not those whose cattle despoil creek beds. Rustic timber or mining camps? Surely not those that cut old growth forests or dump arsenic into wild rivers — and replace with what? Hikers? Surely not those who disembark from recreational vehicles and litter the trails with empty soda pop bottles.

entities, even if small, through a major change in ownership structure is too great to bear. Implicit in the assumption is the corollary that any problems in the present system can be changed incrementally, within existing ownership and regulatory structures.

(a) Are We Preserving the West or Parks Under Federal Management?

One could begin an answer by suggesting that if we continue our present course, we will lose the West anyway or that our national parks will deteriorate irreparably regardless.¹³⁴ There is abundant, alarming evidence that our federal lands, held and managed in their current form, are suffering from the increasing pressure generated by a burgeoning population. The population of the West, those with immediate access to the federal lands, is increasing. As long as access to federal land is subsidized, as it is now, and access is otherwise easy for many people, the land will be overused and overrun.

Anyone who wants to "save the West," that is, preserve its vast openness, must argue for changes in how we currently allocate access to federal land.¹³⁵ One solution, for example, is to favor the reservation of large quantities of land as wild habitat; only hikers with permits, parsimoniously awarded, can access the land. In essence, supporters of the position urge we form, from the federal lands, more, larger, limited-access national parks or wilderness areas. (I use the concept of national parks generically; I am not only referring to land under the jurisdiction of the National Park Service.)

To prevail, the proponents of vast unspoiled spaces must marshal enough political power to defeat the political clout of miners, ranchers, loggers, active recreationists, farmers and electricity users. This is a formidable task and, unless there are major changes in political climate, unlikely to succeed on anything but selected and limited parcels. The 1994 national elections and the 1995 House budget proposals are rude reminders that political fortunes ebb

¹³⁴See James M. Ridenour, *Our National Parks: The Slide Towards Mediocrity*, paper presented at CONFERENCE ON CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFITS, Natural Resources Law Center, Univ. Colo. School of Law, Oct. 11-13, 1995.

¹³⁵See Ridenour, *id.* (find a revenue stream to match recreational use; eliminate parks that ought not to be parks; and so on).

and flow. Can we "save the West" with a strategy dependent on federal management when Democrats will not always control Congress or the Executive?¹³⁶

(b) Retaining Parklands, Wilderness and Wildlife Refuges and Selling What's Left.

At the core of my proposal is the belief that there are vast acreages of federally held land that do not seem susceptible to reasonable claims that they be consolidated into conservation areas.¹³⁷ Approximately 470 million acres of federal land (out of 630 million held) are involved in some kind of commodity production. These areas are, to some extent, grazed, logged, or mined. They are not designated parks, wildlife refuges, or wilderness conservation areas. The balance between commodity production as against other more public uses, such as wildlife habitat or as a source of passive recreation, varies widely with location.

Holding vast amounts of commodity-producing land as federal lands and using this land to subsidize local business supports no national interest and, as noted in section one, probably confounds the nation's interest in a market-determined allocation of goods. *The sale of some of these lands may actually aid conservation efforts by separating land that is susceptible to conservation claims from land that is not.* If we sell land used predominately for commodity production, then one has a leg up in arguing that the land that is left is for conservation. It is sophistry to pretend, as many environmentalists do, that all federal land is like Yellowstone Park.

The distinction between revenue-producing land, which ought to be privately held, and land reserved for public appreciation (parks), which ought to be held by government, is not

¹³⁶Not only do political pressures ebb and flow, we find the same individuals wearing a variety of hats. Just before President Clinton appointed Bruce Babbitt Secretary of the Interior, Babbitt was a consultant for Canyon Forest Village, a very controversial development project on the edge of the Grand Canyon. In a promotional video he championed public-private partnerships to develop "gateway communities" to accommodate tourists outside national parks. Steve Yozwiak, *Project Creates Chasm*, DENVER POST, Dec. 7, 1995, at 29A, col. 1.

¹³⁷I admit, I have not walked on many of the federal lands, nor have I identified specific parcels that I would recommend for sale. This recommendation comes from published materials. More specifically it comes from the aborted study by Secretary of the Interior Watt in 1982, which recommended the sale of 4.4 million acres of federal land and the further study of another 25 million acres. See *infra* note 167.

new. In *The Wealth of Nations*, Adam Smith,¹³⁸ in 1776, focused on the public ownership of stock (real property and animals, for example) and land. Noting that a sovereign needs revenue to "defray ... the expense of defending the society ... and other necessary expenses of government," he discussed the merits of raising revenue through government ownership of resources or from taxes.

He concluded that taxes were preferable because governments do not, unless very small, exhibit "orderly, vigilant, and parsimonious administration" of federal lands or public stock.¹³⁹ He concluded with considerable understatement, "[b]ut whether ... England; which, whatever may be its virtues, has never been famous for good economy; which, in time of peace, has generally conducted itself with the slothful and negligent profusion that is perhaps natural to monarchies ... could be safely trusted with the management of [a mercantile project], must at least be a good deal more doubtful." Critical to Smith's argument was a distinction between government ownership of stock and land for revenue-producing activities, which is suspect, and government ownership of lands for "pleasure and magnificence."¹⁴⁰

¹³⁸For those who scoff at any cite to Adam Smith, see note 141 *infra*.

¹³⁹ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 770 (reprinted 1937).

¹⁴⁰Consider the following passage from the *Wealth of Nations* on crown lands:

Though there is not at present, in Europe, any civilized state of any kind which derives the greater part of its public revenue from the rent of lands which are the property of the state; yet, in all the great monarchies of Europe, there are still many large tracts of land which belong to the crown. They are generally forest; and sometimes forest where, after travelling several miles, you will scarce find a single tree; a mere waste and loss of country in respect both of produce and population.... When the crown lands had become private property, they would, in the course of a few years, become well-improved and well-cultivated. The increase of their produce would ... augment[] the revenue and consumption of the people ... [and] the revenue which the crown derives from the duties of customs and excise....

The revenue which, in any civilized monarchy, the crown derives from the crown lands, though it appears to cost nothing to individuals, in reality costs more to the society than perhaps any other equal revenue which the crown enjoys. It would, in all cases, be for the interest of the society to replace this revenue to the crown by some other equal revenue, and to divide the lands among the people, which could not well be done better, perhaps, than by exposing them to public sale.

Lands, for the purposes of pleasure and magnificence, parks, gardens, public walks, &c. possessions which are every where considered as causes of expense, not as sources of revenue, seem to be the only lands which, in a great and civilized monarchy, ought to belong to the crown. *Id.* at 776.

Adam Smith noted from personal observation (his claim was largely empirical rather than theoretical) that private residual claimants make better use of the land than a government when the land is used to generate revenue. Modern economists have explained the difference as a matter of human incentive. When individuals own not only the income stream but also the income-producing resource (the land), which has value based on capitalized future income flows, we can expect that individuals will take appropriate care of the revenue potential of their land.¹⁴¹ When the government is the owner, politically adroit individuals exploit the public's difficulty in monitoring the government's use of the land to extract income at the expense of the capital asset.

Federal lands held for public purposes — Adam Smith's "purposes of pleasure and magnificence" — are, of course, another matter. I am unpersuaded by libertarian economists who claim that, without the federal government's intervention, a private party would have created Yellowstone National Park or Rocky Mountain National Park to satisfy the demands of consumers.¹⁴² The initial investment would be huge¹⁴³ and the difficulty of capturing (in user fees) value from all those who benefit from the park is substantial.¹⁴⁴ A private owner would have trouble fencing out people who attempted to access the park without

¹⁴¹See, e.g., GARY D. LIBECAP, *LOCKING UP THE RANGE* (1981). I have heard the charge, as have most, that environmentalism is the last refuge of socialists. Pure arguments for socialism have suffered in light of the problems of Eastern Europe, the late U.S.S.R., and the problems of Sweden and New Zealand, each once examples of social systems with cradle-to-grave government programs. So, conservative radio commentators argue, environmentalism is the new cloak for the old position that free-market-based economies are cruel and harsh. My argument in the paper assumes a capitalist economy and considers the appropriate role of government ownership of land inside that style of an economy. Those who take issue with the statement in the text to which this note is attached believe that a capitalist economy is detrimental *in general* to our long run interests (the welfare of our children) and are arguing beyond the scope of my paper. See also note 100 *supra*.

¹⁴²Here I split with John Baden and Steve Hanke who argue that wilderness areas should be privately owned and managed. See MARION CLAWSON, *supra* note 38 at 156 (describing their views).

¹⁴³Economists refer to the problem as "lumpiness." A wilderness area cannot be reduced beyond some practical size before it loses its characteristics.

¹⁴⁴I admit there are scattered examples of the contrary. See *HIGH COUNTRY NEWS*, June 12, 1995, at 13, col. 3, describing the Gray Hawk Ranch, a private bird-watching retreat along the San Pedro River a few miles east of Sierra Vista. The owner, who collects fees for granting access to bird and snake observers, noted "It's very fulfilling. It doesn't pay worth a damn, though."

paying¹⁴⁵ and could not collect fees from those who never set foot in the park but were happy the park existed (for wildlife or for the future benefit of their children, who might want to enjoy the facility). If private parties owned the land that now is Yellowstone, it is far more likely that the area would be pockmarked with gold and silver mines, its timber logged, its river diverted for irrigation, its river beds trampled by cattle, and its canyons crisscrossed with all-terrain-vehicle trails.

A park is also something more akin to a museum or library than a dog racing track in an important dimension. We are uncomfortable allocating such a resource among those who desire access according to ability to pay, even if payment could be extracted practically and fully from any and all users. There is a cultural interest in a populace that appreciates its place in history, appreciates the arts and, in the same vein, appreciates its place in nature. We have not turned to cash subsidies or vouchers to support access to museums and libraries, and our view of parks is similar.

I recognize that the decision about which land to sell and which to keep will be contentious. The federal government will have to develop workable criteria for land to keep, develop a decision-making apparatus for applying the criteria and, finally, develop a sensible method of selling land identified for disposition.¹⁴⁶ Long-term antagonists will be heard at each stage and Congress will intervene on occasion in particularly sensitive decisions with high political stakes. As criteria for holding land in the public domain, I would begin with the proposition that unless land is dominated by a concern for one of three public purposes, it ought to be sold. Those uses would be passive recreation in a public park, wildlife conservation, or wilderness preservation.

¹⁴⁵Economists call this an "externality." The private owner of a park could not capture the value of the views enjoyed by those located outside the park's boundaries. Adjacent owners benefit from the park's existence without payment.

¹⁴⁶The government's history under section 1713 of FLPMA does not inspire confidence. See note 179 *infra*.

(c) Arguments Against the Sale of Nonparklands: Land Sold Is Lost Forever to Public Use and Ecosystems Are Not Enclaves.

It is not a sufficient rebuttal to note simply that we may err in selling land that should be kept. Conservation biologists claim that we don't know enough to make such a decision on any parcel, that we have historically underestimated the interconnectedness of large natural ecosystems. As a consequence, they continue, we ought to hang on to all land currently owned and buy more, perhaps, warehousing federal land in commodity production until we figure out whether it is important enough to conserve.

At the margin, we ought to err on the side of conservation, but the argument is not a substitute for a current evaluation of the usefulness of individual parcels of federal land as wilderness area, park or wildlife refuge. The argument contains no internal standards. It depends in application entirely on historical accident. What federal lands we have we should keep. But reliance on historical accident is not a sufficient guide for future choices. Should we buy more land? How do we decide on what to do with the land that escheats to the federal government? These are not hypothetical questions.

The federal government recently came into possession of a large quantity of privately held land through the collapse of federally insured savings and loan banks and has to decide what to do with outdated military bases. A simple-minded application of the conservation biologists' argument would lead to the federal government's refusal to sell any of the savings and loan land or the military bases.¹⁴⁷ Instead we presume the reverse; the RTC should sell assets, not hold them. Neither the presumption to retain federal land under FLPMA nor the presumption to sell federal land through the RTC seem appropriate. A more sophisticated analysis, neutral to how the federal government acquires land and based instead on some sensible overarching criteria for retention rather than sale, would seem to be preferable.

¹⁴⁷This is the major problem with Scott Lehmann's *PRIVATIZING PUBLIC LANDS*, *supra* note 72. His argument is that we should not sell lands that are already public, but he offers us no help with whether newly acquired S&L land should be sold.

The best argument that conservationists have for keeping commodity-producing lands in the public domain is the stickiness of reacquiring land once sold.¹⁴⁸ If perchance the federal government sells land that it later wants to reacquire for a park or a wildlife refuge, reacquisition could be difficult as owners resist sale, forcing condemnation of the land, or otherwise hold out for top dollar. Moreover, the condition of the land may have deteriorated in the eyes of conservationists, so that sale by the federal government will not only drive up the price but also lead to expensive reclamation efforts. Such possibilities generate an apprehension that land once sold is permanently sold and "lost" to the cause. The apprehension, although real at some level, is often overplayed, for political leverage.

As noted in section 3(b), above, federal land sold is not necessarily land lost to public control. Parcels can be sold under limited-use covenants. And there is considerable residual regulatory flexibility over time. The conditional deed can be renegotiated by government and landowner to change the condition, and zoning, business regulation and wildlife conservation statutes can be amended or augmented. We also have a long and successful history of reacquiring land for airports, highways and parks (the huge Shenandoah Park in the Atlantic states is an example).

Opponents of privatization not only seem to overestimate the costs of reacquisition of land, but they underestimate the political costs of controlling the current use of our vast stock of existing federal land. Government retention of land does not necessarily mean changes in the current use of federal land come cost-free. Success in the political process, which controls the use of federal land, is expensive, as parties will spend substantial (and perhaps offsetting) amounts to lobby public officials for favored government action.

If we get down to establishing criteria for retaining government ownership, and those criteria include, as they should, special consideration for wildlife, will not most all federal lands be included? Environmentalists (aided, perhaps, by officials in federal government agencies who seek to expand their domain) take a very broad view of what is necessary for preservation of wild flora and fauna.

¹⁴⁸See Richard J. Fink, *Public Land Acquisition for Environmental Protection: Structuring a Program for the Lake Tahoe Basin*, 18 ECOL. L.Q. 485 (1991) (detailing the obstacles of land acquisition).

The "ecosystem" concept, the darling of ecologists, is infinitely expandable.¹⁴⁹ In theory, everything in nature is connected to everything else. And people are usually excluded. With such a definition of what we ought to protect, it is not difficult to include in some ecosystem all land now held in government hands (and a substantial amount of land held in private hands as well). In 1980 the National Park Service described the two million acre Yellowstone Park as an intact ecosystem. In 1986 the Park Service defined a "greater Yellowstone ecosystem" of six million acres. By 1991 the service tripled the ecosystem to include eighteen million acres.

The concept of an ecosystem has scientific parameters. But if the scientific boundaries are obscure, the scientific concept transforms into a political one. The danger is that ecosystems become mental constructs that ecologists can define to fit the political circumstance — they can be as large as Nevada or as small as a local pond depending on political exigency.¹⁵⁰ Misuse of the ecosystem concept will trivialize it.

The debate over ecosystems shields a more significant point. Ecologists recognize that ecosystems, even prudently defined, do not respect boundaries between public and private land. They urge us to reject the "enclave" theory of conservation.¹⁵¹ We cannot, they say, protect endangered species by setting aside enclaves of land in public ownership and not regulating other privately held land that impacts the ecosystems in the enclave. They urge regulation of privately held land, through zoning and other land use regulations, to protect targeted watersheds and the like.

But the argument has a flip side. A rejection of the enclave theory of conservation also diminishes the tension created by land sales. If the government sells land under the belief that the land has little conservation value and we later decide that we underestimated

¹⁴⁹See John H. Cushman, Jr., *Timber! A New Idea Is Crashing*, N.Y. TIMES, Jan. 22, 1995, at sec. 4, p.5, col. 1.

¹⁵⁰See generally ALSTON CHASE, *IN A DARK WOOD: THE FIGHT OVER FORESTS AND THE RISING TYRANNY OF ECOLOGY* (1995).

¹⁵¹The best statement of the position is in Joseph L. Sax, *Proposals for Public Land Reform: Sorting Out the Good, the Bad, and Indifferent*, speech presented at CONFERENCE ON CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFITS, Natural Resources Law Center, Univ. Colo. School of Law, Oct. 11-13, 1995.

the land's environmental value, we can still reach the environmentally sensitive aspects of the land through some form of use regulation. In admitting that the government does not have to own the land to implement conservation or environmental goals, advocates admit that land sales are not as critical an event as many claim.

(d) Modern Experiences on Segregating Land Held for Public Purposes from Land Dominated by Private Uses.

At issue for privatizers then is the serious question whether the federal government can make sensible decisions on criteria and the application of those criteria to specific parcels when the matter will be addressed by so many professional spokespeople from opposing camps, each unwilling to compromise and each eager to exaggerate and inflame. I believe the government is capable of carrying out these tasks, were it to take them on. As noted in the following section, however, the issue is likely to be hypothetical.

My optimism is grounded in two recent events, one domestic and one foreign. Consider first the recent experience of New Zealand, a socialist democracy that, after it went broke, awoke to embrace free market principles¹⁵² and to privatize many of its government-owned industries.¹⁵³ The New Zealand government owned most of the country's timber-producing lands and the forests were managed under "multiple use" criteria similar to ours. Government employees had been charged with finding the best mix of timber revenues, recreation and wildlife habitat. Admitting failure, as we have not, the government changed course. The managing director of the New Zealand Forestry Corporation explained:

We had a massive campaign against the logging of our native forests. It went on continuously for 20 years. We gave multiple use the best possible shot, and finally repudiated it entirely. It didn't work in our circumstances. It just led to ambiguity of objectives and ambiguity

¹⁵²See generally COLIN JAMES, *THE QUIET REVOLUTION* (1986). For a criticism of the change, see JANE KELSEY, *ROLLING BACK THE STATE* (1993).

¹⁵³See Marcus W. Brauchli, *The Foreign Invasion: New Zealand Discovered the Benefits of Letting Global Companies Be a Part of the Reform*, *WALL ST. J.*, Oct. 2, 1995, at R16.

of management. So we put all the environmental stuff in one organization and all the wood production in another.¹⁵⁴

Timber producers agreed that native forests consisting of over 19 percent of the country were off-limits.¹⁵⁵ Environmentalists accepted plantation logging on the remaining land, which was allocated to a government-owned corporation.¹⁵⁶ The corporation, which began with timber rights to one-half the country's commercial forests, has sold over 60 percent of its cutting rights to private concerns.¹⁵⁷ On commercially-oriented land trees are planted and harvested, just like corn or barley.

Positive evidence of the United States government's ability to distinguish between land that ought to be held and land that ought to be sold, subject perhaps to restrictions on use, comes from the performance of the Resolution Trust Corporation and the Defense Base Closure Commission. The basic operating presumption, largely uncontested, for both agencies was to *alienate* land, not retain it. That presumption was directly contrary to the presumption for retaining federal lands, *even though in some cases the land in issue was adjacent to federal land*. Moreover, Congress charged each agency to establish procedures for identifying and handling environmentally sensitive land.

Congress charged the RTC with developing regulations that give priority to conservation organizations or other government agencies for purchase or transfer of property that is "within the Coastal Barrier Resources System" or that is "undeveloped, greater than 50 acres in size, and adjacent to or contiguous with any lands managed by a governmental

¹⁵⁴Bruce Ramsey, *Weyerhaeuser Now Looks to New Zealand*, SEATTLE POST-INTELLIGENCER, Aug. 30, 1995 at B5.

¹⁵⁵1988 Report of the Department of Conservation, Presented to the New Zealand House of Representatives, July 14, 1988.

¹⁵⁶The forests were leased to the New Zealand Forestry Corporation Limited, a public company established under the State Owned Enterprises Act of 1986. The Forestry Corporation has two shareholders, the Minister of Finance and the Minister for State Owned Enterprises. Report by the Policy Division of the Minister of Forestry, *The Forestry Sector in New Zealand*, May 15, 1989. In its first six months of operation, the Forestry Corporation showed the first operating profit on government timberlands in over seventy years. N.Z. HERALD, Dec. 9, 1987, at 1.

¹⁵⁷1995 NEW ZEALAND OFFICIAL YEARBOOK at 436.

agency primarily for wildlife refuge, sanctuary, open space, recreational, historical, cultural, or natural resource conservation purposes."¹⁵⁸ "Undeveloped" land is property with "natural, cultural, recreation, or scientific value of special significance" and few man-made structures.¹⁵⁹ Similarly, Congress, in closing several large military bases, turned the task over to the General Services Administration (GSA).¹⁶⁰ Under 1949 legislation, the GSA can dispose of property to other federal agencies, other public bodies, or private enterprise, in that order.¹⁶¹ The GSA is empowered to assess the use of the land for wildlife conservation¹⁶² and to consider local and regional economic needs.¹⁶³ The progress to date under both programs seems to support an argument that the federal government is capable of making headway on large land disposition programs that include environmentally sensitive lands.

5. The Politics of Federal Land Privatization in the United States: A Stillborn Child

(a) The Birth and Death of the Privatization Movement.

The "movement" (and I am being generous here) for privatizing federal lands began with a "small group of intellectuals with respectable credentials who developed their arguments in both scholarly and popular outlets."¹⁶⁴ The movement's base was a scattering of professors at Johns Hopkins University, Montana State University, the University of Washington, and a conservative think-tank or two.¹⁶⁵ The group argued that the literature

¹⁵⁸ 12 U.S.C.A. § 1441a-3 (1995).

¹⁵⁹ *Id.*

¹⁶⁰ See Testimony of Brian J. O'Connell, May 16, 1995, before the Subcommittee on National Parks, Forests & Lands (explaining the base closure procedure).

¹⁶¹ Federal Property and Administrative Services Act of 1949, 40 U.S.C.A. § 471 et seq. (1995).

¹⁶² 10 U.S.C.A. § 2687 (1995), Pub. L. 103-160, § 2911, 107 Stat. 1924 (1993).

¹⁶³ 10 U.S.C.A. § 2687 (1995), Pub. L. 103-160, § 2903(c), 107 Stat. 1915 (1993).

¹⁶⁴ NELSON, *supra* note 15, at 184.

¹⁶⁵ See, e.g., MARION CLAWSON, *supra* note 38 at 149-57 (describing the speeches and writings of John Baden, Richard Stroup, Steven Hanke, Gordon Tullock and others in the late 1970s); Garrett Hardin & John Baden (eds.), *MANAGING THE COMMONS* (1977).

supporting deregulation of transportation, communication, banking and other large industry sectors, the sale of government assets like Conrail and waste-water treatment plants,¹⁶⁶ and our government's increasing tendency to contract out for a variety of public services could inform our decision on how or whether to manage federal lands.

The premises of the general anti-government argument are, by now, well-known. Government management provides an allocation of resources inferior to what a market would provide due to the combination of two phenomena: limited capacity of even well-intentioned government administrators, and ease of corrupting ("capturing") the government planning process. This group of professors simply pointed to the large body of extant literature on failures of federal land management as supportive of general anti-government regulation principles.

The high-water mark of the privatization of federal lands movement came in February of 1982.¹⁶⁷ Early in the month the Cabinet Council on Economic Affairs, due mainly to the efforts of a single economist on the Council of Economic Advisers, presented President Reagan with a proposal for developing a program to dispose of "unneeded public lands."¹⁶⁸ President Reagan acceded and signed an executive order on February 25, 1982 establishing a Property Review Board reporting directly to the White House to identify unneeded lands.

The Property Review Board sought help from the Department of the Interior, asking their field offices to classify federal land into one of three categories: park or wilderness, which would be permanently retained; land suitable for immediate sale; and land marked for further study. The second category of land for immediate sale included a paltry 4.4 million

¹⁶⁶See David Wessel, *The American Way? In the U.S., Ideology and Budget Concerns are Feeding the Privatization Fever: But Are We Going Too Far?*, WALL ST. J. Oct. 2, 1995, at R8.

¹⁶⁷The history is from NELSON, *supra* note 15, Chapter Seven; Note, *Sales of Public Land: A Problem in Legislative and Judicial Control of Administrative Action*, 96 HARV. L. REV. 927 (1983).

¹⁶⁸Memorandum for the President from the Cabinet Council on Economic Affairs entitled "Federal Property Review Program," Feb. 9, 1982, quoted in NELSON, *supra* note 15, at 186.

acres, less than 3 percent of the BLM land and less than 1 percent of all federal public lands. Interior identified only 27 million acres in its "further study" category.¹⁶⁹

Contrary to the widely-held modern view of these events, Interior Secretary James Watt did not initially support the program. Instead, he favored grants of federal land to state and local governments. The press attacked, reporting that the government was going to sell 35 million acres, a false figure, and labeled it the "land sale of the century."¹⁷⁰

To the astonishment of privatization advocates, ranchers and other traditional western land use groups joined leagues with environmentalists to defeat the program. Ranchers feared paying full value for grazing; miners would have to pay more for minerals in place; environmental groups feared large-scale development on sold land; local communities feared losing free access to federal land; private landowners worried about the short-term depression of property values caused by the sale; and hunters, fisherpersons, bikers and other recreational enthusiasts feared having to pay for their pursuits. Even the "sagebrush rebels" of the period attacked the sale.¹⁷¹

The opponents of privatization did not select targets with a sniper's precision; they used a blunderbuss. They labeled as suspect all federal land sales, regardless of location. Public spokespersons for the opposition shamelessly worked, and worked hard, the most politically effective (and false) position: "Reagan is selling (or will be selling next) our National Parks." Public opinion became so polarized that the government could not even sell street-corner lots in Reno and Palm Springs.

Demonstrating how inflamed the issue became, the Governor of Idaho, John Evans, threatened armed resistance to the federal government: he would call out the Idaho branch of the National Guard if necessary to stop the sales.¹⁷² The political pressure was

¹⁶⁹Of this, 7.5 million acres was "checkerboard pattern land" created by checkerboard grants to railroads in the early nineteenth century. See *supra* note 167.

¹⁷⁰Peter Stoler, *Land Sale of the Century*, TIME at 16 (Aug. 23, 1982).

¹⁷¹Hess, *supra* note 22: "Privatization is too risky ... nonranchers — God forbid, environmentalists — might end up with their land. At worst, they might have to pay their own way."

¹⁷²Larry Swisher, *Evans Denounces U.S. Land-Sale Plan*, IDAHO STATESMAN, Oct. 7, 1982.

overwhelming. Secretary Watt officially disabled the Property Review Board from selling land in July of 1983.¹⁷³ Picket's charge was over, the South had lost.¹⁷⁴

The lesson of 1982 is straightforward. The federal government has used its public lands to subsidize a wide variety of groups over a broad political and social spectrum. Threats to their government subsidies unite these disparate constituencies. They are less threatened by their historic fights with each other for an allocation of the subsidy than by the prospect of losing the prize, low-cost land, altogether. This odd alliance of ranchers and ecologists will, absent major changes to our appetite for federal subsidies, defeat serious efforts to sell federal land.

(b) Where We Are Today on Land Sales.

Privatization proponents, chastened, have regrouped somewhat and now make arguments for what they consider second-best solutions. The grant of long-term leases¹⁷⁵ and the recognition of de facto property rights in federal lands¹⁷⁶ are the two proposals most often mentioned. Only a maverick or two arguing for privatization is left.¹⁷⁷

¹⁷³See Coggins & Nagel, *supra* note 51.

¹⁷⁴There has been a random shot or two fired lately, however. In April of 1995 Don Young (R-Alaska), the Chairman of the House Resources Committee, stunned everyone by announcing that he intends to develop legislation to allow ski resort operators on national forest land to acquire the public lands they use. This was news to even the resorts themselves. See 20 PUBLIC LAND NEWS, April 27, 1995, at 1. The House passed Young's provision as an amendment to the Interior Department's spending bill. But Young withdrew his support and the conference committee deleted it after everyone in the Colorado delegation opposed the measure. See Adriel Bettelheim, *Congress Scraps Sale of Ski Areas*, DEN. POST, NOV. 17, 1995, AT 10A, COL. 6.

¹⁷⁵See, e.g., CLAWSON, *supra* note 38, at 200-27.

¹⁷⁶See, e.g., NELSON, *supra* note 15, at chapter 16.

¹⁷⁷See, e.g., David A. Ridenour, *To Save Wildlife, Scrap the Endangered Species Act*, WALL ST. J., July 18, 1995, at A14, col. 3 (sell "surplus" federal land to "foster greater pride of ownership"); Steve H. Hanke, *Frozen Money*, FORBES, Feb. 27, 1995, at 158 ("Both Alexander Hamilton and Thomas Jefferson advocated privatization of federal lands. So what is the new Republican Congress waiting for?").

By and large, a presumption against disposal of federal lands, embodied in the Federal Land Policy and Management Act of 1976 (FLPMA), remains intact.¹⁷⁸ Land swaps are a more common method of transferring land out of federal ownership, but the amounts are still very small.¹⁷⁹ In this process, federal land with little public value is swapped for private land of higher public value. However, as these swaps get more attention, the marginal gains may become elusive.¹⁸⁰

¹⁷⁸43 U.S.C. §§ 1701-1782 (1976). The first sentence of FLPMA declares a policy that "public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest." *Id.* at §1701(a)(1) (1976). The Act provides three criteria for sale. Sale is permitted only if, as a result of systematic land use planning, it is determined that the tract is "difficult and uneconomic to manage," that the tract "was acquired for a specific purpose and ... is no longer required for that or any other Federal purpose," or that "disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values, including, but not limited to, recreation and scenic values, which would be served by maintaining such tract in Federal ownership." *Id.* at §1713(a). A sale of more than 2500 acres cannot be consummated for ninety days, during which time either House may veto the sale. *Id.* at §1713(c). All sales must be at fair market value. *Id.* at §1713(d). See generally 43 C.F.R. § 2710.0-1 (1980) (regulations on BLM land sales).

The planning process required to sell land has proven so cumbersome and so enticing for litigants that all involved agree that the disposal process under FLPMA is "locked up." *E.g.*, *Conservation Law Foundation v. Harper*, 587 F. Supp. 357 (D. Mass. 1984) (conservation organizations successfully halt a public land sale by arguing that the sale requires an environmental impact statement). In 1993, the BLM sold only 4,273.48 acres for \$1,206,821.51. PUBLIC LAND STATISTICS, BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF INTERIOR, at 11 (1993).

¹⁷⁹In 1993 the BLM exchanged 115,357.74 acres. *Id.* at 15. FLPMA governs land exchanges as well. 43 U.S.C.A. §1716 (1995). The land exchanged must be of equal value and in the public interest. *Id.* at §1716(a). The public interest standard is frequently the subject of litigation. *E.g.*, *National Audubon Society v. Hodel*, 606 F. Supp. 825 (D. Alaska 1984). See generally Matheson & Becker, *Improving Public Land Management Through Land Exchange: Opportunities and Pitfalls of the Utah Experience*, 33 ROCKY MTN. MIN. L. INST. 4-1 (1987).

A fall-back argument for retaining federal land of minimal public use is that such land provides currency for the exchange program: when officials in the federal government have difficulty securing appropriations for land purchases, they can use this land for trade. As noted above, the numbers of acres are low; if they increase or even stay at current levels, they will, I believe, soon be substantially tied up by litigation among interested parties. Moreover, justifying acquisitions that Congress will not fund is troublesome, and the traditional practice of holding excessive amounts of public land may be part of the reason Congress will not approve more purchases. A recent example makes the point. See Jerry Gray, *Gingrich Backs Buying Tract on Jersey-New York Border*, N.Y. TIMES, Dec. 12, 1995, at A10, col. 6. The federal government was stymied in its efforts to buy Sterling Forest, which straddles the border of New York and New Jersey. The bills pending in Congress authorizing federal money to buy the forest ran into trouble because western lawmakers took the position that the federal government owns too much land. However, when the proposal was made to fund the purchase through public auction of 56,000 acres of federal land in Oklahoma, it won the support of the Speaker of the House.

¹⁸⁰See, e.g., Katharine Collins, *Irony Piles On Irony in Wyoming*, HIGH COUNTRY NEWS, Aug. 7, 1995, at 4, col. 2 (describing the political difficulties of a proposed land swap in Jackson Hole, Wyoming). See also Samuel Western, *After 17 Years, Property Rights Finally Win in Wyoming*, WALL ST. J., July 19, 1995, at A13 (a botched swap).

(continued...)

6. Conclusion

My basic recommendation seems modest — that we ought to separate federal lands into those that have commodity- and non-commodity-based predominate uses and sell the commodity-based parcels. I am sobered by the understanding, however, that my basic recommendation is not politically feasible. Nor is it likely that, even in the aftermath of the 1994 revolution in Congress, it will be viable in the foreseeable future.

There are too many powerful political interest groups aligned to oppose the sale. They are strange bedfellows. Commodity-based interest groups (ranchers, loggers, and miners), conservation-based interest groups and recreation-based interest groups, who despise and distrust each other, all have joined hands to oppose the sale of federal land. Rather than buy land at auction, the players prefer to struggle amongst themselves over access to government-owned land. The struggle takes the form of a contest on political process. Each side urges the adoption of a political process that allocates use of the land in their favor. The commodity-based interest groups urge us to put the land under state administrative control, while conservation-based interest groups lobby for federal legislation enforced through our federal courts.

The balance of power in this struggle is shifting because the demographics of the West are shifting away from the commodity-based groups, who have dominated allocation decisions for over fifty years, to recreation-based groups. This shift will cause new tensions in old alliances; recreationists and conservationists, for example, will clash with each other over land use decisions. There will also be divisions among the recreationists; backpackers will clash with off-road vehicle enthusiasts and so on.¹⁸¹

These new disputes will be just as ugly as the old ones, with each group marshaling raw political power,¹⁸² throwing out a smoke screen of arguments on public or collective

¹⁸⁰(...continued)

exchange cost the federal government \$200 million, the largest award ever handed down by the U.S. Court of Claims on a takings clause claim).

¹⁸¹The clash is already in evidence. See, e.g., Ray Ring, *supra* note 132. See also Elizabeth Manning, *Outfitters Take Aim at Four-Wheelers*, HIGH COUNTRY NEWS, Dec. 11, 1995 at 12, col. 2.

¹⁸²Through traditional lobbying activities that revolve around cash.

interests, and staking claim to a subsidy for their activities. Until the American public frees itself from the notion that government is a vehicle for the pursuit of private gain through grants of privilege, we will continue to witness this sorry spectacle.¹⁸³

¹⁸³This is not to say that individuals who urge for the expansion and maintenance of national parks and wildlife refuge areas are not public spirited and altruistically motivated. Rather my point is empirical. The state of current use of federal land is overwhelming evidence that private interest groups, seeking special, exclusive advantages, dominate the policies of the land allocation process.