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ARTICLES

THE PUBLIC INTEREST IN PUBLIC LAND LAW: A COMMENTARY ON THE POLICIES OF SECRETARY WATT*

George Cameron Coggins**

It sometimes seems as though most law review articles on American public land and resources law start by saying that the United States owns about one-third of the total national land area, not counting the outer continental shelf.¹ The authors then usually discuss their conception of what is wrong with the rules governing mining,² or mineral leasing,³ or timber cutting,⁴ or water rights,⁵ or wildlife management,⁶ or some kindred topic. Seldom, however, do the public law commentators articulate their fundamental assumptions about the function and purpose of law in this area.

The industry writers, for instance, often assume that the federal government has a duty to assist resource extraction and development.⁷ Oil company representatives frequently remind us of the national vulnerability to Middle Eastern rapacity, but they never explain exactly which national policies support depletion of all domestic public oil and gas reserves as fast as possible. Hardrock miners apparently believe that without the incentives to discovery and production provided by the mining laws, precious and

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¹ This Article is an updated and haphazardly footnoted version of a speech to the Mid-Continent Law School Association in Teton Village, Wyoming, on August 2, 1982.

² Professor of Law, University of Kansas. A.B., 1963, Central Michigan University; J.D., 1966, University of Michigan. The writer confesses that the opinions expressed are solely his own.


⁴ E.g., Symposium, 8 Envtl. L. 239 (1978).


⁷ That, apparently, is the official position of the Reagan Administration Department of the Interior. See infra notes 125-33 and accompanying text.
strategic minerals would be forever wasted. They too tend to assume that public policy dictates immediate exploitation. Wildlife managers write earnestly about how the deer will die unless hunters shoot them, all the while looking nervously at the hunting license fees that pay managerial salaries. One timber industry spokesman wrote that the legal profession has an ethical duty to ensure that forests are not wasted. To quote him on the preservation of old-growth forests: "Such a goal is patently ridiculous and indicates that law schools need to teach... . . . a few facts of life about ecology of plants. All trees have a date certain with death, just like every person. Trees were placed here by higher laws than man's for serving the human race." Does that sound familiar? Fundamentalism is much in vogue these days, and few maxims are more fundamental than the biblical concept that the world was made for human dominion and use.

Those who seek wildlife protection or wilderness preservation, on the other hand, seem to assume that the federal government's duty to protect pristine nature from human incursions always transcends mere economic desires. According to some environmental zealots, every roadless area should be a wilderness, only animals should kill other animals, all nuclear plants should be junked in favor of solar, the only good development is no development, the parks should be protected from people, greedy energy company executives should all be indicted, and that sort of thing. In common with the industry PR representatives, extremists at the other end of the public natural resources law spectrum often neglect to explain exactly why these "shoulds" should be. As differences in policy preference, these conflicts are inevitable, and so are the lawsuits brought by either side when one policy prevails over another.

In law schools, deans tend to frown when instructors wax philosophi- cal in classes. This brief commentary will not try to analyze Rawlsian

8. Even more anomalous, at least to the uninformed, is the corporation lawyer or Chicago-school economist who suddenly feels compelled to defend ghetto children from the dire threats posed by legislation such as the Endangered Species Act. Cf. Rogers, Are Our Natural Resources on the Endangered Species List? 11 NAT. RESOURCES LAW 267, 270 (1978) For some unaccountable reason, such declarations from such sources tend to make me nervous.


10. Genesis 1:26-28. Needless to say, Interior Secretary Watt would have avoided considerable public derision had he kept his Bible-based beliefs, particularly on the imminence of the Second Coming, to himself. See Wall Street Journal, May 5, 1981, at 1. Mr. Watt's comment was in the context of intergenerational equity: he opined that there might not be that many more generations to worry about. But there may be another side to this coin of belief: were Jesus to reappear, should we not, for instance, leave some wilderness in which He could meditate for forty days?

11. Such assumptions sometimes breed severe criticism of things-as-they-are, see, e.g., Foster, BLM Primitive Areas—Are They Counterfeit Wilderness? 16 NAT. RESOURCES J. 621 (1976), or very sweeping proposals for change, e.g., Favre, Wildlife Rights: The Ever-Widening Circle, 9 ENVTL. L. 241 (1979).
theories of distributive land law justice\textsuperscript{12} or similar exotica,\textsuperscript{13} but it will
venture some tentative, not-quite-certain thoughts on the assumptions
underlying federal public land and resources law. The general question is:
What is the proper function of a sovereign which is also a proprietor?
Secretary of the Interior James Watt’s policies will be used as the focal
point because he, more than anyone, has brought these issues to the
forefront of public consciousness.\textsuperscript{14} The somewhat more particular ques-
tion is: What standard or philosophy should guide the sovereign proprietor
in the use or disposition of the public resources? By default, the only
possible answer is the nebulous public interest in the public lands and
resources.\textsuperscript{15} After section I of this paper traces several pertinent trends in
the history of federal land law, section II recounts the ways in which
Secretary Watt is attempting to alter or reverse those trends. Section III
describes the possible consequences of some radical suggestions for
change, and section IV argues for the public interest standard.

I. THE COURSE OF PUBLIC LAND LAW

Historically, federal public land law functioned to transfer the public
lands from the United States to citizens, states, and corporations.\textsuperscript{16} The
national government always kept some lands for narrow federal purposes,
notably post offices and forts,\textsuperscript{17} but it eventually gave away or sold well over
a billion acres.\textsuperscript{18} In this century, public land law has been a far different
thing, with land disposition becoming the smallest part of it. After 1934,
when the remaining public domain was withdrawn into grazing districts,\textsuperscript{19}
only rarely could a state or an individual claim title to federal real estate.\textsuperscript{20}

\textsuperscript{12} J. Rawls, A Theory of Justice (1971).
\textsuperscript{13} This writer is delighted to note that many and various theorists are now taking public land
policy seriously—if not always realistically. E.g., Baden & Stroup, Political Economy Perspectives on
the Sagebrush Rebellion, 3 PUB. LAND L. REV. 103 (1982). Professor Williams Rodgers, engaged in
seeking theoretical support for a "people-based" allocation theory, happily shoots down the exotic
economists as a byproduct. Rodgers, Bringing People Back: Toward a Comprehensive Theory of
Taking in Natural Resources Law, 10 ECOLOGY L. Q. 205 (1982) [hereinafter cited as Rodgers,
Taking Theory], Rodgers, Building Theories of Judicial Review in Natural Resources Law, 53 U.
\textsuperscript{14} The real reason for this focus, of course, is that the irrepressible Secretary is fun to talk about.
\textsuperscript{15} See infra notes 198-207 and accompanying text.
\textsuperscript{17} See, e.g., United States v. Midwest Oil Co., 236 U.S. 459 (1915); Fort Leavenworth R.R. v.
Lowe, 114 U.S. 525 (1885).
\textsuperscript{18} See generally G. Coggins & C. Wilkinson, Federal Public Land and Resources Law
ch. 2 (1981).
\textsuperscript{19} By the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315r (1976). See E. Peffer, The
Closing of the Public Domain (1951).
\textsuperscript{20} See E. Peffer, supra note 19, at 313; G. Coggins & C. Wilkinson, supra note 18, at ch. 2.
Consequently—and except for Alaska and other special situations—the present extent and outline of the federal landed estate was generally set a half-century ago.

Over the years, the major emphasis in public land law shifted almost entirely from land disposition to resource disposition. Even though most present federal lands are unsuitable for conventional agriculture, they contain a wealth of renewable and nonrenewable resources. The United States owns over half of the national inventory of softwood timber. Its lands are the habitat for diverse and abundant wildlife, as well as millions of cattle and sheep, and they provide a wide array of recreational opportunities. Federal water rights overshadow the West, and water development projects blanket the country, providing irrigation, recreation, municipal supplies, and flood control.

The federal government also leases out vast energy resources: it controls all the offshore oil and gas beyond three miles; it owns the biggest share of western coal reserves; its lands contain what are estimated to be most of the domestic undiscovered uranium, oil and gas, and coal; it controls most of the known shale oil deposits; and it also has title to what
may become significant geothermal resources. The federal government
uses some variant of a competitive bidding system to sell or lease known
reserves of most energy resources, but it never seems to get a fair market
value return for them.

In the case of some other resources, Congress does not even make the
pretense. The federal grass grown on 300 million-odd federal acres is
leased to a relatively few ranchers on a preference basis for a fraction of
market value. Similarly, federal reclamation water is delivered to a fairly
small group of farmers for less than cost. Hardrock minerals on the public
lands go to their discoverers for free, and the miners can get title to the land
for a token payment. Most people using the federal lands for recreation
pay even less—maybe $2 to get into a national park—and many hikers,
rafters, and so forth pay nothing at all. Wildlife on the public lands is free
for the taking, and the hunting license fees go only to the states. States

36. See generally Olpin & Tarlock, Water That Is Not Water, 13 LAND & WATER L. REV. 391
(1978).
37. Examples of legal problems in leasing shale oil, coal, oil and gas, and geothermal resources
are set out in G. COGGINS & C. WILKINSON, supra note 18, at ch. 6, § B.
38. Although all of these energy resources except uranium are supposed to go to the highest
bidder, statutory preferences, administrative policies, and private manipulations have combined to
ensure that the United States is taken for a ride. Coal is a good example. After discovering that much
preference right leasing was purely speculative, without any intent to develop, and that most
"competitive" lease sales had "less than two" bidders, Congress in 1975 tightened diligence
requirements and outlawed preference leasing. The impetus for the Coal Leasing Amendments of
681, 94TH CONG., 1ST SESS. 14-21 (1975). The lessons offered by prior experience have not been
learned. Subject to pending litigation, the Interior Department will lease out billions of tons in a soft
market but with minimal consideration of other factors. See infra notes 125-29 and accompanying text.
The coal, consequently, is virtually being given away for a few cents a ton.

The same result may obtain on the outer continental shelf if the Secretary is able to implement his
plan to lease out all remaining acreage. See authorities cited infra notes 126. It is a virtual certainty
that, in sales of that magnitude, much oil and gas will go essentially for free. Onshore oil and gas is
allocated by a fraud-riddled lottery system at noncompetitive prices. See infra note 132 and
39. See Public Rangeland Law II, supra note 24, at 56, 73-75, 84. Virtually all of the 170 million
acres managed by the BLM outside Alaska are under lease or permit to ranchers, and the Forest
Service permits cattle and sheep on much of the 187 million acre National Forest System.
40. See, e.g., Sax, Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy,
42. Like the implied license to graze, conferred upon all in the 19th century by congressional
acquiescence, see Burford v. Houtz, 133 U.S. 320 (1890), an implied license to use the public lands for
recreation without charge is also evolving. See United States v. Curtis-Nevada Mines, Inc. 611 F.2d
1277 (9th Cir. 1980).
43. Ranchers who are upset at allegations that their low grazing fees constitute a federal welfare
program especially tend to point out this disparity.
44. Congress has affirmatively forbidden the multiple use agencies to charge for the exploitation
of wildlife resources. 43 U.S.C. § 1732(b) (1976).
45. See, e.g., Comment, Regulation of Wildlife in the National Park System: Federal or State?
also get payments in lieu of taxes\(^4\) plus a share of the proceeds from federal resource disposition programs\(^7\) and federal excise taxes.\(^4\) In fact, if offshore oil receipts are excluded, public land management by the United States is an economic loser; only the states and private beneficiaries win, while the federal landlord absorbs a huge annual loss.

The reasons for this anomalous state of affairs are mostly historical and political. These federal resource allocation systems were developed piecemeal over the past century, frequently without harmonizing one with another. Some resources go by lease,\(^5\) some by contract,\(^5\) and others by permit.\(^5\) Some private users have statutory or de facto preference,\(^5\) others do not.\(^5\) Some resource use or extraction is attended by intricate procedural requirements,\(^5\) some is not.\(^5\) Some systems give prospective users legal rights,\(^6\) some do not,\(^7\) and others are on the borderline.\(^5\) There may have been compelling reasons for each allocation scheme at its conception, but there is neither rhyme nor reason to the various resource disposition systems when viewed as a whole.

\(^{12}\) NAT. RES. J. 627, 633 (1972).


\(^{49}\) These include offshore oil, see Watt v. Energy Action Ed. Found., 454 U.S. 151 (1981), geothermal resources, see Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978), and onshore fuel minerals, see NRDC v. Berklund, 509 F.2d 553 (D.C. Cir. 1979).

\(^{50}\) Timber is sold in this fashion. See, e.g., Everett Plywood Corp. v. United States, 651 F.2d 723 (Ct. Cl. 1981).

\(^{51}\) Under the Taylor Grazing Act, ranchers using land within grazing districts get permits to graze livestock while those adjacent to isolated tracts get leases. 43 U.S.C. §§ 315b, 315m (1976).

\(^{52}\) E.g., 43 U.S.C. § 315b (1976) (preference in grass allocation).

\(^{53}\) Offshore oil is one of the few federal resources sold only by competitive bidding. The form of the bidding process can vary to accommodate smaller operators, but the Department seldom uses alternate bidding methods. See Watt v. Energy Action Ed. Found., 454 U.S. 151 (1981).

\(^{54}\) The process leading to production of offshore oil, for instance, is highly complex and detailed. See, e.g., California v. Watt, 668 F.2d 1290 (D.C. Cir. 1981); California v. Watt, 683 F.2d 11253 (9th Cir. 1982).

\(^{55}\) One who wishes to hike in a national forest, for instance, ordinarily need not undergo any procedural clearance.

\(^{56}\) One who discovers a valuable mineral deposit, and perfects the location, acquires a property interest called an unpatented mining claim. See, e.g., United States v. Etcheverry, 230 F.2d 193, 195 (10th Cir. 1956). But see Freese v. United States, 639 F.2d 754 (Ct. Cl. 1981).

\(^{57}\) See, e.g., United States v. Cox, 190 F.2d 293, 296 (10th Cir. 1951) (grazing permit is a more revocable privilege).

\(^{58}\) The nature and extent of the interest acquired by an offshore oil and gas lessee is subject to some question. Compare United Oil Co. v. Morton, 512 F.2d 743 (9th Cir. 1975), with County of Suffolk v. Secretary of the Interior, 562 F.2d 1368 (2d Cir. 1977). See generally Comment, The Interrelationships of the Mineral Leasing Act, the Wilderness Act, and the Endangered Species Act: A Conflict in Search of Resolution, 12 ENVTL. L., 363 (1982).
So long as private lands met most national resource needs, few much cared about the apparent inconsistencies in the mechanisms for federal resource disposition. The competition for these resources, however, especially energy resources, has intensified as scarcity became more apparent. The advent of organized constituencies for the so-called noneconomic resources makes the game even more spirited. With the exhaustion of private oil, timber, grass, and similar resources, the availability of public resources for private development can be a life-or-death matter for some companies and communities.

But resource disposition has been losing its dominant position in public land policy. In recent years, public land law has been characterized by procedural and substantive emphases on amenity protection. Congress, courts, and the public have decided that economically measurable production should not be the only goal of public land policy, and profitable exploitation has often been subordinated to noncommodity uses such as preservation.

Amenity protection is not a new idea—Congress has been creating national parks for over 120 years to preserve unique scenic resources for future generations, and the Forest Service began designating wilderness areas back in the 1920's. Not until around 1960, however, did the law directed at environmental protection really explode. In that year, Congress gave the Forest Service its official multiple use, sustained yield mandate. In 1964, in 1976, and again in 1978, Congress told the Bureau of Land Management (BLM) to pay attention to resources other than livestock forage. Congress also dictated intricate planning processes for the public


60. See infra note 184.

61. That state of affairs is most evident in small, isolated towns in the Northwest where the sole or main source of income is the local timber mill which gets its timber from surrounding national forests. Other places and entities are similarly dependent on federal minerals or grass or tourism.


63. Wilderness designation is a prime example. See California v. Block, 690 F.2d 753 (9th Cir. 1982).

64. See generally W. EVERHART, THE NATIONAL PARK SERVICE (1972).


land managers, from the National Environmental Policy Act (NEPA) in 1969,\textsuperscript{72} to the Forest and Rangeland Renewable Resources Planning Act (RPA) in 1974,\textsuperscript{78} to the Federal Land Policy and Management Act (FLPMA) in 1976,\textsuperscript{74} to the Public Rangelands Improvement Act (PRIA) in 1978.\textsuperscript{77} Over a dozen major federal pollution\textsuperscript{78} and wildlife laws\textsuperscript{79} were enacted between 1970 and 1981. National wilderness,\textsuperscript{78} wild rivers,\textsuperscript{79} preserves,\textsuperscript{80} conservation areas,\textsuperscript{81} and national trails\textsuperscript{82} were only some of the dominant use categories that Congress created since 1964, and the legislature also expanded the preexisting park and refuge systems considerably in that period.\textsuperscript{83} New laws and regulations also more closely control activities that threaten certain amenities. Congress has laid down strict standards for stripmining\textsuperscript{84} and timber cutting,\textsuperscript{85} and agencies are imposing new standards to govern mining,\textsuperscript{86} mineral leasing,\textsuperscript{87} and recreational

\begin{thebibliography}{88}
\bibitem{72} 42 U.S.C. §§ 4321-4361 (1976).
\bibitem{74} Supra note 69.
\bibitem{75} Supra note 70.
\bibitem{81} The California Desert Conservation Area was created by 43 U.S.C. § 1781 (1976).
\bibitem{86} See, e.g., United States v. Weiss, 642 F.2d 296 (9th Cir. 1981).
\bibitem{87} See, e.g., NRDC v. Berklund, 609 F.2d 553 (D.C. Cir. 1979).
\end{thebibliography}
use, among others. These and related developments meant that the major public land users have lately found themselves in a new ball game. Ranchers saw decreases in the number of cows and sheep allowed by their Taylor Act permits to graze on the public lands. Timber operators were at the mercy of Forest Service procedures and discretion. Hunters found some game species off-limits, and off-road vehicle fanatics found some areas closed. Miners discovered that their absolute rights were not so absolute after all. Oil drillers received permits and leases newly encumbered by amenity-oriented conditions and regulations. Coal companies could not obtain new coal leases. State jurisdiction was sometimes preempted in the process.

These changes did not take place overnight. Many would argue that the agencies still have not fully implemented the new statutes. In any event, present public land law is clearly a far more complicated and difficult business for all parties than it was just twenty years ago.

These three concerns of federal public land law—land disposition, resource disposition, and amenity protection—certainly are not exclusive categories either in time or in content. There are no bright lines between them, and all have been present in public land policy to a greater or lesser degree for over a century. For present purposes, the main point is that Congress has gradually shifted its major emphasis in public land law, first from land disposition to resource disposition, and then from resource disposition...
disposition to amenity protection. Congress followed the popular will, and, more slowly, the courts followed Congress. As of 1980, land disposition was not a serious concern, and the various interested parties were striking an uneasy balance between leasing public resources and protecting public values. Had that trend continued, the balance likely would have become more stable, because Congress was taking a more active role, environmentalists and development-oriented industries were learning to live with each other, and the federal agencies were gaining a better understanding of their new responsibilities. Legislation was often produced by accommodation among the disparate contenders, and some public land litigation was settled by negotiated three- and four-sided agreements.

II. Secretary Watt's Reversal of Course

All this has changed drastically since James Gaius Watt was confirmed as Secretary of the Interior. Confrontation, harsh words, and

100. FLPMA had declared that the United States would retain its holdings unless the public interest called for disposition of a particular parcel. 43 U.S.C. § 1701(a)(1) (1976).
101. G. COGGINS & C. WILKINSON, supra note 18, at xxi:
Modern public land law, like politics, often makes strange bedfellows: there is a tendency toward coalitions of otherwise divergent entities. In the lawsuit and the lobbying over Locks and Dam 26, for instance, the lamb lay down with the lion: the Sierra Club and the railroads were joint plaintiffs. [Whether the lamb gets much sleep is another question.]...It is likely that more such coalitions will form as corporate self-interest overcomes corporate distaste at cooperating with the erstwhile enemy, as conservationists become more realistic on goals and methods, and as the 'sides' more fully comprehend the areas of common interest where joint action can be mutually beneficial.

So much for my powers of prognostication.


104. The process was accelerated in the Carter Administration when several active environmental lobbyists and litigators, notably James Moorman, John Leshy, Kristine Hail, and Rupert Cutler, were appointed to public land policymaking positions in the federal government.

105. An informal committee of representatives from the forest industry and the environmental community, for instance, worked together on passage of the National Forest Management Act of 1976, and the Public Rangelands Improvement Act of 1978 was the product of general agreement.

106. The Georges Bank litigation, Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979), and the Coal Programmatic EIS lawsuit, NRDC v. Hughes, 437 F. Supp. 981 (D.D.C. 1977), are only a few of the disputes settled in this fashion.
nonnegotiable litigation have made big comebacks.\(^\text{107}\) Dialogue has ceased: the Interior Department seldom consults with the environmental community, and the latter organizations, without pausing to seek less drastic accommodation, now bring suit immediately following the Secretary's announcement of yet another industry-oriented decision.\(^\text{108}\) Beyond this, the available evidence suggests that Mr. Watt and the Administration for which he stands are trying to reverse the historic trends in those three areas of public land law. The Secretary apparently believes that the brave new world can be found in the good old days that never were.

Before his appointment, Mr. Watt was a prominent advocate of the "Sagebrush Rebellion," sometimes called the "Great Terrain Robbery." The Sagebrush Rebels seek, through legal and political means, a transfer of the public lands from federal to state (and then, perhaps, private) ownership—for free.\(^\text{109}\) The Rebellion makes no legal sense,\(^\text{110}\) little economic sense,\(^\text{111}\) and questionable political sense.\(^\text{112}\) At his confirmation hearings, Mr. Watt disclaimed any intention to give away the public lands, stating that his new "good neighbor" policy would ease tensions between the federal and state governments.\(^\text{113}\) At the time, the Rebellion was dying

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107. Popular reaction indicates that Secretary Watt may be the most hated man in America. Not even the corruption of his predecessor, Secretary Fall, led to such outpourings as the million plus signatures on the petitions for Watt's ouster. In fairness to Mr. Watt, it should be noted that not all of the vituperation and vilification now so fashionable originates in his office. Former President Carter, for instance, has stated that the Secretary will go down in history as a betrayer of the public trust. 13 Envt. Rep.-Cur. Devs. (BNA) 601 (1982). Although Secretary Watt's statements comparing environmentalists to Nazis and denying the patriotism of "liberals" evidence an ill-concealed contempt for the environmental community, and although the great bulk of Mr. Watt's official actions (and unofficial actions, such as warning the Israelis to disassociate Israel from environmentally obstructionist American Jews) have detracted from environmental quality goals, the reaction to the Secretary is itself frequently the product of unrelenting hatred, expressed as character assassination. Insiders claim that Mr. Watt is willing to "fall on his sword" in serving presidential policies and that he enjoys being the lightning rod for popular abuse. But the unprecedented degree of ridicule and derision hurled at him daily must necessarily affect the Secretary's judgment. Mr. Watt's claims that he gets his marching orders from God indicates that he is more deserving of compassion than hatred.

108. In the weekly Envt. Rep.-Cur. Devs. (BNA) over the past two years, an announcement of an action by Interior one week is frequently followed by commencement of litigation to enjoin the action the following week.


111. See Coggins, Evans & Lindeberg-Johnson, supra note 59, at 576.


113. Proposed Nomination of James G. Watt, Hearings Before the Senate Comm. on Energy and Nat. Resources, 97th Cong., 1st Sess. 72 (1981). The Secretary-to-be also frequently stated that the Interior Department under him would scrupulously obey the law. Many courts apparently disagree
down as cooler heads pointed out the many reasons why such a massive divestiture program was unacceptable.\[114]\n
More recently, however, the Reagan Administration has floated a flotilla of trial balloons about large-scale federal land sales.\[118]\n
Few of the proposals so far are very specific,\[116]\n
and small miscellaneous parcels such as some Waikiki beachfront acres are the first scheduled for auction.\[117]\n
But the ultimate targets apparently are the BLM lands, some military reservations, parts of the national forests, and, perhaps, several national parks near urban areas.\[118]\n
The President has established a Property Review Board to oversee land sales,\[119]\n
and Secretary Watt has opined that perhaps 35 million acres under Interior jurisdiction could be sold under existing statutes.\[120]\n
The Agriculture Department has proposed selling one-tenth of the national forests.\[121]\n
This “privatization” program is aimed both at paying off the national debt and putting the public lands to “higher and better” private use.\[122]\n
Conservative newspapers and economists think this is a wonderful idea, although some of them do not seem to realize that a section of barren sagebrush land in Nevada will not fetch the price of a small lot in Westchester. Most proponents of federal divestiture disclaim any interest in selling national parks or refuges, but the Interior Department under its new leadership has studied methods to divest the new urban parks.\[123]\n
Whether these efforts are serious or what chances they have of succeeding are unknowns. FLPMA declared that federal land ownership was now pretty much permanent,\[124]\n
even for the old public domain. But it is no longer sacrosanct to Mr. Watt: he is at least contemplating a return to the days of wholesale land disposal.

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114. See, e.g., Babbitt, supra note 112.
117. See Hooper, supra note 115.
120. Shabecoff, supra note 115.
122. Fact Sheet, supra note 119.
123. See Tinianow, supra note 118.
The disposition of public resources and the protection of public amenities are two sides of the same coin termed conservation. Secretary Watt apparently intends to reverse the pre-1981 trend of conditioning resource disposition on far more amenity protection. He advocates accelerating mineral leasing of every kind, ostensibly to promote national security. The Department of the Interior is committed to leasing virtually the entire continental shelf in the next five years, about twenty-five times more offshore acreage than has been leased in the past thirty years. Leases on billions of tons of coal in Wyoming were recently issued for a few cents a ton, and several billion more tons of coal are scheduled for sale in New Mexico, even though the federal coal already under lease is projected to meet demands for generations. Only at the last moment did the Interior Department back off from issuing phosphate leases in Florida that virtually everyone other than the BLM and the mining companies opposed. Interior has also tried to open wilderness areas to oil and gas leasing, and is going full speed on leasing the Overthrust Belt in spite of the widespread fraud that has characterized onshore oil and gas lease operations. Apparently, oil shale, geothermal, and timber resources are also up for grabs, but the state of the present economy detracts from the attractiveness of leasing these resources.

126. This program is one of the Secretary's first priorities. See 12 ENVT. REP.-CUR. DEVS. (BNA) 73, 371, 466, 474, & 452 (1981); 13 ENVT. REP.-CUR. DEVS. 420 (1982).
128. Id. at 1797.
129. See NRDC v. Hughes, 437 F. Supp. 981 (D.D.C. 1977) (and studies cited therein). It is curious that Mr. Watt and his ilk often decry "locking up" mineral resources in wilderness areas while encouraging "locking up" minerals in the hands of speculators. In the case of federal coal, the court in Hughes noted that while coal acreage under lease increased ten-fold from 1945 to 1970, coal production from those lands actually declined in that period. Id. at 984. On the abuses of coal leasing, see H.R. REP. No. 681, 94TH CONG., 1ST Sess. (1975).
130. The dispute likely is not ended. Shortly after Secretary Watt reversed course and notified lease applicants that their applications were denied because the lack of reclamation technology precluded a finding that the deposits had sufficient commercial value, President Reagan vetoed a bill which would have designated the area as wilderness. See 13 ENVTL. REP. CUR. DEV. (BNA) 1620 (Jan. 21, 1983). A congressional spokesman then voiced dissatisfaction, noting that courts could reverse the denial. Id.
132. In one recent instance, two pillars of the Billings, Mont., business community pleaded guilty to fraud charges involving the acquisition of 63 leases from 1975 to 1980. Billings Gazette, Jan. 7, 1983, at 1, col. 1. Secretary Andrus suspended leasing by lottery in March 1980 because of widespread abuses. The system was then reformed somewhat, but the promise of easy wealth is bound to encourage more and higher forms of fraud.
133. Oil shale development has come to a standstill, see infra note 137, and national forest timber is so oversold that Congress and the Department are considering means to relieve timber operators of existing contractual liabilities. See Portland Oregonian, Mar. 3, 1983, at D8, col. 1.
Many of these attempts to get public resources into private hands are not faring all that well. The domestic market for uranium will not achieve projected levels in this century because the nuclear industry is dying,\(^1\) the ill-considered efforts of the Reagan Administration to resuscitate the corpse have been futile,\(^2\) and the states are joining in the popular outcry against nuclear hazards.\(^3\) The oil shale development program is sick, perhaps terminally,\(^4\) in part because the federal eagerness to lease was offset by the post-1980 federal emasculation of the synfuels financing authority.\(^5\) Congress has vetoed much oil and gas leasing in wilderness and wilderness study areas,\(^6\) and it and the courts probably will outlaw the rest.\(^7\) A court enjoined the Administration from releasing wilderness study areas to development,\(^8\) and the mining industry lost its bid to loosen control over such areas.\(^9\) Several states have sued to prevent oil and gas leasing off their coasts.\(^10\) The District of Columbia Circuit even threw out the far more modest program of accelerated offshore leasing proposed by former Interior Secretary Andrus.\(^11\) The Department was also thwarted

\(^{134.}\) It has become apparent that all nuclear generating plants that will be built in this century are already operating or close to operation. No new orders have been placed for years, and cancellations of partially completed plants are announced almost weekly. The result can be chaotic as it is in the Pacific Northwest where the cancellation of several plants and the threat of further cancellations or mothballing has left private and public utilities holding a multibillion dollar bag. E.g., Seattle Times, Feb. 13, 1983, at A-16. Given the monstrously bad decisions made by high executives in many basic American industries (steel, automobile, and aluminum companies, as well as utilities, come to mind), it is a wonder that there have been no large-scale firings of the blunderers. Perhaps the federal government also serves a valuable function in this scenario: scapegoat.

\(^{135.}\) Reagan appointees to the Nuclear Regulatory Commission, acting to implement the President's desire to assist the nuclear industry, have decided to cut back safety requirements for nuclear plants. E.g., "Get-well" Wishes For Nuclear Power, Bus. Wk., Nov. 8, 1982, at 40. This action cannot be described in terms other than counterproductive and stupid.

\(^{136.}\) California's choice, virtually banning further nuclear plants from the state, is now before the Supreme Court as a preemption question in Pacific Legal Found. v. State Energy Resources & Dev. Comm'n., 659 F.2d 903 (9th Cir. 1981), cert. granted, --- U.S. --- (1982). South Carolina is joining as a plaintiff in suits seeking to halt renovation of an obsolete nuclear plant. 13 ENVTL. REP.-CUR. DEV'S. (BNA) 1628 (1982).

\(^{137.}\) After Exxon abruptly abandoned the Colony Shale Oil Project in 1982, only one active oil shale development project remained, and its future is far from assured. See Exxon Halts Colony Shale Oil Project, 80 OIL & GAS. J. 86 (1982).

\(^{138.}\) The Synfuels Corporation was set up to finance coal and shale oil conversion projects when private capital was unavailable. Reagan appointees to the Corporation have essentially put it out of business by adopting the policy of refusing to loan or to guarantee loans unless the applicant demonstrates that it does not need a loan. See, e.g., 417 ENERGY USERS REP. 1193 (Aug. 6, 1981); 424 ENERGY USERS REP. 1433 (Sept. 24, 1981).


in its attempt to turn the Arctic National Wildlife Refuge over to the mineral geologists;\textsuperscript{146} whether it can transfer control of the Matagorda refuge to Texas is being litigated.\textsuperscript{146} Because the Department is stymied at so many turns, many of its plans so far are only plans. But whether or not his efforts succeed, Secretary Watt obviously desires to return to an earlier day in terms of resource disposition.

The "good old days" trend is even more pronounced in the correlative area of amenity protection. The Secretary's unfortunate comments on a variety of amenity issues as much as anything have turned the environmental community to unrelenting, bitter opposition. Relations will not be helped by Mr. Watt's recent and unflattering comparison of environmentalists to Nazis.\textsuperscript{147}

When, after cutting short a raft trip down the Colorado, the Secretary commented that he didn't like to walk and didn't like to paddle,\textsuperscript{148} it not only brought down scorn from many conservationists,\textsuperscript{149} it also brought to mind Ralph Johnson's classic footnote about accommodating human desires in wilderness areas:

Motorbikes are a particular bane in the wilderness. But, it is said, many people like to ride motorbikes on mountain trails. This led me to invite a number of friends to fill in the blank in the following sentence: Because people like to ride motorbikes on mountain trails they should be allowed to do so, is like saying that because they like to ______ on mountain trails they should be allowed to do so. Unfortunately none of the entries were printable.\textsuperscript{150}

\textsuperscript{146} Sierra Club v. Watt, No. CA 82-3638 (D.D.C., filed Dec. 23, 1982). See 13 ENVT. REP. CUR. DEVS. (BNA) 1493 (Dec. 31, 1982).
\textsuperscript{147} Beck & Cook, Watt's Latest Stand, NEWSWEEK, Jan. 31, 1983, at 26. The Secretary's recent bout of shooting from the lip prompts provocative speculation on the nature of the system that the Secretary and the Administration for which he takes the heat are trying to implement. The neutral observer would have to conclude that the Reagan Administration government resembles the Nazi regime far more closely than the beleaguered environmentalists. The gist of national socialism as an economic system was extremely close cooperation and coordination between the general government and the most powerful private interests such as the Krupps. National rearmament was the first priority. Critics outside the government were termed unpatriotic—before harsher actions were taken—and internal dissident views were ignored or squelched. "Law, order, and discipline" was the rallying cry. Positions of importance could only be occupied by those exhibiting political (as well as racial) purity. Cronyism, narrowmindedness, bombast, evasion, and censorship were rampant. Certainly the parallels are not exact, and certainly Mr. Watt is not an American Nazi. Nevertheless, the Secretary's inane comments invite comparisons, and the similarities are disturbing—especially in light of the totalitarian manner in which the Interior Department is now being run. See infra note 203 and accompanying text.
\textsuperscript{148} New York Times, June 27, 1981, at A23 (Nathanial Reed editorial).
\textsuperscript{149} This comment, among others, caused a respected Republican former Interior Under Secretary to observe that "it speaks volumes that Mr. Watt is the first Secretary of the Interior to find the Grand Canyon boring." \textit{Id.}
\textsuperscript{150} Johnson, Recreation, Fish, Wildlife and the PLLRC, 6 LAND & WATER L. REV. 283, 289
The Secretary now seldom states in public that liberals are not Americans, or that we do not have to worry about endangered species because we cannot get rid of the cockroach, or that the Park Service ought to use the crowd control principles developed by Walt Disney. But the proclivities and actions of the Department speak louder: the careful consideration of amenity protection proclaimed—if not practiced—by the five preceding Administrations is now receiving only lip service from Interior.

The Secretary advocates more snowmobiles and boat motors in the parks, and he is willing to reopen the question whether to strip-mine next to a national park. Many allege that the Department is trying to shortcut or circumvent the environmental evaluation required by NEPA. The Interior Department is trying to gut the strip-mining law by new regulations and destruction of federal enforcement mechanisms. Endangered species protection has been put on the back burner. The Department is emphasizing multiple use management of the public lands while ignoring the complementary sustained yield requirement. The BLM apparently has abandoned its efforts to bring livestock grazing on the

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151. New York Times, July 14, 1981, at A1, col. 1. The timing of the Secretary's comments often exacerbates their divisive effect. The notion of opening the parks to snowmobiles, for instance, was made in Yellowstone National Park in September 1981, while Mr. Watt was being picketed for his callousness toward natural amenities.


154. That the Department would revise its voluminous regulations from time to time is unremarkable. That virtually every change would work to the benefit of the industry supposedly regulated is remarkable. Secretary Watt had earlier stated that SMCRA contained "every abuse of government." New York Times, June 16, 1981, at B9, cols. 1, 5. See Special Report, 13 ENVTL. REP.-CUR. DEVS. (BNA) 1684 (1982).

155. One of Mr. Watt's first acts as Secretary was "reorganization" of the Office of Surface Mining. See Great Falls Tribune, July 17, 1981, at 13-B, col. 3. To a great extent, OSM was reorganized right out of business.


157. Cf. Hearings, supra note 113, at 62, 72. The concept, legally originated in the Multiple-Use, Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-31 (1976), and carried over into FLPMA, 43 U.S.C. §§ 1702(c), (h), 1732(a) (1976), requires both compatible combinations of uses on the public lands and achievement of perpetual, high-level production of all resources, including the unquantified, unprofitable resources. The Department is attempting to increase production of economically measurable resources at the expense of future yield of all resources and amenities. See Coggins, Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management, 53 U. COLO. L. REV. 229 (1982).
Policies of Secretary Watt

Public lands within carrying capacity.\textsuperscript{158} Concessionaires are being given a much larger share of national park management.\textsuperscript{159} Mr. Watt promised to swing the pendulum back,\textsuperscript{160} and he is doing so. As he stated in May 1981, "we will use the budget system to be the excuse to make the major policy decisions."\textsuperscript{161}

To ensure that production is a higher priority than protection, the Watt appointments to policymaking positions in the Department are weighted heavily toward employees of the same resource production companies that contract with and are subject to regulation by their new employer.\textsuperscript{162} To say that the foxes are guarding the chicken coop has become a tired cliche' to describe Reagan Administration personnel policy, but it is more polite than saying that the inmates are running the asylum.

III. Alternative Philosophies of Public Land Law

Future public land historians may deem each of these actions or emphases good, bad, or somewhere in between. The totality of Interior policy since January, 1981 clearly represents a rejection of the more cautious and preservation-minded form of conservation that had emerged in recent years. But the worth of the Interior actions can only be measured if there is an appropriate yardstick. In this case, the proper scale is a public land philosophy that defines the goals of a property-owning sovereign. If total federal land divestiture is rejected as a solution—and all concerned except certain free market economists do reject it\textsuperscript{163}—then a spectrum of options remains, ranging from a total lack of regulation to the government acting as a profit-maximizing business.

A total lack of regulation—the kind of free-for-all scramble that characterized the range war era,\textsuperscript{164} and is sometimes called anarchy—requires little discussion. As Hardin demonstrated, uncontrolled

\textsuperscript{158} The appointment of a Colorado rancher as BLM head seemed to promise the continued impotence of the agency as a professional land manager. The promise has been kept. See Coggins, supra note 71, passim.

\textsuperscript{159} New York Times, June 19, 1981, at A15.

\textsuperscript{160} Hearings, supra note 113, at 63, 100.

\textsuperscript{161} Drew, A Reporter at Large: Secretary Watt, \textit{The New Yorker}, May 4, 1981, at 128. The syntax is original.

\textsuperscript{162} The few resource professionals occupying policymaking positions in the brave new Department are far outnumbered by former employees of coal, oil, and mining companies, politically-oriented tyros, and even sworn enemies of federal resource goals. Skeptical outsiders surmise that it is only a matter of time before the conflict-of-interest and "sweetheart" deal allegations how swirling around the Environmental Protection Agency surface in connection with Interior. Cf. 13 ENV'T. REP.-CUR. DEVS. (BNA) 107 (1982).

\textsuperscript{163} Cf. Baden & Stroup, supra note 13, at 116 (proposing, almost seriously, "that wilderness lands be transferred in fee simple to environmental groups").

access to a valuable resource leads almost inevitably to its destruction. The process is frequently accompanied by violence. No one advocates a return to gunfights as a dispute resolution mechanism, but a more subtle version of anarchy is currently in vogue. Mr. Watt is a leader in the Administration's charge against "regulation," which it often describes as unnecessary, initiative-stifling, bureaucratic, nit-picking, red tape. The theory (or, perhaps, faith) is that if the government gets off the backs of producing industries, then free enterprise will rescue the Nation from its present economic doldrums. Even though some in the Administration give the impression of opposing all federal regulation, they certainly could not mean just that. Regulation of conduct, along with mutual self-defense, are the main reasons why people established governments in the first place. Virtually all actions of all organs of government—including the courts—are regulatory in that they authorize or forbid or condition some human or institutional activity. And, of course, the government not only acts to curtail the actions of the economically strong, it also safeguards their property. Regulation is a means of societal self-defense, and no one

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167. The Administration has even created a high-level structure to review all regulations for redtape potential. Not surprisingly, the regulations found to offend also tend to displease the political tenets of the committee members and their constituencies.
168. As of February 1983, with the Nation sunk into a recession whose unemployment approaches depression levels, the strategy obviously is not yet working.
169. In all of the unfavorable attention focused on administrative agencies, it is often forgotten that courts, too, serve a variety of important regulatory functions. Not only do courts define and protect property rights, they also develop rules governing resource use and allocation that govern private relations and transactions, at least until the legislatures supersede the judicial guidelines. The evolution of much law is characterized by the sequence: (1) judicial establishment of a right; (2) judicial creation of common law rules for the use of the right (such as nuisance law); (3) legislative supplementation of the common law rules by affirmative state regulation; and (4) partial preemption of state law by more restrictive federal regulation. On the evolution of the common law, compare Fountainbleu Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 S.2d 357 (Fla. App. 1959) with Prah v. Maretti, 108 Wisc.2d 223, 321 N.W.2d 182 (1982). On the transition from common to statutory law, compare Commerce Oil Refining Corp. v. Miner, 281 F.2d 465 (1st Cir. 1960) with In re Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973). On the transition from state to federal law, compare Train v. NRDC, 421 U.S. 60 (1975) with Union Elec. Co. v. EPA, 427 U.S. 246 (1976). See generally W. RODGERS, ENERGY AND NATURAL RESOURCES LAW (1979).
170. Constant repetition of the theme espoused by the Nation's largest economic entities that the government should unshackle their operations from the constricting restraints of regulation, especially environmental regulation, sometimes leads one to wonder what General Motors or Exxon or General Public Utilities or Louisiana-Pacific would face if the government no longer shielded their property and the lives of their personnel from the ravages of the less-better-off. As Sandberg put it: "Get off this estate."
"What for?"
"Because it's mine."
"Where did you get it?"
who is defended from others or who receives some welfare benefit\textsuperscript{171} from some form of governmental action wishes to lose that particular immunity or gratuity.

In the public land sphere, the notion that regulation is evil becomes almost ludicrous. Apparently, proponents of antifederalism assume that a sort of public social Darwinism should operate, whereby the resources held in trust for all the people should be appropriated by the economically strong without interference from the trustee government.\textsuperscript{172} Thereafter—with the supplies firmly in the hands of Exxon, Amax, or Anaconda—"supply side" economics will operate to "trickle down" resource benefits. Proponents seem to assume that once private property rights in the public resources have been acquired, \textit{then} the government will actively regulate to protect those rights from both the even stronger entities and the growling mob. This view thus sees the function of the federal government as that of an unresisting rape victim who thereafter protects her violator from the consequences of his taking. As such, it has little to recommend itself as a basis for public land policy. The question is not whether there should be regulation of the public lands; there must be. Instead, the real questions are what ought to be regulated, and how, and by whom?

At the other end of the spectrum is the option of the government as a business. In all discussions of the benefits to be garnered by a lack of governmental restraint, seldom does anyone suggest that the governmental proprietor ought to unleash itself. Through historical accident, and to the extent that the public lands and resources are the "means of production," the United States has fostered an odd species of inadvertent socialism. What objections could be raised were the federal government to itself develop the lands and resources it owns, as would any other entrepreneurial proprietor? The notion is neither beyond contemplation,\textsuperscript{173} nor without

\begin{quote}
"From my father."
"Where did he get it?"
"From his father."
"And where did he get it?"
"He fought for it."
"Well, I'll fight you for it."
\end{quote}

\textsc{171.} Cynics are justifiably amused at the spectacle of the President repeating his condemnation of Chicago's "Welfare Queen" while his Administration doles out billions of dollars in direct and indirect subsidies to "truly needy" oil, coal, and timber companies, the nuclear industry, ranchers, and reclamation farmers.

\textsc{172.} The federal government for well over a century has been regarded as a trustee of the public lands, but whether the public trust doctrine makes an appreciable difference in practice is hotly debated. \textit{Compare} Jawetz, \textit{supra} note 1 \textit{with} Wilkinson, \textit{supra} note 25.

\textsc{173.} Congress in FLPMA added an obscure provision to the effect that a "wholly-owned government corporation" would not be precluded from locating mining claims on the public lands. \textit{See}
precedent. The throngs of interests that would oppose such a philosophy likely would argue that it is un-American, that the government is too inefficient to undertake such a task, and that such government enterprise would unfairly compete with private industry. In spite of their mutual inconsistency, both latter contentions could be true.

Again and again, experts, commissions, and economists have advocated more efficiency in government. Inherent in this position is the notion that the government ought to get fair market value for all public resources. In several ways, however, these arguments are persuasive only until more closely examined. First, the federal government is not supposed to be efficient: its whole tripartite structure ensures delay, argumentation, compromise, trade-offs, and inefficiency. In terms of public resource management, Professor Rodgers has made the point that while physical resources such as oil, water, or trees are scarce, there is no scarcity of process—we can have as many hearings, impact statements, reviews, and lawsuits as we want. Most noneconomists would agree that our individual liberties are far more important than the supposed economic efficiency that only fascist or communist or corporate systems can achieve. Thus, not only is the federal government inefficient and likely to remain so, its inefficiency also redounds to the benefit of the body politic.

But the United States as a hard-headed businessman, however inefficient, probably could outdo any private competitors economically. If Congress chose that option as a general philosophy, a whole new structure of public land law would be needed. The attraction of the idea would then rapidly disappear. Given its extent of resource ownership and ability to raise capital, the United States could make huge profits from its lands. The profit-maximization approach would do away with the existing subsidies and extraction policies as well as with environmental impact statements and reclamation requirements. If a private corporation owned 750 million

Sherwood, supra note 2, at 31-32.

174. Federal agencies have been in the resource development business at least since enactment of the Reclamation Act of 1902, 43 U.S.C. §§ 372-573 (1976). Most federal involvement is in the areas of water projects and energy generation (as with the Bureau of Reclamation, the Army Corps of Engineers, the Bonneville Power Administration, the Southwest Power Administration, and the Tennessee Valley Authority), but government business ventures into transportation (the Panama Canal Company) or communications (COMSAT Corporation) are not unknown.


177. Given the performance of many American captains of industry over the past decade, there is reason to question the assumption that corporations, especially large, conservative corporations, are any or much much more efficient than the federal government. Amtrak, for instance, is often held up as a prime example of governmental inability to run a business, yet Amtrak resulted from the massive failures of the massively-subsidized private railroads to provide passenger service.
acres plus the offshore lands, it would (1) lease the grass by competitive bidding (or else run its own cows);\textsuperscript{178} (2) control the soft timber market completely;\textsuperscript{179} (3) itself market its oil and gas;\textsuperscript{180} (4) develop its coal and shale oil resources itself;\textsuperscript{181} (5) and charge all the market would bear for hunting, fishing, camping, hiking, rafting, and birdwatching.\textsuperscript{182} Although a governmental entrepreneur would not give a damn about environmental evaluation\textsuperscript{183} or similar niceties, it would invest a lot of resources in reforestation, alternative energy sources, range rehabilitation, and, in general, protecting and enhancing its investment.\textsuperscript{184} If the public lands

\begin{itemize}
\item \textsuperscript{178} No sane, profit-minded landowner would allow the tenants to both have the grazing at a fraction of value and to keep the land in poor condition at the same time—as the United States now does. See \textit{Public Rangeland Law II}, supra note 24, passim.
\item \textsuperscript{179} As OPEC illustrated until internal dissension and lower demand set in, an entity owning the lion's share of the resources can, by lowering production or withholding it, largely dictate its own prices and profits.
\item \textsuperscript{180} Creation of the national petroleum reserve, together with reservation of naval petroleum reserves, might be a step in that direction.
\item \textsuperscript{181} All concerned realize that shale oil and coal are bound to be primary energy resources in the indeterminate future as supplies of oil and natural gas dwindle. The Supreme Court used that rationale in part to carve out an ill-considered exception to the mining laws for shale oil locations in \textit{Andrus v. Shell Oil Corp.}, 446 U.S. 657 (1980). Yet, for more than half a century, that realization has not been an adequate spur to private development of the resource. Nearly every study concludes that if only the price of oil would rise "x" percent, shale oil would be competitive—and when "x" level occurs, the next study concludes that if only it would rise another "y" percent. . . . The main fact is that private oil company entrepreneurs have been too timid to take a risk on the future—one that, if taken twenty or ten years ago, would have been yielding enormous profits now. The fabled entrepreneurial spirit in America seems to have faded out in recent years: corporations are willing to risk the lives of others in building nuclear plants or discarding hazardous waste, but they are unwilling to risk dollars on the country's future unless the government guarantees their profits. The federal government has often entered a field where private capital dared not tread—reclamation is but one example—and it may be time to consider seriously the notion that the federal government ought to assume direct responsibility for development of synfuels.
\item \textsuperscript{182} No one could argue with a straight face that a visit to Yosemite or Yellowstone is only "worth" the $2 admission fee per car. The explosion of the outdoor recreation industry in all its facets over the past several decades is abundant evidence of the incredible returns that could accrue to the owner of much of the most spectacular scenery in America. Fees for access to inholdings might also be a moneymaker, but charges for driving on federally financed highways would be going too far.
\item \textsuperscript{183} Although the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4363 (1976) would be repealed because of the expense of compliance, the government might prefer to retain the land use planning mechanisms of the RPA and FLPMA, \textit{see supra} notes 73-74, and bend them to profit-maximizing goals.
\item \textsuperscript{184} Prior experience in the private sector—which the private sector apparently wants repeated in the public sector—offers valuable lessons in the need to control resource extraction and exploitation to ensure adequate resource supplies in the future. Ranchers whose ancestors heedlessly overgrazed the public lands now complain that their private operations cannot survive without subsidized access to public grass. Timber companies that depleted their own stands and neglected to invest in reforestation now argue that the public land reserves of old-growth timber must be cut to keep their mills running. Oil companies that flared off, or otherwise wasted, untold billions of cubic feet of natural gas when prices were low now demand access to wilderness areas and the entire outer continental shelf to fend off the "Arab Menace." States whose laws have tolerated, if not encouraged, wasteful uses of water now clamor for federal impoundment of more and yet more water. In every instance, earlier internal or
were to be managed as though privately owned, there would be no mineral location system,185 no preference leases of any sort,186 no concern about local economies or local wishes,187 no lotteries,188 no reclamation water subsidies189—no free lunches at all. And since the federal government would remain the "supreme" government, states would be powerless to interfere.190

In fact, if the United States were really to act as a true free enterprise buccaneer, it could probably destroy most of the Nation's existing natural resources industries. Certainly all present public land users would be harmed to some extent, a result unacceptable to nearly all concerned. No one really wants the federal government to act like General Motors. The people much prefer the government as proprietor to be a government and to act like it. Consequently, any public land law philosophy must start by rejecting economic efficiency theories as lodestars; they simply cannot be applied rationally to overall governmental policies or operations.191 Crossing that hurdle leads to the hard questions.

If Congress were considering what to do with a tract of public land today, without the dubious benefit of our public land law history, almost certainly it would not opt to govern the way it has done in the past. American public resource allocation systems often are neither consistent

external restraints would have avoided or ameliorated subsequent shortage dilemmas.

185. However a governmental entrepreneur would choose to develop or dispose of its vast mineral resources, it would not be by giving them away.

186. Even if the government were acting as a profit-maximizing monopoly, it would certainly not tolerate bid-rigging by its buyers and suppliers. That there is so little present price competition for public resources should occasion little surprise: from the "claims clubs" of the 1820's to the asphalt price-fixers of the 1970's, taking the government for a ride has long been a national pastime.

187. Because of concern for local economies, the BLM often refuses to reduce permitted grazing down to carrying capacity, and the Forest Service sometimes sells timber at prices below sale costs. No self-respecting business entity would tolerate such counterproductive sentimentality.

188. Unless, of course, the lottery were operated at a profit to the lottery holder.

189. Even if the government only enforced the law as written, consequences for present federal water users could be severe. Cf. Greene, Promised Land: A Contemporary Critique of Distribution of Public Land by the United States, 5 ECOLOGY L. Q. 707 (1976).

190. That the congressional power over public land allocation and use is plenary, preemptive, and unlimited was confirmed in Kleppe v. New Mexico, 426 U.S. 529 (1976). That state or local regulation which even threatens to interfere with federal resource allocation goals is invalidated was confirmed by the summary affirmance of County of Ventura v. Gulf Oil Co., 601 F.2d 1080 (9th Cir. 1979), aff'd without opinion, 445 U.S. 947 (1980).

191. Even so, there still thrives a hardy breed of public land economists who insist all would be well if only the federal government gives away its lands to someone who would devote them to higher and better uses. See, e.g., G. LiebCape, Locking Up the Range (1981); Baden & Stroup, supra note 13. Unfortunately for them, however, the "science" of economics not only has never been successfully applied to public resource management, it is also suspect in private arrangements because of its facially fallacious assumptions. See, e.g., Rodgers, Taking Theory, supra note 13; Public Rangeland Law IV, supra note 71. In this regard, it may be appropriate to ask: where is the Laffer Curve, now that we need a "good laff?"
nor efficient nor fair nor reasoned. The crapshoot of history gave us a whole bunch of different federal lands systems managed, to greater or lesser degree, by a bunch of different agencies;\textsuperscript{192} both the agencies and the lands are broken down into unintelligible subdivisions.\textsuperscript{193} Every public resource is now distributed or allocated in a somewhat different fashion from the others, frequently with several federal and state agencies falling over one another trying to make a decision. Many such decisions are attended by mounds of paperwork—plans, impact statements, contracts, consultants’ reports, lawyers’ briefs, internal memoranda—until the hard substantive issues are submerged in the procedural morass.\textsuperscript{194}

The national lands are not managed either for profit maximization, as a corporation would do, or for production maximization, as a socialist state would do or try to do. Instead, the United States has arrived over the years at an uneasy and not entirely rational compromise, which is about what one should expect in a highly politicized democracy. If any present or future public land law policy can be justified, it can only be on the basis of the abstraction that we call the public interest. Like it or not, we are stuck with it as the overriding criterion and standard for public land policy.

IV. The Public Interest in the Public Lands

The “public interest” is a fighting phrase to many. In the public land law arena, those that are labeled environmentalists, preservationists, or conservationists have largely appropriated the description in the public mind.\textsuperscript{195} Most people think of the National Resources Defense Council, or the Environmental Defense Fund, or the Sierra Club Legal Defense Fund as public interest law firms, and they do not regard Secretary Watt’s former employer, the Mountain States Legal Foundation, in the same

\textsuperscript{192} That the Forest Service is in the Agriculture Department is a hangover from the happenstance that Gifford Pinchot had influence with President Roosevelt in 1905. That the BLM exists as a land manager stems from the failure of the Forest Service to acquire jurisdiction in the 1920s and 1930s. Other than history, there is no good reason for the Forest Service to be outside the Interior Department, or for the BLM to exist.

\textsuperscript{193} Public land classification nomenclature has proliferated far beyond need. Even without considering exotic designations such as national lakeshore or national trail, any particular parcel could be within a park, a recreation area, a forest, a conservation area, a preserve, a refuge, a game range, a monument, an “area of critical environmental concern,” a sanctuary, a national river, a gateway area, a scenic river, a battlefield, a specially withdrawn area, a petroleum reserve, a wilderness area, or any other number of classification possibilities. Even though there may have been a good reason for establishing each of these categories at the time, it is submitted that some degree of consolidation and simplification is overdue.

\textsuperscript{194} See, e.g., California v. Bergland, 483 F. Supp. 465 (E.D. Cal. 1980); aff’d in all important respects sub nom. California v. Block, 690 F.2d 753 (9th Cir. 1982).

\textsuperscript{195} In a sense, the old prior appropriation doctrine thus operates in this race for credibility and allegiance.
Most interests that are economically dependent upon public land use—and many political science-oriented law teachers—argue or assume that there is no such thing as the public interest as a standard. Instead, they say, there are only various individual and conflicting private interests, and the compromises or tradeoffs achieved among them by the political process is by default the public interest. This is a curious as well as self-serving argument. Its purpose is to put Exxon and the Wilderness Society on the same level, just two entities each seeking their respective selfish goals. The argument assumes that the world is merely an aggregation of profit motives and use preferences, colliding forces in a moral vacuum. There is no right or wrong; values are irrelevant; only political strength counts. Yet the same industries who so argue almost always try to justify their own public land projects on the basis of some external public interest—jobs, economy, national security, or whatever—even though the first purpose of all such projects is to make money.

I submit that we have to recognize the existence of a higher public interest, even if we do not know what it is. Like Justice Stewart’s description of pornography, we cannot define it, but we know it when we see it. The phrase, and some sort of assumed meaning, is not only implanted in most people’s minds, it also recurs in countless statutes and judicial opinions. The public interest standard as a guide to resource decision-making is an elusive and changing idea, always subject to debate, but it is what government is all about.

It is unlikely that anyone can come up with a definitive or conclusive description of the public interest in public land and resources law. By its nature, the public interest is not a concrete rule or a definite answer. Rather, like the law itself, the public interest is a continuing search, a long-

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196. Mountain States is one of a group of legal foundations that are funded by and represent the views of the larger economic interests in American society. They, like Mr. Watt, toil ceaselessly to reverse the directions in public land law for the benefit of private profit.


199. In many cases, Congress has said to the new agency little more than “go forth and regulate [trade, airwaves, river development, or whatever] in the public interest.” Courts and agencies must then develop a common law defining that particular public interest. A notable example of this process is Scenic Hudson Preservation Conf. v. Federal Power Comm’n., 354 F.2d 608 (2d Cir. 1965).

200. In the landmark Midwest Oil decision, for instance, the Court stated: “[W]hen it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the Government already owned.” United States v. Midwest Oil Co., 236 U.S. 459, 471 (1915). In Udall v. FPC, 387 U.S. 428, 450 (1967), the Court stated: The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the “public interest”, including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.
term effort to find a better resolution and then an even better one. The most
that can be done is to outline what it often entails and to recognize several
notions relevant to its application.

First, the public interest by definition is not the same as private
interest. This does not mean that standard economic arguments about jobs,
cost-benefit ratios, or multiplier effects are irrelevant, merely that they
should not necessarily control. Private profit or private benefit likewise
ought to be just one element in a complicated equation.

Second, the public interest is not necessarily the same as the public
trust. The two ideas have similar origins and purposes, but the latter is
either a facet of property law or a means of judicial imposition of duties on
land management agencies, while the former connotes a more general
standard of more general applicability at all levels of resource allocation.

Third, the process for reaching a decision may often be as important as
the final result. At a minimum, the process must be open and above-board,
as well as fair and consistent. There is a great deal of concern, which I
share, that the Interior Department is now emulating communist systems
by refusing to tolerate internal criticism or uncensored external rela-
tions, and is, therefore, courting disaster.

Fourth, the search for the public interest involves personal and moral
values as much as or more than dollars. Congress and the courts have
recognized this simple truth time and time again, but law schools have had
great difficulty and little success in integrating this consideration into
curricula or classes.

201. This principle is embodied in most law governing public land management. The national
parks and refuges are not, of course, expected to contribute profit-making potential. The multiple use
agencies are specifically cautioned against profit or product maximization. 16 U.S.C. § 531(a) (1976);

202. See Wilkinson, supra note 25.

203. See, e.g., Drew, supra note 161, at 106-7. Interior Department personnel, who shall remain
anonymous for obvious reasons, have informed the writer that: 1. the honors program for recent
graduates in the Solicitor's office was dismantled, and many bright new lawyers fired in the process,
because, at least in large measure, Messrs. Watt and Coldiron "wanted to get rid of all of the eastern
bleeding heart liberal extremists;" 2. any criticism of Departmental officers or policies risks instant
dismissal; 3. only those with known ultraconservative views or close ties to industry will be considered
for appointment; 4. no employee may speak in public without prior clearance of both the speech and its
contents; 5. no employees may talk to the press without prior clearance, and discovered "leaks" will lead
to firing; 6. many holdover employees whose offense was trying to enforce the statutes entrusted to them
were, if civil service, exiled to token jobs; 7. consulting scientists are chosen for their politics, not their
scientific credentials; 8. unless the employee publicly recites his or her faith in the wonderful job being
done by Secretary Watt, it is understood that the employee faces dismissal or exile. As one former
employee described the results of these restrictive changes, "morale went from maybe 75 on a hundred
point scale to ten or fifteen almost overnight. Now fear is the only common bond in the Department
outside the big shots."

204. It is curious how law teachers who should know better continue to assume that the law, or at
least the study of it, is an "objective" exercise into which moral values do not enter or do not count. One
Fifth, the search for the public interest is necessarily circumstantial, at least for public land administrators, because only Congress can lay down hard and fast rules covering a wide variety of situations. No circumstances, including personal, subjective perceptions, is irrelevant, even though obvious self-interest must be appropriately discounted.  

Sixth, a part of the public interest is the realization that future needs will be as great as present desires. Consequently, decisionmakers cannot be too cautious about the limits and applicability of present knowledge or expertise. My impression of public land management history is that well over half of the expert solutions adopted at one time or another turned out to be wrong, useless, or counterproductive. Certainly the application of the economists’ discount rate is inappropriate.

Seventh, the public interest cannot be determined by science, management expertise, or economics. The New Deal hope that unfettered expertise would solve societal dilemmas has not proved out, in part because the scientists and managers know less than is often assumed, and in part because all such major resource decisions are fundamentally political, not technical. The politics of scientists and managers are not superior to those of anyone else.

In the end, the public interest in public land law is what Congress says it is. The major difficulties arise when Congress, as it is prone to do, fails to speak clearly or when the outcome consistent with the congressional command of a particular question before the agency will be politically unpopular. In either case, the agency charged with implementing the law will be better off in the long run by hewing as close as possible to the spirit as well as the letter of the law.

For this reason, among others, Mr. Watt’s tenure as Interior Secretary will later be seen as an aberration, an attempt to turn back the clock to a time that never was. The Department is trying, so far unsuccessfully, to undo not only the work of previous Secretaries, but also the main purposes of the statutory systems now in place. This is not to imply that the Secretary is bad or even necessarily wrong as a political matter. Instead, his efforts need not mention Watergate to note that all law is fundamentally about values and how they are translated into rights, liabilities, and constraints. True, the instructor must avoid preaching, but if he or she does not investigate the whys, then the hows will never be truly understood.

205. Including, of course, the self-interest of the bureaucratic decisionmaker in the middle.

206. The frequent injunction in the public laws to preserve intergenerational equity often seems to be honored mostly in the breach. See 16 U.S.C. §§ 1, 531(a), (b) (1976); 43 U.S.C. § 1702(c) (h) (1976).

207. A thoughtful range economist told this writer that, in his classes, students were instructed to maximize economic benefits from the harvest of blue whales, of which it was given that only one breeding pair remained. No matter how the variables were manipulated, he said, the answer from economic analysis with discount rates was always “kill them now.” Cf. M’Gonigle, The “Economizing” of Ecology: Why Big, Rare Whales Still Die, 9 ECOLOGY L.Q. 119 (1980).
are doomed because his conception of the public interest runs contrary to
deeper currents of popular thought about the public interest in public
natural resources.