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Managing America's Public Lands: Proposals for the Future--Introductory Remarks

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CONFERENCE

MANAGING AMERICA'S PUBLIC LANDS: PROPOSALS FOR THE FUTURE

INTRODUCTORY REMARKS*

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The presumption of this conference is that a new public lands policy is needed; that, as former EPA Chief Council Donald Elliott has said of our environmental laws, "you can't get there from here [using present methods]."[1] I believe this presumption is valid. Based upon a reading of their preliminary papers, I would say that all but one of our panel participants accepts this presumption. This means that our discussion will pass muster under the National Environmental Policy Act (NEPA)[2]—we will examine several alternatives including that of no action.[3]

My assignment is to describe our existing laws and, given the presumption of this conference, to explain what is wrong with them. Bob Keiter of the University of Utah has done an excellent job of providing some historical context. What Bob has described, at least from Gifford Pinchot and Teddy Roosevelt forward, is the product of Progressivism.[4]

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1. E. Donald Elliott, *Environmental TQM: Anatomy of a Pollution Control Program that Works!*, 92 MICH. L. REV. 1840, 1847-48 (1994).

2. 42 U.S.C. §§ 4321-4370d (1994).

3. NEPA regulations require that environmental impact statements present the impacts of the proposed action as well as all reasonable alternatives, including the "no action" alternative. *See* 40 C.F.R. § 1502.14 (1996).

4. The term refers to that ideology which emphasizes the role of government in the furtherance of humanistic reform. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1963).

Therein lies part of the failure of our public land laws.

The defining goals of our current public land policy are two: multiple use and sustainability. Nothing we have done since the Multiple-Use Sustained-Yield Act[5] has altered these guiding values. The Forest and Rangeland Renewable Resource Planning Act of 1974,[6] the National Forest Management Act of 1976 (NFMA),[7] and the Federal Land Policy and Management Act of 1976[8] are all Progressivist solutions to a perceived failure to achieve these values in our public lands management. In that same Progressivist tradition are NEPA, the Endangered Species Act[9] and most of the rest of our environmental laws.

Now two decades after NFMA, we are still in search of better public lands policies. Notwithstanding the creative proposals of some of our panelists, I will predict that we will continue in the Progressive tradition, and that we (or more likely others) can therefore expect to be back here two decades hence to again seek solutions to what by then will be well over a century of failed public lands policies. Why this "vicious circle," to borrow a phrase from Justice Stephen Breyer?[10]

The naivete of Progressivism is half of the problem. The other half is a failure to understand and respect the most basic teachings of the political theory of our national founders.

First, the naivete of Progressivism. The Progressives believed in scientific management. Not just that science could provide information and understanding which would be useful to public lands management, but that it could substitute for the messy politics which had dominated public land policy through the 19th century. The idea was simple. Good science would provide good information which would be used by good public officials to reach good decisions. Thus would be served the public interest.[11]

Most of the public lands and environmental legislation of this century has been firmly rooted in this scientific management tradition. Throughout, there have been constant objections that the public interest is not being served, that special interests are in control, that the public welfare is being sacrificed to partisan politics. Our solution has always been more of the same, but better. Even my colleague Michael Blumm acknowledges that

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5. 16 U.S.C. §§ 528-531 (1994).

6. 16 U.S.C. §§ 1600-1614 (1994). The provisions of this Act were incorporated and revised by the National Forest Management Act. *See* "Short Title" notations following 16 U.S.C. § 1600.

7. 16 U.S.C. §§ 1600-1614 (1994).

8. 43 U.S.C. §§ 1701-1784 (1994).

9. 16 U.S.C. §§ 1531-1544 (1994).

10. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993).

11. *See, e.g.*, GIFFORD PINCHOT, BREAKING NEW GROUND 291-94 (Island Press 1987) (1947); *see also* Robert H. Nelson, *Government as Theater: Toward a New Paradigm for the Public Lands*, 65 U. COLO. L. REV. 335, 344 (1994).

the Multiple Use-Sustained Yield Act has failed,[12] and most will acknowledge that forest planning has been a nightmarish waste of resources and human energy. But we persevere. And now the scientific managers have finally hit upon the solution. They have finally gotten it right. Ecosystem management will assure that science buries politics once and for all.

This Progressivist search for the silver bullet of scientific management reminds me of a story I heard many years ago. A solo climber was ascending the North Face of Granite Peak in the Beartooth Mountains, just north of Yellowstone and, I should note, within the Greater Yellowstone Ecosystem, to which I will return later. As he neared the top he lost his footing and began to fall to certain death 2000 feet below. But fortune was on his side. As he fell, his hand managed to grasp a small outcropping of rock. And so he hung by one hand with no chance of climbing back up and only a matter of time before he lost his grip. In desperation he thought perhaps another climber might be on top of the mountain. If so, he might have a rope which he could lower to our stranded climber. "Is anyone up there?" he shouted. Silence. "IS ANYONE UP THERE?" he shouted a second time. To his surprise and delight a booming voice responded, "YES, I AM UP HERE, WHAT DO YOU WANT." "Please help me," said the climber. "DO YOU BELIEVE?" asked the booming voice. "Oh yes, I believe," said the climber. "IF YOU BELIEVE, LET GO OF THE ROCK." There was a long silence, and then our climber said "is anyone else up there?" Like the climber, our latter day Progressives are looking for better approaches to scientific management of our public lands.

Our public land managers have now embarked upon their most ambitious scientific management effort yet—ecosystem management. Notwithstanding that the public land laws do not authorize it, and I say that in spite of the fact that Judge Dwyer has found such authorization somewhere in the penumbras of those laws,[13] our public land managers are full swing into ecosystem planning and management. And they believe they are really doing it. For example, the manager of the Cabeza Prieta National Wildlife Refuge, the largest in the lower forty-eight states, has the temerity to say that "We're managing whole ecosystems with a staff of only six."[14] Greater hubris I cannot imagine. Nor can I imagine a greater

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12. *See generally* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405 (1994).

13. *See* Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1310-11 (W.D. Wash. 1994) (finding authorization to manage ecosystems based on language of ESA and NFMA, and mention of ecosystems in NEPA regulations, which Dwyer interprets as allowing, if not requiring planning for entire biological communities).

14. *See* Douglas H. Chadwick, *Sanctuary: U.S. National Wildlife Refuges*, NAT'L GEOGRAPHIC,

threat to the fundamental values of liberty and freedom which founded this country and have been the envy of the world ever since.

The idea of ecosystem management is this. Because every action taken on the public lands will have unintended environmental effects on and off the public lands, and because every action taken on private and state lands will have similar unintended environmental consequences, these actions should only be taken in the context of an ecosystem plan. The purpose here is to assure that the ecosystem remains viable and sustainable.

The central assumption is that everything is connected to everything else, which is no doubt true in some ultimate sense. Of course this means that ecosystems are difficult to define, but assuming that we can agree on a definition (here we will turn to science for the answer), contemplate the task of the ecosystem planner and manager.

Take an example right here in the Northern Rockies—the Greater Yellowstone Ecosystem. Ah, the Greater Yellowstone Ecosystem, it already rolls off the tongue as if it really exists thanks to the concerted efforts over the last decade or so of the Greater Yellowstone Coalition.[15] The Greater Yellowstone Ecosystem encompasses parts of three states, probably a dozen counties, and perhaps a hundred municipalities. It also encompasses vast areas of federal land under the jurisdiction of several federal agencies and no doubt some state lands as well. I know all of this because I have seen the map of the Greater Yellowstone Ecosystem which appears regularly in the newsletter of the Greater Yellowstone Coalition. Not identified on that map, but an additional challenge for the ecosystem planners, are thousands of private properties.

Imagine that you are the ecosystem manager for the Greater Yellowstone ecosystem. Where do you begin? Perhaps you could undertake a biological survey after which you will know more than you know now, but certainly not everything there is to know. And what about the economy of the region and all of the governmental authorities and the private property owners? This is a challenge far greater than economic planning without regard for the environment, and we know how that has worked out wherever it has been tried.

How can we be so audacious or naive as to believe that we can really do ecosystem management? The variables are beyond counting, not to mention beyond management. But even if we could acquire the requisite knowledge and somehow make the decisions which are right for the eco-

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Oct. 1996, at 6-7.

15. The Greater Yellowstone Coalition is a private conservation group dedicated to "preserve and protect the Greater Yellowstone Ecosystem and the unique quality of life it sustains." 13 *Greater Yellowstone Report* (a quarterly journal of the Greater Yellowstone Coalition) Summer 1996, at 2.

system (will science tell us what is right?), we do not have the political wisdom to implement those decisions.

Which brings me to the second reason why we are unlikely to reform our public lands laws to anyone's satisfaction. The Progressive belief in scientific management is rooted in an effort to escape political management. How often do we hear interests of all sides of the public lands debate lament that a particular decision is political and call for decisions based on good science? We hear a constant plea for bipartisan action in the public interest, or better yet, as Associate Justice Steven Breyer proposes in *Closing the Vicious Circle*, for expert decision making which can sidestep politics altogether.[16]

Let me remind you of a truth about government which our constitutional founders well understood. We cannot escape politics. Government is politics, particularly democratic government. Public lands are, as Rick Stroup taught me many years ago, political lands. That is the point. That is why they are public lands. Somewhere in the late Nineteenth century it was decided that these lands should not be left to private acquisition and management precisely because governmental, which is to say political, management was thought to be preferable. Numerous commissions and Congresses, including the just adjourned 104th, have revisited this issue with the same result.[17]

What our national founders understood about government is that we cannot escape politics. They understood, as a result of their experiences under both the English Crown and the Articles of Confederation, that, as much as we might appeal to the good will and civic republicanism of those who govern, the power of government must be constrained or it will be abused. The temptations of power corrupt even the best among us. And it is not just kings who abuse power. Madison warned of the tyranny of the majority, and, in an extended republic of multiple factions where the legislative process depends upon horse trading and log rolling, of the tyranny of minorities.

In the public lands context there is no better evidence of these political realities than the fact that a mere 25,000 holders of grazing permits[18]

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16. *See supra* note 10 at 59.

17. The 104th Congress faced various proposals for the privatization of some or many public lands. *See, e.g.*, H.R. 257, 104th Cong., 1st Sess. (1995) (intent of bill was to transfer BLM lands to states and private entities); H.R. 1923, 104th Cong., 1st Sess. (1995) (intent of bill was to sell of public lands to reduce federal deficit). Similar proposals have been made throughout this century. *See generally* George Cameron Coggins, *The Public Interest in Public Land Law: A Commentary on the Policies of Secretary Watt*, 4 PUB. LAND L. REV. 1 (1983).

18. About 30,000 grazing permits and leases are issued for BLM and Forest Service rangelands. However, some of these permittees graze more than 1 allotment, and 15% graze both BLM and Forest Service lands. Thus, the actual number of permittees grazing BLM and Forest Service land in the 16

were able to stymie the early reform efforts of the Clinton administration.[19] As I have argued in an article in the *Colorado Law Review*, public lands law is the product of a history of competing private interests seeking to extract wealth, including the wealth of environmental quality, from the federal lands.[20] No matter how much we appeal to science and wise management in the public interest, we cannot escape the simple reality that public land management is politics.

True reform will only come with basic institutional change. The framers of the Constitution understood that structure is everything if we seek to limit opportunities for private interests to exploit the immense powers of government. For them it was the structure of separation of powers and federalism. Because these structural limits have been largely abrogated by an assertive Congress and Executive and a compliant Supreme Court, the challenge to reform federal lands management is daunting.

We have decades of Supreme Court precedent confirming the unlimited power of Congress and deferring to the expertise of agencies. The latter is a product of the Progressive faith in scientific management, the former of an ends-focused jurisprudence which has ignored the concept of enumerated powers, the Tenth Amendment, and the economic liberties explicit in the Constitution. Without these constitutional limits on the exercise of federal power, we have little hope of reining in the private interest rent-seeking which defines our public lands politics.

Our only hope for meaningful reform is to recognize that incentives matter and that institutional arrangements are critical to the incentives faced by both public and private resource managers. Without a return to constitutionally limited government, our prospects for institutional reform are dim. Perhaps the *Lopez*,[21] *Seminole Tribe*[22] and *Dolan*[23] cases offer

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Western states is about 23,000. LYNN JACOBS, WASTE OF THE WEST: PUBLIC LANDS RANCHING 25 (1991) (citing COMMITTEE ON GOVERNMENT OPERATIONS, FEDERAL GRAZING PROGRAM: ALL IS NOT WELL ON THE RANGE, (1986)).

19. *See* Dover A. Norris-York, Comment, *The Federal Advisory Committee Act: Barrier or Boon to Effective Natural Resource Management?*, 26 ENVTL. L. 419, 434 n.125 (1996).

20. James Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. Colo. L. Rev. 241 (1994).

21. United States v. Lopez, 514 U.S. 549 (1995) (holding that law banning guns in school zones did not pass constitutional muster because prohibited activity did not substantially affect interstate commerce).

22. Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1127-31 (1996) (holding that the Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, did not grant Congress power to abrogate the states' Eleventh Amendment immunity).

23. Dolan v. City of Tigard, 512 U.S. 374 (1994). The *Dolan* Court, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960), stated that "one of the principle purposes of the Takings Clause is 'to bar Government from forcing people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 384. The Court suggests that governmental

a flicker of hope, but that small flame will surely be extinguished not too long after the almost certain reelection of Bill Clinton.

On that pessimistic note, which many will see as reason for optimism, we will now turn to the other members of our panel to propose institutional reforms which might well make a difference, if they can somehow overcome the obstacles of interest group politics.

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entities may not effect a "taking" by requiring that private landowners dedicate their land to public use as a precondition to the granting of building permits, variances, and other such discretionary privileges, *unless* the required dedication is reasonably related to the impact of the proposed development *and* is "rough[ly] proportional[]" to the extent of the impact. *Id.* at 389-90.