

# Do Sagebrush Rebels Have a Colorable Claim? The Space Between Parochialism and Exclusion in Federal Lands Management

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## **Do Sagebrush Rebels Have a Colorable Claim? The Space Between Parochialism and Exclusion in Federal Lands Management**

**Ann M. Eisenberg\***

*This Article asks whether the troubling nature of the Sagebrush Rebellion and similar movements (e.g., their violence, anti-environmentalism, and racist overtones) has made us overly dismissive of a kernel of truth in their complaints. Commentators often acknowledge that federal lands management may be “unfair” to local communities, but the ethical and legal characteristics of the unfairness concern remain under-explored. Although the Sagebrush Rebellion and federal lands communities are far from synonymous, substantial overlap between the complaints and demands of Sagebrush Rebels and the complaints and demands of many regional local (and state) governments suggests that to explore the one necessitates exploring the other. Yet, the extreme tactics of unsavory figures like Ammon and Cliven Bundy stand to overshadow real problems in the region. To search for the potential kernel of truth, I therefore apply a “pro se analysis” to complaints about unfairness in the public lands regime vis-à-vis communities near federal lands in order to transcend rhetorical blind spots and discern the strongest “colorable claims” amidst the noise. After dispensing with land transfer advocates’ common legal arguments, I conclude that a more substantial basis in ethical and legal principle than is generally recognized supports the idea that communities near public lands experience injustices and may be entitled to a form of input over land use (though not through formal law). To categorize these “claims” in a legally digestible way, I articulate three ethically and legally principled “theories” on behalf of the disgruntled: (1) an Exclusion Theory; (2) a Reliance Theory; and (3) a Public Trust Doctrine Theory.*

*This Article builds upon an earlier project, Alienation and Reconciliation in Social-Ecological Systems,<sup>1</sup> which argues that cultural rifts and procedural flaws have contributed to alienating large segments of the country from environmentalism and the federal government, to the*

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1. Ann M. Eisenberg, *Alienation and Reconciliation in Social-Ecological Systems*, 47 ENVTL. L. 127 (2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2930217](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930217).

detriment of climate change law and policy, and that adaptive governance and collaborative decisionmaking may stand to remedy some of these issues. Like in Alienation and Reconciliation, I conclude here that adaptive governance or a similar approach may be the appropriate avenue for mitigating the concerns outlined. This discussion thus serves not only to shed light on a longstanding tension in federal lands law and policy, but also to engage and illuminate the anti-government, anti-environmental sentiment that has percolated throughout the country for decades.

- I. INTRODUCTION ..... 58
- II. THE LAND TRANSFER MOVEMENT AND THE SAGEBRUSH REBELLION: BACKGROUND AND MERITLESS LEGAL ARGUMENTS ..... 68
  - A. Factual and Policy Background..... 68
  - B. Dispersing with Transfer Advocates’ and Sagebrush Rebels’ Legal Arguments ..... 74
- III. COLORABLE CLAIMS..... 78
  - A. Exclusion Theory..... 82
  - B. Reliance Theory..... 88
  - C. Public Trust Doctrine..... 94
- IV. REMEDIES ..... 99
- V. CONCLUSION..... 102

I. INTRODUCTION

In the polarizing debate over federal land ownership, consensus among environmental and natural resources law scholars, federal courts, and the majority of the population holds that public lands should remain federally owned.<sup>2</sup> Supporters of the opposing school of thought—the Movement to Transfer Public Lands, encompassing such sub-movements as the Sagebrush Rebellion, the Wise Use Movement, and the County Supremacy Movement—all maintain some version of the narrative that federal ownership is illegal or mismanaged, and thus, the land should be transferred to the states or counties, or privatized outright.<sup>3</sup> Falling

2. Andrea Hungerford, “Custom and Culture” Ordinances: Not a Wise Move for the Wise Use Movement, 8 TUL. ENVTL. L.J. 457 (1995); Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525 (1994).

3. See Marshall Swearingen & Kate Schimel, *Timeline: A Brief History of the Sagebrush Rebellion*, HIGH COUNTRY NEWS (Feb. 4, 2016), [http://www.hcn.org/articles/a-history-of-the-sagebrush-rebellion?utm\\_source=wcn1](http://www.hcn.org/articles/a-history-of-the-sagebrush-rebellion?utm_source=wcn1)

2017 *DO SAGEBRUSH REBELS HAVE A COLORABLE CLAIM?* 59

somewhere in between these two viewpoints are proponents of “devolved collaboration” or “devolution”—the policy of empowering local communities and constituencies with joint decisionmaking input.<sup>4</sup> Some insist that this approach is necessary, while according to others, it is a constitutionally questionable “ideological fad” or simply an alternate branding for the Sagebrush Rebellion.<sup>5</sup>

In addition to concerns about process and outcomes, part of the impetus driving devolution and collaboration proponents is that federal lands are not always managed in a way that seems completely “fair” to local communities and constituents.<sup>6</sup> The unfairness proposition is not novel.<sup>7</sup> However, the precise parameters of the unfairness proposition remain under-explored. That is, most arguments in favor of

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&utm\_medium=email (discussing “Posse Comitatus, a movement whose members hold the county sheriff to be the highest law of the land”); Hillary Hoffman, *Demand Management, Climate Change, and the Livestock Grazing Crisis in the Great Basin*, GEO. WASH. J. ENERGY & ENVTL. L., Winter 2016, at 22 (“In the 1980s and 1990s, the Sagebrush Rebellion was repackaged and reinvigorated as the County Supremacy, or County Home Rule, Movement.”); J.M. Berger, *What Do the Oregon Ranchers Really Believe?*, POLITICO MAGAZINE (Jan. 10, 2016), <http://www.politico.com/magazine/story/2016/01/oregon-ranchers-radical-ideology-213514> (discussing Wise Use movement, “a conservative ideology that was popular within militia circles during the 1980s and 1990s and is critical of government environmental protections”).

4. Ted Fellman, *Collaboration and the Beaverhead-Deerlodge Partnership: The Good, the Bad, and the Ugly*, 30 PUB. LAND & RESOURCES L. REV. 79, 82 (2009) (discussing many versions of collaborative decisionmaking, including collaborative conservation, cooperative conservation, environmental conflict resolution, multi-party negotiations, and consensus-building).

5. See George C. Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 ECOLOGY L.Q. 602 (1999); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997); Fellman, *supra* note 4, at 81–82 (noting difficulty of defining “collaboration” and details of implementing it, as well as diverging views that collaboration is either the “promise of a better future” or illegal undermining of NEPA); cf. Michelle Bryan et al., *Cause for Rebellion? Examining How Federal Land Management Agencies and Local Governments Collaborate on Land Use Planning*, 6 J. ENERGY & ENVTL. L. 1, 4–5 (2015) [hereinafter Bryan, *Cause for Rebellion?*] (describing state and local efforts to coordinate with federal agency planning as more like “a counter-punch demanding that federal agencies make federal land use planning subservient to local planning”).

6. See Bryan, *Cause for Rebellion?*, *supra* note 5, at 20 (arguing that federal agencies’ planning practices give local governments “cause for rebellion”).

7. Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 853 (1982).

collaboration have been based either in some intuitive sense of unfairness or in pragmatic concerns about effective results and efficiency.<sup>8</sup>

Taking a different approach, this Article examines the unfairness concern through a normative lens, directly questioning why the current administrative regime may be unfair to locals, beyond a general sense of exclusion or injustice.<sup>9</sup> It asks whether a legally or ethically principled case can be made that the local public suffers some form of injustice as a result of federal lands management, and whether legal or ethical norms suggest that communities proximal to public lands may be entitled to some form of participation in decisionmaking over those lands.<sup>10</sup>

This line of inquiry is sensitive and complex, and strong affirmative answers to questions about the potential need for local empowerment might raise some hackles. First, many fear that “local participation” translates in practice to undue influence by powerful, private local constituents.<sup>11</sup> This type of commandeering could be said

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8. Hope M. Babcock, *Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models from Other Laws Save Our Public Lands?*, 14 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 449, 450 (2008) [hereinafter Babcock, *Dual Regulation*] (noting ecologists' recognition that consultation and collaboration among multiple governing authorities is necessary to make natural resources management effective); Fellman, *supra* note 4, at 84 (“[The] simple answer to the question of why collaborate is that ‘collaboration can lead to better decisions that are more likely to be implemented and, at the same time, better prepare agencies and communities for future challenges.’ The long answer is that collaboration builds understanding through information sharing, which allows agencies to learn from and educate the public and manage uncertainty through joint research and fact-finding.”).

9. Cf. Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1177–78 (2005) (discussing philosophical bases for policy of devolution, primarily civic republicanism).

10. Allyson Barker et al., *The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis*, 23 J. LAND RESOURCES & ENVTL. L. 67, 141 (2003) (“The organic acts governing the four principle land management agencies—the BLM, the NPS, the USFS, and the FWS—all contain language encouraging agencies to cooperate with the public affected by the agencies' decisions.”).

11. *Id.* at 67 (“Critics of collaborative groups, however, argue that this optimistic view of their value overlooks some serious flaws. To the extent that collaborative groups will be dominated by local participants, they may reflect the economic interests of the few rather than the public at large for whose interest the public lands are maintained.”); see also Dave Owen, *Regional Federal Administration*, UCLA L. REV. 63.1, 58–121 (2016) (questioning assumption of federal centralization in Washington, D.C.); but see Babcock, *Dual Regulation*, *supra* note 8, at 451–52 (suggesting that cattle and timber barons who benefited from

2017 *DO SAGEBRUSH REBELS HAVE A COLORABLE CLAIM?* 61

to replace the original injustice (unfairness to local communities) with other types of injustice (e.g., the subjugation of indigenous or conservationist concerns to commodity producers).<sup>12</sup> Second, just as formal law does not support a mass land transfer, existing provisions for public participation and local-federal collaboration are limited.<sup>13</sup> The National Environmental Policy Act (“NEPA”), the Federal Land Policy and Management Act (“FLPMA”), and agencies’ organic acts, regulations, and guidance provide for public participation or local-federal collaboration in decisionmaking.<sup>14</sup> However, these provisions typically do not *require* collaboration, or where they do, they remain highly discretionary.<sup>15</sup> Courts have on occasion afforded local governments remedies for procedural deficiencies, but litigation in this vein does not appear to be common.<sup>16</sup>

Another concern is that a fairness-based case for devolution ends up resembling some aspects of transfer advocates’ rhetoric. To take a stance in favor of the “local” in this context risks perceptions of agreeing with unpopular characters like Ammon or Cliven Bundy, or otherwise advocating parochialism.<sup>17</sup> These most recent spokesmen for the

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nineteenth century paradigm “are giving way to multiple public lands . . . diverse communities loosely bound together in a patchwork of shared interests, occupations, and geographic locations, not by a single philosophy of commodity extraction”).

12. Cf. Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY, no. 3, 1997, at 347, available at [http://faculty.virginia.edu/lsanders/SB617\\_01.pdf](http://faculty.virginia.edu/lsanders/SB617_01.pdf) (discussing “a few suspicious antidemocratic associations” with deliberation).

13. See National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (2012); Federal Land Policy & Management Act, 43 U.S.C. § 1701 (2012).

14. 42 U.S.C. §§ 4321–4347; 43 U.S.C. §§ 1701, 1701(a)(8); 602 *FW 1—Refuge Planning Overview*, U.S. FISH & WILDLIFE SERV. (June 21, 2000), <http://www.fws.gov/policy/602fw1.html> [hereinafter *FWS Refuge Planning Overview*]; 16 U.S.C. § 1604(b); NAT’L PARK SERV., MANAGEMENT POLICIES 2, 2.2 (2006), available at <http://www.nps.gov/policy/mp2006.pdf> [hereinafter NPS MANAGEMENT POLICIES]; Bryan, *Cause for Rebellion?*, *supra* note 5, at 5–12 (discussing provisions for local-federal collaboration in BLM, USFWS, USFS, and NPS).

15. Bryan, *Cause for Rebellion?*, *supra* note 5, at 6 (NEPA regulations do not require agencies to designate local governments with “cooperating agency” status necessary to collaborate formally under NEPA, and designation decision is not judicially reviewable.).

16. See *id.* at 7; cf. *Am. Motorcyclist Ass’n v. Watt*, 534 F. Supp. 923 (C.D. Cal. 1981); *Yount v. Salazar*, No. CV11-8171, 2013 WL 93372, at \*1 (D. Ariz. Jan. 8, 2013).

17. Cf. Keiter, *supra* note 9, at 1179 (discussing concern in devolved decisionmaking that “parochial interests may well trump the national interest in the affected lands and resources”); Joseph Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499, 501 (1984)

Sagebrush Rebellion have been the most prominent public figures raising arguments closest to this idea, insisting that federal management is “tyrannical,” unjust, and oppressive of local economic interests.<sup>18</sup> To advocate localism thus raises the specter of complicity in a movement flavored by populism, racism, and anti-environmentalism.<sup>19</sup> Especially in light of the current political climate, a hardline response to transfer advocates’ complaints—insisting that federal agencies protect public resources for all Americans and try their best to pursue local collaboration only by virtue of their altruism—is predictably appealing to those of us who prioritize the environment.<sup>20</sup>

Recognizing that the Sagebrush Rebellion and related movements pose a variety of risks to public welfare—including the likelihood that they are a façade of grassroots rage serving to mask a political and corporate agenda to privatize public lands<sup>21</sup>—this Article asks whether the movements’ troubling character has made the public and scholarly discourse overly dismissive of a kernel of truth within their complaints. Most of their claims can be easily dispensed with; their legal

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[hereinafter Sax, *Do Communities Have Rights?*] (discussing anti-localism trends in American law stemming from localism’s tie to parochialism, and how “[a]mong the most familiar instances of demands for local autonomy are, of course, the ‘States’ rights’ movement, tainted by its association with slavery and the more recent resistance to civil rights; local know-nothingism, evidenced by periodic assaults on the rights to learn, teach and read; and by the unending economic efforts of states to discriminate against interstate commerce”).

18. Ashley Fantz, *Oregon Standoff: What the Armed Group Wants and Why*, CNN (Jan. 6, 2016), <http://www.cnn.com/2016/01/04/us/oregon-wildlife-refuge-what-bundy-wants>.

19. See, e.g., Aaron Blake, *Clive Bundy on Blacks: Are They Better Off as Slaves?*, WASHINGTON POST (Apr. 24, 2014), [https://www.washingtonpost.com/news/post-politics/wp/2014/04/24/cliven-bundy-on-blacks-are-they-better-off-as-slaves/?utm\\_term=.12cf3756456a](https://www.washingtonpost.com/news/post-politics/wp/2014/04/24/cliven-bundy-on-blacks-are-they-better-off-as-slaves/?utm_term=.12cf3756456a).

20. Cf. John Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317, 353 (1980) (“I am not so enamored of federal ownership that I will admit to the infallibility of federal land management. . . . To the extent that the sagebrush rebellion represents public dismay at genuinely insensitive and misguided federal attitudes, it may well succeed in enhancing the federal government’s appreciation of state and local concerns.”).

21. Brad Knickerbocker, *Sagebrush Rebels Take on Uncle Sam*, CHRISTIAN SCIENCE MONITOR (Jan. 3, 1996), <http://www.csmonitor.com/1996/0103/03011.html> (discussing environmentalists’ and other critics’ stance that Wise Use and Sagebrush Rebellion are a front for corporate natural resource extractors); James McCarthy, *First World Political Ecology: Lessons from the Wise Use Movement*, 34 ENV’T & PLAN. 1281, 1282 (2002); Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721 (2005) (discussing “cowboy myth” in public lands debates).

arguments do not hold water and their facts are often wrong.<sup>22</sup> Yet, scholars have acknowledged that it is *possible* that Sagebrush Rebellion-like flare-ups represent sincere, widespread regional frustration about arbitrary federal lands management.<sup>23</sup>

To search for the kernel of truth, this Article examines transfer advocates' rhetoric to discern whether a "colorable claim" can be found amidst the allegations centered on federal injustices. The framing of this analytical exercise is inspired by federal, state, and administrative courts' equitable policy of liberally construing *pro se* filings and engaging in a more searching inquiry where litigants are unrepresented.<sup>24</sup> According to this doctrine, courts are more likely to take an active look into unrepresented litigants' allegations in order to determine whether any meaningful claims could reasonably be construed.<sup>25</sup> Using an analogous lens here, the analysis seeks to look past the incorrectness of the arguments transfer advocates raise in order to determine whether theories with a more legitimate thrust, albeit not cognizable in law, could be discerned.<sup>26</sup> The purpose is not to search for overlooked legal arguments, but to assess whether some reasonable articulation of ethically or legally principled wrong could be on the side of those crying foul.

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22. See, e.g., Bryce Gray, *No, Federal Lands Transfers Are Not in the Constitution*, HIGH COUNTRY NEWS (Feb. 4, 2016), <http://www.hcn.org/articles/legal-experts-oregon-militants-land-transfer-advocates-misguided-on-constitution>.

23. Leshy, *supra* note 20, at 354; Babbitt, *supra* note 7, at 861 (contemplating whether Sagebrush Rebels' "real objective is, as they claim, to eliminate arbitrary, unreasonable, and heavy-handed federal regulation"); Knickerbocker, *supra* note 21 ("Supporters claim [Wise Use/Sagebrush] is truly a grassroots effort involving thousands of individuals and families across the rural West trying to protect their property rights.").

24. See *Moran v. Astrue*, 569 F.3d 108, 113 (2d Cir. 2009).

25. See *id.*; Michael Correll, *Finding the Limits of Equitable Liberty: Reconsidering the Liberal Construction of Pro Se Appellate Briefs*, 35 VT. L. REV. 863 (2011); Edward M. Holt, *How to Treat 'Fools': Exploring the Duties Owed to Pro Se Litigants in Civil Cases*, 25 J. LEGAL PROF. 167, 171 (2001).

26. *Gordon v. Crouchley*, 554 F. Supp. 796, 797 (D.R.I. 1982) ("[T]he Court, pursuant to Fed. R. Civ. P. 8 and *Haines v. Kerner* . . . will scrutinize the pleadings of a non-lawyer appearing *pro se* with especial care to determine if among the dabbings, some colorable claim exists."); cf. Alexandra B. Klass, *Response Essay: The Personhood Rationale and Its Impact on the Durability of Private Claims to Public Property*, 103 GEO. L. J. ONLINE 41, 45 (2014) (because claims of adverse possession on federal lands fail, "why even talk about adverse possession or prescriptive easements in the context of federal lands? In my view, it is relevant because one of the primary policy reasons behind the doctrine of adverse possession, the personhood rationale, may help explain the durability of private claims to public property.").



Several considerations suggest this analysis is worthwhile. First, this issue is symptomatic of a larger cultural and political divide in the United States today. Themes relevant to the Sagebrush Rebellion have received more mainstream attention since Donald Trump's election to the presidency—the urban-rural divide, white populism, and income inequality, for instance.<sup>27</sup> The discussion here builds upon an earlier article in *Environmental Law*, entitled *Alienation and Reconciliation in Social-Ecological Systems*, which argues that cultural rifts and procedural flaws have contributed to alienating large segments of the country from environmentalism and the federal government, to the detriment of climate change law and policy.<sup>28</sup> Although the current presidential administration has cast doubt on the relevance of much of environmental and administrative law scholarship,<sup>29</sup> this discussion uses the “pro se analysis” lens in order to transcend cultural and rhetorical blind spots and illuminate one angle in the deep, mutual hostilities that permeate the country today.<sup>30</sup> The discussion seeks in part to engage and make sense of the type of anti-government, anti-environmental populism that environmentalist sympathizers have at times dismissed.<sup>31</sup>

Because of the polarizing nature of this topic and the unpopularity of people like the Bundys who support the transfer agenda, subtler, related problems stand to be overlooked or minimized.<sup>32</sup> The potential for these problems to remain invisible is troubling partly because many western communities suffer from the widespread economic stagnation that characterizes the American rural landscape.<sup>33</sup>

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27. E.g., David Uberti, *A Divided Empire: What the Urban-Rural Split Means for the Future of America*, THE GUARDIAN (Jan. 9, 2017), <https://www.theguardian.com/cities/2017/jan/09/donald-trump-divided-empire-urban-rural-america-future>.

28. Eisenberg, *supra* note 1.

29. See, e.g., Shi-Ling Hsu, *Climate Policy in the Trump Era: Carbon Tax Rising?* (February 27, 2017) (unpublished manuscript), available at <https://ssrn.com/abstract=2926476> (discussing strong representation of climate deniers within Trump administration).

30. Cf. Robert Reich, *Tribalism Is Tearing America Apart*, SALON (Mar. 25, 2014), [http://www.salon.com/2014/03/25/robert\\_reich\\_tribalism\\_is\\_tearing\\_america\\_apart\\_partner/](http://www.salon.com/2014/03/25/robert_reich_tribalism_is_tearing_america_apart_partner/).

31. See Eisenberg, *supra* note 1, at 126, 134.

32. Cf. Michelle Bryan, *Learning Both Directions: How Better Federal-Local Land Use Collaboration Can Quiet the Call for Federal Lands Transfers*, 76 MONT. L. REV. 147, 148 (2015) [hereinafter Bryan, *Learning Both Directions*] (noting that political posturing over western lands overshadows real problems).

33. See JENNIFER SHERMAN, *THOSE WHO WORK, THOSE WHO DON'T: POVERTY, MORALITY, AND FAMILY IN RURAL AMERICA* (2009); CYNTHIA M. DUNCAN, *WORLDS APART: WHY POVERTY PERSISTS IN RURAL AMERICA* (2000); Lisa

2017 *DO SAGEBRUSH REBELS HAVE A COLORABLE CLAIM?* 65

Although local opinions vary, many residents of these areas sympathize with the Sagebrush Rebel agenda.<sup>34</sup> Residents may also see “rebellion” as the only option due to a lack of access to justice or some other form of voicelessness.<sup>35</sup> This inquiry is thus based in part on the premise that when laypeople or underprivileged people express outrage about land use, they rarely do so with full eloquence or sophisticated legal advocacy.<sup>36</sup> As Joseph Sax remarked, “[e]ven interests that don’t at all resemble ordinary property give rise to important values and expectations that cry for recognition, and sometimes get it.”<sup>37</sup> Further, corporate and political actors’ ability to exploit populist concerns does not necessarily mean the populist concerns are baseless.<sup>38</sup>

Finally, scholars have observed that the complex relationships between westerners and federal land managers involve principles that

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Pruitt, *Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place*, 71 MONT. L. REV. 1 (2010); Jens Manuel Krogstad, *How the Geography of U.S. Poverty Has Shifted Since 1960*, PEW RESEARCH CTR. (Sept. 10, 2015), <http://www.pewresearch.org/fact-tank/2015/09/10/how-the-geography-of-u-s-poverty-has-shifted-since-1960/>.

34. Babbit, *supra* note 7, at 853. (“It is easy to dismiss the motives of the small group of stockmen and their political allies who have revived the rallying cry of states’ rights for their own benefit. But the considerable support that the Sagebrush Rebellion has gained in the West reflects a deep-seated frustration with what is perceived to be heavy-handed, arbitrary, and unreasonable federal regulation of public lands.”).

35. Cf. Robert L. Fischman & Jeremiah I. Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion As Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123, 129–30 (2011) (“[A]djudicated rights do not necessarily translate into social facts. . . . [A] strictly legal evaluation of the *Kleppe* litigation fails to measure its true significance as a galvanizing event for the Sagebrush Rebellion of the 1970s . . . social science scholarship helps explain how . . . western states made lemonade out of courthouse losses. The political consequences of the ‘un-cooperative’ [federalism] challenges to federal power mostly aided ranchers and other interest groups associated with western state governments.”); Lisa Pruitt & Bradley Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S. DAKOTA L. REV. 466 (2014) [hereinafter Pruitt & Showman, *Access to Justice*].

36. Cf. Sanders, *supra* note 12, at 2. (noting advantage some citizens may receive in deliberative processes because of greater ability to articulate arguments in rational, reasonable terms, and concomitant disadvantages borne by groups that are already underrepresented in formal political institutions).

37. Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 187 (1980) [hereinafter Sax, *Liberating the PTD*].

38. Cf. Sanders, *supra* note 12, at 2.

transcend formal law.<sup>39</sup> While transfer advocates' constitutional claims invariably fail, scholars have remarked upon other concepts at play in this context, including "a de facto rebuttable presumption in favor of claim renewal," the "rationale behind the doctrine" of adverse possession, and other forms of informal law, operative law, or law that appears to mold itself to fit with practice.<sup>40</sup> This unique interplay of formal law and some form of shadow law—be it a natural law, cultural law, or an of-necessity set of practices—suggests the presence of a unique paradigm requiring further examination. Although not the focus here, the theory of popular constitutionalism—the idea that people assume "active and ongoing control over the interpretation and enforcement of constitutional law"—would also suggest this deeper look is warranted.<sup>41</sup>

The Article concludes that a more substantial basis in ethical and legal principle than is generally recognized supports the idea that communities near public lands experience injustices, and that communities may be entitled to some form of input over land use. Although little formal law supports this stance,<sup>42</sup> these principled, affirmative findings are significant for western public lands management. The findings suggest to federal agencies and other land use managers that their duties extend beyond an altruistic or self-serving interest in incorporating local concerns into public lands management. Rather, this more nuanced foundation suggests that public land managers have an actual normative obligation to pursue devolved collaboration. At the very least, the findings suggest that some westerners' outrage over land use should not automatically be dismissed as irrational. This latter point in turn relates to natural resources policy as well as the broader societal divide, suggesting that the discourse is sometimes overly dismissive of the concerns of the "other side" when a legitimate grievance is expressed.<sup>43</sup>

Part I.A provides an overview of "complaints" raised by transfer advocates, using the Sagebrush Rebellion and the Bundy family as a proxy for the broader movement and illustration of some of the

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39. See Bruce Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L. J. 991, 1038 (2014).

40. *Id.*; Klass, *supra* note 26.

41. Larry D. Kramer, *Popular Constitutionalism*, 92 CAL. L. REV. 959, 959 (2004).

42. *Cf.* 42 U.S.C. §§ 4321–4347 (2012); 43 U.S.C. §§ 1701, 1701(a)(8) (2012); 16 U.S.C. § 1604(b) (2012); *FWS Refuge Planning Overview*, *supra* note 14; NPS MANAGEMENT POLICIES, *supra* note 14, at 2.2.

43. See Reich, *supra* note 30.

movement's community-based rhetoric. This section also reviews main policy points relevant to western public lands management. Part I.B briefly dispenses with the explicit legal arguments that transfer advocates tend to make. After introducing the lens of the "pro se analysis" and defining "local community,"<sup>44</sup> Part II concludes that transfer advocates' community-based rhetoric and related complaints over western land management give rise to several "colorable claims." Specifically, it assesses the contours and merits of three ethically and legally principled theories that I use to characterize the strongest arguments for justifying local outrage, including: (1) an Exclusion Theory based on procedural justice, the right to participatory land use decisionmaking, due process, and what I call "reverse environmental justice"; (2) a Reliance Theory that combines aspects of estoppel, adverse possession, and the concept of "just transitions"; and (3) a Public Trust Doctrine Theory. Part III discusses collaboration as a remedy to address these concerns. While this discussion necessarily simplifies a complex and far-reaching system that is not conducive to any one-size-fits-all characterization, the hope is to "enrich the storehouse of ideas we draw from in the search for solutions,"<sup>45</sup> as well as to shed light on a controversy that serves as an apt symbol for larger divisions.

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44. Cf. Sax, *Do Communities Have Rights?*, *supra* note 17, at 499–500 ("Although there is no definition of community, nor a doctrine of community entitlements to bring legal coherences to . . . diverse cases . . . the law has by no means been indifferent to particular claims in a range of specific situations. . . . [T]here is a widespread sense that community is important, and a willingness exists to protect community interests; yet there is no principle or doctrine to which to turn in those cases where, for whatever reasons, the people affected are unable to generate the political support necessary to induce an act of grace."). Although "local community" is defined here geographically, the discussion recognizes that both tension and overlap likely exist among pluralistic, geographically defined communities, and the more identity- or occupation-based communities that may hold the loyalties of people like the Sagebrush Rebels. See Sarah F. Bates, *Public Lands Communities: In Search of a Community of Values*, 14 PUB. LAND L. REV. 81 (1993).

45. Babcock, *Dual Regulation*, *supra* note 8, at 196.

## II. THE LAND TRANSFER MOVEMENT AND THE SAGEBRUSH REBELLION: BACKGROUND AND MERITLESS LEGAL ARGUMENTS

### A. Factual and Policy Background

The emergence of the Sagebrush Rebellion represented the first phase in the evolution of the Land Transfer Movement (“LTM”).<sup>46</sup> The Rebellion has been active since the 1970s, after conservation laws, such as the FLPMA, foreclosed future private appropriations of public land and began to infringe upon western commodity producers’ activities.<sup>47</sup> Since then, the Rebellion and related groups, such as Wise Use and County Supremacy, have surged under Democratic administrations and waned under Republican ones.<sup>48</sup> The tactics of these groups, which comprise the LTM’s militant arm, have consistently involved standoffs and the use of force.<sup>49</sup> For instance, the “Bundy” of the 1990s was Richard Carver, a Nevada rancher featured on the cover of Time magazine after he “bulldozed open a road on Forest Service land that had

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46. Richard Lee Simmons, *The Sale of Our Land: A Look at Public Land Transfers*, 5 ARIZ. J. ENVTL. L. & POL’Y 1068, 1070 (2015).

47. Keiter, *supra* note 9, at 1129, 1176 (discussing, in addition to FPLMA, “the National Environmental Policy Act of 1969, the Endangered Species Act of 1973, [and] the National Forest Management Act of 1976”); Leshy, *supra* note 20, at 341, 341–43 (“[T]he Public Land Law Review Commission . . . . concluded that most public lands would not serve the maximum public interest in private ownership. . . . As the reality of [new] restrictions has become apparent, those most affected—graziers and miners—have begun to chafe at this reduction in their freedom of exploitation.” (internal quotations omitted)); *see also* Swearingen & Schimel, *supra* note 3; Babbitt, *supra* note 7, at 854; *see also* Fischman & Williamson, *supra* note 35 (pointing to Wild Free-Roaming Horses and Burros Act of 1971 as displacing ranching as de facto priority use of public range, helping trigger Sagebrush Rebellion).

48. Knickerbocker, *supra* note 21; McCarthy, *supra* note 21, at 1282–83 (“[Wise Use] claimed to be a grass roots social movement, rooted in a regional culture, responding to overly intrusive outsiders. It defined itself mainly in opposition to the environmental movement, environmental regulations, and federal agencies governing land uses, all of which it portrayed as arrogant, ignorant outsiders intruding on local communities and denying them their livelihoods and right to self-determination.”); Robin Bravender, *Bundys Fuel ‘Round Two’ of Sagebrush Rebellion*, GREENWIRE (Jan. 6, 2016), <http://www.eenews.net/stories/1060030207> (noting that tensions associated with Sagebrush Rebellion “died down a bit” under President Reagan, and flared up under President Clinton and President Obama).

49. Bravender, *supra* note 48.

2017 *DO SAGEBRUSH REBELS HAVE A COLORABLE CLAIM?* 69

been closed” with “a crowd of friends and neighbors cheering him on as federal officials stood by.”<sup>50</sup>

The LTM transcends well beyond angry ranchers or other self-styled cowboys, however, and the political arm of the movement has achieved substantial clout.<sup>51</sup> For instance, western state legislators have regularly introduced bills seeking to effectuate title transfers of public lands, prompting former Solicitor of the U.S. Department of the Interior John Leshy to characterize them as entirely “rebellious states.”<sup>52</sup> In 2014, the Republican National Committee made the transfer of public lands to the states part of its national platform.<sup>53</sup>

The LTM’s goals are not necessarily always articulated in a consistent manner. However, the main goal always has the same thrust: secure more local or private access to public lands. Some transfer advocates pursue the goal by claiming that individual commodity producers have property rights-entitlements to particular lands or resources.<sup>54</sup> Others argue that the states have formal legal rights to the land.<sup>55</sup> Yet others argue in favor of county control.<sup>56</sup> The Posse Comitatus and County Home Rule/County Supremacy movements, for instance, went so far as refusing to recognize any government authority beyond the county sheriff.<sup>57</sup> This discussion treats these movements’

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50. Knickerbocker, *supra* note 21; *see also* Robert L. Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647 (1997).

51. Howell Raines, *Reagan and States’ Rights: News Analysis*, N. Y. TIMES (Mar. 4, 1981), <http://www.nytimes.com/1981/03/04/us/reagan-and-states-rights-news-analysis.html?pagewanted=all>.

52. Leshy, *supra* note 20, at 327.

53. Bryan, *Cause for Rebellion?*, *supra* note 5, at 1.

54. Sally Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945, 986–69 (1982); *Sagebrush Rebellion*, PBS (May 13, 2016), <http://www.pbs.org/wnet/religionandethics/2016/05/13/sagebrush-rebellion/30487/> (discussing the goal of the Rebellion to give public land to local governments).

55. Leshy, *supra* note 20, at 326.

56. Hoffman, *supra* note 3, at 22; Alexander H. Southwell, *The County Supremacy Movement: The Federalism Implications of a 1990s States’ Rights Battle*, 32 GONZ. L. REV. 417 (1997); Reed, *supra* note 2.

57. *See* Swearingen & Schimel, *supra* note 3 (“For purposes of this discussion, these movements are treated as distinct from similar ones that do not focus on natural resources, and focus primarily on the illegitimacy of the federal government.”); *see* Daniel Lessard Levin & Michael W. Mitchell, *A Law Unto Themselves: The Ideology of the Common Law Court Movement*, 44 S.D. L. REV. 9 (1999) (discussing common law court movement, groups such as Montana Freeman and Republic of Texas, and personal sovereignty movements and how they “misuse principles from liberal theory, English common law, and the American constitutional tradition to support their claims”).

efforts as collectively represented in the Sagebrush Rebellion and focuses on the militant and populist arm of the LTM, rather than the political arm.

The Rebellion received relatively little mainstream attention during the Obama administration until members of the Bundy family became involved in tense standoffs with federal officials over contested public land uses.<sup>58</sup> Carol Rose describes patriarch Cliven's 2014 incident:

In the spring of 2014, rancher Cliven Bundy, together with a group of self-appointed armed "militiamen," placed himself in a standoff with the Federal Bureau of Land Management (BLM) in southern Nevada. The BLM insisted that Bundy owed over \$1 million in delinquent and current fees for grazing his livestock on federally owned land, but Bundy insisted that grazing on this land should be costless to him and refused to pay. Bundy's group effectively chased off the federal officials and, in doing so, garnered considerable conservative media support—at least until Bundy himself made some extemporaneous and intemperate remarks about the state's African-American population. Not surprisingly, his reference to alleged welfare freeloading invited comparison to his own considerable outstanding bill for the use of federal property.<sup>59</sup>

The Bundy family once again drew national attention when adult sons Ammon and Ryan led a militant takeover of the Malheur Wildlife Refuge in Harney County, Oregon, in January and February 2016.<sup>60</sup> What began as a peaceful protest of the incarceration of two local ranchers evolved into Ammon and Ryan leading a splinter group that

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58. Bravender, *supra* note 48; *see also* Martin Nie & Christopher Barns, *The Fiftieth Anniversary of the Wilderness Act: The Next Chapter in Wilderness Designation, Politics, and Management*, 5 ARIZ. J. ENVTL. L. & POL'Y 237, 273–74 (2014) (arguing that western states' bills and resolutions seeking to transfer federal lands to states "breathed life into a once dormant Sagebrush Rebellion").

59. Carol M. Rose, *Claiming While Complaining on the Federal Public Lands: A Problem for Public Property or a Special Case? A Comment on Bruce R. Huber, The Durability of Private Claims to Public Property*, 104 GEO. L.J. ONLINE 95, 111 (2015); *see* Huber, *supra* note 39.

60. Nora Simon, *Oregon Standoff: A Timeline of How the Confrontation Unfolded*, OREGON LIVE (Jan. 27, 2016), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/oregon\\_standoff\\_a\\_timeline\\_of.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/oregon_standoff_a_timeline_of.html).

2017 *DO SAGEBRUSH REBELS HAVE A COLORABLE CLAIM?* 71

forcefully occupied Refuge headquarters, insisting they would not leave “until local property owners ha[d] control over the refuge.”<sup>61</sup> They purported to protest “federal tyranny,” encouraging local ranchers “to tear up their government grazing contracts.”<sup>62</sup> The occupiers were arrested in late January and early February.<sup>63</sup> In October 2016, the Bundy brothers were “shockingly” acquitted of charges of conspiracy to impede federal officers.<sup>64</sup> As of this writing, Cliven, Ammon, and Ryan Bundy are slated to be prosecuted for the 2014 Nevada standoff under sixteen felony charges.<sup>65</sup>

Although Sagebrush Rebels’ tactics and goals garner condemnation, commentators have consistently recognized that political posturing, longstanding disputes, and dramatic scenarios have masked real governance problems—remarking, ultimately, on the unfairness concern.<sup>66</sup> Former Secretary of Interior Bruce Babbitt wrote in 1982 that though Sagebrush Rebels’ motives were “suspect,” these conflicts illustrated intergovernmental tensions concerning how to manage voluminous western federal land holdings.<sup>67</sup> Pointing to federal lands’ impediment on localities’ ability to plan, zone, and allocate water, Babbitt

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61. *Id.*

62. *Id.*; Hal Bernton, *The Story Behind the Malheur National Wildlife Refuge, Ranchers and Armed Anti-Government Protestors*, SEATTLE TIMES (Jan. 9, 2016), <http://www.seattletimes.com/seattle-news/politics/occupied-oregon-wildlife-refuge-known-for-listening-to-ranchers/>; Liam Stack, *Wildlife Refuge Occupied in Protest of Oregon Ranchers’ Prison Terms*, N.Y. TIMES (Jan. 2, 2016), <https://www.nytimes.com/2016/01/03/us/oregon-ranchers-will-return-to-prison-angering-far-right-activists.html>; *Faces of the Malheur Occupation: Meet the Militants and Their Visitors*, OREGON LIVE (Jan. 22, 2016), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/oregon\\_militant\\_profiles\\_list.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/oregon_militant_profiles_list.html).

63. Stack, *supra* note 62; Kirk Seigler, *Bundy Militia Not Backing Down Following Oregon Trial Acquittal*, NPR (Nov. 4, 2016), <http://www.npr.org/2016/11/04/500506710/bundy-militia-not-backing-down-following-oregon-trial-acquittal>.

64. Seigler, *supra* note 63.

65. Ken Ritter, *Prosecutors Want 3 Bunkerville Trials; Cliven Bundy Wants 1*, OREGON PUBLIC BROADCASTING (Dec. 1, 2016), <http://www.opb.org/news/article/cliven-bundy-trials-how-many-bunkerville/>.

66. Bravender, *supra* note 48; Knickerbocker, *supra* note 21; Ray Ring & Marshall Swearingen, *Defuse the West: Public-Land Employees Are Easy Targets for a Violent, Government-Hating Fringe*, HIGH COUNTRY NEWS (CA) (Oct. 27, 2014), <http://www.hcn.org/issues/46.18/defuse-the-west>; Klass, *supra* note 26, at 41; Elizabeth G. Daerr, *Study Finds Park Rangers Facing Increased Violence: Fugitives Are Drawn to Isolation of Parks, Putting Rangers at Risk*, 75 NAT’L PARKS, Nov. 2001, at 12–13, available at <http://www.thefreelibrary.com/Study+finds+park+rangers+facing+increased+violence+fugitives+are...-a080015214>; Babbitt, *supra* note 7, at 848.

67. Babbitt, *supra* note 7, at 848.



concluded that “[b]y any conceivable measure of the relative federal and state interest, management of the public domain in the West is not fairly shared.”<sup>68</sup> Babbit argued that the unfairness lay not in locals’ lack of ownership, but in a lack of management control by local constituencies, and thus called for strengthening mechanisms for joint decisionmaking.<sup>69</sup>

In 2015, University of Montana law professor Michelle Bryan raised similar arguments: “While there is ample political rhetoric to go around, beneath it all lie truly important questions about current land management practices and the complementary roles federal agencies and local communities could play in managing shared lands.”<sup>70</sup> In a series of interviews with local government and federal agency representatives, Bryan found that both camps noted a lack of or dissatisfaction with processes of local-federal collaboration.<sup>71</sup> An illustrative problem was federal agencies’ tendency to file county concerns as among the “nonsignificant” issues in their Environmental Assessments created pursuant to NEPA.<sup>72</sup> For instance, in a case study of one wildlife refuge’s comprehensive conservation planning process, county officials raised concerns about “cabin leases, private mineral rights, grazing fees, road access, federal water rights, and military overflights.”<sup>73</sup> However, after agency planners deemed the concerns “nonsignificant,” one county commissioner lamented “hours and hours” of wasted efforts trying to contribute and ultimately “feeling like it was a waste of time because nobody was listening to us anyway.”<sup>74</sup> Although “nonsignificant” has a technical meaning for agencies, for local laypeople, it may seem dismissive and alienating.<sup>75</sup>

The county commissioner’s comments reveal the diversity of local sentiments concerning federal ownership of public land. Many western residents value the public lands as they are and are content with the status quo, or wish to see changes unrelated to the Sagebrush Rebel agenda.<sup>76</sup> However, regional sympathies for more robust local

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68. *Id.* at 853.

69. *Id.* at 853, 858.

70. Bryan, *Learning Both Directions*, *supra* note 32.

71. Bryan, *Cause for Rebellion?*, *supra* note 5, at 1.

72. *Id.* at 14.

73. Bryan, *Learning Both Directions*, *supra* note 32, at 151.

74. Bryan, *Cause for Rebellion?*, *supra* note 5, at 20.

75. *Id.* at 14 (“[A]gency planning jargon can be off-putting and difficult to understand.”).

76. See, e.g., Eva Hershaw, *People in the Western U.S. Really Do Want Federal Regulation of Land*, VICE NEWS (Jan. 12, 2016), <https://news.vice.com/article/people-in-the-western-us-really-do-want-federal-regulation-of-land>.

2017 *DO SAGEBRUSH REBELS HAVE A COLORABLE CLAIM?* 73

empowerment run deep.<sup>77</sup> For instance, a small public opinion poll conducted in 2014 in eight western mountain states found that a majority of Utah residents (52%) and a plurality of Wyoming residents (percentage unknown) favored a transfer of public lands to the states.<sup>78</sup>

Some refinements to mitigate these conflicts have been made in the more than thirty years between Babbitt's and Bryan's observations.<sup>79</sup> NEPA regulations, the common denominator among all agency planning frameworks, give agencies permission to designate local governments as "cooperating agencies" for planning purposes, which in turn can lead to close cooperation on planning.<sup>80</sup> Bureau of Land Management ("BLM") regulations require collaboration in the creation of resource management plans, in addition to any NEPA collaboration pursued.<sup>81</sup> The Negotiated Rulemaking Act of 1996 and the Department of Interior Adaptive Management Technical Guide also purport to further local-federal collaboration by facilitating stakeholder input and decisionmaking.<sup>82</sup> Technological innovations and various recent "open government" initiatives may help facilitate increased public participation, although these avenues remain untested.<sup>83</sup>

Obstacles are significant and persistent, however. Although the "legal and policy framework indicates high-level support for the principles of public engagement governance . . . [it] is not yet widely adopted by managers in day to day practice."<sup>84</sup> Compared to BLM, Fish and Wildlife Service ("FWS") and National Park Service ("NPS") have more inconsistent directives and cultures in their approaches to

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77. Eisenberg, *supra* note 1; Bryan, *Learning Both Directions*, *supra* note 32, at 151.

78. Eisenberg, *supra* note 1, at 124–25 (describing Wyoming as "divided"); Memorandum from Lori Weigel, Partner, Pub. Opinion Strategies & David Metz, Partner, Fairbank, Maslin, Maullin, Metz & Assocs., to Interested Parties, *Western Voter Attitudes Toward Management of Public Lands 2* (Sept. 23, 2014), available at <https://perma.cc/6X37-WXRZ>.

79. E.g., Bryan, *Cause for Rebellion?*, *supra* note 5, at 3 (noting "limited examples of emerging collaboration").

80. *Id.* at 5.

81. *Id.* at 8.

82. Kirsten M. Leong et al., *The New Governance Era: Implications for Collaborative Conservation and Adaptive Management in Department of the Interior Agencies*, 16 HUMAN DIMENSIONS OF WILDLIFE, 2011, at 236, 239, available at [https://www.nps.gov/civic/resources/Leong%20et%20al\\_2011\\_New%20Governance%20Era.pdf](https://www.nps.gov/civic/resources/Leong%20et%20al_2011_New%20Governance%20Era.pdf).

83. Cf. Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 348–49 (2010).

84. Leong, *supra* note 82, at 239.

collaborating with localities.<sup>85</sup> As to NEPA, overall, “agency planners vary in their understanding of NEPA and agency planning protocols and hold a multitude of views about whether and how to include local governments.”<sup>86</sup> NEPA has been criticized as perfunctory and “lacking the soul” needed for what is necessarily an intimate and involved process.<sup>87</sup> The variability among agency processes and cultures confuses and estranges some residents.<sup>88</sup> Bryan’s interviews revealed that many agency planners “believe more is needed to foster true local-federal collaboration and build long-term relationships.”<sup>89</sup>

*B. Dispensing with Transfer Advocates’ and Sagebrush Rebels’ Legal Arguments*

Transfer advocates’ arguments go well beyond the unfairness concern and nuanced discussions about process. Yet, discerning the precise parameters of their legal claims to public lands is not always an easy task. Movements of the 1970s and 1980s may have had a more cohesive approach, but the specific claims raised today appear to differ from incident to incident and place to place.<sup>90</sup> For instance, a journalist who spent time at Malheur during Bundy’s occupation commented that it did him “no good whatsoever” to try and discuss the provisions and operations of actual law and government with the occupiers.<sup>91</sup> He observed that any time an argument arose that could not be easily countered, he was “assailed with a pocket Constitution,” and little more.<sup>92</sup> “Liberty and freedom and the Constitution” were similarly cited in general terms in Cliven Bundy’s 2014 standoff with federal officials.<sup>93</sup>

One argument transfer advocates have raised for decades, also asserted at Malheur, is that Article 1, Section 8, Clause 17 of the Constitution, also known as the “Enclave Clause” within the enumerations of the federal government’s powers,<sup>94</sup> established “that the

85. See Bryan, *Cause for Rebellion?*, *supra* note 5, at 10–12.

86. *Id.* at 13.

87. *Id.* at 7, 14 (quoting Fish & Wildlife Service project leader).

88. *See id.* at 6, 14.

89. *Id.* at 7.

90. Hal Herring, *Can We Make Sense of the Malheur Mess?*, HIGH COUNTRY NEWS (Feb. 12, 2016), <http://www.hcn.org/articles/malheur-occupation-oregon-ammon-bundy-public-lands-essay>.

91. *Id.*

92. *Id.*

93. Hoffman, *supra* note 3, at 1.

94. U.S. CONST. art. I, § 8, cl. 17 (“The Congress shall have power . . . [t]o exercise exclusive legislation in all cases whatsoever, over such District (not

2017 *DO SAGEBRUSH REBELS HAVE A COLORABLE CLAIM?* 75

federal government ha[d] no right to own any of these lands.”<sup>95</sup> This argument has been consistently dismissed. Article IV, Section III of the Constitution provides that “Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.”<sup>96</sup> The United States Supreme Court has construed this latter provision liberally. In the 1840 *United States v. Gratiot*<sup>97</sup> decision, the Court held that the Article IV power is “vested in Congress without limitation.”<sup>98</sup> A few decades later in *Gibson v. Chouteau*,<sup>99</sup> the Court held that no limitations existed over the federal power to use and dispose of public lands. In *Kleppe v. New Mexico* in 1976,<sup>100</sup> the Court reaffirmed that “the power over the public land thus entrusted to Congress is without limitations”<sup>101</sup> and upheld the Wild and Free-Roaming Horses and Burros Act of 1971,<sup>102</sup> “a federal statute that pre-empted long-established state wildlife programs.”<sup>103</sup> In short, the federal government’s Article IV authority over public lands is beyond question; as John Lesly has explained, “[t]here are 225 years of history and thousands and thousands of court decisions and congressional statutes that interpret the Constitution” in a manner contrary to these claims.<sup>104</sup>

Other Malheur occupiers argued that “grazing rights on public land are a property right attached to the base private land.”<sup>105</sup> This argument also fails. The Taylor Grazing Act of 1934 explicitly states that “the issuance of a grazing permit shall not create any right, title,

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exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.”); Spencer Driscoll, *Utah’s Enabling Act and Congress’s Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Movement*, 2012 BYU L. REV. 999 (2012).

95. Herring, *supra* note 90.

96. U.S. CONST. art. IV, § 3.

97. 39 U.S. 526 (1840).

98. *Id.* at 538.

99. 80 U.S. 92 (1871).

100. 426 U.S. 529, 539 (1976).

101. *Id.* at 539.

102. 16 U.S.C. 30 (1971).

103. Fairfax, *supra* note 54, at 970.

104. Seigler, *supra* note 63.

105. Herring, *supra* note 90.

interest, or estate in or to the [public] lands.”<sup>106</sup> Although ranchers’ investments in their operations have been given some protections at times,<sup>107</sup> in the 1973 case *United States v. Fuller*,<sup>108</sup> the Supreme Court definitively concluded that “[t]he provisions of the Taylor Grazing Act . . . make clear the congressional intent that no compensable property right be created in the permit lands themselves as a result of the issuance of [a grazing] permit.”<sup>109</sup>

Of course, if preexisting property rights based on longevity of use of western lands did exist, these claims would belong to Native Americans, including at Malheur. “[R]ecords of human habitation in the Great Basin region date from approximately 12,000 B.C.”<sup>110</sup> Several centuries ago, “ancestral relatives of modern native nations such as the Bannock, Chemehuevi, Kawaiisu, Mono, Paiute, Panamint, Shoshone, Goshute, Washoe, and Ute” arrived there, and their descendants still live there.<sup>111</sup> During the Malheur occupation, representatives of the Paiute tribe claimed the occupiers were desecrating a sacred site and argued that “[t]he protestors have no claim to this land. It belongs to the native people who continue to live here.”<sup>112</sup> In contrast to the Malheur occupiers, Paiute leaders could at least point to an attempted 1868 treaty with the federal government that would have protected their land and cultural resources.<sup>113</sup> Also unlike the occupiers, the federal government actually did impose a forced relocation on the Paiute tribe in 1879.<sup>114</sup>

Transfer advocates have also pointed to Article IV, Section 3 of the Constitution providing for the admission of new states to the Union.<sup>115</sup> “Particularly, the rebels construe the so-called ‘equal footing’ doctrine—which allows that all states are admitted to the Union on an

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106. 43 U.S.C. § 315b (2012).

107. *See, e.g.*, *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308 (D.C. Cir. 1938) (While the court recognized that rights under the Taylor Grazing Act of 1934 did not fall within the conventional category of vested rights in property, it concluded that equity required recognition of the substance of the interest rather than the nomenclature, and the “real value for the possessors” was something to be recognized.).

108. 409 U.S. 488 (1973).

109. *Id.* at 494.

110. Hoffman, *supra* note 3, at 10.

111. *Id.* at 11.

112. Carissa Wolf, *Go Vegan and Go Home: Occupiers Under Siege from PETA, Native Tribe*, WASHINGTON POST (Jan. 6, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/01/06/go-vegan-and-go-home-occupiers-under-siege-from-peta-native-tribe/>.

113. *Id.*

114. *Id.*

115. U.S. CONST. art. IV, § 3; Leshy, *supra* note 20, at 319.

2017 *DO SAGEBRUSH REBELS HAVE A COLORABLE CLAIM?* 77

equal footing with each other—to require that all states be treated alike as far as federal retention of lands within their borders after statehood.”<sup>116</sup> However, states typically bargained away any claim they may have had to federal lands in exchange for entry into statehood in the first place.<sup>117</sup> Leshy argues that if states were afforded a remedy based on this claim, they would have to give up their statehood.<sup>118</sup>

Claims that counties have superior rights to the land also do not withstand scrutiny. In the 1990s, several dozen counties in Nevada, California, Idaho, New Mexico, and Oregon passed ordinances purporting to require certain forms of federal consultation with localities in decisionmaking over public lands.<sup>119</sup> Proponents of these “custom and culture ordinances” pointed to: (1) NEPA section 101, which directs the federal government to preserve “cultural aspects of our national heritage”; and (2) the FLPMA’s provisions for public participation and local-federal collaboration.<sup>120</sup> Courts have held these and comparable ordinances seeking to regulate public lands unconstitutional based on federal preemption.<sup>121</sup>

Although this section has not addressed all claims raised in western anti-federalist tensions over public lands, it shows that several of the most popular claims to public lands do not withstand even brief analysis.<sup>122</sup> Federal ownership of western land is a longstanding practice with strong, longstanding authority; formal legal claims otherwise do not find constitutional support. The discussion below explores concepts that transcend formal legal arguments, looking to discern whether other principles might justify the sense of injustice that many in the region feel.

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116. Leshy, *supra* note 20, at 319–20.

117. *Id.* at 326 (discussing, *inter alia*, *Andrus v. Utah*, 446 U.S. 500 (1980), and suggesting that if states were given the remedy of title to public lands, they would have to give up their statehood).

118. *Id.*

119. Knickerbocker, *supra* note 21; Hungerford, *supra* note 2, at 457.

120. Hungerford, *supra* note 2, at 469.

121. *Boundary Backpackers v. Boundary Cnty.*, 913 P.2d 1141, 1147 (1996); *United States v. Bd. of Cnty. Comm’rs of the Cty. of Otero*, 184 F. Supp. 3d 1097 (D.N.M. 2015), *aff’d* *United States v. Bd. of Cnty. Comm’rs of Cnty. of Otero*, 843 F.3d 1208 (10th Cir. 2016); *S.D. Mining Ass’n v. Lawrence Cnty.*, 155 F.3d 1005 (8th Cir. 1998).

122. Klass, *supra* note 26, at 41 (concluding that claims of adverse possession also fail, for instance).

## III. THE COLORABLE CLAIMS

Having dismissed transfer advocates' legal arguments and claims to outright ownership, and recognizing that other legal standards are of limited help to their case, this discussion searches for the strongest arguments they could advance based in more general principles. As mentioned above, the analysis is inspired by courts' treatment of pro se litigants' complaints, where decisionmakers focus on the most relevant allegations, construe those allegations liberally, and aim to discern the strongest claims.<sup>123</sup> The allegations of interest to the strongest claims in

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123. Federal courts' lenient treatment of pro se complaints goes back to the U.S. Supreme Court's 1972 decision in *Haines v. Kerner*. 404 U.S. 519, 520 (1972). In *Haines*, the Court stated that it held a pro se complaint "to less stringent standards than formal pleadings drafted by lawyers." *Id.* Courts' policies of leniency and even active assistance have since been extended to motions for summary judgment, appellate briefs, administrative proceedings, and other procedures. Correll, *supra* note 25; Holt, *supra* note 25, at 171. The rationales behind this "paternalistic approach" vis-à-vis complaints center on free, open, and equal access to the judicial system and the notion that decisionmakers in positions of power have heightened duties to vulnerable members of society. Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 970-71 (1990); Correll, *supra* note 25, at 881. In *Moran v. Astrue*, in which the court reviewed a pro se social security matter on appeal from an Administrative Law Judge ("ALJ"):

[t]he court explained that pro se litigants enjoy a special status in the Second Circuit. In particular, the mere presence of a pro se litigant imposes 'heightened' duties on the ALJ. The court even went so far as to explain that '[t]he ALJ must adequately protect a pro se claimant's rights by ensuring that all of the relevant facts are sufficiently developed and considered.'

Correll, *supra* note 25, at 881.

Later, "[i]n *Weixel v. Board of Education of New York*, the court held in the course of a normal civil litigation matter that 'the [pro se litigants'] allegations in this case must be read so as to raise the strongest arguments that they suggest'". *Id.* These rationales in turn are based on pro se litigants' due process right to a meaningful opportunity to be heard. The standards for ensuring this opportunity typically maintain that, rather than acting as passive arbiters that disregard litigants' circumstances, decisionmakers should take an active role to find pro se complainants' strongest claims or to look for "any allegation stating federal relief." *Franklin v. Rose*, 765 F.2d 82, 85 (6th Cir. 1985); see also Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010). Thus, while a court normally disregards claims that are "vague and conclusory," *Easter v. Hill*, No. 95-3047, 1997 WL 30553, at \*5 (D. Kan. Jan. 8, 1997) ("When a litigant . . . fails to support with fact his allegations of constitutional violations, the allegations are vague and

this analysis are (1) something about federal-local relations is unjust to local communities; and (2) western communities proximal to public lands are somehow entitled to more access and control.

This intellectual exercise is premised on the possibility that those crying foul may face disadvantages in the public discourse that are analogous to being unrepresented in court.<sup>124</sup> Those disadvantages could include poverty, disenfranchisement, limited access to justice, and the inartfulness or inaccuracy that laypeople may exhibit when seeking to articulate injustices. They could also include the possibility that high-profile characters like the Bundys distract from real problems and inspire commentators to dismiss concerns. Another possible disadvantage is that the urgency of climate change may inspire minimization of unfair governance. In light of these issues, this discussion recognizes a need to give some of the disgruntled an opportunity to be heard in discourse and scholarship. I refer to these advocates for community empowerment—which include Sagebrush Rebels, other LTM proponents, and others unassociated with those movements—as “the complainers,” as they are the theoretical complainants in this analysis.<sup>125</sup>

This framing is not intended to suggest that the complainers are invariably voiceless or lacking other means to pursue their political aims. Indeed, as Alexandra Klass has observed, those who currently use public lands for commodity production:

receive the benefits of grazing, resource extraction, or other land uses at low cost without any of the burdens of land ownership. . . . [They] do not pay taxes on the land,

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conclusory, and the claims must be dismissed.”), it relaxes that standard where litigants are at certain disadvantages.

124. Cf. Pruitt & Showman, *Access to Justice*, *supra* note 35.

125. Admittedly, this group is defined somewhat loosely for purposes of this discussion. Whoever does and does not comprise the “complainers” may in fact be determinative of what constitutes an injustice in this context. Indeed, the prospect of untangling real regional problems from political posturing is one of the challenges in trying to deal with the Sagebrush Rebellion. This discussion seeks merely to contemplate that while it is easy to condemn people like the Bundys, there are other, more sympathetic, or even tragic figures who share their sympathies and may not warrant such quick condemnation—the frustrated local government representative, for instance, *see infra* section 1A, or even individuals like Shawna Cox, who occupied Malheur and sued the U.S. government for “works of the devil.” Justin Worland, *Oregon Occupier Sues Government for \$666 Billion over ‘Works of the Devil,’* TIME (Feb. 18, 2016), <http://time.com/4229281/oregon-occupier-lawsuit/>. This discussion contemplates that characters such as these may deserve more consideration as possible symbols of larger regional angst and desperation.



need not restore the land in case of drought or natural disaster, often have priority rates . . . and may face less liability for the environmental impacts of their activities than if they were the fee simple owners.<sup>126</sup>

Many localities benefit from government jobs or contracts and see ample popular support for federal land ownership.<sup>127</sup> This is also not the first time that the complainers have received consideration; others writing on this subject have entertained the arguments raised.<sup>128</sup>

This exercise is worthwhile, first, because most inquirers do not take the extra analytical step to account for the complainers' "disadvantages" presupposed here. Yet, geography scholar James McCarthy has questioned why "Third World" movements based on cultural identity, local knowledge, self-determination, and access to resources garner western scholars' sympathy, while in the First World context, they garner visceral condemnation.<sup>129</sup>

Second, much of the inquiry on this subject stops at the edge of formal law. Yet, several points of note suggest that a deeper look into informal norms is warranted.<sup>130</sup> Joseph Sax and other property law scholars have observed of the unique nature of property that property attachments are fundamental, yet formal law and title often fail to adequately characterize them.<sup>131</sup> Sax also commented that he sensed that

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126. Klass, *supra* note 26, at 42.

127. Patrik Jonsson, *Armed Oregon Occupation: Is it Really About White Poverty in the West?*, CHRISTIAN SCIENCE MONITOR (Jan. 9, 2016), <http://www.csmonitor.com/USA/Justice/2016/0109/Armed-Oregon-occupation-Is-it-really-about-white-poverty-in-the-West> ("Nine out of 10 Westerners surveyed in 2013 by Colorado College said national parks and wildlife preserves are boons to the economy. . . . Moreover, federal subsidies and government jobs help keep many towns afloat, and low grazing fees have helped make many ranchers wealthy.").

128. E.g., Jonathan Thompson, *The First Sagebrush Rebellion: What Sparked It and How It Ended* (Jan. 14, 2016), <http://www.hcn.org/articles/a-look-back-at-the-first-sagebrush-rebellion>.

129. McCarthy, *supra* note 21.

130. Jonsson, *supra* note 127 (discussing Western rural poverty, including Harney Country's transition "from Oregon's wealthiest to its poorest since federal land management tightened in the 1970s, and popular support for the Bundys' message, though acknowledging the Bundys as "imperfect messengers"); Klass, *supra* note 26, at 47–48 (acknowledging that members of public may support the Bundys specifically and private claims to public lands generally).

131. Sax, *Liberating the PTD*, *supra* note 37, at 187 ("The idea of justice at the root of private property protections calls for identification of those expectations which the legal ought to recognize . . . [and though] it is hard to imagine legally enforceable expectations unconnected to formal title . . . we know

tensions in competing claims of the local versus the state versus the national over land uses were:

not likely to be fruitfully resolved by the means that have traditionally been applied to them—the effort to carve out separate domains of authority along political subdivision lines, and using doctrines such as commerce clause analysis and preemption. Such traditional analysis fails to recognize the extent to which the nation, as the dominant community, has triumphed, and fails to accept that what local community values need most is to obtain recognition within (rather than as competitors of) national values.<sup>132</sup>

Other considerations include the rift between the law as written and the law as practiced in this unique context;<sup>133</sup> the surprising level of public sympathy with the Sagebrush Rebel agenda and historical lack of agency consideration of effects of agency actions on communities;<sup>134</sup> and the fact that many commentators do not share the burdens of the conservation-oriented measures they call for.<sup>135</sup>

The analysis conceptualizes a “public lands community” as a geographical entity, potentially bounded by municipal or county lines, located close enough to federal lands so as to be affected by agency decisionmaking.<sup>136</sup> This definition necessitates, then, that white, anti-government ranchers like the Bundys are not, in fact, adequate spokespeople for the concerns of these communities. These communities include people of a variety of cultural and socioeconomic backgrounds and who have varied opinions about the state of public lands.<sup>137</sup>

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that, insofar as expectations underlie strong and deeply held legal-ethical ideals, they are not limited to title ownership.”).

132. Sax, *Do Communities Have Rights?*, *supra* note 17, at 502.

133. *Cf.* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991); Huber, *supra* note 39, at 1003–19.

134. Sax, *Do Communities Have Rights?*, *supra* note 17, at 506 ([T]he law “does not agonize over” the effects of agency actions on aggregate communities, viewing those interests as “only sentiment.”).

135. *E.g.*, Froma Harrop, *Federal Lands Belong to All of Us*, SAN ANTONIO EXPRESS (June 12, 2015), <http://www.mysanantonio.com/opinion/commentary/article/Federal-lands-belong-to-all-of-us-6324856.php> (opinion piece written by journalist living in Providence, RI and New York, NY).

136. Bates, *supra* note 44.

137. *Cf. id.* at 83 (describing “the community of the Deschutes River basin in Oregon, which includes people living in the growing city of Bend, the small

Nonetheless, although the Sagebrush Rebellion and federal lands communities are not synonymous, substantial overlap between the complaints and demands of Sagebrush Rebels and the complaints and demands of many regional local (and state) governments suggests that to explore the one necessitates exploring the other. In addition, both tension and overlap exist between the geographical communities surrounding public lands and the ideological or occupation-based communities of which Sagebrush Rebels see themselves as a part.<sup>138</sup> This discussion contemplates that both these communities—the diverse, geographically defined proximal communities and the ideological communities directly linked with “rebellion”—cannot always necessarily be distinguished, yet both must somehow be accounted for through law and governance.

The discussion below expands upon three “colorable claims” of injustice that could be discerned from the complaints raised by those dissatisfied with federal lands management. These three claims are discussed in terms of theories crafted here to encapsulate several different principles. They include: (1) an Exclusion Theory based on procedural justice and the right to participatory land use decisionmaking, also touching on concepts of due process and a “reverse environmental justice” conceptualization; (2) a Reliance Theory based on conceptions of estoppel, adverse possession, and “just transitions”; and (3) a Public Trust Doctrine Theory.

#### A. Exclusion Theory

The first “colorable claim” that communities proximal to public lands could raise is a claim of exclusion: exclusion from environmental decisionmaking processes, exclusion from the regulatory system as a whole, and exclusion from the opportunity to collectively pursue distributive justice. The exclusion, complainers would argue, stems from non-inclusive processes and inconsistencies within the regulatory scheme, as well as limited consideration of local interests in an oversight framework that has flavors of due process- or takings-like concerns.

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town of Maupin, the Warm Springs Indian Reservation, and all the other human settlements and outlying areas within the basin”).

138. *Cf. id.* at 83–84 (arguing that “the geographic definition of community is simply inadequate to describe the complex relationships among the many individuals who share interests in the natural resources that occur on public lands,” and that identity-based communities, occupational communities, communities of interests, and institutions of governance are necessary frameworks to consider).

While this claim lacks the concreteness and weight of a formal legal claim—and while there are ample counterarguments rooted in formal law, the Supremacy Clause, and reasons for not making broad concerns like “exclusion” actionable—these considerations could at least be acknowledged as meaningful.

This claim is perhaps best exemplified by the spate of custom and culture ordinances passed in the 1990s.<sup>139</sup> These ordinances illustrate how many communities consider themselves to be external to or in adversarial relations with the federal agency governance paradigm. While counties could do much on their end to improve local-federal relations, this widespread sense of exclusion could reflect a weakness on the federal side.<sup>140</sup>

In his 2014 article *The Durability of Private Claims to Public Property*, Bruce Huber explores the paradoxical governance regime that has characterized western public lands management for the past several decades.<sup>141</sup> Most relevant to the discussion here is that the “open-access model” that dominated land management for the bulk of western history has never been truly overhauled even though more stringent conservation laws were imposed starting in the 1970s.<sup>142</sup> Huber calls this latter regime the “proprietary model . . . in which the public interest in federal land is given effect not by offering open access, but by securing fair compensation for public resources extracted by private enterprise.”<sup>143</sup> The limp progress in the transition from open access to proprietary stems in large part from a shadow system of operative law that functions alongside and often in contrast to formal law on western public lands.<sup>144</sup>

The regime’s failure to transition involves a parallel failure of meaningful transition in the treatment of private claims to public land: those claims that should be excluded or limited according to the proprietary model are instead sanctioned under the de facto open-access model.<sup>145</sup> Under this dualistic legal framework, “even weak or limited entitlements” and “even claims that lack the formal status of property” seem to “take on a life of their own” and are “treated more or less as if they were protectable property interests, even when they are not so in the formal nomenclature of the law.”<sup>146</sup>

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139. See Hungerford, *supra* note 2.

140. Cf. Bryan, *Cause for Rebellion?*, *supra* note 5, at 14–16.

141. Huber, *supra* note 39, at 997.

142. *Id.*

143. *Id.*

144. *Id.* at 994.

145. *Id.*

146. *Id.* at 994, 1001.

The formal legal system also seems to operate in contradiction to its own directives, with the result of stymieing the transition to the proprietary model. Although the federal government has legal authority to terminate, limit, or let expire many claims—mineral and ski resort leases, grazing permits, hydropower licenses, and residential leases, for instance—it nonetheless opts to do so less frequently than would be expected according to policy mandates characterizing the post-1970s conservation era.<sup>147</sup> Rather, these rights “are often extended, expanded, renewed, and protected by law and by agency managerial practices in ways that shape, and often trump, other policy objectives with respect to federal land.”<sup>148</sup> Huber deems these formal and informal rights “surprisingly durable,”<sup>149</sup> and attributes this durability to two main factors: (1) natural resource law’s historical solicitude to traditional extractive industries; and (2) the reticence of officials and land management agencies to overhaul existing land uses despite new mandates because they have “local, visible, and immediate reasons not to disrupt them.”<sup>150</sup>

Turning to the Exclusion Theory, these observations suggest that federal agencies could be accused of two wrongs. First, they send stakeholders conflicting messages. Namely, they are mandated under express provisions of law to take certain actions or serve certain policy objectives. Yet, in many instances they either decline to do so or act with enough deference and leniency as to undermine their own mandates.<sup>151</sup> Second, in these mixed messages sent to current or would-be users, agencies fail to explicitly acknowledge and validate the thrust of historical patterns of use in order to prepare the regulated community for the fact that transitions are underway. Rather, agencies defer to historical patterns through the mixed formal/informal legal system of lenience, non-enforcement, and grandfathering. This latter deference might seem as if the system is doing those users a favor. However, it could also leave them in an anxiety-inducing state of limbo.

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147. *Id.* at 1001–02.

148. *Id.* at 994–95.

149. *Id.* at 994.

150. *Id.* at 998.

151. *Id.* at 1012–18. Huber describes several examples of these practices. For instance, the U.S. Forest Service has tolerated unauthorized cabins in National Forests, allowed unauthorized improvements to those cabins, and disregarded other violations, such as nonpayment of use fees and neglected maintenance. *Id.* As another example, he observes that “federal oil and gas leasing terms provide opportunities for private claimants to extend rights to public resources beyond what would generally be available on private lands, or even what would appear to be allowable on the face of federal law.” *Id.*

These mixed messages could be chalked up to a common truth: law as practiced is never quite the same as law as written.<sup>152</sup> The complexities of western land use may require de facto law to diverge even more than usual from written law.<sup>153</sup> However, to the extent a pattern could be demonstrated, the mixed messages could also be characterized as a cardinal sin of government: arbitrariness. Arbitrariness has been defined as law enforced irrationally or “without adequate determining principle.”<sup>154</sup> Courts, scholars, and other authorities have recognized for hundreds of years that arbitrariness is inimical to principled governance.<sup>155</sup> Bryan has observed that communities proximal to public lands experience federal planning as arbitrary because it is “so highly discretionary that it has become inexcusably inconsistent from one agency to the next.”<sup>156</sup> Interestingly, arbitrariness has also been defined in the very words used by Sagebrush Rebels—as “tyrannical, despotic, oppressive or by caprice.”<sup>157</sup>

Arbitrariness that alienates the regulated community from the regulatory system is at the heart of procedural justice literature. Decisionmaking and governance procedures that people perceive to be fair nurture people’s trust in those systems, even if outcomes do not favor them.<sup>158</sup> The reverse is true as well: the public’s propensity to comply with law is “powerfully influenced by people’s subjective judgments about the fairness of the procedures” through which

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152. Cf. ELLICKSON, *supra* note 133; Huber, *supra* note 39 (discussing management difficulties because of vast federal land holdings in west); Lisa Pruitt, *The Rural Lawscape: Space Tames Law Tames Space*, in *THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY* (I. Braverman, N. Blomley, D. Delaney & A. Kedar, eds., 2013).

153. Cf. ELLICKSON, *supra* note 133; Huber, *supra* note 39 (discussing management difficulties because of vast federal land holdings in west).

154. Christine N. Cimini, *Principles of Non-Arbitrariness: Lawlessness in the Administration of Welfare*, 57 *RUTGERS L. REV.* 451, 457 (2005).

155. *Id.*

156. Bryan, *Learning Both Directions*, *supra* note 32, at 149.

157. Cimini, *supra* note 154; see generally PHILLIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 51–54 (1997) (discussing liberty as requiring security against interference on an arbitrary basis); PHILLIP PETTIT, *JUST FREEDOM: A MORAL COMPASS FOR A COMPLEX WORLD* (2014) (discussing arbitrariness as “unfreedom”).

158. Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 *YALE L.J. F.* 525 (2014), available at <http://yalelawjournal.org/forum/justice-sotomayor-and-the-jurisprudence-of-procedural-justice> (discussing relationships among fairness in decisionmaking, transparency, and perceptions of legitimacy and procedural justice in the legal system).

governmental entities exercise their authority.<sup>159</sup> In turn, “[t]o be effective . . . laws need generally to be widely obeyed by members of the public in their everyday lives.”<sup>160</sup> Procedural exclusion contributes to a vicious cycle of alienation and undermined legitimacy: exclusion fuels alienation among the regulated, alienation fuels non-compliance and outrage, and non-compliance and outrage further undermine institutions’ effectiveness.

Protections against arbitrariness are also at the heart of due process and takings jurisprudence. None of the complainers in this broad analysis would have a clear substantive due process, procedural due process, or takings claim—particularly given the lack of jurisprudential clarity in those doctrines.<sup>161</sup> But if the question is whether land users’ sense of injustice is justified, it seems telling that themes relevant to those doctrines are all present here: (1) land, contracts, livelihoods, and other economic interests and activity; (2) unpredictable and inconsistent government regulation that may or may not impinge on those interests; (3) limitations on notice and the opportunity to be heard in relevant decisionmaking processes; and (4) limitations on compensation for losses.<sup>162</sup>

A particularly sensitive and important process underscores the tensions at hand in federal land management and the case for procedural injustice in this context: land use decisionmaking. Planners, philosophers, and environmental justice theorists agree that ethical norms and legal principles support the idea that people’s interest in participatory land use decisionmaking transcends formal law.<sup>163</sup> For instance, in philosopher Martha Nussbaum’s articulation of the goals of “good political organization” as manifested through rights-like “capabilities,” she advocates not just freedom from pollution, but also the right to

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159. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003).

160. *Id.*

161. *Cf.* John D. Echeverria, *Public Takings of Private Contracts*, 38 ECOLOGY L.Q. 639 (2011).

162. *Id.*

163. The stance of the American Planning Association is that local land use planning “should be engaging citizens positively at all steps in the planning process, acknowledging and responding to their comments and concerns. Through collaborative approaches, planning should build support for outcomes that ensure that what the public wants indeed will happen.” Patricia E. Salkin, *Environmental Justice and Land Use Planning and Zoning*, 32 REAL EST. L.J. 429, 436 (2003), available at <http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1570&context=scholarlyworks>.

“control over one’s environment.”<sup>164</sup> While this latter point is not a call for unmitigated autonomous decisionmaking over land, it does sanction the combined, fundamental importance of property rights, economic opportunity, and the ability to participate in political processes.<sup>165</sup>

A “reverse environmental justice” conceptualization is likewise relevant here. Environmental justice is usually defined as the right to free and autonomous decisionmaking in order to ensure the fair distribution of the burdens and benefits of environmental conditions.<sup>166</sup> Classic environmental justice scenarios focus on marginalized communities that bear inordinate burdens of pollution.<sup>167</sup> Yet, the rhetoric used to justify vast public land holdings in the West—that those lands “belong to all Americans”—evokes an analogous subjugation of local will to “the greater good.” That is, for example, just as low-income communities may be coerced into bearing the hazards of a nearby factory while those living at a safe distance tout the economic benefits of the factory, those living nowhere near public lands nor experiencing the restrictions they entail may tout the conservation benefits of those restrictions.<sup>168</sup> As Sax remarked (followed by several disclaimers about the primacy of pressing national priorities), “[w]e should be reluctant to

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164. Martha Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 288 (1997).

165. See *id.*; Nancy D. Perkins, *Livability, Regional Equity, and Capability: Closing in on Sustainable Land Use*, 37 *U. BALT. L. REV.* 157 (2008).

166. Raina Wagner, *Adapting Environmental Justice: In the Age of Climate Change, Environmental Justice Demands a Combined Adaptation-Mitigation Response*, 2 *ARIZ. J. ENVTL. L. & POL’Y* 153, 158 (2011).

167. *Id.*

168. Jerrold Long, *Public Lands, Common Ground, and the Smell of Sagebrush after the Rain*, LPB NETWORK (Feb. 3, 2016), <http://lawprofessors.typepad.com/property/2016/02/public-lands-common-ground-and-the-smell-of-sagebrush-after-the-rain.html> (“A common response to sagebrush rebels is that the public lands are just that, public—owned by all people, whether in New York or Nevada, and managed by the federal government in trust for all of us. In this argument, it doesn’t matter where a person lives, or whether they have or ever will visit the public lands—all should have equal say in their management. That is, of course, true in a general sense. But it assumes a specific type of and singular purpose for the public lands. The public lands story is somewhat more complex than that . . . . [M]any current public lands users were part of that complex public lands history. Long-term successful management of the public lands as public lands will require an intricate and nuanced understanding of the conflicting notions of purpose and ownership that have always been a part of the public lands story. . . . We cannot claim nor expect legitimacy if we ignore the history of the place or its people.”); see also Loka Ashwood & Kate MacTavish, *Tyranny of the Majority and Rural Environmental Injustice*, 47 *J. RURAL STUD.* 271 (2016) (noting under-discussion of rural environmental injustice).



require people to arrange their lives to serve the demands of some larger external community.”<sup>169</sup> Although the environmental consequences in this context are conservation rather than pollution, this advocacy of inequitable distribution of a particular environmental pursuit seems violative of environmental justice principles.<sup>170</sup> It at least evokes the need to consider the subjective nature of “benefits” versus “burdens” as they are experienced, and raises the question of whether the larger society is willing to admit that some inequity is involved in this model.

The combined effects of the volume of western federal landholdings and the limitations on collaborative decisionmaking could thus be considered a “reverse environmental justice” scenario. Commentators acknowledge that the absence of avenues for local input may be unfair. But the analysis above suggests that this regime and its dominating influence on local communities may be “unjust” according to certain specific paradigms. The arbitrariness concern taken alone might suggest that the solution is more consistency and aggressive, top-down enforcement. However, taken altogether, these considerations demonstrate how the absence of input into environmental decisionmaking is its own particularized ethically and/or legally principled failure.<sup>171</sup>

### B. Reliance Theory

The second “colorable claim” that emerges from complainers’ community-based rhetoric is a claim centered on reliance. The types of reliance complainers refer to in support of their claims of entitlements take on three forms. First, they point to communities’ and individuals’ reliance on the longstanding history and continued persistence of the

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169. Sax, *Do Communities Have Rights?*, *supra* note 17, at 509–10.

170. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice”*, 47 AM. U. L. REV. 221, 231–34 (1997) (discussing environmental justice as distributive justice and political justice—respectively, justice of fairly distributed benefits and burdens, and justice of fairness of decisionmaking processes).

171. “When the public has not participated meaningfully in the proceedings (both in an informal and formal sense) leading to [a] pivotal [environmental] decision, or series of pivotal decisions, then the decision rests on a weakened form of political legitimacy and stability.” Eileen Gay Jones, *Risky Assessments: Uncertainties in Science and the Human Dimensions of Environmental Decisionmaking*, 22 WM. & MARY ENVTL. L. & POL’Y REV. 1 (1997); Salkin, *supra* note 163, at 448 (“Professor Arnold argues that ‘land use planning and regulation foster choice, self-determination, and self-definition for local neighborhoods, not paternalism that insists that there is a single correct environmental justice goal.’”).

open-access model as a whole.<sup>172</sup> Second, they point to their reliance on the durability of their private claims to public lands.<sup>173</sup> Third, they evoke a more basic reliance concept: that natural resources in the region are scarce, and they are relying on particular resources and land uses for their livelihoods.<sup>174</sup>

The reliance concept evokes the doctrine of estoppel.<sup>175</sup> Courts crafted the common law theory of promissory or equitable estoppel “to address injustices resulting from reliance on a gratuitous promise”<sup>176</sup> and “to avert a litigant’s contradictory arguments . . . or conflicting allegations.”<sup>177</sup> Solidified into law during the English Enlightenment era, the doctrine reflected an effort to craft an ethical counterbalance to the royal and aristocratic class’s mentality that “might makes right.”<sup>178</sup> Lord Kenyon defined it in an eighteenth century case as the principle “that a man should not be permitted to ‘blow hot and cold’ with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interests.”<sup>179</sup> In a nineteenth century case, Lord Denham explained, “where one by his words or conduct willfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at

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172. E.g., Matt Ford, *The Irony of Cliven Bundy’s Unconstitutional Stand*, THE ATLANTIC (Apr. 14, 2014), <https://www.theatlantic.com/politics/archive/2014/04/the-irony-of-cliven-bundys-unconstitutional-stand/360587/> (quoting Cliven Bundy accusing BLM of having “seized access to all of the . . . rights of Clark County people that like to go hunting and fishing. They’ve closed all those things down, and we’re here to protest that action.”).

173. E.g., Klass, *supra* note 26, at 49.

174. E.g., Salvador Hernandez, Nicolás Medina Mora & Jason Wells, *Oregon Sheriff Tells Militia Occupiers to Go Home as Ranchers Surrender*, BUZZFEEDNEWS (Jan. 4, 2016), [https://www.buzzfeed.com/salvadorhernandez/militia-group-hoping-to-overthrow-government-occupies-buildi?utm\\_term=.mdx3pkXEj#.yWxWozBd2](https://www.buzzfeed.com/salvadorhernandez/militia-group-hoping-to-overthrow-government-occupies-buildi?utm_term=.mdx3pkXEj#.yWxWozBd2) (quotations omitted) (Ammon Bundy insisted that the federal government had “pushed people into poverty by denying private ranchers full use of public lands.”).

175. Cf. Klass, *supra* note 26, at 45–46 (quoting Joseph Singer).

176. Charles Calleros, *Cause, Consideration, Promissory Estoppel, and Promises Under Deed: What Our Students Should Know about Enforcement of Promises in a Historical and International Context*, 13 CHI.-KENT J. INT’L & COMP. L. 83, 86 (2013).

177. T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 384 (2008).

178. *Id.* at 384–85.

179. *Id.* at 387.

the same time.”<sup>180</sup> Over the years, the doctrine has evolved, gained flexibility, and grown to encompass more diverse scenarios.<sup>181</sup> For instance, it now may allow for recovery of reliance costs even where promises are so indefinite as to be unenforceable.<sup>182</sup> Under modern American common law, the elements of the doctrine typically include: (1) reliance and (2) on a position willfully taken.<sup>183</sup>

Established doctrine holds that agencies are very infrequently subject to equitable estoppel claims.<sup>184</sup> The United States Supreme Court has never upheld such a claim against the government.<sup>185</sup> Yet, standing in tension with this rule, “[o]ne of the most firmly established principles in administrative law is that an agency must obey its own rules”—a principle known as the *Accardi* doctrine.<sup>186</sup> These two doctrines collide: where an agency has violated the *Accardi* doctrine, the remedy might well be a measure resembling a remedy to an estoppel claim. The resulting body of law has been called “incoherent”—and likely unavailable to the complainers here.<sup>187</sup>

Turning to basic principles, though, two characteristics of the regulatory regime give strength to a general theory of reliance supporting communities’ entitlement to access public lands. First, as discussed above, agencies and managers do “blow hot and cold” by promising one form of law in writing and another in practice. This is the type of mixed messaging that estoppel was designed to guard against and to which the *Accardi* principle could theoretically apply. If these principles were embodied in formal law applicable here, agencies could theoretically be “estopped” from further excluding local residents from historical land uses.

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180. *Id.*

181. Calleros, *supra* note 176, at 86.

182. *Id.*

183. Anenson, *supra* note 177, at 404.

184. *See* Holloway v. United States, 845 F.3d 487 (1st Cir. 2017) (equitable estoppel doctrine used sparingly against the government); McCrory v. Administrator of Federal Emergency Management Agency of U.S. Dept. of Homeland Sec., 22 F. Supp. 3d 279 (S.D. N.Y. 2014), *judgment aff’d*, 600 Fed. Appx. 807 (2d Cir. 2015) (doctrine of estoppel generally not available against the government).

185. Dorit Rubinstein Reiss, *Relying on Government in Comparison: What Can the United States Learn from Abroad in Relation to Administrative Estoppel?*, 38 HASTINGS INT’L & COMP. L. REV. 75, 75 (2015).

186. RICHARD MURPHY & CHARLES H. KOCH, 1 ADMIN. L. & PRAC. § 4:22 (3d ed. 2017); Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency’s Violation of Its Own Regulations or Other Misconduct*, 44 ADMIN. L. REV. 653, 655 (1992).

187. *Id.* at 743.

Second, the regime's foot-dragging on its path to the proprietary model could be seen as a way of tacitly validating users' reliance on access. Klass has considered a theme in this vein, with a focus on adverse possession.<sup>188</sup> She argues that although land users' adverse possession claims would fail against the federal government, "one of the primary policy reasons behind the doctrine of adverse possession, the personhood rationale, may help explain the durability of private claims to public property."<sup>189</sup> Specifically, one of the bases of adverse possession claims—involving society's sanction of "title by theft"—is the concept that someone in possession of land develops a personal attachment to the land, which should then be given priority over the original owner's now-weaker attachment based on less productive use of the resource.<sup>190</sup> The shadow legal regime in western public lands seems to have embraced this principle throughout its history: many claims that were originally illegal have eventually been rendered legal through formal or informal operation of law.<sup>191</sup> This tacit embrace of an adverse possession-like principle suggests the system seeks to validate use and reliance. In seeking to illuminate the psychological drivers behind Sagebrush Rebel conflicts, Klass has observed their rhetoric related to these principles: longevity of use, reliance, and the right to a traditional livelihood all shaped the narrative surrounding Cliven Bundy's outrage over limitations imposed in 1993 on his ability to graze cattle on public lands.<sup>192</sup> While not justifying Bundy's actions, Klass and others also noted the Bundy family's 100 years of grazing on those same lands and the BLM's failure to enforce its own law for twenty years.<sup>193</sup>

It is not unheard of for reliance interests to create entitlements to uses of public lands. In a 1938 decision interpreting the then-new Taylor Grazing Act, the Court of Appeals for the D.C. Circuit acknowledged that rights falling short of full-fledged property rights may warrant equitable protection.<sup>194</sup> The court said:

We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property. Yet, whether they be called rights, privileges, or bare licenses, or by whatever name,

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188. Klass, *supra* note 26, at 45.

189. *Id.*

190. *Id.*

191. Huber, *supra* note 39.

192. Klass, *supra* note 26, at 49.

193. *Id.*

194. *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 315 (D.C. Cir. 1938).

while they exist they are something of real value to the possessors and something which have their source in an enactment of the Congress. The jurisdiction of equity is flexible and should not be confined to rigid categories so that the granting of an injunction will depend upon nomenclature rather than upon substance.<sup>195</sup>

The court continued:

There are well known situations where equitable protection is accorded to rights or interests which do not come within the category of vested interests in property. Among these are cases involving water rights, both the rights recognized under the rule of prior appropriation in the Western states and riparian rights. While the owner of a water right has a vested interest in that right, the right itself is something less than the full ownership of property because it is a right not to the corpus of the water but to the use of the water.<sup>196</sup>

This case highlights the problematic nature of some of the rhetoric used to dismiss the complainers' arguments. The to-the-letter legal interpretations discussed in Section I are advanced as counterarguments to assertions of entitlements. Commentators similarly point to the unilateral power federal agencies wield to make decisions about access, arguing that users should be grateful to benefit from the "largesse" of the federal landlord and insisting that federal lands belong to all Americans.<sup>197</sup> Yet, perhaps such rhetoric reflects a disregard toward the longstanding nature and importance of access to some users. While technically correct, this positivist interpretation could be said to overlook practice, equity, and the complex nature of property.<sup>198</sup>

After the Malheur occupation, University of Idaho law professor Stephen Miller sought to illuminate the contrast between the realities of

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195. *Id.* at 315.

196. *Id.*

197. James Huffman, *Book Review: 'A Climate of Crisis' by Patrick Allitt*, WALL ST. J. (Apr. 23, 2014), <http://www.wsj.com/articles/SB10001424052702304512504579496060586409>.

198. *Cf.* Sax, *Liberating the PTD*, *supra* note 37, at 187 ("[M]any things lacking traditional status as formal property . . . in fact generate expectations quite like those that attach to traditional forms of property.").

2017 *DO SAGEBRUSH REBELS HAVE A COLORABLE CLAIM?* 93

western life and the law as written, also zeroing in on a reliance theme. Recognizing that “species protection has hit this region hard,” he notes:

there are families that have been farming these federal lands for generations. In the weird world of renewable, non-compete grazing permits, there are families that have grazed federal land for generations but do not own it. There is an odd tenant-farmer reality: some of these families have been here for generations but do not own any land. This creates immense hostility, especially when new conditions are placed on those permits.<sup>199</sup>

This once again raises Sax’s views as to how the concept of property and the law’s protection of it are more complicated than simple title. In the context of the Medieval commons, Sax remarked:

title was not always sufficient to settle . . . controversies. One might have been able to trace a grant back a long time, but if common uses incompatible with the grant had developed, those uses had to be reckoned with. The more necessary the uses, the stronger the claims of justice that attached to the custom.<sup>200</sup>

This point speaks to the third reliance argument advanced by complainers: that they are entitled access to scarce resources because they need them.<sup>201</sup>

Finally, the concept of “just transitions” is relevant here.<sup>202</sup> The crux of this theory is that progressions in environmental policy will impose burdens on certain sectors, and that workers should not bear

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199. Stephen R. Miller, *As Bundy’s Malheur Takeover Ends, the Real Concerns of Sagebrush Country Ranchers Linger*, LAND USE PROF BLOG (Jan. 26, 2016), [http://lawprofessors.typepad.com/land\\_use/2016/01/as-bundys-malheur-takeover-ends-the-real-concerns-of-sagebrush-country-ranchers-linger.html](http://lawprofessors.typepad.com/land_use/2016/01/as-bundys-malheur-takeover-ends-the-real-concerns-of-sagebrush-country-ranchers-linger.html).

200. Sax, *Liberating the PTD*, *supra* note 37, at 191.

201. Hernandez, Mora & Wells, *supra* note 174 (discussing Ammon Bundy’s claim that ranchers needed the Malheur Refuge resources to stay out of poverty).

202. David J. Doorey, *A Law of Just Transitions?: Putting Labor Law to Work on Climate Change*, 164 OSGOODE LEGAL STUD. RES. PAPER SERIES, Oct. 26, 2015, at 5, available at <http://digitalcommons.osgoode.yorku.ca/olsrps/164/> (brackets in original).

disproportionate burdens in those transitions.<sup>203</sup> Rather, government should ensure a smooth transition for workers through workforce development initiatives and other social programs.<sup>204</sup> This principle does not necessarily find support in formal law, yet policymakers begrudgingly recognize it when enough public pressure is applied.<sup>205</sup> For instance, a federal jobs program was implemented to replace the lost wages of lumberers in towns affected by the establishment of Redwoods National Park.<sup>206</sup> A more recent example is the Obama administration's "Power Plus Plan" for coalfield communities affected by regulations of the coal industry.<sup>207</sup> When it is recognized, the just transitions doctrine connotes the equitable principle that when people's livelihoods are affected by regulations, they are owed some form of compensation.

In sum, the Reliance Theory provides more robust contours for some of the complainers' allegations: they want to keep doing things the way they have been doing them, and arguably agencies have sent them the message that they can, despite what laws directing otherwise might say. These principles buttress the idea that the public lands scenario may be unjust to locals, as well as the case for local entitlement to certain uses.

### C. The Public Trust Doctrine

The final "colorable claim" that can be discerned in complainers' rhetoric turns to the arguments that local communities have a greater claim to public lands than the national public as a whole. The pitting of two different "publics" against one another gives rise to the question of how conflicting conceptualizations of public ownership might be resolved. Complainers' advancement of the idea of some informal,

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203. Peter Newell & Dustin Mulvaney, *The Political Economy of the 'Just Transition'*, 2 GEOGRAPHICAL J., no. 179, June 2013, at 132, available at [https://www.researchgate.net/publication/259043435\\_The\\_Political\\_Economy\\_of\\_the\\_Just\\_Transition](https://www.researchgate.net/publication/259043435_The_Political_Economy_of_the_Just_Transition) (reviewing background and development of the concept).

204. "Just Transition"—*Just What Is It?*, LABOR NETWORK FOR SUSTAINABILITY, <http://www.labor4sustainability.org/uncategorized/just-transition-just-what-is-it/> (last visited May 2, 2017).

205. 16 U.S.C. §§ 79(g), (k) (2012).

206. *Id.*

207. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,670–71 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, INVESTING IN COAL COMMUNITIES, WORKERS, AND TECHNOLOGY: THE POWER+ PLAN (2015), <https://perma.cc/RJ4S-9FGV>; Eisenberg, *supra* note 1, at 149.

smaller-public superior claim continuously appeals to rhetoric that evokes some form of natural law.<sup>208</sup> Their arguments sound as if they claim local rights based on a conception of a superior, separate, and innate public trust entitlement.

The public trust doctrine is usually discussed in the context of advancing environmental stewardship, conservation, or minimally commercial public access and enjoyment of natural resources, such as for navigation and travel.<sup>209</sup> It articulates the duty of a sovereign to protect common resources for common use, rather than selling or privatizing them.<sup>210</sup> The trust is said to stem from natural law, with its innate roots dating back to indigenous cultures, the Roman Empire, and medieval England.<sup>211</sup> In the modern era, while formal public trusts may be created through statute or common law, the trust obligation continues to be characterized as “natural” and “ancient.”<sup>212</sup>

Perhaps surprisingly, the central idea behind the public trust doctrine historically was “not particularly aimed at preserving resources that we generally denote as environmental.”<sup>213</sup> These aspects of the public trust bring us back to the Reliance Theory and Sax’s views on the complexity of property. Considered the father of the public trust doctrine after planting the seed for its revival in a 1970 article,<sup>214</sup> Sax explained

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208. Cf. Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393, 394 (2009) (arguing that public trust doctrine is “a good legal fiction because it enables new uses of the doctrine to perform a gap-filling function in the absence of positive law”).

209. Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998) [hereinafter Rose, *Joseph Sax*].

210. MARY WOOD, *NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* 126 (2014).

211. *Id.*; cf. Rose, *Joseph Sax*, *supra* note 209, at 356 (noting the lack of clarity about the doctrine, and confusion as to whether it is substantive, procedural, or otherwise).

212. WOOD, *supra* note 210, at 125–26; Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U. CAL. DAVIS L. REV. 741 (2012); Rose, *Joseph Sax*, *supra* note 209, at 359 (noting that public trust doctrine is “only one of several that supported the idea that some property inherently belongs to the public”).

213. Rose, *Joseph Sax*, *supra* note 209, at 359.

214. Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 509–46 (1970) [hereinafter Sax, *Effective Judicial Intervention*]. Rose notes that “Sax seemed to change focus” with this article and faced criticism when he “argued that the public trust should become a tool for avoiding destabilizing change and for incorporating community values in decisions about social as well as ecological resources. Despite the apparent differences in these depictions of the trust, however, they may be closer



his view of the public trust's relationship with reliance and expectations a few years later, arguing that the public trust doctrine:

should be employed to help us reach the real issues—expectations and destabilization—whether the expectations are those of private property ownership, of a diffuse public benefit from ecosystem protection or of a community's water supply. The historical lesson of customary law is that the fact of expectations rather than some formality is central . . . . [W]here title and expectations are not congruent, title should carry less weight . . . . Where traditional expectations must give way to new techniques or new needs, the transition should be as evolutionary—rather than revolutionary—as the new needs permit.<sup>215</sup>

In other words, Sax believed: (1) that “[t]he essence of property law is respect for reasonable expectations”; (2) that expectations not recognized with formal title are just as fundamental to property law and that “[t]he idea of justice at the root of private property protections calls for identification of those expectations which the legal system *ought* to recognize”;<sup>216</sup> and (3) that the public trust doctrine's respect for informal expectations serves both to protect those expectations and to keep communities stable.<sup>217</sup> Sax was also concerned with the relationships between communities and property, noting the absence of a modern legal definition of “community” and the phenomenon that informal property expectations could be a community-wide phenomenon.<sup>218</sup>

Sax additionally noted that the doctrine's roots in Medieval England served to incorporate customary law into formal law because “ideas of custom, justice and law were inextricably intertwined.”<sup>219</sup>

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than they seem . . . . These two versions of the trust, taken together, suggest that Sax's goal was to loosen the public trust doctrine from its historical connection with navigation and waterways, and turn the doctrine instead into a more general device for managing change and recognizing community values in diffuse resources.” Rose, *Joseph Sax*, *supra* note 209, at 355.

215. Sax, *Liberating the PTD*, *supra* note 37, at 192–93.

216. *Id.* at 186–87 (emphasis added).

217. *Id.* at 187, 188, 191–92 (Historically, “[w]hat brought disputes over the commons to crisis was neither title nor custom, taken alone, but the sharp disappointment of expectations, continuance of which was perceived as a necessity.”).

218. *Id.*

219. *Id.* at 189.

2017 *DO SAGEBRUSH REBELS HAVE A COLORABLE CLAIM?* 97

When resources became scarce and lords sought to limit common rights, peasant revolts were not uncommon.<sup>220</sup> One such agitator Sax quotes sounded quite like a Sagebrush Rebel, “asserting longstanding customary use” and declaring: “Let the knights then feel our strength . . . . We can go to the woods as we will—to cut the trees and take our pick—to catch the fish as they swim—to chase the deer through the forests—to do there what we please—in the clearings, waters and trees.”<sup>221</sup> Sax did not suggest that customary uses could not be wasteful, destructive, or otherwise misguided. Rather, those issues notwithstanding, concepts of law and justice evolved to recognize people’s expectations as to those uses.<sup>222</sup> Also like western public lands, the medieval commons were “a fertile source of controversy because their legal status was so often buried in a shadowy history of competing claims of title and custom.”<sup>223</sup>

Once again, of course, if a community were to raise a local public trust claim to federal lands, they would likely lose. Yet, applying the concept here puts more theoretical meat on the bones of the “This is ours!” declarations raised by the complainers. The demand that expectations not be frustrated and insisting upon continued local, historical land uses could be construed as a form of public trust claim. Since public trust uses differ and not all are geared toward conservation or recreation, complainers could be said to argue: “Our public’s needs and priorities are different from your public’s, and we have a natural right to our uses to meet those needs.”

Scholars agree that the trust exists at the state level, and ample authority suggests it exists at the city and county level.<sup>224</sup> The prospect of a federal trust is somewhat more controversial.<sup>225</sup> Perhaps counter-intuitively, it is not necessarily obvious that federal statutory authority or a federal public trust doctrine would automatically preempt state or local public trust obligations on public lands. In the theoretical world where

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220. *Id.* at 189–90.

221. *Id.* at 190.

222. *Id.*

223. *Id.* at 191.

224. Robin Kundis Craig, *Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution toward an Ecological Public Trust*, 37 *ECOLOGY L.Q.* 53, 89 (2010) (discussing state-level public trust doctrine); Hope M. Babcock, *Is Using the Public Trust Doctrine to Protect Public Parkland from Visual Pollution Justifiable Doctrinal Creep?*, 42 *ECOLOGY L.Q.* 1, 10 n.55 (2015) (listing cases applying public trust to municipalities and counties).

225. Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 *ENVTL. L.* 399 (2015).

this dispute is pursued under this framing, the doctrine would be unclear, particularly since the hierarchy or possible cotenancies of federal, state, and local public trust uses have not been settled.<sup>226</sup> Environmental attorney Cynthia Carlson has argued that federal preemptive capability over state public trusts:

is limited to those instances where uses allowed by the state doctrines are in direct conflict with one or more purposes of a special use federal property located on state public trust lands. Multiple use federal property does not have such a preemptive capability in relation to state public trust doctrines . . . [and] federal preemption will only occur as the result of a site-specific determination of whether a particular state public trust use is in conflict with a federal property purpose.<sup>227</sup>

Finally, some public trust interpretations also support the idea that a local public might in fact have greater claims to proximate public resources than a national public. Most discussion of public trust beneficiaries refers to “the common citizen,”<sup>228</sup> “the public as a whole,”<sup>229</sup> “the public as well as future generations,”<sup>230</sup> “the world’s peoples,”<sup>231</sup> “present and future global citizenry,”<sup>232</sup> and “present and future generations.”<sup>233</sup> But other characterizations exist. In the seminal case of *Illinois Central Railroad Co. v. Illinois* in 1892, the United States Supreme Court referred to “the people of the State” as the beneficiaries of the resources at issue.<sup>234</sup> The Court used the same characterization in *Geer v. Connecticut*.<sup>235</sup> In *Arnold v. Mundy* and subsequent decisions, courts held that state ownership of oysters in trust by the State of New

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226. WOOD, *supra* note 210, at 213.

227. Cynthia Carlson, *Federal Property and the Preemption of State Public Trust Doctrines*, 20 ENVTL L. REP. 10003 (1990).

228. Craig, *supra* note 224, at 89.

229. Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources*, 16 DUKE ENVTL. L. & POL’Y F. 57, 66 (2005).

230. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 93 NOTRE DAME L. REV. 699, 702–703 (2006).

231. WOOD, *supra* note 210, at 214 (quoting Peter Sand).

232. *Id.* at 217.

233. MONT. CONST. art. II, § 3; MONT. CONST. art. IX, § 1.

234. *Ill. C. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

235. *Geer v. Connecticut*, 161 U.S. 519, 534 (1896), *overruled on other grounds*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

Jersey meant that a statute prohibiting nonresidents from harvesting oysters did not violate the Commerce Clause or the Privileges and Immunities Clause.<sup>236</sup> State or local public trusts could, then, have different beneficiaries than a national public trust.<sup>237</sup>

This discussion does not seek to delve too deeply into the technical merits of a formal legal argument based on this theory. Rather, it seeks to show that local residents are not necessarily outrageous or incorrect in their belief that they have some greater right to federally managed public resources than the public at large. This discussion provides a slightly more sophisticated and legally palatable articulation—a “liberal construction”—of the less nuanced arguments advanced by the complainers.

The sum of all of these theories reflects a general injustice in western land management based on lack of democracy—specifically related to arbitrariness, lack of local input, lack of recognition of reliance, and a variety of complex normative clashes. The Sagebrush Rebels gesture at these ideas, albeit inelegantly and violently. While they are highly imperfect messengers who fail to articulate complaints with credibility, something ethically significant can be derived from the symbolic function of their outrage about western land management. Milder manifestations of similar sympathies, such as those expressed by frustrated local government officials, risk being dismissed along with dismissal of Sagebrush Rebel rhetoric. This liberal construction of local concerns suggests the presence of ethical problems that stand to be righted.

#### IV. REMEDIES

A robust body of literature has explored how local-federal collaboration can be improved.<sup>238</sup> In seeking to illuminate the ethically and legally principled impetus for that improvement, this discussion may also inform the mechanisms for achieving it. In *Alienation and Reconciliation*, I argued that the Bundys’ occupation at Malheur was an ironic choice because Malheur actually serves as a case study of successful, multi-scalar social-ecological systems management that reconciles diverse, potentially conflicting interests through extensive and

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236. Kanner, *supra* note 229, at 69.

237. Cf. John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II-Environmental Rights and Public Trust*, 104 DICK. L. REV. 97, 124 (1999) (characterizing trust beneficiaries as “including people living near or using the lands in question”).

238. E.g., Fellman, *supra* note 4, at 87, 105.

intimate local-federal collaboration on the Refuge's Comprehensive Conservation Plan.<sup>239</sup> The model illustrated at Malheur also stands to address the theories raised here, with its implementation on other public lands potentially serving to "remedy" the complainers' concerns. Specifically, the model addresses the three theories expounded above—the Exclusion Theory, the Reliance Theory, and the Public Trust Theory—because it involved intimately collaborative processes that constitute an adaptive governance approach, requiring stakeholders to engage one another, exchange information, adjust outcomes, and seek consensus.

First, the Malheur-adaptive governance model stands to address the Exclusion Theory because it is inclusive. The three-year collaborative decisionmaking process at Malheur brought local residents into the regulatory regime and reduced "reverse environmental justice" concerns by providing them with an opportunity for meaningful input into land use outcomes while also validating their diverse experiences—both allowing them to actually influence outcomes, and helping to repair their trust in the decisionmaking apparatus itself.<sup>240</sup> The model stands to mitigate the concerns behind the Reliance Theory for similar reasons: residents' participation in planning processes allowed them to advocate their reliance interests in that decisionmaking, resulting in a more balanced approach to how conflicting uses were reconciled.<sup>241</sup> Finally, to the extent a "local public trust" and local public trust beneficiaries might conflict with other statutory or public trust parameters, the collaborative decisionmaking process facilitates reconciliation by allowing locals' vision for their natural resource uses to be incorporated into decisionmaking. This incorporation in turn validates whatever entitlement to the resources their "localness" may afford them. The Malheur model also seems to comport with Sax's vision for public trust management, which he hoped could serve as "a vehicle to ensure the democratization of natural resource decisionmaking," better taking into account "issues affecting the poor and consumer groups" as well as "problems of equality in the political and administrative process."<sup>242</sup>

The existing legal framework in NEPA, FLPMA, and agencies' organic acts would be a workable starting point for enabling these

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239. Eisenberg, *supra* note 1, at 137–45.

240. *Id.* at 139–45.

241. *Id.* at 141 (discussing reconciliation of grazing uses with conservation priorities).

242. Sax, *Effective Judicial Interpretation*, *supra* note 214, at 557.

2017 *DO SAGEBRUSH REBELS HAVE A COLORABLE CLAIM?* 101

processes.<sup>243</sup> Working within these frameworks could also mitigate concerns about the legality of certain collaborative procedures.<sup>244</sup> Michelle Bryan argues that the framework can be improved through several straightforward steps which are consistent with this discussion. First, Bryan recommends implementation of a standardized planning approach across agencies and formulation of mutual cultural and technical literacy to help working relationships, such as by reconsidering terms such as “nonsignificant.”<sup>245</sup> Bryan also recommends implementation of measures to provide actual empowerment for community input, including “a guarantee of early and meaningful involvement” in agency planning for local governments—noting that officials “can tell the difference between genuine and artificial inclusion in federal planning processes.”<sup>246</sup> Last, Bryan calls for consideration of existing boundaries, including local government boundaries, in the creation of federal agency planning areas.<sup>247</sup> Protections should, of course, be put in place to ensure that powerful constituencies do not steamroll other voices.<sup>248</sup>

The theories considered in this discussion suggest that enabling and implementing a system of collaboration like that seen in the Malheur model and in other successful case studies is not just a nice thing to do.<sup>249</sup> Rather, a normative case rooted in ethical and legal principle supports the need for such changes. But perhaps more importantly, this discussion provides an impetus and model for engagement that could apply in a variety of contexts in the country today. Anti-government, anti-environmental populist sentiment is not an incurable disease. The norms and processes discussed here generally suggest that seeking to surmount

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243. Cf. Eisenberg, *supra* note 1, at 145 (discussing Craig and Ruhl’s Model Adaptive Management Procedure Act and the potential that “Malheur’s significance may . . . lie in a discipline other than administrative law”).

244. Cf. *id.* at 86–89; Robert D. Comer, *Cooperative Conservation: The Federalism Underpinnings to Public Involvement in the Management of Public Lands*, 75 U. COLO. L. REV. 1133, 1133–58 (2004).

245. Bryan, *Cause for Rebellion?*, *supra* note 5, at 2, 14–16.

246. *Id.*; see also Fellman, *supra* note 4, at 82 (discussing best practices for collaborative conservation).

247. Bryan, *Cause for Rebellion?*, *supra* note 5, at 2, 14–16.

248. Cf. Fellman, *supra* note 4, at 83 (noting concern that collaboration should not replace NEPA and “does not include ‘negotiated political deals . . . behind closed doors[,] deal making, or other processes that are not open, transparent, and strive to be inclusive’”).

249. See generally *id.* (discussing Beaverhead-Deerlodge Partnership and other case studies, and arguing that these examples revealed some successes).

cultural and rhetorical blind spots in order to engage rather than exclude may stand to reduce alienation, conflict, and polarization.

## V. CONCLUSION

This discussion aims to illustrate that some Western residents' outrage about federal lands management, often embodied in the less-than-perfect symbol of the Sagebrush Rebellion, is less irrational and more grounded in legal and ethical principle than is typically recognized. Some reticence to discuss these issues is unsurprising in light of the overpowering need for conservation and biodiversity interests to take priority in the age of climate change, as well as concerns about unfettered parochialism and certain movements' murky motivations. Yet, from a standpoint rooted in ethics, legal principles embraced by our system of law, and pragmatism, it would behoove scholars and land managers to consider these angles more deeply. Incorporating the principles discussed here may well lead to reduced tensions and improved outcomes in the West, but those principles also reflect a more "fair" and ethically correct approach to public lands management.