Federal Lands And Invisible Hands

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Forum shopping by profit-seekers who want access to natural resources on federal lands is not new. Profit-seekers perpetually search for the most sympathetic level of government and the most advantageous processes through which to advance their economic interests. While profit-seekers advocate in all available forums, they naturally concentrate on forums they believe provide the greatest likelihood of success. If the recent flurry of local "consensus" group efforts is any indication, the "best" forum for profit-seekers who desire access to federal resources is currently the local level. This article suggests that local and state participation in managing federal lands should be

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2. The terms "land management" and "ecosystem management" as used in this article refer to regulatory actions addressing activities that damage ecological systems on federal lands. The terms as used in this article do not mean regulatory actions that improve ecological systems over their natural conditions. As explained in Part I, few, if any, such activities actually improve ecological systems over their natural condition. While some management activities may mitigate the impacts of development, and thereby improve conditions over a degraded baseline, it is misleading to suggest that ecosystem management can improve natural ecological processes. Unfortunately, because management suggests improvement and it is difficult to object to activities that improve things, the phrase "ecosystem management" is now used to jus-
limited to (1) insuring that federal land managers comply with environmental laws and (2) monitoring the environmental impacts of activities conducted on federal lands. The informal lobbying that profit-seekers regularly engage in should not be supplemented with additional avenues to influence federal land management.

Part I begins by drawing an analogy between ecosystem functions on federal lands and market functions in the national economy. This fact suggests that the Commerce Clause provides useful guidance when considering how to allocate and how to exercise power over federal lands. Part II then looks at the role that local governments and industries have historically played in federal land management and concludes that excessive influence by these interests has pushed ecosystems on federal lands to the brink of collapse. Part III suggests a number of value neutral reasons for restricting formal state and local government and industry roles in decisionmaking regarding access to federal natural resources. This Part also suggests value neutral reasons for encouraging local participation in enforcement of environmental laws. The discussion uses federal grazing permits and section 401 of the Clean Water Act to illustrate the benefits of such participation. The Article concludes with a look at local consensus efforts, such as the Quincy Library Group, watershed councils, and grazing advisory boards and argues that giving such groups more influence in decisionmaking about federal resources contradicts the principles supporting federal management of federal lands.

I.

INVISIBLE HANDS AND FEDERAL LANDS

Our Constitution and the economic system that has developed under it assume that, for the most part, markets operate best when left alone. Government intervention should occur only when necessary to protect markets and correct market failures. The framers of the Constitution were familiar with the power of the "invisible hand" of the marketplace and the driving assumption that free markets promote public welfare.

A rapidly expanding body of scientific literature, particularly activities that do not actually improve, but rather degrade, ecosystems.

3. See Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (Edwin Cannan ed., 1961). This influential treatise, which was published more than ten years before the drafting of the Constitution in 1787, almost certainly affected the thinking of the framers.
in the fields of conservation biology and normative ecology, is confirming that ecological systems also operate best when left alone.\(^4\) Interference with, or management of, ecological systems, often just create new problems.\(^5\) Nature and the marketplace thus share the attribute of an inherent power to produce benefits.\(^6\) The role of government with respect to each should not be to simulate through artificial means the benefits created when markets or ecosystems function naturally, but to protect markets and ecological systems so they can function naturally and occasionally to step in if those natural functions produce societal harm. Lessons learned from government's relationship to the marketplace, therefore, may prove useful when trying to construct the ideal government relationship with ecological systems.

The Commerce Clause is the principal constitutional provision addressing the framers' approach to establishing a national marketplace.\(^7\) In general, the Commerce Clause anticipates a national economy; gives the federal government the power to regulate commerce among the states; and by negative implication, through the "dormant" Commerce Clause, prohibits states from interfering with national markets, except when necessary to

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5. In the area of fish habitat restoration, for example, researchers are discovering that:

Past and most proposed approaches to riverine restoration can best be characterized as "band-aid" strategies . . . . Put simply, traditional restoration techniques fail to address the root biological and physical causes of ecosystem dysfunction . . . and they often aggravate, complicate, or add to existing problems . . . . [A] recent report that evaluated stream restoration projects in the Upper Columbia Basin in Oregon and Idaho over the past 10 years found that almost all efforts were ineffective, and that millions of dollars had been wasted.


6. This is not to say that there is no role for government in managing markets or nature. Plainly there is such a role for government, both in protecting markets and nature (for example, by preventing other governments from interfering in domestic markets or by preventing development from destroying water quality) and in preventing markets and nature from causing undesirable outcomes (such as monopolies or catastrophic wildfires).

preserve the core functions of state sovereignty. The prohibition on state interference in the national market is necessary to prevent self-dealing and retaliation among states.

The Supreme Court, in applying the dormant Commerce Clause, has created a presumption that state and local regulatory activities that discriminate against interstate commerce, and thus interfere with the natural functioning of the marketplace, are contrary to the purposes of the Commerce Clause. Such state actions are subject to "strict scrutiny."

A conceptual approach to federal lands that roughly approximates the Court's approach to the dormant Commerce Clause would recognize that ecological systems perform best when left alone; assign the federal government the role of protecting those ecosystems from state and local interference; create a presumption that activities which interfered with natural ecological processes on federal lands were forbidden; and identify the circumstances under which exceptions to this presumption would be allowed.

Left to operate as designed, ecological systems will perpetuate themselves indefinitely, produce clean water and air, support wildlife, provide recreation, and contribute to the quality of our lives. In fact, healthy ecological systems will also contribute to long term economic stability. The economy (as well as the environment) of the Northwest, for example, is doing much better since timber cutting has been drastically reduced on federal lands in order to protect ancient forests.

The framers of the Constitution recognized that the larger the scale of a market, the more diversity and strength the market

8. See, e.g., Dennis v. Higgins, 498 U.S. 439, 448 (1991) (noting that the Commerce Clause has often been described "as conferring a 'right' to engage in interstate trade free from restrictive state regulation").


10. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). The modern test for Commerce Clause compliance looks first at whether state legislation discriminates against interstate commerce, either on its face or in effect. If the statute discriminates, the court determines whether the statute serves a legitimate state purpose. If it serves a legitimate state purpose, the court asks whether alternative, less discriminatory means are available to achieve the same purpose. See id. at 142.

11. See, e.g., ECONOMIC WELL BEING AND ENVIRONMENTAL PROTECTION IN THE PACIFIC NORTHWEST: A CONSENSUS REPORT BY PACIFIC NORTHWEST ECONOMISTS 16 (Thomas M. Power ed., 1995) (concluding that relatively intact national forests contribute to high quality of life in the Northwest and have attracted more jobs to the area than have been lost through reductions in timber cutting).
will have. The same economies of scale apply to ecosystems on federal lands: the larger the area allowed to function as a natural ecosystem, the more diversity and strength the system will exhibit. Moreover, the same potential evils of self-dealing, protectionism, and retaliation by state and local governments that gave rise to the Commerce Clause also pose risks for ecological systems that make it necessary to continue, and perhaps even strengthen, proscriptions on state and local control over federal lands.

II. LOCAL CONTROL AND THE DECIMATION OF FEDERAL LANDS

Until recently, federal agencies like the Forest Service and the Bureau of Land Management provided a very hospitable forum for profit-seekers hoping to develop federal resources. The Forest Service in particular, since the end of World War II, has opened the national forests to the timber industry. In the process, the Forest Service has allowed such massive destruction of wildlife habitat that a number of species have been pushed to the brink of extinction. Over one hundred stocks of fish in the Pacific Northwest already have gone extinct, in large part due to the impacts of logging on their habitat. Many additional “fish populations are at risk due in part to habitat loss in the forests. Among these are anadromous fish prized for commerce and sport.” One might naturally question why federal control is preferable to state or local control, given the abysmal record of federal land management agencies in protecting functioning ecosystems. The answer is that, while historically federal land managers have not protected adequately federal ecosystems, turning authority over to state or local control would only make things worse.

An important reason for failures in federal land management has been the decentralized decisionmaking system that allowed

15. See id. at V-7.
local federal land managers to grant access to resources on the lands they managed. These managers, while federally employed, are subject to intense lobbying by local economic interests and naturally feel pressure to support the economies of the communities in which they live.

Because national forests are located near rural communities, foresters make management decisions to support perceived needs in the communities. By sharing timber proceeds with those communities, the Forest Service strengthens the link between timber sales and the livelihood of local constituencies. The resulting dependency of these communities on timber production causes over-harvesting and destructive harvesting methods. As the court noted in *Sierra Club v. Thomas*:

The relationship of the Forest Service to the timber industry also constrains the Forest Service's planning freedom. Rural constituencies reliant on timber sale revenues may provoke politicians to place pressure on the Forest Service to sustain that revenue. Consequently, the Forest Service becomes trapped: cutting off timber sales would cause loss of employment and revenue in local communities but continued timber sales risk over-harvesting and below-cost sales.

As another court found during the litigation surrounding the impacts on the northern spotted owl of cutting old growth timber: "Mill owners and loggers, and their employees, especially in small towns, have developed since World War II an expectation that federal timber will be available indefinitely, and a way of life that cannot be duplicated elsewhere." The court also found that, in order to continue to support these small communities and provide a steady flow of federal timber, the Forest Service and Bureau of Land Management had engaged in "a remarkable series of violations of the environmental laws."

Ironically, the failure of federal land managers to protect ecosystems allows profit seekers to make generalized statements that federal land management isn't working, and needs to be fixed. They then propose solutions that work to their benefit, rather than assisting ecosystems. Formal mechanisms allowing for increased state and local control, however, would exacerbate

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20. Id.
the problem, not cure it. While supporting local economies is a desirable goal, that support should not take the form of short term subsidies and sacrifice of federal ecosystems.

One of the reasons that profit-seekers are currently advocating more local control is that historically receptive federal venues have become less hospitable.\(^2\) Although federal land management remains imperfect, things are changing at the federal level. Beginning with the National Forest Management Act\(^2\) and the Federal Land Policy and Management Act,\(^3\) Congress began asserting more control at the national level over federal lands. More recently, the national offices of the land management agencies themselves have taken steps to restrict the discretion of local federal land managers in ways that will provide greater protection for ecosystems and remove temptations to appease local economic interests. Prices for federal resources, while still heavily subsidized, are at an all time high, and both Congress and the Forest Service have started to suggest that full payment should be demanded from those seeking to develop federal resources.\(^4\)

An evolving scientific understanding of the true social and environmental costs of habitat destruction, together with more accurate appraisals of how federal dollars are subsidizing industry access to federal resources, has also dampened federal enthusiasm for resources development. As James Lyons, Undersecretary For Natural Resources and the Environment at the Department of Agriculture, recently stated: “Today National Forest System management emphasizes maintenance of ecosystem health to sustain the production of all the goods and services which derive from the national forests, including timber, forage, fish and wildlife, recreation, wilderness, and water.”\(^5\) As a consequence of the growing resolve at the federal level to protect rather than exploit ecosystems, those who wish to profit from federal resources are increasingly turning to city, county, and state governments, as well as "consensus" processes involving local citizen organizations, for assistance in gaining access to

\(^2\) See generally FEMAT REPORT, supra note 14, at 55 fig.16 (showing dramatic reduction in federal timber sales under recommended management option).
\(^3\) 16 U.S.C. §§ 1600-1687.
federal resources.

III. WHY LOCAL CONTROL OVER FEDERAL LANDS IS A BAD IDEA

In the rush to praise new initiatives, it is easy to lose sight of the reasons for traditional ways of doing things. In the case of federal lands, the traditional reasons for retaining federal control have become more, not less, compelling with time. As natural ecosystems on federal lands gradually erode under the accumulated weight of various locally sponsored and federally approved development projects, the need for a management regime insulated from local pressure becomes increasingly urgent. This Part reviews and analyzes some of the fundamental reasons for retaining and strengthening federal control over federal lands.

A. Pigeons, Paternalism, and Ulysses

Human beings tend to make decisions differently depending upon the circumstances in which the decisions are made. The framers placed a number of safeguards in the Constitution to prevent short-term, hasty decisions from eroding the more deliberative and somber principles imbedded in the Constitution. Laurence Tribe illustrates this distinction in decisionmaking by drawing an analogy to an experiment with pigeons. When pigeons in a test chamber were presented with the choice of pecking a key that would provide a small but immediate food response or pecking a key that provided a larger but delayed amount of food, nearly all of the pigeons pecked the immediate gratification key.

When the pigeons were given the option, however, before being placed in the test chamber, of pecking a key that would prevent the short term gratification key from working, a significant percentage of them elected to restrict their future choices and bind themselves to the longer term solution. As Tribe puts it: "even pigeons seem capable of learning to bind their 'own future freedom of choice' in order to reap the rewards of acting in ways that would elude them under the pressures of the moment." Thus, Ulysses was bound to the mast to prevent him from following the sirens into the sea. When a smoker gives her

27. Id.
28. See Jon Elster, Ulysses and the Sirens: Studies in Rationality and
cousin a pack of cigarettes with instructions not to return any cigarettes, no matter how hard she pleads, she is recognizing the distinction between her short-term and her long-term decision-making. As Joseph Sax has suggested, this distinction between short term gratification and long term deliberation underlies much of our legislation governing federal lands. This distinction is also reflected in the American Indian tradition of thinking about how decisions made today will affect the seventh generation out from today.

B. The Ecological Big Picture

Local communities are not as well positioned as the federal government to consider the broader ecological implications of site specific projects. The closer a community is to a resource, and the more economically dependent the community is on the resource, the less likely it is that the community will make decisions with respect to those resources that are the best for the public in the long run. While the environmental impacts of a particular timber sale, or series of timber sales, may seem relatively minor, the cumulative impacts can be devastating. To properly assess those impacts requires an ability to monitor and analyze at all ecosystem levels—local, regional, and even global.

In an ecological sense, size often matters. Greater geographic area frequently means greater biological diversity, and greater diversity usually means greater strength and resistance to stochastic forces. Local interests, while they may recognize this principal, are likely to conclude that unless assurances are provided that other localities will share in protecting large areas, they should "get theirs" before someone else does. Federal control removes this incentive for self-dealing.

The cumulative impacts of federal timber sales and road building can have negative economic impacts on communities downstream from the communities that benefit from timber cutting. As members of the fishing industry recently informed Congress:

We are also a natural resource dependent industry. We are


31. See Russell Lande, supra note 13.

32. See, e.g., Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968).
sympathetic to the plight of timber communities, and are not opposed to harvesting timber through the existing Forest Plan or in ways that are legal under current law. However, it makes no sense to harvest timber on the backs of fishermen and at the expense of the jobs and coastal communities which salmon support. This would be a form of economic suicide for the region.33

Downstream municipalities have also been hit hard by pollution caused by excessive logging and roadbuilding on federal lands. In 1996 a number of communities in the Northwest had to shut down their water supply systems due to the amounts of sediment coming off federal lands.34

C. Inherent Imbalances Between Profit Seekers and Public Interest Advocates

Profit seekers already operate within an economic system, protected and subsidized by the government, that allows them to pursue their economic interests—even to the detriment of other societal values.35 We assume that a robust economy, driven by profit-seekers, will also benefit the public, and we are willing to accept some of the societal costs that a free market system imposes in order to reap these benefits. One way that we support (and subsidize) profit-seekers is by making federal resources available to them—often at significant subsidies.36

Because the existing incentives for profit-seekers to lobby intensively and continually for access to federal resources are already significant, there is no need to establish additional forums or institutions for profit-seekers to advocate their interests.

Compared to the institutional protections and incentives for profit-seekers who wish access to federal resources, citizens concerned about the impacts of development on ecological systems on federal lands have few resources. There are no economic incentives for citizens to participate in decisionmaking that affects federal resources, and unlike its efforts to insure freely operating


35. See, e.g., Save Our Ecosystems v. Clark, 747 F.2d 1240 (9th Cir. 1984) (balancing safety and economic impacts in the registration of pesticides).

36. See generally DEAN STANSEL & STEPHEN MOORE, FEDERAL AID TO DEPENDENT CORPORATIONS: CLINTON & CONGRESS FAIL TO ELIMINATE BUSINESS SUBSIDIES 1 (Cato Institute Briefing Papers No. 28, May 1, 1997) (describing government subsidies to U.S. corporations).
markets, the government does not protect citizen participation in the abstract. Instead, citizens must find specific authorization before they are allowed to participate in governmental decision-making.

To some extent the laws designed to protect ecological systems on federal lands already recognize the benefits of citizen participation and particularly citizen enforcement of the laws. Several laws, such as the Endangered Species Act and the Clean Water Act, have citizen suit provisions that expressly invite citizen participation in enforcement.\textsuperscript{37} Others, such as the National Forest Management Act,\textsuperscript{38} anticipate citizen participation at the administrative level and may be enforced through the judicial review provisions of the Administrative Procedure Act.\textsuperscript{39}

Congress recognized, when it first adopted citizen suit provisions, that citizen enforcement of environmental laws would both supplement agency resources and provide enforcement when agencies lacked the political will to enforce.\textsuperscript{40} In the context of federal land management, however, the need for citizen enforcement is even greater. The Justice Department does not allow one agency to bring suit against another agency to enforce the law.\textsuperscript{41} Unless citizens are authorized and encouraged to enforce the law, there is no mechanism to force compliance with environmental laws.\textsuperscript{42}

### D. Market Distortions

Many of the market distortions discounted by neoclassical economists emerge and are magnified when local control is exerted over federal resources. Information and the ability to contradict misinformation is more limited at the local level, giving profit-seekers with the resources to control information flow a distinct advantage. During the debate over the northern spotted owl, for example, industry advocates regularly claimed that pro-


\textsuperscript{38} 16 U.S.C. §§ 1600-1687.

\textsuperscript{39} 5 U.S.C. §§ 702, 706 (right of review provision).

\textsuperscript{40} See, e.g., JEFFERY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 4 (1987) (discussing the role of citizen suits in enforcement).

\textsuperscript{41} See, e.g., Authority of Dep't of Housing and Urban Dev. to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies, 18 Op. Off. Legal Counsel No. 29 (May 17, 1994) (noting that a suit between two agencies of the executive branch does not constitute an actual case and controversy).

\textsuperscript{42} See, e.g., Seattle Audubon Soc'y v. Evans, 771 F. Supp. at 1089 (noting "remarkable series of violations" of environmental laws by the Forest Service).
tecting old growth forests on federal lands would costs thousands of timber jobs. From 1979 to 1989, while this message was being sent, federal timber supplies were at their peak and still the total number of jobs in the timber industry in Oregon dropped by seventeen percent, or 13,500 workers. The decrease, which was largely due to mechanization and log exports, was attributed by industry spokespeople, and consequently local communities, to environmentalists efforts to protect old growth.43

Ironically, there is still no shortage of timber in the Northwest. In fact, several billion board feet of private timber are shipped overseas each year.44 The true reason for most mill closings was that mills accustomed to receiving subsidized federal timber were not efficient enough to compete for this timber. This message, however, was not circulated by local profit-seekers in the debate over ancient forests.

A contemporary example of how information is managed by profit-seekers is the very debate over local control that is addressed in this symposium. While profit-seekers argue that better decisions will be made with more local input, they simultaneously oppose greater local control when that control is likely to lead to greater protection for the environment.

In *Oregon Natural Desert Association v. Thomas,*45 plaintiffs successfully argued that section 401 of the Clean Water Act (CWA) gives state water pollution authorities control over federal grazing permits that may result in water pollution. Many of the same industry groups that advocate for greater local control opposed plaintiffs' efforts to secure such control in the ONDA case. The principle of local control was not publicly mentioned by the industry intervenors in this case, because local control did not further their actual profit-seeking motives.

This case also revealed an interesting split between federal agencies. EPA, the agency charged with implementing the CWA, agreed with plaintiffs' interpretation of the Act. Federal land management agencies, however, such as the Forest Service, the BLM, the Department of Energy, and the Department of Defense, disagreed with plaintiffs' interpretation, because it would make them subject to state regulatory control. Ultimately, the Justice


Department decided to represent the interests of the land management agencies regulated by section 401, rather than the interests of EPA, the agency charged with implementing the Clean Water Act.

CONCLUSION

Ecosystems on federal lands are in trouble. One of the main reasons is that historically state and local interests that stand to benefit economically from development of federal resources have enjoyed excessive influence over decisions about how much development to allow on federal lands. Institutional approaches to solving the problem should focus on insulating federal land managers from the economic and political influence of local industries and governments and enlisting the help of local citizens in enforcing environmental laws that govern federal lands.