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Public Land: How Much Is Enough?

Dale A. Oesterle*

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* The Monfort Professor of Commercial Law, University of Colorado School of Law. The author prepared the text of this article for a speech delivered on November 13, 1995, before the Western Land Advisory Group, Natural Resources Law Center, University of Colorado School of Law, Boulder, Colorado.
I was raised in Indiana, went to college and professional school in Michigan, practiced law in Virginia and taught law in New York before I accepted an opportunity to teach out West, in Colorado. During my time in the Midwest, South, and Northeast, the controversy over the use of public lands was not a topic of conversation or concern. One enjoyed local public parks, spoke of travelling to Yellowstone, and occasionally skimmed through newspaper accounts of the Sagebrush Rebellion or the plight of spotted owls, but that was pretty much it.

Since my move to Boulder, Colorado, I have been exposed to and touched by the passion of those who care about public lands. Disputes over the use of public lands, both local and federal, provide a constant source of media fodder. Some exceptionally well-done weeklies, such as the bi-weekly High Country News from Paonia, Colorado, specialize in the area. The nationally known Natural Resources Law Center, at the University of Colorado Law School, is a hub for information exchanges on public lands controversies. After one of my recurring requests for new academic literature in this area, the acting director of the National Resources Law Center asked for

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

2. There was discussion of ski vacations, but we did not understand, or care, that the ski slopes are often on federal land. I also vaguely remember President Reagan’s present to Interior Secretary James Watt—a foot with a bullet hole in it.
my comments on what I had read. With apologies to all those who have spent their lives on these issues, here is the view of a tenderfoot.3

I.
THE ECONOMIC CONSEQUENCES OF PUBLIC LAND OWNERSHIP IN THE WEST.

A. The Vast Size of Federal Lands: Who Owns the State of Nevada?

The federal government owns an enormous amount of land.4 As of 1990, the federal government owned and administered about 662 million acres, or about twenty-nine percent of the total area of the United States.5 It also owns the surface or sub-surface mineral rights to another sixty million acres.6

Four federal land management agencies hold 630 of the 662 million acres of public land.7 These agencies are the Bureau of Land Management (BLM), the Fish and Wildlife Service, the National Park Service, and the Forest Service. The first three agencies are subdivisions of the Department of the Interior (DOI); the Forest Service is in the Department of Agriculture. The primary mission of these four agencies is to determine the use of federal lands, in accordance with their respective statutory mandates. Most refer to the federal land held by these agencies as “public lands;”8 however, I will call them “federal lands.”

3. This can be dangerous, as Bill McKibben found out. An easterner dismayed at the western focus of environmentalists, he wrote that the recovery of eastern forests was the “real” environmental triumph, a more “mature mythos” than the romance of the West. He found himself cited in Gregg Easterbrook’s attack on environmentalism, A MOMENT ON THE EARTH (1994). His friends in the West, “waging the good fight for wilderness in Utah,” were not amused and he has recanted. See Bill McKibben, An Easterner Ponders the West’s Alleged Wildness, HIGH COUNTRY NEWS, Sept. 18, 1995, at 14.


7. Other federal agencies also manage significant amounts of land. The Department of Defense holds about twenty-five million acres allotted to military uses. The Army Corps of Engineers holds 11.7 million acres for flood control and water recreation. The Bureau of Reclamation holds 6.4 million acres for irrigation. BATES, supra note 5, at 28.

8. Western states also hold significant amounts of public land. A 1991 survey in eleven western states calculated the total acreage of state-owned lands in the West to be more than forty-one million acres, an average of about six percent of the total acreage in each state. Arizona has the highest percentage with thirteen percent. Id. at 28.
Approximately ninety million acres of federal lands are designated wilderness areas, and the figure could grow to over 115 million acres if Congress accepts current proposals for new wilderness designations. The BLM has exclusive jurisdiction over about 272 million acres, with approximately one-third of this area in Alaska. The Forest Service is the second-largest federal land manager, holding approximately 191 million acres of national forests and grasslands (twelve percent of which is in Alaska). The Fish and Wildlife Service holds nearly ninety-one million acres (eighty-four percent of which is in Alaska), and the National Park Service has almost seventy-seven million acres (seventy-one percent in Alaska). In fiscal year 1988, the total budget of the four agencies was $4.872 billion. In addition, the National Wild and Scenic Rivers System protects 9,586 miles on 123 rivers (5,093 miles on seventy-eight rivers in the western states and 3,211 miles on twenty-five rivers in Alaska). The National Trails System includes 8,050 miles on 752 trails, and federal agencies manage 501 of these trails.

I had heard some of these figures before, but I had no real sense for the size of this vast acreage until I travelled in the West. The scale of these holdings is breathtaking. As reflected in these figures, the heaviest concentrations of federal lands are in the eleven western states and Alaska. For example, the federal government owns eighty-two percent of Nevada, sixty-eight percent of Alaska, sixty-four percent of Utah, sixty-three percent of Idaho, sixty-one percent of California, forty-nine percent of Wyoming, and forty-eight percent of Oregon. The claim that Nevada and Alaska are sovereign within their boundaries is surely a jest.

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

For one who naively thought that non-defense-related federal lands were largely composed of parks and wildlife refuges, there was another surprise: much of federal land use is commodity-based, and

9. Efforts to designate 5.7 million acres in Utah as wilderness are in committee. 21 PUB. LANDS NEWS 3 (Apr. 4, 1996).
11. Id. at 22.
12. Id.
13. Id. at 29.
14. Id. at 21.
the quantities produced on the land are staggering. Although precise figures are elusive, even rough estimates of the government's role as a commodity supplier are eye-openers. The federal government owns fifty percent of the nation's soft-wood timber inventory, and it controls approximately twelve percent of the western states' total forage, where three percent of the nation's cattle graze. Thirty percent of the nation's coal reserves lie on federal lands, and thirty percent of the coal produced in the United States comes from those reserves. In any given year, federal lands produce approximately six percent of the nation's oil and gas, ninety percent of the nation's copper, eighty percent of the nation's silver, and almost 100 percent of the nation's nickel. Federal lands also yield substantial amounts of phosphate, sodium, potassium, sulfur, gilsonite, asphalt, uranium, lead, zinc, sand and gravel, pumice, stone, and a host of other valuable minerals.

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

There are also indirect effects on industries which do not use raw materials taken from federal lands. Price affects market allocation. It follows that if timber is underpriced, consumers will over-purchase products that use timber and under-purchase timber substitutes, such as bricks, or other major purchase alternatives, such as automobiles.

Some who agree the federal government should not be in the commodity supply business argue that the solution is to alter the use of the land by preserving it as parks or wilderness. However, the government cannot become a neutral party in these markets by simply withdrawing its assets from the fray. As the owner of a substantial inventory of raw materials, the government affects the market as significantly by choosing to withhold its assets as by choosing to sell. If the government stopped all coal mining on government land, the increased scarcity of coal would drive up coal prices and affect the price of, among other things, electricity. The same is true for grazing, timber, and other commodities that are on federal lands in sizable amounts. The withdrawal of timber resources would raise the price of homes, and the elimination of grazing on federal lands would likewise

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18. Id. at 43.
raise the price of steaks and hamburgers. The magnitude of the effect on prices is difficult to predict, but, at the margin, the price pressure would be positive.

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

Federal ownership of large amounts of commodity-rich land puts the federal government at the core of our national market system. This ownership affects the price of raw materials and of a myriad of down-stream products, and alters what we produce and consume. Such a consequence should give us great pause.

C. A Fifty-Year Fire Sale on Natural Resources

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

The federal government has not, as any private business must, priced its product to cover, at the bare minimum, its operating costs. A 1983 BLM study concluded that the direct costs of operating the federal grazing program, at $61 million, far exceeded the revenue produced from grazing fees, at $25 million. This calculation did not include a proportionate allocation of BLM's overhead, which could add another $60 million to costs. The unsurprising results of the 1983 study did not precipitate a change. A 1991 General Accounting Office (GAO) study found BLM grazing fees were only $1.97 per animal

20. Id.
21. For an excellent, comprehensive discussion of old laws still on the books that subsidize local irrigators, ranchers, miners, and loggers, see WILKINSON, supra note 4. My quibble with the book is that it should include recreation in its list of subsidized activities.
23. Id. at 264.
24. Id.
unit-month (AUM) while the agency costs were close to double that figure at $3.86 per AUM.  

The deficit grows when one considers revenue against not only costs of land management but against a return on the true market value of the grazing resource that the federal government leases. In 1990 the federal government collected about $30 million from grazing fees on national forests and BLM lands combined. The value of grazing on these lands is estimated at twelve times the revenue currently collected.

The government’s below-market grazing fees generate strong incentives to over-use the resource. Although government officials place per-head limits on each grazing allotment, ranchers exert constant, sustained political pressure to exploit the low fees. As a consequence, too much land is used for grazing, and that land is both overgrazed and an environmental mess. The sorry state of otherwise beautiful western rivers and grasslands is penalty enough. But overgrazing has other costs as well. Overuse for grazing means underuse of the land for alternative activities, the most obvious losers being fishing and recreation interests. The government also subsidizes western beef and sheep industries, at the expense of, for example, chicken farming in Arkansas.

Timber sales by the United States Forest Service present a similar debacle. There are 136 million acres of timberland—commercially valuable forest land capable of producing at least twenty cubic feet per acre per year—in public ownership. The Forest Service’s own

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25. BATES, supra note 5, at 46.
26. Id. at 46-47.
27. Id.
29. In 1988 a GAO study concluded that sixty percent of BLM’s grazing allotments were in less than satisfactory condition and that the agency was taking almost no action to reduce overgrazing. See BATES, supra note 5, at 48.
30. See, e.g., DAN DAGGET, BEYOND THE RANGELAND CONFLICT 1 (1995) (“I believe that much of the western range is in worse shape than even some of the most alarming assessments would have us believe.... A significant portion of these magnificent and irreplaceable lands have deteriorated to the point where they are no longer able to rebound.”).
31. See Karl Hess, Jr., The Lesson of the Sagebluff Rebellion, DENV. POST, Aug. 12, 1995, at 7B (“Sagebrush rebels have done their job well. Thanks to the big government they built, and its fountain of subsidies, Western ranges now hold a third more cattle than the land can sustain and a free market would allow.... Overgrazing persists, ranges and streams degrade and deficit ranching thrives at taxpayer expense.”).
32. BATES, supra note 5, at 52.
calculations for 1978 show timber harvesting operations did not generate enough public revenue to cover the agency’s operating costs.\textsuperscript{33}

Fifteen years later we are no better off. A 1995 GAO study found that logging in the eleven national forests of Colorado over a three-year period cost the Forest Service $20.53 million more than it collected in sales receipts, an $11,100 loss for each Colorado person employed as a logger.\textsuperscript{34} The same report found that logging in all national forests cost the Forest Service $1 billion more than it received from timber sales.\textsuperscript{35} Again, the deficit figures grow when the true market value of the timber, rather than operating costs, is the baseline.

Ecologists also argue, with justification, that the GAO timber studies are too rosy. The studies use figures that significantly undervalue the government’s timber.\textsuperscript{36} Measuring the value of timber solely for the purposes of the wood products industry excludes the value of trees as the linchpins of stable ecosystems that include lichens and mosses as well as invertebrates, birds, and mammals.\textsuperscript{37} Moreover, western forests on federal lands often are the headwaters of our western river systems.

The federal government also gives away its hardrock minerals essentially for free. Under the Mining Law of 1872, miners can patent claims for silver, gold, and other hardrock minerals for as little as $2.50 an acre.\textsuperscript{38} It is now common for local newspapers to report on the Secretary of the Interior gnashing his teeth when he signs patents to valuable federal lands over to major foreign mining conglomerates at $2.50 an acre.\textsuperscript{39} Other acquirers of patents have used their rights to

\textsuperscript{33} See Nelson, supra note 22, at 77.

\textsuperscript{34} Adriel Bettelheim, \textit{Logging Loss: $1 Billion}, DENV. POST, Nov. 2, 1995, at 1A. A total of 84.6 million board-feet were harvested in Colorado in 1994, enough to build about 8,400 homes. The timber industry supports about 1,850 jobs in the state. Nearly $900 million from timber sales are sent to local counties in which the forests are located. Factoring the local payments into the calculation, the program makes a profit; however, assessing whether the program operates in the red depends on what you count. \textit{Id.}

\textsuperscript{35} \textit{Id.} In the Forest Service’s defense, the 1995 GAO figures include payments to local communities in which the forests are located (known as Payments in Lieu of Taxes, or PILT payments) as costs. If the local payments are excluded, however, the Service barely covers its administrative costs, again without allowance for basic overhead charges. The Service is, at best, selling its trees at its operating cost. No solvent business can do that.


\textsuperscript{37} See Bates, supra note 5, at 53.

\textsuperscript{38} See Wilkinson, supra note 4, at 48.

\textsuperscript{39} \textit{Babbitt Attacks Mining Deal}, DENV. POST, Dec. 2, 1995, at 10A ($3 billion in mining rights in Coronado National Forest sold for $1,745); Adriel Bettelheim, \textit{Babbit Rips “Gold Heist”: Feds Seek Tough New Mining Royalties}, DENV. POST, May 17, 1994, at 1A (Babbitt “angrily” signs over 1,038 acres of federal land in Nevada to Canadian mining corporation). \textit{See also} Mark Obmascik, \textit{Private Firm Mines Public Gold}, DENV. POST, Nov. 1, 1993, at 1A (mineral-rich public land sold to American Barrick for $5 per acre).
extract "holdup" payments from those who want to put the land to other uses. Some patentees, never having swung a pick, have sold their mineral claims to ski resorts, for example, for as much as $100,000 an acre.\(^{40}\)

One cannot justify the low prices for mining patents by suggesting that stricter and more vigilant environmental controls on the use of federal lands lower the land's profitability. To the contrary, hardrock miners have left a legacy of toxic mine waste, eroded stream banks, and barren hillsides.\(^{41}\) A recent GAO report estimates that more than 424,000 acres of federal land bear the scars of mining without reclamation.\(^{42}\) Abandoned claims on BLM and National Park Service lands will require well over $320 million to reclaim.\(^{43}\)

Perhaps the most startling example of government largess is the federal government's abuse of its water resources.\(^{44}\) For years we have subsidized western agriculture through below-cost water sales to irrigators, and we have subsidized western business development with below-cost electricity from federal water projects.\(^{45}\) In the past we have subsidized hardrock mining operations that employed water sluices or used water pressure to remove topsoil in hydraulic mining.\(^{46}\) Indeed, one can argue that the prior appropriation doctrine, controlling water use in most western states, originated with private individuals taking water from the federal lands, with the federal government unable or unwilling to resist the expropriation.\(^{47}\) The United States

\(^{40}\) See Nelson, supra note 22, at 313.

\(^{41}\) See Bates, supra note 5, at 56.

\(^{42}\) Id.

\(^{43}\) Id.

\(^{44}\) See Wilkinson, supra note 4, at 219-92.


\(^{46}\) See Wilkinson, supra note 4, at 231.

\(^{47}\) See California v. United States, 438 U.S. 645, 653 (1978) (finding a "consistent thread of purposeful and continued deference to state water law by Congress"). Under this doctrine an appropriator obtains a vested property right in water flow superior to all later water users if the diverter has put the water to a beneficial use. The doctrine arose out of customs prevalent in the early mining camps on the public lands. See Coggins et al., supra note 6, at 364-366 (discussion of the prior appropriation doctrine in the western states). Environmentalists are now in the process of trying to reclaim water resources by state statute (which sets minimum stream flows for the protection of fish and wildlife, for example), through assertions of "implied" federal water right reservations (e.g., Arizona v. California, 373 U.S. 546 (1963)), and by pushing the boundaries of old common law public trust doctrines. See A. Dan Tarlock, Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights, 1978 Utah L. Rev. 211 (1978); Charles Wilkinson, Western Water Law in Transition, 56 U. Col. L. Rev. 317 (1985). The efforts to reclaim water are running into formidable political opposition. The executive
Bureau of Reclamation charges on average less than thirty percent of the true cost of delivering water to irrigators. The result often is the farming of high-water-use crops, such as lettuce, on desert land. Customers of public utilities who receive electricity from government power facilities benefit from prices far below market rates. The recipients of power from Hoover Dam pay rates less than twenty-five percent of the normal market prices for electric power. The availability of below-cost water and electricity has accelerated the population and industrial growth in the West, perhaps beyond sustainable levels, at the expense of other regions.

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

II

FEDERAL LAND MANAGEMENT: THE LESSONS OF HISTORY

The poor showing of the federal government as a large scale manager of land resources puts at issue, among other things, whether it ought to hold such significant quantities of land. There are three possible improvements to current government management practices, all of which have vigorous advocates. First, the government could absent

branch, for example, has refused to assert reserved water rights for wilderness. See Coggin's et al., supra note 6, at 397.

48. Nelson, supra note 22, at 350. See also Blumm, supra note 45, at 411 (California irrigators using Central Valley Project water have received subsidies for forty years, repaying only one percent of total project cost). The Bureau of Reclamation has estimated that annual irrigation subsidies in the West total $2.2 billion. Id.

49. Nelson, supra note 22, at 351. See also Howard Kurtz, Most Grace Panel Ideas Have Merit, GAO Says; Projections of Budget Savings Challenged, WASH. POST, Mar. 23, 1985, at A7 (power generated by Hoover Dam is sold for as little as one-tenth of market rates).

50. A good example is the spotted owl controversy. Small and medium-sized lumber companies in the Pacific Northwest argued that restricting the amount of timber cut on federal lands would drive them out of business and put loggers out of work, and a timber industry economist estimated that the cutting restrictions would boost the price of a $100,000 home by $300. See John M. Berry, The Owl's Golden Egg; Environmentalism Could Boost Lumber Profits and Prices, WASH. POST, Aug. 4, 1991, at H1.

51. Bates, supra note 5, at 52.
the field, turning commodity-producing land over to the private sector (privatize).\textsuperscript{52} Second, the government could better mimic a private-market player, pricing its commodities at fair market value (marketize). Finally, the government could manage less and preserve more, redefining its goals in broader collective value terms (preserving ecosystems, for example) which eclipse the narrower goal of seeking an economic return on its assets. Since the federal government has, at different times and with different resources, tried each of the three approaches, there is much to learn from our federal lands history. Unfortunately, as the succeeding sections show, none of the three approaches has a successful history.

A. Privatization of Federal Lands: Land Disposition Itself Is Often a Failed Government Program

Those who view government land ownership as a calamity face a pragmatic problem. Changing from government ownership to private ownership itself requires a government decision and some form of government administration. The government’s land disposal record is as bad as its land management record. Historians have documented rampant fraud, frequent concessions to organized political groups at the expense of the public interest, and ubiquitous poor judgment when the federal government engages in widespread land disposal programs.\textsuperscript{53} An advocate of privatization must inevitably, at some

\textsuperscript{52} In this paper I will use the term to refer to what is also called “denationalization”—when a government divests itself of assets or businesses. Privatization is also used elsewhere to describe a government choice to delegate a public service to a private company. For example, many United States cities pay private firms to handle municipal garbage collection. Others use the term to describe providing individuals with cash subsidies rather than with in-kind services. The United States food stamp program is a case in point.

\textsuperscript{53} There are a wide variety of privatization methods. Former members of the Soviet Bloc simply give state enterprises to citizens. A common technique is to issue vouchers to the general public that can be exchanged directly for shares in a privatizing company. In other cases, the state turns over ownership directly to the workers and managers of a factory or store. In capitalist countries, privatizations tend to occur either through auction or broad public stock offerings.

\textsuperscript{53} The best summaries of the history of federal disposition of public lands, which largely stopped in 1936, are Roy M. Robbins, Our Landed Heritage: The Public Domain, 1776-1936 (1942); Samuel T. Dana & Sally K. Fairfax, Forest and Range Policy: Its Development in the United States (2d ed. 1980); Hibbard, supra note 4; and Gates, supra note 4. The attitude of government officials and westerners alike was summarized as: “[T]hey favored transferring public lands to private ownership as rapidly as possible and were not very squeamish as to how that alienation was achieved.” Id. at 488.

My favorite scandal is a swindle involving swampland in 1850. Under several acts beginning in 1849, the federal government ceded swamplands to several states, with the proceeds from the sale of the lands to be devoted to reclamation by levees and drains. Agents of the states, which had agreed to sell land to dealers and speculators, would swear to federal officials that they had crossed the swampland by boat—neglecting to mention that the boat had been mounted on a wagon and pulled by horses over cultivable land.
level, become an advocate of sensible government action. Without a feasible program of land disposition, put in place by the government, any call for privatization is inherently incomplete and suspect.

Many pro-privatization forces now are asserting that the government has unwittingly already disposed of federal lands by creating a variety of private ownership rights in federal lands. They argue that renewable grazing licenses and rafting permits have evolved into a form of private property that cannot be taken by the government (i.e., not renewed) without compensation; thus, we do not need to privatize federal lands because we already have. This argument is not only disingenuous, it also proves the point that large-scale land disposition by the government is itself a problematic process.

Transfers of property, except by adverse possession or conquest, require the owner's consent. It is a stretch to argue that the federal government has consented in any meaningful way to such transfers. Moreover, adherents urge Congress to "recognize and formalize" what already exists de facto—that the government, for example, declare all grazing licenses permanent. The position is self-defeating. If the courts will not enforce these new property rights (and there is no serious indication they will), then unless Congress expressly grants private owners these rights, the implication is that the rights have not yet vested.

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

Seventy-five percent of the land reclaimed was not in any sense swampy. Hibbard, supra note 4, at 278-87.

54. This point is also made well by Marion Clawson in The Federal Lands Revisited 163-65 (1983).

55. See Nelson, supra note 22, at 333-64; McCoy, supra note 15, at A1 (describing the property rights argument at the local level over grazing rights on federal lands).


now exist through federal lands. Acquisition of permanent property rights by accretion, when the public is represented by transitory and often ineffectual government officials, stretches any notion of public consent to property transfers beyond reasonable boundaries. Indeed, problems associated with incompetent government officials support an argument for the transfer of land only by adherence to orthodox formalities.

Recent evidence suggests that the government may be more capable than in the past of large-scale land disposition which respects formalities of transfer. The Resolution Trust Corporation's (RTC) sale of the assets of bankrupt savings and loan institutions\(^{58}\) and the government's disposal of closed military bases\(^{59}\) offer some hope that current land disposition by government officials may not be inherently problematic. The RTC, for example, had within its charge an obligation to sell undeveloped land, which included some wetlands, and seemed to perform adequately in protecting environmental interests.\(^{60}\) While there has been some criticism of these programs, widespread fraud similar to that seen in the late 1800s was not in evidence.\(^{61}\) I suspect the openness of the process, coupled with the number of interest groups paying attention to the result, has led to a cleaner, less corrupt process. The real danger posed by large-scale privatization is, perhaps, the opposite of the fraud in the 1860s. The heavy attention paid to any land disposition may effectively lock up any government decisionmaking process.\(^{62}\) The government has yet to learn that a goal of accommodating all competing interests effectively accommodates none.

\(^{58}\) Congress created the Resolution Trust Corporation in 1989 to sell off $8 billion in assets left to the government by failed savings and loan institutions. \textit{Final S&L Tab $91 Billion}, \textit{UNITED PRESS INT'L}, May 16, 1995.


\(^{60}\) \textit{Final S&L Tab $91 Billion, supra} note 58.

\(^{61}\) Although widespread fraud was not in evidence, some thought that the RTC could have, for example, used auction techniques that generated higher prices. \textit{Contra Increased Reliance on Auctions Questioned by Land Analysts}, \textit{RTC WATCH AM. BANKER-BOND BUYER}, July 13, 1992, at 1 (stating that auctions generate lower prices); \textit{Buyers Making Windfalls on RTC Property Sales: Many Parcels are Quickly Resold}, \textit{THE RECORD} (Northern New Jersey), July 12, 1994, at C3. \textit{See also} Robert W. Poole, Jr. & David Yardas, \textit{A Shocking Approach to Privatization}, \textit{WALL ST. J.}, Sept. 26, 1995, at A22 (describing President Clinton's proposed sale of several power administrations at half their worth and without an open bidding process).

\(^{62}\) \textit{See infra} notes 66-72 and accompanying text (discussing problems with the federal coal leasing program).
B. The Limits of Marketization: The Federal Government Cannot Mimic the Pricing Behavior of a Private Supplier

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

Suppose the federal government attempted to set its prices, at a minimum, to cover its costs of operation—the normal approach taken by private firms that want to stave off bankruptcy. In allocating grazing leases, if the government set its fees based on its costs of administration, the fees could be well in excess of fair market prices charged by private land owners. At present, there is no strong incentive for BLM officials to keep administrative expenses of grazing leases down because the BLM does not worry about bankruptcy. In fact, it has converse incentives: higher administrative costs mean a larger agency budget, which is the ultimate goal of many bureaucrats. When a bureaucrat can dress up an increased budget request in the mantle of the public interest, so much the better.

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

Alternatively, could the government rely on competitive bidding to create a system of fees based on fair market prices? Again, our experience with attempts to develop a competitive bidding system for coal leasing suggests that an auction system would not work.

63. See Wilkinson, supra note 4, at 169.
64. An example is the old-line land manager who believes "that it is morally, ethically, and professionally right to institute management practices that stop erosion, grow better forage and vegetation, and improve rangeland condition and trend. We should not have to economically justify these management practices." Nelson, supra note 22, at 98.
65. See Marvel Considers Bid On "Disaster," Idaho Statesman, July 11, 1995, at 1 (conservation group has bid on state rangeland and despite high bids in each of last three years, state has given leases to ranchers).
By statute, the DOI cannot accept a coal lease “which is less than the fair market value of the coal subject to the lease” and must use “competitive bidding.”66 In response to this mandate, the DOI has devised and used a variety of bidding systems,67 yet the coal leasing program is rife with problems.

One such problem is allocation. Before the government can begin auctioning leases, it must determine the appropriate amount of coal to lease and the eligibility of individual parcels for mining. The decisions about which coal deposits to lease present tailor-made opportunities for titanic struggles between clashing interest groups. As a result, planning decisions for the past twenty-five years have resulted in a swirl of controversy, litigation, and gridlock.68 Congress established a detailed administrative decisionmaking process to ensure that all are heard, and thus unwittingly created a platform for lawsuits by all who disagree with any administrative decision. Inevitably, these planning decisions affect the prices of the leases themselves.69

Another problem is designing an auction system that encourages competition; a 1983 study found that “competition has been the exception rather than the rule” in coal leasing.70 In both coal and grazing leases, bidding competition for some tracts tends to be weak because the location of the land makes it of interest to only a single firm or rancher.71 For example, where federal land is encircled by a private ranch,72 only the ranch owner and possibly a few others will be interested in it. This is reflected in a 1976 study that found over seventy-two percent of coal lease auctions had fewer than two bidders.

Clever auction systems for timber, designed to minimize the problem of the absence of competing bidders through the use of such devices as grouping tracts, have been blocked by both industry and environmental groups.73 Oddly enough, both of these traditional op-

67. See National Wildlife Federation v. Burford, 871 F.2d 849, 856 (9th Cir. 1989) (describing the DOI’s shift from a prior minimum acceptable bid system to an entry level bid system).
69. Another method of allocation is by price rather than by parcel. The government could set a minimum price and accept any offers over the minimum on designated tracts. The price determines the amount of coal leased. The issue remains, how should the government set the minimum price?
70. COGGINS ET AL., supra note 6, at 543.
71. NELSON, supra note 22, at 292.
72. This is an extreme case, but the argument is similar for the common case of remote public land in reasonable proximity to only one private ranch.
73. For a description of the intertract bidding system, see NELSON, supra note 22, at 292-95.
ponents believe they would be worse off under an auction system. Industry believes it would have to pay more for what it already has, while environmental groups believe they would have less access to the land use planning process. In short, experience with marketization demonstrates that the government has been unsuccessful in its efforts to mimic the behavior of private market participants in pricing its assets.

In the end, those who favor the retention of federal lands usually eschew marketization just as they reject privatization. Those who seek to justify the government's retention of federal lands must find more fertile soil to till. Most who push for the retention of federal lands find the goal of marketization easier to attack than defend. They find justification in noble "public" values which require the "collective" action of government. The obvious difficulty with the rejection of marketization (and privatization), acknowledged by its adherents, is the need to develop an alternative—a workable political mechanism that allocates use of scarce resources. Thus far we have not had much success.


Those who advocate holding federal lands to effectuate some notion of collective value, to preserve natural ecosystems or to provide public access to and use of open space, for example, are, in essence, asking for the government to subsidize favored allocations of land. The history of federal land allocations as subsidies is not pretty. Past allocations have either benefited predominately private interests at the expense of public interests or have proven to be problematic over the long-run even when made with good intentions.

Government subsidies to privileged recipients can take several forms, the most common being cash grants, tax forgiveness programs, business regulations that effect monopolies, and in-kind transfers of

74. See, e.g., Karen Brandon, Ecogroups Told: This Land is Not for Lease to You, SEATTLE TIMES, June 1, 1995, at A3. Idaho ranchers angrily watched grazing lease prices rise above fair market levels as an environmentalist outbid the ranchers in lease auctions. The Idaho Land Board, citing an economic interest in aiding ranchers, then arbitrarily restored the leases to the ranchers, one of whom didn't even bother to bid. Id.


76. There is an important exception. Marketization can be viewed as an alternative to privatization because land retained can later be more easily reclaimed from commodity producers. Marketization, then, is a holding position, making land available for future parks. See infra part IV.C.

77. See infra part III.
government assets. Federal lands are a prime illustration of the fourth method, in-kind transfers. The government allocates the use of federal lands to provide in-kind subsidies to interest groups with political clout. Often the purpose of a subsidy is simply to route federal largess to a congressperson’s local district; new parks front for regional economic development grants. In-kind subsidies may also create a variety of spin-off monopolies, such as park concessions.

The use of federal lands as in-kind subsidies is, in some ways, inherently deceptive. Cash subsidies are more obvious and harder to defend. Subsidies that involve allocations of assets like water, grass, and tramping rights are especially difficult to price, compared with raw cash grants. Indeed, one of the most problematic subsidies to identify and price is the grant of low-cost water originating on federal lands.

During the first 150 years of our nation’s history, the federal government disposed of public land to subsidize railroads, canals, education, local towns, homesteaders, war veterans, and other recipients deemed worthy at the time, as well as out-and-out crooks. The government continues its policy of retaining public land and supporting favored groups by granting them access to the land. By setting below-market prices for land use and subsidizing management costs, the government transfers wealth to loggers, miners, cattle ranchers, energy and water users, and recreational users. At present, the fastest growing group of beneficiaries of government largess are those who use land for active recreation (hikers, climbers, bikers, hunters, skiers, snowmobilers, four-wheelers) and those who use land for passive recreation (enjoying scenic beauty and/or solitude of the land for contemplation, emancipation, or refreshment).

The problem with using federal lands to provide in-kind subsidies to various groups is that we are now in the unenviable position of having to counteract the effects of previous subsidies with new subsidies that well exceed the previous ones. The overpopulation of the West, which threatens its natural systems, is a direct result of provid-

78. They have also provided opportunities for regulatory monopolies. Monopoly grants of concession services to private industry in our national parks are an example. See infra note 128 and accompanying text.

79. See Randal O'Toole, The National Park Service, FORBES, Nov. 20, 1995, at 160-161. O'Toole describes Congress' creation of parks and the misuse of the Park Service's construction budget to funnel federal money into the hands of local businesses. For example, in Seranton, Pennsylvania, Congress allocated $65 million, and $4 million a year thereafter, to open a small, sixty-two acre park holding a collection of Canadian steam locomotives. The park employs seventy-eight full-time employees, half as many as those employed at Utah's Bryce Canyon National Park. Id. at 164.

80. Some of my favorite authors and photographers access public land and chronicle its beauty, sell books for profit (blue herons charge less than super-models), and hurt the resource by encouraging more people to visit an already over-trampled area.
ing below-cost resources (water, electricity, minerals, timber, and recreational areas) to private parties.

Consider, for example, the town of Sheridan, Wyoming, nestled at the foot of the Bighorn Mountains. One-third of the surrounding county is federally owned. The three biggest employers in town are the Veterans Administration Hospital and two coal companies which produce low-sulphur coal from shallow strip mines. Sheridan also has a saw mill that cuts studs from trees on federal lands. The coal mines and logging are profitable but ugly. Environmentally active organizations are attempting to stimulate tourism to replace the mines and the mill, but not many people in Sheridan are buying it; they do not want to eke out a living "making beds for some Californian." This town, which was created and sustained almost entirely through federal subsidies of one sort or another, seems inevitably on the verge of pleading for additional federal subsidies to aid its transition from mining and logging to recreation.

The federal government has created, in large part, western population centers and, indeed, the essential character of the West. The population movement to the West and the creation of western industries in agriculture, livestock, and recreation were the principal goals of early federal subsidies, which were often outright land grants but also commonly took the form of permission to use federal lands. It is easy to understand the government policies in the early part of this century that were aimed at encouraging local economic development. But these early subsidies were either too effective, simply wrong-headed, or have outlived their policy base. In any event, it is now difficult to get rid of them.

Today, more government subsidies are requested in order to reverse the effect of earlier federal subsidies. For instance, some claim that the government must subsidize the reintroduction of wolves to counter the effect of turn-of-the-century government bounties on wolf tails. The original subsidy has created a cyclical pattern. If the government grants new subsidies to preserve wildlife at the cost of local timber and mining communities, we will inevitably face requests from those communities for new and more costly payments or programs (perhaps in the form of relocation payments) to counter the effect of the new subsidies. One wonders—what wolf tail bounty are we subsidizing today that will have to be reversed tomorrow?

82. Id. at 22.
83. For a sympathetic treatment, see Wilkinson, supra note 4, at 236-59 (discussing the Bureau of Reclamation's efforts to irrigate desert land).
There is unmistakable irony to the new argument that "sustainable" western ecosystems ought to be our overriding goal but that we need large government subsidies to get there. Perhaps we would be better off going cold turkey by establishing a heavy presumption against all types of government subsidies. If we refuse to use federal lands as in-kind subsidies, we may be able to achieve more sustainable, self-supporting land use practices and preserve greater flexibility to respond to changing political understandings. In sum, this nation's federal lands have provided and will continue to provide grist for government officials dispensing favors to groups with political power. This is not all bad for some. How happy one is with the use of federal lands depends on whether one's interest group is in the ascendancy or descendancy. But political fortunes can be volatile.

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

III

ABSTRACTIONS THAT OBSCURE IN THE PRIVATIZATION DEBATE

The privatization debate is blurred by a strong narcotic—the tendency of participants to argue passionately in lofty abstractions. The conversation often remains entirely on this plane, occasionally delving...
into the specific only to buttress an already generalized position. Those who have noticed and bemoaned this phenomenon use a variety of pejoratives to describe it—“political,” “ideological,” or, the favorite of academics, “value-laden.” The arguments are simply too general. Whatever the label, more attention to detail would help clear the air of overused and boring rhetoric. Below I discuss what I see as the most harmful of the common abstractions.

A. “Federal Lands Are All the Same”

While economists, lawyers, and real estate brokers agree that every parcel of land is unique, most participants in the privatization debate refer to federal lands as a single unit. Conservationists see federal lands as rugged, unspoiled wilderness or national parks; privatizers see them as commodity-laden pastures or tree farms.

Both views are flawed. The argument that federal lands promote collective values sounds sensible in the abstract, but looks odd when one sees public land used primarily by a single rancher with a grazing lease or a single coal operator with a mining lease. On the other hand, the argument for selling federal lands based on the fundamental advantages of the free market also sounds sensible in the abstract, but rings hollow when considering a marshland that is used biannually by endangered species of migrating birds.

I suspect the general arguments on privatization are surrogates for more specific land use positions. Those who believe federal lands embody collective values are often advocates for reducing the amount and type of commodities produced on federal land. Those who advocate privatization or marketization are pushing for a more commodity-oriented use of federal lands. All advocates enjoy the luxury of not tying their positions to specific parcels of land.


89. See, e.g., Scott Lehmann, *Privatizing Public Lands* (1995). The real estate broker’s well-worn axiom that the price of a parcel of land is determined by three factors—location, location, and location—is familiar to most.


92. This may not mean an increase in production. Once subsidies are eliminated, production may decrease. See, e.g., Brandon, *supra* note 74. Critics charge Idaho state officials with violating a state land trust by bypassing higher bids from environmentalists in grazing lease auctions. When Idaho was admitted into the union it formed an endowment for public schools consisting of state-owned lands, and the state constitution requires offi-
To break the log-jam of hackneyed verbiage, we need to encourage both sides of the debate to approach the problem from the ground up. We should look at a specific tract of federal land and ask whether we should sell it or keep it. Whether or not we decide to sell it or keep it, we should reconsider what uses to allow. Land that is used primarily for developing commodities—grazing, mining, logging, water accumulation, or electricity generation—should be segregated from land that is reserved for parks, water purity, wildlife support, or wilderness preservation. We should further subdivide each category by sub-purpose (water recreation or wetlands, for example). Under this approach, the arguments about privatization will differ for land in each category and perhaps even for land in each sub-category.

Critics of my proposal for selling commodity-producing federal lands doubt the government’s ability to make a distinction between commodity and non-commodity lands in a useful and defensible way. Again the argument smacks of artifice. We now must make basic distinctions between commodity and non-commodity use in government management decisions that allocate use. What the critics fear is the permanency of the decision to sell commodity-producing land, and the loss of the political opportunity to push for ever larger reallocations of land from commodity production to conservation. I will respond to this argument, an important one, later.

My proposal ought not to appear to be a radical or controversial suggestion, much less a novel one that merits the attention of an essayist. But the facts suggest the contrary. Secretary of the Interior James Watt generated a firestorm of protest when he formed a task force in the early 1980s to study the appropriateness of selling selected individual tracts of land which constituted a very small amount of the total land held by the government. The proposal to study and evaluate, not to sell, was soon withdrawn by Watt in humiliating contri-

93. See Lehmann, supra note 89, at 212-14.
94. See infra part IV.B.
95. See infra notes 242-246 and accompanying text.
96. See, e.g., Paul Rauber, National Yard Sale, Sierra, Sept./Oct. 1995, at 28 (stating that “not even our beloved national parks are out of bounds”); see also Ellen Marks, Opposition Builds to Federal Land Sale, High Country News, Feb. 18, 1983, at 16 (stating that “the Reagan administration’s unprecedented plan to sell 2.7 million acres of public lands as a revenue-raising venture is striking fear in the hearts of many Westerners worried that ‘No Trespassing’ signs may soon pop up at their favorite recreation spots”).
Most commentaries on the privatization debate implicitly and incorrectly assume that selling public land to private entities necessarily means losing public control of the parcel. The reverse assumption is also incorrect: public ownership does not necessarily maximize public control. We need a more careful and thoughtful analysis of the regulatory alternatives. The choice between public and private ownership is merely the first in a hierarchy of choices, and we need to flesh out the alternatives before we declare our choice at the top. Government intervention to provide public goods or to give voice to collective values does not necessarily require public ownership of land, nor, for that matter, does a free market in resources require private ownership in fee of the underlying land.

Consider the hierarchy of choices that begins with the decision to hold a parcel as public land. That decision requires a second decision about how to apportion the land's use, and there are many choices for each parcel. We can lease or license the tract for a short time or a long time, for specific, limited uses or for unlimited use. We can allow or prohibit access. If we allow access, how do we limit access? If we charge rental and license fees, how do we set them? If we charge no or insignificant fees, how do we prevent overuse?

The wide range of choices available for public land means some federal lands are not necessarily under public control. When the government decides to lease federal lands long-term, it loses some control over the land to private parties. When the government enters a long-term lease that does not impose specific use limitations and that permits sub-leasing, it loses substantial control. Even more limited leases can significantly limit future public control. Government grants of specific-use leases or licenses to private parties bind subsequent administrations. If the time periods for the leases or licenses are long or the terms are renewable, then the future effect is patent.

There are more subtle ways to effect long-term commitments. If permitted uses are intertwined (like water and grazing permits), or if land is committed long-term to a use (like coal mining), even short-term licenses can create significant, hard-to-alter future obligations. Changes in the use of federal lands come very slowly and at a high political cost to the movants. Indeed, the history of federal land allocation has been dominated by quasi-permanent use of the lands by private families or businesses based on ostensibly short-lived, non-exclusive grants of access.

Conversely, private land is not necessarily free from public control. While I am not recommending the full use of regulatory devices,
it is important to note the extent of the government's regulatory power over private parcels. Government land can be sold with substantial limited-use restrictions in the title or with stipulations that members of the public can always access the land in specified ways. For example, the government could sell a tract with a deed covenant requiring the purchaser to run a natural park on the premises.

Within the bounds of constitutional takings caselaw, local government can zone privately held land for specific uses. The extent of zoning power, although controversial, is substantial. For example, a parcel could be zoned exclusively for "natural" ranching which would only include animals indigenous to America such as buffalo or elk. The federal government can also pass statutes that regulate the conduct of specific businesses that affect the use of the land. Private nature parks can be regulated to require minimal environmental impact, and ranching can be regulated to require private landowners to conserve and protect wildlife or rare, indigenous flora and fauna.

The government has choices beyond selling or holding public land. Hybrid public-private forms of ownership deserve serious consideration. In these hybrids, ownership of land is deeded to a new, separate legal entity with mixed private and public stakeholders and/or claimants. There are two prominent examples: corporatization and public trusts. With corporatization, the state holds a controlling parcel of shares (or an option on a controlling parcel of shares) in the new corporate entity and private citizens hold the rest. Under a public trust, the government holds land in trust for a beneficiary who

97. This is already being achieved by the Nature Conservancy, which has acquired and protected eight million acres of environmentally sensitive land in North America. The Conservancy may sell land to private purchasers, or give land to government agencies, provided that a conservation easement on the land is donated to the Conservancy. See New Plan in Environmental Protection, Houston Post, Apr. 2, 1995, at A8.


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

102. New Zealand has been the leader in the corporatization movement. See Ian Duncan & Alan Bollard, Corporatization and Privatization: Lessons from New Zealand (1992).
is a defined sub-division of the public. The aim of these hybrids is to replicate some of the organizational efficiencies of a business-style organization with an enforced sensitivity for defined public values.

The previous discussion is not exhaustive, only illustrative of the variety of creative choices available after the decision whether to sell or not to sell federal lands has been made. To push the point, recognize that the two branches of the decision tree, begun with a decision on whether to hold or to sell federal land, cross on a scale that represents the degree of residual public control in the option chosen. In other words, federal lands leased long-term without use restrictions can be subject to less ongoing public control than heavily conditioned and zoned private land. Any decision, then, to sell or hold ought to be part of a larger planning package that involves much more detail.

C. "Federal Lands Further Collective Values"

The argument is often made that federal lands should be retained because they further collective values. If one can justify the costs of inaccurate pricing of government-owned commodities by gains in respectable collective values which are not reflected in market price mechanisms, then calls to privatize the resource or mimic market price are beside the point.

There are two versions of the collective value position. One version posits that existing collective values are not furthered by market pricing mechanisms, and thus, government action is necessary to correct certain chronic market failures. According to the other version, collective ownership aids in the development of new and preferred collective values. The first version gives effect to public values; the second version seeks to elevate public values.

The collective value argument for federal lands is powerful and is to some extent undeniable. As noted in part IV below, I find a

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103. For a discussion of state land trusts, see Sally Fairfax, Thinking the Unthinkable: States as Public Land Managers, Paper Presented at Challenging Federal Ownership and Management: Public Lands and Public Benefits, Nat. Resources L. Center, Univ. of Colo. School of Law (Oct. 11-13, 1995) at 16 (state land trusts exceed 183 million acres nationwide). See also Who Should Run the West, ECONOMIST, Nov. 1995, at 27 (discussing the benefits of state land trusts and noting that state land trusts, only one-fifth the size of the federal lands, returned more revenue than the federal lands).

104. See Fairfax, supra note 103, at 18-19.


107. For a general (too general) defense of collective management, see Mark Sagoff, The ECONOMY OF THE EARTH (1988); Lehmann, supra note 89, at 179-200; see also Sax, supra note 106.

108. See infra part IV.A.
version of the collective value argument persuasive when applied to
the government retention of land for parks, wilderness areas, and
wildlife protection. These uses are traditional "public goods" as that
term is defined in modern economics. ¹⁰⁹ However, the collective
value argument is more frequently misused than made honestly. It
has important limits which advocates conveniently overlook. First,
wilderness areas and national parks are not pure public goods.¹¹⁰ Sec-
ond, public goods arguments are often tainted by requests for subsi-
dies. Third, even when a true public good is identified, selecting
among competing conceptions of collective value remains
problematic.

The distinguishing feature of a public good is that consumption
by one does not reduce the availability of the good for others. Passive
recreational use of federal lands is often cited as the typical public
good—one person viewing a waterfall does not reduce the benefits
available to others.¹¹¹ Even assuming that all federal lands are scenic,
the argument is false.

Sophisticated economists claim that federal lands are, at best, a
combination of private and public goods.¹¹² The limited size of the
waterfall overlook creates the attributes of a private good: the space
taken by one viewer at any given moment reduces the remaining
space available for others. Add the problems of maintaining parking
for visitors to the overlook and the problems of refuse disposal and
wildlife displacement created by heavy traffic, and one has a classic
allocation problem that can only be solved by capturing the resource
and charging fees.

So what is the public goods aspect of federal land? It is the value
that we place on others having access to the land. In other words,
Yellowstone is a public good for those who may never go there but
who value the park's existence for conservation or for the positive
impact it will have on others who do visit the park.¹¹³ A common

¹⁰⁹. Decades ago, economists recognized that some things desired by the public could
not be distributed or allocated through a private market system because providing the
good to any member of a referent group made it simultaneously available to all members
of the groups. National defense is the classic example. Consumption by one individual
does not reduce the availability of the good for any other individual in the relevant group.
¹¹⁰. Advocates of the public goods argument do not make distinctions among the
types of land held by the government. See supra part III.A.
¹¹¹. John B. Loomis, Economic Rationales for Continued Government Ownership of
Land, Paper Presented at Challenging Federal Ownership and Management: Public Lands
and Public Benefits, Nat. Resources L. Center, Univ. of Colo. School of Law (Oct. 11-13,
1995) at 2.
¹¹². Krutilla et al., supra note 105, at 551-52.
¹¹³. Some see land as important to our moral development, others see nature as a
teacher. See, e.g., Edward O. Wilson, The Diversity of Life (1992) (respect for land is
important to moral development).
version of this position is our heart-felt belief that we must preserve wilderness for subsequent generations. In other contexts this sort of public goods rationale supports public subsidization of museums, libraries, and radio and television programs. The arguments are multifaceted and can be spiritual. Federal land, some declare, is a core part of our national identity and culture.\textsuperscript{114}

These are all, beyond a doubt, important considerations. But advocates are rarely careful to respect the boundaries of the position. Environmentalists and their allies routinely commingle the public goods argument with appeals for private subsidies, usually for passive or active recreationists.\textsuperscript{115} The request for a private subsidy from recreationists who do not want to pay for their personal enjoyment of federal lands is raw interest group politics, not a public goods argument.\textsuperscript{116} Although noble perhaps, a claim that I (or my family) ought to enjoy the solitude and spirituality of a breathtaking natural vista at no personal cost is a request for a private subsidy. Neither the desire to obtain below-cost access to public land for personal recreation nor the desire of particular recreational groups to gain access at the expense of other recreational groups are respectable public goods arguments.

After endorsing a collective value position, two major, and some would say intractable, government planning problems arise. First, how should the federal government accurately identify values that are collectively held, distinguishing them from private interests? And second, once it identifies values as collectively held, how should the federal government choose between competing collective values?

An answer depends on the mechanism we put in place for defining public or collective values. Our history and traditions require us

\textsuperscript{114} See, e.g., Parks to Benefit from ‘March for Parks’ Event, U.S. NEWSWIRE, Apr. 8, 1996 (Paul C. Pritchard, president of the National Parks and Conservation Association, stated that “the open space, culture, and history found in our urban national parks are the heart of the park system to many Americans”).

\textsuperscript{115} See, e.g., Rich Laden, Recreation Fees Likely to Rise as Park Policy Shifts, COLO. SPRINGS GAZETTE TELEGRAPH, Sept. 7, 1995, at A1 (the Colorado Springs Parks and Recreation Department instituted a new user-pay policy for recreational services, but “public good” activities such as parks and trails would continue to be subsidized by the taxpayers, and other activities such as swimming lessons and day camps would be financed through a mix of fees and tax subsidies).

\textsuperscript{116} KCNC television of Denver, Colorado had on its ten o’clock news three separate segments during the week of Nov. 27, 1995 on hunters’ anger about the practices of the Smith ranch in northwestern Colorado. The Smith ranch is in prime elk hunting territory and the owner charges $3,000 a week to hunt on his ranch. The hunting pressure on the adjacent federal lands has driven elk onto the Smith ranch. In the initial segment a hunter from Missouri, having spent a week without seeing an elk on federal land, peers over the fence in amazement and disgust at an elk herd languidly grazing on the Smith ranch. “I’m a poor fellow from Missouri; I can’t afford $3,000,” he laments. The Ten O’Clock News (KCNC television broadcast, Nov. 27, 1995).
to make these choices through a republican form of government with elected decisionmakers, complicated by a division of authority between the federal and state governments. Interest group politics are, of course, the result of open access to government processes. Our government occasionally identifies and provides for public goods, but it also routinely panders to special interest groups in ways that do not further the public interest, sometimes catering to different groups on the same subject matter.\footnote{117}

For example, in providing for national defense, the federal government cannot resist sweetheart contracts with private industry.\footnote{118} The federal government has a mixed record not only on national defense lands but also on its use of federal lands. As noted in part IV.D. below, we have not, and probably will not, find the perfect government process to correctly identify and deliver a defensible quantity of public goods. Significant waste seems to be an inevitable by-product of the governmental planning process.\footnote{119}

The use of federal lands for recreation illustrates the planning problems generated by collective decisionmaking about the allocation of a scarce resource. Assuming some aspect of recreation is a public good, we move to the nettlesome controversy over how much land to

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\footnote{117. \textit{See, e.g.}, James M. Buchanan & Gordon Tullock, \textit{The Calculus of Consent} (1962) (discussing the incentives of government officials to maximize their personal positions at the expense of the public interest).

118. \textit{See, e.g.}, Patrick J. Sloyan, \textit{GAO Finds USAF Pays $12,280 for Door Hook}, Plain Dealer (Cleveland), Feb. 14, 1996, at 6A (the Clinton administration has been paying $12,280 for a door hook on the Air Force C-17 cargo jet that originally cost $389, as a result of shifting production from subcontractors to a McDonnell Douglas spare parts contract).

119. How do we then identify and decide among competing public goods? A group of environmentally sensitive economists believe they have the answer: public opinion polls. \textit{E.g.}, Robert C. Mitchell & Richard T. Carson, \textit{Using Surveys to Value Public Goods: The Contingent Valuation Method 2-4} (1989); John B. Loomis, \textit{Integrated Public Lands Management: Principles and Applications to National Forests, Parks, Wildlife Refuges, and BLM Lands} 151-70 (1993). With clever polling polsters have found, for example, that people would pay, say, $60 annually for Yellowstone National Park regardless of whether they intend to visit. \textit{See, e.g.}, Joel Sleed, \textit{Preservation Main Concern for Parks}, San Diego Union Trib., Aug. 8, 1991, at D5 (in one survey, ninety percent of Americans said that the main purpose of the National Park Service should be the preservation of our country's natural beauty, rather than recreation, and seventy percent would be willing to designate an additional $5 on their federal tax returns to help maintain the parks).

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

Poll results often depend on who asks the questions. I suspect that if the polls come to have political value, ranchers, loggers, and miners would become sophisticated and adept pollsters too—as would hunters and bikers.
devote to recreation, a controversy that pits powerful interest groups against each other. The fight generated by the expiring oil and gas leases in the Badger-Two Medicine area of the Montana Rocky Mountain Front Range is a good example. Should the leases be renewed or the land left to fisherpersons and hikers?

Even if we presume that government planners will favor recreation users in the Badger-Two Medicine area, the management problems have just begun. Through its ownership of parks and the like, the federal government subsidizes selected types of outdoor recreation, meaning that people using a park do not pay the full cost of maintaining it; taxpayers who do not use the park contribute as well. This allows hikers, mountain bikers, rafters, hunters, off-road motorcyclists, bird and wildlife watchers, fisherpersons, skiers, and those who just appreciate scenic vistas to have access to federal lands at bargain-basement rates. The BLM estimated in 1988 that recreationists, who pay less than $2 million in user charges on BLM land, cost the BLM $125 million. The National Park Service collects fees of about $100 million when its operating expenses, not the market value of the opportunities, are over $900 million.

The effect of the recreation subsidy is three-fold. First, we now face an overuse of the underpriced resource. There are too many people on federal lands, and there will be more because outdoor recreation is the fastest-growing use of the western federal lands. People put themselves in harm’s way without considering the costs of rescue. Yosemite’s central road now carries traffic equal to that in downtown Houston, and park rangers have reported air pollution worse than that measured for the same day in Los Angeles. Plans to ration the recreation resource on federal lands are inevitable. Rationing decisions will force us to face equity concerns (should only the wealthy have access?), make judgments about lifestyle (should parks

120. See Gene Sentz, Montana’s Rocky Mountain Front: Sell It or Save It?, HIGH COUNTRY NEWS, June 26, 1995, at 8.
121. See Bates, supra note 5, at 35, 38.
123. This is known to economists as “the tragedy of the commons.” See, e.g., James L. Huffman, Public Lands Management in an Age of Deregulation and Privatization, 10 PUB. LAND L. REV. 29, 40-41 n.43, 46-49 (1989).
124. The problems of Moab, Utah are an example. Moab Area Acts to Regain Control of Public Lands, HIGH COUNTRY NEWS, June 12, 1995, at 6 (describing the “silly season” when visitors flock to Moab “like swallows returning to Capistrano”).
125. Bates, supra note 5, at 33.
126. In 1992, eleven people died on Mt. McKinley. The National Park Service spent large sums (and risked lives) rescuing injured climbers and retrieving bodies. See Dennerlein, supra note 122, at 8.
127. Bates, supra note 5, at 41.
have high or low traffic volume?) and address claims for elevated status among competing groups of potential recreational users (is hiking preferable to biking?).

Second, the creation of parks gives federal politicians control over another source of beneficence—concessions. The government has created a monopoly, in the form of single-source food and lodging accommodations in federal parks, and doles the fruits out to favored constituents. A 1965 act on park concessions stifles competition and costs the federal government between $40 million and $60 million a year in lost revenue. Ski areas and other concessions earn over $1.5 billion annually, but pay less than three percent of that sum to the government in fees.

Third, we encourage people to use federal lands for recreation rather than, say, to go bowling. Have we made a collective judgment to favor hikers over bowlers? Perhaps. I am more comfortable with an argument based on market imperfections (private parks are not, on average, feasible) over one based on the position held by many environmentalists—that people are made better by hiking but not bowling. In other words, hiking, unlike bowling, somehow elevates people.

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

I regularly see pro-hiker types dressing up their positions in terms of the degree of adverse impact on the environment—low impact uses are preferred to high impact uses. But underneath is a qualitative judgment about the value of competing activities. Throw into the mix those who trump even low-impact hikers by advocating that all people should be kept off federal lands so as to preserve the lands’ wildness (this argument is usually buttressed by a reference to the welfare of

128. See Christopher Palmeri, Coddled Concessionaires, FORBES, Nov. 6, 1995, at 74. The National Park Concession Policy Act of 1965 gives incumbent concessionaires advantages over rival bidders. The effect is a system in which the government is paid only $36 million out of total revenues of over $670 million. Id.
129. Dennerlein, supra note 122, at 4.
130. BATES, supra note 5, at 38.
children and grandchildren) and arguments on policy start taking on ugly overtones of elitism.

In sum, when advocates state that federal lands further collective values, they often either use “collective value” as a front for a preferred, private subsidy or, if true public goods are at issue, underestimate the problems associated with accurately identifying the public’s sense of collective values and with choosing among those that are mutually exclusive.

D. “All We Need Is More Sensitive and Thoughtful Government Officials”

Public ownership of vast quantities of land requires government planning and management, which in turn requires a government decisionmaking process and government officials. While no one seems to be content with the government’s past performance in managing most of our federal lands, most still assume that we can correct the effects of fifty years of poor government planning and management through more of the same. Advocates of government ownership of federal lands have yet to give up the search for the ideal government process; they still argue that we just need to redesign the planning process, write better regulations, and hire better administrators.

This optimism is catching and those who have it offer moral, uplifting exhortations: “It’s a difficult task, but through hard work and cooperative effort, we can do it.” It is seriously debatable whether this “difficult task” is humanly possible. Collective planning and man-

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

See also Nathan Edelson, Conservationists vs. National-Park Visitors, N.Y. TIMES, Oct. 12, 1985, at A27 (“The conservationists say we should accept their lockout philosophy—if not for our own sake, then for that of future generations. But if the parks are reduced to virtual fiefdoms from which most of us are banned, how will this allow our children and grandchildren to enjoy the parks?”).

132. See, e.g., Loomis, supra note 111. Loomis argues that public land management has a strong economic foundation and should not be abandoned, recommending that we instead seek to reform existing institutional rules.

133. For examples of this genre, see Blumm, supra note 45, at 405; George C. Coggins, The Law of Public Rangeland Management V: Prescriptions for Reform, 14 ENVTL. L. 497 (1984) (suggesting significant restructuring and rethinking, while still advocating predominantly government ownership of the federal lands); Wilkinson, supra note 4, at 300-01.

134. The podium at the recent Natural Resources Law Center Conference often rang with calls to meet the challenge. See generally Challenging Public Ownership and Manage-
agement are inherently flawed processes, so why do we think we can make them work for federal lands? There are answers aplenty, each grounded in a favorite government process. But the skeptic in me says that behind the process arguments swirling around the federal lands debate is something considerably less than detached, objective interest in government process.

It is an old negotiating adage that one pushes the “objective” process that is the most likely to generate the outcomes one favors, and interest groups seeking a favored use of federal lands are no different. They veil self-serving goals in arguments for an objective, neutral legal process. Our recent political history is rife with passionate arguments for a wide variety of collective decisionmaking processes by interest groups who pursue one legal process, find it less than satisfactory, and then argue, just as ardently, the merits of another. Those who make pure process value arguments with intellectual integrity are as scarce as hen’s teeth.

1. Environmentalists as Federalists and Communitarians

Some years back, conservation groups found political success through local action tough going, so they pushed successfully for federal legislation; the Clean Water Act and the Endangered Species Act are prominent examples. They worked through Congress, usually controlled by Democrats, rather than through executive agencies, which were too often controlled by Republicans. Federal legislation empowered the federal courts to intervene in western affairs. Conservationists could, through strategic litigation, choose the judge, and in the hands of sympathetic judges the new acts proved to be potent weapons.

Enforcement efforts based on federal environmental statutes produced a vigorous local political backlash, the “Sagebrush Rebellion.”

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136. See, e.g., Jack McWethy, After Setbacks—New Tactics in Environmental Crusade, U.S. NEWS & WORLD REP., June 9, 1975, at 62 (environmentalists fought most of their battles in the pro-environment legislature, contending that there was a “leadership vacuum” in the White House on environmental issues). The Endangered Species Act was the result of “congressional concern about rapidly deteriorating fish, wildlife and plant habitat, indiscriminate utilization of plants and animals and increasing numbers of species threatened with extinction.” H.R. 167, 96th Cong., 1st Sess. (1979). The Act repealed the Endangered Species Conservation Act of 1969, broadening federal responsibilities to list species and increasing federal authorizations and programs for ensuring the survival of species. 16 U.S.C.A. § 1531-1544.
137. See, e.g., Joanne Ornang, Bill Seeks Less Friendly Forums for Environmental Suits, WASH. POST, Mar. 27, 1980, at A14 (discussing the intensive forum shopping which occurred in environmental cases).
lion." Many conservation groups then turned to grass roots environmental efforts to defuse the surprisingly bitter local opposition. These groups organized consensual, Quaker-style gatherings of all interested parties to work out solutions to environmental problems like conflicts over watersheds. The conservationists quickly found that these gatherings gave veto power, via endless discussion, to individual interest groups, some of whom had little common ground with the conservationists. Nothing happened quickly in these cooperative gatherings and the status quo favored those with access or expectations of access to the federal lands. Conservationists also found themselves in an awkward position because they could not compromise, for example, by allowing some timber cutting on old growth forests, without offending their constituencies. Without the power to compromise they could not bargain.

Realizing their political power was at the federal level and not at the local level, most conservation groups renewed and refocused their efforts on Congress and federal agencies. For the past fifteen years or so, national environmental groups have been able to persuade representatives of eastern states with small federal land holdings to join their number and outvote local western representatives who tend to favor in-state business interests.

138. See, e.g., R. McGreggor Cawley, Federal Land, Western Anger: The Sagebrush Rebellion & Environmental Politics 4 (1993) ("At the heart of the Sagebrush Rebellion was a belief that the ascendancy of the environmental movement throughout the 1970s produced an unacceptable burden of regulations.").

139. See Lisa Jones, As a Last Resort Westerners Start Talking to Each Other, HIGH COUNTRY NEWS, May 13, 1996, at 1 (discussing the Sierra Club’s skepticism towards attempts at collaboration). The Sierra Club is concerned that many of these coalitions are actually designed to redistribute power away from their heavily urban constituency. Id. at 6.

140. See id. at 1 ("These efforts at collaboration haven’t exactly transformed the Western landscape. They’re slow, tedious, fragile processes that seem to fail at least as often as they succeed. And the status quo is still strongly in evidence . . . ."); Michael McCloskey, Collaboration Has Its Limits, HIGH COUNTRY NEWS, May 15, 1996, at 7.

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


143. See, e.g., Cawley, supra note 138, at 144. During the 1980s, most of the major environmental groups increased the size of their national staffs and intensified lobbying efforts. A coalition of environmental groups broke with their tradition of non-participation in electoral politics and endorsed a bipartisan slate of forty-eight congressional candidates in the 1982 elections. Thirty-four of the endorsed candidates won seats, prompting Business Week to suggest that "the environmental movement has established a substantial beachhead in American electoral politics." Id.

144. This can be irritating to local westerners. Sam Donaldson, the well-known liberal (and self-righteous) television reporter who, among other things, used to spar with President Nixon at his press conferences, recently appeared as a guest on David Letterman’s show. Mr. Donaldson complained about "New Yorkers . . . putting wolves on my sheep
Federal representatives of eastern states support federal ownership so that their constituents will be able to access and partly control national land located in western states like Colorado and Montana that they could not access or control if the land were private or state-owned. Moreover, New York does not receive any significant monetary benefit if federal lands are transferred to Colorado. However, it is easy for New York congresspersons to offer support to environmentalists who are intent on pushing national parks, unless western business interests contribute significantly to the campaign coffers of eastern representatives.145

In 1992, conservation groups were delighted over the election of a Democratic President and a particularly vocal environmentalist as Vice President.146 The appointment of Bruce Babbitt as Secretary of the Interior raised expectations; he had the correct sensibilities and seemed determined.147 However, conservationists hit a new snag. They developed, myopically, a one-party constituency in Congress—only Democrats are environmentally sensitive—and the chickens came home to roost two years later.

In 1994, when the Democratic party lost control of Congress, conservationists shifted their support from the legislative process to the administrative process.148 Their pressure is now directed less at Congress than at the Executive Branch and its administrative agencies.149 To the extent conservationists continue to lobby Congress, it is to block a Republican roll-back of environmental legislation already in

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145. See, e.g., John Aloysius Farrell, Big Shots with Big Money, BOSTON GLOBE, July 16, 1989, (N.H. Wkly.), at 1 (several New Hampshire congressional candidates raised more than half of their war chests from out-of-state interests).

146. See, e.g., William H. Miller, It's Easier Being Green, INDUS. WK., Mar. 1, 1993, at 64 ("Now that Democrats are again running things and environmental soul mate Al Gore holds the No. 2 spot in government, the environmental community is coming out of its shell.").

147. See, e.g., Meredith Cohn, Earth Day: How Do the Clinton Administration and Congress Shape Up This Year?, STATES NEWS SERVICE, Apr. 20, 1994 (a spokesman for the Wilderness Society cited Babbitt's appointment as a "major boost for the protection of public lands").

148. See, e.g., Clinton Announces New Protections for National Parks, AGENCE FRANCE PRESSE, Apr. 22, 1996 (the Republican Congress sought to water down environmental protections, whereas the Democratic administration positioned itself as a champion of the environment).

149. See, e.g., Robert Braile, Is DeVillars' Job Endangered?, BOSTON GLOBE, May 14, 1995, (N.H. Wkly.), at 9 (the Conservation Law Foundation urged the Clinton administration to "stand tough on environmental issues, because the forces in Congress clearly want to roll back decades of progress," and observed that the tough calls would be made by agencies such as EPA); see also Tom Kenworthy & Gary Lee, Environmental Bills Still Due, WASH. POST, Sept. 16, 1994, at A4 (environmentalists "enjoy considerable access within the executive branch").
place. Conservationists now push for better agency administration of federal lands, but so far this approach has proven to be only marginally successful.

At present, conservationists are disappointed and disillusioned with the efforts of Bill Clinton and Bruce Babbitt to "claim back" the West. Regional interests, through their national representatives and the threat of withdrawing electoral support for the President, have led to the failure of several fairly moderate environmental initiatives—the failure of the Secretary to increase grazing fees on federal lands is perhaps the best known example.

Ironically, conservation groups now find the President touring the West, along with those western governors who will appear with him, admiring and encouraging local, multi-interest group gatherings. The question remains whether these local cooperative efforts will advance conservation objectives on federal land. Some environmentalists believe these local efforts currently offer their best hope for significant advances. Others are not so sure.

Those in favor of local efforts point to the successful results of one or two recent negotiations. Betsy Rieke's success with the "Bay-Delta Accord" is a frequently mentioned example. Despite these positive results, the advocates admit that the successes are fragile and other negotiations seem to be bogged down. They nevertheless realize these multi-party negotiations appear to be their best chance.

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

151. See Babbitt Drops Plan to Raise Grazing Fees, IDAHO FALLS POST REG., Dec. 22, 1994, at A1 (Babbitt's abandonment of a plan to increase grazing fees was seen as evidence of the political clout of western lawmakers in the new GOP-led Congress and the Clinton administration's desire to appease them).


153. Recent federal lands conferences have focused on these local cooperative efforts. See Remarks of Mary Chapman, Mike Jackson, and Jack Shipley, at CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFITS, Nat. Resources L. Center, Univ. of Colo. School of Law (Oct. 11-13, 1995) (discussing the Quincy Library Group and the Applegate Watershed Partnership). See also Jon Christensen, EVERYONE HELPS A CALIFORNIA FOREST—EXCEPT THE FOREST SERVICE, HIGH COUNTRY NEWS, May 13, 1996, at 16 (discussing the difficulties of the Quincy Library Group, a fading star).

154. Nelson & Chapman, supra note 152, at 6-9 (describing the successes and failures of the San Juan Community/Public Lands Partnership, the Gunnison Grazers and the High Country Citizens Alliance, and the Quincy Library Group).

155. Id. at 6 (describing partnerships being formed between local officials, public land managers, and faculty members from a local college in San Juan Capistrano to bring about change).

156. See Betsy Rieke, THE BAY-DELTA ACCORD: A STRIDE TOWARD SUSTAINABILITY, RESOURCE L. NOTES, Sept. 1995, at 5. The Accord is an agreement among federal, state, and local governments, private water users, environmental interests, and recreational users on water allocation from the two major river deltas in California.
Even the successful negotiations are not truly local. Negotiations do not exist in a vacuum. Individual negotiators agree to concessions based on their assessment of their "best alternative to a negotiated agreement" (known to trained negotiators as "BATNA").\textsuperscript{157} The BATNA is a projection of the party's position in court, usually under the plethora of federal and state land use legislation and administrative rules currently on the books. This quilt of rules and legislation is the backdrop for any negotiated agreement; change the quilt and the agreement changes.

Consequently, those who believe in local negotiations cannot be neutral about the administrative rules and legislation that set the parameters for those at the negotiating table. Environmentalists are discovering that local negotiation does not mitigate the need to martial political resources at the state or federal level to obtain favorable legislation. The Bay-Delta Accord, for example, was negotiated in the shadows of the Clean Water Act and the Endangered Species Act, both of which contributed to the accord's support from agricultural interests.\textsuperscript{158}

The conservationists' marginal record of success on federal lands, coupled with their severe criticism of current government management practices, makes it difficult to understand their indefatigable optimism in government ownership. They seem to believe, and want us to believe, that we are one President, or one Interior Secretary, or one perfect consensus-building process, away from fixing our management problems. If government management of the federal lands has been, on average, an ecological disaster for more than fifty years,\textsuperscript{159} why should we believe that it can be corrected for the better? Where is the evidence for such a proposition? How many more years of failure will it take to convince environmentalists that hopes for better public management of land are illusory?

There are breaks in the environmentalists' ranks on this position. In 1990, the Nature Conservancy bought one of the most beautiful and uniquely diverse stretches of open country still intact in the West.\textsuperscript{160} At the time, the purchase was the largest single private conservation acquisition in United States history.\textsuperscript{161} Four years later, finding that it could not carry an $18 million asset, the Conservancy looked for a

\textsuperscript{157} See, e.g., ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 101-11 (Bruce Patton ed., 1981).
\textsuperscript{158} See Rieke, supra note 156. The federal government agreed to set identified limits on its water claims under the statutes that otherwise had left its water claims open-ended.
\textsuperscript{159} See Hess, supra note 31.
\textsuperscript{160} DAGGET, supra note 30, at 13-23. The property is known as the Gray Ranch and consists of 502 square miles of land (226,000 acres of which is privately owned) in southwestern New Mexico. Id. at 13-14.
buyer. The United States Fish and Wildlife Service offered to buy it, but estimates of 65,000 recreationists a year on the rural enclave led to an intense lobbying campaign sufficient to block the federal acquisition.\textsuperscript{162}

The Conservancy made a controversial but courageous decision. It sold the land to a local rancher whom they trusted to preserve the essential character of the land.\textsuperscript{163} A Conservancy spokesman noted, “[w]e came to think that this was the place to see if private ownership could be equal or possibly even superior to public ownership in achieving both conservation goals and rural economic goals.”\textsuperscript{164} Not surprisingly, the transaction came with strings—the legal purchaser was a not-for-profit foundation funded by the rancher and other interested parties. The charter required the foundation to own the ranch in perpetuity, to never let it be developed, and to conduct cattle operations that do not damage the land’s natural ecosystems.\textsuperscript{165}

The political struggles of conservationists to find the process that gives them the most voice points to a very serious pragmatic problem for collective-value theorists. Public choice theorists dispute the claim that the government can make choices that promote collective values, and argue instead that our political process rewards discrete, focused interest groups who easily triumph over more diffuse public interests.\textsuperscript{166} Federal lands have given these folks a case study as commodity-based interest groups have successfully pressured land managers to maintain historic levels of grazing and timber harvesting.\textsuperscript{167} Whether or not one agrees with the collective value arguments used to justify federal ownership, the argument is incomplete without a political theory that predicts that the government will, in fact, make at least a majority of its decisions in the public interest.\textsuperscript{168}

\begin{footnotes}
\footnote{162. Cf. Michael Scanlon, \textit{Ranch Purchase a Coup for Conservationists}, \textsc{Gannett News Service}, Jan. 30, 1990 (explaining that area ranchers opposed a federal purchase, arguing that the federal government already controls too much New Mexico real estate, and expressing uncertainty about the future of the federal payment program, under which the government makes payments to counties in lieu of property taxes).}
\footnote{163. It rejected Ted Turner’s and Jane Fonda’s offer. Turner, already a major owner of western rangeland, offered to stock the ranch with bison rather than cattle. His offer was greeted by locals with howls of protest, however. \textit{Dagget}, \textsc{supra} note 30, at 17.}
\footnote{164. \textit{Ranch Bought to Bar Buffalo}, \textsc{Dallas Morning News}, Feb. 20, 1993, at 13F.}
\footnote{165. \textsc{Id.}}
\footnote{167. \textit{See Blumm, \textsc{supra} note 45, at 421.}}
\footnote{168. For the best effort I have seen at making the connection, see Krutilla et al., \textsc{supra} note 105, at 554-56.}
\end{footnotes}
2. Commodity Producers as Advocates of Property Rights, “States’ Rights,” and Federal Treaties

Groups other than conservationists exhibit similar histories of opportunism when “objective” processes are discussed. Ranchers, proud of their “fierce independence,” have long benefited from subsidized grazing permits on federal land.169 As long as BLM managers cooperated, ranchers were happy with federal ownership and management of federal lands.170

Their views changed when the Secretary of the Interior threatened to increase grazing fees and questioned whether watersheds on BLM land ought to be free of grazing. Ranchers became advocates of private property rights, and they now argue that their grazing permit rights have vested, giving them a property right on federal land.171 At the same time, ranchers and loggers oppose genuine efforts at privatization because they realize they might be worse off if local lands were put up for bid. Market prices could exceed current use payments, and non-grazing outsiders might buy the land. Thus, ranchers argue for private property, but only to a point.

Worries over the future direction of the Department of the Interior have also led ranchers to become ardent states’ rights advocates.172 They argue that the states should control federal lands through land trusts or direct ownership. This is not a principled argument about the merits of state autonomy in a federal system; it is an argument based on the belief that their waning political power at the federal level can be more concentrated at the state level in the West. The argument that state ownership will turn losing timber programs on federal lands into profitable ones is a thinly veiled argument for

169. See McCoy, supra note 15.

170. See, e.g., Karl Hess Jr., Sagebrush Rebels Want It Both Ways, S.F. EXAMINER, Sept. 15, 1995, at A23 (“Western ranchers, of course, are like most other Americans. Their rebellion is not against government per se, but against government that serves them poorly.”).

171. See, e.g., Jim Nesbitt, Grazing Permits Feed Cow Collateral, HARRISBURG PATRIOT, Nov. 13, 1995, at B18 (federal grazing permits are used as collateral for bank loans, and the Internal Revenue Service routinely includes permits in the inheritance tax calculations of a dead rancher); Guy Webster, Grazing Arizona: Leases of State Land Under Dispute, ARIZ. REPUBLIC, June 5, 1995, at A1 (grazing rights on federal lands have long been considered a rancher’s entitlement, with the price of private ranch land reflecting the value of grazing rights associated with it).

172. See Hess, supra note 170, at A23 (explaining that “privatization is too risky. Non-ranchers—God forbid, environmentalists—might end up with their land. At worst, [ranchers] might have to pay their own way. It’s much easier to demand, as have a handful of rural Western counties, that Washington . . . hand over federal lands to state administration.”). See also McCoy, supra note 15 (proposed federal grazing reforms have prompted more than 100 Western counties to pass ordinances repudiating federal control of public lands).
cutting more timber.\textsuperscript{173} It is unlikely, however, that those urging that federal lands be given to the states really intend the move as the first step toward ultimate privatization.\textsuperscript{174}

In this vein, there is a bevy of extraordinary rationalizations for continuing the grazing subsidy based on the complete denial of any federal authority over federal lands. Some ranchers and local government officials have turned into lay legal experts: they deny that the federal government ever owned the land, and they assert that the Treaty of Guadalupe Hidalgo guarantees locals the right to graze free from federal interference. They also maintain that the federal government has violated the “equal footing doctrine” by keeping too much land in the western states when they were granted statehood, and finally, they argue locals can pass ordinances overriding federal laws.\textsuperscript{175} Recently, the United States Department of Justice had to sue Nye County, Nevada, to assert federal control over federal land.\textsuperscript{176} The County had passed resolutions that claimed state ownership of federal land, authorized the bulldozing of a national forest road, and filed criminal charges against federal employees who attempted to do their jobs on federal premises.\textsuperscript{177}

These states’ rights advocates, however, are beginning to wake up to a real problem. Under the current system of federalism they get more back from the federal government than they give in taxes.\textsuperscript{178} Indeed, it is a mystery why other states in our federal system have allowed the western states to receive a positive return on their federal tax payments for so long.\textsuperscript{179} Western states’ rights advocates may find that the cost of their renewed interest in federalism carries too high a price tag.


\textsuperscript{174} See, e.g., Like Thieves in the Night, \textit{supra} note 86, at 1 (political pressures at the state level might develop to give a single commercial interest title to the land and open the lands to development). My skepticism is based on the argument in part V, infra.

\textsuperscript{175} See McCoy, \textit{supra} note 15.


\textsuperscript{177} Id.

\textsuperscript{178} See, e.g., Ken Miller, \textit{BLM Land Rush: Are They Serious?}, \textit{Gannett News Service}, Oct. 5, 1995 (eight Western states would lose nearly $400 million in federal funds if all BLM lands were transferred to the states).

\textsuperscript{179} For the western states to have a positive return on their tax payments, other states must suffer and allow a negative return. The northeastern states seem to be the big losers. Why do they acquiesce? The historical answer seems to lie in the structure of Congress. In the United States Senate, sparsely populated states, such as those in the West, are over-represented, and a coalition among the senators of western states, concentrated on mutual issues, such as water management, for example, can marshal significant political influence.
Adam F. Dahlaman, a Republican commissioner in Teton County, was a big supporter of states’ rights until someone showed him the actual figures documenting the federal government’s net contributions in his county. For every $1 paid by a Teton County taxpayer, the federal government gives back $2.50. Teton County residents paid $10 million in federal taxes and received roughly $25 million in federal dollars in 1993, not including another $11 million of Social Security payments distributed annually in the county. The United States Forest Service paid the county $70,870 in fiscal year 1994 as part of a government deal to return twenty-five percent of the revenue derived from timber, grazing, mineral, and recreation use in national forests to counties whose borders encompass the forests. These Payments in Lieu of Taxes (PILT) are part of a $29 million payment the Forest Service distributes to forty-eight counties in the western states. When confronted with the data, Mr. Dahlaman conceded, “Sure shoots my theory in the head.”

Robert H. Nelson has studied what economic effect state ownership of BLM lands within their boundaries would have on the states. He compared additional revenues from the land (current federal revenue from the land minus PILTs) to the costs the states would incur by assuming the complete management responsibilities for the land. His findings? Assuming similar types and levels of management, most states are big losers. It would cost the Alaska state treasury $103.5 million, Idaho over $40 million, Nevada $36 million, Arizona $31.7 million, Montana $29.3 million, California $25.1 million, and Utah $21 million to take control of federal lands within their boundaries. Only Wyoming and New Mexico would gain. States, already strapped for cash, would incur a large, immediate cash drain as a result of such transfers. Even James Watt, the former Secretary

181. Id. The county had received $2.7 million in direct loans and $19.9 million in guaranteed loans and insurance. Much of the assistance went to farmers, whose output allows the county to claim itself as the malting barley capital of the world. The government paid farmers $9.3 million to reduce the size of their crops to stabilize demand and another $3.3 million to keep erodible land from being plowed. Drought assistance came to $300,000 and crop insurance totaled $505,744. Medicaid channeled $2.09 million into the county and Medicare gave another $341,000. Id.
182. Id.
183. Id.
184. Id.
185. Id.
187. Id. at 7.
188. Id.
of the Interior under President Reagan, acknowledged that states could not afford to manage the gifted land.\textsuperscript{189}

In the end, however, Nelson favors transferring federal lands to the states. He argues the states are the laboratories of the federal system and state control would break ossified patterns of land use and facilitate greater innovation and experimentation.\textsuperscript{190} Conservationists fear such a transfer would only lead to more timber cutting and grazing.

3. Changing Demographics Will Dwarf the Process

In the end, brute political force generated by fundamental shifts in economic and social trends will prevail across whatever government decisionmaking processes we choose, be they local, federal, or administrative. As is well chronicled by astute social observers, the face of the West is changing. As demographics change, the political fortunes of various groups will also change.\textsuperscript{191} The economy of the West is shifting away from mining, ranching and agriculture to recreation, high-tech (like communications, computers, and biotechnology) and service industries.\textsuperscript{192}

With the shift will come a new balance of political power that affects our use of federal land. Conservationists and recreationists appear to be gaining the ascendancy. But once they do, the uneasy alliance of these interests will unravel. The hunters will find themselves in conflict with the conservationists,\textsuperscript{193} and backpackers will find themselves in conflict with mountain bikers. With the break-up of old alliances, we will witness a new round of self-serving arguments that local decisionmaking or federal legislation or some other process is the best government process.

\begin{itemize}
  \item \textsuperscript{189} See Like Thieves in the Night, supra note 86, at 2.
  \item \textsuperscript{190} Nelson, supra note 186, at 7.
  \item \textsuperscript{191} See Michael Elliott, The West at War, NEWSWEEK, July 17, 1995, at 24 (tracking the conflict between the traditions of the mountain states and affluent newcomers to the region); Carol Chorey, Tracking the Rapidly Growing West: Effort Pokes Fun, Takes Hard Look at Effects of Change, DAILY CAMERA, July 15, 1995, at 1A (chronicling the "modern cowboy" phenomenon by charting the small western towns in which one can buy a daily New York Times, land a Lear Jet, and get access to a fiber-optic network).
  \item \textsuperscript{192} See Sharon Begley, In Utah, the New West Trumps the Old, NEWSWEEK, July 17, 1995, at 28.
  \item \textsuperscript{193} See Ray Ring, Unarmed But Dangerous Critics Close in on Hunting, HIGH COUNTRY NEWS, Dec. 11, 1995, at 10 ("image of hunters as conservationists has always suffered an inherent contradiction").
\end{itemize}
IV

A PROPOSAL FOR PRIVATIZING SOME FEDERAL LANDS:
BUT “WILL WE LOSE YELLOWSTONE?”

Considering the vast acreage of federal lands and noting the predominate use of some of these lands for commodity production, usually to benefit favored private interest groups, I propose that we sell some of our vast federal holdings—specifically, those parcels that politicians use to benefit favored interest groups through subsidized commodity production. My proposal is counter to the current trend, in which the acreage of federal lands is slowly growing rather than contracting. Although privatization is a political dead end,¹⁹⁴ this part presents the argument on the merits.

A. Retaining Parklands, Wilderness, and Wildlife Refuges and Selling What’s Left

At the core of this proposal is my belief that there are significant amounts of federally held land that should not be consolidated into conservation areas.¹⁹⁵ Approximately 470 million acres of federal lands (out of a total of 630 million acres) are involved in some kind of commodity production. These areas are, to some extent, grazed, logged, or mined. They are not designated parks, wildlife refuges, or wilderness conservation areas. The balance between commodity production and public uses, such as wildlife habitat or passive recreation, varies widely with location.

As noted in part I, using commodity-producing federal lands to subsidize local business confounds the nation’s interest in a market-determined allocation of goods. The sale of some of these lands may actually aid conservation efforts by separating land that is susceptible to conservation claims from land that is not. It is sophistic to pretend, as many environmentalists do, that all federal lands are like Yellowstone Park. If we sell land used predominately for commodity production, then conservationists may have a leg up in arguing the remaining land ought to be set aside expressly for conservation and preservation.

The distinction between revenue-producing land that should be privately held and parkland reserved for public appreciation that should be government owned is not new. In 1776 in The Wealth of Nations, Adam Smith focused on the public ownership of stock, like

¹⁹⁴. See infra part V.
¹⁹⁵. I admit, I have not walked on many of the federal lands, nor have I identified specific parcels that I would recommend for sale. This recommendation comes from published materials. More specifically it comes from the aborted study by the Secretary of the Interior in 1982, which recommended the sale of 4.4 million acres of federal lands and the further study of another 25 million acres. See infra note 243.
real property and animals. Noting that a sovereign needs revenue to “defray . . . the expence of defending the society . . . and other necessary expences of government,” he discussed the merits of raising revenue through government ownership of resources or through taxes.196

Adam Smith concluded taxes were preferable to government ownership of resources because governments do not, unless very small, exhibit “orderly, vigilant, and parsimonious administration” of federal lands or public stock.197 He concluded with considerable understatement, “[b]ut whether . . . England; which, whatever may be its virtues, has never been famous for good economy; which, in time of peace, has generally conducted itself with the slothful and negligent profusion that is perhaps natural to monarckies . . . could be safely trusted with the management of [a mercantile project], must at least be a good deal more doubtful.”198 Critical to Smith’s argument was a distinction between government ownership of stock and land for revenue-producing activities, which is suspect, and government ownership of lands for “pleasure and magnificence.”199

Adam Smith noted from personal observation (his claim was largely empirical rather than theoretical) that private residual claimants make better use of land than a government when the land is used to generate revenue. Modern economists have explained the difference as a matter of human incentive. When individuals own both the income stream and the income-producing resource, in this case the

197. Id. at 770.
198. Id.
199. Consider the following passage from THE WEALTH OF NATIONS on crown lands:

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

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

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

Id. at 775-76.
land, individuals will take appropriate care of the land because the land itself has value based on capitalized future income. By contrast, when the government owns the land, politically adroit individuals can exploit the public's difficulty in monitoring the government's use of the land to extract income from the land at the expense of the land itself.

Federal lands held for public purposes—Adam Smith's "purposes of pleasure and magnificence"—are, of course, another matter. I am unpersuaded by libertarian economists who claim that, without federal government intervention, a private party would have created Yellowstone National Park or Rocky Mountain National Park to satisfy the demands of consumers. The initial investment would have been enormous and the difficulty of capturing the value of the recreational use in fees from all those who benefit from the park would have been substantial. These difficulties would only be compounded by the fact that a private owner would have trouble fencing out people who attempted to enter the park without paying and could not collect fees from those who never set foot in the park but were simply happy the park existed (for wildlife or for the future benefit of their children who might want to enjoy the facility). If private parties owned the land that now is Yellowstone, it is far more likely the area would be pockmarked with gold and silver mines, its timber logged, its

200. See GARY D. LIBECAP, LOCKING UP THE RANGE 23-28 (1981). I have heard the charge, as have most, that environmentalism is the last refuge of socialists. Pure arguments for socialism have suffered in light of the problems of Eastern Europe, the late U.S.S.R., Sweden and New Zealand, each once examples of social systems with cradle-to-grave government programs. So, conservative radio commentators argue, environmentalism is the new cloak for the old position that free-market-based economies are cruel and harsh. My argument in this paper assumes a capitalist economy and considers the appropriate role of government ownership of land inside that style of an economy. Those who take issue with the statement in the text to which this note is attached believe that a capitalist economy is detrimental in general to our long run interests (the welfare of our children) and are arguing beyond the scope of my paper.

201. Here I split with John Baden and Steve Hanke, who argue that wilderness areas should be privately owned and managed. See CLAWSON, supra note 54, at 156 (describing their views).


203. I admit there are scattered examples of the contrary. See Tony Davis, The Southwest's Last Real River, Will It Flow On?, HIGH COUNTRY NEWS, June 12, 1995, at 1 (describing the Gray Hawk Ranch, a private bird-watching retreat along the San Pedro River a few miles east of Sierra Vista, Arizona. The owner, who collects fees for granting access to bird and snake observers, noted, "It's very fulfilling. It doesn't pay worth a damn, though.").

204. Economists call this "free riding." The private owner of a park could not capture the value of the views enjoyed by those located outside the park's boundaries. Adjacent owners benefit from the park's existence without payment. PAUL A. SAMUELSON, ECONOMICS 150-51 (11th ed. 1980).
river diverted for irrigation, its river beds trampled by cattle, and its canyons crisscrossed with all-terrain-vehicle trails.

A park is also more akin to a museum or library than an amusement park or race-track in an important dimension. We are uncomfortable allocating access to parklands according to ability to pay, even if it would be practical to extract payment from all users. There is a cultural interest in a populace that appreciates its place in history, appreciates the arts and, in the same vein, appreciates its place in nature. We have not turned to cash subsidies or vouchers to support access to museums and libraries, and we view access to parks as similarly important.

I recognize the decision about which land to sell and which to keep would be contentious. The federal government would have to develop workable criteria for guiding its decisions, develop a decision-making apparatus for applying the criteria, and develop a sensible method of selling land identified for disposal. Long-term antagonists would be heard at each stage, and Congress would intervene occasionally in particularly sensitive decisions with high political stakes. As criteria for holding land in the public domain, I suggest land should be sold unless it is used for one of three public purposes: passive (not active) recreation in a public park, wildlife conservation, or wilderness conservation.

Common questions asked in response to this proposal are: “Will we lose the West?” and “Will we lose our national parks?” To those who ask these questions, the present system provides some things that are dear and worth keeping—the West or Yellowstone—and even a small risk of losing these through a major change in ownership is too great to bear. Implicitly, these questioners assume any problems in the present system can be changed incrementally within existing ownership and regulatory structures. However, if we continue on our present course, we may lose the West regardless as our national parks and other heavily used federal lands deteriorate irreparably. Managed in their current form, our federal lands suffer from increased pressure generated by a burgeoning population. As long as

205. The government’s history under section 203 of the Federal Land Policy and Management Act (FLPMA) does not inspire confidence. See infra note 255.

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

207. See, e.g., Rauber, supra note 96.

208. See James M. Ridenour, Our National Parks: The Slide Towards Mediocrity, Paper Presented at Conference on Challenging Federal Ownership and Management: Public
access to federal lands is subsidized, making access easy for many people, the land is in jeopardy of being overused and overrun.

Anyone hoping to "save the West"—that is, to preserve its open vastness—will ultimately have to advocate changes in how we allocate federal land use.209 For example, one could argue we should reserve land as wild habitat and allow only hikers with permits to access the land, effectively creating limited-access national parks or wilderness areas. However, unless there are also major shifts in political climate, such changes are generally unlikely to succeed, except perhaps in Alaska or with very small parcels where uses are inherently limited. Proponents of vast unspoiled spaces must marshal enough political power to defeat the considerable political clout of miners, loggers, ranchers, active recreationists, farmers, and electricity users. The 1994 national elections and the 1995 House budget proposals are rude reminders that political fortunes ebb and flow.210 Can we save the West with a strategy dependent on federal management when environmentally conscious Democrats will not always control Congress or the presidency?211

B. Arguments Against the Sale of Nonparklands: "Land Sold Is Land Lost" and "Ecosystems Are Ubiquitous"

It is an insufficient rebuttal to argue that we may mistakenly sell land that should be kept. Conservation biologists claim that we do not know enough about any parcel of land to make a decision to sell, and they point out how we have historically underestimated the interconnectedness of large natural ecosystems. As a consequence, they continue, the federal government should hang on to all land currently owned and maybe buy more, (warehousing it in commodity production, like mining and logging?), until we figure out whether it is important enough to conserve.

At the margin, it is wise for us to err on the side of conservation when land disposition is at issue, but we should still evaluate the usefulness of individual parcels of federal land as wilderness areas, parks,
wildlife refuges, and as commodity-producing lands. After all, the government owns most of its lands entirely by historical accident, not because the lands had special conservation value.\textsuperscript{212} Reliance on historical accident is not a sufficient guide for future choices; it contains no internal standards.

The absence of sensible criteria for land disposition is best illustrated by two questions. Should we buy more land? What should we do with the land that escheats to the federal government? These are not hypothetical questions.

The federal government recently came into possession of a large quantity of privately held land through the collapse of federally insured savings and loan banks; it is also in the process of deciding what to do with outdated military bases. A simple-minded application of the conservation biologists' argument would lead the federal government to refuse to sell any of the land obtained through S&L foreclosures or any of the abandoned military bases.\textsuperscript{213} Instead the Resolution Trust Corporation has a presumption favoring sale. Neither the presumption to retain federal lands under the FLPMA\textsuperscript{214} nor the presumption to sell federal lands through the RTC seem appropriate. A more sophisticated analysis, neutral to how the federal government acquires land and based instead on some sensible overarching criteria for retention, would be preferable.

Conservationists' best argument for keeping commodity-producing lands in the public domain is that it is difficult to reacquire land once it is sold.\textsuperscript{215} If the federal government sells land that it later wants to reacquire for a park or a wildlife refuge, then reacquisition could be difficult if the owners hold out for top dollar or resist sale and force condemnation of the land. Moreover, the ecological condition of the land may have deteriorated, leading to expensive reclamation efforts. These possibilities generate an apprehension that land once sold is permanently lost to the conservationist cause. These fears, although real at some level, are overplayed, perhaps for political leverage.

\textsuperscript{212} Much of the federal lands were once offered to private interests but there were no takers. See Bates, supra note 5, at 4-7 (describing various programs to dispose of federal lands).

\textsuperscript{213} This is the major problem with Scott Lehmann's Privatizing Public Lands, supra note 89, at 217-20. His argument is that we should not sell lands that are already public, but he offers us no help with whether newly acquired S&L land should be sold.

\textsuperscript{214} For more discussion of the presumption against the sale of federal lands embodied in the FLPMA, see infra note 255.

As noted above in part III.B., the federal government can choose to retain significant control over land it has sold. Parcels can be sold under limited-use covenants, and Congress can enact broad based regulations governing land use. A conditional deed can be renegotiated, and state zoning, business regulation, and wildlife conservation statutes can be amended or augmented. We actually have a long and successful history of reacquiring land for airports, highways and parks, for example, the huge Shenandoah National Park in Virginia.

Opponents of privatization not only overestimate the costs of reacquiring land, but they underestimate the political costs of managing our vast stock of existing federal land. Government retention of land does not necessarily mean that changes in the current use of federal lands come cost-free. Success in the political process, which controls the use of federal land, is expensive, as parties will spend substantial (and perhaps off-setting) amounts to lobby public officials for favored government action. The private cost of extensive lobbying by both sides attempting to secure specific use allocations of federal lands ought to be added to the huge costs of federal land management when making any calculation of the total social cost for federal management of public land.

Even if we can establish criteria for retaining government ownership, and those criteria include, as they should, special consideration for wildlife, opponents of land disposition will claim (and have claimed) that all federal lands must be retained. "Scientific" analysis of what land is necessary to preserve habitat for plants and animals seems boundless and ever expanding. Environmentalists (aided, perhaps, by federal agency officials who seek to expand their domain) take a very broad view of what is necessary to preserve wild flora and fauna. The ecosystem concept, the darling of ecologists, is infinitely

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216. See, e.g., Government Should Add to Park Land, Groups Say, DENV. POST, Feb. 26, 1995, at 2C (the Federal Land and Water Conservation Fund, the largest source of land acquisition funds, has appropriated an average of $252 million per year since 1981 to purchase private lands in and adjacent to national parks, forests, and BLM lands).

217. See, e.g., Congressional Hearing Testimonies, FED. NEWS SERVICE, Mar. 9, 1995 (properties within Shenandoah National Park were acquired by Virginia and donated to the federal government).

218. See, e.g., Robert T. Nelson, Tate Seeks to Curb Lobbying by Federal Grant Recipients, SEATTLE TIMES, Oct. 26, 1995, at B6 (some $260,000 was spent on television and radio ads to oppose U.S. Representative Randy Tate's political positions, including a series of radio spots by the Sierra Club targeting Tate's support for changes to the Clean Water Act); Kevin Carmody, It's a Jungle Out There, COLUM. JOURNALISM REV., May 1, 1995, at 40 (ten public relations firms earned a total of $75 million from their corporate clients in 1993 for lobbying on environmental issues).

219. Cf. RICHARD POSNER, ANTITRUST LAW 11 (1976) (identifying the costs of attempting to obtain a monopoly as a social loss).

220. An example is the debate over recent amendments to the Clean Water Act which were approved by the U.S. House of Representatives. Proponents of the bill posited that
The danger is that the ecosystem concept will become a malleable construct that ecologists can define to be as large as Nevada or as small as a local pond, depending on political exigency. In theory, everything in nature is connected to everything else. Consistent with such a view, all government and most private land is part of the same ecosystem.

In 1980, the National Park Service described the two million acre Yellowstone Park as an intact ecosystem. In 1986, the Park Service defined a “greater Yellowstone ecosystem” of six million acres. By 1991, the Service tripled the ecosystem to include eighteen million acres. Has our view of “ecosystem” changed or is it politics? Although the concept of an ecosystem has scientific parameters, where the scientific boundaries are obscure the scientific concept transforms into a political one. Such misuse of the ecosystem concept trivializes it.

The debate over ecosystems also obscures a more significant point. Ecologists recognize that ecosystems, even prudently defined, do not respect boundaries between public and private land. They urge us to reject the “enclave” theory of conservation: they say we cannot protect endangered species by setting aside enclaves of public lands while not regulating other private lands that impact the ecosystems in the enclave. They urge regulation of private land, through zoning and other land use regulations, to protect targeted ecosystems.

Their argument has a flip side. Rejection of the enclave theory of conservation also diminishes the tension created by land sales. If the government sells land it believes has little conservation value and later decides that it underestimated the land’s environmental value, it can...

“the bill requires a new definition of what constitutes a wetland—a definition that actually requires a reasonable relationship to water.” See Kris Henry, House Rewrites Clean Water Act, STAR TRIB., May 17, 1995, at 1A.

Environmentalists argued that the existing definition of wetlands should not be tightened, despite the fact that the definition includes areas that are bone-dry for months at a time, and even regions that are frozen for much of the year. Compounding the problem is the involvement of several government agencies—the U.S. Army Corps of Engineers, EPA, the Fish and Wildlife Service, and the Department of Agriculture—in determining what is or is not a wetland. See Gary Lee & Curt Suplee, Debate to Begin on Clean Water Act Revision, WASH. POST, May 10, 1995, at A8.


222. See ALSTON CHASE, IN A DARK WOOD: THE FIGHT OVER FORESTS AND THE RISING TYRANNY OF ECOLOGY (1995) (arguing that implementation of the “ecosystems ecology” notion has been detrimental to society and nature).

223. People, of course, are excluded from an ecosystem analysis. See, e.g., EASTERBROOK, supra note 3, at 106-109.

still regulate the environmentally sensitive aspects of the land. In admitting the government does not have to own the land to implement conservation or environmental goals, advocates admit land sales are not as critical an event as many claim.

C. Modern Experience on Segregating Land Held for Public Purposes from Land Dominated by Private Uses

At issue for privatizers, then, is the serious question of whether the federal government can choose and apply sensible criteria to specific land parcels when any proposal will be addressed by so many professional advocates from opposing camps, each unwilling to compromise and each eager to exaggerate and inflame. I believe the government could select and apply appropriate criteria were it to try. As noted in the following part, however, present politics make this issue hypothetical.

My optimism is grounded in two recent events, one foreign and one domestic. Consider first the recent experience of New Zealand, a socialist democracy that, after going broke, embraced free market principles and privatized many of its government-owned industries. The New Zealand government owned most of the country's timber-producing lands. It managed them under "multiple use" criteria, similar to ours, that sought the best mix of timber revenues, recreation, and wildlife habitat. Admitting failure, as we have not, New Zealand's government changed course. The managing director of the New Zealand Forestry Corporation explained:

We had a massive campaign against the logging of our native forests. It went on continuously for 20 years. We gave multiple use the best possible shot, and finally repudiated it entirely. It didn't work in our circumstances. It just led to ambiguity of objectives and ambiguity of management. So we put all the environmental stuff in one organization and all the wood production in another.

Timber producers agreed that native forests consisting of over nineteen percent of the entire country were off-limits. Environmentalists accepted plantation logging on the remaining land, which was allocated to a government-owned corporation. The corpora-

229. The forests were leased to the New Zealand Forestry Corporation Limited, a public company established under the State Owned Enterprises Act of 1986. The Forestry Corporation has two shareholders, the Minister of Finance and the Minister for State
tion, which began with timber rights to one-half of the country's commercial forests, has sold over sixty percent of its cutting rights to private concerns and has the remainder up for bidding.\textsuperscript{230} On commercially-oriented land, trees are planted and harvested, just like corn or barley.

Back home in the United States, there is positive evidence of the government's ability to distinguish between land that ought to be held and land that ought to be sold subject to any appropriate restrictions on use. The performances of the RTC and the Defense Base Closure Commission in disposing of federally owned land suggests that disposal of federal lands is possible. The basic and largely uncontested operating presumption for both agencies was to alienate land, not retain it. The agencies maintained the presumption to sell even where the land at issue was adjacent to federal lands (BLM land, for example) and could have easily been incorporated into the existing land management structure (e.g., ceded to the BLM). Moreover, Congress charged each agency with establishing procedures for identifying and handling environmentally sensitive land.

The RTC developed regulations that give priority to conservation organizations or other government agencies for purchase or transfer of property that is "within the Coastal Barrier Resources System" or that is "undeveloped, greater than fifty acres in size, and adjacent to or contiguous with any lands managed by a governmental agency primarily for wildlife refuge, sanctuary, open space, recreational, historical, cultural, or natural resource conservation purposes."\textsuperscript{231} According to the regulations, "undeveloped" land is property with "natural, cultural, recreation, or scientific value of special significance," and few man-made structures.\textsuperscript{232}

Congress gave the General Services Administration (GSA) the task of closing several large military bases.\textsuperscript{233} Under 1949 legislation, the GSA offers property which it has the authority to alienate to other federal agencies, other public bodies, or private enterprises, in that order.\textsuperscript{234} The GSA is empowered to assess the suitableness of land for

\textsuperscript{230} Owned Enterprises. Report by the Policy Division of the Minister of Forestry, \textit{The Forestry Sector in New Zealand} \textit{8} (May 15, 1989). In its first six months of operation, the Forestry Corporation showed the first operating profit on government timberlands in over seventy years. \textit{N.Z. HERALD, Dec. 9, 1987}, at 1.
\textsuperscript{231} \textsuperscript{232}12 U.S.C.A. § 1441a-3(c)(2)(B) (West Supp. 1996).
wildlife conservation and to consider local and regional economic needs. To date, both programs seem to demonstrate that the federal government can capably handle large land disposal programs that include environmentally sensitive lands.

V
THE POLITICS OF FEDERAL LAND PRIVATIZATION IN THE UNITED STATES

The "movement" (and I am being generous here) for privatizing federal lands began with a "small group of intellectuals with respectable credentials who developed their arguments in both scholarly and popular outlets." The movement's base was a scattering of professors at Johns Hopkins University, Montana State University, the University of Washington, and a conservative think-tank or two. The group argued that the decision of how or whether to manage federal lands could be informed by the literature supporting deregulation of transportation, communication, banking, and other large industry sectors; by the sale of government assets like Conrail and waste-water treatment plants; and by our government's increasing tendency to contract out a variety of public services.

The premise of the general anti-government argument is well known by now. Government management does not allocate resources as well as a market because of the combination of two phenomena: the limited capacity of even well-intentioned government administrators; and the ease with which interest groups can corrupt ("capture") the government planning process. The group of professors used the large body of extant literature on failures of federal land management as support for general anti-government regulation principles.

236. Id. § 2687 (note, § 2903).
238. See, e.g., Clawson, supra note 54, at 154-56, 169 n.6 (describing the speeches and writings of John Baden, Richard Stroup, Steven Hanke, Gordon Tullock, and others in the late 1970s).
240. See supra part II.B.
241. See, e.g., Gershon Feder & Guy le Moigne, Managing Water in a Sustainable Manner, ASAP, June 1994, at 24 (exploring the problems associated with government water regulation). The weaknesses of government management include fragmented management of resources, overextended government agencies, and underpricing of resources. Id. See also Amy Hillman & Gerald Keim, International Variation in the Business-Government Interface: Institutional and Organizational Considerations, ASAP, Jan. 1995, at 193 (government agencies may be "captured" by well-organized interest groups so that agency decisionmaking is more responsive to those organized groups than to unorganized constituents).
The high-water mark of the privatization movement came in February, 1982.\textsuperscript{242} Early in the month the Cabinet Council on Economic Affairs presented President Reagan with a proposal for a program to dispose of “unneeded public lands.”\textsuperscript{243} President Reagan acceded and signed an executive order on February 25, 1982 establishing a Property Review Board to identify unneeded lands.

The Property Review Board sought help from the DOI, requesting that its field offices classify federal lands into one of three categories: park or wilderness to be permanently retained; land suitable for immediate sale; and land marked for further study. A paltry 4.4 million acres, comprising less than three percent of BLM land and less than one percent of all federal public lands, were earmarked for immediate sale. DOI identified only twenty-seven million acres in its “further study” category.\textsuperscript{244}

Contrary to the widely-held contemporary view of these events, Interior Secretary James Watt did not initially support the program. Instead, he favored grants of federal lands to state and local governments. Nevertheless, the press falsely reported that the government was going to sell thirty-five million acres and labeled it the “land sale of the century.”\textsuperscript{245} To the astonishment of privatization advocates, ranchers and other traditional western land use groups banded together with environmentalists to defeat the program. Ranchers feared paying full value for grazing; miners feared paying more for mineral deposits; environmental groups feared large-scale development on sold land; local communities feared losing free access to federal land; private landowners worried about the short-term depression of property values caused by the sale; and recreational enthusiasts feared having to pay for their pursuits. Even the “sagebrush rebels” of the period attacked the sale.\textsuperscript{246}

The opponents of privatization did not select targets with precision; they used a blunderbuss. They labeled as suspect all federal land sales, regardless of location. Spokespersons for both sides shamelessly worked the most politically effective rhetoric, falsely accusing Reagan of wanting to sell the national parks.\textsuperscript{247} Public opinion became so po-


\textsuperscript{243} Nelson, supra note 22, at 186 (quoting from memorandum for the President from the Cabinet Council on Economic Affairs entitled “Federal Property Review Program,” (Feb. 9, 1982)).

\textsuperscript{244} Id. at 189. Of this, 7.5 million acres was “checkerboard pattern land” created by checkerboard grants to railroads in the early nineteenth century. Id.


\textsuperscript{246} See supra note 172.

larized that the government could not even sell street-corner lots in Reno and Palm Springs. The issue became so inflamed that the Governor of Idaho, John Evans, threatened to call out the Idaho branch of the National Guard to stop the sales. In response to the overwhelming political pressure, Secretary Watt officially disabled the Property Review Board from selling land in July, 1983.

Privatization proponents, chastened, have regrouped somewhat and now argue for what they consider second-best solutions: the grant of long-term leases and the recognition of de facto property rights in federal lands, among others. Only one or two mavericks are still arguing for privatization. By and large, the presumption against the sale of federal lands embodied in the FLPMA remains intact.

248. See, e.g., Coggins & Nagel, supra note 68, at 495 (public opposition stymied the Property Review Board's plan to sell off 4.4 million acres of federal land, and land sales totaled a mere 4,600 acres when the Board was finally disbanded a year later).


250. See Coggins & Nagel, supra note 68.

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

252. See generally CLAWSON, supra note 54, at 200-24 (describing long-term leases and the operation of such a system on federal lands).

253. See, e.g., NELSON, supra note 22, at 333-64.


255. 43 U.S.C.A. §§ 1701-1782 (West 1986 & Supp. 1996). The first sentence of FLPMA declares a policy that "public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest." Id. § 1701(a)(1). The Act provides three criteria for sale. Sale is permitted only if, as a result of systematic land use planning, it is determined that the tract is "difficult and uneconomic to manage," that the tract "was acquired for a specific purpose and . . . is no longer required for that or any other Federal purpose," or that "disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values, including, but not limited to, recreation and scenic values, which would be served by maintaining such tract in Federal ownership." Id. § 1713(a). A sale of more than 2,500 acres cannot be consummated for ninety days, during which time either House may veto the sale. Id. § 1713(c). All sales must be at fair market value. Id. § 1713(d). See generally 43 C.F.R. § 2710.0-1 (1995) (regulations on BLM land sales).

247. See, e.g., Coggins & Nagel, supra note 68, at 495 (public opposition stymied the Property Review Board's plan to sell off 4.4 million acres of federal land, and land sales totaled a mere 4,600 acres when the Board was finally disbanded a year later).
swaps are more common than sales, but the amount of land swapped is still very small.256 Federal lands with little public value are swapped for private lands of higher public value. However, as these swaps get more attention, even these marginal gains may become more difficult to achieve.257

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

The planning process required to sell land has proven so cumbersome and so enticing for litigants that all involved agree that the disposal process under FLPMA is “locked up.” E.g., Conservation Law Foundation v. Harper, 587 F. Supp. 357 (D. Mass. 1984) (conservation organizations successfully halted a public land sale by arguing that the sale required an environmental impact statement). In 1993, the BLM sold only 4,273.48 acres for $1,206,821.51. BUREAU OF LAND MGMT., U.S. DEP’T OF INTERIOR, PUBLIC LAND STATISTICS 11 (1993).


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

257. See, e.g., Katharine Collins, Irony Piles On Irony in Wyoming, HIGH COUNTRY NEWS, Aug. 7, 1995, at 4 (describing the political difficulties of a proposed land swap in Jackson Hole, Wyo.). See also Samuel Western, After 17 Years, Property Rights Finally Win in Wyoming, WALL ST. J., July 19, 1995, at A13 (a botched exchange cost the federal government $200 million, the largest award ever handed down by the U.S. Court of Claims on a takings clause claim).
CONCLUSION

My basic recommendation is straightforward—we should sell federal lands where commodity-based uses predominate. I am sobered by the understanding, however, that this recommendation is not politically feasible. Nor is it likely, even in the aftermath of the 1994 revolution in Congress, to be viable in the foreseeable future.

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

The balance of power in this struggle is shifting because the demographics of the West are moving away from commodity-based groups, who have dominated allocation decisions for more than fifty years, to recreation-based groups. This shift will cause new tensions in old alliances; recreationists and conservationists, for example, will disagree with each other over land use decisions. There will also be divisions among the recreationists: backpackers will clash with off-road vehicle enthusiasts, and birdwatchers will object to mountain bikers.258

These new disputes will be just as ugly as the old ones, with each group marshaling raw political power, throwing out a smoke screen of arguments based on collective values while staking claim to a subsidy for their activities. Until the American public frees itself from the notion that government is a vehicle for the pursuit of private gain through grants of privilege, we will continue to witness this sorry spectacle.259

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258. The clash is already in evidence. See, e.g., Ring, supra note 193; Outfitters Take Aim at Four-Wheeler, HIGH COUNTRY NEWS, Dec. 11, 1995, at 12.

259. This is not to deny that many supporters of parks and wilderness areas are motivated to some degree by admirable altruism. The overwhelmingly private use of federal land—for logging, ranching, mining, and active recreation—suggests, however, that federal land policies typically serve predominately private interests.