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George C. Coggins

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Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration

George C. Coggins*

INTRODUCTION

The general question is: Who should make the decisions allocating or protecting the federally owned lands and natural resources? The more specific question is: Should such authority be "devolved" upon private "collaborative" groups? This essay answers the latter question with an emphatic no.

The appropriate level of management decisionmaking concerning public resources is a policy or political problem, not a legal question, because the law is settled. The Constitution of the United States delegates exclusively to Congress the power to make needful rules governing federal property.1 The United States Code is equally clear: Congress has delegated regulatory power, together with substantive and procedural limitations, to four main federal land management agencies.2 Those agencies are required by law to invite public participation in the deliberative and regulatory processes,3 but Congress has stated plainly that in each case final decisions are to be made by the agencies.4 Those agency decisions ordinarily are subject to judicial review5 and can be overridden by the legislature.6 But, no federal stat-

1. U.S. CONST. art. IV, § 3, cl. 2.
2. See generally, GEORGE C. COGGINS & ROBERT L. Glicksman, PUBLIC NATURAL RESOURCES LAW (1990 supplemented) [hereinafter COGGINS & Glicksman].
4. See e.g., § 1732(a).
6. See, e.g., GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES
ute purports to delegate (or "devolve") powers of decision over federal natural resources to unelected, unappointed local citizens councils. Nor do any of those laws instruct the agencies to abdicate their powers in that fashion.

Nevertheless, devolved collaboration has become the latest ideological fad in federal land management. The Quincy Library Group and the Applegate Partnership are only the most notorious of the consensus-building organizations springing up all over the West.\(^7\) Their immediate cause is dissatisfaction with the workings of the Forest Service, the Bureau of Land Management (BLM), the National Park Service, or the Fish and Wildlife Service for a multitude of real and perceived shortcomings. The underlying theory is that a self-selected group of local people who promise to be civil with one another can do a better job of allocating federal natural resources than the duly constituted federal authorities. Many federal bureaucrats are enthusiastic about this kind of private process because it is an all-purpose method of passing the buck on difficult and controversial allocation issues.\(^8\)

Collaboration, consensus, civility, cooperation, and community of course are not bad attributes or characteristics in themselves. They are entirely appropriate for resolving local issues over use of private property. Confrontation, controversy, and litigation usually are best avoided. Consensual transactions, such as Nature Conservancy land purchases, serve many public and private values. But national lands are not private lands, and allocation of national resources is not a local issue. Ownership does matter. When the subject is every American's natural heritage, devolved local collaborationism is entirely inappropriate.

The reasons for this contrarian conclusion span a wide spectrum. As a legal matter, devolution, or collaboration, as currently envisioned is simply abdication of responsibility and as such is unlawful. As an historical matter, the method has been tried and found wanting.\(^9\) As a theoretical matter, nearly all the premises underlying local superiority are false or unproven. As a

\(^7\) See generally Linda Blum, The View from Quincy, 2 CHRONICLE OF COMMUNITY 39 (Winter 1998) (discussing the Quincy Library Group's consensus-building efforts).


\(^9\) See id. at 218.
policy matter the process lends itself to co-optation and has the potential for severely interfering with national priorities. Devolution in the end only adds more layers of complication and irresponsibility to an already complicated arena, and it should be jettisoned.

I.
HISTORY AND LEGALITY

The notion of devolving decisionmaking authority over federal resources down to local citizens' groups is anything but novel. From the birth of the Nation, local citizens have banded together, usually at the expense of the general public and often with the connivance of federal and local officials. "Claims clubs" were formed locally to dissuade outsiders, usually by illegal means, from bidding on lands the members wanted for themselves.¹⁰ Similarly, local citizens assisted one another in stealing federal timber¹¹ and lead mines in the Midwest.¹²

Local collaboration has been a favored technique in this century as well. Irrigators have organized to cheat the government out of reclamation subsidies.¹³ Logging companies, loggers' unions, and timber dependent communities long have agreed on how the Forest Service should subsidize them.¹⁴ The most egregious example are the grazing advisory councils composed of ranchers who dictated the winners and losers in federal forage allocation.¹⁵ They won; small ranchers, nomadic sheepherders, and rangeland health lost.¹⁶

Very few positive results from devolved collaboration/consensus can be identified. Much local decisionmaking has been narrow, greedy, and shortsighted, resulting in price-fixing, collusion, corruption, and subsidization. Perhaps the worst aspect of devolution is the utter irresponsibility of all of the parties, notably the federal agencies who abdicate their legal functions.¹⁷

¹⁰ See Paul W. Gates, History of Public Land Law Development 152-63 (1968) [hereinafter Gates].
¹¹ See id. at ch. XIX.
¹² See id. at 702-706.
¹³ See id. at 661-66.
¹⁴ See id. at ch. XX.
¹⁵ See, e.g., Phillip O. Foss, Politics and Grass passim (1960) [hereinafter Foss].
¹⁷ See George C. Coggins, "Devolution" in Federal Land Law, supra note 8, at
All four of the main federal land management agencies have been guilty of abdication at one time or another. The National Park Service eradicated predators in parks at the behest of local ranchers. The Fish and Wildlife Service elevated expediency over principle to appease local recreationists. The Forest Service often abandoned scientific forestry to serve local demands. The BLM long was the model for the capture phenomenon in administrative law.

Most of these abdications were not held illegal by the courts, in part because irresponsibility is common in federal public land law. In 1911, the United States Supreme Court upheld a broad delegation of management authority to the Forest Service. Since that time, Congress again and again has ducked hard allocation questions by delegating nearly standardless management powers to the Forest Service and the BLM. The courts too have invented and embellished mechanisms allowing themselves to avoid difficult substantive issues. The most pernicious mechanism is the doctrine of deference to agency interpretations of law. The courts so deferring ignore Chief Justice Marshall's dictum that it is "most emphatically the province and duty of the judicial department to say what the law is" and the similar command in the Administrative Procedure Act. Deference, coupled with other judge-made doctrines (such as standing and ripeness) that are designed to avoid judicial decision of the merits of the case, has resulted in such truly awful decisions as the Reno District Grazing case. These instances of abdicative irresponsibility are legal because the Court says they are.

20. See, e.g., Foss, supra note 15, passim.
25. 5 U.S.C. § 706 (1994) (The reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions . . .").
28. NRDC v. Hodel, 819 F.2d 927 (9th Cir. 1987).
Fortunately, courts have also sketched out a few lines beyond which agencies cannot go in abdicating administrative functions. When the Secretary of the Interior refused to take action to protect the resources of Redwoods National Park, a district court ordered him to do whatever was possible to preserve the Park. \(^{30}\) When the Fish and Wildlife Service abdicated to local political pressures and allowed harmful motorboat use in a wildlife refuge, a court enjoined the action. \(^{31}\) When the Forest Service refused to assert implied reserved water rights for its wilderness areas, a lower court ordered the agency to take appropriate protective action. \(^{32}\)

Two related instances provide the most relevant examples. In the first case, the BLM decided to devolve management authority onto selected rancher-permittees through Cooperative Management Agreements. \(^{33}\) The court strongly denounced this abdication of BLM’s authority, holding it arbitrary and unlawful under all of the governing statutes. \(^{34}\) In the second case, Secretary of the Interior, James Watt, attempted to abdicate general land management authority in favor of land and resource privatization. \(^{35}\) Courts and Congress responded to Secretary Watt’s devolution and privatization initiatives by frustrating them at nearly every turn. \(^{36}\)

Devolved collaboration as currently advocated crosses the line at which judicial deference insulates agency irresponsibility from reversal. Every pertinent statute says that the Secretary or an agency, not local citizens, shall decide the allocation questions. No statute authorizes abdication of the authority. It is illegal. Period.

II.
PREMISES, ASSUMPTIONS, AND SURMISES

History and illegality are not the only reasons to oppose devolved collaborative processes. The notion rests on false and unproven premises. Devolution proponents assume, without

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34. Id.
36. See id. at 498.
stating, that all participants are reasonable people who will see all sides of an issue and reach appropriate, mutually acceptable compromises. This assumption is demonstrably false. The West is home to a disproportionate number of every kind of obdurate extremist,\textsuperscript{37} demagogue,\textsuperscript{38} and outright crook.\textsuperscript{39} Reasoned discourse with them will be unavailing.

In addition, the premise that compromise is possible is often dead wrong. Interests and ideologies are too strong on all sides. The assumption that all parties will be winners is usually false as well. Distribution of losses is a more likely outcome, especially when resource damage is the cause of the collaborative effort. Further, not all participants will come to the table with equally clean hands or equal powers, as proponents must presume. Finally, the premise that all legitimate voices will be heard is also clearly false.\textsuperscript{40} Some current groups are intentionally exclusionary, barring participation by outside interests.\textsuperscript{41} When the nation’s lands and resources are at stake, there are no outside interests.\textsuperscript{42}

III.
\textbf{CO-OPTATION}

National conservation organizations increasingly oppose local collaborative processes.\textsuperscript{43} Their objections go beyond complaining about exclusion. They argue that the interminable meetings are unnecessarily time-wasting and futile. These organizations also believe that the results set no precedents.\textsuperscript{44}

Some environmentalists further contend that the collaboration movement is essentially reactionary, springing primarily from a desire to defend the West’s peculiar caste systems from the onslaught of modern reality. Certainly, the main western commodity interests have never sought consensus from or col-

\begin{itemize}
\item[38.] And, to be fair, demagoguette. See id. at 663 n.113 (regarding Rep. Che-nowith, (R- Idaho)).
\item[39.] This category includes not only timber, water, and cattle thieves, but also tree spikers and monkeywrench gangs.
\item[40.] See Louis Blumberg & Darrell Kunffke, \textit{Count Us Out}, 2 CHRONICLE OF COMMUNITY 41, 42 (Winter 1998)
\item[41.] See id.
\item[42.] These contentions are further developed in Glicksman, supra note 37; Cog-gins, \textit{"Devolution in Federal Land Law}, supra note 8; Blumberg & Kunffke, supra note 40.
\item[43.] See Blumberg & Kunffke, supra note 40.
\end{itemize}
laboration with the conservationists when production was the dominant mode on the federal lands.\textsuperscript{45}

Collaboration protagonists' emphasis on concepts such as lifestyle, community, western way of life, custom and culture, and so forth buttresses the surmise that the movement is reactionary.\textsuperscript{46} This approach has already spawned the silly and dangerous "county supremacy" movement.\textsuperscript{47} Most of the subsidies, preferences, privileges, and related benefits that characterize federal land law have no modern justifications.\textsuperscript{48} The rest of the country has no obligation whatsoever to continue to prop up the "lifestyles" of westerners. The welfare cowboys should compete like everybody else.

IV.

NATIONAL MANAGEMENT OF NATIONAL LANDS AND RESOURCES

Devolved collaboration threatens to undo important elements of federal procedural law, federal substantive law, and emerging national priorities. Procedurally, federal law calls for regulation promulgation,\textsuperscript{49} public participation,\textsuperscript{50} environmental evaluation,\textsuperscript{51} state and local cooperation,\textsuperscript{52} and endangered species consultation,\textsuperscript{53} among other things.\textsuperscript{54} Congress in its wisdom also has decreed that land management agencies must comply with various land use planning procedures in their decision-making.\textsuperscript{55} The intentional inefficiency of these arrangements tempts agencies to cut corners and exasperates local citizens. While the latter may wish to "cut red tape," local collaboration in fact adds another level of complication. In any event, the seeming labyrinth of federal procedural requirements, however burdensome, is legally required.\textsuperscript{56}

Substantively, local consensus builders have little incentive to abide by federal law. For better or worse, Congress over the

\textsuperscript{45} See, e.g., Coggins & Lindberg-Johnson, supra note 16, at 65-66.
\textsuperscript{46} See, e.g., Glicksman, supra note 37, at 653-54, 661-62.
\textsuperscript{47} See id. at 654.
\textsuperscript{49} See, e.g., 16 U.S.C. § 1604(g) (1994).
\textsuperscript{50} See, e.g., 43 U.S.C. § 1739(e) (1994).
\textsuperscript{52} See, e.g., 43 U.S.C. § 1712(c)(9) (1994).
\textsuperscript{54} See Coggins & Glicksman, supra note 2., at ch. 6-8.
\textsuperscript{56} More federal projects and proposals are enjoined for procedural noncompliance than are halted for substantive reasons.
past several decades has dictated a variety of environmental and other safeguards in public land decisionmaking.\textsuperscript{57} The pollution laws set national standards.\textsuperscript{58} The National Forest Management Act\textsuperscript{59} and Federal Land Policy and Management Act\textsuperscript{60} require formal planning,\textsuperscript{61} public participation,\textsuperscript{62} and multiple-use, sustained-yield management.\textsuperscript{63} The Endangered Species Act\textsuperscript{64} contains strict rules for wildlife protection.\textsuperscript{65} Abdicating management authority to local citizens councils would be the functional equivalent of repealing those laws by implication, a highly disfavored construction.\textsuperscript{66} The Environmental Protection Agency has a better idea of the magnitude of wetlands destruction nationally than the Quincy Library Group, and the Fish and Wildlife Service is far more devoted to preserving endangered butterflies than the Applegate Partnership.

The critical fact is that the national lands and resources are, indeed, national. Congress has determined that the remaining federal lands have sufficient national value to retain them in federal ownership under federal management.\textsuperscript{67}

Federal land management is in the process of becoming broader and more inclusive. Large scale regional plans, such as the Pine Barrens in New Jersey, the Tahoe Basin in California and Nevada, and the Columbia River Gorge in Washington and Oregon\textsuperscript{68} are growing in popularity and complexity. The concept of a Greater Yellowstone Ecosystem plan is gradually coming to fruition.\textsuperscript{69} Popper's idea of a Buffalo Commons on the High Plains has no visible political support, but nevertheless makes considerable sense. Some recently have advocated creation of a wildlife supercorridor running from Yellowstone to beyond Lake Louise in Canada.\textsuperscript{70} Others are promoting a National Heritage

\textsuperscript{57} See generally COGGINS & GLICKSMAN, supra note 2.
\textsuperscript{58} See id., at chs. 11-11D.
\textsuperscript{60} 43 U.S.C. §§ 1701-1784 (1994).
\textsuperscript{61} See COGGINS & GLICKSMAN, supra note 2, at ch. 10.
\textsuperscript{62} See id. at ch. 7.
\textsuperscript{63} See id. at ch. 16.
\textsuperscript{64} 16 U.S.C. §§ 1531-1544 (1994).
\textsuperscript{65} See COGGINS & GLICKSMAN, supra note 2, at ch. 15C.
\textsuperscript{68} See e.g., 16 U.S.C. §§ 544-544p (1994).
Trust to increase and consolidate preservation holdings. All of these are national proposals of national magnitude; all would suffer if subjected to parochial local concerns.

Local collaboration cannot deal with problems or issues of national scope. Land use planning for federal tracts must embrace more than local opinion.

CONCLUSION

Devolution and collaboration are merely forms of abdication. Abdication is the biggest problem in federal land management; it certainly is not the solution. Failure to carry out responsibilities by public officials and private citizens alike has been far too common in this arena. Congress often has refused to make the hard political choices, instead delegating broad management discretion to land management agencies without clear standards of decision. The courts too have abdicated a basic judicial function by deferring to those agencies' choices and interpretations. The instances of agency abdication in the face of local political pressure are too numerous to list. Devolution to local citizens' councils takes irresponsibility to the maximum because, with the inevitable dissolution of the local group, no one is responsible for anything.

Worthwhile reform will not come about by delegating decisions to transient, legally irresponsible, local groups. The legal system we have evolved, for all its faults, is fundamentally sound; most decisions emerging from it, however slowly, are consistent with law and public preference. Anyone who wants to can have a say. All interests will be better off if Congress actually decides the political resource allocation questions; the executive carries out the letter and spirit of the law; and the courts make sure the executive does just that.

71. See id.