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The Federal Forests Are Not What They Seem: Formal and Informal Claims to Federal Lands

Sally K. Fairfax, Louise P. Fortmann, Ann Hawkins, Lynn Huntsinger, Nancy Lee Peluso, and Steven A. Wolff

INTRODUCTION

Before the roles of states and communities in federal forest management can be evaluated, and possibly changed, the existing allocation roles must be properly understood. In this paper we first describe a Normal model of federal holdings that emphasizes federal ownership, jurisdiction, and decisionmaking.
We then discuss why that model is a poor point of departure for understanding or improving the management of federal lands. Assumptions that normally attach to the term "federal" simply confuse our understanding of these lands.

This review of the complex array of claims to "federal" lands is organized in five parts. We open with some preliminary thoughts about levels of government and the working realities of federalism. Next we briefly describe elements of the Normal model, as a combination of assumptions which depict federal lands as fairly contiguous geographic entities under fairly consistent federal jurisdiction and authority. Specifically, the normal model emphasizes three aspects of federal authority: ownership, jurisdiction, and administration. We then critique the model according to those three headings. Special attention is paid to ownership claims, as the other two issues are more familiar and are amply covered in other conference papers. We conclude that while much is known about the formal leakage in federal authority, the informal end of the spectrum is ill defined, with important consequences for informal claimants. If we are in the process of redesigning federal authority over public lands, further research is needed to better understand informal claims, particularly those we categorize as "historic." Failure to recognize and include these claims in the design process will likely result in inequities and unanticipated disputes.

I. INTRODUCTORY COMMENTS ABOUT LEVELS OF GOVERNMENT

The Normal model used to describe federal lands is supported by a simplistic notion of federalism, which is described as a layer cake. Each of the three layers, (federal, state, and local) has its own functions, spheres of authority, and resources. These levels of government are frequently portrayed as conflicting. In the conservation field, for example, local and state governments are thought to emphasize economic development and to support regional and local industry. In contrast the federal government is seen as more remote and therefore a more reliable
proponent of resource conservation; the necessary enforcer of environmental priorities and the protector of national interests in the nation’s resources.

The layer cake analogy has long since fallen into desuetude in academic circles.\textsuperscript{4} Academic arguments, however, are sometimes forgotten in the midst of practical considerations. Three issues ought to play a more consistent role in our thinking about levels of government. First, it should not be presumed that the federal government, states, or localities, consistently uphold identifiable positions on particular issues.

As residents of California, we are particularly aware that states frequently lead the federal government on environmental protection and sustainable resource management issues. Pesticide regulation, air quality, protection of the redwoods, and most recently, definition of and support for organic agriculture, are all areas in which California has had to defend its own standards against national efforts to dilute them.\textsuperscript{5} It is important to remember that over time public priorities, as well as state and federal administrations change, and therefore what constitutes a given policy direction is frequently a transitory matter.\textsuperscript{6}

Second, it is an error to think about levels of government as monolithic, or even as coherent. For example, “federal” forests are managed by four major conservation agencies— the US Forest Service, the National Park Service, the US Fish and Wildlife Service, and the Bureau of Land Management. These agencies proceed under different mandates, serve different constituencies, respond differently to market forces, and have significantly different agency cultures. Even in the same landscape, the federal agencies do not work or plan together, do not pursue the same goals, and do not necessarily support each other’s efforts.\textsuperscript{7}

\textsuperscript{4} See generally Fairfax, Old Recipes, supra note 2.

\textsuperscript{5} See Charles Wilkinson, Public Lands are Essential to Our National Heritage, (unpublished paper presented at the Conference on Public Land Management at the Natural Resources Law Center, University of Colorado, Oct. 11-13, 1995) (arguing for the absolute necessity for federal management to protect the Kaiparowits Plateau, apparently without realizing that the major threats to the same area are almost without exception federal projects and federally approved projects).

\textsuperscript{6} See Fairfax et al., Federalism and the Wild and Scenic Rivers Act, supra note 3.

one considers that the Bureau of Indian Affairs, the Corps of Engineers, the Army, Navy, Air Force, and a host of other federal agencies are also involved, it becomes clear that a monolithic view of federal land management is flawed.

Finally, local constituencies are not always just county, town, or locally elected and empowered officials. Anyone who has ever heard a federal bureaucrat in the field discuss the Washington D.C. or regional office, or a state bureaucrat complain about Sacramento or Albany, recognizes that "local" officialdom frequently means all the resource managers in a local area, irrespective of who signs their check.\textsuperscript{8}

All of this is familiar, but should remind us that levels of government do not consistently take positions that can be predicted, do not act in a coordinated fashion, and are not entirely discrete. We must remember, then, to be cautious in imputing meaning to levels of government.

II.
THE NORMAL MODEL

Many of these notions about levels of government undergird what we have characterized as the normal model of federal holdings. The conventional wisdom, symbolized on maps depicting large solid blocks of federal lands, is that the federal lands are relatively uninterrupted areas of federal ownership and jurisdiction, where federal agencies make decisions about management. This normal model is related to the presumption that the federal lands are national resources and ought to be managed to benefit the nation as a whole. The theory is that the federal agencies will be more environmentally benign than local managers who are tempted to exploit the commodities for private economic gain.\textsuperscript{9} Similarly, when Americans see a line on a map enclosing a green space (indicating a national park, forest, or grassland), they tend to presume that the primary purpose of the area is either conservation or public pleasure and that the public should be entitled to free or below cost recreation, hunting, or hiking access. We critique this Normal model by discussing


claims of ownership, jurisdiction, and the right to participate in decisionmaking and management.

III. DIVERSE OWNERSHIP CLAIMS ON FEDERAL LANDS

Contrary to the Normal model, federal lands are not just blocks of territory that are owned by the federal government. Rather there are three significant kinds of interruptions to federal ownership: (1) intermixed ownership; (2) easements, leases, and partial titles; and (3) informal claims. Spillovers and ecological interrelationships further complicate the notion of nationally owned parcels.

A. Intermixed Ownership

Historic disposition and settlement patterns led to admixed ownership in federal forests. The most obvious residue of the disposition policies of the nineteenth century land grants are the checkerboard patterns associated with railroad land grants made to states and private individuals.10 Other disposition policies led to a less patterned admixture. The Stock-Raising Homestead Act of 191611 severed, in a variety of ways, the surface estate from the mineral estate, leaving the federal government with only one or the other. Most of the federally owned coal in the Powder River Basin, for example, underlies privately owned surface estate. Thus, the admixture of ownership is not simply on the surface, but includes the subsurface as well. This admixture of disposition and reservations has left the Bureau of Land Management (BLM), holding many scraps of land that, for diverse reasons, did not pass into private ownership or reserved status until 1976.12

Recently acquired park lands include not only state parks, but also diverse federal holdings and extensive private land holdings. These lands, even those that are federally "owned" are subject to easements or other reservations of rights. Many of

12. It is frequently asserted, therefore, that the BLM manages the lands that nobody wanted. This is a very destructive myth. A better point of departure is that the lands now managed by the BLM were effectively controlled by users who saw no reason to endure the burdens of ownership. See Leigh Raymond & Sally K. Fairfax, Fragmentation of Public Domain Law and Policy: An Alternative to the "Shift to Retention" Thesis (forthcoming 1999) (on file with authors).
these arrangements reflect decisions made beginning very early in the land acquisition process. The federal government's policy has been to ease the political pain of federal designations by granting to existing rights holders a stunning variety of lease-back, life estate, heritable partial title and similar arrangements that are and will continue to be an important part of the federal ownership story for many decades to come.\footnote{See Sarah Connick & Sally K. Fairfax, Federal Land Acquisition for Conservation: A Policy History, (forthcoming 1999) (on file with authors). It is important to note that many of these variations arise from the fact that the four federal conservation agencies have significantly different acquisition authorities and use them to achieve very different purposes. See Joseph L. Sax, Buying Scenery: Land Acquisitions for the National Park Service, 1980 DUKE L.J. 709 (1980).}

The National Park Service, in particular, has very narrow land acquisition authority, that is frequently further constrained by Congressional language, providing that private lands within park boundaries, which are in conformity with land use plans approved by the Secretary will not be acquired.\footnote{See Sax, Buying Scenery, supra note 13. For a focused analysis of federal land acquisition policies, see Connick & Fairfax, supra note 13.}

B. Leases and Private Development and Access Rights.

Fragmentation is intensified by management decisions that are as old as the public lands agencies. Almost without exception, federal policy has been to lure private investment. The most basic decision made regarding management of the "federal" domain is that the federal government does not invest to develop the resources. A major goal of federal management has been, therefore, to encourage private investment without giving away the store.

Toward this goal, the government has devised a number of different arrangements which grant to private parties what can be understood as easements\footnote{See Keith D. Wiebe et al., Finding Common Ground on Public and Private Land, 52 J. SOIL AND WATER CONSERVATION 162 (1997).} or partial title to public lands. These arrangements\footnote{See SALLY K. FAIRFAX & CAROLYNE YALE, FEDERAL LANDS: A GUIDE TO PLANNING, MANAGEMENT, AND STATE REVENUES (1987).} include: recreation leases for private cabins in national forests and parks; oil, gas, and coal leases on national forest and wildlife refuge lands; timber sale contracts on BLM and national forest lands; concessions to run gas stations, hotels, bars, souvenir shops, grocery stores, marinas and similar facilities in national parks; timber sale contracts; rights to provide guide services on major rivers; and grazing leases.\footnote{See Leigh Raymond, Viewpoint: Are Grazing Rights on Public Lands a Form of} Each of
these arrangements conveys to private parties significant rights, frequently including the right to access their parcel over adjoining federal property. These private rights are neither insignificant nor unusual; rather, they are significant, contractual, and ubiquitous. The exact nature of the right differs slightly depending on the agency that granted it. And while federal managers have generally attempted to retain sufficient authority to protect federal interests, they have not always succeeded.

C. Informal Claims

Informal claims are difficult to assess because they are frequently ill defined and poorly understood. Nevertheless, they play an important role in public land policy and politics and must be recognized as part of the mixture of claims to federal resources. We tentatively organize informal claims into three categories that merit further analysis: transitional claims, underground economy claims, and historic claims.

Transitional claims describe two kinds of use or access: (1) those that are not formally recognized, but for which affected groups are in the process of seeking recognition; and (2) uses which were once recognized, but are presently losing their legitimacy. Off-road vehicle (ORV) riders, collectors of mushrooms and floral greens, trail bikers, and hang gliders all stake claims

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18. See James L. Huffman, The Inevitability of Private Rights in Public Lands, 65 U. COLO. L. REV. 241 (1994). Not wanting to plunge in over our heads with Dan Tarlock and Joe Sax headed to the podium, we carefully eschew any comment on the impact of private rights to water on the normal model of federal ownership. For an interesting view into part of this subject, see David Abelson, Water Rights and Grazing Permits: Transforming Public Lands into Private Lands, 65 U. COLO. L. REV. 407 (1994). Abelson concludes, in spite of his article's title, that water rights do not bolster grazers land claims. But there is little support for his claims, other than a religious faith in the normal model, and the outcome remains in doubt.


to the public lands. Some, like the mushroom collectors, are claiming particular collecting areas. Others, like the ORV riders, claim both recognition as a legitimate use of public lands and particular or generalized access to pursue their interests. On the other hand, the passage of time and changes in federal land management extinguish some well established rights. For example, the culturally important practice of hunting in Point Reyes National Seashore has been stopped. Additionally the practice of driving vehicles on the beach at Cape Cod has been curtailed and is now heavily regulated.

The notion of a transitional use helps us distinguish two other categories of informal claims to federal resources: underground claims, and historic claims. Underground claims assert rights to particular territories or uses, but are specifically not evolving toward legal recognition. The pot growers in Northern California, the Indian pot hunters in the South West, and meat hunters represent underground economy claimants. These claimants do not seek agency recognition of their presence—in fact they are generally clandestine—but they do claim the land they access or upon which they operate, often in ways that effectively exclude other users, occasionally with violence.

Historic claims, although presently considered illegal by the managers, are in fact perceived as legitimate by claimants, who are openly seeking formal recognition. They are perhaps best described by reference to the upper Rio Grande Valley, of New Mexico, or the Dann Sisters. Federal title to significant portions of the federal domain is strongly disputed, particularly by Hispanics in the Southwest and, more broadly, by Native
American populations. 25

Historic claims are diverse and complex, but two subspecies are worth noting. The first are historic claims to land title. Many groups and individuals believe, some with considerable justification, that the federal government stole their land, and they are making more or less formal efforts to have their historic rights and title recognized. Second, many groups claim historic access for particular purposes that the federal agencies do not recognize as rights. Some agencies may elect to manage with those claims in mind, 26 but it is discretionary with the agency rather than a matter of right with the claimant. These claims include not only traditional rights asserted by Native American and Hispanic communities, but also more recently evolved “rights” of local residents to collect firewood on federal lands. 27

Some informal claims are well understood and intensely litigated, such as many Native American claims. Others, are not well integrated into public resources planning. Similarly, while some claims and claimants are well represented in management adjudicating them, and outright land fraud and speculation schemes by land hungry American settlers and investors. For New Mexican examples, see CLYDE EASTMANN & JAMES R. EASTMANN, COMMUNITY GRAZING: PRACTICE AND POTENTIAL IN NEW MEXICO (1987). See also Placido Gomez, The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants, 25 NAT'L RES. J. 1039 (1985); Calvin Trillin, U.S. Journal: Costilla County, Colorado: A Little Cloud on the Title, NEW YORKER MAGAZINE, Apr. 26, 1976, at 122 (analyzing a land grant based dispute in Southern Colorado); PAUL STARRS, LET THE COWBOY RIDE (1998) (using the Rio Arriba County as a case study in describing the relationship between the federal government and Hispanic settlers, as well as “neo-traditionalist” Anglo ranchers). In the case of the Chama Valley in Rio Arriba County, efforts to rebuild a traditional New Mexican grazing economy and lifestyle faltered on the lack of availability of grazing lands, most of which are today controlled by the federal or state government and Anglo ranchers. For a fictionalization of this dispute, see JOHN NICHOLS, THE MILAGRO BEANFIELD WAR (1974).


26. See Jesse Ribot, Decentralization and Participation in Sahelian Forestry: Legal Instruments of Central Political-Administrative Control (unpublished paper presented in the Environmental Politics Working Group seminar, Institute of International Studies, University of California, Berkeley, Mar. 1998) (on file with authors) (arguing that the participation process frequently undermines the historic claimant by allowing the agency to grant privileges rather than recognizing historic rights).

27. See WAYNE HAGE, STORM OVER RANGE L ANDS: PRIVATE RIGHTS IN FEDERAL LANDS (1994) (arguing that appropriative water rights held on the public domain by most public land ranchers are based on putting that water to “beneficial use,” and restriction or elimination of grazing from the area is a violation of that water right); see also Raymond, Viewpoint, supra note 17 (discussing the validity of legal versus customary claims to grazing).
institutions and groups that try to influence them, others are nearly invisible at an institutional level. If management regimes are to be inclusive, equitable, and capable of identifying and reducing conflict in resource allocations, more must be known about all of these informal claims and claimants. Much more effort must be invested in identifying, addressing, and minimizing unintended consequences of management programs.

D. Spill Overs and Ecological Interconnections

The green block on the map is thus a mosaic of claims and claimants, some well documented and identified, and some needing further clarification and understanding. But the mosaic, and therefore the allocation of roles in management, is further complicated by spillovers and ecological interconnections. Even if we could draw an accurate map which reflected all the claims and rights in a particular landscape, the parcels would still not be discrete entities, each governable by the priorities of the dominant claimant. Decisions by one claimant or rights holder affect others. The standard vision of a river running through diverse ownerships provides a clear example of how conditions, decisions, and actions on one ownership affect others.

A partisan tilt exits here. There is a tendency to talk primarily in terms of "external threats" to parks. This suggests that activities on private lands within or around federal parcels have a negative impact of the public lands. But it is important to

28. See WILLIAM R. LOWRY, THE CAPACITY FOR WONDER: PRESERVING NATIONAL PARKS (1994); see also Joseph L. Sax, Helpless Giants: The National Parks and the Regulation of Private Lands, 75 MICH. L. REV. 239, 240 (1976) (addressing the issue, although the author did not use the term). The idea quickly became a stock item in discussions of national park policy. See NATIONAL PARK SERVICE, U.S. DEPT OF THE INTERIOR, STATE OF THE PARKS (1980); see also National Parks and Conservation Association, NPCA Adjacent Lands Survey: Part II, NATIONAL PARKS & CONSERVATION MAGAZINE, Apr. 1979, at 4. See OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS (David J. Simon ed., 1988), for a compendium of articles all based on the idea of external threats. While not wanting to minimize the problems created for any resource manager by decisions on any neighboring holding, we believe that it is worth focusing as well on the problems that Park managers themselves create, with their own errors, and therefore could more easily control. For a brief introduction to some of the more obvious management problems that the Park Service creates for itself, see RONALD A. FORESTA, AMERICA'S NATIONAL PARKS AND THEIR KEEPERS (1984). See also ALSTON CHASE, PLAYING GOD IN YELLOWSTONE: THE DESTRUCTION OF AMERICA'S FIRST NATIONAL PARK (1987); KARL HESS, ROCKY TIMES IN ROCKY MOUNTAIN NATIONAL PARK (1993); RICHARD W. SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY (1997). For perspective, it is worth trying to imagine a discussion of Forest Service or BLM management that ignores agency decisions and begins and ends with decisions made by neighbors.
understand that the impacts are not all private corrosions of public value. Private lands, particularly in BLM areas, create much of the value of the federal lands. For example, water for much of the alleged wildlife habitat on lands managed by the BLM is on privately held base properties rather than on the publicly held lands. Without the private land and water, large areas of public lands would become worthless for wildlife habitat. Conversely, activities on federal lands frequently have significant negative impacts on surrounding private lands and communities. Development of ski areas and land slides caused by logging on national forest lands come immediately to mind.\(^2\) The implications of the misguided fire suppression programs promulgated on public lands for the last fifth to eighty years have more widespread effects.\(^3\)

Spillovers from one parcel to another are not the only, or even the most interesting, aspect of the spillover problem. Ecologists\(^3\) have pointed to a more ubiquitous factor of interconnections: not only water, but air, wildlife, soil moisture regimes, indeed the whole landscape or ecosystem can perhaps be best understood as a series of physical and biological relationships that transcend property boundaries. Many have argued that those fundamental ecological interconnections are destroyed by our system of private and public property and the notion of ownership of specific parcels.\(^3\)

The block of federal land on the map is largely a myth. Even

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30. See Lynn Huntsinger & Cathy Lemp, No Lake is an Island: Lake Tahoe Case Study, in WILDLAND FIRE PROJECT (1998); see also Lynn Huntsinger & Cathy Lemp, Linking Forest and Community Health: Quincy Case Study, in WILDLAND FIRE PROJECT, supra; Joan Wright et al., San Bernadino Case Study, in WILDLAND FIRE PROJECT supra. Funding limitations for vegetation management, as well as hands-off management policies, may lead to the perception that communities are inadequately protected. See Jeremy Fried & Lynn Huntsinger, No Park is an Island: Managing for Naturalness at Mt. Diablo State Park, SOCIETY AND NATURAL RESOURCES (forthcoming 1999) (on file with authors) (discussing the reaction of neighboring communities to changes in fire hazard management).
32. See Sax, Ecosystems and Property Rights in Greater Yellowstone, supra note 31 at 7. Sax argues that a "fundamental purpose of the traditional system of property law has been to destroy the functioning of natural ecosystems." Id. Although Sax intended the argument to be a "slightly shocking statement," he does not back off from it. Id.
in the West, where federal lands were generally reserved from the public domain, ownership is mixed; rights of access, development, and use are diverse and complex; informal expectations and transitional rights are apparent; and the boundaries between parcels are blurred by spillovers and ecological connections. This must be reflected in the allocation of roles in decisionmaking processes.

IV.

ADMINISTRATIVE JURISDICTION ELEMENTS OF THE NORMAL MODEL

Federal authority over federal lands is similarly complex. The normal model of the superior federal sovereign is described most familiarly in *Kleppe v. New Mexico*.\(^3^3\) Citing a long line of cases, Justice Marshall concluded that the “power over the public land thus entrusted to Congress [by the Property Clause] is without limitations.”\(^3^4\) This has translated into a popular wisdom that state and local jurisdiction is largely or completely displaced on federal lands—and is frequently associated with the idea of “exclusive” federal jurisdiction on federal lands. The best option for states and localities when confronted with a Kleppe-based argument is to concede that when Congress chooses to act as the superior sovereign on the federal lands, state and local priorities must yield. There is ample room, however, in a long line of political compromises and preemption decisions to suggest that Congress does not ordinarily elect to act as the superior sovereign.\(^3^5\) The result is that the pattern of shared responsibility and intermixed federal, state, and local jurisdiction is similar to environmental regulation on private lands.

The effectiveness of federal control over federal lands depends on the resource and resource interests involved. For most of this century, the range livestock industry has effectively exploited its advantages in the United States Senate to procure advantageous regulation and to retain control where it considered federal regulation threatening.\(^3^6\) At the other end of the spectrum, US Forest Service control over timber sales has been relatively solid for most of this century, although many observers are

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34. Id. at 539 (1976) (citing United States v. San Francisco, 310 U.S. 16, 29 (1940)).
35. See Cowart & Fairfax, Public Lands Federalism, supra note 1.
not impressed with the results of its efforts. Note, however, that even this control is under serious challenge from community based planning collaboratives such as the Quincy Library Group. These groups are increasingly able to force the Forest Service and Congress to adhere to local perceptions and priorities in planning for the national forests.37

Three categories of shared authority underscore the complexity of administrative jurisdiction on federal lands: institutional evolution, receipt sharing, and regulatory authority. Oil and gas leasing provides an interesting example of the admixture of federal and state authority and dual regulation that operates on federal lands.38 First, institutional evolution plays an important role in the allocation of management authority on federal lands. Oil and gas conservation and pool unitization requirements were first defined by state law. Those laws have never been displaced by federal enactments and virtually all such programs are state defined, state run, and operative on federal lands.39

Second, a major impetus for state participation in oil and gas management is receipt sharing. It is generally true that throughout the 20th century, whenever federal land reservations and authorities were extended into states that anticipated full disposition, those extensions were accompanied by increasingly generous programs for sharing the receipts of the federal programs with the states. Coal, oil, and gas leasing returns 50% of gross receipts to the states and, in theory, another 40% is deposited in the “reclamation fund.” In addition, since 1976, the Congress has offset any burdens created by the tax exempt status of federal lands by making payments in lieu of taxes to the affected jurisdictions.40 These revenue shares play an enormous role in shaping state and local preferences regarding federal land management and the politics of Congressional decisionmaking about federal priorities.41

37. The pendency of legislation imposing the Quincy Library Group’s plan on national forests in Northern California is a continuing saga, which you can follow in succeeding issues of PUBLIC LANDS NEWS, over the last year.

38. Note that the federal land management agencies have for the most part relied upon state standards and capacities for enforcement of air and water pollution on federal land. See Cowart & Fairfax, Public Lands Federalism, supra note 1; see also Debra L. Donahue, The Untapped Power of Clean Water Act Section 401, 23 ECOLOGY L.Q. 201 (1996).


40. See generally id.

41. Since 1990, for example, Congress has established a revenue sharing formula for “owl country” based on historic rather than current receipts in order to dif-
Third, this receipt sharing is a central element in increasing state authority over federal programs. The fact that their stake in outcomes is enormous has been viewed as a justification for state participation in management decisions.\textsuperscript{42} It is interesting to note that after almost thirty years of dispute, states began, in the mid-to late 1980s, to take responsibility for oil royalty accounting on federal lands. States have an enormous financial interest in correct production and royalty accounting, and they believed, correctly, that the federal government was not pursuing their interests with sufficient vigor.\textsuperscript{43} Following the report of the Linowes Commission,\textsuperscript{44} Congress designed a system under which interested states could assume "primacy" in royalty accounting.\textsuperscript{45} Disputes on this front are ongoing.\textsuperscript{46} Moreover, several states are now seeking "primacy" in inspection and enforcement in "management of BLM's oil and gas lease program . . . ." The BLM wants to transfer only authority over inspection, while the states maintain that BLM "should transfer substantive authority, much as the Office of Surface Mining has done for coal mining."\textsuperscript{47}

Without going into a long and tedious description of the details of the program, three points are important. First, there are whole areas of oil and gas management on federal lands where the federal government has elected not to play any role at all. Second, even where federal authority is clear and well established, it is frequently shared with the states.\textsuperscript{48} Finally, there is a clear trend in oil and gas towards granting the states more and more authority over the details of leasing and lease management.

\footnotesize{fuse local hostility to decreased timber harvest.}

\textsuperscript{42} See Arkla Exploration Co. v. Texas Oil & Gas Corp., 734 F.2d 347 (8th Cir. 1984), cert. denied, 469 U.S. 1158 (1985).

\textsuperscript{43} There is a simple reason for states to pay intense attention to receipts which the federal agencies tend to ignore: the states gain enormous benefits from the leasing revenues while the federal agencies gain nothing. The programs generally run at a loss and the federal government, but not the agencies, derives most of its benefits from the leasing programs from taxing the income of the developers. The agencies accordingly have little incentive to invest effort in careful accounting of production and royalties. See Fairfax & Yale, Federal Lands, supra note 16, at 26-27.

\textsuperscript{44} U.S. Commission on Fiscal Accountability of the Nation's Energy Resources, Report of the Commission (1982).

\textsuperscript{45} See Fairfax & Yale, Federal Lands, supra note 16, at 73-76 (discussing FOGRMA, the Federal Oil and Gas Royalty Management Act of 1982).

\textsuperscript{46} See, e.g., Wyoming, IPAA Think Alike on Oil Royalty, in Public Lands News, Nov. 13, 1997, at 6.

\textsuperscript{47} See Does Shea Hold Key to State Oil and Gas Role?, in Public Lands News, Oct. 2, 1997, at 9. Much, but not all, of this authority shifting comes from Congress. See Arkla Exploration Co., 734 F.2d at 354 (embracing state's rights in federal decisionmaking based on their share of the revenues).

\textsuperscript{48} See Cowart & Fairfax, Public Lands Federalism, supra note 1.}
The federal sovereign remains supreme, but the extent of dual regulation is surprising. These carefully negotiated areas of shared authority must be acknowledged and built into any allocation of decisionmaking roles.

IV.

DECISIONMAKING ELEMENTS OF THE NORMAL MODEL

The oil and gas example suggests a larger point: the admixture of federal and state authorities on federal lands is every bit as complex as is the pattern of ownership and claims. Neither federal title nor federal authority is as the normal model suggests. Finally we discuss decisionmaking on the federal lands. In federal planning, states, localities, tribes, interested groups and individuals all have enormous expectations and indeed rights regarding participation in the decisionmaking process. Throughout the growth of public involvement as an increasingly formal and mandatory element of federal lands management, the agencies have sought to soothe their employees by reiterating that although they are required to involve the public in decisionmaking, the authority for those decisions remains with the agencies. Although there is more than a kernel of truth in this position, the on-the-ground reality is less clear. Formal and informal expectations have evolved rapidly and will likely continue to alter the face of planning and outcomes on federal lands.

Grazing Advisory Boards were among the earliest formal organs of public involvement in federal land management agency decisionmaking. They effectively ruled the public range between the passage of the Taylor Grazing Act and the Federal Land Policy and Management Act. Since that time, the Boards have diversified and become less consistently the representatives of the range livestock industry and less consistently the decisive factor in land management.49

A more ubiquitous pattern of public involvement developed from the notice-and-comment rule making procedures of the Administrative Procedures Act. The public's right to be consulted carried over fairly easily into the interpretation and implementation of the meager public involvement requirements of the National Environmental Policy Act,50 and from there into the

49. During the McCarran years of the late 1940s and early 1950s, the Grazing Advisory Boards were actually paying BLM personnel when Congress cut their funds. See Samuel T. Dana & Sally K. Fairfax, Forest and Range Policy: Its Development in the United States 182-83 (2d ed. 1980).

planning procedures of the four federal land management agencies.

The National Forest Management Act and the Federal Land Policy and Management Act make extensive and particular provisions for public involvement in land use planning beyond those found in NEPA. It is important to note that the two acts convey significantly different rights of participation to different groups. NFMA participation, which defines the process on national forest lands, basically mimics the evolution of NEPA. The BLM statute is peculiar in two notable particulars. First, the Bureau is directed to involve the public not only in planning processes but specifically "in the management" of BLM lands. Second, the BLM is required to devise plans that are to the maximum degree possible "consistent" with applicable state, local, and tribal land use plans. Neither of these provisions have given dissenters any right to a judicial proceeding, which might veto agency decisions. Nevertheless, they have created a political environment in which outsiders' hands are clearly strengthened. Moreover, they establish at least a base line presumption that although Congress, as Kleppe suggests, has full authority to displace state and local regulation, it has not consistently chosen to exercise it.

More importantly, the blurring of the edges of the notice-and-comment approach to public involvement set off a process of evolution in agency public involvement programs and public response that has not yet come to repose. In an effort to get beyond the formalized exercise of notice-and-comment public involvement, all the agencies experimented broadly with cooperative planning efforts, negotiated rule makings, the Coordinated Resource Management Planning (CRMP) processes, and a number of elaborate formats. Some of these evolved into participatory rights. It is now fairly standard for courts to insist that citizen designed alternatives be included in agency planning documents and evaluated right along side the agency created ones. This has evolved further into heavily subsidized decision-making consensus groups that have sprouted all over the United States, where all sorts of configurations of affected interests and local communities have developed their own planning procedures with or without the involvement of the federal agencies. The Quincy Library Group, poster child for this latest evolution, verges on success in an effort to get Congress to insist that the

1978, at 743.

Forest Service heed the local consensus in managing national forests in Northern California. The federal agencies are increasingly providing the arena in which interest groups sort out their priorities and work out compromises. As a result they are less and less able to assert decisionmaking authority on federal lands.

CONCLUSION

We believe that the Normal model of the federal lands, emphasizing areas of fairly consistent federal ownership, regulatory jurisdiction and decisionmaking authority is misleading. The lands encoded "federal" on maps are in fact a tapestry of public and private rights and entitlements and a landscape of ecological interactions. Kleppe appears to assert that federal agencies can routinely impose their preferences under color of superior sovereignty. But Kleppe's assumption is subject to refutation in the particular legal situation defined by historic institutional arrangements, current agency capacities, and the complex interaction of Congressional statutes that simply refuse to assert the authority which the Courts have carved for it. Finally, expectations of public involvement in decisionmaking processes has reduced the role of the federal managers and has severely compromised the ability of agencies to unilaterally set program priorities on federal lands.

We conclude therefore, that the Normal model is a poor reference point for understanding or redesigning allocation of decisionmaking on federal lands. What is less obvious is the impact that efforts to change the allocation of authority will have on informal claimants and underrepresented stakeholders. Therefore a critical issue for institutional designers is to achieve better understanding and enhanced participation by underrepresented and under-theorized informal claimants.