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## Commentary: Overcoming the Unfortunate Legacies of Western Public Land Law

George Cameron Coggins

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## Commentary: Overcoming The Unfortunate Legacies of Western Public Land Law\*

*George Cameron Coggins\*\**

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The legacies of public land law in the West are unfortunate. The residue of history has left the American people with a series of problems, difficulties, irrational postures, confusing legal structures, dilemmas, and conundrums, many of which are wholly unnecessary. This is the result neither of a plot nor of a conscious strategy, but merely the way things worked out. History in this area is just one damn mistake after another. These unfortunate legacies can be grouped into four main, nonexclusive categories: geographic, economic, legal, and attitudinal. The harmful effects of these legacies can be overcome by reasonable people. But, while this commentary offers some suggestions toward that end, it cannot strike a positive note because neither sweet reason nor cooperation are prominent characteristics of western history.

## I. THE UNFORTUNATE LEGACIES OF WESTERN PUBLIC LAND LAW

### A. *Geographic Legacies*

The land ownership maps of western states resemble general cartographic chaos. Usually, the best land—parcels with access to water—are privately owned, often in narrow strips, because this land was taken—sometimes legally—by homesteaders.<sup>1</sup> The worst lands are owned by the federal government and comprise nearly half of the west.<sup>2</sup> These lands have been zoned into so many categories that not only are there five separate land management systems<sup>3</sup> in the charge of four separate agencies<sup>4</sup>—not to mention defense, reclamation, power site, offshore, or Indian lands<sup>5</sup>—but the systems are themselves divided into almost innumerable sub-categories.<sup>6</sup>

1. See generally PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1969).

2. GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 12 (3d ed. 1993) [hereinafter FEDERAL PUBLIC LAND]; U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 1990, at 5, table 4.

3. The "systems" are the national park system, the national forest system, the national wildlife refuge system, the BLM "public lands", and the national wilderness preservation system. GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 1.01[2] (supp. 1990) [hereinafter PNRL].

4. The United States Forest Service in the Department of Agriculture and three agencies in the Department of the Interior—the Bureau of Land Management, the U.S. Fish and Wildlife Service, and the National Park Service—manage most federal land. *Id.* See also PERRY R. HAGENSTEIN, *The Federal Lands Today*, in RETHINKING THE FEDERAL LANDS 74, 76-79 (Sterling Brubaker ed., 1984); GENERAL SERVICES ADMINISTRATION, SUMMARY REPORT OF REAL PROPERTY OWNED BY THE UNITED STATES THROUGHOUT THE WORLD AS OF SEPTEMBER 30, 1991, Table 7.

5. The United States holds about 52 million acres in trust for Native Americans. See Reid P. Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 n.1 (1974).

6. See, e.g., 16 U.S.C. §§ 1 to 460ggg-3 (1988 & supp. 1992) (creating national parks, monuments, seashores, lakeshores, battlefields, cultural areas, parkways, conservation areas, historical parks, and military parks, all within the National Park System); National Trails Sys-

This is confusing enough, but ad hoc developments over the course of history make it worse. First, many of the section-by-section checkerboards created by the transcontinental and other railroad grants still remain, many in Wyoming. Theoretically, at least, under *Leo Sheep Co. v. United States*,<sup>7</sup> no one has any right of access to his or her own property if it requires crossing section corners in the checkerboard.<sup>8</sup> Given the barren nature of much of these lands, and the need for large areas to be managed effectively, continuance of the checkerboard makes no contemporary sense.

Second, federal and private lands are larded with interspersed, isolated state school sections.<sup>9</sup> Rarely does the Intermountain West have the agricultural productivity of Iowa: many if not most of these scattered sections are largely worthless, functioning only to complicate management of the larger tract.<sup>10</sup> Similarly, use of private inholdings within federal reservation boundaries can be antithetical to federal purposes.<sup>11</sup> Third, boundaries—such as between BLM and Forest Service areas—often are completely arbitrary, created by mapmakers in Washington, D.C., with no regard for watersheds, ecosystems, or other defensible dividing lines.<sup>12</sup>

Fourth, our archaic mineral location system<sup>13</sup> allows anyone to create additional inholdings for nearly any reason at all.<sup>14</sup> These problems do not end the list, but they illustrate that no one but a lawyer badly in need of business would consciously design such a land ownership and classification system. The proliferation and fragmentation of jurisdictions, ownerships, land categories, and sovereignties helps few and hurts most.<sup>15</sup>

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tem Act of 1968, 16 U.S.C. §§ 1241-51 (1988 & supp. 1992); Wilderness Act of 1964, 16 U.S.C. §§ 1131-36 (1988 & supp. 1992); Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271-87 (1988 & supp. 1992); 43 U.S.C. § 1711(a)(1988) (authorizing creation of "areas of critical environmental concern").

7. 440 U.S. 668, 668, 672-74, 678-79 (1979).

8. See generally FEDERAL PUBLIC LAND, *supra* note 2, at 97-98; PNRL, *supra* note 3, § 2.02[3][c], 10.02[3].

9. See Melinda Bruce & Teresa Rice, *Controlling the Blue Rash: Issues and Trends in State Land Management*, 29 LAND & WATER L. REV. 1 (1994).

10. Cf. *Andrus v. Utah*, 446 U.S. 500 (1980); see also PNRL, *supra* note 3, § 10.03.

11. *E.g.*, *Montana Wilderness Ass'n v. United States Forest Service*, 655 F.2d 951 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

12. See PNRL, *supra* note 3, § 2.05[2].

13. General Mining Law of 1872, 30 U.S.C. §§ 21-54 (1988).

14. See generally JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* (1987).

15. The current enthusiasm for "ecosystem management" is a direct outgrowth of general frustration with artificial boundaries as well as narrow management orientations. See generally Robert

### B. Economic Legacies

By any free market model, the economic factors influencing public land management are skewed, outrageously so and probably hopelessly so. With one dominant landowner, the resource ownership and development markets in the western economies can never be truly free. This form of inadvertent socialism likely is permanent; privatization is not in the cards for the near future.<sup>16</sup> This may be why direct and indirect subsidies are more the norm than the exception.

As an initial matter, states and localities receive payments in lieu of taxes for federal holdings,<sup>17</sup> and their share of federal assistance for highways, education, etc. are favorably influenced by federal ownership.<sup>18</sup> States can tax all resource extraction within their borders, even on federal lands, and even at very high rates.<sup>19</sup> Further, virtually all federal resource development programs provide for returning a share of the federal gross proceeds to states and localities.<sup>20</sup> The percentages vary wildly for reasons lost in the mists of time.<sup>21</sup> These rebates generate considerable inequities both between "public land states" in the West and nonpublic land states in the East and between the public land states themselves.<sup>22</sup> This complex, little known subsidy system for states leads to incongruous positions. Recently, for example, various concerned private parties reached an agreement for a three-way land exchange that would benefit them all: the coal company would get title to exploitable coal, the landowners would get money, and the United States would clear up inholdings in Grand Teton National Park.<sup>23</sup> The State of Wyoming, which should have been delighted with the arrangement, instead sued to stop it.<sup>24</sup> Why? Because if the coal were mined from private, rather than federal lands, the state would only collect its

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B. Keiter, *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands*, 25 LAND & WATER L. REV. 43 (1990).

16. 43 U.S.C. § 1701(a)(1)(1988).

17. 31 U.S.C. § 6901 (1988).

18. 23 U.S.C. § 120 (1988).

19. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

20. See generally SALLY K. FAIRFAX & CAROLYN E. YALE, FEDERAL LANDS: A GUIDE TO PLANNING, MANAGEMENT, AND STATE REVENUES 18-19 (1987).

21. See FEDERAL PUBLIC LAND, *supra* note 2, at 223-26; PNRL, *supra* note 3, § 4.05.

22. For instance, on coal mined from federal lands in Alaska, the State receives 90% of the bonus, rentals, and royalties in addition to any severance taxes it chooses to impose; Wyoming receives 50% of the lease benefits plus taxes; and Kentucky, without federal coal holdings, can recoup only severance taxes.

23. *National Coal Ass'n v. Hodel*, 825 F.2d 523 (D.C. Cir. 1987).

24. *Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877 (10th Cir. 1992) (state lacks standing).

severance taxes and would be deprived of its share of the gross receipts from federal bonuses and royalties.<sup>25</sup>

States, of course, are not the only beneficiaries of federal subsidization largess. In fact, nearly every user of the federal lands enjoys some special benefit not available to most Americans. The one democratic subsidy is the zero or low cost of access to the federal lands for recreational purposes.<sup>26</sup> It is available to all citizens, even though westerners are far better situated to take advantage of it. For economic users, federal resource disposition is a fixed game for the privileged and the lucky.

Take hardrock mining. A locator who actually discovers a valuable mineral deposit can mine it for free<sup>27</sup>—no charges, no royalties, no nothing. That is the exceptional case, because more than nine out of ten mineral locations are made for reasons other than actual mining—blackmail,<sup>28</sup> obstruction,<sup>29</sup> marijuana farming,<sup>30</sup> hunting camps,<sup>31</sup> recreation cabin sites<sup>32</sup>—these are just a few of the frauds committed daily.<sup>33</sup> Showing how seriously the weekend prospectors take the system, more than half of the locators on record abandoned their claims, at least temporarily, when a small maintenance fee payment on them came due in August 1993.<sup>34</sup> And if the miner actually finds something in a good location, near Las Vegas or Vail, say, he can buy fee title for \$2.50 an acre and turn around and sell it the next day to developers for \$250,000 an acre.<sup>35</sup> The parties apparently agree that if the owners of the Barrick gold mine get the patents they have applied for, they will pay to the U.S. Treasury a little over \$5000 for a resource with a gross value in excess of \$10 billion.<sup>36</sup> That is right: billion. Not bad work if you can get it.

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25. Alaska, not to be outdone, recently filed suit against the United States for \$29 billion which it says is its share of mineral leasing that did not happen. *Inside Energy/With Fed. Lands (BNA)*, at 2 (July 26, 1993).

26. 16 U.S.C. § 4601-6a (1988). *Cf.* Hanna J. Cortner & Dennis L. Schweitzer, *Institutional Limits and Legal Implications of Quantitative Models in Forest Planning*, 13 *ENVTL. L.* 493, 505 (1983).

27. 30 U.S.C. § 22 (1988). *See generally* LESHY, *supra* note 14, *passim*.

28. *United States v. Zweifel*, 508 F.2d 1150 (10th Cir. 1975), *cert. denied*, 423 U.S. 829 (1975).

29. *Cameron v. United States*, 252 U.S. 450 (1920).

30. *People v. Wilmarth*, 132 Cal. App. 3d 383, 183 Cal. Rptr. 176 (1982).

31. *United States v. Curtis-Nevada Mines*, 611 F.2d 1277 (9th Cir. 1980).

32. *United States v. Smith Christian Mining*, 537 F. Supp. 57 (D. Or. 1981); *cf.* *United States v. Coleman*, 390 U.S. 599 (1968).

33. *See PNRL*, *supra* note 3, § 25.01[3].

34. 18 *Pub. Lands News* No. 19, at 2 (Sept. 30, 1993).

35. *See, e.g.*, *Inside Energy/With Fed. Lands (BNA)*, at 16 (Mar. 20, 1989).

36. James P. Donahue, *Fat Cat Freeloaders: When American Big Business Bellies Up to the Public Trough*, *WASH. POST*, Mar. 6, 1994, at C1.

Take ranching and farming. As we all know, American agriculture is subsidized in dozens of ways, from crop supports to payments for not growing anything.<sup>37</sup> But the western agriculturalists have so many additional subsidies that the mythic Chicago Welfare Queen might swoon with envy. Federal reclamation has given farmers free land and very cheap water;<sup>38</sup> federal taxpayers have chipped in the billions of dollars needed to make this system work.<sup>39</sup> Some western ranchers have permits to graze their livestock on BLM or Forest Service lands at a rental which not only is merely a small fraction of private land rentals but also does not even cover the cost of administration.<sup>40</sup> Like reclamation, grazing is a huge loss leader, requiring millions in taxes to sustain every year.<sup>41</sup> These benefits certainly are not exclusive—ranchers receive many indirect subsidies, such as federal predator control<sup>42</sup>—and they are available only to the privileged few whose ancestors were fortunate enough to be rich in 1929-1938 when these perks were handed out.<sup>43</sup> It is as though only descendants of the old mountain men would be allowed to visit Yellowstone National Park.

The same principles hold to greater or lesser degree for all commodity developers in the West. Below-cost timber sales,<sup>44</sup> noncompetitive mineral leasing,<sup>45</sup> ancient free rights-of-way,<sup>46</sup> free appropriated water,<sup>47</sup>

37. 7 U.S.C. §§ 1421-69 (1988 & supp. IV 1992); 16 U.S.C. §§ 3801-62 (West Supp. 1993). In 1983, the federal government paid out \$28.3 billion in farm-price and income support programs and in-kind commodities. DOMESTIC POLICY ALTERNATIVES TASK FORCE, NAT'L AGRICULTURE FORUM, ALTERNATIVES FOR U.S. FOOD AND AGRICULTURAL POLICY 72 (Dec. 1984).

38. 43 U.S.C. §§ 371-6000(e)(1988).

39. See Hamilton Candee, *The Broken Promise of Reclamation Reform*, 40 HASTINGS L.J. 657 (1989).

40. George Cameron Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535 (1982) [hereinafter PRM I]; see also George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1 (1982) [hereinafter PRM II]; George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRLA and the Multiple Use Mandate*, 14 ENVTL. L. 1 (1983) [hereinafter PRM IV].

41. See, e.g., DENZEL FERGUSON & NANCY FERGUSON, SACRED COWS AT THE PUBLIC TROUGH ch. 16 (1983).

42. Animal Damage Control Act of 1931, 7 U.S.C. § 426 (1988 & supp. IV 1992). See generally George Cameron Coggins & Parthenia Blessing Evans, *Predators Rights in American Wildlife Law*, 24 ARIZ. L. REV. 821 (1982).

43. See PRM II, *supra* note 40, at 58-60.

44. See, e.g., Randal O'Toole, *Reforming the Forest Service*, 13 COLUM. J. ENVTL. L. 299 (1988); James F. Morrison, *The National Forest Management Act and Below Cost Timber Sales: Determining the Economic Suitability of Lands for Timber Production*, 17 ENVTL. L. 557 (1987); PNRL, *supra* note 3, § 20.02[3][d][vi].

45. See PNRL, *supra* note 3, §§ 24.03[2][b], 24.04[3].

46. *Id.* § 10.05.

47. See generally Charles F. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317 (1985).

free federal land hunting and fishing privileges,<sup>48</sup> and so forth. The West may be an economic colony in some respects, but it has preferred nation status in most others. Economically, federal land ownership is the best thing that could have happened to the Western states. In fact, the Intermountain West is the fastest-growing region of the country, economically, even though all of its resource extraction industries have been more or less depressed for a decade.<sup>49</sup>

### C. Legal Legacies

Many, if not most, of the foregoing anomalies are embodied in law. If laws are supposed to be reasonable, democratic, comprehensible, clear, uniform, just, or equal, the great body of modern public natural resources law often fails on every count.

First, there is simply too many and too much. The 3000-odd federal statutes<sup>50</sup> are buttressed by uncountable administrative interpretations and quirks, many thousands of judicial opinions, volumes of regulations, changing agency manuals, ancient doctrines, and embedded attitudes. Some statutes apply to all agencies,<sup>51</sup> some just to one or two.<sup>52</sup> State law also applies to federal resource allocation where not preempted (itself a difficult inquiry).<sup>53</sup> No one can possibly comprehend all of the potentially applicable law.

Second, public natural resources law exhibits a spectacular lack of uniformity or consistency. Every major federal natural resource has a different disposition mechanism under a different set of laws and interpretations. Water is "appropriated";<sup>54</sup> hard rock minerals are "located";<sup>55</sup> other minerals are "leased";<sup>56</sup> livestock grazing is allowed by "permit";<sup>57</sup> wildlife is taken pur-

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48. See, e.g., FEDERAL PUBLIC LAND, *supra* note 2, at 861-65.

49. Ray Rasker, *Toward a New Outlook on Old Vistas: The Economic Role of Environmental Quality in Western Public Lands*, Presentation to Conference on a New Era for the Western Public Lands, Boulder, Colo. (Sept. 20, 1993).

50. See PNRL, *supra* note 3, ch. 5.

51. E.g., Endangered Species Act of 1973, 16 U.S.C. §§ 1531-43 (1988); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-61 (1988).

52. E.g., Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-84 (1988); National Forest Management Act of 1976, 16 U.S.C. §§ 1600-14 (1988).

53. See *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987).

54. Arising from 19th century mining customs, prior appropriation ("first in time, first in right") generally gives priority to senior water users who divert a particular amount of water and intend to put that water to beneficial use. See generally DAVID H. GETCHES, *WATER LAW IN A NUTSHELL* 74-190 (1990).

55. 30 U.S.C. §§ 26, 28 (1988). See generally LESHY, *supra* note 14.

56. Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1988). See generally PNRL, *supra* note 3, chs. 22-24.

57. 43 U.S.C. §§ 315-315r, 1751-52 (1988). See generally PRM IV, *supra* note 40.



suant to a state "license";<sup>58</sup> all public land recreation users have "implied licenses" for access and use;<sup>59</sup> timber is sold by contract<sup>60</sup> (as are a few minerals<sup>61</sup>); formal access rights are granted in the form of rights-of-way,<sup>62</sup> and some companies acquire rights through concessions arrangements.<sup>63</sup> Some laws, such as NEPA,<sup>64</sup> apply to all of these transactions, but each resource also has its own separate constellation of statutes and understandings.<sup>65</sup>

Why is this? History. Each statute seemed like a good idea at the time, and inertia is the strongest force in this area.<sup>66</sup> Are these distinctions really necessary? Are gravel, coal, oil shale, and pumice really that different? Disposition of each is governed by an entirely different legal system<sup>67</sup>—depending, of course, on whether the lands are reacquired or merely acquired.<sup>68</sup>

Third, for all of its volume and verbosity, the law does not say nearly enough, nor does it say it clearly enough. The vocabulary and argot of resources law are strange and strained. The statutory numbering alone would inspire headaches in normal citizens.<sup>69</sup> Special provisions are rampant.<sup>70</sup>

Probably the most pernicious type of such legal ambiguity is the embodiment of the multiple use, sustained yield management concept in the laws

58. 43 U.S.C. § 1732(b)(1988). See *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1250 (D.C. Cir. 1989).

59. *United States v. Curtis Nevada Mines*, 611 F.2d 1277 (9th Cir. 1980). See PNRL, *supra* note 3, § 10.01[3].

60. See PNRL, *supra* note 3, § 20.03.

61. *Id.* § 24.06.

62. 43 U.S.C. §§ 1761-71 (1988). See PNRL, *supra* note 3, § 10.05.

63. Hotels in national parks and ski areas in national forests are examples of privately-run concessions. See PNRL, *supra* note 3, § 17.04.

64. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70 (1988) (environmental analysis requirements).

65. In fairness, it should be noted that the disparate resource allocation mechanisms are becoming more alike as general statutes such as NEPA and the Endangered Species Act are applied across the resource spectrum. See, e.g., George Cameron Coggins & Jane Van Dyke, *NEPA and Private Rights in Public Mineral Resources: The Fee Complex Relative?*, 20 ENVTL. L. 649 (1990).

66. John D. Leshy, *Sharing the Federal Multiple-Use Lands—Historic Lessons and Speculation for the Future*, in *RETHINKING THE FEDERAL LANDS*, 235, 254-71 (Stuart Brubaker, ed. 1984).

67. Gravel is sold, 30 U.S.C. §§ 601-04 (1988); pumice is located, *id.* §§ 22-45; oil shale is leasable under the MLA, *id.* § 241; and coal is leasable under the Federal Coal Leasing Act Amendments of 1976, *id.* §§ 201 to 208-11.

68. If the parcel in question was conquered or purchased from foreign and Indian sovereigns and never left federal ownership, then it was considered to be part of the "public domain," whereas if it was purchased or condemned from private or state owners, it was "reacquired." Different statutes apply depending on federal ownership origins. See PNRL, *supra* note 3, §§ 1.02[1][b], 8.05.

69. Can there be any good reason to number a law, e.g., 16 U.S.C. § 410(h)(1)(D)(1988)?

70. E.g., 43 U.S.C. § 992 (1988) (sale of erroneously designated water-covered areas in Arkansas).

governing the Forest Service and the BLM.<sup>71</sup> This notion, again, is a product of history: it is the latter-day offshoot of Gifford Pinchot's utilitarian maxim, the most benefits for the most people in the long run.<sup>72</sup> Still, however, nobody knows what multiple use really means, but all have opinions. To the resource exploitation industries, multiple use means full speed ahead on the development of all surface and subsurface resources.<sup>73</sup> To the managers on the ground, it means that they are free to decide every question according to their expert judgment without legal standards or judicial review.<sup>74</sup> Neither ever mention sustained yield, except in the context of timber.<sup>75</sup> This commentator once argued that the multiple use laws actually meant something—not much, but something<sup>76</sup>—but no court or agency has ever taken that argument seriously.<sup>77</sup> Fortunately (from this perspective), multiple use as an operational standard is already dying a slow death, even without statutory repeal or revision.<sup>78</sup> Even so, the notion that bureaucrats, however expert, can unilaterally decide allocation questions unconstrained by legal standards is antithetical to all democratic theories and concepts. Multiple use as practiced is government by men, not by law, and it can be just as harmful to land users as environmentalists.<sup>79</sup>

Multiple use is obsolete. Obsolescence in a broader sense is the fourth category of unfortunate public land legal legacies. This summary cannot even list all of the outmoded laws on the books, but it can point to the main culprits that have lost all contemporary justification. The General Mining Law of 1872<sup>80</sup> of course heads the list. It was obsolete when it was enacted, and now it is merely a romantic remnant of the bad old West, operating mostly to generate abuses.<sup>81</sup> The Desert Lands Act of

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71. Multiple-Use, Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-31 (1988); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-84 (1988). See generally PNRL, *supra* note 3, ch. 16.

72. See, e.g., FEDERAL PUBLIC LAND, *supra* note 2, at 115-20. Pinchot derived the concept from German forestry. See James L. Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239, 267 (1978).

73. See PNRL, *supra* note 3, § 16.01[1], and authorities cited therein.

74. See *id.* § 16.02[1]. See also George Cameron Coggins, *Some Disjointed Observations on Federal Public Land and Resources Law*, 11 ENVTL. L. 471, 488-91 (1981).

75. On sustained yield, see generally Richard W. Behan, *Political Popularity and Conceptual Nonsense: The Strange Case of Sustained Yield Forestry*, 8 ENVTL. L. 309 (1978).

76. See George Cameron Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. COLO. L. REV. 229 (1981); PRM IV, *supra* note 40.

77. This may be changing. See, e.g., *Intermountain Forest Indus. Ass'n v. Lyng*, 683 F. Supp. 1330 (D. Wyo. 1988).

78. See PNRL, *supra* note 3, § 16.02[3]; *infra* notes 120-24 and accompanying text.

79. See, e.g., *Hi-Ridge Lumber Co. v. United States*, 443 F.2d 452 (9th Cir. 1971).

80. 30 U.S.C. §§ 21-54 (1988).

81. See LESHY, *supra* note 14, *passim*.

1877<sup>82</sup> is the last remaining homesteading statute, and its consequences are merely pathetic.<sup>83</sup> The Reclamation Act of 1902<sup>84</sup> long ago served its purpose<sup>85</sup> and effectively is dead in terms of new projects.<sup>86</sup> The Mineral Leasing Act of 1920<sup>87</sup> has been overhauled, resource by resource,<sup>88</sup> but to the extent it still allows noncompetitive leasing,<sup>89</sup> it is out of step with recent legislative directions.<sup>90</sup> The Taylor Grazing Act of 1934<sup>91</sup> had the beneficial effect of closing the public domain,<sup>92</sup> but it locked in the undemocratic system of range rights for the privileged,<sup>93</sup> another idea which should end up on the junk heap of history. And, of course, the Multiple Use, Sustained Yield Act of 1960<sup>94</sup> and the multiple use sections of FLPMA<sup>95</sup> were lousy ideas to start with and have outlived whatever usefulness they might have had.<sup>96</sup>

The fifth legacy is inefficiency. Legitimate land users must jump through multiple hoops because statutes and requirements have piled up over time without coordination or design. Take the situation in which the Forest Service wants to sell, and companies want to buy, timber from a national forest. As matters now stand, a determined opponent of the timber sale can hold it up for years even without a strong case. The challenger can appeal within the agency (somewhat)<sup>97</sup> and then sue, alleging seriatim or all at once that the sale contravenes the APA,<sup>98</sup> NEPA,<sup>99</sup> the Clean Water Act,<sup>100</sup> the Endangered Species Act,<sup>101</sup> the Organic Act,<sup>102</sup>

82. 43 U.S.C. §§ 321-39 (1988).

83. *See, e.g.*, *Stewart v. Penny*, 238 F. Supp. 821 (D. Nev. 1965).

84. 43 U.S.C. §§ 371-431 (1988).

85. *See Candee, supra* note 39.

86. Dan Beard, BuRec Director, Presentation to Conference on a New Era for the Western Public Lands, Boulder, Colo. (Sept. 20, 1993).

87. 30 U.S.C. §§ 181-287 (1988).

88. *See PNRL, supra* note 3, §§ 22.03, 23.03, & ch. 24.

89. *See id.* §§ 24.03[2][b], 24.04[3].

90. *See id.* § 1.02[3][c][vi] (congressional trend of requiring fair market value).

91. 43 U.S.C. §§ 315-315r (1988).

92. *See generally* E. LOUISE PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900-1950* (1951).

93. *See* 43 U.S.C. § 315b (1988); PRM II, *supra* note 40.

94. 16 U.S.C. §§ 528-31 (1988).

95. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1702(a), (h), 1732 (1988).

96. *See* PRM IV, *supra* note 40; *Coggins, supra* note 76.

97. *See* PNRL, *supra* note 3, § 6.04[3].

98. Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (1988).

99. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70 (1988). *See, e.g.*, *National Wildlife Fed'n v. United States Forest Service*, 592 F. Supp. 931 (D. Or. 1984), *appeal dismissed*, 801 F.2d 360 (9th Cir. 1986).

100. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1387 (1988). *See, e.g.*, *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581 (9th Cir.

the Wilderness Act,<sup>103</sup> the Wild Rivers Act,<sup>104</sup> herbicide laws,<sup>105</sup> and the National Forest Management Act,<sup>106</sup> not to mention regulations, manual provisions, land use plans, and other sources of legal obstruction.<sup>107</sup> This is simply too damn much.

In short, our legal legacy is one of too many laws, too many interpretations, too many regulations, too many mechanisms, too many land categories, too many agencies, and too many outmoded statutes, on one hand; and not enough guidance, consistency, rationality, fairness, and democracy on the other. No one benefits except lawyers.

#### *D. Attitudinal Legacies*

Possibly the very worst legacies of our public land law history are the attitudes that permeate the rural west—and nowhere else. The assumptions made by the resource industries and politicians are truly amazing. Their philosophical positions often seem to be something like this:

First, federal land ownership, or at least much of it, is immoral and probably unconstitutional.<sup>108</sup> Even if it is not unconstitutional—as courts have held for a century and a half<sup>109</sup>—then the federal government as a landowner is merely a landowner, fully subject to state law and without sovereign powers.<sup>110</sup> In other words, if state law allows a rancher to shoot wild horses, then

1985), *rev'd on other grounds*, 485 U.S. 439 (1988).

101. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-43 (1988). *See, e.g.*, *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

102. Forest Service Organic Act of 1897, 16 U.S.C. §§ 476-551 (1988). *See West Virginia Div., Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975).

103. 16 U.S.C. §§ 1131-36 (1988). *See, e.g.*, *California v. Block*, 690 F.2d 753 (9th Cir. 1982).

104. 16 U.S.C. §§ 1271-87 (1988). *See Wilderness Soc'y v. Tyrrel*, 918 F.2d 813 (9th Cir. 1990).

105. *See, e.g.*, *Save Our Ecosystems v. Clark*, 747 F.2d 1240 (9th Cir. 1984).

106. National Forest Management Act of 1976, 16 U.S.C. §§ 1600-14 (1988). *See, e.g.*, *Citizens for Environmental Quality v. United States*, 731 F. Supp. 970 (D. Colo. 1989).

107. *See generally* PNRL, *supra* note 3, § 20.02; Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1 (1985).

108. The argument proceeds from the presumption that the Property Clause, U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States . . .") (emphasis added), requires that federal ownership be only temporary, or that "non-enclave" lands (i.e. federal lands other than the District of Columbia, forts, post offices, "and other needful Buildings," U.S. CONST. art I, § 8, cl. 17), be held only in a "proprietary" capacity. *See, e.g.*, David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283 (1976). The Supreme Court's unanimous opinion in *Kleppe v. New Mexico* destroys both assumptions. 426 U.S. 529 (1976).

109. *See United States v. Gratiot*, 39 U.S. (14 Pet.) 526 (1840); *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

110. *See Engdahl, supra* note 108.

federal law is powerless to stop him. This, too, is legal nonsense<sup>111</sup> and always has been,<sup>112</sup> but the diehards die hard. The latest concerted challenge of this nature was the ill-fated Sagebrush Rebellion of the late 1970s.<sup>113</sup> It collapsed when the ranchers, miners, loggers and so forth realized that loss of federal ownership could also mean loss of federal subsidies.<sup>114</sup>

The same basic attitude is evidenced by those Westerners who argue such positions as:

- we have a god-given right to exploit all natural resources;
- we have a right to continued subsidization;
- we have a right to artificial prosperity in our small communities;
- we have a right to cut corners, such as poisoning eagles that eat our sheep;
- we have a right to control federal land use; and
- we have a right to continue the grand tradition of cheating the federal government.<sup>115</sup>

The Wise Use Movement, which apparently is far more devoted to use than to wisdom, is the most recent pseudopopulist group to make these sorts of arguments.<sup>116</sup> Such contentions may seem silly, and they are, but it would be a mistake to laugh them off. Whether articulated or not, these views are deeply held, and with them comes enormous antipathy toward those who want to disturb the status quo by enforcing environmental laws and standards. Many in the West profess to hate all things federal, but none of them turns down federal money.

The staunch defenders of ancient western privilege get a lot of publicity, but the world largely has passed them by. The West is now the most urbanized region of the country,<sup>117</sup> and city dwellers tend to place more value

111. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

112. See *Light v. United States*, 220 U.S. 523 (1911).

113. See John D. Leshy, *Unravelling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

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

115. Cheating the government, whether through perjury, bribery, or just plain theft, is a constant in public land law history. See GATES, *supra* note 1, *passim*. Evidently, the justification for the widespread occurrence and acceptance of such cheating was and is that stealing is not really criminal so long as no actual person is harmed.

116. See, e.g., Bruce Babbitt, *The Public Interest in Western Water*, 23 ENVTL. L. 933, 935-36 (1993). As another instance, the Western Livestock Reporter has developed the theory that fair market grazing fees and endangered species protection are just ploys in the great vegetarian conspiracy to abolish cattle. See, e.g., Pat Goggins, *As I See It*, in WESTERN LIVESTOCK REPT'R, May 26, 1993, at 1.

117. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK 2 (1977); cf. Babbitt, *supra* note 116, at 941.

on pristine lands for recreation than on mines or cows. The basic fact is that the conservationists/preservationists have won the battle for the hearts and minds of most Americans.<sup>118</sup> This was illustrated most dramatically by the wholesale rejection of Secretary Watt's reactionary proposals by nearly all concerned.<sup>119</sup>

### E. Summary

The picture painted above is, of course a caricature, a one-sided view of where we have come from and where the nation now stands in relation to its publicly-owned lands. All of the problems and deficiencies listed are real, but the many positive aspects to the evolution of the law in this area should not be discounted. The undemocratic multiple use management standard is disappearing from multiple causes, even without statutory revision.<sup>120</sup> The most prominent causes of decline are preservational designations, such as parks in Alaska<sup>121</sup> and wilderness areas,<sup>122</sup> which erode the multiple use land base; stricter external standards, such as water pollution and endangered species,<sup>123</sup> which prohibit or condition some uses; and, especially, formal federal land use planning, which often rezones the land for one or more dominant uses.<sup>124</sup> Transboundary planning on the scope of watersheds or ecosystems or river basins, or nationally, is the wave of the future and may even be the wave of the present.<sup>125</sup> Planning in general should bring a new measure of rationality and uniformity to public natural resources law,<sup>126</sup> but many quirks remain to be sorted out.<sup>127</sup>

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118. George Cameron Coggins & Doris K. Nagel, "Nothing Beside Remains": *The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 548-49 (1990).

119. Secretary Watt initiated measures to privatize federal lands, privatize federal resources, and deregulate commodity users of federal lands. *See id.*, *passim*. Nearly all of these initiatives were defeated by courts, Congress, public opinion, and subsequent Interior Secretaries. *Id.*

120. *See* Coggins, *supra* note 76.

121. Between 1975 and 1988, lands under BLM jurisdiction declined from 447 to 270 million acres. *Compare* PUBLIC LAND STATISTICS 1975, Table 9; PUBLIC LAND STATISTICS 1988, Table 5. The process continues: a large chunk of the California desert likely will become a new national park. *See* 18 Pub. Lands News No. 20, at 6-7 (Oct. 14, 1993).

122. 43 U.S.C. § 1782 (1988). That process, too, is continuing.

123. In the timber harvesting context, such external constraints have virtually eliminated the multiple use discretion of the Forest Service in the Pacific Northwest. *See supra* notes 99-107 and cases cited therein.

124. *See* PNRL, *supra* note 3, ch. 13.

125. *See, e.g.*, *Columbia River Gorge United-Protecting People and Property v. Yeutter*, 960 F.2d 110 (9th Cir. 1992).

126. *See, e.g.*, George Cameron Coggins & Parthenia Blessing Evans, *Multiple Use, Sustained Yield Planning on the Public Lands*, 53 U. COLO. L. REV. 411 (1982).

127. John D. Leshy, Solicitor of the Interior, has stated (without apparent contradiction) that planning on the federal lands so far has failed. Presentation to Conference on a New Era for Western Public Lands, Boulder, Colo. (Sept. 20, 1993). Reasons for failure are discussed in PNRL, *supra* note 3, ch. 13.

Other progressive developments include the gradual demise of the prior appropriation doctrine,<sup>128</sup> the imposition of fair market value fees for public commodity resources,<sup>129</sup> the sporadic elevation of wildlife, recreation, and preservation to coequal status with resource exploitation,<sup>130</sup> and the renewed interest in Congress for reforming obsolete and counterproductive statutes.<sup>131</sup> Even with the many progressive developments since 1964, however, the general legacy of public land law remains an unfortunate mess, and reform ought to be far broader than the relatively low-level tinkering now being considered by Congress.<sup>132</sup>

## II. KING-FOR-A-DAY REFORM AGENDA

What should be done to modernize public land and natural resources law? The goals we should strive for are fairness, uniformity, efficiency, and most of all, comprehensibility for the average citizen. The following macro-cosmic suggestions for achieving those values are arranged in the same fashion as the problems above identified: geographic; economic; and legal. Unfortunately, not even a monarch could do anything about the western legacy of antifederal, anti-environmental attitudes, so this commentary will not even attempt it.

### A. Geographic Reforms

Several steps would largely resolve the structural geographic problems and make land management easier for all concerned. First, the states and the federal government should design massive land exchanges to rid the federal public lands of the isolated school and other sections, much after the fashion of the ill-fated Project Bold in Utah.<sup>133</sup> This will not be easy; in the Project Bold setting, all parties agreed with the exchange in principal and opposed it in practice as it may have affected their particular interests.<sup>134</sup> But assuming that a fair exchange can be arranged (perhaps a farfetched assumption), both

128. See, e.g., Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989); Charles F. Wilkinson, *In Memoriam: Prior Appropriation 1848-1991*, 21 ENVTL. L. v (1991).

129. See PNRL, *supra* note 3, § 1.02[3][c][vi].

130. *Id.* ch. 16.

131. See, e.g., 18 Pub. Lands News No. 20, at 1-4, 10 (Oct. 14, 1993).

132. Congress has been unable, from 1985 to 1994, even to agree on a grazing fee amount or formula, for instance, a far less important matter than general livestock grazing programmatic reform.

133. In Project Bold, the State would have transferred its scattered lands to the United States in exchange for manageable blocks of federal land. See Scott M. Matheson & Ralph E. Becker, Jr., *Improving Public Land Management Through Land Exchange: Opportunities and Pitfalls of the Utah Experience*, 33 ROCKY MTN. MIN. L. INST. 4-1 (1988).

134. *Id.* at 4-10.

sovereigns would benefit greatly. The recent Utah land-for-mineral-revenue exchange is a good start and could be a model.<sup>135</sup> Various other land exchanges with other parties, especially inholders, also recommend themselves.<sup>136</sup>

Second, echoing the Public Land Law Review Commission of 1970,<sup>137</sup> the United States should sell, at auction, its isolated sections and checkerboarded lands, unless in each case there is a very persuasive federal reason to retain them.<sup>138</sup> Federal mineral estates under private lands also should be sold.<sup>139</sup> With surface owner vetoes over some uses,<sup>140</sup> they are of little public value and mostly tend to complicate matters.<sup>141</sup> Proceeds, which would not amount to much, should go into the Land and Water Conservation Fund,<sup>142</sup> or preferably, a National Heritage Trust if it is enacted.<sup>143</sup> Third, the General Mining Law,<sup>144</sup> insofar as it allows a locator to take fee title and create an inholding,<sup>145</sup> should be repealed.<sup>146</sup>

For the great bulk of the lands that would remain in federal ownership, three basic changes are imperative. First, the federal land management agencies should be consolidated and realigned. No rational person starting out today would create four separate agencies in two departments to manage our landed heritage. Two should be plenty. Because the BLM always has been the administrative weak sister,<sup>147</sup> the most efficient course would be simply to abolish it and transfer its lands and functions to the Forest Service, to be called the Forest and Range Service. The new FRS should reside in the Interior Department, but it probably does not matter that much. At the same time, the powers that be should merge the National Park Service with the

135. Utah Schools and Lands Improvement Act of 1993, Pub. L. No. 103-93, 107 Stat. 995 (1993).

136. See PNRL, *supra* note 3, § 8.05.

137. PUBLIC LAND LAW REVIEW COMMISSION, ONE-THIRD OF THE NATION'S LAND 48 (1970).

138. The Federal Land Policy and Management Act, which does not distinguish between types of holdings, generally embodies the contrary assumption. 43 U.S.C. § 1701(a) (1) (1988).

139. The United States owns roughly 60 million acres of severed mineral estates, but its ownership seems devoid of any particular public benefit.

140. 30 U.S.C. § 1304(c).

141. It is still theoretically possible for a hardrock mineral prospector to start digging trenches in suburban backyards, if the subdivision was patented under the Stock-Raising Homestead Act of 1916. 43 U.S.C. §§ 291-301 (repealed 1976, except § 299). This is dumb.

142. 16 U.S.C. §§ 4601-4 to 4601-11 (1988). See PNRL, *supra* note 3, §§ 8.05[1], [3] (describing the Land and Water Conservation Fund).

143. Proposals for a bigger, more inclusive fund for purchase of lands to be added to the federal conservation systems have been floating around for a decade, but none has yet to get out of committee.

144. 30 U.S.C. §§ 21-54.

145. *Id.* §§ 22, 26.

146. Legislation pending in early 1994 would accomplish that end. See S. 775, 103d Cong., 2d Sess. (1993); H.R. 322, 103d Cong., 2d Sess. (1993).

147. See, e.g., Coggins, *supra* note 76, at 235-38.



Fish and Wildlife Service to form the National Park and Wildlife Service. The functions of the present two agencies are sufficiently similar that one set of bureaucrats could be eliminated without greatly missing them.<sup>148</sup>

The second geographical reform proposal is realignment of the boundaries of the resulting two agencies' lands along watershed, river basin, and ecosystem lines. Yellowstone National Park, for instance, has totally artificial boundaries that make little allowance for wildlife migration, among other things, much to the consternation of the semi-tame bison that get blasted in Montana's "sport" hunt when they cross the line they cannot see.<sup>149</sup>

Third, elimination of at least half of the federal land zoning categories that have accumulated over time strongly recommends itself. What, really, is the point of distinguishing between national parks and national monuments, or between bird sanctuaries and wildlife refuges, or between national grasslands and grazing districts, or between acquired and reacquired lands, and so forth?

The geographic upshot should be a far more sensible map of land ownership and management. State holdings will be consolidated; federal holdings will be blocked out and greatly simplified; and some lands will become available to the private sector.

### B. Economic Reforms

Economic reform programs should be simple but sweeping. First, all statutes that rebate percentages of receipts from resource extraction on federal lands to states should be repealed and the payment-in-lieu-of-taxes stipend doubled.<sup>150</sup> That would put the federal lands on a more equal footing with private lands and would reduce state pressures on federal agencies to cut, dig, drill, shoot, and graze regardless of consequences.<sup>151</sup> Second, for recreational use of the federal lands, Congress should impose modest access and user fees. An uncut national forest has enough of a scenic advantage over private campgrounds that it should not be free. Third, for recreation concessionaires and all commodity extracting companies, a fair market value standard should be enforced across the board.<sup>152</sup> A fiscally-responsible Congress

148. The question whether the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, the Corps of Engineers, and like agencies should be consolidated into one department will be left to another day.

149. See, e.g., *Fund for Animals v. Lujan*, 962 F.2d 1391 (9th Cir. 1992).

150. Congress in 1994 was considering the latter but not the former. See 19 Pub. Lands News No. 4, at 1 (Feb. 17, 1994).

151. Cf. Jerome C. Muys, *The Federal Lands*, in FEDERAL ENVIRONMENTAL LAW ch. 7, at 532 (1974).

152. This would conform to the clear legislative trend in recent years. See PNRL, *supra* note 3, § 1.02[3][c][vi].

would also outlaw all noncompetitive leasing, all below-cost timber sales, all free minerals, and all grass and water subsidies. To the extent the United States wishes to dispose of these resources, buyers should pay fair market prices at open auction.

These sets of geographic and economic reform suggestions would save American taxpayers billions of dollars annually. Our form of government was not constructed to be efficient, economically or otherwise, but no constitutional command says that it has to be as economically wasteful as it is.

### *C. Legal Reforms*

Legal reform suggestions follow naturally from and are inherent in the foregoing. Congress should repeal much of the statutory law now on the books. Those laws that are most obsolete and most harmful should go first. The General Mining Law,<sup>153</sup> the Desert Lands Act,<sup>154</sup> the Reclamation Act,<sup>155</sup> the Animal Damage Control Act,<sup>156</sup> parts of the Mineral Leasing Act,<sup>157</sup> and the Taylor Grazing Act<sup>158</sup> all qualify. Next to go would be the statutes that embody philosophies inconsistent with modern priorities. The multiple use, sustained yield laws,<sup>159</sup> the O & C Act,<sup>160</sup> and similar legislation that fails to give land managers real direction should be superseded by laws reflecting distinct congressional policy choices. Congress, not the agencies, has the constitutional lawmaking power.<sup>161</sup>

The third major wave of legislative reform would be weeding out the various special interest provisions that now encrust Titles 16, 30, and 43 of the United States Code. These would include the state rebates, special exceptions, and so forth, many of which never have seen the light of public focus. Some of the more obscure laws are sadly in need of rewording—the Mining Law, if it survives, is a prime example—and the remaining statutes should be consolidated into one title, reorganized, and renumbered in an intelligible fashion.

The fourth wave of statutory reform in this scenario could be the most difficult as a legal matter. The environmental and allocational laws governing federal land use and management should be coordinated and streamlined to

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153. 30 U.S.C. §§ 21-54.

154. 43 U.S.C. §§ 321-29 (1988).

155. 43 U.S.C. §§ 371-431.

156. 7 U.S.C. § 426.

157. 30 U.S.C. §§ 181-287.

158. 43 U.S.C. §§ 315-315r.

159. 16 U.S.C. §§ 528-31; 43 U.S.C. § 1732(a) (1988).

160. Oregon & California Act of 1937, 43 U.S.C. §§ 1181a-1181j (1988).

161. U.S. CONST. art. I.

facilitate the business of public land users. As matters now stand, federal environmental law is too vast for comprehension, too uneven in application, and too fragmented by statute and by agency.<sup>162</sup> We need a more efficient mechanism, perhaps a one-stop permit with expedited review. Delay often has been a valuable conservation tool, but there must be some limits. Environmentalists may well disagree, but whether to allow resource development on federal lands and to what degree, and with which conditions, are all political judgments appropriately made by elected politicians. If Congress decrees use and development, that wish must be honored.

### III. CONCLUSION

None of the ideas expressed or the suggestions made above are particularly novel or original, although the aggregate package presented might be. Charles Wilkinson, among others, has lamented the chokehold of the past on the present in this area, calling for overcoming the Lords of Yesterday. His pathbreaking book, *Crossing the Next Meridian*,<sup>163</sup> is commended to your attention. Many others, including Bob Keiter, have expressed somewhat similar sentiments.<sup>164</sup>

The changes suggested in this commentary will not happen soon, and probably not in your lifetimes. During the Reagan and Bush Administrations, these notions were, if not unthinkable, at least un-sayable. The Clinton/Babbitt Administration has a new, apparently broader reform agenda, but its actions have not evinced a clear policy course.<sup>165</sup> The time now is ripe for a reasoned discussion and debate over new directions in public natural resources law. These immodest suggestions might spark or contribute to such a debate. Repeating history is the fate of the ignorant; accepting and living with its unfortunate legacies is un-American.

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162. See PNRL, *supra* note 3, ch. 5.

163. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (1992).

164. See Keiter, *supra* note 15.

165. This is a polite way of saying that the current Administration has backed and filled, waffled, reversed itself, and otherwise obfuscated on nearly every major federal land issue it has confronted—while ducking most of them.