

June 1989

The Field of Public Land Law—A Ten-Year Retrospective

Charles F. Wilkinson
fore.wilkinson@colorado.edu

Follow this and additional works at: <https://scholarworks.umt.edu/plrlr>



Part of the [Law Commons](#)

Let us know how access to this document benefits you.

Recommended Citation

10 Pub. Land L. Rev. 19 (1989)

This Address is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Public Land & Resources Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

THE FIELD OF PUBLIC LAND LAW — A TEN-YEAR RETROSPECTIVE

Charles F. Wilkinson¹

As my many good friends here know, I am not gilding the lily when I say I love Montana and Missoula and the things that you stand for here. I have credentials. I am the author and only singer of the song, “To Be a Boy” It has just one audience and has been sung — wretchedly — only to each of my four boys, who range from 15 down to 2. But its lyrics are heartfelt and the ending is, “when you’re a big boy, you can go to England. You can even go to Japan. And when you’re a *real* big boy, you can go to Montana.” So in that spirit, perhaps you’ll forgive me if I get a bit sentimental during my assignment, which is to give an informal review of the past decade in this field.

I remember vividly the first of these conferences, ten years ago. It was held in April in Helena, and I was to give the opening address, entitled “The Field of Public Land Law — Some Connecting Threads and Future Directions.” The lecture was later revised and expanded and published in the *Public Land Law Review*. It is quite an honor for me to have been the author of 1 *Public Land Law Review* 1, which is still the one legal citation I am able to recite from memory.

When I came to Montana to give that lecture, I was intimidated, scared by the prospect. I could tell that what you had in mind was going to be a major conference. I was awed by some of the distinguished people who were going to be present, including John Mcguire, who was Chief of the Forest Service during most of the 1970’s and was perhaps the greatest chief of all, along with Gifford Pinchot. George Coggins and I were in the process of finishing our casebook on public land law that year and we did not have a sense of how some of our ideas would be received. I still remember sitting in the Spokane airport, during one of those layovers that we are all so familiar with in Northwest air terminals, scribbling frantically away, putting my final notes together. That assignment caused me to try to pull a number of concepts together. It caused me to reach and was a personal watershed for me.

Most vividly of all, though, I remember the tone of the gathering here — open, honest and friendly. For the first time I began to gain a sense of some of the traditions that run so deep in Montana.

The sessions you have held over these ten years, and the *Public Land*

1. Moses Lasky Professor of Law, University of Colorado School of Law. This paper was originally delivered as an after-dinner talk at a banquet hosted by the Public Land Law Review in Missoula on April 28, 1988 to commemorate its tenth year.

Law Review itself, have been very significant. You have brought in the leading scholars, practitioners, and land managers from around the nation. This is an interdisciplinary field and you have been expansively interdisciplinary. You have always been relevant and dealt with the most important current issues. You have dealt with traditional public land law — mining, grazing, and so forth — in depth. You also have dealt extensively with the newer kinds of issues that have emerged in recent years. Numerous pieces in the *Review* have treated subjects such as wilderness, recreation and wildlife. You also took on water policy, which has such a great impact on the public lands. Indeed, the *Review* has published twelve articles on water during your first nine issues. You have also covered American Indians, and recognized their importance in the West, by including eleven articles over the years on Indian issues. In fact, every issue except No. 4 of your *Review* has dealt with Indian issues. You ought to be proud of these achievements as you look forward to another decade of production of the *Public Land Law Review*.

Your accomplishments and subject matter have meshed perfectly with the mission of a university in the American West. It is not parochial for a western university to emphasize regional issues. Ultimately, the future of the West is a national, not regional, matter, for our nation has always lodged many of its best dreams in the West. We fulfill and expand not just Westerners but all Americans by creating a better understanding of our region and its wonders.

I have been asked to look back over the last ten years, which of course is the kind of thing you ask someone to do who is very senior, which is short for being old. But it has been fun to put these thoughts together. I will start by giving a few awards for outstanding achievements in public land law during the past decade.

The first award is for the best footnote in a judicial opinion. That goes to District Judge Karlton in the RARE II opinion in 1980. He found that the Forest Service had failed to describe individual wilderness study areas in sufficient detail in its RARE II study. He observed that, “the comments are very brief and of a very general nature. Major features of an area are often reduced to highly generalized descriptions such as ‘mountain’ or ‘river.’” Judge Karlton then said, “We can hypothesize how the Grand Canyon might have been rated — ‘canyon with river, little vegetation.’”

The second award is for the best footnote in a law review article. It goes to Professor Ralph Johnson at the University of Washington. His footnote about accommodating human uses in wilderness areas is a classic. It reads this way:

Motor bikes are a particular bane in the wilderness. But it is said many people like to ride motor bikes on mountain trails. This led me to invite a number of friends to fill in the blank in the following

sentence. Because people like to ride motor bikes on mountain trails they should be allowed to do so, is like saying that because people like to _____ on mountain trails, they should be allowed to do so.

Unfortunately, none of the entries was printable.

Some sharp-eyed observers may point out that Professor Johnson's footnote first appeared in an article written in 1970, long before this journal was begun. It was lovingly reprinted, however, in the 1983 *Public Land Review* in an article by George Coggins.

The third award is for the best performance by a previously unknown animal species in stopping a major development project. There was a 26-way tie for first place.

The fourth and last award is for the most courageous, inspiring, and enduring performance toward the protection of the nation's environment by a former forestry school dean. No, I am not going to award that one. These awards are supposed to challenge you and the answer to that one is too obvious, so I'm going to pass that one up. And it would be obvious at a banquet anywhere in the country, not just in Missoula, where Arnie Bolle lives and continues his illustrious career.

Let me look back in a somewhat more serious way. As a starting point, the field of public land law has become a more cohesive body of law and policy. It is now a structured body of law rather than a loose collection of marginally related fields. One way to see the change is to look at what was the leading source in public land history and policy ten years ago, Paul Gates' 1968 book on the history of public land law development. It was and is a fine and important book, but some of its deficiencies — the byproducts of the era in which it was written — show us how far we have come. Gates wrote that Indians had no aboriginal ownership rights in property. We understand now that Indian title is the intellectual and legal foundation for property rights in the field of public land law. Indeed, property rights cannot be examined in our real property system without starting with Indian title, as several authors of property law casebooks acknowledge by presenting *Johnson v. McIntosh* as the first case. But that was outside our ken in 1968. The *Public Land Law Review* has played a part in the change by bringing Indian issues into this field.

The field has changed in other ways. The Gates book slighted the importance of issues related to water, recreation and wilderness. It never, as far as I can tell, mentioned the names of John Muir, Bob Marshall or Aldo Leopold. In fact, each of them made indelible contributions to this field. Among other things, they were primarily responsible for installing in public policy one of the great ideas in our society, the wilderness ideal. Further, today it is unimaginable to think about the field of public land law as a body of law and policy or thought without referring to Aldo Leopold,

who wrote *Sand County Almanac*, probably the greatest book on conservation ever written in any language.

Today public land law is much stronger in a structural way. We understand the federal/state relationship, the nature of executive power, the nature of judicial power, and the interrelationships among the different resources. I think George Coggins would agree with me that one of the most useful contributions in our public lands casebook was to build toward the last chapter, which is entitled "The Preservation Resource." Preservation deserves equal treatment with the traditional extractive resources, for it too is a resource — it is a supply of something valuable.

Many different scholars from many different disciplines have participated in diverse ways to articulate the doctrinal and philosophical benchmarks in public land law and policy. Conceptually, the field is firmer. The key issues are much brighter, and the thinking and research in the field is much broader and more sophisticated. This intellectual movement, in which the *Public Land Law Review* played a significant role, is one of the noteworthy developments of the past decade.

What events were the most important over the period 1979-1989? One characteristic is that it has been an ambiguous time, a difficult period to label. Many earlier eras can be described in fairly precise terms, but the characterizations here are harder to come by. One fact worth contemplating is that during the last ten years there has not been a single major piece of comprehensive legislation passed in this field. This is not to say that Congress was entirely inactive. In 1987, Congress adopted reform legislation governing oil and gas leasing, but that Act dealt with just one resource. ANILCA, the Alaska Lands Act of 1980, is plainly major but it is not comprehensive. It dealt only with Alaska, although we later learned that at least one provision applies to Montana and the other Lower 48 States also. The Clean Water Act of 1987 had important provisions on non-point source pollution control, but it is still far too early to determine the importance of that program.

Compare this, however, to earlier times. During the 1960's, Congress enacted the Multiple Use-Sustained Yield Act, the National Refuge Administration Act, the Wilderness Act, the Wild and Scenic Rivers Act, and created the Public Land Law Review Commission. Then, during the next ten years, our national legislature mandated the National Environmental Policy Act, the Wild Horses and Burros Act, the Endangered Species Act, the Resource Planning Act, the National Forest Management Act, the Federal Land Policy and Management Act, and the Public Rangelands Improvement Act. During the recent past, however, Congress has been mostly deadlocked, especially as to broad-gauged, organic issues. The lack of congressional action is one of the dominant characteristics of the past decade.

Five events were perhaps the most important milestones.

The structure and practice of public land law is such that very broad authority has always been delegated to the federal land agencies. The Secretary of the Interior is especially prominent. Earlier times were dominated by secretaries such as Harold Ickes and Stuart Udall, who held the office longer than any other two people. The last decade is personified by Jim Watt, the most activist Secretary of Interior in history. In retrospect, however, in spite of all the color, bombast, and constructive debate, it seems apparent now that remarkably few of Secretary Watt's policies have endured. He put through no significant legislation. Oil and gas leasing in wilderness areas was stopped by Morris Udall's Interior Committee and the courts. The attempt to grant near-complete autonomy to ranchers under the Cooperative Management Agreements was curtailed by the courts. He never achieved his desire to lift the tens of thousands of withdrawals that existed when he came into office. The major legacy in terms of hard, on-the-ground results from the Watt administration is the leasing of tens of millions of acres of potential coal lands and off-shore oil and gas tracts.

A second set of issues was privatization of public lands. This was the centerpiece of Secretary Watt's agenda, but is treated separately because it so dramatically raised what always has been and always will be the central policy and theoretical issue in the field of public land law: whether the public lands ought to remain in federal ownership.

The privatization program presented that ultimate question directly, but the Reagan-Watt Administration proposal went nowhere. The nation rejected privatization of the public lands in a public debate carried out on the floor of Congress, in the national media, and across dinner tables all over the country. The American people have rejected wide-scale privatization of the public lands ever since the magnitude of railroad grants and the massive land and resource fraud sunk in. Some of the reasons are concrete; they have to do with excessive concentration of wealth and the value to the public of an open hunting, fishing, and hiking commons. Some of the reasons are less easy to articulate; they have to do with intangible, emotional factors, with open space and tradition.

The American people rejected privatization of Yellowstone in 1872 when the great park was established. They rejected it in the early 1900's when Pinchot and Roosevelt set aside the vast forest reserves. They rejected it in the 1940's when Bernard DeVoto got up on his hind legs and railed against the land grab. They rejected it during the debates in the 1960's and 1970's over the Public Land Law Review Commission and FLPMA, and they did it again during Jim Watt's tenure in the early 1980's. The public lands are too much a part of our national heritage for us to relinquish them and public sentiment during the last decade underscores

that commitment once again.

Jim Watt is a major figure, and the ideas he stood for raised major issues. But in this classic jurisprudential case study of the tension between the toughness of the law that prevents lurching action and, on the other hand, the flexibility of the law that allows change to occur so that the public will can be reflected, the toughness of the law won out.

The third category of events involves wilderness legislation. During the last decade, the wilderness system went from about 19 million acres to almost 90 million acres. The biggest chunk by far was in Alaska, where 54 million acres were declared as wilderness. But in the Lower 48 the RARE II litigation spurred major wilderness acts for the western coastal states, several of the interior states in the West, and even in the eastern half of the country. As Montanans, Coloradans, and Idahoans well know, the unresolved wilderness designations are among the leading public issues in the West. Certainly wilderness — that which was declared and that which remains in limbo — had more practical impact during this 10-year period than at any other time in our nation's history.

The fourth area dealing with the public lands is water law reform. The tough issues in water law tend to be decided at the state level. Traditionally, the effect of state water policy on the public lands have not been widely recognized but in fact water law has widespread ramifications for the federal lands. Most notably, because of the imperatives of gravity flow systems, many diversion points and reservoir sites are up high, so water policy as carried out by the states has a significant impact on the high-country public lands. In addition, many of the most objectionable aspects of mining, timber harvesting, and grazing on the public lands involve impacts on our rivers and streams.

The last ten years have marked the beginning of a deep and broad reform movement in western water law and policy. In-stream flow legislation has proliferated in nearly every western state. Organizations such as the Nature Conservancy have begun to use market mechanisms to buy water rights and transfer them into in-stream flows. The public trust doctrine has been invoked in a serious way. This has occurred in Montana, North Dakota, Idaho, maybe in Alaska, and most dramatically in California. A newly-informed citizenry in Colorado and Nebraska stopped the Two Forks Dam on the South Platte River, the symbol of old-style, overbuilt water projects. Conservation of water is now a subject that can be raised in polite company.

Still, in spite of a decade of ferment in western water law, most of the old rights that have built up over a century and a quarter remain in place. The western water reform movement gained its sea legs during the 1980's, but it is still in its early stages.

The last of the major developments involves planning in the national

forests. The regulations drafted by the Committee of Scientists came out in 1979, and that is when the NFMA began to be implemented. Then the plans were developed. The Forest Service, through the planning process, has substantially changed policies. The data accumulated under the planning regime has been exceedingly valuable. The agency has showed flexibility in moving proposed cuts within and among watersheds, and there have been efforts to limit erosion. After ten years, the Forest Service is giving us more or less the best national forest system in terms of protecting amenity values, wilderness, and wildlife that can be produced if 11 billion board feet are to be cut nationally each year.

The problem is whether 11 billion board feet ought to be cut nationally each year. This same figure was in place ten years ago. It was in place twenty years ago. And make no mistake about it: the cut has always been the key determinant in the national forests. In the Forest Service, real change is measured ultimately by the cut. The high level remains constant due to a number of factors: timber domination within the Forest Service, laws that tilt in favor of timber production, legitimate economic demand, a desire to assist communities dependent on public timber harvesting, pressure from a numerically small but politically influential bloc in Congress, pressure from industry, and inertia.

The individual forest plans, if looked at cumulatively, say that a total of 11 billion board feet is too high. The plans say that but, regardless of what the NFMA may instruct, the cut doesn't get set by the plans. The cut comes down from Washington and 11 billion board feet have to be spread out to the regions and down to the forests and then to the ranger districts. That is going to change, but it didn't change in the last ten years and that lack of change is one of the most important occurrences, or nonoccurrences, of the decade.

In years hence, however, this decade of confusing and ambiguous cross-currents may be measured best in ways other than by trying to catalogue events. Rather, the 1980's are likely to be seen in retrospect as a time when essentially new ideas in public land law and policy germinated and then flowered in later times. Some of those ideas include: the increasingly sophisticated use of economic analysis; a move toward true interdisciplinary planning and management; a much greater willingness to talk about intangibles such as beauty and awe and wonder; and the greatly expanded influence of sciences that are effectively new sciences in this field — biology, ecology, and hydrology and its techniques for measuring and controlling non-point sources of pollution.

Taken together, these abstract developments have caused us, for the first time in our history, to think in a serious way about new and overarching concepts. One example is diversity of species. A determination to protect and promote species diversity is not a firm part of our law and

policy yet, but it will be. And the ecosystem concept — born at Yellowstone — is a critically important idea that is in very good hands. The Greater Yellowstone Coalition is as effective a citizens' organization as exists in the American West. My sense is that the Forest Service has no more than five years to dispense with the phrase "Greater Yellowstone Area," adopt the "Greater Yellowstone Ecosystem," and lead a movement toward the comprehensive, coordinated ecosystem management of the seven forests, the two parks, the three wildlife refuges, and the scattered BLM lands in the ecosystem. Otherwise, rapidly building political forces are likely to strip away the leeway that the federal agencies now possess at Yellowstone. But, whatever course is taken, my guess is that when the Public Land Law Conference meets ten years from now to celebrate its twenty-year anniversary, the ecosystem concept will be firmly embedded at Yellowstone and probably at several other places around the country and the world. That idea, along with diversity of species, was born during this time.

In closing, let me try to express what I really wish for the field of public land law — and for Montana and the West in general. I speak from a different perspective than I had ten years ago, when I tended to see the public lands through a more traditional legal lens. I tend now to see the field of public land law and policy as an area that deals most fundamentally with social issues — with our way of life here in the West. I wish for us that we can eliminate our tendency as Westerners to fall prey to the eastern establishment's view of us and our tendency to have an inferiority complex about our societies. In fact, we are blessed to be able to live in the Intermountain West in these times. We have some things, sacred things, that no society in the history of the world has ever had. They are not all conventional things — it is different here. But we are too slow to dare to talk about all that we have. We must all try to articulate and fulfill the sacred things that we deserve from our sacred places.

One place where you can see what we have is in the *Last Best Place*, the recently-published anthology of Montana writing. It is a stunning accomplishment. I am taking three copies back with me this time — last time I made the mistake of taking only one. And since I get to come back next month I will be up to seven or eight. It articulates both in all its bulk (it is over 1100 pages long) and also in its precision what is here in Montana, and it must make your buttons pop to be presented in that way, to see what you have and what you have accomplished as a people. And the *Last Best Place* is directly relevant to public land law because this book helps define Montana, because the public lands are a central element of Montana's society, and because law ought to embody and enhance a people's best assets, places, and dreams.

These ideals, then, are what I wish for Montana and for its laws, including its public land laws. The hard accomplishments during the last

ten years are inconclusive. But great ideas and aspirations began to germinate during the 1980's and we all can hope that their power will have more clearly enriched our laws when we meet here in decades to come.

