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ARTICLES

PUBLIC LANDS MANAGEMENT IN AN AGE OF DEREGULATION AND PRIVATIZATION

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I. INTRODUCTION

What to do with the millions of acres of land owned by the United States government? It is a perennial question. Should we raise or lower the allowable timber harvest? Should we designate more lands as wilderness areas? Should we manage lands for their value as wildlife habitat at the expense of resource development?

At the surface, these questions reflect the competing preferences of the individuals who will experience the benefits provided by public lands. All the participants in this political struggle for the scarce resources of the public lands will each claim that the public interest is served by the allocation they urge. They will even come to believe that their view of the public interest is the correct one, and that the political opposition is probably acting out of self interest.

Few individuals or interest groups are so bold or politically naive as to claim that they simply have a better understanding of the public interest. Thus they rely on the process of public lands decision making as the assurance that the public interest is being served. If the decision is reached in the right way, it will be the right decision, and the fact that it happens to coincide with the personal preferences of some is just their good fortune. Processes influence outcomes. But our debates over public lands management processes have seldom ranged beyond alternative forms of public management. There is a presumption in favor of public, as opposed to private management. This presumption predisposes us to make particular allocations of our public lands resources.

Some will insist that we have explored the public and private alternatives and have settled upon public management as appropriate to

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the resources on the public lands. Having committed these lands to public control, the issue for many is simply one of economics, or science in the "hard science" sense of things like entomology, silviculture and geology. For others it is all politics, or perhaps land use planning which is somehow supposed to purify the political process when allocating scarce resources. But the reality is that public management only limits and controls the ways in which private or "special" interests may influence public lands resource allocation. The private alternatives merit consideration regardless of our social objectives.

Our objective in public lands management should be to maximize the net benefits experienced by the members of our society while assuring fairness in the distribution of the costs and benefits of that management.[2] These are social goals borne of personal values. Some will prescribe different goals. Others will agree with my objectives but will disagree about the manner and measure of their realization. These are hard questions about which reasonable people can differ. Unfortunately reasonable people do not always resort to reason in settling their differences.

When people are faced with these hard questions they normally look for a shortcut; for some way to make a difficult problem simple. When faced with the reality of fundamental disagreement over questions of value, people tend to resort to debate over questions of minutia. The shortcut becomes a seemingly endless journey of procedural intricacy and factual trivia.

The evidence of hard question avoidance is everywhere: in legislative debates, agency hearings, environmental impact statements, and in the opinions of our courts. We are not very good at addressing what really

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2. These objectives can be stated alternatively as allocational efficiency and distributional fairness. See *infra* note 19 for an explanation of the difference between the concepts of allocation and distribution.

It is often argued that although allocational efficiency and distributional fairness are legitimate and important goals, there are other goals of equal importance, like aesthetic values, species survival, and the needs of future generations. But these values are encompassed in the objective of allocational efficiency. There is nothing about the concept of efficient allocation which precludes all manner of human values from entering into the calculus of maximized net social welfare. Market mechanisms may bias results in a particular direction, but that is a failure of the market, not evidence that certain values are not accounted for in the pursuit of allocational efficiency. People can and do place measurable value on aesthetic pleasures or upon the survival of species. The efficiency interests of future generations are accounted for as well as they can be by the discounting mechanisms of the market. Nonmarket allocational mechanisms will not avoid the need to discount future interests relative to current interests. The distributional interests of future generations can only be weighed in the balance with the distributional interests of current generations.

The only interests which are precluded from the objectives of allocational efficiency and distributional fairness are those which do not attach to people. If spotted owls or old growth trees have interests of their own, they are not included in my objectives for public lands management. This is not because I am unwilling to conceive that such interests might exist, but rather because I, like all other humans, am unable to conceive of these interests independent from my own interests. *See infra* note 19.

matters to us. We prefer to win our point by circumvention and obfuscation, by focusing on the trees rather than the forest. Our obsession with the mechanics of process—with notice and hearings and comments and findings of fact—facilitates, even requires, evasion of the important questions. If we hope to manage public lands resources efficiently and fairly, we need to pay more attention to the philosophy of process, which means we must seriously address the fundamental choice between public and private control.

A. *The Spotted Owl Controversy*

Illustrative of our approach to public lands management is the currently heated public lands issue in the Pacific Northwest — the spotted owl. The spotted owl seems to prefer old trees to young trees. Would they, if forced, be willing to live in a new forest of young trees? The issue is being hotly debated. But even if it turns out that spotted owls would do just fine in a thirty or sixty year old stand of Douglas Fir, the forest management controversy in the Northwest will not go away. Radical environmentalists will continue to chain themselves to trees and construct themselves into stone roadblocks even if it turns out that the spotted owl does not really need old growth timber.

The controversy will not go away because the spotted owl is not really the issue. For a few "birders" it may be the issue, but most people have never seen a spotted owl and would not miss them if they all moved to California. The real issue is how should we decide whether the benefits of spotted owl habitat preservation justify the costs? The environmentalists argue that the owl is an "indicator species," which means that if it cannot survive, there are many other species which cannot survive, which means that an ecotone or perhaps an entire ecosystem will have been destroyed. The environmentalist assumes that this is bad and that the case for protecting the spotted owl is thus made. Congress seems to have reached the same conclusion in the Endangered Species Act, but the difficult task of resource allocation will never be satisfactorily accomplished by resort to such absolutes.

On the other side of the debate in the Pacific Northwest are jobs in the timber industry. The old growth forests which spotted owls inhabit are an important source of timber for the mills which employ thousands of people in Oregon and Washington. Not only are old growth trees unproductive from a silvicultural point of view, but their preservation will keep some of the best timber lands out of production permanently. If the spotted owl stays, some existing jobs in the timber industry will be lost. No one really debates that conclusion, although the environmentalists question the industry's claim that fifty percent of the Oregon and Washington mills will be closed by January if old growth cutting is forbidden. But will it

permanently cripple the economy of the Pacific Northwest? No. History demonstrates the capacity of the Northwest economy to adapt to the declining importance of timber. Will the timber workers drop their opposition to old growth forest preservation if it turns out that the Northwest economy will in fact gain from such action? Probably not. Like the environmentalists, the proponents of old growth harvesting have more to their agenda than meets the eye.

Either some timber workers or some spotted owls will face hard times depending upon who prevails in the current debate, but neither the owls nor the jobs are the central issue. Both are symbols in a debate we need to have, but have been avoiding for decades. The fundamental question is not what we should do with the public lands, but how we should go about deciding what to do. Environmentalists and timber industry adversaries in Oregon's old growth forests will probably disagree with this formulation of the fundamental question. After all, what they care about is the fate of the old growth forests. But the reality is that what we do with those forests depends significantly on how we decide what to do. The social institutions of resource allocation are not neutral. Even if we set a common goal—the public interest is usually a leading candidate—different allocational institutions will allocate scarce resources differently.

We all have more or less strongly held opinions about whether a particular forest should be logged or preserved as wilderness, or whether a particular waterway should be dammed or protected for white water rafting. There will always be disagreements. The question is how to decide among the various points of view, all of which have a legitimate claim to being heard when the lands are publicly owned. Should we simply vote and count everyone's vote the same? Should we weight the votes on the basis of people's stakes in the decision? Should we rely on expert resource managers to determine the "best" uses of our natural resources? Or should we manage these resources the way we manage most other resources in the American economy—through regulated private rights and market forces? The choice among these alternative allocation institutions will have more to do with the future of our public lands than will competing perceptions of the public interest.

Spotted owls and timber industry jobs are symbols in a hidden or obscured controversy over public versus private management of natural resource lands. Although the very concept of public lands would seem to suggest that this controversy has been resolved in favor of public management, at least with respect to the resource lands in federal ownership, the issue is not so simple. As many public land laws evidence, public ownership of resource lands does not necessarily commit us to public management of the resources on those lands. Nor does private ownership commit us to private management as evidenced by the complex of land and resource use

regulatory schemes which apply to privately owned properties. The important factor is who makes management decisions, not who has title. The private lessee of public resources is the decision maker within the terms of the lease. The public regulator of private resources is the decision maker to the extent of the regulatory authority.

B. *Deciding How to Decide*

There are persuasive arguments to be made for both public and private management. Depending upon our objectives in allocating resources, these arguments will lead us to choose public management in some cases and private management in others. The reason we need to examine the public and private alternatives is that existing public ownership and control is largely a consequence of historical circumstance, not of rational application of the arguments for public management. The same can be said of much existing regulatory authority, although government regulation has received more reasoned analysis than public ownership.

Some will suggest that this debate has long since been settled. But the reality is that the debate over rational management of scarce natural resources has never really taken place. It is true that the Public Land Law Review Commission considered the question of federal ownership of vast western lands and concluded that retention, rather than disposition, should be the guiding principle for the future.[3] It is also true that Congress approved this principle in the Federal Land Policy and Management Act of 1976.[4] And it is true that a few within the early Reagan administration urged a policy of privatization. There were, however, relatively few transfers of land to the private sector, perhaps fewer acres sold than were added during the same period of time.[5] But federal retention of public lands, although it certainly facilitates public control, does not preclude effective private management of resources located on federally owned lands. The issue of public versus private management is not resolved by the retention of title in the federal government. The important question is not who has title, but rather how and by whom resource allocation decisions are made. To a significant degree, what should have been a debate over public

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3. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 9 (1970). The Commission recommended that lands should be disposed of only if it was the only way to maximize the net public benefit.

4. 43 U.S.C. §§ 1701-82 (1982). "The Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposition of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a)(1).

5. For a Discussion on Reagan administration policy and the "sagebrush rebellion," see Babbitt, *Federalism and the Environment: An Intergovernmental Perspective on the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982).

versus private management has been obscured by arguments over who should have title.

To the extent that the issues of title and public versus private control have been addressed, they have been engaged largely at a political level. At that level public control and ownership are the inevitable results since the question is not how best to allocate resources but who will control and benefit from particular allocations. The proponents of private management are typically those not in control of publicly owned resources. If and when they gain political control, their interest in privatization quickly dissipates.[6] This political reality makes it unlikely that the debate will ever transcend academic discussions like this one,[7] but the effort is not necessarily quixotic. Principle has occasionally, but importantly, prevailed over politics in the American system of government.

To achieve the objectives of maximized net benefits and fair distribution of those benefits, we must address the alternatives of public and private management in isolation from particular resource use questions. This essay will not attempt to prescribe the appropriate mix of public and private management. Rather it explains why we have not successfully addressed this difficult question in the past and suggests that now is an opportune time to do so. Part II examines the history of public land law through the middle of the 20th century to reveal the dominant role of special interests in the making of public land policy. Part III demonstrates how private interests have continued to govern public lands policy during the succeeding two decades of "public interest" legislation. Part IV concludes by suggesting that the deregulation and privatization themes of the current decade provide an opportunity to carefully and rationally reassess our approach to managing the resources of the public lands.

II. Public Lands History as Myth and Reality

Public lands history is well documented. Gates,[8] Hibbard,[9] and Peffer[10] have all provided excellent, detailed accounts of the history of America's public lands. But in a society with little patience for understand-

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6. The Reagan administration came into office with plans for privatization of much of the public land resources, but with time and the passing of Secretary of Interior James Watt, the Reagan appointees seemed to become less interested in disposal and more interested in management of the public lands.

7. The question has remained on the agenda of many political conservatives outside of academia. For a contemporary prescription for privatization, as modified by political realism, see The Heritage Foundation, Mandate for Leadership III: Policy Strategies for the 1990s, at 148-150, 311-316 (1989). Included in the section on the Department of Interior is a specific proposal for decentralization in the control of wilderness and park lands.

8. P. Gates, History of Public Land Law Development (1968).

9. B. Hibbard, A History of Public Land Policies (1924).

10. L. Peffer, The Closing of the Public Domain (1951).

ing the complexities of history, we tend to rely on brief, thematic accounts of our past. There are at least two such accounts of the history of the public lands, each with a constituency which stands to benefit from acceptance of its version of history. Such uses and abuses of history are a staple of American politics, especially evident in the politics of the public lands.

According to the account favored by environmentalists and much of the general public, the public lands of the United States were exploited and abused by big business until the federal government intervened in the late 19th century to protect those lands and the resources they contain. The government provided this protection for several decades, particularly through the Forest Service and the National Park Service, but by the 1960s the government's land managers had been led astray or captured by politically influential private interests. This required both Congressional and judicial action to assure that the public lands continued to serve their public purposes. This account is largely mythology, or at least a gross oversimplification.

For every bit of politically useful mythology there will be an opposing myth, which in the case of public lands history is the view commonly espoused by the traditional developers of public land resources and often by the western states. According to this view the federal government's public lands policies have been, for well over a century, an obstacle to economic growth and prosperity. Beginning with early restraints on private acquisition of public lands,[11] followed by the locking up of millions of acres of those lands under pressure from conservationists,[12] followed in turn by the recent adoption of a complex of statutes and regulations at the behest of environmentalists,[13] the industries and communities of the West have been denied the use of the vast resources of the public lands.

Thematic accounts of history are not the exclusive tool of politics, however. If we are unwilling to take the time to understand history, those who do may rescue us from our ignorance by providing us with thematic, if generalized, accounts of our past. One such account of public lands history is that offered by Professors Coggins and Wilkinson in their public lands coursebook for law students.[14] According to Coggins and Wilkinson, public land law, which presumably has had a dominant influence on public lands history, was largely concerned with questions of private rights in public land resources until the mid 1960s. At that time a dramatic philosophical shift made the public interest, rather than private rights, the focus of public land law. "During the last generation," they conclude, "the

11. *See infra* text accompanying notes 41-48.
12. *See infra* text accompanying notes 50-66.
13. *See infra* text accompanying notes 78-87.
14. G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW (2d ed. 1987).

central place of private rights, private disputes, and private law . . . has been superceded by overriding public considerations . . . . There is [now] an elusive unity . . . which for want of a more definitive phrase can be called the public interest in the public resources."[15] Wilkinson has argued elsewhere that this philosophical shift has changed the federal government from a land and resource manager to a steward or trustee of the public lands.[16]

This account of our public lands history seems plausible in light of the rush of public lands legislation which Congress has adopted over the last quarter century. It is legislation which speaks the language of public interest both in the objectives and the processes of public lands management. But the plausibility of the Coggins and Wilkinson version of public lands history is rooted in a particular conception of the public interest. It is rooted in that conception of the public interest which warrants the Sierra Club, but not the Pacific Legal Foundation, in calling itself a public interest advocate. Although Coggins and Wilkinson studiously avoid denying the public interest title to the Pacific Legal Foundation,[17] their account of public lands history reveals an assumption that the interests represented by the PLF and similar organizations are the stuff of past (private interest), not modern (public interest) public lands law.

This makes the Coggins and Wilkinson account of public lands history suspect. There is no reason to assume that the Congress and the federal bureaucracy of the last quarter century have been more motivated to serve the public interest than were the Congresses and bureaucracies of earlier generations. Nor is there any reason to assume that today's public interest lobbyists are any closer to the true public interest than their predecessors. Rather than concluding that public interests have replaced private interests as the driving force in public lands management, we might better conclude one of two things. Either public lands history has been marked by changing notions of the public interest, or it has been marked by the changing political influences of competing interest groups. These may or may not be two different things, depending upon whether we assume that the public interest is simply an aggregation of private interests or something independent from private interests.

Our understanding of public lands history would benefit from an account which avoids the assertion of a single "public interest." The

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15. *Id.* at 3.

16. Wilkinson, *The Public Trust Doctrine in Public Land Laws*, 14 U.C. DAVIS L. REV. 269 (1980).

17. "Beginning with the Pacific Legal Foundation, industries and individuals have financed their own versions of public interest law firms to present the corporate view of the public interest in resource litigation." G. COGGINS & C. WILKINSON, *supra* note 14, at 7.

concept of the public interest is most often the tool of private interests in the competition for scarce resources. The Sierra Club and its members claim that the public interest requires the preservation of more wilderness and wildlife habitat. The Pacific Legal Foundation claims that the public interest requires the development of public land resources. Is it just coincidence that these conceptions of the public interest conform to the interests of the individuals who make up these organizations? To label one's preferences as one's own is to give them no more weight than the preferences of others. To label one's preferences as the public interest is to conclude the debate over what should be done with the public lands.[18]

The ultimate issue in the allocation of scarce resources is this: Which sets of individuals will experience the benefits and costs, and what benefits and costs will they experience, from the use or non-use of resources?[19] In the final analysis it is individuals who experience whatever benefits and costs there are. The individuals may be of some future generation and thus unable to express their preferences, but they are none-the-less individuals

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18. In the culture of modern American politics it is not possible to assert any objective other than the public interest, except in the narrow realm of civil liberties, and even there the ultimate justification is that the public interest depends upon the protection of civil liberties. Thus when an advocate for a particular action asserts that it is in the public interest, opponents can only respond by claiming that some other action will better serve the public interest. Public interest is the high ground of American politics; private interest, notwithstanding an historical concern for individual liberty, is the concern of the self-indulgent.

19. This statement does not reflect a failure to recognize the economists' distinction between allocation and distribution. My contention is that individuals care about resource allocation only because it impacts upon distribution. Thus allocation is important, but only because we care about distribution.

The distinction between distribution and allocation used in this paper is the following: Distribution has to do with who bears the costs and benefits of resource uses. Allocation has to do with what costs and benefits will be produced by resource uses.

Social policy may be concerned with either or both. Our social objective (without addressing the difficult question of how social objectives are determined) may seek to allocate resources so that net social wealth is maximized, or it may seek to distribute costs and benefits equally to all members of society. More probably, the social goal will be some mix of allocational and distributional results. Although one might adopt the purely utilitarian position that social wealth maximization should guide all social policy, distributional questions cannot be ignored since the efficient allocation of resources will be different for every distributional circumstance. Similarly one cannot be exclusively concerned about wealth distribution since the wealth available for distribution is dependent upon the allocation of resources, a point implicit in the trickle down theory of Reaganomics.

From the point of view of an individual, allocations of resources are important because of their distributional consequences. The implication of this statement is that people are self-interested, and some will deny that their interest in natural resources relates to the benefits and costs which they personally experience. It may be argued that altruism leads to a concern for the welfare of others, but even accepting that altruism is not rooted in self-interest, it is nonetheless a distributional concern. Even those environmentalists who claim only to be concerned for the environment, without regard even to future generations, are expressing a distributional concern. The only difference is that they have expanded the relevant universe of individuals to include the trees and the spotted owls. *See* Stone, *Do Trees Have Standing*? 45 S. CAL. L. REV. 450 (1972). For a critique of the Stone thesis, see Huffman, *Trees as a Minority*, 5 ENVTL. L. 199 (1974).

whose interests can only be imagined and represented by living individuals.

The public has no interests independent from the interests of individuals. The public has no capacity to enjoy benefits and suffer costs. Thus the public interest can never be greater or distinct from some aggregation of individual interests.[20] That is why the way we make resource allocation decisions is so important. Our resource allocation institutions determine how individual interests are to be aggregated. We should therefore design those institutions to achieve an acceptable aggregation.

What is an acceptable aggregation of individual costs and benefits? Of course individuals will have different views on that question depending upon their place in the aggregate. Does this mean that the selection among resource allocation institutions can be no more objective than the selection among possible allocations of particular resources? The challenge is to somehow isolate the debate over allocational institutions from debates over particular allocations. We have theories about how to achieve such objectivity in the design of social institutions,[21] and we have evidence in the United States Constitution that it can be achieved.[22] In any event we must aspire to its achievement or be forced to abandon our discussions to an inevitable scramble for the scarce resources of our planet.

But asserting that there is no such thing as the public interest is not likely to persuade many who have devoted their careers to public lands management. The concept of the public interest is ingrained in the culture of public lands ownership and management. Thus, I will suggest a thematic account of public lands history which accommodates the concept of the public interest.

From the beginning of our national history, lands in public ownership have been viewed as important to the future of American society and nationhood. For most of a century it was widely accepted that the public interest would be best served by disposing of publicly owned lands. Virtually every politically influential interest group in early 19th century American society stood to gain from federal land disposals.

The earliest battles over publicly owned lands were disputes over

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20. For contrasting views, see V. HELD, THE PUBLIC INTEREST AND INDIVIDUAL INTERESTS (1970) and R. NOZICK, ANARCHY, STATE AND UTOPIA (1974).

21. *See* J. RAWLS, A THEORY OF JUSTICE (1971).

22. Perhaps the most remarkable thing about the United States Constitution is its articulation of general principles free, for the most part, of specific requirements of application. The history of constitution making in this country and elsewhere evidences the difficulty of separating principle from interest. Perhaps the homogeneity of colonial America led the framers of the Constitution to believe that principles would be interpreted to assure particular results, or perhaps the fortuity of circumstances provided them a window of objectivity seldom experienced in politics. Whatever the explanation for its content, it has proven to be a rare document in its ability to serve the interests of diverse segments of the population. Of course this is not to say that the Constitution is a neutral or value free document. It is value laden, but central among the values is equality among social participants.

political jurisdiction among states and between the states and the new national government,[23] rather than contests over authority to allocate the resources of those lands. After the federal government emerged with the lion's share of disputed lands and acquired other lands by conquest and purchase,[24] new states were gradually created on those lands.[25] The federal government undertook to grant increasingly greater amounts of land to the new states, while making concessions to the old states, for the purposes of supporting schools and internal improvements. But the idea was never that the federal government or the states would retain these lands in public ownership.

Beginning with the Land Ordinance of 1785,[26] the clear intent was to divide these lands into parcels for disposal to private parties. The federal and state governments were to benefit from the proceeds of land sales. More importantly, they were to benefit from the economic development which was to result from the wise disposition of these lands into private hands. The national government did resist the unauthorized settlement of the public lands,[27] but in the interest of controlled and profitable disposition, not in the interest of public retention of those lands.

In 1830 Congress passed the first general preemption law allowing squatters on public lands to acquire private rights,[28] an act which was renewed four times prior to the adoption of the Preemption Act of 1841.[29] That law was amended periodically until repealed fifty years later by the

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23. After the Revolution and before the ratification of the Constitution, the original states and the new national government came to agreements on the extensive western lands to which various states had laid claim. Most of these lands came into federal ownership as part of the compromise necessary to the adoption of the Constitution by the states.

24. The Northwest Territories were ceded to the United States by the original states at the time of the Constitution. What is now Tennessee was ceded by North Carolina in 1790. What is now Mississippi and Alabama was ceded by Georgia in 1802. The Louisiana Purchase was acquired from France in 1803. Florida, the southwest corner of what is now Louisiana and a bit of central Colorado were ceded by Treaty with Spain in 1819. Texas was annexed in 1845. The Oregon Territory (Washington, Oregon, Idaho and parts of Montana and Wyoming) was recognized as United States territory by treaty with Great Britain in 1846. Most of the Southwest including California was ceded by Mexico in 1848. Parts of what are now New Mexico, Colorado, Wyoming, Nebraska and Oklahoma were purchased from Texas in 1850. The Gadsden Purchase (the southern extremities of Arizona and New Mexico) was acquired from Mexico in 1853. Alaska was purchased from Russia in 1867. Hawaii was annexed in 1898.

25. *See* U.S. CONST. art. IV, § 3, cl. 1. This provision gives Congress the authority to admit new states.

26. Ordinance of May 20, 1785, 28 J. CONTINENTAL CONGRESS 375 (Fitpatrick ed. 1933).

27. *See, e.g.*, Act of March 3, 1807, ch. 46, 2 Stat. 445; *amended by* Act of March 2, 1833, ch. 95, 4 Stat. 665.

28. Act of May 29, 1830, ch. 208, 4 Stat. 420, *repealed by* Act of March 3, 1891, ch. 561, 26 Stat. 1095.

29. Act of July 14, 1832, ch. 246, 4 Stat. 603; Act of June 14, 1834, ch. 54, 4 Stat. 678; Act of June 22, 1838, ch. 119, 5 Stat. 251; Act of June 1, 1840, ch. 32, 5 Stat. 382; The Preemption Act of 1841, §§ 10-15, ch. 16, 5 Stat. 453, *repealed by* Act of March 3, 1891, ch. 561, 26 Stat. 1095.

General Land Revision Act of 1891.[30] In the meantime Congress passed several other laws designed to encourage the private acquisition of public lands. The Homestead Act,[31] the Desert Land Act,[32] the mineral location laws,[33] the Timber Culture Act[34] and the Timber and Stone Act[35] were all outgrowths of a consistent policy of land disposal. This policy was continued into the 20th century by the Kinkaid Homestead Act,[36] the Forest Homestead Act,[37] the Enlarged Homestead Act,[38] the Three Year Homestead Act,[39] and the Stock-Raising Homestead Act of 1916.[40]

But the Congress was not ideological in its commitment to private management of natural resource lands. The idea that certain lands could and should be retained in public ownership also had deep historical roots. Generally the ostensible or express purpose of these public reservations has been to assure a particular resource allocation which is considered unlikely to result from private management of the resource.[41] For example, trees suitable for use as ship's masts were reserved from other uses under the charter of the Massachusetts Bay Colony in 1691.[42] The reservation was presumably motivated by a continuing depletion in the supply of such trees in the accessible forest lands of the colony. Nearly three centuries later, Garrett Hardin would explain why this scarce resource was being depleted, although he would probably have suggested a different solution to the

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30. Act of March 3, 1891, ch. 561, 26 Stat. 1095 (current version at 43 U.S.C. §§ 893, 1181 (1982)).

31. Act of May 20, 1862, ch. 75, 12 Stat. 392, *repealed by* Act of October 21, 1976, Pub. L. 94-579, Title VII, § 702, 90 Stat. 2787.

32. Desert Land Act, ch. 107, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. §§ 321-339 (1982)).

33. Act of July 26, 1866, ch. 262, 14 Stat. 251 (codified at 30 U.S.C. §§ 43, 46, 51 (1982); 43 U.S.C. § 661 (1982)). Placer-Mining Act of 1870, ch. 235, 16 Stat. 217 (1870) (codified at 30 U.S.C. §§ 35, 36, 38, 43, 46, 47, 51, 52 (1982); 43 U.S.C. §§ 661, 766 (1982)). Mining Act of May 10, 1872, ch. 152, 17 Stat. 91.

34. Ch. 277, 17 Stat. 605 (1873), *repealed by* Act of March 3, 1891, ch 561, § 1, 26 Stat 1095.

35. Ch. 151, 20 Stat. 89 (1878) (codified as amended at 18 U.S.C. § 1852 (1982)).

36. Kincaid Act (Nebraska Homesteads), ch. 1801, 33 Stat. 547 (1904), *repealed by* "Act of October 21, 1976, Pub. L. 94-579, Title VII, § 702, 90 Stat. 2787.

37. Forest Act (Agricultural Entries), ch. 3074, 34 Stat. 233 (1906), *repealed by* 16 U.S.C. § 506 (1982).

38. Ch. 298, 36 Stat. 531 (1910).

39. Ch. 153, 37 Stat. 123 (1912), *repealed by* Act of Oct. 21, 1976, Pub. L. 94-579, Title VII, § 702, 90 Stat. 2787.

40. Ch. 9, 39 Stat. 862 (1916), *repealed by* Act of 21, 1976, Pub. L. 94-579, Title VII, § 702, 90 Stat. 2787.

41. In modern economic jargon the problem with private management in these cases is that the market fails to provide for pricing and exchange of certain goods and services because of high transactions costs. If these "public goods" are not provided publicly they will be monopolized or will not be provided at all.

42. J. ISE, THE UNITED STATES FOREST POLICY 19 (1920).

problem.[43] Even before 1691 the King of England had reserved mines and minerals to the Crown, although the purpose of that reservation, like many modern reservations, was clearly distributional rather than allocational.[44]

It is important to note that although the justification for public control is generally rooted in the theory of market failure,[45] the problem in the case of the depleted timber for ship masts was the existence of a commons and therefore the lack of property rights which enable a market to function with allocational efficiency. Market failure and the lack of a market are two different problems. The public goods of modern economic theory are not necessarily the commons of American history.

The preferred solution to the tragedy of the commons is the creation of property rights with resultant markets, not the substitution of one type of commons for another. Although there are resources for which some form of commons is unavoidable due to the nature of the resource and the limits of our thinking on private rights, it is a serious mistake to assume that government control is always, or even often, the best solution to the tragedy of the commons. Frequently government control simply substitutes one tragedy for another.

From the beginning of the 19th century Congress occasionally undertook to reserve lands or resources for particular purposes. One early concern was for a continued supply of oak for the ship building industry.[46] Were these reservations in the public interest? Perhaps. Were they in the interest of the ship building industry? Certainly. The same questions can be asked about most of the subsequent reservations of public lands.

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43. Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). The solution to the tragedy of the commons is the substitution of private property for the commons, thus assuring that the person or persons who benefit from the use of a resource also bear the costs of that use. Theoretically this elimination of external costs may be accomplished by public ownership, but the reality is that public ownership merely substitutes the resource depleting scramble of politics for the exploitation of the commons. *See infra*, pt. III.

In the case of the reservation of trees for masts it may have been that suitable trees were being used for other, less valuable purposes, and that more efficient allocation of timber was achieved by the reservation. However, it may have been that the Crown was in competition for such trees with others in need of masts, and that the reservation thus served to monopolize the supply, perhaps with inefficient results.

44. On the distinction between allocation and distribution see note 19 *infra*.

The King no doubt asserted that it was important to the welfare of the state and therefore the citizenry that title to mines and minerals remain in the Crown. However, it is equally clear that title to mines and minerals was critical to the wealth of the Crown as a private entity. It is unlikely that one could demonstrate that minerals were more efficiently allocated as a result of Crown ownership than they would have been in private ownership. The creation of public reserves for private benefit is not unique to the King of England. It has generally been the motivation for public reserves under American public land law as well. *See* text acc. *supra* notes 62-65.

45. *See supra* note 41.

46. J. CAMERON, THE DEVELOPMENT OF GOVERNMENTAL FOREST CONTROL IN THE UNITED STATES chs. II, III and IV (1972).

Yellowstone Park was reserved in 1872 in a response to a remarkably early concern for the preservation of unusual geology and geography.[47] In light of the modern taste for nature and the outdoors, it was a fortunate, some would say far-sighted, action. Was it in the public interest in 1872? Perhaps, but it was in many ways an easy decision to make in a seemingly endless and inexhaustible wilderness. Those wishing to preserve Yellowstone's unique geology could be satisfied without serious impact upon the interests of other's seeking benefits from the public lands.[48]

After the creation of Yellowstone National Park, the most common argument against disposal of public lands related to a desire for watershed protection at the headwaters of the Missouri, Columbia and other navigable rivers.[49] But it was timber, not water, protection which inspired the most significant reservations of public lands in American history. What motivated the exclusion of national forest lands from those generally available for private acquisition?

In 1879 a Public Land Commission was created to inquire into, among other things, the advisability of retaining or disposing of the public lands.[50] But that issue did not receive much consideration because any disagreements "were over how to dispose of it,"[51] not whether to do so. The Commission recommended the continued disposal of farm lands, but suggested that the federal government retain ownership of timber lands while selling the timber.[52] Although this recommendation was to find growing support, its rationale is lost upon most modern advocates of multiple use public lands management. The Commission concluded that the "most conspicuous characteristic [of western public land] from an economic point of view is its heterogeneity. One region is exclusively valuable for mining, another solely for timber, a third for nothing but pasturage, and a fourth serves no useful purpose whatever."[53]

In 1891 Congress adopted An Act to Repeal Timber-Culture Laws, and for Other Purposes, the 24th section of which authorized the President

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47. Act of Mar. 1, 1872, ch. 24, 17 Stat. 32 (codified as amended at 16 U.S.C. §§ 21-40 (1978)).

48. An illustration of the ease of resource reservation under conditions of abundance was the Montana Board of Natural Resources and Conservation's actions on the Yellowstone in the late 1970s. For an indepth study of this proceeding see Huffman, The Allocation of Water to Instream Flows: Montana Water Resources Management (1980) (available from Natural Resources Law Institute, Lewis and Clark Law School, Portland, OR).

49. G. PINCHOT, BREAKING NEW GROUND 27 (1947).

50. 9 Cong. Rec. 2339-40 (1879).

51. Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239, 255 (1978).

52. For a summary of the Commission's recommendation see P. GATES & R. SWENSON, HISTORY OF PUBLIC LAND LAW DEVELOPMENT xi-xii (1968).

53. REPORT OF THE PUBLIC LAND COMMISSION, H.R. EXEC. DOC. NO. 46, at 9, 46th Cong., 2d Sess. (1880).

to create public, forest reservations.[54] Because the bill was presented as a rider to other legislation near the end of a legislative session to a committee without significant western representation, it was passed with little debate.[55] But the debate was soon to come because President Harrison did not delay in creating over 13 million acres of forest reserves.[56] Although President Cleveland sought to avoid political controversy through the creation of a National Forest Commission which would develop a plan for national forest management, politics and the end of his term led him to create 21 millions acres of reserves on a single day in 1897.[57] A battle over public land reservation ensued.

On the side of public lands retention were conservationists like Gifford Pinchot who sought to substitute European forestry methods for cut and run logging.[58] In opposition to the forest reservations were most western communities and politicians who feared that their development would be retarded by the restriction of access to the public lands.[59] In the background was the timber industry which may well have perceived that it would prosper in either case. If the lands were not reserved, the public lands disposal laws would remain impossible to enforce and the timber companies would continue to make short term profits while lacking any incentive to invest in the future productivity of the commons.[60] If the forest lands were reserved from settlement, the timber companies would no longer have to compete with other economic interests for the use of these lands. Consistent with the recommendations of the Public Lands Commission, forest lands would be zoned for the primary purpose of timber production.[61]

In a sense, the public interest (of aggregated private interests) was served by this system of forest reservations because most interest groups got much of what they wanted. Preservationists got more national parks and numerous primitive and wilderness areas within the boundaries of the

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54. Act of March 3, 1891, ch. 561, 26 Stat. 1095.

55. J. ISE, *supra* note 42, at 117-118.

56. J. CAMERON, *supra* note 46, at 205.

57. 29 Stat. 893 (1897).

58. G. PINCHOT, *supra* note 49, at 23.

59. The Montana Legislature adopted a resolution on March 1, 1897 which stated: "We, the legislative assembly of the State of Montana, do earnestly protest against the recent order of the President setting aside large timber reservations in this State, knowing that its enforcement would seriously cripple and retard its development. For these and other reasons, we respectfully request that this order be at once revoked." 29 Cong. Rec. 2548 (1897).

60. *See* Huffman, *supra* note 51, at 249-250.

61. "Although the . . .[forest reservations] had the support of the American Forestry Association, it was opposed by most western Congressmen as a sell-out to the timber corporations. . . . The. . . [reserves] were also opposed by miners who generally opposed a forest reserve system within which they could not mine." *Id.* at 261.

national forests.[62] Miners got access to the forest reserves.[63] Local communities got guarantees of input on management of the forest reserves,[64] and an opportunity to make claims on lands prior to the creation of many of the reserves.[65] Conservationists got forests to manage like the tree farms which Pinchot envisioned.[66] The timber industry got vast areas of forest land protected from competing uses. The industry also got a government agency it could call its own over time. And so it was that the public interest led to the creation of the National Forest system. For the next half century, the various private interests would remain reasonably happy with this system for allocating the scarce resources of federally owned timber lands.

Although forest reservations constitute the bulk of withdrawn public lands, both in number and total area, lands have also been withdrawn for other purposes. The National Park System consists of over 77 million acres, all but 20 million acres of which are in Alaska, withdrawn over the last century and administered pursuant to the National Park Service Organic Act of 1916.[67] Since 1903 a system of wildlife refuges has gradually been created and is now administered as the National Wildlife Refuge System.[68] These, and an array of other special use areas have been reserved, many in the last two decades, always in the name of the public interest. But like the national forests, these reservations were expected to, and do serve the interests of particular segments of American society. For every successful assertion of public interest, there is a determined private interest in the background.

And what of the vast reaches of public lands not included in the special use reservations? For several decades most of them remained available for private acquisition under the various land disposal laws. Consistent with the early land grants designed to promote public works, millions of acres were given to the railroads. Some of America's greatest personal fortunes were built on this foundation of public largess in the public interest. On almost all public lands miners could explore for minerals and acquire title

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62. These areas were administratively created by the Forest Service. In almost every case they encompassed areas with little value for timber production.

63. 27 Cong. Rec. 85, 111, 364 (1894).

64. Secretary of Agriculture James Wilson directed the Chief Forester in 1905 that "[in] the management of each reserve local questions will be decided upon local grounds." *See* J. CAMERON, *supra* note 46, at 240.

65. Act of June 4, 1897, ch. 2, § 2, 30 Stat. 34. This act suspended the reserves until March 1, 1898 and left the lands open to settlement until that date.

66. "Forestry is Tree Farming," wrote Pinchot in BREAKING NEW GROUND, *supra* note 49 at 31. Pinchot's book is replete with explanations of his views on managed timber production and his disagreements with the preservationists. *See* Huffman, *supra* note 51, at 251-252.

67. 16 U.S.C. §§ 1-18(f) (1982).

68. 16 U.S.C. §§ 668(dd)-668(ee) (1982).

to lands they proved to be productive. The Mining Law of 1872 remains the basis for allocation of the mineral resources of the public lands,[69] "because mineral development has been seen in every generation as a necessary requisite to national growth and development."[70] Originally coal and fuel minerals were treated like other minerals, but they were gradually severed from the surface estate and reserved to the federal government. These reserved fuel minerals were allocated pursuant to leasing systems rather than private title in fee simple,[71] a distinction without a difference if the tenure of the lease is of economically appropriate duration.

Still, vast areas of public lands remained without express statutory provision for its management. For the most part these were lands which nobody wanted, at least not under the terms of the land disposal laws. These lands were generally useful and used only for grazing. "The reality of the tragedy of the commons is nowhere more evident," wrote Coggins and Wilkinson, "than in the history of grazing on the public domain."[72] Several decades of politics aided by the crisis of the midwest dustbowl of the mid-1930s led to the adoption of the Taylor Grazing Act,[73] which, like the Mineral Leasing Act, sought to allocate a resource through a combination of public ownership and private rights of use. These new grazing reservations, although they were never called that,[74] were subjected to more government control than were the fuel mineral reservations, although with little evidence of improved management,[75] and over the objections of many ranchers who would have preferred permits of a more economically appropriate duration.[76]

The resources of the public lands were thus gradually parcelled out for ultimately private uses. Not everyone was happy with the allocation, but

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69. 30 U.S.C. §§ 22-39 (1982).

70. G. COGGINS & C. WILKINSON, *supra* note 14, at 146.

71. Mineral Leasing Act, 30 U.S.C. §§ 181, 182, 184, 187(a), 226, 226-1, 226-2, 241 (1982).

72. G. COGGINS & C. WILKINSON, *supra* note 14, at 153. Note that Coggins and Wilkinson have here recognized that the public lands are a commons just like the grazing commons about which Hardin wrote. The solution to the tragedy of the commons on BLM lands was greater government control under the Taylor Grazing Act (*infra* note 73), not elimination of the commons.

73. Ch. 865, 48 Stat. 1269 (1934) (current version at 43 U.S.C. §315-315(r) (1982)).

74. "Just as the Forest Reservation Provision of the 1891 legislation had accidentally created the National Forest System, so too did the Taylor Act create a new federal land system by indirection, now variously called the 'BLM lands' or the 'national resource lands' of the 'public lands' ". G. COGGINS & C. WILKINSON, *supra* note 14, at 159.

75. *Id.*

76. *See* D. FULTON, FAILURE ON THE PLAINS: A RANCHER'S VIEW OF THE PUBLIC LANDS PROBLEM (1982). Private grazing rights on public lands are based upon renewable permits of relatively short duration. It is true that many private ranches effectively had a proprietary interest in these permits, but the security of that interest was dependent upon political influence, not the terms of the lease. For a discussion of the history of public grazing lands see G. COGGINS & C. WILKINSON, *supra* note 14, at 675-681.

most interests were getting something of what they wanted and always at some expense to the federal taxpayers. Because the public lands were vast and the population of the West was relatively small, private interests were seldom denied at least some time at the public trough. The most vehement objections continued to come from western politicians still fighting the battle lost by the original states with the adoption of the constitution. But as Coggins and Wilkinson have observed,[77] public lands law and management experienced a dramatic transition in the 1960s.

III. The Modern Era: Public Management in Earnest

The modern era in public lands management started with the passage of the Multiple-Use, Sustained-Yield Act of 1960.[78] Congress declared "that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."[79] Multiple use was defined as that "combination that will best meet the needs of the American people," and "not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."[80] On the face of things the Act did not require significant changes in Forest Service management practices. Although prior Congressional directives were vague about the purposes of national forests land management, the Forest Service had been providing all of the specified uses for decades. But the Act did serve as a reminder to non-timber interests that the public forest lands were still a commons—that a half century of proprietary pretense by the timber industry gave it no greater claim on the national forests than anyone else.

The interest group most threatened by timber oriented management of the national forests and agricultural oriented management of the BLM lands were the preservationists who, unlike the conservationists of the Roosevelt and Pinchot era, sought to preserve some of the public lands as natural areas unaffected by human civilization. Although the Forest Service had long maintained wilderness and primitive areas pursuant to administrative policy, the imprimatur of Congress was sought and realized in the Wilderness Act of 1964.[81] Over the objections of the timber industry, and only after major concessions to the mining industry,[82] a new interest group had staked a claim to a significant role in public lands

77. *See* G. Coggins & C. Wilkinson, *supra* note 14.
78. 16 U.S.C. §§ 528-31 (1982).
79. *Id.* at §528.
80. *Id.* at §531(a).
81. 16 U.S.C. §§ 1131-36 (1982).
82. The mineral exploration and development laws continued to apply to designated wilderness areas until the end of 1983. *Id.* at § 1133(d)(3).

management.[83]

Wilderness advocates and other environmentalists rode the momentum of their victory in the Wilderness Act through the rest of the 1960s and into the 1970s. After decades of settled relationships with the timber industry and local communities, the Forest Service found itself with a new constituency, but without an understanding of the new politics of public lands management. The Renewable Resources Planning Act of 1974[84] was designed to facilitate Forest Service planning, but the ink had barely dried on the President's signature before the clearcutting controversy put the Forest Service at the forefront of national debate.[85] After heated and extended debate Congress adopted the National Forest Management Act of 1976 which launched the Forest Service on a planning mission of previously unimagined proportions.[86] In the same session Congress adopted the Federal Land Policy and Management Act and thus brought multiple use and planning to the BLM lands which had previously been little noticed in the controversy over the management of the National Forests.[87]

The National Forest Management Act and the Federal Land Policy and Management Act are models of public interest legislation. Both the Forest Service and the BLM must develop plans which will assure that they meet their obligations of multiple use management. Consistent with the provisions of their agency specific legislation and the Administrative Procedures Act,[88] both agencies have undertaken elaborate planning processes which involve every conceivable interest group. The agencies must, as Coggins and Wilkinson say of the BLM, "tread a sensitive tightrope in . . . regulating public land use."[89] When they fall off the tightrope, as they often do, they must then face the disgruntled in court.

Old timers in the Forest Service and the BLM surely did not comprehend what had hit them. Foresters, range managers, geologists, hydrologists and other experts in resource management were faced with making resource allocation decisions with significant distributional im-

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83. The environmentalists and recreationists were a new interest group in the sense that they could no longer rely on the abundance of public lands to guarantee their preferred uses. With increases in population, growth in competing uses, and a dramatic increase in demand for non-consumptive uses, these interests were forced to become involved in public lands politics.

84. 16 U.S.C. at §§1601-13 (1982).

85. The clearcutting issue is discussed in CLEARCUTTING: A VIEW FROM THE TOP (E. Horwitz ed., 1974). *See also A University View of the Forest Service* [The Bolle Report], S.Doc. No. 91-115, 91st Cong., 2d Sess. (1970). The issue reached the federal courts in West Virginia Division of the Izaak Walton League of America, Inc., v. Butz, 522 F.2d 945 (1975).

86. 16 U.S.C. §§ 1600-14 (1982).

87. 43 U.S.C. §§ 1701-84 (1982).

88. Administrative Procedure Act, 5 U.S.C. §§ 551- (1982).

89. G. COGGINS & C. WILKINSON, *supra* note 14, at 717.

pacts on various segments of the American population. That they were not up to the task was evidenced by an early Forest Service effort to implement the National Forest Management Act. A widely circulated questionnaire asked respondents to indicate whether they preferred more, less, or the same amounts of timber, wilderness, wildlife, recreation, etc. The uses were not posed as alternatives. One could vote, as I did, for more of everything. It was a prescription for continued depletion of the commons.

The Forest Service has since become more sophisticated in its planning. It has hired professional planners who have produced mountains of documents. Plans are emerging and being implemented, but many people are unhappy. Although even those who are moderately concerned about allocation of public land resources may be worn down by the convolutions of professional planning, the economic interests and the environmentalists will not be denied. The timber industry and cattlemen say they are being run out of business. The environmentalists say that species are endangered and wilderness lands are being lost forever. The BLM and the Forest Service dodge bullets from all sides while they struggle to be better planners. If only they could figure out what multiple use really means, perhaps they could plan for it.

It is a cruel task we have set for our public land managers. They are expected to provide diverse and often incompatible benefits from public land resources, but they do not know what their allocational and distributional objectives are. The public lands legislation, along with the Administrative Procedures Act, provide ample guidance on how to go about making decisions, but there is little guidance in terms of substantive goals. The Multiple Use Act provides that the Forest Service's purpose is "not necessarily . . . the greatest dollar return or the greatest unit output,"[90] while the Federal Land Policy and Management Act requires the BLM to "receive fair market value . . . unless otherwise provided for by statute."[91] The BLM manager seems to have an affirmative goal, but the agency's mission is clouded by requirements to "protect the quality of scientific, environmental, air and atmospheric, water resource, and archeological values,"[92] while recognizing "the Nation's need for domestic sources of minerals, food, timber, and fiber . . . ."[93] Congress did the easy part. It wrote legislation expressing the desires of its numerous constituencies and it even made express allocational choices in some cases, but the ultimate allocational decisions are usually left to the agencies. What, when, where and how much of alternative benefits and costs will be provided? On this

90. 16 U.S.C. §531(a) (1982).
91 43 U.S.C. § 1701(a)(9) (1982).
92. *Id.* at § 1701 (a)(8).
93. *Id.* at § 1701(a)(12).

"highly complex"[94] problem, to use Congress' words, the public land manager is left to referee a scramble for the resources of the commons. With few exceptions the only guidance they have on making the allocational decisions is Congress' insistence that every interest group have a shot at getting a piece of the public pie. It reminds an Oregonian of the Goals and Guidelines which govern our comprehensive statewide land use planning system.[95] We want to provide every conceivable benefit, or at least every benefit that will influence the next election of public officials.

Proponents of public resource management and even most public land managers will no doubt consider these views cynical. They will argue that the public lands laws are extensive and detailed, that the planning processes lead to informed decision making, that Congress can always act to correct agency errors, and most importantly that the alternative of private allocation has proven itself to be a failure. There can be no doubt that the public land laws are extensive and detailed, and I suspect that some useful information has been generated by Forest Service and BLM planning, although at costs that often exceed the value of the outputs. But the assertion that Congress can correct for agency mistakes is irrelevant to my critique, and the claim that private allocation has proven its shortcomings is simply not true.

IV. THE AGE OF DEREGULATION AND PRIVATIZATION

It may be that the age of deregulation and privatization has already passed us by. President Bush appears to be a practical politician, unlike his ideological predecessor. The politics of accommodation, rather than the politics of principle, may be the earmark of the new administration. If so, we are surely headed for more of the same in public lands management. The public interest land laws of the 1960s and 1970s are the product of the politics of accommodation. Some people win and some people lose, and many of them feel better for having been in the fray. It may be good politics, in a recreational sense, but it is no way to allocate scarce resources.

Although we purport to have allocational objectives, the reality is that our commitment to public resource ownership and our existing public lands management system are motivated largely by unarticulated distributional ends. Like the grazing commons of old New England, the public lands promise equality, which is good, and a free lunch, which is impossible. The history of public lands management evidence that equality is elusive, and that some people get free lunches at great expense to others. The fix is not

94. 16 U.S.C. § 1600(1) (1982).

95. OREGON LAND CONSERVATION AND DEVELOPMENT COMMISSION, OREGON LAND USE HANDBOOK ch. 2 (1978).

more public lands or more planning on the public lands we have. The fix must be one which internalizes the costs and benefits of our allocational choices so that we can know their real distributional consequences.

Public control and ownership is sometimes the best we can do, but often it is not. As much of the world undertakes to correct for the failures of centralized planning, our public land laws suggest that our learning curve is flat. We have nearly a century of data from our experiment in public management and should have learned the lessons from our own experience. The greatest irony and tragedy of the environmental movement is its reliance on the alleged failures of private property and the market as its reason for being. Whenever it is suggested that private management of resources might better serve the public interest, a refrain about resource destruction by greedy capitalists arises from the environmental choir. But these greedy capitalists could not have done it on their own. They had the willing and able assistance of the government in every act of rape and pillage. They got free land, tax subsidies, and favorable regulations from friendly politicians and bureaucrats. And who is it that the environmentalists sue when they have complaints about resource management? In the vast majority of cases the government is the defendant.

I do not mean to say that private resource managers have not made mistakes—actions which adversely affect other people, plants and creatures. They have made plenty of mistakes, without the assistance of the government. People are not less self-interested when they act privately than when they employ the government to garner a share of the commons. Alternative allocational institutions do not lead people to be more or less public spirited. Values guide human pursuits, while legal institutions only influence the intended and unintended consequences of those pursuits. In effect they set the rules of the chase; and rules have ethical implications. The choice between public and private control of resources should thus turn on the consequences which the alternative institutional arrangements are likely to deliver. Of course we must determine what consequences we prefer, but it is foolhardy, and often counterproductive to insist on public control of resources for its own sake.

Before we become reimmersed in the politics of accommodation, perhaps we could at least attempt to answer the questions raised during our era of deregulation and privatization. Simply addressing the questions does not commit us to a policy of wholesale disposal of public lands. The ghost of John Baden,[96] who says he wants to keep the White House, Arlington Cemetery and other such symbols of union in federal hands, does not need

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96. *See, e.g.*, BUREAUCRACY VS. ENVIRONMENT: THE ENVIRONMENTAL COSTS OF BUREAUCRATIC GOVERNANCE (J. Baden & R. Stroup, eds., 1981).

to haunt us. Baden and his former associates at the Political Economy Research Center in Bozeman are not robber barons reincarnate. Most of them are legitimate environmentalists, in terms of their personal values, whose only sin is to openly challenge conventional environmental wisdom and argue that private alternatives might better deliver environmental benefits. That they seem to arouse such antagonisms is testimony to the substance of their thinking, to entrenched biases about private management, and to the threat that privatization would pose to those who now benefit from public resource management.

A society immersed in public interest philosophy and the processes of public resource allocation tends to see the world as "us" and "them." This essay has adopted that perception to describe the competing interests in public land management debates. But the reality is that "us" consists of the people who share our views on a particular allocational question and "them" are those who disagree. It all comes down to individuals with similar and different values who seek strength in numbers. If numbers were actually determinate of public decisions, as democratic theory prescribes, we would have a philosophically articulate basis for preferring public control. But only the politically naive would claim that numbers control in the management of public land resources.

Our objective in resource allocation should be to maximize net benefits while assuring distributional fairness. On the maximization of net benefits we have well developed theories which can guide our choice among allocational institutions.[97] To the extent that we care about maximizing net benefits, those theories and our experience with alternative institutions, not the legacy of two centuries of public land ownership, should guide our decisions about public versus private control. If and when environmental benefits are truly undervalued in the private market and can somehow be corrected with government, public intervention may be appropriate. But the risks to those seeking environmental benefits may prove to be greater in the public arena, where it all depends upon influence, and nothing is guaranteed beyond the next session of the legislature.

The distributional part of my prescription for resource allocation raises more difficult institutional questions. We do not have the benefit of the same level of sophistication in thinking about the impact of institutions on wealth distribution. Because the private market has seldom been left to deliver its own distributional results, we do not really know if it is the distributional failure it is often claimed to be. The robber barons did their robbing both from, and with the generous assistance of the government. In

97. *See, e.g.*, M. ABRAMOVITZ, THE ALLOCATION OF ECONOMIC RESOURCES (1959); HAVEMAN, THE ECONOMICS OF THE PUBLIC SECTOR (1970); HIRSHLEIFER, PRICE THEORY AND APPLICATIONS (1976); POSNER, ECONOMIC ANALYSIS OF LAW (3rd ed. 1986).

theory government can assure any distributional results it chooses, but it can do so only in a relative sense because it can only distribute what is produced, and distribution has a clear and significant impact on productivity. As the robber barons proved, government control is an invitation to those who prefer not to make money by working to increase productivity and create value. Government control of resources fosters the creation of another version of the commons.

Some view the sagebrush rebellion of the early 1980s as a recent debate on the merits of public lands management, but it was not. It was a generally unsophisticated argument over political turf in the spirit of colonial land claims and two centuries of intervening assertions of states' rights. Few of the sagebrush rebels sought to eliminate public control. Most of them sought to shift public control from the federal to the state governments so that they might better influence the decisions of public managers.[98] There are good reasons to prefer localized public management over national public management in certain circumstances, but it will remain a commons with all of the attendant problems.

We should permit the spirit of a decade of deregulation and privatization to invigorate our thinking about public lands management. We should not permit the forest of public interest legislation adopted over the last three decades to obscure the underlying and basic questions which will always face us in resource management. The presumption that public management will always serve the public interest is belied by the history of the American and other national economies. America's economic successes have been built upon the security and incentives of private property. Although that private allocational system has created serious environmental problems, some of serious proportions, there is little reason to believe that public managers would have avoided those problems. Indeed, there is ample evidence that public managers created even worse environmental problems, while subsidizing the environmental errors of the private sector.

Public management of resources by the federal government requires central planning on a national basis. For a century that central planning took place behind closed doors under the influence of well-heeled, private interests. For the last three decades it has taken place in the open under the influence of any interest willing to participate in the complex processes enacted by Congress. These modern planning processes probably contribute at least modestly to distributional fairness, but not with reference to any rational conception of what fairness requires. Any distributional gains of modern public lands planning are the incidental consequence of having

98. *See Symposium on Federalism and the Environment: A Change in Direction*, 12 ENVTL. L. 847-1029 (1982).

more interests involved in the scramble for scarce public resources.

The history of public lands management is one of private interests seeking benefits from public land resources. The appeal of the system to private interests is that they can enjoy the benefits of allocational decisions while the public treasury bears at least some of the costs and many of the environmental costs are ignored. Often the only costs to the private interests are those associated with the political and legal transactions necessary to maintaining influence in the public management process. Logically such subsidies could only be justified on distributional grounds. Most of the beneficiaries of public lands based subsidies can make no defensible claim to such redistributions of wealth.

The public lands management system has gradually become an apparently more sophisticated version of the grazing commons of old. American society has paid a heavy price for the maintenance of that commons over the last century. Modern legislation has lessened the tragedy in some respects, but without a rational foundation, and at the expense of rapidly rising transaction costs. We could do far better, both economically and environmentally, if we abandoned the presumption in favor of public management and took a hard look at the institutional alternatives for managing the resources which are now in public ownership. Merely addressing the question does not inevitably lead to the sale of Yellowstone National Park or the Bob Marshall Wilderness Area or their transfer to "ecological endowment boards" as Baden has recently argued.[99] If the presumption is well-founded, the wisdom of public control will be demonstrated. If not, we may develop institutions which will lead to better management of these scarce resources.

99. *Take Politics Out of the National Parks: Let Nature Groups Bid for Control*, Wall St.J., November 23, 1988.