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Proposals for Public Land Reform: Sorting Out the Good, the Bad and the Indifferent

Joseph L. Sax*

On August 1, 1995, the Subcommittee on National Parks, Forests and Lands of the House Committee on Resources held a hearing on Representative Jim Hansen's bill, H.R. 2032,¹ to offer to transfer the lands administered by the Bureau of Land Management (BLM) to the States in which the lands are located. That bill itself, which contains virtually no constraints on use, no limitations on sale to private interests, no provisions for public access, and which would allow resource-rich states to take lands with billions of dollars of resource value, while leaving the federal taxpayer to manage the lands in other less fortunate states, does not have much in the way of serious prospects, even in the self-described "revolutionary" atmosphere that has pervaded the Congress, and especially the house in 1995.

*Joseph L. Sax is Counselor to Secretary of the Interior Bruce Babbitt. He came to the Department of the Interior from the University of California, Berkeley, where he was the James H. House and Hiram H. Hurd Professor of Environmental Regulation. Sax has written extensively on Western public land and water issues, national parks, the public trust doctrine, and the "takings" clause of the Constitution. He is author or co-author of a number of books, including *Legal Control of Water Resources*, and *Mountains Without Handrails: Reflecting on the National Parks*, and of more than a hundred articles on natural resources and property rights in both scholarly and general interest journals. Among his most recent articles is a study of the U.S. Supreme Court opinion in *Lucas v. South Carolina Coastal Council*, *Property Rights and the Economy of Nature*, which appeared in the *Stanford Law Review* in 1995.

A graduate of Harvard College and the University of Chicago Law School, Sax worked at the U.S. Department of Justice and in private practice in Washington, D.C., and has served on the faculty at the University of Colorado, the University of Michigan, and at Berkeley. He has been a visiting professor at many universities including the University of Paris, Stanford, and the University of Utah.

He holds an honorary doctor of laws degree from the Illinois Institute of Technology, and is a member of the American Academy of Arts and Sciences. He is the recipient of many awards including the Elizabeth Haub Medal of the Free University of Brussels (Belgium), the University of Chicago Alumni Achievement Award, the American Motors Conservation Award, and awards from the U.S. Environmental Protection Agency, the National Wildlife Federation, and the Environmental Law Institute, the Audubon Society, and the Sierra Club.

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1. H.R. 2032, 104th Cong., 1st Sess. (1995).

Like the proposal associated with Interior Secretary James Watt a dozen or so years ago,² which faced as western subsidized resource users contemplated the prospects of sales of BLM lands to profit-maximizing foreign investors unlikely to continue subsidizing local commodity users of the federal lands, the Hansen bill has taken a rapid downward slide in the political marketplace. It is only one of a variety of bills in various stages in the Congress, including a bill to establish a commission to look at decommissioning national parks,³ a pervasive public land review commission,⁴ and a proposal to sell off National Forest Service land on which as many as 137 ski resorts are located.⁵

Shortly after the introduction of the Hansen bill, Ted Stewart, Utah's Department of National Resources director, told the Utah press that the state could not afford to manage the BLM lands the way the federal government would require under a transfer. "[t]he state could probably make an argument that it could manage the lands more effectively than the BLM - but only if the lands came free of environmental 'encumbrances' and were allowed to be managed for . . . develop[ment]."⁶ The reality he said is that "Congress is never going to relinquish BLM lands without promises from the states that those lands will be protected," and "[i]f the state were to manage BLM lands in Utah under those requirements, it would likely lose millions of dollars annually."⁷ "State officials are so disinterested in Hansen's proposal," the press reported, "that they terminated a cost-benefit study . . ."⁸

For all its obvious difficulties, and its repeated failure to become reality, the dream of federal land disposition to the western states (sometimes erroneously described as giving the western lands back to the states) is remarkably persistent. When I went back to read Bernard DeVoto's famous 1947 article, *The West Against Itself*,⁹ I was not surprised to see the parallels between his description of the sagebrush agenda of a half century ago, and that which has emerged in the 104th Congress of 1995. DeVoto described a plan for "[d]istribution of all the Taylor Act grazing lands . . . to the individual states as a preliminary to disposing of them by private sale."¹⁰ He even noted a proposal to sell the Central Valley Project to California, another idea that has returned in similar form today.¹¹

2. Executive Order 12348 (Feb. 25, 1982). See generally B.D. Gardner, *The Case For Divestiture*, in *RETHINKING FEDERAL LANDS* (S. Brubaker ed., 1984).

3. H.R. 260, 104th Cong., 1st Sess. (1995).

4. S. 1151, 104th Cong., 1st Sess. (1995).

5. H.R. 2491, 104th Cong., 1st Sess. (1995) (Budget Reconciliation Act) (this provision was withdrawn by the leadership before the bill was sent to the President).

6. Jerry Spangler & Brent Israelson, *Utah Not So Eager to Grab BLM Land*, *Deseret News*, Sept. 4, 1995, at A1.

7. *Id.*

8. *Id.*

9. Bernard DeVoto, *The West Against Itself*, *Harper's*, Jan. 1947, at 231.

10. *Id.* at 248.

11. Alex Barnum, *Farmers Seek Control of Water Assets*, *S.F. Chron.*, Aug. 4, 1995, at A1.

The message seems to be the familiar one that nothing really changes, and that resource plunder is a permanent theme of western land politics. Certainly it is one element in the perennial public-land/states-rights debate. Maximizing the acreage devoted to resource development, with minimal regulation, is an enduring theme; and state ownership and management (often as a prelude to disposition) has routinely been thought the best route to that end.

Without diminishing at all the importance of that traditional theme, I would like to suggest that there is also a new dimension to the public land debate, and that the familiar elements in proposals like the Hansen bill are only part of a much larger drama that is being played out in the public policy arena. The larger show is not just about resource exploitation nor is it just about the public lands. It extends to a variety of matters that have been put on the agenda of the 104th Congress, beginning in January of 1995: the battle over the Environmental Protection Agency and its legislation, regulatory reform, reauthorization of the Endangered Species Act, controversy over wetlands regulation, and the various legislative proposals proffered at the behest of the property rights movement.¹²

The larger question is how we are to deal with lands and waters that are simultaneously claimed for competing purposes—both to serve developmental interests and to continue (or be restored) to provide natural services, such as wildlife habitat. Bluntly put, the question is what we are to do about the tree that is at once wanted as lumber and as essential habitat for nesting birds?

The issue has perhaps been most candidly put by Senator Conrad Burns of Montana, who has introduced a facially neutral bill to establish a Commission to review and report on both administrative and ownership changes for the public lands.¹³ While the Burns bill advertises itself as an objective look at the public lands, it has a variety of elements that suggest it would not be a replay of the serious, analytical effort of the Public Land Law Review Commission (PLLRC) of the 1960s.¹⁴

For example, the Burns bill calls for proposed implementing legislation to be put forward, which need not be the draft proposed by the Commission, and requires that bill to be put on a congressional fast track, which would mean limited referral, discharge from congressional committee, prohibition on amendment, and limitation on debate. The model is that of military base closings, which was devised to prevent congressional efforts to pick favored local facilities and exempt them from the base closing process. No such express ride through Congress is appropriate for the national review of public land policy. By contrast the PLLRC report was under consideration for half-a-dozen years before legislation, in particular the Federal Land Policy and Management Act of 1976 (FLPMA),¹⁵ finally evolved from it.

12. H.R. 925, 104th Cong., 1st Sess. (1995) and S. 605, 104th Cong., 1st Sess. (1995).

13. S. 1151, 104th Cong., 1st Sess. (1995).

14. ONE THIRD OF THE NATION'S LAND - A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION (1970).

15. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-84 (1994).

The composition of the Commission proposed in the Burns bill,¹⁶ in contrast to the PLLRC, is unlikely to be politically balanced. Six of its nine members are to be appointed by Congress, and only three by the President. Another indicator that the Burns bill has a built-in agenda is that it already incorporates a series of quite specific conclusions that would ordinarily be put to a study commission as items for consideration, such as a directive to reduce administrative and management costs by 50%; a mandate about how land management plans may be challenged (on site-specific actions, rather than on the plan itself); and a directive describing how the administrative appeals process is to work. The PLLRC, by contrast, was given a broad, and open-ended charge to provide "a comprehensive review of [the public land] laws and the rules and regulations promulgated thereunder and to determine whether and to what extent revisions thereof are necessary."¹⁷

Perhaps the most significant fact about the bill lies in the statement which Senator Burns made in introducing it. He contrasted the recent emphasis on environmental protection, conservation and nonconsumptive uses of the public lands with earlier legislation that emphasized commodity production and development. Current public land laws, he indicated, have upset the preexisting balance of uses, and efforts to utilize the lands for commodity purposes have been brought to a halt in the face of demands that they be left to provide more environmental benefits and services. He said: "Instead of fulfilling a widely supported and legally established goal of providing products and services from our public lands under the reasonable requirements of sustained yield and multiple uses, we have natural resource management gridlock."¹⁸

I believe Senator Burns has identified the new issue that has come to dominate conflict over public land policy. It is not simply profit-maximizing by commodity users; nor is it a special love for state government as somehow better or closer to the citizen, though both those issues continue to be present. What has changed is the presence of a new and deeper conflict over the allocation of the public lands to the competing demands made upon them.

That issue has become especially pointed in recent years because the established way of dealing with the problem is no longer sufficient to the task, if it ever was. As to the public lands, for more than a century—indeed from the very first days of the withdrawal and reservation of federal forest, park, and refuge land—the operative assumption has been that different purposes and different needs could be achieved by setting aside distinct enclaves, each with its own stated purpose. The unstated assumption of an enclave theory, however, is that since a particular interest or value has been protected in one place that it need not be attended to elsewhere. That is the view, for example, that because wildlife is protected in a refuge or in a park, other lands need not be managed for the maintenance of wildlife habitat.

16. S. 1151, 104th Cong., 1st Sess. (1995).

17. Pub. L. No. 88-606, 78 Stat. 982 (1964).

18. [4] Cong. Rec. S12242 (daily ed. Aug. 10, 1995) (statement of Sen. Burns).

Under enclave management, every interest has its own space, often won at great expense of effort. The crucial question under enclave management is where the national park boundary is drawn, or whether land shall be in a park or a national forest. But once the battle is over and the line drawn, the negative imperative of such parcelization comes into play. What you have not won for your categorical enclave is not mandated to be managed for your purposes.

As long as the enclave approach dominated public land policy, for the most part peace reigned. To be sure, it was never a satisfactory approach from an ecological point of view. The physical consequences of the enclave theory were visible, for example, in forests cut right up to the park boundary. Similarly, a park official, until quite recently, would not ordinarily think it appropriate to concern himself with the planning process in an adjacent national forest even though that planning might involve activities such as oil and gas developments that could or would affect park wildlife. Moreover, there was no necessary relationship between enclave boundaries and ecological goals, such as preserving biological diversity.

The various legislative embodiments of multiple use nibbled at the edges of this approach, but never fundamentally challenged or undercut it. For the most part, the 1960 Multiple Use Sustained Yield Act¹⁹ only codified the preexisting reality, that the national forests were not solely to be allocated to commodity use (though they continued to be used primarily for timber harvesting). The more elaborate multiple use mandates of FLPMA²⁰ and the National Forest Management Act in 1976²¹ were more environmentally sensitive, but they moved away only slightly from the "discrete pieces" approach that underlies enclave planning. To the extent that there are issues of "critical environmental concern," FLPMA anticipates that distinct areas shall be designated and set aside to be protected. In the same rather laconic spirit, the statute provides that planning "shall provide for compliance with applicable pollution control laws."²² The notion that critical environmental concerns may be pervasive, rather than discrete, does not inform the mid-1970s generation of public land legislation, despite the fact that the Endangered Species Act had been enacted several years earlier.²³

Similarly, under the older approach, a sharp line was drawn between private and public land, and between federal and local/state government areas of responsibility. The very notion of federal land use law has been anathema to the Congress, and even rather moderate efforts to craft national park protection bills by some sort of compatibility regulation of adjacent lands whose uses were affecting parklands has been repeatedly rejected by Congress as a form of unwanted federal zoning.²⁴ All these elements of conventional policy reveal the enclave mentality in its starkest form.

19. 16 U.S.C. §§ 528-31 (1994).

20. 43 U.S.C. §§ 1701-84.

21. 16 U.S.C. §§ 1600-87.

22. 43 U.S.C. §§ 1712(c).

23. 16 U.S.C. §§ 1531-44 (enacted Dec. 28, 1973).

24. See, e.g., Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 Mich. L. Rev. 239 (1976).

Several things might be observed about enclaves, which helps to explain their appeal and persistence as an approach. Like all "bright line" rules and approaches, they make things clear. You know where you stand; you know what you can do, and what is none of your business. Moreover, you have a clear sense of the physical scope of your victory or your defeat in the political arena. If you have fought over adding 1,000 acres to a park, that 1,000 acres definitively measures your achievement.

On the other hand, just about everything about enclaves is at odds with just about everything about protecting natural systems. As we began to become concerned about protection of natural systems, we found ourselves with a dysfunctional federal land infrastructure. We had in effect created a system of rights and expectations that was poorly attuned to our emerging goals. That is not to say that everything had worked as badly as possible, primarily because a great deal of western land (whatever its category) was largely undisturbed through most of the nineteenth and the twentieth centuries. It hardly mattered that a park was surrounded by forests, or even private land, so long as those nearby lands were largely uncut, ungrazed and unmined, as many were. Moreover, where enclaves were more or less congruent with natural boundaries, such as a discrete river basin segment or landscape, they allowed effective protection of a coherent part of a natural system.

The first significant step away from enclave theory, though certainly not in any conscious way, was what may be called overly planning, as illustrated by the Wilderness Act.²⁵ That law created a management prescription which could be laid over any sort of designated federal land, regardless of its enclave character—a park, a national forest, a BLM area—and then that place would be managed according to wilderness principles.

The next step, again certainly not one that was consciously taken, was habitat, formalized in the critical habitat, designation under the Endangered Species Act.²⁶ Again, the format is overlay, but this time the designation is driven by scientific data rather than legislative line-drawing, and it can cover public and private land. The habitat overlay trumps not only previous enclave designations for federal land management, but encompasses private as well as public land. It fundamentally shifts attention away from the enclave. Instead, it describes an area for which a specified management prescription is appropriate based on its natural qualities and possibilities, and it sets a management prescription whose purpose is to maintain various natural processes that are required to assure the viability and recovery of protected species.

The meaning of these changes is that the central issue for the public land is no longer, as it once was, whether a given place shall be open to mining and grazing, or set aside as a refuge, or committed to use as a ski resort. It is rather how to mediate between the new sort of demands arising out of tension between what I have elsewhere called "the economy of nature,"²⁷ that is, a demand that land provide

25. 16 U.S.C. §§ 1131-36.

26. 16 U.S.C. § 1533(b)(2).

27. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 Stan. L. Rev. 1433, 1442-46 (1993).

natural services, such as habitat for birds or bears, on the one hand, and the more traditional demands such as commodity and recreational use, the conventional developmental economy, on the other. Not long ago, either the demands of the conventional economy alone had to be met (in a national forest which was committed to timber harvesting, notwithstanding its declining population of owls, for example), or it was assumed that while the conventional economy could be served in the forest, the economy of nature in the form of the owls' needs, would be met elsewhere, in some designated enclave. Similarly, one river would be dewatered to meet the needs of the conventional economy, while it was assumed that others would meet the needs of fishermen, and preserve aquatic species.

The significance of the change away from distinct enclaves as our management prescription for the public lands can hardly be overstated. Once it is accepted that preservation of natural processes is not to be limited only to a discrete category of "preservation" enclave lands, but is an obligation borne by lands that have been in the developmental economy, some very important changes are necessarily going to take place. After all, the essence of the developmental economy is to replace natural processes and largely to terminate them: forests and grasslands become farmland; indigenous mammals are replaced by grazing cattle and sheep; aquatic systems are dried up and rivers become sources of irrigation and drinking water. The economy of nature demands some level of reversal to a preservation state and giving up their commodity and developmental values.

What does all this say about the debate over public land policy? It says that the old arrangements are not holding. The victories commodity users won by having certain enclaves carved out from preservation-type designations are no longer insulated from the claims of the economy of nature. Neither can interests rely on the managerial agencies to accommodate their needs. Because of the intervention of courts, and the interpenetration of mandates generated by environmental laws, agencies are no longer nearly as much the masters of the lands they manage as they once were. The old politics may still govern some issues, as has been the case with mining or grazing fees, but for many issues that is distinctly no longer the case.

The new situation means that commodity users are looking for new ways to unburden themselves from the environmental obligations that are being imposed on all the public lands. This search, in my opinion, explains in large part why there has been a resurgence of interest in various proposals for getting the public lands out of federal control. Ironically, however, most of the proposals that have been put forward would not achieve what their proponents seek even if they were enacted as they stand.

The reason is that neither disposition of public lands to the states, nor even sale by the states into private ownership, would lift the obligation of laws like the Endangered Species Act. That law follows the land anywhere and everywhere, whatever its designation and whatever its ownership. Not surprisingly, bills to weaken the Endangered Species Act have been prominent during the 104th Congress.²⁸

28. See, e.g., H.R. 2275, 104th Cong., 1st Sess. (1995) and S. 768, 104th Cong., 1st Sess. (1995).

Most careful observers, I am sure, believe that no extreme is likely to prevail. The West will not be returned to some pristine pre-European settlement state. Nor are essentially all controls going to be lifted off either public or private lands. No significant segment of the federal lands will be turned over to the States, nor will they be sold off. Observation suggests that a new and quite different approach is coming into being to accommodate the tensions between developmental and natural demands, an informal approach that has thus far not been codified in statute, but is likely to play a dominant role in the next generation of public land management.

The place to look for the shape of the emerging future is to the settlements that have been hammered out in places like the Pacific Northwest in response to the controversy over the spotted owl; in the California Bay-Delta where a primary concern is meeting downstream water quality problems; and in the Florida Everglades where the issue has been restoration of historic water flows into southern-most Florida. These efforts, most of which have been fashioned under Interior Secretary Bruce Babbitt's leadership, are all still very much in the early stages of life. All of them are fragile, and all must be considered works in progress.

Despite their provisional status, I am confident that they are the best indicators of where we are going. They denote first and foremost that the established structure of federal land planning and management is fading in significance. In each of these negotiated planning efforts, it matters less and less that an area is designated as a national forest or as BLM land, or even as something as distinctive as the Oregon & California lands.²⁹ What is turning out to matter is that a workable deal can be put together that accommodates the natural system demands that drive the new planning process, along with the economic and social needs of the other communities that rely on the land—timber companies, cities that need municipal water supply, Indians who have traditional fishing claims, along with commercial fishers, homebuilders, and so on.

In short, what is occurring is negotiated regional land use planning. In form it is federal planning, but as I think we shall see increasingly—and the California Bay-Delta negotiation may be our most revealing current model—success is likely to depend on the ability to bring together federal and state officials, as well as private owners and other organizational and interest stakeholders. The instructive archetype is the diplomatic negotiation of an international agreement, with dominant coercive power a diminishing factor, and mutual interest in "getting to yes." All this is a far cry from the rhetoric of sagebrush rebels, or even the concerns of Bernard DeVoto. But it is, I would submit, a central reality of land use in the 1990s. And if we can get to a broadly acceptable agreement through negotiation in the most sensitive regions and river basins of the public lands, we will have achieved about as much as we can expect of our institutions.

29. See 43 U.S.C. § 1181(a).
