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## "Devolution" in Federal Land Law: Abdication by Any Other Name . . .

George Cameron Coggins\*

### I. Introduction

History has come full circle in just fourteen years. In 1981, divestiture and deregulation were the buzzwords in federal land law as Sagebrush Rebels Reagan and Watt<sup>1</sup> took office. That movement to abdicate federal responsibility for land management, like the Sagebrush Rebellion itself, failed miserably.<sup>2</sup> The wheel turned. Only two years ago, at the 1993 Conference on Public Lands,<sup>3</sup> the theme was "ecosystem management," and the participants reached a consensus that this new wave was inevitable, even if no one could define exactly what it was.<sup>4</sup>

Times again changed quickly. The Republican takeover of the House and Senate in the 1994 elections has alarmed or elated the public land policy wonks who fear or hope that the old Sagebrush themes have arisen from history's scrap pile. The 1981 and 1995 situations on the federal lands are not precisely comparable, however.<sup>5</sup> Then, as now, divestiture and deregulation are fashionable themes of the theorists,<sup>6</sup> but "devolution" is in

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This essay is taken from the remarks of Professor Coggins at the Natural Resources Law Center of the University of Colorado School of Law conference, Challenging Federal Ownership and Management: Public Lands and Public Benefits (Oct. 11-13, 1995).

1. Secretary of the Department of the Interior during the Reagan Administration.
2. George Cameron Coggins & Doris K. Nagel, *Nothing Beside Remains: The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. Envtl. Aff. L. Rev. 473 (1990).
3. Natural Resources Law Center of the University of Colorado School of Law conference, A New Era for the Western Public Lands, (Sept. 21, 1993) [hereinafter A New Era Conference].
4. See George Cameron Coggins, *Eleven Reasons to Disregard This Commentary on the Brave New World in Western Public Land Law*, 65 U. Colo. L. Rev. 401 (1994).
5. In 1981, a conservative Republican Administration did battle with a Democratic Congress; in 1995, the reverse is true.
6. Terry Anderson, *Back to the Future: Privatizing the Federal Estate*, A New Era Conference, *supra* note 3.

some senses an even more prominent motif in the political and academic arenas. "Devolution" in general refers to a transfer of regulatory authority downward, usually from the federal government to the states.<sup>7</sup> "Devolution" in this context basically means transferring authority to make public resource decisions from the federal land management agencies to local citizens. Power, thus, is "devolved" upon localities.

Oddly enough, virtually all of the major players in the federal land and resource drama—with the probable and notable exception of the national conservation organizations such as the Sierra Club, Natural Resources Defense Council, National Wildlife Federation, and Environmental Defense Fund<sup>8</sup>—seem to favor devolution in one form or another. Privatization economists,<sup>9</sup> ranchers, tree-huggers, sociologists, lumber company employees, and even some federal land managers recently have asserted the value of local control over the use of federal lands in the area.<sup>10</sup> Philosophically, devolution is closely tied to divestment and deregulation, but its proponents seem to believe that devolution of management authority is possible under federal ownership and under existing federal law.<sup>11</sup>

This essay disputes those conclusions and the premises that necessarily underlie them. Devolution, as now advocated, is abdication of legal management responsibilities by federal land managers. The proposition raises both legal and policy questions, and care should be taken in separating those questions. Legally, the inquiry focuses on the degree that current federal statutes allow land management agencies to delegate their decision-making powers. Politically, the debate is over the desirability of allowing agencies to do so. This essay concludes that federal law allows the management agencies wide (and perhaps undue) latitude to structure their operations, but that the abdication contemplated by devolution proponents exceeds the limits set by the judiciary.<sup>12</sup> It also concludes that, as a matter of policy, if not politics, devolution/abdication is a terrifically bad idea from any but the most shortsighted perspective.<sup>13</sup>

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7. See, e.g., John Pendergrass, *You Say You Want a Devolution*, *Envtl. Forum* 8 (Winter 1995).

8. E.g., Chip Dennerlein (National Parks and Conservation Association), *Charging Public Land Users for Minerals, Grazing, and Recreational Uses*, A New Era Conference, *supra* note 3.

9. E.g., Anderson, *supra* note 6.

10. A New Era Conference, *supra* note 3, *passim*. Whether hardrock miners share that passion seems unlikely in the wake of *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (holding that there was no per se preemption of the California Coastal Commission's permit system by federal mining law).

11. E.g., Mary Chapman & Mike Jackson, *Public-Private Partnership*, A New Era Conference, *supra* note 3.

12. See *infra* Part II.

13. See *infra* Part III.

The first part of this essay defines the premises on which the debate should proceed. The succeeding section briefly traces through history some prominent instances of abdication by all three branches of government in the public lands sphere. It also examines more closely four specific examples in which land management agencies intentionally abdicated their statutory responsibilities, and the three-year period in which Interior Secretary James Watt attempted to do so on a wholesale basis. The final section harps on the damage done by abdication/devolution in the past as a strong argument for avoiding such damage in the future.

## II. The Premises Underlying Resource Allocation Decisions On The Federal Lands

Except for asserting that local citizens will make "better" decisions than professional land managers—an assertion disputed below<sup>14</sup>—devolution proponents seldom spell out in any detail the premises upon which their position is based. While they also frequently claim that federal ownership is inherently "A Bad Thing,"<sup>15</sup> and that federal land management reeks of overbearing, incompetent colonialism,<sup>16</sup> the western taste for hyperbole should be disregarded and the real reasons examined. All of the real legal and political premises upon which modern public land law is founded cut against the devolution notion.

The beginning often is a good place to start. In the beginning, the Constitution of the United States vested legislative power in the House and Senate, judicial power in a Supreme Court and such other courts as Congress may create, and executive power in a President.<sup>17</sup> This simplistic rendering ought to have real consequences. Article IV of the Constitution assigns Congress - not the President, and certainly not the Bureau of Land Management - the power to make needful rules respecting the territory or other property of the United States.<sup>18</sup> That power is plenary and preemptive;<sup>19</sup> the United States remains a sovereign even when it acts as a landowner.<sup>20</sup> It is for Congress, as trustee, to say whether the lands should be disposed of, retained, protected, or exploited.<sup>21</sup>

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14. See *infra* Part III.

15. Richard Stroup & John A. Baden, *NATURAL RESOURCES: BUREAUCRATIC MYTHS AND ENVIRONMENTAL MANAGEMENT* (1983).

16. Remarks of Sen. Hatch, 125 Cong. Rec. 22640-41 (1979) (*quoted* in GEORGE CAMERON COGGINS, CHARLES F. WILKINSON & JOHN D. LESHY, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 35 (3d ed. 1993)).

17. U.S. Const.

18. U.S. Const. art. IV, § 3, cl. 2.

19. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

20. *Light v. United States*, 220 U.S. 523, 536 (1911) (holding that Congress determines how the public lands of the nation, held in trust, are to be administered).

21. *Id.* at 536.

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Several related principles bear repeating. First, the United States, not the individual western states, bought, conquered, or stole the present federal lands. Second, they are owned by the United States in trust for all of the people in the country (and, increasingly, in the world), not just for the souvenir sellers in Cody, Wyoming,<sup>22</sup> or the mining claimant marijuana farmers in California,<sup>23</sup> or the county commissioners in Garfield County, Utah.<sup>24</sup> Third, Congress has determined, somewhere along the historical line, that all of these federal lands should remain federal because they serve some important national purposes.<sup>25</sup> These premises are beyond reasonable dispute.

They also are more than mere junior high civics maxims. They reflect other premises that are integral to American national life. Such hoary notions as

- this is a government of law, not of men; or
- the ends do not justify the means;

are exactly the sorts of propositions that devolution proponents usually ignore. The public lands are *public*. They are the property of all of the people, not just those who live in their immediate vicinity.<sup>26</sup> They are national assets, not local storehouses to be looted in the deregulation riots.

Federal land management may well be economically inefficient, as the rightist economists claim, but that fact has no relevance except in ethereal policy terms. The Framers of the Constitution intentionally created a highly inefficient form of government because they knew that efficiency can be merely a synonym for despotism. American constitutional law is heavily procedural because the Framers recognized that ends do not justify means. Public land management does not necessarily have to be inefficient as a matter of economic theory, but Congress has chosen to require a great many procedural safeguards such as environmental evaluation<sup>27</sup> and land use planning.<sup>28</sup> Whether or not undue expense and frustration result, the most appropriate response to the complaint of inefficiency is: "so what?"

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22. See *NWF v. NPS*, 669 F. Supp. 384 (D. Wyo. 1987).

23. See *People v. Wilmarth*, 132 Cal. App. 3d 383 (1982).

24. Comm'r Louise Liston, remarks at A New Era Conference, *supra* note 3.

25. Federal Land Policy & Management Act (FLPMA), 43 U.S.C. § 1701(a)(1) (1988), starts with a catchall retention clause: "The Congress declares that it is the policy of the United States that—(1) the public lands be retained in Federal ownership. . . ."

26. This proposition often is at the unstated core of the debate: many westerners regard adjacent federal lands as their own property, even though legal and moral support for this assumption is wholly lacking.

27. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1988). See, e.g., *California v. Block*, 690 F.2d 753 (9th Cir. 1982).

28. E.g., 16 U.S.C. §§ 1600-14 (1988); 43 U.S.C. § 1712 (1988). See George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 *Env'tl. L.* 1 (1983).

Jim Huffman and others call the federally-owned lands the "political lands,"<sup>29</sup> and of course that description is accurate. The corollary some seek to draw from that notion is that politics (or "raw politics"<sup>30</sup> to some) is a positive evil to be avoided at all costs. That corollary is hypocritical academism at its worst. Politics and law in a democratic republic are simply the means by which this nation transacts public business of all kinds. Politics, properly understood as the use of policy to make positive law, is not only the normal mechanism for resolving public land policy disputes, it is an essential means. Neither economics nor the real sciences can answer questions of values. Biological sciences cannot tell us how much wilderness is enough, and economists cannot calculate whether the money spent to save bald eagles was worth it.

The final premise, that the current political climate is not a good reason for land managers to devolve their authorities onto local citizens, is somewhat more debatable. At this writing, Newtoid legislators have introduced dozens of bills which, if enacted in their totality, would cause public land law as we know it to regress about a century: disposition would be a main priority; logging could proceed at the logger's will; mining and grazing would be dominant, unregulated uses; protective land classifications would be extinguished; endangered species could fend for themselves; and pollution would come back into vogue as a necessary evil.<sup>31</sup>

Predicting legislative actions can be hazardous to one's prophetic reputation, but the scenario proposed by Newtie and the Congressional Blowfish is unlikely to become reality. The question of federal land divestiture has been endemic and epidemic for more than a century. The current balance, in which small scale divestiture is offset by smaller scale acquisition, represents a politically acceptable consensus that will not be overturned lightly.<sup>32</sup> In terms of deregulation, John Leshy noted long ago that the strongest force in modern public land law is inertia; it is simply much easier to block reform (in any direction) than it is to achieve it.<sup>33</sup> Thus, the Chicken Little reaction is at best premature.

Only Dr. Pangloss or the abysmally ignorant could believe that this is the best of all possible federal land worlds, and that no reform would be

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29. James Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. Colo. L. Rev. 241 (1991).

30. Anderson, *supra* note 6.

31. Many of the proposals are listed in James Huffman, *Public Land Policy is Ripe for Change*, A New Era Conference, *supra* note 3.

32. See generally GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW ch. 8 (1990).

33. John D. Leshy, *Sharing Federal Multiple-Use Lands*, in RETHINKING THE FEDERAL LANDS 235, 254 (1984).

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availing.<sup>34</sup> The new/old ideas coming from the radical rightists should therefore be welcomed as providing an opportunity for all to reexamine basic premises, assumptions, priorities, and philosophies. If history is a guide, however, radicals of any stripe cannot win rational debates.

### **III. A Brief History of Governmental Abdication of Management Responsibilities on the Federal Public Lands**

Abdication is simply buck-passing. It occurs when branches of government act irresponsibly, a not uncommon phenomenon. Congress, of course, often prefers to avoid hard questions that could cause political backlash. That is one reason why federal public land law suffers from such gobbledygook statutes as the Multiple-Use, Sustained Yield (MUSY) Act<sup>35</sup> that use all the right words to say not much of anything at all.<sup>36</sup> The MUSY Act and similar legislation is a congressional abdication of its responsibility to make basic resource allocation decisions by delegating them to supposedly expert, but certainly unelected, public land managers without any real guidance or standards.

Congress can abdicate in this fashion only because the Supreme Court abandoned the constitutional requirement that Congress cannot delegate its basic legislative authority.<sup>37</sup> In recent years, some Supreme Court Justices also have sought to abdicate their responsibility to ensure the executive branch acts within the law. The Court has not adopted Justice Scalia's executive nullification theory<sup>38</sup> outright, but a narrow majority in a few cases has advanced it indirectly through doctrinal reinterpretation in seemingly neutral areas such as standing and ripeness.<sup>39</sup> These instances of congressional and judicial abdication are "legal" because the Court says they are. The next step on the irresponsibility spectrum—delegating power from federal agencies to private, interested citizens or local officials—is not necessarily legal.

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34. See George Cameron Coggins, *Commentary: Overcoming the Unfortunate Legacies of Western Public Land Law*, 29 Land & Water L. Rev. 381 (1994).

35. Multiple-Use, Sustained Yield Act of 1960, 16 U.S.C. §§ 528-31 (1988).

36. This writer once tried to read the MUSYA as meaning something other than a standardless delegation, but neither courts nor agencies have agreed. See Coggins & Glicksman, *supra* note 32, at ch. 16 and authorities cited therein.

37. See, e.g., *South Dakota v. U.S. Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995).

38. Justice Scalia has argued, evidently seriously, that the executive branch should be free to ignore statutory requirements with which it is in political disagreement. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 895 (1983).

39. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. NWF*, 497 U.S. 871 (1990) (examining the sufficiency of affidavits by respondent members to confer standing).

Neither is it original. Agency or departmental abdication of statutory responsibilities has a long and inglorious history. In the 19th century, localities invented dozens of ways to cheat the United States out of lands and resources, from claims clubs to railroad subsidiary corporations and from "rubber 40s" to perjury and bribery.<sup>40</sup> All of these were possible only because they had local approval and because the responsible federal officials turned blind eyes to these perversions of the land laws. The old, unspoken premise—that it is perfectly okay to steal, cheat, lie, etc. so long as the government is the faceless victim—along with the idea that westerners deserve something for nothing, is at the bottom of the current renewed call for abdication, privatization, and decentralization.

In this century, professional management agencies succeeded the old General Land Office, and instances of abdication multiplied. The Bureau of Reclamation long turned a blind eye toward those farmers routinely violating the acreage and residency requirements of the Reclamation Act.<sup>41</sup> The National Park Service, though directed to preserve park wildlife for future generations, not only allowed ranchers to eradicate predatory species, it actively assisted them.<sup>42</sup> The Fish and Wildlife Service on occasion has preferred local use priorities to the welfare of wildlife on national wildlife refuges.<sup>43</sup> The Forest Service, after World War II, abdicated its independence to clearcutting lumber companies and timber dependent communities.<sup>44</sup> The Bureau of Land Management neither regulated destructive mining practices nor much curtailed destructive overgrazing.<sup>45</sup> Abdication—agency refusal to perform its statutory duties—is a constant temptation to all parts of government when the answer dictated by law is unpopular with local constituents.

Unlike congressional or judicial abdication, however, the failure of agencies to do their legal jobs may provide dissenters with some judicial remedies. Prediction is difficult because the judicial record is mixed, and the cases tend to be circumstance-specific. The remainder of this section surveys four notable instances in which federal land management agencies arguably abdicated their responsibilities and the efforts of Secretary Watt to abdicate departmental duties wholesale.

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40. See generally PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

41. See May Kelley, *Staging a Comeback - Section 8 of the Reclamation Act*, 18 U.C. Davis L. Rev. 97, 105 (1984); Hamilton Candee, *The Broken Promise of Reclamation Reform*, 40 Hastings L.J. 657, 661 (1989).

42. E.g., GEORGE CAMERON COGGINS & PARTHENIA BLESSING EVANS, *Predators' Rights and American Wildlife Law*, 24 Ariz. L. Rev. 821 (1982).

43. E.g., *Defenders of Wildlife v. Andrus*, 455 F. Supp. 446 (D.D.C. 1978) (holding that Fish and Wildlife regulations permitting power boating, motorless boating, and water-skiing in a national wildlife refuge as non-interfering was an arbitrary and capricious determination).

44. E.g., *West Virginia Div., Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975).

45. E.g., Coggins, *supra* note 28.

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### **A. National Park Service**

Redwood National Park, as originally created, was a hodgepodge of formerly state and federal parcels. Clearcutting on adjacent lands harmed the new Park aesthetically and physically. The general congressional mandate to the NPS is preservation of park resources for future generations,<sup>46</sup> but that statute does not mention threats to those resources from other lands. The Redwood Park Act, however, authorized the Interior Secretary, in his discretion, to take a variety of actions to abate such threats.<sup>47</sup> Instead of doing so, the Secretary commissioned a series of studies to stall and then refused to act on the studies' conclusions that action should be taken. The Sierra Club, claiming that the NPS inaction was an abdication of its preservational duty, sued to force action.

The district court agreed with plaintiff, Sierra Club.<sup>48</sup> It ruled that the statutes, when read in light of the Secretary's public trust duties, required all reasonable efforts to preserve the park;<sup>49</sup> damage to park resources was evident and largely uncontested. The court entered a mandatory injunction requiring the NPS to initiate a series of actions to alleviate the harm.<sup>50</sup> The Park Service did so, but the other entities whose cooperation was necessary (Office of Management and Budget, the State of California, Congress, and the timber companies) refused to go along.<sup>51</sup> The court finally dismissed the action, whereupon Congress decreed the purchase or condemnation of the lands where the offending activities were taking place.<sup>52</sup> In sum, the court ordered the agency to cease abdicating its responsibilities, but the judicial remedy was futile because it depended on third party cooperation that was not forthcoming.

### **B. Fish and Wildlife Service**

The Ruby Lake National Wildlife Refuge in Nevada encompasses a shallow lake that provides breeding habitat for many avian species. In 1978, local politicians prevailed upon departmental superiors to open Ruby Lake

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46. 16 U.S.C. § 1 (1988).

47. *Id.* § 79(c), (e).

48. *Sierra Club v. Department of the Interior*, 376 F. Supp. 90 (N.D. Cal. 1974) (Sierra Club brought an action to obtain judgment directing the Department of Interior to use its powers to protect Redwood National Park from damage allegedly caused or threatened by logging operations. The court held review was permissible and denied defendant's motion to dismiss.).

49. *Id.* at 95-96; *cf.* *Daingerfield Island Protective Soc'y v. Babbitt*, 823 F. Supp. 950, 955 (D.D.C. 1993), *aff'd in part*, 15 F.3d 1159 (D.C. Cir. 1993) (affirmative duty to safeguard NPS units).

50. *Sierra Club v. Department of the Interior*, 395 F. Supp. 284, 294 (N.D. Cal. 1975).

51. *Sierra Club v. Department of the Interior*, 424 F. Supp. 172 (N.D. Cal. 1974).

52. *Id.* at 175-76.

to virtually unlimited power boating, despite staff dissent that the recreational activity would be extremely harmful to nesting waterfowl. In effect, the FWS abdicated its responsibility for wildlife welfare to local political and popular desires.

The reviewing court twice enjoined the effectiveness of the regulations allowing power boating on Ruby Lake.<sup>53</sup> The 1962 Refuge Recreation Act requires a secretarial finding that a recreational use will not unduly interfere with basic refuge purposes before such a use may be allowed.<sup>54</sup> No such finding had been made. The court went further to opine that the Secretary could not, under the law, take into account or balance political or economic factors in making the finding, and that the burden was on the Secretary to show statutory compliance not on the challenger to demonstrate noncompliance.<sup>55</sup> In this case, the court had no difficulty remedying the abdication of statutory authority and responsibility because a standard negative injunction served that purpose.

### C. National Forest Service

The federal implied reserve water rights doctrine provides that when a federal parcel is reserved for a particular purpose, the United States also impliedly reserves sufficient unappropriated water in the reservation to serve the purpose of the reservation.<sup>56</sup> National forests are entitled to water rights that enable the Forest Service to carry out the dual but narrow purposes of the 1897 Organic Act.<sup>57</sup> The questions arose in Colorado whether further reservation of an area within a national forest as a wilderness area carried with it an additional implied water right, and whether, if it did, the Forest Service was obligated to assert such rights in pending water rights adjudications. The Forest Service (pursuant to an edict from the

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53. *Defenders of Wildlife v. Andrus*, 11 ERC 2098, 455 F. Supp. 446 (D.D.C. 1978) (Wildlife organizations brought an action against the Secretary of the Interior claiming regulations which allowed power boating in refuge violated Refuge Recreation Act. The court held the regulations did violate the Act and were inconsistent and interfered with refuge's primary purpose.).

54. 15 U.S.C. § 460k (1988).

55. *Defenders of Wildlife*, 11 ERC at 2101.

56. *E.g.*, *Cappaert v. United States*, 426 U.S. 128 (1976) (holding that when the U.S. Government reserved a cavern as a national monument, the government also acquired by reservation water rights in unappropriated appurtenant water sufficient to maintain the water level of the underground pool).

57. *United States v. New Mexico*, 438 U.S. 696 (1978) (holding that in setting aside the Gila National Forest from other public lands the U.S. Government did reserve water out of the Rio Mibres to preserve timber and maintain water flows but not to further aesthetic, recreational, wildlife-preservation, and stock-watering purposes).

conservative Administration) denied both that such rights existed and that it had to assent and protect such rights even if they were implied.

The district court had little difficulty concluding that wilderness designation was a separate reservation that carried implied water rights with it.<sup>58</sup> This was an important holding inasmuch as the preservational purpose of wilderness designation could require all unappropriated water to be reserved. The district court, however, had more difficulty in fashioning an appropriate remedy. The court rejected application of the public trust doctrine, instead requiring the agency to submit a report on possible ways to meet its responsibilities. The first report was rejected as grossly deficient, but the court refused to order the Forest Service to enter litigation.<sup>59</sup>

On appeal, the Tenth Circuit dismissed the litigation for lack of ripeness.<sup>60</sup> The highly confusing opinion in essence decided that suit on these questions was precluded until a distinct, serious threat to wilderness water resources was actually demonstrated. Several parts of the appellate court's opinion strongly hinted that the lower court was correct on the merits of the existence of the right.<sup>61</sup> Because the lawsuit was dismissed for technical reasons, the question whether the agency unlawfully abdicated its duty to preserve resources under its jurisdiction remains unresolved.

#### **D. Bureau of Land Management**

The case most on point in any discussion of devolution/abdication is the 1985 "Ramirez" decision on the validity of the BLM's proposed "Cooperative Management Agreement" (CMA) program.<sup>62</sup> The Watt regime promulgated regulations which effectively would have delegated virtually all livestock management authority to selected rancher-permittees. This was done in concert with a variety of other regulatory changes also aimed at abdicating BLM control of the public lands. The reviewing court remanded most of the proposed regulations for procedural reasons. As to the CMA program, however, the court addressed the substantive merits and flatly rejected the BLM's abdication attempt as a gross departure from its pertinent statutes. In words that still resonate, the court concluded:

Permittees must be kept under a sufficiently real threat of cancellation or modification in order to adequately protect the public lands from overgrazing or other forms of mismanagement. Any other interpretation

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58. *Sierra Club v. Block*, 615 F. Supp. 44 (D. Colo. 1985), 622 F. Supp. 842, 851 (D. Colo. 1985).

59. *Sierra Club v. Block*, 661 F. Supp. 1490 (D. Colo. 1987).

60. *Sierra Club v. Yeuter*, 911 F.2d 1405 (10th Cir. 1990).

61. *Id.* at 1413, 1414.

62. *See NRDC v. Hodel*, 618 F. Supp. 848, 871-77 (E.D. Cal. 1985).

of congressional intent is inconsistent with the dominant purposes expressed in the [statutes]. It is for Congress and not defendants to amend the grazing statutes. In the meantime, it is the public policy of the United States that the Secretary and the BLM, not the ranchers, shall retain final control and decision-making authority over livestock grazing practices on the public lands.<sup>63</sup>

That is what the law should be. Other courts, however, including the Ninth Circuit, tend to be far more deferential to agency discretion as to appropriate management means.<sup>64</sup> The *Reno* case is perhaps the worst of this genre.<sup>65</sup> Still, all courts will recognize a line beyond which agencies cannot go in their quests for devolution.

### **E. Secretary Watt's Wholesale Devolution**

The period 1981-1983 saw a concerted effort by Secretary of the Interior James G. Watt to divest, deregulate, and devolve. He was unsuccessful in the great majority of important instances.<sup>66</sup> Congress halted some proposals, such as coal lease sales<sup>67</sup> and oil and gas leasing in wilderness areas.<sup>68</sup> None of Mr. Watt's reactionary ideas were adopted by Congress. Courts sidetracked many more Watt initiatives, from ANWR opening<sup>69</sup> to shooting wolves,<sup>70</sup> from establishing an oil refinery on a wilderness wildlife refuge<sup>71</sup> to halting parkland acquisition,<sup>72</sup> and from revoking

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63. *Id.* at 871; *cf.* *Anacostia Watershed Soc'y v. Babbitt*, 871 F. Supp. 475 (D.D.C. 1994) (transfer to jurisdiction enjoined).

64. *E.g.*, *Perkins v. Bergland*, 608 F.2d 803 (9th Cir. 1979).

65. *NRDC v. Hodel*, 819 F.2d 927 (9th Cir. 1987) (NRDC challenged BLM policy decision to eschew the use of available data for purposes of setting grazing levels on lands in Reno Area. Ninth Circuit held that BLM need not determine grazing capacity for each allotment to satisfy statutes.).

66. *See generally* Coggins & Nagel, *supra* note 2.

67. *See* *NWF v. Watt*, 571 F. Supp. 1145 (D.D.C. 1983).

68. *See* *Pacific Legal Found v. Watt*, 529 F. Supp. 982 (D. Mont. 1981).

69. *See* *Trustees for Alaska v. Watt*, 690 F.2d 1279 (9th Cir. 1982) (upholding district court conclusion that Secretary Watt improperly transferred lead responsibility for studies involving ANWR from USFWS to USGS).

70. *See* *National Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985) (regulations permitted sport hunting and trapping of eastern timber wolf held to be illegal).

71. *See* *National Audubon Soc'y v. Clark*, 606 F. Supp. 825 (D. Alaska 1984) (Secretary attempted to transfer a wilderness area to Alaska native corporations in exchange for land interests in two other wilderness areas. Court held that Secretary's discretion was reviewable and here, Secretary's "Public Interest Determination" suffered from serious errors of judgment and misapplication of law. The land exchange was invalid.).

withdrawals<sup>73</sup> to ignoring environmental evaluation.<sup>74</sup> The question in most cases was whether the Interior Department had followed the substantive and procedural requirements of the relevant statutes. Usually, the answer was no.

Several conclusions may be derived from these and many other instances. First, the federal public land statutes often suffer from a severe lack of precision, detail, and management guidance. Barring resurrection of the nondelegation doctrine,<sup>75</sup> however, Congress cannot be forced to make the hard choices. Second, courts often are loathe "to say what the law is"<sup>76</sup> in this area. This aversion to judicial duty is a consequence, in part, of the opacity of the statutory law, which necessarily delegates wide discretion to the managing agencies,<sup>77</sup> but it also stems from historical assumptions and premises, now long outmoded,<sup>78</sup> and from radical judicial theories that alone cannot stand the light of day.<sup>79</sup> In other words, courts for whatever reason are very reluctant to reverse administrative determinations on public resource questions.

Third, judicial deference to agency discretion only goes so far. Courts in most cases will not allow land management agencies to ignore or circumvent clear statutory directives. The *Monongahela*,<sup>80</sup> *Snail Darter*,<sup>81</sup> *Wilderness Review*,<sup>82</sup> *Minnesota Wolf*,<sup>83</sup> and *AMA II*<sup>84</sup> decisions can be added

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72. See generally Robert L. Glicksman & George Cameron Coggins, *Federal Recreational Policy: The Rise and Decline of the LWCF*, 9 Colum. J. Envtl. L. 125, (1983).

73. See *NWF v. Burford*, 835 F.2d 305 (D.C. Cir. 1987) (environmental group challenged actions by Secretary of Interior withdrawing protective restrictions from 180 million acres of federal lands. Court upheld injunction against Secretary's conduct of this program.), *rec'd on other grounds*, 497 U.S. 871 (1990).

74. See, e.g., *NRDC v. Hodel*, 618 F. Supp. 848, 871-877 (E.D. Cal. 1985) ("Experimental" program allowing selected ranchers to graze livestock on public land in manner they deemed appropriate violated NEPA, APA, and other federal or state environmental laws).

75. The Eighth Circuit recently held that a statute giving the Interior Secretary unqualified power to acquire land "for Indians" was an unconstitutional delegation. *South Dakota v. Dep't of the Interior*, 69 F.3d 878, 882-83 (8th Cir. 1995).

76. This is "emphatically the province and duty of the judicial department." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

77. See, e.g., *Perkins v. Bergland*, 608 F.2d 803, 807, nn. 11, 12 (9th Cir. 1979).

78. See, e.g., *NRDC v. Hodel*, 624 F. Supp. 1045, 1054 (D. Nev. 1985) (elimination of grazing "unthinkable"), *aff'd*, 819 F.2d 927 (9th Cir. 1987).

79. E.g., Scalia, *supra* note 38.

80. *West Virginia Div., Izaak Walton League v. Butz*, 522 F.2d 945 (4th Cir. 1975) (holding that contracts allowing clear cutting of timber on National Forest lands violated provisions of Organic Act requiring individual tress be marked).

81. *TVA v. Hill*, 437 U.S. 153 (1978) (holding that ESA gave protection to small fish, halting construction of a dam by TVA).

to the list of cases in which courts thwarted agency abdication efforts. So long as the federal laws delegate decision-making authority to federal administrative entities, and not to local citizens' groups, devolution of that authority to those groups will remain arbitrary and unlawful.

#### IV. Conclusion: Is Devolution Good Political Policy?

The negative answer to the legal question whether devolution is possible under existing law does not necessarily answer the policy question whether it should occur. As the preceding part illustrates, devolution/abdication is hardly a novel idea: it has been a common phenomenon on the federal public lands almost since the beginning of nationhood. This concluding section argues that the effects of devolution/abdication almost always have been bad in one or more respects, and that there is little or no reason to believe that modern devolution would have better results.

Proponents claim that resource allocation by local residents instead of professional land managers will result in "better" decisions. "Better" in this context, could mean anything from economic efficiency to environmental safeguards to blissful unanimity (or least consensus) to lack of red tape to more prosperity to anything else. However "better" is defined, history provides strong evidence that the premise is untrue.

Whenever western economic interests were able to control local resource allocation and use, they chose to "cut and run" rather than to use self restraint in the interests of conservation and sustainability. Westerners are no better than the rest of us: profits now seem always to take precedence over health of the natural systems that provide those profits. Why are the Nation's public lands now characterized by:

- torn up deserts?
- increasing numbers of threatened and endangered species?
- polluted and depleted waterways?
- multiplying instances of outright poisonings as at Kesterson National Wildlife Refuge?
- loss of primeval forests?
- ugly clearcut swathes and patches?

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82. *Sierra Club v. Watt*, 608 F. Supp. 305 (E.D. Cal. 1985) (district court held that Secretary's attempt to withdraw lands from the wilderness inventory if the U.S. did not hold subsurface mineral rights was improper and tracts of less than 5000 acres subject to non-impairment management even if withdrawn from inventory).

83. *Sierra Club v. Clark*, 755 F.2d 608.

84. *American Motorcyclist Ass'n v. Watt*, 543 F. Supp. 789 (C.D. Cal. 1982) (In California Desert Conservation Area Plan, Secretary of Interior ignored statutory requirements in designation of motorized vehicle routes. Plaintiffs granted declaratory and injunctive relief.).

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- severely diminished grazing capacity?
- invasions of pest species?
- destruction of fishing industries?
- lost access opportunities?
- violence against federal employees?
- economic speculation and concentration?
- destruction of free-flowing rivers?
- destruction of wildlife habitat?
- and many more such problems?

The answer of course is that in most cases the local people did it, and the managing agencies did not do their jobs. Defacto devolution benefits only a few, and only briefly. Local westerners are concerned first and foremost with whose ox is to be gored. When the property in question is public property, all people who want to be heard regarding the use or disposition of public land, should be. But the person or body who ultimately decides should not have a personal ox on the firing line. Chicken coops should not be regulated by foxes.

No resource allocation mechanism ever will be perfect because people and politics will never be perfect. The disputes involved in federal public land law seldom can be resolved without legal coercion, from federal administrative agencies in the first instance and thereafter by courts and congress. Blind belief in discussion and consensus is just a phoney substitute for a real system of decision making. And, in every such decision, there will be at least one loser—no amount of rhetoric can change that fact. Instead of allowing federal land managers to devolve their authorities and responsibilities onto local citizens' councils, a far better balance will be achieved if only legislators would legislate, judges would judge, and managers would manage in accordance with the law.