

1-1-2008

Thinking the Unthinkable: States as Public Land Managers

Sally K. Fairfax

Follow this and additional works at: https://repository.uchastings.edu/hastings_environmental_law_journal



Part of the [Environmental Law Commons](#)

Recommended Citation

Sally K. Fairfax, *Thinking the Unthinkable: States as Public Land Managers*, 14 *Hastings West Northwest J. of Envtl. L. & Pol'y* 509 (2008)

Available at: https://repository.uchastings.edu/hastings_environmental_law_journal/vol14/iss1/16

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in *Hastings Environmental Law Journal* by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Thinking the Unthinkable: States as Public Land Managers

Sally K. Fairfax*

I. Introduction

The purpose of this paper is to emphasize the importance of thinking broadly about public resources. It will do so primarily by focusing on two frequently overlooked public resources; state school and trust lands.¹ The management of these lands differs significantly from the operative on most federal lands. As a result, the story of these lands has much to add to our thinking about why we, as a nation, might continue to support government ownership and management of extensive land and related resources. In addition, state lands have a great deal to teach us about management institutions and tools.

The basics of public resources—why to have them, and the tools and institutions for managing them—are timely topics. This nation is in the midst of yet another century-long discussion about public land issues.² Typically the debate is intense; characterized by rhetoric and stereotypes that obscure fundamental issues. The legitimacy of federal ownership of public lands in the west has been a recurring theme. This issue emerges for two reasons. First, the conceptual tools for conducting this debate are impoverished and misleading. Second, ranchers and other commodity interests have found it fruitful to discuss title to public lands, when their actual agenda has been about control of public resources. This inadequate framework for discussion has made it possible to derail the dialogue onto the merely strategic title issue.

There has long been a predictable tilt to this title issue. Commodity users and states typically align themselves with states rights, arguing for a "return" or a grant of

*B.A. Hood College (1965); M.A. New York University (1968); Ph.D. Duke University and M.A. Forestry (1974). Professor and Associate Dean, College of Natural Resources, University of California, Berkeley. This article is an outgrowth of the author's presentation 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. See JON A. SOUDER & SALLY FAIRFAX, *STATE TRUST LANDS* (1996).

2. The public lands (also known as the "federal lands") have been reviewed episodically, most recently and with several interesting new twists by Patrica N. Limerick, *A History of the Public Lands Debates*, 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) (hereinafter Public Lands Conference).

the lands to the states in order to achieve less restricted access to these resources for their own development. Not unexpectedly, environmentalists and preservationists have, in response, reviled the states as managers. While this embracing and bashing has continued for decades, no one has paid attention to what the states have actually been doing.

Taking states seriously as land managers and evaluating their constraints and potentials is a contribution to the dialogue in and of itself. Nevertheless, because appearing to be pro-state is tantamount to being pro-development and anti-environment, it is important to clarify the subtexts of this article at the outset. My attention to the long ignored state trust lands is not part of a plea, explicit or implicit, to turn the federal lands over to the states. Rather, it is my intention to demonstrate that state trust lands are our oldest and most durable public resource management regime. When considering the appropriate paths for public resource management over the next century, it is important to keep all of the current programs, including state trust lands and their management, and the lessons they provide to us, fully in view.

My discussion of the state trust land management experience will proceed under three headings. The first section describes the inadequacy of our intellectual and conversational tools for addressing public resources. How is it, this section will ask, that state lands and land managers fell so far into disrepute? The section will provide a brief overview of the history of state-federal relations, both in general and with respect to public lands management. It will assert that state and federal governments go in and out of fashion in long cycles. However, the real target of my discussion is the familiar acquisition-disposition-retention triptych that structures much of our thinking about public lands history. It is my goal to undo some of the damage done by that construct to the states' reputation in the history of public resource management and to challenge the currently near-ubiquitous presumption of federal dominance in this field. Both the states' invisibility and the inevitability of federal primacy are seen herein as artifice.

The second section will rescue a potential for dialogue from that rather disgruntled description of our past conversations in the area. Why, if our tools are inadequate and our dialogue is impoverished and largely irrelevant, should we hold out any hope for a more meaningful conversation at this juncture? I offer five observations that suggest that the dialogue may be more productive this time around.

The third part of the paper will put some flesh on the bones of the most obvious—right under our noses—set of institutional alternatives for thinking about public resources, the state lands. It will briefly relate a compressed history of the land grant program. A description of the trust notion and how it operates in public land management will follow. The basic idea that will emerge is that the state trust lands management mandate differs strikingly from the federal multiple use mandate.

Federal managers are told to manage the lands in the "combination of uses that best meets the needs of the American people."³ This flaccid direction is

3. 16 U.S.C. § 531 (1985).

translated into volumes of procedural guidance, but gives relatively little direction as to substantive priorities or goals to be obtained. In contrast the state trust lands are managed like private property that a trustee directs to be maintained for the benefit of a specified beneficiary. This trust mandate will be described in terms of four themes: clarity, accountability, enforceability, and perpetuity.

Next, I will recount four stories—each involving a major trust land dispute. My goal is to suggest ways in which the trust mandate might expand and clarify our thinking about public resources. Several of these stories may suggest that the trust land mandate is a good way—or a lousy one, depending on one's perspective—to manage public resources. This paper avoids making such sweeping conclusions and argues merely that this extensive—in time and space—experience with public resource management ought to be part of our lexicon as we debate, yet again, the meaning of public resources.

State land trusts have a great deal to teach us—understanding their management can help clarify issues, identify alternatives, and underscore the notion that we have a lot more in our intellectual pantry than the multiple-use model mandate that presently characterizes federal lands.

Four related ideas merit special introduction. Understanding of the centrality of the Progressive Era consensus regarding resource planning and management is crucial to discussing alternative approaches because it continues to be the dominant paradigm. The era of Theodore Roosevelt and Gifford Pinchot was characterized by a commitment to rational and national scientific planning for resource development. For most of the last century, this commitment has justified both government ownership of public lands and a centralized approach to their management. It now appears that the consensus and the agencies that embody the spirit of the Progressive Era, most notably the U.S. Forest Service, appear to be under trenchant, perhaps, finally successful challenge.

Second, a slightly less explicit set of arguments focuses on the distinction between title and control. Although Progressive Era management has dominated the public lands debate, it has always conflicted with the pervasive commitment to protection of private property and the philosophical supremacy of the fee-simple title. Predictably, therefore, a major strand of our nation's public lands debate has focused on whether to retain or dispose of the remaining federal lands. This emphasis on title begs and conceals more important questions about who controls the land and to what ends, an issue that this discussion of the state trust lands experience will highlight.

Writers such as Carol Rose have observed that the relationship between title to land and control of that land is often weak or non-existent.⁴ Western ranchers on federal lands have perfected the art of making this distinction work to their advantage. Federal grazing permittees have argued for decades that they need securer title over their grazing allotments, all the while maintaining remarkably effective control over those public lands. Having title to the land

4. CAROL ROSE, *PROPERTY AND PERSUASION* (1994).

often is of surprisingly little importance to who actually controls the use of the land.⁵ Thus, the over-emphasized question of title ownership obscures other ways to change or achieve control over public lands.

Discussions of ownership and control are related to a third theme, the geographic location of authority. The appropriate level of decision making has emerged with such emphasis in recent years as to constitute a new wrinkle in this century long dialogue. Alternatives to current centralized federal approaches to land management are being discussed less in the traditional context of state versus federal control and more in terms of a search for participation options for affected local communities. The current federal land management planning process leaves much to be desired for local communities, which may be one reason why most innovative local "consensus" groups are working explicitly outside that process. Nurturing groups such as the Applegate Alliance in Southern Oregon,⁶ the Quincy Library Group in Northern California,⁷ and dozens of other local planning organizations are unique and important strands of the present debate.

Finally the title/control issue focuses attention on mechanisms through which that relationship is defined and enforced. I conclude by suggesting that there is enormous understanding to be gained by focusing on the lease as a major component of identifying who controls the resources and how. One frequently overlooked component of both federal and state land management is that the government land owner has uniformly and historically decided not to develop the resource itself. Rather, both state and federal land managers lease land and resources to private parties who make the necessary investment. For many analytical purposes, the canonization of the publicness of public lands obscures the issue of who controls them. Because the lease is a common instrument on private lands, such focus serves to break down the heavily laden emotional distinctions between public and private lands. The lease, characteristic of many private land transactions as well, is a method for sharing risk, responsibility and returns from resource development. Focusing on the lease, its flexibility and variability will enhance our understanding of control and diversify the array of tools available to us for managing public resources.

The state trust lands are an interesting foil for all four of these issues. Because the state trust lands generally do not participate in the matrix of management

5. This is not to say that title is irrelevant - obviously it is not. The federal government has sometimes used title as a means to expand real control over the land - through the budget process for public lands agencies, for example, and also via laws such as the Endangered Species Act (ESA). 16 U.S.C. §§ 1531-1543 (1985). One could also ask the owners in title of an old-growth forest enjoined from logging by the ESA whether their title gives them control over the land in question.

6. Jack Shipley, *Watershed Based Efforts: The Applegate Partnership of Southwest Oregon*, Public Lands Conference, *supra* note 2.

7. Michael Jackson, *Sharing Public Land Decision Making: Public Private Partnerships II*, Public Lands Conference, *supra* note 2.

mandates, goals, assumptions and institutions that form the heart of the Progressive Era consensus, a view of public resources that includes them is especially fruitful in an era when many have argued that the era's consensus is finally about to fall completely apart. Furthermore, because the issue of ownership and public benefit is constitutionally defined at the state level, the issue of title and control, although it emerges in the trust land context, is significantly different. The lease which is clearly central in trust management, can be used to focus on key aspects of federal land leasing that are obscured in the present debate.

The underlying assertion of this article is that the trust lands can be boiled down to produce a new and quite instructive soup of perspectives and issues than those that have immobilized discussions of federal lands. The trust mandate, which is flexible, familiar, and easily adapted to diverse management settings, provides an important perspective for approaching the local control component presently so central in public resource debates. Neither states nor the trust concept will resolve our public resource management debates. Our problems are diverse, deeply regionalized and localized, and too complex to justify seeking single, or nationwide solutions. However, if we are to avoid yet another round of the disputes so typical of the public lands, we must become much clearer about the issues and the alternatives.

II. Impoverished Intellectual Tools for Discussing Public Resource Management or How States Came To Be Regarded as "Venal and Incompetent" and "State Management of Federal Lands" Unthinkable

A. General Intellectual and Political Trends

In the standard discussion of public resource management, the states are ignored or vilified. General intellectual and political trends affect how the states are regarded at any point in history. Particular components of the public resources arena reflect and sometimes intensify those larger political trends. This part presents an overview of those trends, and concludes that at present the more virtuous level, or perhaps more accurately, which type of government is least objectionable, is not at all clear.

I. The Early Days of State Supremacy and The Gradual Expansion of the Federal Government

The states preexisted the central government and were displaced gradually and unevenly by the "superior sovereign."⁸ It is a matter of much discussion when this shift occurred. Certainly for most purposes, the Civil War was pivotal.

In the context that most interests us, the rise of the bureaucratic state in the 1870s, particularly the emergence of public resource management and management agencies,

8. John P. Roach's article entitled, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799 (1961), is probably as good a place to start as any. See also CATHY MATSON AND PETER S. ONUF, *A UNION OF INTERESTS: POLITICAL AND ECONOMIC THOUGHT IN REVOLUTIONARY AMERICA* (1990).

was the key period. It was at that point, as historian James O. Wilson notes, that growth in the federal government began to exceed growth in the postal service for the first time. Before the 1870s, expansion of the federal bureaucracy occurred primarily in the Post Office, and reflected the expanding geographic reach of the nation. Following the 1870s, growth in the federal government could no longer be attributed to growth in the Post Office alone. Between 1861 and 1901, more than 200,000 civilian employees were added to the federal service, and only 52 percent of them were in the Postal Service. James O. Wilson writes that "what is striking about the period after 1861 was that the government began to give formal, bureaucratic recognition to the emergence of distinctive interests in a diversifying economy."⁹

Historian Robert Wiebe presents an excellent account of this rise of federal management.¹⁰ He argues that America in the 1870s was a series of "loosely connected islands,"¹¹ with little holding the nation together as a whole. Anxiety within the nation increased throughout the 1880's and 90's as this localized society began breaking down. Economic interdependence and social complexity spread from small town to small town along newly developed railroad tracks, driven by the growing corporation and monopolies that spawned them.

According to Wiebe's analysis, the conflict between localities and the growing forces of external control climaxed in the 1896 Presidential election—an election in which modern-style political campaigning through paid advertising and mass media was essentially invented. In this election, the advocates of populism and local control went down with their candidate, William Jennings Bryan. The ensuing decades instead brought us progressivism—a doctrine emphasizing societal reform and unity through a new federal bureaucracy and a new reverence for the power of science and scientific management.

Much of this change was specifically anti-local, putting power in the hands of a technical, federal elite where before it had resided at local levels. By 1920, in a history familiar to most westerners, the Progressives had created a federal legacy that included a new national income tax, a well-established system of national forests, and a soon-to-arrive federal grazing service. National control and "scientific management" were firmly in place and have remained so until the present.¹²

2. The General Decline of the States

The accompanying decline of the states is another, obviously related, long and complex story, too rich to do more in this context than point to a few indicators. William Riker summarized the situation in his 1964 period piece on federalism. "Thus," his study concludes, "if one disapproves of racism, one should

9. James O. Wilson, *The Rise of the Bureaucratic State*, 41 PUB. INTEREST 77 (1975).

10. ROBERT WIEBE, *THE SEARCH FOR ORDER: 1877-1920* (1967).

11. *Id.* at 4.

12. *Id.*

disapprove of federalism."¹³ Suffice it to say that states and state rights advocates were not viewed as centers of progressive action during much of this century.

Although it is wholly reasonable to blame the aftermath of the Civil War and the residue of slavery for the erosion of the state's efficacy and respectability, the Advisory Commission on Intergovernmental Relations (ACIR), summarized a long and impressive line of political science analyses and concluded that the states were ineffectual partners in the federal system because "they operated under outdated constitutions, fragmented executive structures, hamstrung governors, poorly equipped and unrepresentative legislatures, and numerous other handicaps."¹⁴

3. What Goes Up Must Come Down

A subsequent ACIR report, significantly entitled *The Federal Role in the Federal System: The Dynamics of Growth: A Crisis of Confidence and Competence*¹⁵ suggests that at some point in time the tide shifted. The federal government's luster began to erode and public sentiment turned cynical, hostile, and more recently, violently opposed to the mess Washington. The reformation and modernization of state governments, and their increasing efficacy and ambition is another well documented story, one which is appropriately supported by reference to the growing state role in environmental regulatory programs passed during the late 1960s and 1970s.¹⁶

4. A Motor for These Cycles

This brief passage through standard literature will suffice to suggest the contours of the ebb and flow in national perceptions of the relative merits of federal and state governments.¹⁷ The major mechanism powering this ebb and flow is not difficult to discern. Surely it is neither the insightful commentary of scholars, nor the useful involvement of that putative umpire of federalism, the

13. WILLIAM RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 155 (1964).

14. THE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, IN *BRIEF: STATE AND LOCAL ROLES IN THE FEDERAL SYSTEM* 3 (1981).

15. THE ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, IN *BRIEF: STATE AND LOCAL ROLES IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH, A CRISIS OF CONFIDENCE AND COMPETENCE A-77* (1980).

16. Richard Cowart & Sally K. Fairfax, *Public Lands Federalism: Judicial Theory and Administrative Reality*, 15 *ECOLOGY L.Q.* 375, 409-413 (1988).

17. The literature is on the whole unpalatable; Cakes are the featured analogy. A more detailed summary, also of my own devising, can be found in Sally K. Fairfax, *Old Recipes for New Federalism*, 12 *Envtl. L.* 945 (1982). This article was prepared the last time we went through one of these Sagebrush Rebellion/federalism spasms and will provide easy access to the earlier literature.

United States Supreme Court.¹⁸ The motor consists of nothing more surprising than advocates looking for a better deal: if mother says no, ask grandmother. There is a lot of searching in literature, most of it easily dismissed, for inherently federal or necessarily state or local functions. We can, largely by force of tradition, come up with a few nominees: land use planning and education are local; post offices, coinage, and the military, which are federal.

Interest groups drive the direction of public policy. When an interest believes that it can do better for itself by embracing or distancing a specific sovereign at a particular time, the balance of power and public policy shifts. Further, when one level of government is financially superior to another, the balance of power is again altered. For instance, the federal government depends on generous receipt and revenue transfers to western states and localities to support the establishment of permanent federal land reservations in ostensibly reluctant states.¹⁹ Presently, as both federal and state governments drastically cut expenditures and services, the debate over federal land retention is understandably reopened, and the virtues of one form of government, as opposed to the other, become less clear.

B. The Same Cycles in the Context of Public Lands and Resource Management

For good or bad—and this paper argues that it is for decidedly bad—much of the general ebbing and flowing in thought and evaluation of the virtues of one form of public land management over another has been lost on students of public resource management. The first pivotal period of state ascendancy, during which the template for virtually the next 150 years of Congressional policy toward public domain resources was formed, has been obscured. Public resource management has become suffused with the centrality of the federal government; intellectual models and stories about the glory days of the onset of conservation, which is, of course, nothing less than the onset of federal ownership and management, dominate our discussion today. Therefore, our ability to appreciate the alternatives and options that inhere in an ebb and flow between federal and state has been stifled.

I. The Days of State Dominance in the Public Lands and Resources Field

Not surprisingly, there was a period when the states were pivotal in decision making in the public resources arena. The initiation of the public domain and the structure of the first 150 years of federal experience with land disposition were defined

18. See Cowart & Fairfax, *supra* note 16, at 380-81, *see also* Fairfax, Andrews & Buschbaum, *Federalism and the Wild and Scenic Rivers Act: Now You See It, Now You Don't*, 59 WASH. L. REV. 417 (1984).

19. Sally K. Fairfax, *Interstate Bargaining Over Revenue Sharing and Payments in Lieu of Taxes: Federalism As If States Mattered*, in *FEDERAL LANDS POLICY* (FOSS ed., 1987).

largely by the terms and conditions under which state claimants ceded land to the new central government in the early 1780s and by the statutes that the Confederated Congress enacted, without authority to deal with the ceded lands. Our preoccupation at the close of the 20th century with the federal-ness of the federal lands has obscured the degree to which the state land cessions and the General Land Ordinances of 1785 and 1787 (enactments not under the Federal Constitution but rather under the Articles of Confederation)²⁰ were dispositive in defining the next 150 years of public lands policy throughout the nation.

The General Land Ordinance of 1785 provided for the rectangular survey and sale of western lands. It also initiated the program of land grants for schools, providing that lot number 16 in every township would be reserved "for the maintenance of public schools within the said township."²¹ The Northwest Ordinance, passed two years later, provided a system for territorial governance and transition to statehood.²²

2. The Withering of the States In Public Lands Policy Discussion

This high water mark for the states as framers of public lands policy was also a rich period of negotiating the nature of the nation. Its present importance for understanding both ancient documents (like the Constitution) and the full range of choices and alternatives that confronted us then and now, is all but lost on modern participants in and students of public lands policy. Part of the problem is the troubling tendency of scholars to assert that the acquisition of the public domain began in 1805, with the Louisiana Purchase.²³ Lopping off the first forty years distorts the story and conceals issues, choices, and options.

A more pervasive problem is the way we present conservation history. When referencing the public domain we speak, traditionally, in terms of three periods: acquisition, disposition, and retention.²⁴ The normal story line is obvious on the face

20. See Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. V. HIST. REV. 27 (June 1936); PAUL W. GATES, PUBLIC LAND LAW REVIEW COMMISSION, HISTORY OF THE PUBLIC LAND LAW DEVELOPMENT (1968). SEE ALSO BENJAMIN H. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (1939); ROY M. ROBBINS, OUR LANDED HERITAGE: THE PUBLIC DOMAIN 1776-1936 (1942). For an exhilarating discussion of key issues in the 1780s, see Peter S. Onuf, *Statehood and Union: A History of the Northwest Ordinance* (1992).

21. See, e.g., HILDEGAARD B. JOHNSON, ORDER UPON THE LAND: THE U.S. RECTANGULAR SURVEY AND THE UPPER MISSISSIPPI COUNTRY (1976); PAYSON JACKSON TREATT, THE NATIONAL LAND SYSTEM: 1785-1920, ch. 2 (1910).

22. See generally, the analysis of the accession process in SOUDER & FAIRFAX, *supra* note 1, ch. 2 (researched by Karen Bradley).

23. GEORGE C. COGGINS, ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 45-6 (1993).

24. See GEORGE M. STEPHENSON, POLITICAL HISTORY OF THE PUBLIC LANDS FROM 1840 TO 1862: FROM PREEMPTION TO HOMESTEAD (1917) (terms originating in); PAUL J. CULHANE, PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND BUREAU OF LAND MANAGEMENT (1981) (fully elaborating upon terms).

of the terms: first we acquired land, then we disposed of it, then we began to hold onto it. There are a number of obvious flaws in this presentation, most obvious being that we are still, at the end of the 20th century, engaged in all three programs.

However, in the context of this paper, it is most important to note that in addition to its obvious misrepresentations, the traditional configuration of acquisition-disposition-retention has two corrosive but slightly concealed components: (1) it equates federal land retention with the onset of enlightenment, and (2) it paints a wildly inaccurate portrait of clearly identified good guys and bad (those who supported federal land ownership and those who opposed it).

There is, of course, an element of truth in the wisdom of retention. The rise of science as the basis of public decision making was not an evil idea, and it still has defenders. Others, of course, have argued persuasively that the science of the progressive era agencies was and continues to be self-serving, clearly falsified, and upon reflection, a fairly consistent disaster.²⁵ Nevertheless, the way we tell our story puts federal ownership of the resources as the heart, if not the totality, of the policy. This leaves us thinking that there is no other option.

"The acquisition-disposition-retention template" has also had substantial consequences for other institutional components of governance. For instance, the effects of federal science on local institutions have been enormous.²⁶ Local people and institutions were specifically identified as the problem - these centralized science-based agencies aimed to cure them. It is little wonder then that the rise of national government sapped the vitality and legitimacy of state and local institutions and denied the federal agents access to locals' experiences with resource and insight into local prorates for defining solutions to allocation and management disputes. Ironically, scientific management was specifically designed to achieve those goals. The emphasis on retention and federal management has always had as a crucial part of its assumptions that local folks and local priorities were bad, and the solution to resource allocation problems lay in displacing them with scientifically trained representatives of the federal government. An essential aspect of the marketing of federal science and science-based agencies was, accordingly, the division of the world into good and evil participants in the debate. This presumption that the good guys were for "the use of science" and the bad guys against, lies like a dense fog over the whole story of 20th century conservation.²⁷

25. See, e.g., ASHLEY SCHIFF, *FIRE AND WATER: HERESY IN THE FOREST SERVICE* (1960); SHERRY H. OLSON, *THE DEPLETION MYTH: A HISTORY OF RAILROAD USE OF TIMBER* (1971); ROBERT NELSON, *PUBLIC LANDS, PRIVATE RIGHTS: THE FAILURE OF PROGRESSIVE ERA MANAGEMENT* (1995).

26. See SAMUEL P. HAYS, *Conservation and the Future of Efficiency*, 275-76 (1960); see also Louise P. Fortmann & Sally K Fairfax, *America Forestry Professionalism in the Third World: Some Preliminary Observations*, 11 POP. & ENV'T 259 (1985).

27. See, e.g., GIFFORD PINCHOT, *THE FIGHT FOR CONSERVATION* (1910) (excoriating the special interests) and CHARLES WILKINSON, *CROSSING THE NEXT MERIDIAN* (1992) (inveighing against The Lords of Yesteryear).

Several points are obvious about this durable screed. First, there is no avoiding the plain and simple fact that the shift to federal land retention benefited huge segments of the resource management industry, such as it was. Large cattle operators embraced a leasing system for "their" public grazing areas as a means of excluding homesteaders and sheep operators. Similarly, the timber holders were well aware that withdrawing public timber from the market would enhance, not diminish, the value of their property. The idea that public lands reservations were a victory forced upon a reluctant resources industry by aroused conservationists is a half, quarter, or eighth truth. The stereotypes and misrepresentations of advocate's interests has confounded reasonable discussion of the subject ever since.

Again, it is appropriate to suggest a motor for this process of concealment and miscasting of motives. One hypothesis, fully explored elsewhere regarding one small but central aspect of the tale, lays the blame at the feet of lazy historians and enterprising bureaucrats.²⁸ The major history of the key "shift to retention" legislation, the Forest Reserve Act of 1891,²⁹ was written by Jonathan Ise, at the behest of, with the support of, and with full access to the personal files of, Gifford Pinchot.³⁰ Ise devised the now familiar "miracle of 1891 and 1897" story of the forest reserves - no legislative history can be found; a feckless Congress needed prodding from folks like Mr. Pinchot; the provisions of the 1891 and 1897 simply popped out and nobody knows where they came from or what they "really" meant.³¹ Every major history of the reserves have subsequently relied upon, and few have done the full research necessary to unwind the real roots. My brief sortie was sufficient to establish a long and complex legislative history for both acts, and the sad trail of footnotes that has pushed Pinchot's self-serving good guys and bad guys tale to the level of unquestioned verity.³²

3. Consequences of This Inadequate Intellectual Tool Kit

Our narrow view of public resources and their management has resulted in an inflexible academic debate approach to dispute resolution which fails to address basic issues of public land management. We have become locked in a series of outbursts based on distrust which has deepened preexisting stereotypes.

One way to underscore the paucity of the debate is to note the failure of academics to elucidate the full range of what is possible. Trying to understand

28. See Sally Fairfax and A. Dan Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 509 (1979) (discussing alternative views of the history of the 1891 and 1897 acts).

29. 16 U.S.C. § 471 (1891), *repealed by* Act Oct. 21, 1976, P.L. 94-579, Title VII, § 704(a), 90 Stat. 2792.

30. JONATHAN ISE, *THE UNITED STATES FOREST POLICY* 370-1 (1920).

31. *Id.*

32. SEE FAIRFAX & TARLOCK, *supra* note 28 at 534 and accompanying text.

22-50 state programs and their history is a little much to be parceled out in the two-to-three year publication cycle that is required at most research institutions. It is easier to focus on one or two programs run by one federal agency. Hence, very little in the way of comprehensive or comparative data on state programs is available.

When states emerge from these shadows they are frequently slandered. One particularly egregious example is a Sagebrush Rebellion era volume by Marion Clawson.³³ Clawson's unsubstantiated work vilifies state land managers and management. Drawing on his own "considerable knowledge of state land administration over the past four decades" he writes, with careful indirection, about the "state's incompetence and veniality based on many [albeit none mentioned] episodes of the past;" he configures the state managers as less competent than the federal agencies; "the worst of both worlds: that is still public land, not private, and state-managed rather than federally managed."³⁴

The debate over public land management is also marred by academic dishonesty. Frequently, long term participants in the debate are caught arguing against their own oft-stated goals or transparent self interest. First, take the case of Nevada, where both citizens and diverse government entities have long been leading advocates of giving the federal lands to, or less plausibly, back to the states.³⁵ This movement thrives in Nevada, despite the documented fact that Nevada is consistently among the biggest gainers of federal subsidies on federal lands and would be among the biggest losers if the lands were transferred.³⁶ Second, take the case of the ranchers. Episodically³⁷ ranchers have demanded the opportunity to purchase or otherwise receive fee simple title to "their" federal grazing allotments. However, the reality of the situation is that ranchers generally cannot afford to purchase these lands at anything approaching the fair market value, nor could they afford to maintain and pay taxes on the lands if they were donated to them. Nevertheless, the cry continues.³⁸

33. MARION CLAWSON, *THE FEDERAL LANDS REVISITED* (1983).

34. *Id.* at 188-189.

35. *State of Nevada ex. rel. Nevada State Bd. of Agric. V. United States*, 512 F. Supp. 166 (D. Nev. 1981), *aff'd* 699 F.2d 486 (1983); RESOURCE CONCEPTS, INC., *IDENTIFICATION OF PUBLIC LAND TRANSFER ISSUES AND PRELIMINARY COMPARATIVE ECONOMIC ANALYSIS* (1994) (prepared for the Eureka County Board of County Commissioners); *but see* letters from Frankie Sue del Pappa, Attorney General of Nevada to Edward L. Perry, County Alliance to Restore the Economy and Environment (Sept. 17, 1993) (Appendix A).

36. Robert Nelson has been compiling these data for decades, most recently in *Essay: Transferring Federal Lands in the West to the States: How Would it Work*, POINTS WEST CHRONICLE 6 (Winter 1994-95); *see also* CONGRESSIONAL RES. SERVICE, *BLM REVENUES AND EXPENDITURES* (July 28, 1995). One flaw in these analyses is that they assume that the states would continue to manage the lands under the same circumstances that presently characterize federal land management—that is, one is presuming that after taking title to the Carlin Trench gold resources, the Nevada legislature would continue to insist that mining interests cannot afford to pay rents or royalties.

37. *Reviewed in* COWART & FAIRFAX, *supra* note 16, at 383.

38. PUBLIC LANDS NEWS is, over time, an excellent source on this general posturing.

It seems likely that the interest groups in Nevada and the ranchers understand the issue of title versus control. As Peffer made clear so many decades ago,³⁹ the title issue in both cases is likely strategic: By arguing over title, interest groups are able to bash the bureaucrats and increase their control over the land. However, this focus on title and taking title does not appear to be in the interest of either the State of Nevada nor the ranchers.

Least explicable of all is the consistent rush of environmentalists to defend the federal agencies whenever the title issue is raised. Having spent two-thirds of the 20th century pointing out, with considerable accuracy and disappointingly less impact, the flaws of federal management, those groups' embrace of the federal agencies and their stout unwillingness to consider alternatives to federal management is nothing short of sad and ironic. It demonstrates the bankruptcy of our ideas on the subject of public resources. When pressed, we have precious little to offer each other beyond what we already know to be deeply flawed.

C. Summary

Public lands policy is not the only arena in which the states' reputation and potential has been obscured by a presumption that the feds are the government of choice. However, difficulties in seeing the states are peculiarly debilitating in the public lands field. The inertia in favor of federal retention and federal lands is buoyed by its association with the apparently salubrious notion of non-partisan technical competence. However soured in the post-Silent Spring⁴⁰ world, such scientific decision making remains a major source of legitimacy in our culture. Our inability to see the states clearly leads to the deeply problematic preoccupation with federal land retention. This heavily promoted notion sealed us in an analytic void. We know very little of any other way to approach resource management, even those which have been in place since 1785. As a result, our public discourse on the subject is intense, vitriolic, full of destructive stereotypes, and almost utterly beside the point. My advocacy of the state trust lands is not proffered as an alternative to federal management, but as one method of enriching our impoverished vocabulary about public lands. It is one set of alternatives in action; one widely dispersed array of experiences that can diversify our notion of what public resources are for and how to manage them.

III. Why Is This Becoming Thinkable

Even after arguing at length that our intellectual tools, and the acquisition-disposition-retention framework reifying federal ownership makes it extremely difficult to discuss public lands issues, or even to frame them in a meaningful way, I am nonetheless optimistic about the present form of the debate.

39. See generally E. LOUISE PEFFER, *THE CLOSING OF THE PUBLIC DOMAIN* (1951).

40. RACHEL CARSON, *SILENT SPRING* (1963).

One important aspect of the currently more nuanced and substantive debate can be traced to the evolution of a viable grassroots environmental movement. Its position on issues of locus of power and the priorities of public resource management are significantly different from the positions of the national groups.⁴¹ This grassroots environmental dialogue most emphatically includes, indeed is in part defined by the fact that it includes, many ranchers, and those dependent on western commodities. Perhaps what unites these new consensus seekers is a shared antipathy for "espresso by fax"⁴² but it does reshape the conversation to have this new breed in the room.

A second important and positive variable in the new debate is the introduction of economics. This is not, in itself a panacea—in fact, to the contrary. There is probably considerably more gibberish being written these days about the virtues of free market economics than about the veniality of the states.⁴³ Nevertheless, economists, with their diverse tools and propensities for evaluating tradeoffs are no longer dismissed as merely the spear carriers of commodity interests. Their presence at the table has enriched the discussion.

A third factor is the gradual encroachment of landscape level thinking. Academics and advocates alike have been trying for years to tell the Forest Service that they were not the only game in town—that, for example, an even flow of logs from national forests would not produce an even supply of timber to mills unless the Forest Service were the only supplier. Agency reluctance to the contrary notwithstanding, the idea that each parcel of land, regardless of ownership, is part of an integrated ecosystem has encouraged a broader dialogue about management of all the parcels. This in turn suggests that discussing federal land management apart from the management of state and privately held land in the same region or watershed is not likely to be fruitful.⁴⁴

Fourth, while it is perilous to perform an historical analysis of the present, it seems fair to say that we are in another period similar to that described by Wiebe circa 1896. American society is again becoming increasingly anxious and

41. See generally, 9 NORTHERN LIGHTS (Don Snow, ed., Winter 1994).

42. See, Don Snow *Cappuccino Cowboy*, 9 NORTHERN LIGHTS 3, at 3 (Winter 1994).

43. Peter S. Menell, *Institutional Fantasyland: From Scientific Management to Free Market Environmentalism*, 15 HARV. J. L. & PUB. POL'Y 489 (1992) provides an excellent introduction to the literature and the debate over this issue.

44. Probably the best discussion of transcending the parcelness and viewing land as part of an ecosystem is Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. R. 1433 (1993). See also *Myth of the Green Blob*, in COWART & FAIRFAX, *supra* note 16, at 410 (for a slightly different take on landscapes), and JOHN A. DIXON & LOUISE A. FALLON, *The Concept of Sustainability: Origins, Extensions, and Usefulness for Policy*, 2 SOC'Y & NAT. RESOURCES 73 (1989) (discussing sustainability or "ecosystem management"). For a terse distinction between sustainability and sustained yield, see Jon A. Souder, *et al.*, *Sustainable Resources Management and State School Lands: The Quest for Guiding Principles*, 34 NAT. RESOURCES J. 271, 273-78 (1994).

upset about the country and the way it has been governed—symptoms of that anxiety may be found in the news and at the ballot box. Local-national control issues are again in the spotlight. Many would argue that we are witnessing the end of the Progressive era.⁴⁵ Clearly, the conflicts of today share important similarities with the ones fought nearly 100 years ago; however the result may be quite the opposite. For instance, in 1896, states and localities lost the battle for local control. In 1996, on the other hand, there is a genuine interest in exploring increased autonomy and self-determination for local communities, as well as transfers of control of, or title to, public lands to the states.⁴⁶ States have traditionally been excoriated in this dialogue, but the present era suggests that this may no longer be the case. While we have no clearly designated Populist candidate running for President (at least, not yet), the issue of local control is back on the public agenda in a manner very similar to the era marking the birth of the Progressive movement.

Finally, least noticed in these parts, but ultimately perhaps the most important, the observation that the problems experienced in the West are also being experienced in the East, and indeed in many parts of the world, is starting to refocus the discussion in interesting ways. The fact that these issues of the appropriate locus of control over resources are ubiquitous means that the federal government is likely neither the cause of all the problems nor the source of all the solutions. Obviously, in the western United States, where the federal government is the major landowner in many jurisdictions, the federal government will continue to play an integral role in public land management. But the fact that many of the same issues are also confronted in West Texas, Vermont, Botswana, and Brazil suggests that we can over-attend to the fed's presence.

These five factors are among those that are altering the dialogue beyond that structured by the impoverished acquisition-disposition-retention triptych. They suggest to me that perhaps we are ready now, to a degree that we have not been for most of this century, to think about alternative ways of organizing to manage what we have only recently come to think of as "federal lands." With that thought in mind, now turn to the core of this paper.

IV. States as Managers of Lands

The currently renewed quest for alternative forms of public resource governance, and especially the emphasis on finding structures and institutions that are closer to the ground, suggest that this may be an auspicious time to restore the states, their priorities and potential as managers, to an appropriate role in the

45. See, e.g., COWART & FAIRFAX, *supra* note 16, in its milder, pre-reinventing government manifestation. For a different approach to the same general topic, see ROBERT NELSON, *PUBLIC LANDS, PRIVATE RIGHTS, THE FAILURE OF SCIENTIFIC MANAGEMENT* (1995).

46. Theresa Rice, *Federal Lands and Watershed Based Management Approaches*, Public Lands Conference, *supra* note 2.

discussion. Unfortunately, the absence of research on state lands limits us to only the most tentative generalizations about even such basic facts as the extent of state land ownership.⁴⁷ This lack of information puts a crimp in our discussions of the most important aspect of states as land managers. Nonetheless, it is appropriate to notice that the states do and/or could play at least two other roles.

First, it is important to appreciate the role that the states presently play as partners, managers and as regulators of lands admixed with federal lands. The federal lands do not exist as the green or pink blob that shows up on AAA maps. Almost without exception, "federal" holdings are intermixed with significant sections of state, private and other federal lands. Second, as a spin-off from managing their own lands, states could, and do, frequently act as "little laboratories;" sites of experimentation with tools and approaches that spread to other states and occasionally even to the federal government.⁴⁸

A. State Trust Land Management

The history of state trust lands is treated in detail elsewhere.⁴⁹ Here, it is necessary only to outline the basic principles. Beginning with Ohio in 1803 and ending with Alaska in 1959, Congress reserved and then granted to newly joining states increasing amounts of land to support common schools and other public institutions, such as hospitals and insane asylums. Early grants were to townships, and were lost or sold in much the same way as the primary disposal of the public domain. However, interest groups supporting public education flourished throughout the 19th century and brought increasing pressure on states to retain and secure the grant lands. Momentum was added toward orderly approaches to the lands when states rather than townships were made grant recipients at mid-century.

The states established permanent school funds to pool and distribute the receipts. This allowed standardization of what constituted a school and signaled increasing state level attention to protection and management of the grants, which were, probably as a result of the permanent fund paraphernalia, increasingly called "trusts."⁵⁰ The definition and spread of different protective

47. Randal O'Toole, *Why State Lands*, 2 DIFFERENT DRUMMER 2 (Summer 1995).

48. There is fairly interesting political science literature on the subject, Keith Boeckelman, *The Influence of States on Federal Policy Adoptions*, 20 POL'Y STUD. J. 365 (1992) and Jon A. Souder & Sally K. Fairfax, *Federalism as Little Laboratories, Yes, No, and Maybe: The State School Trust Lands*, Presented at the 1990 Annual Meeting of Western Political Science Association, Newport Beach, CA. The concept actually originated with Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J., Dissenting); see also DAVID E. OSBORNE, *LABORATORIES OF DEMOCRACY* (1988).

49. Sally K. Fairfax, et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797 (1992) and Jon A. Souder & Sally K. Fairfax, *State Trust Lands*, 2 DIFFERENT DRUMMER 36 (Summer 1995), and the references cited therein.

50. See O'Toole, *supra* note 47, at 1 (federal conditions on the grants rather than state initiatives are crucial in what he describes as the states "marginally better fiscal manage[ment].") The strings were

measures in state constitutions is an example of the "little laboratories" principle. Frequently individuals with experience in one state moved west to help write the constitutions of subsequent states,⁵¹ and brought with them knowledge of transfers.

State trust land management appears to have been dominated by lessees and an emphasis on local development, in combination with the professional ideologies of the underlying management groups—not all that different from federal land management—until the middle of the 20th century. The key dispute is described below in *Lassen v. Arizona*.⁵² Beneficiaries and concerned trust managers successfully sought protection for the school and related trusts in a series of disputes throughout the states.

B. The Trust Mandate

A trust is a fiduciary relationship in which the trustee holds and manages property for the benefit of a specific beneficiary. The major obligation of the trustee is to act with "undivided loyalty" to the beneficiary.

The key Arizona case, *Lassen v. Arizona Highway Dep't.*, illustrates the core of the trust mandate.⁵³ In *Lassen*, the Arizona Highway Department sought to use granted school lands for a public highway without compensating the trust - this, in spite of the fact that the state enabling act which granted the lands dictated that the lands were not to be acquired for use for less than their fair market value, and that specified and defined the manner in which the lands had to be offered for sale. It had nevertheless come to be the tradition in Arizona, and elsewhere, that states simply took school lands for highway and related purposes. Not infrequently an offset or enhancement argument was made, a common feature of early eminent domain cases of the late 19th century. The enhancement in the value of the remaining parcel was deemed sufficient to repay the property owner for the land taken, hence no compensation was required.⁵⁴ In *Lassen*, the U.S. Supreme Court announced unmistakably that the lands

not federal in this instance but the result of state constitutional provisions. Not until 1910 did the federal enabling act for Arizona and New Mexico make any discernible attempt at "strings.")

51. See, e.g., W.H.H. Beadle, *Memoirs of W.H.H. Beadle*, (Robinson ed., 1906); South Dakota Beadle Club, *Permanent School Fund in South Dakota and the Beadle Club* (1976). The club, founded in 1925 to foster support and good fellowship among "schoolmen" of South Dakota and to celebrate General Beadle, is still active and continues to protect and enhance the school lands.

52. 385 U.S. 458 (1966).

53. When speaking of school and related trusts, the trust referenced is not the public trust, which limits the ability of the sovereign to alienate public rights in the bed and banks of navigable waters and related resources, but rather a "beneficial" trust, of the kind that an indulgent grandmother would instruct a bank officer to manage for the benefit of her grandchildren.

54. This history is grist for the "givings" topic that seems to be emerging in the context of "takings." See generally Harry Scheiber, *The Road to Munn: Eminent Domain and the*

granted in Arizona were a trust that was to be honored, with full and undivided loyalty to the designated beneficiaries—common schools and similar state institutions. A spate of similar cases, frequently forbidding state legislatures from setting maximum prices for trust resources or forbidding managers from allowing or requiring preference right renewal of agricultural leases followed.⁵⁵

The following four examples summarize the full panoply of trust responsibilities under four general headings: clarity; accountability; enforceability; perpetuity.⁵⁶

Clarity: The trust mandate is clear and simple. The goal is to make the trust productive for the specified beneficiary. Because it is crystal clear (relatively speaking) what the trustee is supposed to be doing, it is easy (again, relatively speaking) to figure out whether or not she is doing it. It is, for example, fairly simple to identify investments that have the effect of subsidizing excess management rather than benefiting the beneficiary. Under the trust mandate, with a clear and simple goal, it is not possible to use returns in one program to subsidize investments in another program area where the returns do not justify the commitment.

Accountability: This is the key to achieving compliance with the clear mandate. Again, unlike the federal multiple use agencies, the trustee is obligated to deal openly and honestly with the beneficiary and to maintain and furnish records about receipts, disbursements, and management. It is relatively simple to obtain basic data about trust land management that facilitates analysis of whether the trustee is doing her job.

Enforceability: These obligations have been defined in centuries of litigation and judges have enormous experience in the field and proceed with vigor to protect the beneficiary.

Perpetuity: The trustee is obligated to preserve the productive capacity of the trust. Although a beneficial trust is not necessarily perpetual (it could end, for example, when the grandchild graduates from College), the permanent school fund makes the school trusts peculiarly emphatic about the long term commitment of trust management.

Concept of Public Purpose in State Courts, 5 PERSPECTIVES IN U.S. HISTORY 329 (1971) (describing treatment of eminent domain in early 1800s).

55. Nebraska actually beat everybody to the punch with the first of the modern agency changing cases: *State ex rel. Ebke v. Board of Educ. Lands and Funds*, 154 Neb. 244, 47 N.W. 2d 520 (1951). The most recent and interesting cases are probably *County of Skamania v. State of Washington*, 685 P.2d 230 (Ok. 1982); *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981); *ASARCO v. Kadish*, 109 S. Ct. 2037 (1989). Here again, I take issue with Randal O'Toole, *supra* note 47, who asserts that "state reform is no faster than the slackwater behind a Bureau of Reclamation dam." *Id.* at 2. In the state trust lands field, the opposite appears to be true: a few well placed beneficiary originated law suits have radically altered the priorities and the outcomes in state trust land offices." See generally SOUDER & FAIRFAX, *supra* note 1, at 33-36.

56. See Jon A. Souder, *et al.*, *supra* note 44 at 278; RESTATEMENT (SECOND) OF TRUSTS, §§ 2-4 (1959); GEORGE T. BOGERT, TRUSTS (1987).

Without belaboring the obvious, this mandate is significantly different from the rather mushy commands and Byzantine procedural requirements that afflict the federal land management agencies.⁵⁷

C. So What

I have established that state trust lands are different from federal multiple use management lands, but does it matter and what can we learn from this distinction? I will answer this question, first by recounting three stories about disputes involving trust lands that present an array of situations in which the trust mandate appears to teach something about alternatives in public land management, and second, by returning to my opening remarks lamenting the acquisition-disposition-retention triptych. Finally, I urge participants in the debate to look more closely at management tools and priorities, as opposed to merely questioning who holds title to the lands. Finally, I will focus on the lease as an appropriate focus of study and thought. The lease is a core tool of land management (state, federal, public and much private) and hence is the appropriate unit of analysis for understanding alternative approaches to land management, public or private, state or federal.

1. Subsidizing Agriculture and Grazing in Oklahoma

The first story concerns taking control over the grazing and agricultural land leasing program from the lessees. If you are looking for perfection in trust lands management programs, you will be disappointed. Nothing about the trust mandate indemnifies the managers against the political realities in which we all operate. But, the trust mandate has a central role in defining the political environment of the debate, which this story underscores. The Oklahoma story is a recent, but a classic example of using the trust mandate to shift the balance between the lessee and the manager.

The Oklahoma state legislature had enacted statutes which set maximum agricultural and grazing fees, limited the amount of interest the Land Commissioners could charge when making farm loans and when selling trust property, and allowed existing lessees a preference right to release "their" allotments if they were in full compliance with the terms of their lease.⁵⁸The beneficiaries, in the form of the Oklahoma Education Association sued the Commissioners, charging that all three legislative enactments violated the state constitution. They won on all three counts. The Supreme Court of Oklahoma stated that "[t]he State has an irrevocable duty, as Trustee, to manage the trust estate for the exclusive benefit of the beneficiaries, and return full value from

57. Discussed mercifully briefly in Souder *et al.*, *supra* note 44, at 276-79 and the many references cited therein.

58. Oklahoma Educ. Assoc. v. Nigh, 642 P.2d 230, 233 n.1 (1982).

the use and disposition of the trust property.⁵⁹ It concluded that "a State may not use school land trust assets to subsidize farming and ranching."⁶⁰

Respondents asserted that conservation and prevention of waste were also important concerns, and that "attainment of maximum return to the trust [was] not a controlling factor." The Court agreed, noting, however, that this does not render the question of income "an unimportant factor," and asserting instead that "[c]onservation necessary to protect the value of the lands leased can be adequately controlled by lease provisions and conditions, and by reasonable conservation regulations . . ." rather than by "rental discounts" or the ability "to borrow trust funds at below market interest rates."⁶¹

As a result of this decision, Oklahoma went through a protracted and painful process which changed the fee structure, established minimum lease fees, eliminated preference right leasing and offered expiring leases at auction. The result is an 80 percent increase in revenues received by the state.

Several points stand out. First, subsidies, hidden and otherwise, are considerably easier to address on trust lands than on multiple use lands. The clarity of the trust mandate, although it does, as the court emphasizes, attach great importance to income, can be very effective in plugging leaks in the management system. Second, those whose primary concern is land protection or environmental quality probably do not care particularly or are not satisfied by an 80 percent increase in revenues. They will have to focus on issues other than subsidies. The clarity of the mandate helps sort out that strain in the debate.

Finally, the new system in Oklahoma has required the Commission to increase the program staff. Their presence is more than compensated for by the revenue gain—the trust mandate is no kinder to subsidizing managers than subsidizing lessees. We are not in a position to respond to questions about whether increased monitoring of lease compliance improves stewardship or resource protection, but it is one worth evaluating when weighing the pros and cons of profit oriented management.⁶² The trust lands present a fundamental challenge to the assumption that "for profit" management is somehow incompatible with public land ownership. In the clear and well understood constraints of the trust mandate, there is arguably a better chance for achieving diverse public goals than on the public lands where political influence distorts the basic questions of who pays and who benefits.

2. The Washington Asset Repositioning Program and the Notion of a Portfolio of Assets

The trust mandate creates a peculiar and interesting spin on issues which involve wresting management from traditionally dominant lessees. It has a starkly different flavor in preservation vs. development debates, due to its

59. *Id.* at 235.

60. *Id.* at 236.

61. *Id.* at 237-38.

62. Discussed in SOUDER & FAIRFAX, *supra* note 1, at 107-09.

emphasis on undivided loyalty. The trust creates a tension between general public benefit, on the one hand, and benefit for the beneficiary on the other. One of the real contributions to this tension is that when discussing trust resources, it is imperative to be clear about what constitutes general public benefit. Is aesthetic preservation a general public benefit? Is creating jobs, or a stable tax base a general public benefit? One of the questions which Nigh obscures is whether or not the trust beneficiaries, which are after all, the schools, do better when the trust is producing a profit, or when its resources are managed to create the strongest possible base for property taxes, which provide the vast majority of support for schools. Washington State, which draws the vast majority of its trust revenues from timber harvesting, was unable to avoid those and similar questions. They responded in a privileged—that is, cash intense—but suggestive program.

In Washington's program, revenues earned on sale of renewable resources from common school lands is allotted to the school construction fund. In the 1980s, demand for construction money rose, timber harvests became controversial and many areas previously thought to be valuable primarily for timber were seen to have "values beyond income production." Many of those areas were located on the Olympic Peninsula. The legislature established the "Trust Land Transfer Program" which enabled the State Department of Natural Resources to reposition its assets while compensating the trust for environmentally sensitive areas shifted to parks and maintaining deposits in the school construction fund. Basically, the program consisted of appropriations which purchased trust lands with high timber and environmental values. The timber was not cut. The portion of the value that was attributable to the standing timber was deposited in the school construction fund. The land portion of the value was retained in the trust to purchase replacement timber production lands. And the lands and unharvested timber were turned over to the state parks or other appropriate agencies to manage.⁶³

Superficially, this story underscores the obvious: if you have the money, you can buy your way out of many environmental conflicts. There are other, more important lessons, however. One is the importance of the attitude that is prevalent among state trust managers that they manage assets for a public beneficiary rather than specific acres as a sacred trust. The state trust land managers' notion of assets rather than sacred acres lends itself to an even more important component of trust land management, the notion of the portfolio. The notion of the portfolio invites us to put aside the traditional division of attention in public resource management—focusing agency by agency and resource by resource—and looking instead at all of the assets in the trust and how they are managed.

This is an especially invigorating perspective in the context of the trust lands because of the existence of the permanent funds. Again, many people object as a

63. WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, TRUST LAND TRANSFER PROGRAM (handout).

matter of principle to managing public lands for profit. However, the portfolio concept invites inquiry into issues of intergenerational equity and conservative resource management that do not come up in the absence of the permanent fund and beneficiary. One simple illustration should suffice. If the goal of resource development is to produce a high level of returns for the beneficiary, it does not make sense to invest in development of resources that will not produce a profit. Further, if the returns are placed in a permanent fund, and the fund does not grow at a rate at least equal to the inflation rate, then developing the resource does not make sense. Flexibility regarding the location and extent of assets is an asset in itself.

Second, this story underscores the importance of being clear about what is being subsidized, why, and by whom. The legislature appropriated public funds to make the trust whole; the trust provides a ready and open accounting system whereby school construction is not pressured into subsidizing aesthetic preservation. Finally, the specific difference between the clarity and accountability of the trust mandate as opposed to the decision making process on ostensibly public federal lands should be noted. When the beneficiary, or the statutory goal of management, cannot be traded away in a political process, it is possible to talk clearly about who is paying whom for what, and how much.⁶⁴

64. We are much intrigued by the number of trusts that are being established as part of mitigation programs. *See, e.g.*, THE PLATTE RIVER WHOOPING CRANE HABITAT MAINTENANCE TRUST, INC., THE FIRST TEN YEARS - 1979 - 1989 (1989). The trust was set up via a settlement between a region-wide power project, the state government, and an environmental group regarding a controversial power plant proposal. This trust is the Platte River Whooping Crane Critical Habitat Maintenance Trust, created in 1979. The Platte River trust is directed by three trustees, one appointed by the power project, one by the governor of Nebraska, and one by the environmental group involved. The trust mission is simply to acquire and preserve habitat for the endangered Whooping Crane, thereby permitting a new power project favored by the utility group to be built. To date the trust has acquired control over 9,000 acres of land in voluntary purchases, both through fee-simple title and through easements. Where it is an owner in title, the trust still leases its property for grazing and farming activity. Indeed, these leases are important to the mission of the trust, because the post-harvest corn and hay meadows are an important source of food to the protected cranes. Leases are arranged explicitly with the goals of the trust in mind, and include provisions such as requiring farmers to leave grain residues on the fields to feed the cranes. Payments to the trust from the leasing arrangements pay a significant portion of the trust's operating costs, so that the interest from the trust's endowment can go directly towards land acquisition.

The Platte River trust is not a solution without conflict. The trust has become involved, for example, in litigation over water rights for the Platte River system. Others in the debate have not always been pleased with this aspect of the trust's role. Nevertheless, the trust models some of the qualities we have been espousing here as cause for encouragement in the discussion regarding public lands management. It is not a large federal bureaucracy. It is a small, locally-based organization that acts quickly and efficiently with detailed knowledge about local conditions and desires. The trust has remained relatively free of the political pressure that dogs federal land managers, however, by virtue of its clear mandate. There is

3. The Lease: Tool Kits with Emphasis on The Notion of a Conservation Buyer

Prolonged contact with the state trust lands has forced an important realization upon me. The states, like the federal government (and, indeed, many private land holders), have decided almost without exception not to develop the resources under their authority. They lease them out to others who bring them to market. Lessees (concessionaires, timber purchasers, or whomever) are pretty much the same, over time and irrespective of ownership. The lease is a common instrument—one designed to allocate risk and rights between the owner and the user or developer of a property. This common tool is important because it suggests that it is possible to strip public resource management of its historical and emotional mumbo jumbo—such as that contained in the ideology of the shift to retention—and talk about the specific terms of the agreement that allocate control over a specific resource to a specific individual, subject to what kinds of conditions, and for what ends.

An interesting dispute in Idaho⁶⁵ underscores the importance of one of the tools of trust land management, specifically, the lease. Briefly stated, an environmental organization in Idaho, the Idaho Watersheds Project, has been trying, with limited success, to lease specific state grazing lands which the organization believes (and according to plaintiff's opening brief, the Bureau of Land Management and the Forest Service concur) are overgrazed. To date, the Idaho Board of Land Commissioners and the Idaho legislature have prevented the organization and its president Jon Marvel from obtaining a lease, this in spite of the fact that he has been not merely high bidder but apparently the only bidder in one of several contested lease auctions. This dispute focuses, among other things, on the importance of talking about tools, specifically the details of the lease.

First, when reviewing this dispute, one should inquire into the bidder qualifications. It is typical for land owners to express some minimum qualifications before considering leasing property. The land owner wants to make sure that the lessee has sufficient qualifications so that they will be able to pay the rent. One should ask several questions: What are the qualifications in Idaho for bidding on a grazing lease? How do the qualifications relate to the goals of the program? How do they compare to the qualifications in similarly

no confusion about what the trust is doing, or should be doing, among the parties involved. Like the state trust managers in Washington, the Platte River trust group manages their small holdings with a clarity of purpose and vision that is in marked contrast to the multiple-use mandate on the federal lands. The trust is soon to be subject of a master's thesis by Darla Guenzler to whom I am grateful for material on this case.

65. See *Unranchers' Reach for West's State Lands*, 26 HIGH COUNTRY NEWS, July 25, 1994, at C18; Timothy Egan, *In Idaho, Wiley Opponent Who Takes on Ranchers*, N.Y. TIMES, July 21, 1995, at C18. The story fails to mention that unlike the larger story which it accompanies, the Wiley Opponent is working on state lands; see also *Opening Briefs, Idaho Watersheds Project, Inc. v. State Board of Land Commissioners*, No. CV-94-117, appeal docketed, No. 21-774 (1994).

situated states and on federal lands? And, who gains and who loses control given the bidder qualification requirements?

Second, one might look at the process for allocating a lease, and its length. Does the lease ever expire, in fact or technically? How do others find out about that and how do they participate in the process of evaluating and bidding on the lease? Who gains control from the lease provisions? Again, a comparison of several similarly situated states and the federal government would be illuminating.

Finally, the dispute raises the question of whether a lessee is allowed to not use the grazing lease. Is it permissible under the rules to abstain from grazing, or does that amount to forfeiture of the lease? Again, comparing federal and state rules would be instructive.

It is difficult to tell from a distance, but the apparent facts suggest that the Idaho Land Board is not acting in accordance with the best interests of the beneficiary. The high bidder has been consistently rejected for reasons that have no clear basis in the rules or goals of the trust. That is the bad news about trust land management in this instance, it is not, as previously noted, immune to the political pressures that surround us all. But, the good news is that the question has come up. It is more than a little difficult to imagine transporting this scenario to federal lands, where bidder qualifications require that you own a "base property," where permits do not expire but rather are sold with the base property, and where non-use is tolerated but not permitted. It is also difficult to see you could unravel these issues to understand what was happening without looking at the terms and conditions of the lease.

V. Conclusion

State land management is not in itself a panacea, nor are state trust lands or trust lands in general a model which Congress ought to emulate as a solution for disposing of federal lands. States do have diverse experiences in land management, however, which are often overlooked and which include the flexible management of a surprisingly powerful mandate—public trusts and leases. What is impressive in state management is the utility of the trust concept in clarifying and addressing a growing number of complex situations. Trusts can be managed for a variety of purposes and goals, which makes them a flexible and non-partisan tool. One need not agree with the goals of a given trust in order to agree that a trust structure in and of itself is often a good idea. Nor should one have to agree with all state trust management practices (which are as diverse as the many states that practice them) to agree that more attention to the states' experience is a good idea.

In light of this newfound relevance of state land management, it is appropriate to be concerned by the enormity of what we do not know about state land management and the need to explore further the full range of tools and lessons that those diverse programs embody before we reach decisions in this debate. Such an exploration would be most profitably aimed at understanding the lease as the instrument of management on not only state

and federal lands, but as they link public to private lands as well. There in the lease, an instrument which is common and well understood, rather than in the exotica of particular agency cultures, histories, and planning and management programs, we believe we can find tools that work in particular settings to balance specific risks and benefits.

In our explorations we must move beyond the issue of mere ownership of the public lands. Considering tools such as the trust and the lease helps us do so by requiring us to deal with the more important question of land control instead of land title. In particular, questions of improving local control are becoming increasingly relevant, regardless of federal or other land title. Attorney Michael Jackson of the previously mentioned Quincy Library Group notes that it is time that residents of the rural west realize that they have more in common with each other than with people three thousand miles away.

It is worth revisiting the grassroots aspects of my topic once more with a slightly different purpose. There is little doubt that much of the dialogue and movement on the public lands issues of late have come due to pressure from local groups and coalitions of all stripes—local environmentalists (rather than national groups) and county-rights activists alike. Indeed, the presence of these groups in the discussion is a major reason to hope for a more satisfactory resolution this time around. Any debate, therefore, about shifting public lands from the federal government to the states or private hands in some ways begs an even larger question—how are we better to include truly local priorities and values in the land management decision-making system? The federal government has demonstrated for the last two decades that public hearings and litigation regarding an unending land management planning process is an inadequate approach to working with the local community.

Former Speaker of the Montana House of Representatives Daniel Kemmis notes, in his thoughtful work, *Community and the Politics of Place*⁶⁶ that it is "an insult" to local residents to assume that they cannot solve such resource use conflicts themselves. States have in some instances demonstrated a flexibility in their land management practices that localities are seeking. Nevertheless, state-control and local control are not the same thing, nor do state goals and local goals always coincide. As the states (or other groups) consider expanding their role in controlling or owning the public lands, it would therefore behoove all of us to bear in mind the lessons learned under federal control. For while there are clearly many goals to consider in managing these lands, and many tools by which to do so, surely one of the most important ones is to respect the needs and experience of the local communities living within and among them.

66. DANNIEL KEMMIS, *COMMUNITY AND THE POLITICS OF PLACE* (1990).

* * *