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Buying Back the West

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Public land historians have traditionally broken down the history of public land law into three distinct periods—acquisition, disposition, and retention. Sometimes a fourth period—management—is added or combined with the era of retention. In light of the last couple of decades, it might be time to update the list and recognize that we have entered a new period which might be termed a period of reacquisition. Beginning with the rise of the environmental movement in the late 1960s and 1970s, and accelerating in recent years with the increasing public preference for preservation and recreational opportunities, public land law and policy has moved in the direction of reacquiring natural resources that many perceive to have been unwisely disposed of during the nineteenth and early twentieth centuries. This reacquisition has taken a variety of forms, some of which are quite obvious, whereas others are more subtle. Of the more obvious variety are laws allowing states, and sometimes private parties, to purchase water rights and dedicate them to instream flow; the rise of grazing buyouts; and purchases of important habitat and watersheds using the Land and Water Conservation Fund. A perhaps less obvious form of reacquisition is the move to more aggressively regulate natural resource uses in the West. As explored below, such regulation is largely indistinct from the assertion of a public property right.

The question this essay hopes to address, if only briefly, is how, if we are indeed at the front end of a new period of acquisition, we ought to achieve that emerging policy. The essay suggests that the public's preference for reacquisition will be best fulfilled, not by focusing on regulation, litigation, or backdoor reacquisition theories like the public trust doctrine, but by actually buying back the West through a variety of approaches that recognize legitimate reliance interests in natural resource use and the power of economic incentives in encouraging private actors to fulfill public purposes.

At the outset it is important to concede that any demarcation of the periods of public lands policy is not intended to be precise. For a geography as large as the public lands, and for a law and policy as complex, there will inevitably be counter-examples inconsistent with broader trends. Thus, even though most commentators are comfortable with dividing public land history broadly into periods of acquisition, disposition, and retention, the division is necessarily imprecise. As Leigh Raymond and Sally Fairfax discussed in their article, *Fragmentation of Public Domain Law and Policy: An Alternative to the*

"*Shift-to-Retention*" Thesis, the history of the public lands is not nearly so facile.¹

For example, the period of federal retention is often identified as beginning around the turn of the twentieth century with passage of the General Revision Act of 1891,² which allowed presidents to establish the national forests, and with the conservation efforts of Pinchot and Roosevelt. The truth is that the United States had moved to retain some public land—such as Yellowstone, hot springs in Arkansas, and certain mineral-bearing lands—long before the General Revision Act, and would continue to dispose of the public lands long after, whether under the Homestead Act, the Stock-Raising Homestead Act, or a variety of other disposition statutes that remained in force or were enacted after 1891. Indeed, it was not until the passage of the Federal Land Policy Management Act of 1976 (FLPMA)³ that Congress made a final decision to retain the public lands, and even now we continue to "dispose" of public lands and natural resources through the General Mining Law, the Mineral Leasing Act, Forest Service timber sales, and the like. Nevertheless, the general categorization of acquisition-disposition-retention works because it identifies broader historical trends that at some point became clear enough to identify as the dominant, if not exclusive, approach to public land policy. The claim for a period of reacquisition is of the same sort. The existence of counter-examples should not be taken as undermining the thesis but simply showing its imprecision.

The product of the fragmented but discernible movement in public land policy from disposition to retention is, not surprisingly, a fragmented landscape. Public lands are shot through with mining claims, state school trust sections, and other inholdings. In some cases, desirable private land might adjoin or be intermixed with a federal designation. A portion of the watershed of a national park might, for example, be privately owned. In other cases, private land might be critical habitat or have other qualities that the public would like to preserve. This fragmentation creates tremendous natural resource management difficulties because of mismatches between political and biophysical scale.

In addition to presenting management challenges, the disposition policies of the nineteenth and twentieth centuries often appear misguided when judged against today's priorities. As Jan Laitos has described, it is increasingly the case that the preferred use of the public lands is for recreation and preservation.⁴ The mere shift to a policy of retention is insufficient to fulfill

¹ See generally Leigh Raymond & Sally Fairfax, *Fragmentation of Public Domain Law and Policy: An Alternative to the "Shift-to-Retention" Thesis*, 39 NAT. RESOURCES J. 649 (1999).

² 26 Stat. 1095.

³ 43 U.S.C. § 1701(a) (2000).

⁴ See generally Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140 (1999).

this growing public demand for preservation and recreation. Nor does retention address the management problems of fragmentation. If such issues are to be addressed, there is really only one answer and that is the reacquisition of the land and resources misallocated and mismatched. Unsurprisingly, that is the direction in which law and policy have been moving.

To date, the preferred approach to reacquisition has been increased regulation of resource users, whether through the Endangered Species Act, restrictions on access, 3809 regulations to cover environmental harm from mining, or changes in the range code, to give just a few examples. Some may object to the characterization of such regulation as a form of acquisition. In their view, this description may appear to assume that by regulating property the public always acquires a benefit for itself as opposed to preventing harm to itself by having resource users internalize a few of their externalities. The description of regulation as reacquisition is not intended to take sides in that debate. Rather, it is intended to recognize that there is no obvious distinction between regulation and the assertion of a public property right. As Dan Cole explains, if land and natural resources in the initial position are common pool resources to be allocated by the sovereign, all sovereign decisions can be described as allocating ownership.

What distinguishes th[e] regulatory approach from “privatization” is not the existence or nonexistence of property rights but only the *type* of property regime imposed. Privatization converts nonproperty into private (individual or common) property. Government regulation typically (if tacitly) converts nonproperty into public/state property or some mixed form of public and private property. It may be objected that government regulation constitutes an exercise in *imperium* (sovereign authority) rather than *dominium* (ownership). However, this old Roman-law distinction marks little practical difference. Property and sovereignty are both forms of power—as Denman puts it, “a sanction and authority for decision-making”—over resources. Whether the state is purporting to act as sovereign or owner, the rights it asserts are in the nature of property.⁵

Even if one is inclined to disagree with Cole’s typology, the view of this essay’s thesis need only be altered slightly. Whereas this essay suggests that regulation should not be the default reacquisition tool, if one views regulation as distinct from ownership, the essay can simply be understood to advocate focusing less on regulation and more on traditional reacquisition.

If the shift to reacquisition has thus far been largely a function of regulation, that has not been its only manifestation. The effort to reacquire land and resources improvidently allocated in the past has taken other forms as well,

⁵ DANIEL H. COLE, POLLUTION & PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION 7-8 (2002) (alteration in original) (citations omitted).

and the momentum for such approaches appears to be increasing. Below, the essay considers a few examples of kinder, gentler reacquisition and suggests that they are often preferable to reacquisition via regulation. The examples coalesce around two basic principles. First, they exhibit respect for property rights or, to the extent there is not a formal property interest, as in the case of grazing permits, they value the legitimate and longstanding reliance interests of resource users. Second, they recognize the value of achieving public reacquisition goals by facilitating, rather than demanding, private preservation efforts, typically by using economic incentives or other quasi-market approaches.

Perhaps the most straightforward example of the shift to reacquisition, and one that also emphasizes the imprecision of demarcating a precise beginning to the shift, is the Land and Water Conservation Fund of 1965 (LWCF), which was established precisely for the purpose of buying back critical land and resources.⁶ The two most prominent recent uses of the LWCF were the Clinton Administration's negotiation of purchase and exchange agreements for the New World Mine near Yellowstone National Park and the Headwaters ancient redwood grove in California, which were then funded by Congress from the LWCF. Unfortunately, Congress has rarely appropriated all of the available funds from the \$900 million credited each year to the LWCF. In 2000, Congress looked set to alter the LWCF to make it a true trust fund under which the money allocated to the LWCF could not be used for other purposes. The Conservation and Reinvestment Act (CARA) proposed to guarantee \$3 billion per year for 15 years to a number of different conservation programs.⁷ Although CARA passed the House by a wide margin (315 to 103), it died before it reached the floor of the Senate, partly because of appropriation committee concerns about retaining their power to direct spending and partly because of the concerns of self-styled property rights advocates who feared additional public ownership in the West. The latter objection seems particularly irrational. If reacquisition is going to happen, and given public preference it almost surely will, one wonders why a "property rights advocate" would oppose a buyback when the alternative is likely regulation and litigation of the properties targeted for purchase under the LWCF.

Another approach to reacquisition, and one focused as much on correcting mismatches as on fulfilling public preference, is the Clinton Administration's efforts to exchange public lands for inheld state and private lands. The most prominent example is the federal deal with Utah in which Utah gave up 363,000 acres of school trust lands, which were inheld within national parks, monuments, forests, recreation areas, and Indian reservations, for \$50 million and 145,000 acres of federal lands elsewhere in the state that had significant

⁶ Pub. L. No. 88-578, 78 Stat. 897 (codified as amended at 16 U.S.C. §§ 4601-4 - 4601-11 (2000)).

⁷ H.R. 701, 106th Cong. (2000).

potential for coal and natural gas development.⁸ As with the straightforward use of the LWCF, exchanges recognize the legitimate property interests of state and private inholders and avoid the need to fight costly battles, whether by regulation or litigation, over access across precious federal lands to inheld parcels for resource development.

Unfortunately, just as in the case of the LWCF, this collaborative and rights-respecting approach to reacquisition has drawn fire, only this time the criticism has come from those who think the approach is unfair to the United States, allegedly because the BLM has been negotiating exchanges that do not provide the federal government an adequate return for the land exchanged. While there is no excuse for BLM's failure to adhere to existing legal standards on equal value exchanges, part of the problem is that current exchange rules focus on the potential economic returns to be derived from the property acquired and do not adequately account for the aesthetic and recreation value of property which is usually the primary reason for promoting the exchange. If the BLM deserves some criticism, Congress, which does not operate under the same legal constraints, should be praised when it legislates exchanges that achieve significant management and preservation objectives, even if the exchange is not strictly of equal value in economic terms. In truth, if non-market values are considered, criticized exchanges look a lot better; and to the extent the United States ends up paying a premium, it may well come out ahead if the alternative is costly fights over resource development on inholdings. President Clinton seemed to recognize this basic fact when he instructed the Department of the Interior in negotiating the exchange of Utah's school lands within the Grand Staircase-Escalante National Monument that "reasonable differences in valuation" should be resolved "in favor of the school trust."⁹

Another example of kinder, gentler reacquisition, but this time on the state side, is legislation to allow state agencies to purchase or accept donations of existing water rights and dedicate the water to instream flow. As in the federal context, states are faced with a problem—they have allocated a natural resource to private users but now the public prefers a different allocation, namely instream flow for habitat and recreational purposes. A state looking into its reacquisition toolbox could turn to an aggressive application of the beneficial use doctrine or public trust doctrine and argue that limitations on water use imposed under either doctrine always inhered in a user's water right. Such a move, however, tends to run roughshod over the reasonable reliance interests of water rights holders who, looking at a century of water practice and

⁸ See Brent Israelsen, *Leavitt to Sign Pact Today for Land Swap*, SALT LAKE TRIB., May 8, 1998, at D1.

⁹ See SHANNON KELLY, GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, UTAH - THE CREATION OF GSENM: A CASE STUDY IN THE POLITICS OF LAND USE (John D. Grahame & Thomas D. Sisk eds., 2002), at <http://www.cpluhna.nau.edu/Places/gsenm4.htm> (last visited Mar. 30, 2004).

judicial decisions, would have been hard-pressed to discern such an application of the two doctrines. Although one may legitimately dispute the precise content of appropriative water rights, a diverter's reliance interests are at least sufficient to justify an initial effort to satisfy the public's reacquisition desire by relying on state buybacks of existing water rights or, as some states have done, by allowing private parties to serve the public interest by acquiring water rights and dedicating the water to instream flow.

At first glance, it may appear that this latter example of *private* acquisition of instream flow rights is inconsistent with the broader thesis of a shift toward *public* reacquisition of natural resources, but it need not be understood that way. Rights dedicated to instream flow, even if held by a private party, are generally available for public use and fulfill public purposes. The state achieves its reacquisition goals by removing an impediment to private achievement of those same goals. While one might fear that the private instream flow right is perhaps less permanent than a public instream right because it would be subject to market pressure and theoretically could be changed to an out-of-stream use, the truth is that the public instream flow right is subject to political and public choice pressures that can be just as fierce as those of the market.

In much the same way that allowing private instream flow rights is consistent with the reacquisition thesis, so too are the various state and federal efforts to create incentives to preserve land, habitat, and threatened species. In the last couple of decades, for example, there has been a tremendous boom in conservation easements. From one perspective, it may seem as though the work of land trusts like The Nature Conservancy and the Trust for Public Lands is quintessentially private. However, the conservation easement boom has been driven largely by state and federal tax incentives for charitable giving; and those tax incentives are only available if the conservation easements fulfill certain statutory objectives.¹⁰ In essence, state and federal governments are spending money through their tax codes to achieve reacquisition of land and habitat. The government has slightly less control of the lands on which the money is spent, and there have been abuses of the system (witness the recent *Washington Post* expose of some of The Nature Conservancy's practices), but such tax expenditures are less costly than full-fledged public reacquisition. Moreover, it is not entirely clear that private decisions about critical habitat will be less wise than those of public officials. Of further benefit, incentives for private habitat conservation decrease the need to use regulatory or litigation approaches to reacquire necessary habitat.

¹⁰ See, e.g., 26 U.S.C. § 170(f)(3)(B) (1976) (providing for tax deductions for land and conservation easements given to environmental charities for conservation purposes); MINN. STAT. §§ 272.02(10), (11) (1993) (exempting from property tax undisturbed wetlands and ungrazed native prairie upon certification by the state department of natural resources).

As a matter of long-term trends, grazing permits on the public lands, particularly the arid lands of the desert Southwest, also appear headed for reacquisition and reallocation to different uses. Because the permits are not private property, there would be few legal impediments to a federal decision to terminate ranchers' grazing permits. On the other hand, ranchers and public land communities have significant reliance interests in being able to continue to graze. If reacquisition is coming, what is the best method? Instead of simply terminating the permits, or regulating grazing into submission, a preferable approach is that used by organizations, such as The Grand Canyon Trust, who have decided to recognize the value of the ranchers' nonproperty reliance interests by buying out and then retiring their grazing permits. Again, the apparently private transaction is thoroughly commingled with federal reacquisition preferences because the BLM must amend its land use plans to actually retire grazing on the purchased allotments. A similar approach, although one that tends to hurt the market for the allotment-by-allotment approach of The Grand Canyon Trust, is that proposed by The Public Lands Grazing Campaign under which the federal government would essentially condemn grazing permits for \$175 per AUM. Discouragingly, the equitable efforts of The Grand Canyon Trust and others have been rejected by some members of the ranching community who decry what they see as an effort to end their way of life. What the ranchers fail to see is that as a matter of both ranching economics and changing public land preferences, reacquisition is coming, and that buyouts—which require negotiation and recognize reliance interests—offer the fairest possible method of achieving that objective.

While it seems evident that a shift to reacquisition is underway and that the primary question with which we ought to struggle is how best to achieve that reacquisition, those in the free-market environmental community might well disagree and suggest that what we really need is another period of disposition. Although free-market environmentalists have expressed approval for efforts to use positive incentives rather than prohibitory regulation to influence individuals to preserve nature,¹¹ they would surely be wary of any project or trend labeled "reacquisition." Given the federal government's management track record and the too frequent fulfillment of the postulates of public choice theory, their concerns should not be easily dismissed. I do not mean to suggest that there are not circumstances in which to pursue privatization. Nevertheless, for those of us who perceive the very publicness of the public lands (or at least much of the public lands) to be part of their value, broad-gauge privatization is an unattractive alternative to equitable reacquisition.

¹¹ See John A. Baden & Pete Geddes, *Environmental Entrepreneurs: Keys to Achieving Wilderness Conservation Goals?*, 76 DENV. U. L. REV. 519, 521 (1999) (praising policies that create "environmental entrepreneurs" who "specialize in identifying conservation opportunities, mobilizing resources, and building a constituency for conservation").

Others may object to the emphasis on a buyback approach on the theory that the public should not pay resource users for anything but the most clearly defined and recognized property rights. Why, after all, should the public pay for that which it already effectively owns as a function of its police power? This is a legitimate question and I do not mean to suggest that there is no role for regulation as part of a reacquisition policy, particularly where the negative externalities of a resource use are substantial. Nevertheless, alternative approaches to reacquisition should not be limited solely to those instances where regulation would result in a constitutional taking. Buying back the West can make sense even when payment is not constitutionally required. In some cases, such as with arid lands grazing, buying back permits will likely prove less costly in the long run than regulation and management of grazing. In other cases, such as with conservation easements, public funds augment private efforts and arguably produce more reacquisition benefits than regulation could achieve. However, even when regulation can achieve reacquisition at less cost, the equitable consideration of the longstanding reliance interests of many resource users, as well as the prudential consideration of what sort of reacquisition is politically feasible, may merit an alternative approach.

The public lands are on the front end of a period of reacquisition that has the potential to unfold through a variety of different mechanisms. Of the available approaches, the sort described in the examples above ought to receive increased emphasis in the future. In the long term, buying back the West will likely achieve more for the public and the environment, be generally less costly, and ultimately be fairer to existing resource users and resource-dependent communities.