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## The Case Against Transferring BLM Lands to the States

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## ESSAY

# THE CASE AGAINST TRANSFERRING BLM LANDS TO THE STATES

*Michael C. Blumm\**

The Republican revolution's rush to deregulate environmental resources—witnessed thus far by slashing agency budgets,<sup>1</sup> restricting agency enforcement,<sup>2</sup> and exempting developments from environmental laws<sup>3</sup>—may soon include a serious effort to transfer control over the 270 million acres of federal lands administered by the Bureau of Land Management (“BLM”) to the states. Two bills in the 104th Congress, House Bill 2032<sup>4</sup> and Senate Bill 1031,<sup>5</sup> would authorize states to demand the wholesale transfer of BLM lands located within their boundaries. Both bills present an all-or-nothing option: a state may choose to acquire all of the BLM lands or none of them, but may not choose to acquire just a portion of them.<sup>6</sup>

This effort to de-federalize the public lands is perhaps the result of an adverse reaction within the ranching community and, to a lesser extent, the timber and mining communities to the

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1. See *GOP Budget Cuts Diluting Environmental Protection, Democrats Say*, CHI. TRIB., Feb. 27, 1996, at 9; Gary Lee, *GOP Environmental Tactics Scored*, WASH. POST, Feb. 27, 1996, at A17.

2. *GOP Budget Cuts*, *supra* note 1, at 9; Lee, *supra* note 1, at A17.

3. See William Neikirk, *Empowerment Zones Hit a Wall*, CHI. TRIB., July 27, 1995, at 1 (discussing exemptions from federal environmental laws to promote revitalization of inner cities).

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

5. S. 1031, 104th Cong., 1st Sess. (1995).

6. H.R. 2032 § 1(c); S. 1031 § 1(c).

implementation of federal environmental laws.<sup>7</sup> About 160 million of the 270 million acres of BLM lands are currently subject to grazing permits.<sup>8</sup> Grazing permittees have come to rely on their grazing allotments as if they were their private property,<sup>9</sup> even though the 1934 Taylor Grazing Act<sup>10</sup> expressly declared that a grazing permit conveyed no property rights.<sup>11</sup> As a result of this reliance, graziers are particularly vulnerable to land-use changes resulting from plans submitted in compliance with the Federal Land Policy and Management Act,<sup>12</sup> the environmental evaluations required by the National Environmental Policy Act,<sup>13</sup> and the consultation process mandated by the Endangered Species Act.<sup>14</sup> Transfer of BLM lands to the states would be a convenient way to eliminate these requirements and put an end to what some in the ranching community have called the federal government's "war on the West."<sup>15</sup>

The combatants in this new war, which include members of the so-called "wise use" movement<sup>16</sup> and the "county supremacy"

7. See, e.g., Timothy Egan, *In Battle Over Public Lands, Ranchers Push Public Aside*, N.Y. TIMES, July 21, 1995, at A1.

8. See GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 688 (3d ed. 1991).

9. See *Storm Over Rangelands*, WASH. TIMES, Feb. 19, 1996, at A22 (discussing the case of a Nevada rancher who claims that his federal grazing permit confers a private property right based on nineteenth century state law).

10. 43 U.S.C. §§ 315-315r (1988).

11. 43 U.S.C. § 315b. See *United States v. Fuller*, 409 U.S. 488, 494 (1973) (federal government does not have to pay "permit value" when condemning private ranch lands because grazing permit is not a compensable property interest).

12. 43 U.S.C. §§ 1701-1784 (1988 & Supp. V 1993). For plan requirements, see *id.* § 1712.

13. 42 U.S.C. §§ 4321-4370 (1988 & Supp. V 1993). An environmental impact statement must be prepared pursuant to 42 U.S.C. § 4332(2)(C). See also 40 C.F.R. pt. 1502 (1995) (requiring preparation of environmental impact statements); 40 C.F.R. § 1501.3 (1995) (stating when a federal agency should prepare an environmental assessment).

14. 16 U.S.C. §§ 1531-1544 (1998 & Supp. V 1993). Section 1536(a) requires inter-agency consultation and cooperation.

15. See, e.g., Timothy Egan, *Campaigns Focus on 2 Views of West*, N.Y. TIMES, Nov. 4, 1994, at A29.

16. See Keith Schneider, *Landowners Unite in Battle Against Regulators*, N.Y. TIMES, Jan. 9, 1995, at A1. The "wise use" movement is funded in large

movement,<sup>17</sup> are latter day "sagebrush rebels."<sup>18</sup> These rebels gained prominence in the late 1970s, when President Carter and his Democratic administration newly implemented several federal environmental laws.<sup>19</sup> Successor administrations made clear that

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measure by mining companies. *Id.* For a general discussion of the "wise use" movement, see Rene Erm II, *The "Wise Use" Movement: The Constitutionality of Local Action on Federal Lands Under the Preemption Doctrine*, 30 IDAHO L. REV. 631 (1993-1994).

17. The "county supremacy" movement has recently gained notoriety in the dispute over Nye County ordinances which assert that the federal government does not, in fact, own BLM administered lands. See Timothy Egan, *Court Puts Down Rebellion Over Control of Federal Land*, N.Y. TIMES, March 16, 1996, at A1. A district court in Nevada has virtually eliminated all hopes of the "county supremacy" movement to gain control of BLM lands absent congressional approval. *United States v. Nye County, Nevada*, No. CV-S-95-00232, slip op. (D. Nev. March 14, 1996). Contrary to the position of the county supremacists, the court ruled that "the United States owns and has the power and authority to manage and administer . . . public lands . . ." *Id.*

For an account of the Nye County controversy, see Erik Larson, *Unrest in the West; Welcome to Nevada's Nye County, Whose Angry Residents are Spearheading the Region's Charge Against Washington*, TIME, Oct. 23, 1995, at 52. See also Gary Poole, *Hold It! This is My Land! Led By Commissioner Dick Carver, Nevada's Nye County is Now Ground Zero in the West's War Against the U.S. Government*, L.A. TIMES, Dec. 3, 1995, Magazine, at 28.

18. Dave Abelson, Comment, *Water Rights and Grazing Permits: Transforming Public Lands Into Private Lands*, 65 U. COLO. L. REV. 407, 409 (1994); Theodore Blank, *Grazing Rights on Public Lands: Wayne Hage Complains of a Taking*, 30 IDAHO L. REV. 603, 605 n.5 (1993-1994). *But cf.* Harvey M. Jacobs & Brian W. Ohm, *Statutory Takings Legislation: The National Concept, the Wisconsin and Minnesota Proposals*, 2 WIS. ENVTL. L.J. 173, 183 (1995) (stating that wise users and county supremacists are not latter day sagebrush rebels).

For a description of the "sagebrush rebellion," see Bruce Babbitt, *Federalism and Environmental Law: An Intergovernmental Perspective on the Sagebrush Rebellion*, 12 ENVTL. L. 847, 848 (1982) (Mr. Babbitt is currently Secretary of the Interior). The sagebrush rebellion unsuccessfully sought to turn federal lands over to the states in the 1970s. Jon Christensen, *As a Way of Life Vanishes, a 'Revitalization' Movement Arises in the West*, BALT. SUN, May 3, 1995, at 19A.

19. See John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

they would assume an approach more favorable to existing commodity users.<sup>20</sup>

More than a decade later, the sagebrush rebels are back as "wise users" or "county supremacists," and have apparently convinced many legislators that the federal presence is costly to local communities.<sup>21</sup> This is in spite of the evidence that annual family income in rural counties with public lands is about \$2,000 higher than in counties without public lands.<sup>22</sup> This Essay suggests that there are several reasons why Congress should reaffirm the role of the federal government in public land management.

### 1. Non-Market Values

The BLM lands contain values which are not subject to accurate market pricing. As of January 1995, there were some 622 wilderness study areas containing over 20 million acres on BLM lands.<sup>23</sup> Moreover, as of 1992, BLM had designated 524 of these sites, embracing more than 8.7 million acres, as "areas of critical environmental concern."<sup>24</sup> There is reason to believe that the natural, historic, cultural, and "existence" values of these areas would be sacrificed by states in the pursuit of market-oriented commodity production.<sup>25</sup>

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20. For a discussion of the Reagan Administration's policies, see Robin E. Folsom, Comment, *Executive Order 12,630: A President's Manipulation of the Fifth Amendment's Just Compensation Clause to Achieve Control Over Executive Agency Regulatory Decisionmaking*, 20 B.C. ENVTL. AFF. L. REV. 639, 644-54 (1993).

21. See Abelson, *supra* note 18, at 409; Schneider, *supra* note 16, at A1.

22. UNITED STATES DEP'T OF AGRICULTURE, ECON. RES. SERV., BULL. NO. 710, UNDERSTANDING RURAL AMERICA (1995).

23. Telephone Interview with Rob Hellie, Wilderness Staff, Bureau of Land Management, Washington, D.C. (Mar. 6, 1996).

24. Telephone Interview with Cheryl McCaffrey, State Office Botanist for Bureau of Land Management in Oregon and Washington (Oct. 12, 1995).

25. See Melissa A. Heath, Note, *A Tidelands Trust for Georgia*, 17 GA. L. REV. 851, 877 (1983) (discussing the case of a state court's approval of a lease of nearly 25,000 acres of land for phosphate mining despite the implication of non-market values); Valerie Richardson, *On Western Range, BLM is Hated Federal Regulator*, WASH. TIMES, Oct. 15, 1995, at A1.

## 2. Access

One of the great advantages of federal ownership is that it affords the public access to the lands for a variety of recreational activities.<sup>26</sup> In 1994, the public made more than 65 million visits to BLM lands for hunting, fishing, camping, and other leisure activities.<sup>27</sup> Residents of Michigan and Massachusetts, for example, have the same right of access to BLM lands located in Western states as residents of those states.<sup>28</sup> Devolution to the states could threaten this access, effectively creating monopoly rights.

## 3. Scientific Expertise

The federal government possesses large advantages over individual states in terms of its ability to marshal scientific expertise.<sup>29</sup> The federal government, for example, has been collecting ecological data throughout the upper Columbia Basin in an effort to rationalize federal land management east of the Cascades.<sup>30</sup> This effort, which the Republican Congress threatens to de-authorize,<sup>31</sup> should be contrasted with state land management efforts, which are characterized by a general lack of systematic, scientific planning.<sup>32</sup>

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26. See *To Transfer the Lands Administered by the Bureau of Land Management to the State in Which the Lands Are Located: Hearings on H.R. 2032 Before the Subcomm. on Nat'l Parks, Forests and Lands, 104th Cong., 1st Sess. (1995)* [hereinafter *Hearings*] (statement of Bonnie R. Cohen, Assistant Secretary—Policy, Management and Budget, U.S. Department of the Interior) (stating that H.R. 2032 would limit access to public lands for recreational visits), available in WESTLAW, US TESTIMONY Database, Aug. 1, 1995.

27. *BLM Report Cites Rewards From Public Lands*, PR NEWSWIRE, July 31, 1995, available in LEXIS, NEWS Library, CURNWS File.

28. *Hearings*, supra note 26.

29. See Gary D. Meyers, *Old-Growth Forests, the Owl, and Yew: Environmental Ethics Versus Traditional Dispute Resolution Under the Endangered Species Act and Other Public Lands and Resources Laws*, 18 B.C. ENVTL. AFF. L. REV. 623 (1991) (reviewing the ecological and other scientific bases for listing the owl as an endangered species).

30. See also Scott Sonner, *Columbia Basin Environmental Study Vital to Wildlife, Forest Chief Says*, OREGONIAN, Feb. 18, 1996, at D2.

31. See H.R. 1977, 104th Cong., 1st Sess. § 314 (1995).

32. Mark Borkowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697, 726 (1995).

Most Western states have yet to complete an inventory of the public lands within their borders.<sup>33</sup>

#### 4. Limited Jurisdiction

There is an inherent incongruity between state boundaries and the dimensions of watersheds and biodiversity concerns.<sup>34</sup> Political boundaries have seldom been drawn to reflect ecological realities.<sup>35</sup> In fact, political boundaries are typically drawn at the middle of a waterbody, effectively bisecting a watershed.<sup>36</sup> State control of public lands would ensure fragmented management, making a large part of ecosystem management extrajurisdictional, or “external,” to the state.<sup>37</sup>

#### 5. Public Choice Theory

Limited boundaries are not the only reason why state control of public lands would increase environmental costs. Federal control of public lands has been justifiably criticized for allowing well-organized commodity users—ranchers, miners, timber companies—to dominate public land decision making.<sup>38</sup> Public choice political theory predicts that small, well-organized groups will capture decision making, allowing these groups to capture “economic rents” and pass the costs on to the unorganized, but more numerous public.<sup>39</sup> While this “capture by the organized” describes much federal land decision making, it would reign without restraint if the individual

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33. Melinda Bruce & Teresa Rice, *Controlling the Blue Rash: Issues and Trends in State Land Management*, 29 *LAND & WATER L. REV.* 1, 35 (1994).

34. See Robert B. Keiter, *Conservation Biology and the Law: Assessing the Challenges Ahead*, 69 *CHI.-KENT L. REV.* 911, 920-22 (1994).

35. See *Columnist Cries Wolf on Predators in Yellowstone Park*, *WASH. TIMES*, Apr. 11, 1992; Roger K. Lewis, *Shaping the City*, *WASH. POST*, Mar. 17, 1990.

36. Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 *ENVTL. L.* 973, 992 (1995).

37. *Id.*

38. See Michael C. Blumm, *Public Choice Theory and the Public Lands: Why Multiple Use Failed*, 18 *HARV. ENVTL. L. REV.* 405 (1994).

39. *Id.* at 415-22. For a definition of “economic rents,” see Linz Audain, *The Economics of Law Related Labor V: Judicial Careers, Judicial Selection, and an Agency Cost Model of the Judicial Function*, 42 *AM. U. L. REV.* 115, 146 (1992).

states were the decision makers.<sup>40</sup> The current management of state-owned lands may foreshadow state management of BLM lands. A recent study found a “numbing sameness” in state land-management techniques, characterized by a general failure to obtain fair market value for the use of the land, persistent underfunding of management, and high environmental costs.<sup>41</sup>

Current state land management in Oregon, viewed by many to be a progressive state,<sup>42</sup> is instructive. The Oregon Land Board recently rescinded a policy that had allowed the leasing of state rangelands to the highest bidder.<sup>43</sup> The Board replaced that policy with a more restrictive one, limiting participation in the program to ranchers only, despite the prospect of reduced revenues for the state school fund.<sup>44</sup> Further, implementation of the State’s Forest Practices Act<sup>45</sup>—under which the State has approved the liquidation of nearly all ancient forests on non-federal land<sup>46</sup>—will now be constrained by a 1996 amendment.<sup>47</sup> This amendment limits environmental protection to measures that do not result in more than a ten percent reduction in the volume or value of timber harvests.<sup>48</sup> James Madison warned, two centuries ago, that “special interests” exerted a greater influence at the state than the federal level.<sup>49</sup> His insight has certainly proved to be true in the field of land management.

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40. See Blumm, *supra* note 38, at 417-18 (describing how “political activity would be dominated by small special interest groups engaging in rent-seeking at the expense of the public”).

41. Bruce & Rice, *supra* note 32, at 22-26.

42. *Forestry Data Network Due*, OREGONIAN, May 5, 1993, at C1.

43. *Land Board Rejects Selling Large Areas of State Rangeland*, OREGONIAN, Dec. 13, 1995, at D13.

44. OR. ADMIN. R. 141-110.010 to 141-110.170 (1995); see also Kathleen Kreller, *State Land Board Dumps Policy Requiring Bids for Grazing Land*, OREGONIAN, June 14, 1995, at B4.

45. OR. REV. STAT. §§ 527.610 to 527.770 (1995).

46. OR. REV. STAT. § 527.707.

47. OR. H.B. 3485, 68th Leg., Special Sess. § 17(2)(a) (1996).

48. *Id.*

49. THE FEDERALIST No. 10 (James Madison); see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).



## 6. Public Participation

One unavoidable result of transferring BLM lands to the states will be the loss of public participatory rights.<sup>50</sup> Virtually no state makes citizen access to administrative and judicial appeals as readily available as does the federal government.<sup>51</sup> Reduced opportunities to appeal will inevitably lead to reduced opportunities for meaningful participation in the administrative process.

## 7. Nationhood

Life in America in the twentieth century is characterized by strong centrifugal forces. As Congress "de-federalizes" entitlement programs<sup>52</sup> and slashes the federal role in a host of social service<sup>53</sup> and regulatory programs,<sup>54</sup> very little remains that binds us together as a nation. We vote in only one national election and, even then, actually vote just for state presidential electors; through the 14th Amendment,<sup>55</sup> we enjoy the protections of the Bill of Rights against state government actions;<sup>56</sup> and we all own a share of the federal lands. The federal lands are important symbols of our nationhood, and we should be extremely reluctant to deprive our children and future generations of their inheritance. The economic, environmental, and psychic costs will not only be substantial, they will be irreversible.

50. See 43 U.S.C. § 1739(e) (requiring public participation in planning and managing public lands). For a definition of "public participation rights," see David J. Abell, *Exercise of Constitutional Privileges: Determining Abuse of the First Amendment—Strategic Lawsuits Against Public Participation*, 47 SMU L. REV. 95, 101 (1993).

51. For a discussion of the breadth of federal appeal procedures, see 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* §§ 7-8 (1995).

52. See, e.g., *Lawmakers Pushing Hard For a Softer Bill; Welfare Bill Goes After Deadbeat Parents*, SALT LAKE TRIB., Mar. 24, 1995, at A1.

53. See, e.g., *id.*

54. See, e.g., Gary Lee, *Compromising on Clean Air Act; Under Republican Pressure, EPA Reduces Enforcement Efforts*, WASH. POST, Feb. 21, 1996, at A1.

55. U.S. CONST. amend XIV.

56. Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 753 (1992).

More than a hundred years ago, a similar proposal to de-federalize Indian reservations was enacted by a reform-minded Congress.<sup>57</sup> The reformers claimed that dismantling the traditions of communal land ownership would transform the Natives into productive agrarians.<sup>58</sup> Unfortunately, the chief result of the Dawes Act of 1887 was a loss of nearly two-thirds of the Indian land base to the white settlers and a steady decline in the quality of the native standard of living.<sup>59</sup> The fragmentation of ownership created by the Dawes Act has turned the management of reservation lands into a jurisdictional nightmare.<sup>60</sup> That Act's reforms proved disastrous to their intended beneficiaries.<sup>61</sup> Regrettably, recognition of the failures of the Dawes Act did not mean that its effects could be reversed.

I submit that congressional de-federalization of the BLM lands will result in the destruction of wilderness, the loss of public access, a decline in science-based management, fragmented jurisdiction, increased environmental costs, a reduction in public participation, and an irretrievable loss of national heritage lands. The costs of losing some 270 million acres of the national estate—fully three times the amount of land de-federalized by the Dawes Act—will be paid not just by this or the next generation but also by generations yet unborn. These are the costs that the 104th Congress and its successors should be unwilling to pay.

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57. That proposal was contained in the Dawes Act of 1887, 23 U.S.C. § 331 (1988). See ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 152 (3d ed. 1991).

58. George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467, 484 (1994).

59. L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 53 (1994).

60. See Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

61. John F. Walsh, Note, *Settling the Alaska Native Claims Settlement Act*, 38 STAN. L. REV. 227, 230 (1985) (stating that the loss of the Indian land base caused by Dawes Act was "a crushing blow both to the economic hopes and to the cultural morale of the Indian people").

