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## Fear and Loathing on the Federal Lands\*

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### I. INTRODUCTION

On July 4, 1994, Dick Carver, a rancher and a Commissioner of Nye County, Nevada, climbed aboard his twenty-two-ton D-7 Caterpillar and began bulldozing open a road in the Toiyabe National Forest.<sup>1</sup> The county had asked the United States Forest Service, an agency within the Agriculture Department responsible for managing the national forests, to reopen a former stagecoach trail, but the agency said an archaeological survey was needed first.<sup>2</sup> Without waiting for Forest Service approval, and with the consent of his fellow Commissioners, Carver drove the bulldozer to the road and began plowing a roadbed outside the existing right-of-way.<sup>3</sup> In front of him stood an armed agent of the United States Forest Service, who held a hand-lettered sign ordering Carver to halt.<sup>4</sup> The agent stumbled to his hands and knees, but Carver drove on, waving his pocket-sized copy of the United States Constitution, as his son-in-law stood by and sang the national anthem.<sup>5</sup> Spurred on by a local rancher who argued that the United States had been won by "fighting men and bloodshed," and that peaceful solutions were no longer sufficient, a crowd

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1. See James S. Gilliland, *When Right is Determined by the Bulldozer*, 12 ENVTL. F., Sept./Oct. 1995, at 40; Eric Larson, *Unrest in the West*, TIME, Oct. 23, 1995, at 52, 52. See also *United States v. Nye County*, 920 F. Supp. 1108, 1111-12 (D. Nev. 1996).

2. See Larson, *supra* note 1, at 56, 66.

3. See *id.* See also Gilliland, *supra* note 1, at 40.

4. See Larson, *supra* note 1, at 66.

5. See Gilliland, *supra* note 1, at 40; Larson, *supra* note 1, at 66.

of about 200 onlookers, many waving guns, cheered.<sup>6</sup> The Nye County Commission subsequently requested that criminal charges be brought against the two Forest Service employees.<sup>7</sup>

This story is not unique. Similar incidents have occurred in other parts of the West in recent years. The most recent example took place on lands in Utah, which, in the fall of 1996, President Clinton included within the newly established Staircase-Escalante National Monument.<sup>8</sup> Officials of the Bureau of Land Management (BLM), while conducting an inventory in October 1996 of undeveloped lands inside the national monument for possible wilderness designation, noticed that hundreds of miles of trails had been bulldozed and graded without agency approval.<sup>9</sup> It turned out that the counties in which the lands are located, which asserted ownership of the graded roads, ordered the bulldozing in an attempt to disqualify the areas from further consideration as wilderness.<sup>10</sup> They did so despite warnings by the BLM that they lacked the authority to engage in those acts on lands under the BLM's jurisdiction.<sup>11</sup> Instead of resorting to legal means of resolving the dispute first, the counties began leveling.<sup>12</sup> They stopped only when the federal government filed suit alleging trespass by the counties and a federal district court issued an injunction to stop the unauthorized work.<sup>13</sup> Even after the suit was filed, Garfield County officials declared that they would "not be beholding" to the federal officials who brought suit.<sup>14</sup> One Utah rancher's response to the creation of the national monument may have summarized the feelings of many when he declared that he would "like to secede from the nation. I'd like to go to war."<sup>15</sup>

Recent dissatisfaction with ownership and management of the federal lands has manifested itself in more ominous forms as well. Pipe bombs

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6. See Larson, *supra* note 1, at 52, 66.

7. See Gilliland, *supra* note 1, at 40. See also *United States v. Nye County*, 920 F. Supp. 1108, 1111-12 (D. Nev. 1996).

8. See Tom Kenworthy, *Blazing Utah Trails to Block a Washington Monument*, THE WASHINGTON POST, Nov. 30, 1996, at A1.

9. See *id.* at A1, A8.

10. See *id.*

11. SALT LAKE TRIBUNE, Oct. 19, 1996, at A1; LAS VEGAS REVIEW-JOURNAL, Oct. 19, 1996, at 3B. The counties ordered road crews to scrape hundreds of miles of back-country roads designated as wilderness study areas. 6 AMER. POL. NETWORK-GREENWIRE # 147, Dec. 2, 1996; Kenworthy *supra* note 8, at A1. See also John H. Cushman, Jr., *Defining Roads in Utah's Wilderness*, N.Y. TIMES, Jan. 28, 1997, at A9.

12. See Kenworthy, *supra* note 8, at A1.

13. See *Bulldozed*, NEWSWEEK, Nov. 11, 1996, at 6; Kenworthy, *supra* note 8, at A8.

14. See Gorrell, *Garfield County Snubs the Monument Money*, SALT LAKE TRIBUNE, Oct. 29, 1996, at B1.

15. CAPITAL MARKETS REPORT 07:56:00, Oct. 22, 1996.

have appeared in the Gila Wilderness in New Mexico.<sup>16</sup> An unknown assailant shot at a Forest Service biologist in California.<sup>17</sup> A bomb was thrown onto the roof of the BLM's state headquarters in Nevada on Halloween night in 1993.<sup>18</sup> School children have been beaten because their parents work for the Forest Service.<sup>19</sup> In August 1995, the family van of a forest ranger in Carson City, Nevada, was blown up while parked in his driveway.<sup>20</sup> That episode marked the second time within a year in which violence was directed at the ranger, who previously supervised Forest Service lands in Nye County.<sup>21</sup>

Incidents of civil disobedience involving the disruption of lawful activities on the federal lands have not been confined to those who oppose restrictions on development that stem from environmental and natural resource protection laws. Radical environmentalists, for example, have spiked trees and otherwise sought to disrupt logging in the national forests.<sup>22</sup> The difference between those protests and the ones I have been discussing is that only the latter have occurred under the sponsorship of local governments.

Why has dissatisfaction over federal land management provoked these recent incidents that either threatened to erupt into or actually involved violence? My answer to that question begins with a description of how the functions of federal land ownership and management have changed over the years. These changes provide a backdrop for a series of attacks that have been leveled against the legality of federal land ownership and management over the past two decades. After placing these attacks into the context of a broader, ongoing re-evaluation of environmental policy, I will discuss factors that may explain why attacks on federal land ownership and regulation have moved beyond the realm of legislative debate and litigation into the realm of lawless, even violent, behavior, as illustrated by Nye County and similar incidents. Finally, I will suggest how the powderkeg of discontent evident in parts of the West may be defused in a way that increases the prospects for resolving the debate over the future shape of federal land ownership and management in accordance with the rule of law rather than through inflammatory appeals to intolerance and violence.

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16. See Larson, *supra* note 1, at 54.

17. See *id.*

18. See *id.*; Tom Udall, *Law Enforcement Cannot Back Off*, 12 ENVTL. F., Sept./Oct. 1995, at 45.

19. See Gilliland, *supra* note 1, at 41.

20. See Larson, *supra* note 1, at 54.

21. See *id.*

22. See Peter Burke, Note, *Application of RICO to Political Protest Activity: An Analogy to the Antitrust Laws*, 12 J.L. & POL'Y 573, 574 n.12 (1996).

## II. THE PURPOSES OF FEDERAL LAND OWNERSHIP AND MANAGEMENT

During the first century following adoption of the United States Constitution, the nation pursued a policy that favored the transfer of public land into state and private hands.<sup>23</sup> The establishment of Yellowstone National Park in 1872<sup>24</sup> marked the beginning of a shift in emphasis in national land policy from disposition to retention and management for purposes that included recreation, conservation, and preservation.<sup>25</sup> The National Park Service Act of 1916<sup>26</sup> was adopted to conserve scenery, natural and historic objects, and wildlife, and to provide for their enjoyment by current and future generations.<sup>27</sup> Millions of acres adjacent to the national parks were set aside in national forests. Under the Forest Service Organic Act of 1897, these acres were to be held "for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber" to the nation.<sup>28</sup> Beginning in 1903, presidents and then Congresses established national wildlife refuges on more than 90 million acres of federal lands.<sup>29</sup> The death knell of the disposition impulse came in 1976 when Congress declared in the Federal Land Policy and Management Act (FLPMA) that "the public lands shall be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest."<sup>30</sup>

Not only did Congress over the years declare an unmistakable end to the previous policy of federal land disposition; it also imposed new constraints on the federal land management agencies in a concerted effort to reverse their traditional inclination to favor extractive and consumptive uses over recreation, wildlife protection, and preservation.<sup>31</sup> It did so by

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23. See 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 2.01 (1990). The Homestead Act of 1862, 43 U.S.C. § 161-164 (repealed 1976), made western lands available to settlers for free, the federal government granted land to the transcontinental railroads and to the states for public education, and the 1872 General Mining Law, 30 U.S.C. §§ 21-54 (1994), promoted mineral development by establishing a location system which enabled miners to extract minerals and eventually claim title to public lands without charge. 1 COGGINS & GLICKSMAN, *supra*, § 2.02[2], [3][b], [c]. Congress early in the 19th century even authorized the sale of western lands to raise revenue. See 1 *id.*, § 2.02[2].

24. See 16 U.S.C. §§ 21-40c (1994).

25. See 1 COGGINS & GLICKSMAN, *supra* note 23, § 2.03[1].

26. 16 U.S.C. §§ 1-20 (1994).

27. See *id.* § 1.

28. 16 U.S.C. § 475 (1994).

29. See 1 COGGINS & GLICKSMAN, *supra* note 23, § 2.03[2][c].

30. 43 U.S.C. § 1701(a)(1) (1994).

31. See Robert L. Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breach of) the Contract with America: Improving Environmental Policy or Destroying Environmental Protection?*, 5 KAN. J. L. & PUB. POL'Y, Winter 1996, at 9, 12.

carving out certain federal lands (such as wilderness areas<sup>32</sup> and wild and scenic rivers<sup>33</sup> and resources (such as endangered species<sup>34</sup>) for special protection, requiring the land management agencies to factor into their decisions oft-ignored considerations such as the potential adverse environmental consequences of those decisions,<sup>35</sup> and mandating the adoption of land use plans to which subsequent resource allocation decisions had to conform.<sup>36</sup> Congress delegated to the courts the power to oversee and enforce these new preservation-oriented obligations. The result of these changes was a decline in the ability of developmental interests such as ranchers and loggers to control the decisions of the land management agencies in allocating public resources.<sup>37</sup>

A related tradition was the federal government's willingness to subsidize the extraction of resources from and the development of the federal lands. The General Mining Law of 1872<sup>38</sup> provides probably the most striking example by allowing miners to procure title to both hard rock minerals and the land that contains them for a pittance.<sup>39</sup> Similarly, federal timber sales often wind up costing the government money.<sup>40</sup> In recent years, the federal government has made halting steps to put an end to some of the most egregious of these subsidies. The Reclamation Reform Act of 1982,<sup>41</sup> for example, was adopted to reduce the size of the

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32. See The Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1994). This Act was enacted to preserve areas "for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas." *Id.* § 1131(a).

33. See The National Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271-1287 (1994). The Act states a policy of preserving in free-flowing condition, for the benefit of present and future generations, selected rivers and their immediate environments which possess outstanding scenic, recreational, wildlife, or similar values. See *id.* § 1271.

34. See The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1994). This Act, probably the apex of preservation-oriented laws, seeks "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." *Id.* § 1531(b).

35. See 42 U.S.C. § 4332(2) (1994).

36. See 16 U.S.C. § 1604 (1994); 43 U.S.C. § 1712 (1994).

37. Under the "environmental overlay" created by the statutes described above, "multiple use management is no longer synonymous with unrestrained administrative discretion, and federal land managers are required to consider and protect environmental values when allowing multiple uses to go forward." Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 371 (1994). See also John W. Hart, Comment, *National Forest Planning: An Opportunity for Local Governments to Influence Federal Land Use*, 16 PUB. LAND L. REV. 137, 145-46 (1995) ("Interest groups opposed to the preservation of public land and in favor of its traditional use and development certainly perceive that their economic needs and expectations carry less weight with federal officials than they once did.").

38. 30 U.S.C. §§ 22-24, 26-30, 33-35, 37, 39-43, 47 (1994).

39. See 3 COGGINS & GLICKSMAN, *supra* note 23, § 25.01[3].

40. See 3 *id.* § 20.03[4][f].

41. Pub. L. No. 97-293, 96 Stat. 1261 (1982).

subsidies provided to corporate farmers, who enjoyed access to irrigation water from federally constructed dams at far below market prices.<sup>42</sup> The Clinton Administration has made aborted attempts to reduce subsidies to ranchers who continue to pay grazing fees that are much lower than they would incur if they leased private lands.<sup>43</sup>

### III. LEGAL ATTACKS ON FEDERAL LAND OWNERSHIP AND MANAGEMENT

These changes in well-entrenched and historic policies for allocating the federal lands and the resources they contain sparked discontent that surfaced in the form of a series of attacks on the legitimacy of continued federal land ownership. The forerunner of the claims by the officials of Nye County, Nevada and Garfield County, Utah that they had the right to control activities on the federal lands was the Sagebrush Rebellion of the mid-1970s.<sup>44</sup> Led by western ranching interests opposed to increased federal land use regulation, the rebels sought the transfer of title to millions of acres of federal lands to the states containing them.<sup>45</sup> They asserted that the Constitution imposed on the national government a trust obligation that requires it to dispose of the lands it has acquired from other sovereigns such as France, Spain, Russia, and Mexico.<sup>46</sup> These

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42. See 3 COGGINS & GLICKSMAN, *supra* note 23, § 21B.04[2].

43. See 3 *id.* § 19.02[2].

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

45. See Hardt, *supra* note 37, at 346. The Rebels reacted in part to the declaration in FLPMA of a general policy that the public lands be retained in federal ownership. See *id.* at 346 n.6 (citing 43 U.S.C. § 1701(a)(1) (1994)). See *supra* note 30 and accompanying text. See also Hart, *supra* note 37, at 137 (noting that the Sagebrush Rebels "demanded that the federal government relinquish management authority over the public domain and grant it to individual states"). For one description of the motives of the Rebels, see Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525, 527 (1993-94) (characterizing the rebellion as "simply another spin on how to place the public lands under the control of the private commercial users").

46. See *Nevada ex rel. Nevada State Bd. of Agric. v. United States*, 512 F. Supp. 166 (D. Nev. 1981) (rejecting the argument), *aff'd on other grounds*, 699 F.2d 486 (9th Cir. 1983). The United States acquired much of its territory, particularly in the West, by treaty with other countries. The land that today comprises Nevada, for example, was acquired under the Treaty of Guadalupe Hidalgo with Mexico in 1848. See *United States v. Gardner*, 107 F.3d 1314, 1317 (9th Cir. 1997); *United States v. Nye County*, 920 F. Supp. 1108, 1110 (D. Nev. 1996).

The federal government also reacquires land that has moved out of the public domain into state or private hands. It does so through land exchanges for purposes that include consolidating fragmented holdings and promoting more effective management. See 1 COGGINS & GLICKSMAN, *supra* note 23, §§ 10C.05-.06. See also 43 U.S.C. § 1716(a) (1994) (authorizing exchanges when they will serve the "public interest"). It also reacquires land to enhance conservation objectives. The Land and Water Conservation Fund Act, 16 U.S.C. §§ 4601-4 to 4601-11 (1994), for example, authorizes and has financed the acquisition of lands for outdoor recreation and wildlife purposes. See generally Robert L. Glicksman & George Cameron Coggins, *Federal Recreational Land Policy:*

legal arguments made no real headway, and by the mid-1980s, the rebellion had fizzled out.<sup>47</sup>

The successor to the Sagebrush Rebellion was the Wise Use Movement, born around 1988 in reaction to the increased emphasis placed on preservation of federal lands and resources. The movement's adherents argued that federal land management policy should subordinate recreational and preservation-oriented uses to economic and commodity uses of public resources.<sup>48</sup> The Wise Users focused on the threats posed to western communities by environmentalists and the need for stronger protection of private property rights.<sup>49</sup> Their goal, like that of the Sagebrush Rebels, was the transfer of undeveloped federal lands in the West to the private sector for commercial exploitation.<sup>50</sup>

At some point, the former Sagebrush Rebels and their ideological allies realized that large-scale transfer of federal lands to state or local ownership might be financially disastrous for the western states.<sup>51</sup> Counties with substantial federal land holdings, for example, typically receive greater federal revenue sharing and other aid than counties without such lands.<sup>52</sup> The same private interests who steadfastly oppose federal land ownership and management are often the ones who protest

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*The Rise and Decline of the Land and Water Conservation Fund*, 9 COLUM. J. ENVTL. L. 125 (1984).

47. See Hardt, *supra* note 37, at 346.

48. See Rene Erm II, Comment, *The "Wise Use" Movement: The Constitutionality of Local Action on Federal Lands Under the Preemption Doctrine*, 30 IDAHO L. REV. 631, 633, 635 (1993-94). According to one observer, the Movement "constitutes a giant step backward in federal land management policy to a narrow utilitarian perspective that ignores advances in human knowledge over the past century." Hardt, *supra* note 37, at 402.

49. See Andrea Hungerford, "Custom and Culture" Ordinances: *Not a Wise Move for the Wise Use Movement*, 8 TULANE ENVTL. L.J. 457, 458 (1995). See also Ray Vaughan, *State of Extinction: The Case of the Alabama Sturgeon and Ways Opponents of the Endangered Species Act Thwart Protection for Rare Species*, 46 ALA. L. REV. 569, 588 (1995) ("The main, stated goal for the wise use movement is indeed the annihilation of environmental groups and their influence.").

50. See Hungerford, *supra* note 49, at 457. See also Patrick Austin Perry, Comment, *Law West of the Pecos: The Growth of the Wise-Use Movement and the Challenge to Federal Public Land-Use Policy*, 30 LOY. L.A. L. REV. 275, 276 (1996) (noting that the Wise Use Movement "represents a coalition of property owners, natural resource industries, trade associations, and conservative political interest groups, all of whom profess an ideological and economic interest in the continued utilization of public lands").

51. See ROBERT F. DURANT, *THE ADMINISTRATIVE PRESIDENCY REVISITED: PUBLIC LANDS, THE BLM, AND THE REAGAN PRESIDENCY* 111 (1992). Cf. George Cameron Coggins & Robert L. Glicksman, *Power, Procedure, and Policy in Public Lands and Resources Law*, NAT. RESOURCES & ENV'T, Summer 1995, at 3, 5 (noting that recent proposals to divest the federal government of its lands "got a very cool reception from western interests, who have realized, perhaps belatedly, that federal ownership, with its subsidies, below-cost sales, rebates to states, and lax requirements, is an enormous economic boon to states and localities").

52. See Hart, *supra* note 37, at 138 n.12. Under the Payments in Lieu of Taxes Act, 31 U.S.C. §§ 6901-6907 (1994), states receive from 10 to 75 cents every year for every acre of land owned by the federal government. See generally 1 COGGINS & GLICKSMAN, *supra* note 23, § 5.05.

most vociferously even modest steps to reduce the availability of these kinds of government-sponsored benefits.<sup>53</sup> Robert Glennon captured the schizophrenic attitude of many westerners toward the federal government most succinctly in describing their plea as: "Get out! And give us more money!"<sup>54</sup> The upshot was a revised strategy, often labeled the County Supremacy Movement, whose aim was to reap the benefits of controlling allocation of federal lands and resources without being subjected to the burdens of ownership.

The County Supremacy Movement was born in Catron County, New Mexico, which in 1991 passed the first so-called "custom and culture" ordinance. It purported to require that the federal government coordinate and consult with the county and consider its custom and culture before making management decisions concerning federal lands within its borders.<sup>55</sup> At least thirty-five counties in Arizona, New Mexico, Nevada, and California have since declared themselves to be in control of federal lands within their boundaries.<sup>56</sup> The ordinances adopted by these counties typically require that current levels of grazing, farming, and timber harvesting on federal lands continue and that the federal land management agencies refrain from taking any action that would make those activities financially infeasible.<sup>57</sup> Some ordinances purport to place control over these activities in the hands of the county and prohibit implementation of federal land use management plans or acquisition or disposition of federal lands without county approval. They may prohibit the government from designating federal lands as wetlands or wilderness, override federal statutory provisions that require a permit to dredge or fill wetlands, or require county approval of plans to protect endangered species.<sup>58</sup> The ordinances often criminalize violations,<sup>59</sup> which explains

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53. See Glicksman & Chapman, *supra* note 31, at 19.

54. Robert Jerome Glennon, *Federalism as a Regional Issue: "Get Out! And Give Us More Money!"*, 38 ARIZ. L. REV. 829, 842 (1996). See also PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 772 (1968) ("Too often, [the western opponents of continued federal land ownership and management] forgot that substantial portions of the returns from minerals, lumbering, grazing, and water power development on the public lands were either flowing into reclamation development or the building of access roads and other improvements in their section.").

55. See Hungerford, *supra* note 49, at 457.

56. See Larson, *supra* note 1, at 54. The National Federal Lands Conference, a Utah organization opposed to federal land ownership, puts the number of counties claiming sovereignty over federal lands at more than 300. See *id.* Catron County, however, repealed its County Supremacy ordinance. See Perry, *supra* note 50, at 320.

57. See Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 322 (1994) ("For the most part, these land use plans, modeled upon a Catron County, New Mexico ordinance, have expressed strong support for traditional extractive industries, such as mining, logging, and grazing, generally without much regard for the environmental consequences.").

58. See Hungerford, *supra* note 49, at 461-68.



the criminal charges brought by Nye County against the Forest Service employees who stood in Dick Carver's way.

The County Supremacy Movement has justified these custom and culture ordinances primarily on the basis of the so-called equal footing doctrine.<sup>60</sup> The initial premise is that all states admitted to the Union are entitled to the same rights of sovereignty as the original thirteen. The eastern states were permitted to retain title to the unappropriated dry land within their borders. By retaining a large percentage of land in the western states, the United States has improperly relegated these states to second-class status. As a result, the government's ownership of lands in these states is unconstitutional.<sup>61</sup>

It is useful to begin any assessment of the validity of this line of argument with a little more history. When the western states were admitted to the Union, the federal government typically imposed conditions on statehood. The Nevada Enabling Act,<sup>62</sup> for example, required that the convention charged with drafting a state constitution for ratification by the residents of the Nevada Territory adopt an ordinance agreeing that the state would "forever disclaim all right and title to the unappropriated public lands lying within [the] territory, [which] shall be and remain at the sole and entire disposition of the United States."<sup>63</sup> The convention that adopted the Nevada Constitution also enacted that ordinance. The Nevada Constitution provides that the ordinance is irrevocable without the consent of the United States and the people of the state.<sup>64</sup> The Montana Enabling Act provided similar disclaimers on state ownership.<sup>65</sup> These statutory and state constitutional provisions belie the contention that the federal government's ownership of lands in the West is without the consent of the states.<sup>66</sup>

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59. See *id.* at 468.

60. Supporters of the County Supremacy Movement also claim that federal statutes such as the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1994), reveal Congress's intention to accommodate local laws and customs. See, e.g., Anita P. Miller, *All Is Not Quiet on the Western Front*, 25 URB. LAW. 827, 831-33 (1993). These theories have yet to be definitively tested.

61. See *United States v. Nye County*, 920 F. Supp. 1108, 1114 (D. Nev. 1996); Gilliland, *supra* note 1, at 40.

62. 13 Stat. 30 (1864).

63. *United States v. Gardner*, 107 F.3d 1314, 1319 (9th Cir. 1997) (citing 13 Stat. 30, 31, § 4 and *Nye County*, 920 F. Supp. at 1110).

64. *United States v. Gardner*, 903 F. Supp. 1394, 1397 (D. Nev. 1995), *aff'd*, 107 F.3d 1314 (9th Cir. 1997).

65. See *Wagner v. Montana*, 889 P.2d 1189, 1191 (Mont.) (citing 25 Stat. 676 (1889)), *cert. denied*, 116 S. Ct. 101 (1995).

66. Although the 9th Circuit characterized the disclaimer clause in the Nevada Enabling Act as "declaratory," it rejected the contention that it amounts to an unconstitutional attempt to divest Nevada of its title to the unappropriated lands within its boundaries. See *Gardner*, 107 F.3d at 1320. The court concluded that the United States did not need the disclaimer to gain title to the public lands

The starting point for analysis of the federal constitutional issues is the Property Clause, which vests in Congress the power "to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States."<sup>67</sup> As early as 1840, the Supreme Court described the resulting congressional power over the public lands as without limitation,<sup>68</sup> and it has confirmed that description repeatedly ever since.<sup>69</sup> The most notable recent endorsement of the broad scope of the federal government's power to control the use of its own property came in the 1976 *Kleppe v. New Mexico* decision,<sup>70</sup> where the Court upheld the constitutionality of a statute designed to protect wild horses and burros from state estray laws. In particular, the Court held that where "state laws . . . conflict with legislation passed pursuant to the Property Clause, the law is clear: the state laws must recede."<sup>71</sup>

The *Kleppe* decision should have put an end to the spurious notion that state or local governments have the right to dictate how the federal government may use and restrict its own lands. But the County Supremacists and their ideological kindred continue to press their claims which, despite refinements, still fly in the face of precedent. One of the most recent and stinging repudiations of the County Supremacists' legal arguments came in a suit involving Nye County.<sup>72</sup> The County passed two resolutions in 1993 in which it declared that the state of Nevada owned the public lands within the county (including the national forests), that the county owned all rights-of-way across those lands, and that only the state and county governments had the authority to manage those lands. It was those ordinances that Dick Carver relied on when he bulldozed the stagecoach trail in the Toiyabe National Forest. The United States filed suit, seeking a declaration that it owns and has the authority to manage the federal lands in Nye County and that the ordinances were preempted to the extent they purport to apply to roads for which no valid rights-of-way exist. The court found the county's claim that the state owns the public lands located within the county to be "unsupported, unconstitutional, and [invalid] as a matter of law."<sup>73</sup>

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in Nevada because it already had title to those lands through the Treaty of Guadalupe Hidalgo and the disclaimer merely recognized preexisting title in the federal government. *Id.*

67. U.S. CONST. art. IV, § 3.

68. See *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840).

69. In *Light v. United States*, 220 U.S. 523, 536 (1911), for example, the Court stated that the United States "can prohibit absolutely or fix the terms on which its property may be used."

70. 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

71. *Id.* at 543. See generally *Coggins & Glicksman*, *supra* note 51, at 4 (noting that *Kleppe* "finally and firmly shut the door" on claims that state law prevails over contrary federal laws as applied to activities on the federal lands.)

72. See *United States v. Nye County*, 920 F. Supp. 1108 (D. Nev. 1996).

73. *Id.* at 1114.

The court easily disposed of the equal footing claim. The Supreme Court had decided that lands submerged under tidal waters passed to the original 13 states as an attribute of sovereignty upon their admission to the Union because, under the English common law, the sovereign owned these lands as a public trust, and the original 13 states should have the same rights.<sup>74</sup> The Court later extended this doctrine to submerged lands under navigable inland waterways not subject to the ebb and flow of the tide<sup>75</sup> and to the other states.<sup>76</sup> But the Court also decided that title to lands that were not submerged by navigable-in-fact or tidal waters upon admission did not pass to the states.<sup>77</sup> Because there was no evidence that the dry lands in Nye County were submerged by navigable or tidal waters at the time Nevada was admitted to the Union, these lands did not pass to the state under the equal footing doctrine.<sup>78</sup> The district court in *Nye County* also refused to interpret the doctrine “as limiting the broad powers of the United States . . . to regulate government lands under [the Property Clause].”<sup>79</sup>

The Court of Appeals for the Ninth Circuit subsequently agreed with the *Nye County* court on both points. It held that the equal footing doctrine does not reserve to the states title to fast dry lands. Perhaps even more importantly, it confirmed that the equal footing doctrine is concerned only with “those attributes essential to [a state’s] equality in dignity and power with other States.”<sup>80</sup> Agreements concerning ownership of property within the state do not invoke concerns over equality of status. In short, the equal footing doctrine “applies to political rights and sovereignty, not to economic or physical characteristics of the states.”<sup>81</sup>

The district court regarded Nye County’s argument that the federal government has no authority to retain the public lands, which has been repeatedly rejected by the Supreme Court, as even more baseless.<sup>82</sup> The

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74. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484-85 (1988); *Nye County*, 920 F. Supp. at 1115.

75. See *United States v. Gardner*, 903 F. Supp. 1394, 1400 (D. Nev. 1995) (citing *Barney v. Keokuk*, 94 U.S. 324, 338 (1877)), *aff’d*, 107 F.3d 1314 (9th Cir. 1997); see also *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892).

76. See *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

77. See *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Scott v. Lattig*, 227 U.S. 229 (1913).

78. 920 F. Supp. at 1117.

79. *Arizona v. California*, 373 U.S. 546, 597-98 (1963).

80. *Gardner*, 107 F.3d at 1319 (quoting *Coyle v. Smith*, 221 U.S. 559, 568 (1911)). See also *Nevada v. Watkins*, 914 F.2d 1545, 1555 (9th Cir. 1990).

81. *Gardner*, 107 F.3d at 1319.

82. In *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840), the Court held that the Property Clause vests this power in the national government. The Court later “reaffirmed the broad power of the federal government to retain and regulate public lands.” *United States v. Nye County*, 920 F. Supp. 1108, 1117 (D. Nev. 1996) (citing *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976)).

county originally argued that, even if the federal government may own federal lands in Nevada, it lacks the power to manage them. Because that argument flew in the face of the *Kleppe* decision, the county ultimately abandoned it.<sup>83</sup> The court nevertheless ruled that whatever concurrent authority the county may have had to control activities on lands belonging to the federal government within the county was overridden under the Constitution's Supremacy Clause<sup>84</sup> to the extent that authority conflicts with federal laws concerning management of those lands.<sup>85</sup> Similarly, the court held that the provision of the ordinance declaring the county to be the owner of all rights-of-way across the federal lands was displaced by federal law.<sup>86</sup>

The Ninth Circuit reached the same results in *United States v. Gardner*,<sup>87</sup> just as it endorsed the district court's application of the equal footing doctrine in *Nye County*.<sup>88</sup> The case arose when the Gardners, Nevada ranchers, continued to graze their cattle in the Humboldt National Forest after the Forest Service revoked their grazing permit for violation of its terms. The United States sued the Gardners, seeking an order requiring them to remove their cattle from the forest and to pay damages for past trespasses. The Gardners' defense was that the unappropriated

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It stated that the federal government's power over the federal lands is "without limitations"; this power necessarily includes the power to own those lands. *Id.* Similarly, in *United States v. Klump*, No. 93-16728, 1994 WL 127169 (9th Cir. Apr. 12, 1994), *cert. denied*, 115 S. Ct. 1102 (1995), the court dismissed as insupportable the argument that the Constitution forbids the United States from owning land. "[T]he Constitution itself empowers the federal government to own land." *Id.* at \*1.

83. See *Nye County*, 920 F. Supp. at 1117.

84. See U.S. CONST. art. VI, cl. 2.

85. See *Nye County* 920 F. Supp. at 1118. A similar result was reached in *Boundary Backpackers v. Boundary County*, 913 P.2d 1141 (Idaho 1996). The Boundary County Board of Commissioners adopted an ordinance that directed all federal agencies to comply with the county's land use policy plan in allocating the use of public resources located in the county. See *id.* at 1143. Among other things, the ordinance purported to prohibit the designation of any wilderness areas in the county, to restrict federal acquisition of lands within the county, and to require the federal land management agencies to seek the concurrence of the county before changing any land uses. See *id.* at 1144. The Idaho Supreme Court declared the ordinance unconstitutional, null, and void. See *id.* at 1149. Congress has adopted a multitude of laws that govern management and preservation of the federal lands, and all of them are authorized by the Property Clause. See *id.* at 1146. The county ordinance was inconsistent with many of those laws, including FLPMA, the Endangered Species Act, the Wild and Scenic Rivers Act, and the Wilderness Act, and was therefore preempted. See *id.* at 1147-48.

86. The county protested that the ordinance was nothing more than a statement of opinion that created no legal rights and that it was protected speech under the First Amendment. See *Nye County*, 920 F. Supp. at 1118. But the court concluded that the county intended that the ordinance would have the effect of law, as evidenced by Commissioner Carver's reliance on it in bulldozing in the Toiyabe as well as in another national forest. See *id.* at 1119.

87. 107 F.3d 1314 (9th Cir. 1997).

88. See *supra* notes 74-81 and accompanying text.

lands in Nevada, including the national forests, did not belong to the United States, which therefore had no authority to order them to remove their cattle or require them to pay damages for trespass. The appellate court ruled that the United States owned the lands in question as a result of the Treaty of Guadalupe Hidalgo, by which Mexico ceded title to the federal government. Contrary to the Gardners' assertion, the United States was not bound to hold the land in trust for the benefit of future states and then divest itself of title in favor of those states upon their creation.<sup>89</sup> The court also gave short shrift to the Gardners' claim that federal ownership of the public lands in Nevada violates the Tenth Amendment.<sup>90</sup> Federal ownership of the public lands, the court concluded, does not completely divest the state of its ability to exercise sovereignty over those lands. Instead, the federal and state governments exercise concurrent jurisdiction over them, although the state's authority is limited by the Supremacy Clause and by the exercise of federal power under the Property Clause.<sup>91</sup>

The recent decisions in *Nye County* and *Gardner* remove whatever slim doubts may have remained about the legality of federal land ownership in the western states. These two cases confirm the obvious: claims that the federal land management agencies are powerless to own and manage activities on the lands under their jurisdiction are "legally frivolous."<sup>92</sup> More broadly, as one commentator aptly remarked, "[t]he county supremacy ordinances have the durability of cow chips."<sup>93</sup>

#### IV. THE IMPETUS FOR REFORM OF PUBLIC LAND LAW

The recent attacks on federal land ownership and management policies are part and parcel of a broader effort to scale back the regulatory powers of the federal government. This effort to decrease the role of the federal government is a significant component of an ongoing re-evaluation of environmental policy that is taking place in Congress, the administrative agencies, the courts, and the halls of academia. The movement has borne legal fruit in the form of a Supreme Court decision that, for the first time in decades, invalidated a federal statute as beyond the scope of the

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89. See *Gardner*, 107 F.3d at 1318.

90. U.S. CONST. amend. X (reserving to the states and the people powers not delegated by the Constitution to the federal government).

91. See *Gardner*, 107 F.3d at 1320 (citing *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987); *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)).

92. *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1083 (9th Cir. 1979). The judges in *Gardner* apparently found the arguments against federal authority to be so lacking in merit that they decided to issue a ruling without even holding oral argument. See *Gardner*, 1997 WL 76243, at \*1 n.\*

93. Reed, *supra* note 45, at 527.

Commerce Clause.<sup>94</sup> Thus far, similar attacks on the laws that govern federal land and resource management have not succeeded.<sup>95</sup>

Even where federal power undoubtedly exists, those who oppose its exercise have contended that it is less "democratic" than the exercise of state or local authority. The Unfunded Mandates Reform Act of 1995<sup>96</sup> is an example of recent reforms that are designed to restore governmental accountability.<sup>97</sup> The County Supremacy Movement obviously builds on the notion that governmental authority exercised at the local level is somehow more legitimate than power wielded by federal bureaucrats. Proponents of custom and culture ordinances claim that their purpose is to promote the "American tradition of self-government" by reducing bureaucracy and increasing economic stability.<sup>98</sup>

Another prominent theme in the recent movement to reform environmental policy is the charge that the exercise of federal regulatory power results in unwarranted infringements on private property rights. Hostility to regulatory constraints on the use of private property is particularly strong in some areas of the West. Nye County, for example, has no zoning laws.<sup>99</sup> Advocates of enhanced protection of private property have introduced legislation that would require the federal government to compensate private property owners when regulation results in a decline in the market value of their land.<sup>100</sup> A slew of lawsuits have been filed in which property owners have charged that the implementation of federal environmental and natural resources legislation has taken their property, entitling them to the payment of just compensation under the Fifth Amendment's takings clause.<sup>101</sup> Some of these lawsuits have been financed by the same interests responsible for the Wise Use and County

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94. See *United States v. Lopez*, 115 S. Ct. 1624, 1934 (1995) (declaring the Gun-Free School Zones Act of 1990 unconstitutional). The Supreme Court also has issued recent decisions under the Tenth and Eleventh Amendments which may constrain the exercise of federal regulatory power over activities with potential adverse effects on the environment. See, e.g., *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996) (overruling *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989)); *New York v. United States*, 505 U.S. 144 (1992).

95. See, e.g., *United States v. Lundquist*, 932 F. Supp. 1237 (D. Or. 1996); *United States v. Romano*, 929 F. Supp. 502 (D. Mass. 1996).

96. Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified in scattered sections of 2 U.S.C.).

97. See generally Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97 (1996).

98. See *Hungerford*, *supra* note 49, at 470 (citing Jeanette Burrage, *The County Movement: A Review by the Northwest Legal Foundation, a Public Interest Law Firm*, FEDERAL LANDS UPDATE, Nov. 1993, at 3).

99. See *Larson*, *supra* note 1, at 56.

100. See *Glicksman & Chapman*, *supra* note 31, at 17.

101. See U.S. CONST. amend. V. See generally the cases discussed in I COGGINS & GLICKSMAN, *supra* note 23, § 4.05.

Supremacy Movements.<sup>102</sup> If the federal government is required to compensate regulated property owners to a much greater extent than has been the case to date, either because of new legislation or an expansive reading of the takings clause by the courts, the result is likely to be a greater reluctance on the part of the land management agencies to use the regulatory tools at their disposal.<sup>103</sup>

#### V. THE IMPETUS FOR LAWLESSNESS

The reform efforts I have just summarized amount to the most far-reaching attack on the implementation of federal environmental legislation in the last thirty years. It is not surprising, then, that westerners have sought to capitalize on the urge for reform to achieve a lightening of what they perceive to be the heavy regulatory hand of the federal land management agencies. But why has the impetus for reform evolved into something more sinister? Why has it been accompanied by a hostility towards federal regulators that is so strong that opponents of the regulatory status quo have exhibited a willingness to engage in extreme and, in some cases, violent forms of protest that for the most part have been absent from the debates over reforming the pollution control laws? Several factors, I think, are responsible.

The first is the tradition of lawlessness in the West, some of it reality and some of it myth. My colleague and frequent co-author Professor Coggins has noted that in the west "a degree of lawlessness generally was tolerated in the era following the Civil War."<sup>104</sup> According to Donald Worster, "men came west with plenty of guns in their hands still, sometimes the very guns they had used in battle [during the Civil War]; and perhaps hardened by all the bloodshed they had seen, they proceeded

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102. See Perry, *supra* note 50, at 277-78, 292-307.

103. Cf. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting) (discussing the "chilling effect" that an expansive reading of the takings clause will have on officials responsible for protecting the environment). A third element of the struggle to reform environmental law and policy is based on the notion that existing environmental regulation tends to be inefficient in two senses. First, it often imposes costs on the regulated community that are not justified by the benefits that flow from the regulation. Second, it is often directed at problems that are not as serious as ones that are left unregulated. See generally Thomas O. McGarity, *Environmental Regulation and the "Cost-Benefit State": A Response to Professor Sunstein* (forthcoming) (draft on file with author). This diagnosis has prompted proposed legislation that would require federal regulatory agencies to incorporate cost-benefit analysis and comparative risk assessment into their decisionmaking processes to a greater extent than is currently the case. See Glicksman & Chapman, *supra* note 31, at 16-21.

104. See George Cameron Coggins & Doris K. Nagel, "Nothing Beside Remains": *The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 480 (1990).

to shoot their way to a new conquest."<sup>105</sup> Glorification of outlaws like Jesse James and Billy the Kid reinforced for some the preeminence of "bonds of kin and custom" over "the more modern principles of law and order."<sup>106</sup>

A second important factor, which Professor Worster also has emphasized, is the western tradition of subjugating nature. "The drive for economic development of the West," according to Worster, "was often a ruthless assault on nature, and it has left behind it much death, depletion, and ruin."<sup>107</sup> He claims that westerners were impelled to conquer nature in part by the perceived need to eliminate resource scarcity, particularly of water.<sup>108</sup> But successful elimination of scarcity compromised the sense of freedom that is also an important part of the western psyche. Because of the extent of its land holdings in the West, the federal government already had a "presence" there that it did not have in other regions.<sup>109</sup> Efforts to assure adequate supplies of water by building dams owned and operated by federal agencies made that presence even more visible. "You cannot maximize technological abundance without setting up powerful government agencies, corporations, and other chains of command, other

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105. DONALD WORSTER, *AN UNSETTLED COUNTRY: CHANGING LANDSCAPES OF THE AMERICAN WEST* 70 (1994). See also Ted Louis, *Hidden California Gold Treasure*, STAMPS, Jan. 17, 1995, at 12 ("Inevitably, the West became a land of violence [during the 19th century], as greed came to the forefront and dictated men's actions.").

106. Richard Maxwell Brown, *Desperadoes and Law Men: The Folk Hero*, 6 MEDIA STUD. J., Winter 1992, at 150. See also Reed, *supra* note 45, at 531 ("It is entirely appropriate that the major commercial, mythic figure for the Southwest is Billy the Kid, a reckless, marauding, gunslinging juvenile delinquent who died early without any significant accomplishments to his name other than a number of unmotivated murders."); Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229, 238 (1987) ("Not surprisingly, cowboys were not the only heroes of the Old West: vigilantes like Jesse James and Billy the Kid were pop heroes too.").

107. DONALD WORSTER, *UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST* 13 (1992). See also WORSTER, *supra* note 107, at 65 (the "wildlife numbers in the West plummeted," particularly in the 19th century, because wildlife was assaulted "by loutish men who recognized neither law nor ethics and by civilized gents who wanted laws and ethics applied to everyone but themselves").

108. *But cf.* Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 ECOLOGY L. Q. 631, 642 (1996) (the expansive Western frontier weakened the sense of ownership norms that promoted sustainable land use practices due to a sense of plenitude and inexhaustible resources and of impermanence and mobility).

109. See Glennon, *supra* note 54, at 837. "[T]he federal government owns so much land in each of the western states that it simply has a different relationship to those states and individuals in those states than it does" with the rest of the country. *Id.* at 838.



hierarchies of authority, and these endanger democracy and independence as they grow. You cannot have it both ways.”<sup>110</sup>

The federal government has provided a convenient scapegoat for the resulting pent-up frustrations. Westerners have provided a receptive audience for the steady stream of incendiary, anti-government rhetoric that comprises the third factor responsible for the more volatile forms of protest represented by the Nye County incident. The Chairman of the Resources Committee of the House of Representatives has referred to environmentalists as a self-centered, despicable, “waffle-stomping, Harvard-graduating, intellectual bunch of idiots.”<sup>111</sup> More to the point, he has accused the National Park Service of engaging in Gestapo tactics.<sup>112</sup> A member of Idaho’s congressional delegation seems to direct a torrent of inflammatory bombast at the federal land management agencies, their resource allocation policies, and the values these policies reflect. Environmental policies, she has declared, “are driven by a kind of emotional spiritualism that threatens the very foundation of our society, by eroding basic principles of our Constitution.”<sup>113</sup> They amount

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110. Worster, *supra* note 107, at 89. Worster adds:

To date the West has hardly acknowledged that it has created any contradiction at all. It has simply built more dams, made more money, packed in as many people as it could, ignored the costs to the environment and society that had to be paid, and told itself all the while it was the freest place around. Now that will no longer do.

*Id.* at 90.

111. 142 CONG. REC. H3659, H3659 (daily ed. Apr. 23, 1996) (statement of Rep. Miller, describing remarks by Rep. Young).

112. This seems to be the accusation of choice among legislators opposed to the initiatives of the federal environmental and natural resource agencies. Representative Tom Delay of Texas called EPA the Gestapo of government. *Id.* (statement of Rep. Miller, quoting Rep. Delay); *see also* 141 CONG. REC. H4934, H4952 (daily ed. May 15, 1995) (“My congressional district borders Maryland, and I can tell you in western Maryland there are hundreds of people who are furious about the environmental Gestapo which is there and which is attempting to tell them how to live their lives and what to do with their land beyond all reason. So things might be well on the Eastern Shore, my good friend, but in the neck of the woods I come from which borders on western Maryland there is outrage at what this environmental Gestapo is doing.”) (statement of Rep. Shuster); 139 CONG. REC. H7468, H7486 (daily ed. Oct. 6, 1993) (“[A] National Biological Survey will lead to the establishment of a militant eco-Gestapo force, with little regard for the constitutional protections of private property ownership”) (statement of Rep. Emerson); 139 CONG. REC. S5108, S5141 (daily ed. Apr. 29, 1993) (stating that the EPA “act[s] like the gestapo, . . . invading with terrorizing and threatening letters [and does] not seek to solve problems but impose their will”) (statement of Sen. Wallop); *id.* at S5142 (calling the EPA “a Gestapo-like agency” that acts “to intimidate, not to create clean environment. They do it to get people marching in lockstep, seeking actively to serve that agency as it lives and operates out of Denver.”) (statement of Sen. Wallop).

113. 142 CONG. REC. H1002, H1002 (daily ed. Jan. 31, 1996) (remarks of Rep. Chenoweth). She added that “there is increasing evidence of a government sponsored religion in America. This religion, a cloudy mixture of new age mysticism, Native American folklore, and primitive Earth worship, (Pantheism) is being promoted and enforced by the Clinton administration in violation of our rights and freedoms. . . . [Interior Secretary] Babbitt has made it clear that environmental-

to "a war on the West," of which the President's policy on resource-allocation issues like salvage timber sales is "only one of the battles that we will fight, but we will fight. I can tell you, Mr. Speaker, the West was not settled by wimps and faint-hearted people, and we will not give it up easily."<sup>114</sup> The custom and culture ordinances backed by the County Supremacists clearly echo these sentiments. One Oregon county's ordinance stated that: "Federal and state agents threaten the life, liberty, and happiness of the people of Klamath County. They present a clear and present danger to the land and livelihood of every man, woman, and child. A state of emergency prevails that calls for devotion and sacrifice."<sup>115</sup>

These diatribes have been enthusiastically received in some corners of the West because of a combination of resentment over the disappearance of longstanding traditions and practices and fear of what the future will bring.<sup>116</sup> Until fairly recently, those who wanted to use the federal lands typically did so without opposition by federal land managers. Issuance of permits to ranchers who wanted to graze on land managed by the BLM, for example, was virtually automatic. It also was cheap, as grazing fees were set far below market value, and relatively condition-free.<sup>117</sup> But as federal land managers belatedly began to impose constraints on federal land use (such as reduced animal unit months for grazing allotments) to protect the environment, these historic users found access to federal resources to be more difficult and costly.<sup>118</sup> One source attributes Catron County, New Mexico's trend-setting custom and culture ordinance to the

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ism—the religion—is driving this Nation's regulatory scheme. This is a violation of the establishment clause of the Constitution. It smothers our values and it threatens our liberties." *Id.* at H1002-03; *see also id.* at H1005 ("The environmentalists want a new Inquisition to eradicate those with opposing views, and they have the might of the Executive behind them.").

114. 141 CONG. REC. H8789, H8790 (daily ed. Sept. 12, 1995) (remarks of Rep. Chenoweth).

115. Hungerford, *supra* note 49, at 459 (quoting Klamath County, Or., Land and Water Management Plan at xviii (May 1994)); *see also* Miller, *supra* note 60, at 829.

116. *See, e.g.,* Keiter, *supra* note 57, at 321-22 ("In an era when timber and mineral dependent communities throughout the West have been experiencing jarring dislocations and when recreational development and accompanying subdivisions have dramatically transformed prominent chunks of the western landscape, the [County Supremacy] Movement's plea for economic and community stability has an innate appeal.").

117. *See, e.g.,* Hart, *supra* note 37, at 144-45 ("For most of this century, community and economic leaders voicing local economic interests have advised public land managers to the exclusion of other voices. These local economic interests have historically overshadowed other groups' concerns. Moreover, local communities expect privileged treatment, and to have federal land management tailored to local needs."). *Cf. Sierra Club v. Thomas*, 105 F.3d 248, 251 (6th Cir. 1997) (asserting that the Forest Service "has a history of preferring timber production to other uses" and that forest planning "is a political process replete with opportunities for the intrusion of bias and abuse.").

118. *See* Larson, *supra* note 1, at 64; Reed, *supra* note 45, at 528-29.

influence of local cattlemen, “angered by threatened reductions in grazing allotments on federal lands,” who “saw their traditional control over the local United States Forest Service and the [BLM] slipping away.”<sup>119</sup> The traditional consumptive users also now face more competition for the right to use the federal lands than they did previously. Recreational use of the federal lands by hikers, campers, hunters, and boaters is heavier than ever before.<sup>120</sup> Westerners such as ranchers who want to graze their animals on federal lands and developers incensed about restrictions placed on their access to water are simply fed up with federal “intrusion” into their lives and livelihoods.<sup>121</sup>

The upshot is that “economic dislocation in the rural West is now more widespread [and] more persistent” than it has been in the past.<sup>122</sup> Some of this dislocation has nothing whatsoever to do with the policies of the federal government that dictate use of the federal lands. It has instead been induced by changes in the national economy that have made it more difficult for small, marginally successful users of public resources, such as ranchers, to compete with larger corporate conglomerates, and that have contributed to a shift in the economies of many western states away from resource extraction and toward tourism. The West, surprisingly, is now the most urbanized section of the country, and traditional industries such as farming, mining, ranching, and logging contribute less to state economies than they used to do.<sup>123</sup> But the federal land management agencies provide a convenient target for the unhappiness, confusion, and rage that sometimes accompanies such changes.

The phenomenon is not a new one. Historian E. J. Hobsbawm describes a particular form of rural social unrest, which he calls social banditry, as “most likely to become a major phenomenon when the . . . social equilibrium is upset: during and after periods of abnormal hardship, such as famines and wars, or at the moments when the jaws of the dynamic modern world seize the static communities in order to destroy and transform them.”<sup>124</sup> Historian George Rudé claims that the

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119. Reed, *supra* note 45, at 528-29.

120. See DURANT, *supra* note 51, at 13, 18.

121. See GATES, *supra* note 54, at 772 (“[The] western states came to think of the extensive Federal lands within their borders, reserved or withdrawn from entry, as retarding their development, slowing down their progress, and keeping them in thrall to a remote government not capable of understanding their needs.”).

122. Rodger Schlickeisen, *A Growing Threat to Sane Management*, 12 ENVTL. F., Sept./Oct. 1995, at 44.

123. See Glennon, *supra* note 54, at 841. See also Lindell L. Marsh, *Conservation Planning Under the Endangered Species Act: A New Paradigm for Conserving Biological Diversity*, 8 TUL. ENVTL. L.J. 97, 119 n.72 (1994) (“the primary long term issue in the [Pacific] Northwest was the economy, not the [northern] Spotted Owl.”).

124. E.J. HOBBSAWM, *PRIMITIVE REBELS* 24 (1959).

social protests that characterized non-urban Europe during the 19th century were "fired as much by memories of customary rights or a nostalgia for past utopias as by present grievances or hopes of material improvement; and they dispense[d] a rough-and-ready kind of 'natural justice' by breaking windows, wrecking machinery, storming markets, [and] burning their enemies of the moment in effigy,"<sup>125</sup> much as President Clinton and Interior Secretary Babbitt recently have been burned in effigy in the West.<sup>126</sup> "[O]nce the rhetoric of community and culture is stripped away, the arguments [of the County Supremacy Movement] . . . largely . . . reflect[] a rejection of change in favor of the status quo in order to retain traditional access rights and prerogatives."<sup>127</sup> A senior fellow at the Cato Institute, a conservative think tank, said that what supporters of the County Supremacy Movement really want to do is "build walls against the future."<sup>128</sup>

## VI. DEFUSING THE CONTROVERSY

Although no sweeping proposals to defuse the tinderbox of federal lands policy in the West readily suggest themselves, several steps are worth considering. The easiest to accomplish would be to tone down the inflammatory, reckless, and irresponsible rhetoric that has emanated from all levels of government, from county commissions to the halls of the United States Congress. Pandering to the basest instincts of one's constituents cannot help but encourage them to take the low road, too.

Federal employees also may be able to discourage lawless and violent behavior by resorting to the courts. In 1995, a group called the Public Employees for Environmental Responsibility sued a Catron County company that held an unpatented mining claim on property in the Gila National Forest for harassment and malicious prosecution of government workers.<sup>129</sup> Those workers had been charged by the mine operator with trespassing for conducting water sampling at a mining site on federal lands, but the state court had dismissed the trespass action.<sup>130</sup> Similar tactics have been used successfully against environmental extremists. In November 1996, an Idaho jury awarded \$150,000 in compensatory damages and \$1 million in punitive damages against twelve members of the environmental group Earth First! for damage to equipment and work

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125. GEORGE RUDÉ, *THE CROWD IN HISTORY, 1730-1848* at 6 (1964).

126. See James Brooke, *Utah Foes Angry About Federal Land*, DALLAS MORNING NEWS, Oct. 27, 1996, at 14A. "Something has come unfastened in the West, and everybody has guns." Larson, *supra* note 1, at 66.

127. Keiter, *supra* note 57, at 322.

128. Larson, *supra* note 1, at 55.

129. See *Hitting Back at "Supremacists"*, 12 ENVTL. F., Nov./Dec. 1995, at 16.

130. See *id.*

delays resulting from protests against timber harvesting in the forests of that state.<sup>131</sup> The imposition of punitive damages on those who participate in unlawful acts on the federal lands may provide an important deterrent to such conduct.

A third step would involve developing new or taking full advantage of existing procedures for informing and giving a meaningful voice to those whose day-to-day lives are most affected by the process of allocating public natural resources. President Clinton's attempt to resolve the controversy generated by efforts to save the northern spotted owl in the Pacific Northwest by convening a summit of interested parties in April 1993 provides one example of how this might be accomplished,<sup>132</sup> although that process was by no means problem-free.<sup>133</sup> The summit resulted in the establishment of a Forest Ecosystem Management Assessment Team, which assisted in the adoption of a management plan that withstood judicial review,<sup>134</sup> even though it did not fully satisfy any of the affected interests.

A fourth step risks perpetuating the West's reliance on federal subsidization of activities that cannot otherwise prosper, but is nevertheless worth considering given the role that economic dislocation has played in stirring up unrest in the West. The government could provide some kind of financial assistance to those who are displaced by dramatic changes in federal land and resource allocations. The job-retraining benefits afforded to coal workers who were displaced following the adoption of the 1990 Clean Air Act Amendments provide an example of resort to this strategy in the recent past.<sup>135</sup> Benefits of this sort would differ from past subsidies in that they would be limited in time and designed to ease the transition and adaptation to current resource allocation realities.

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131. See *Jury Orders Environmentalists to Pay \$1 Million for Idaho Protest*, N.Y. TIMES, Nov. 8, 1996, at A21.

132. See Andrea L. Hungerford, Chapter, *Changing the Management of Public Land Forests: The Role of the Spotted Owl Injunctions*, 24 ENVTL. L. 1395, 1429-30 (1994).

133. See, e.g., *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009, 1013 (D.D.C. 1994) (finding management assessment team convened by the President violated the Federal Advisory Committee Act, 5 U.S.C. app. § 2 (1994), by refusing to make information available to the public). Cf. Tom Melling, *Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-Term Report Card*, 30 LAND & WATER L. REV. 57, 63-64 (1995) (noting that 1989 summit failed to produce a consensus on how to manage spotted owl habitat because both environmentalists and timber interests were excluded from the decisionmaking process); Bryan M. Johnston & Paul J. Krupin, Case Study, *The 1989 Pacific Northwest Timber Compromise: An Environmental Dispute Resolution Case Study of A Successful Battle that May Have Lost the War*, 27 WILLAMETTE L. REV. 613, 624-36 (1991) (describing recommended elements of a successful environmental dispute resolution process).

134. See *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996).

135. See 29 U.S.C. § 1662e (1994).

My remaining recommendations are much more amorphous, and therefore likely to be considerably more difficult to effectuate. The debate over how to allocate the riches of the federal lands and resources must be reinfused with a sense that a national public interest exists and is worth vigorously pursuing. Public choice theorists have asserted that "the activities of modern government [have] nothing to do with the public interest—except perhaps at the level of justification and propaganda," and instead are nothing but efforts to redistribute wealth away from disfavored interest groups and toward favored groups.<sup>136</sup> The growing influence of the law and economics movement has contributed to the tendency to view public policy as nothing more than an aggregation of individual preferences instead of as something apart from and "loftier than" that.<sup>137</sup> But the Supreme Court declared in 1911 that "[a]ll the public lands of the nation are held in trust for the people of the whole country,"<sup>138</sup> and many of the statutes that govern management of the federal lands and resources reflect that sentiment. The National Park System Organic Act of 1916, for example, declares that the parks were established "to the common benefit of all the people of the United States," including future generations.<sup>139</sup> The Land and Water Conservation Act of 1964 provides funds for the acquisition of lands that will "assur[e] accessibility to all citizens of the United States of America of present and future generations" of "outdoor recreation resources as may be available and are necessary and desirable" for "strengthen[ing] the health and vitality of [those] citizens."<sup>140</sup> The Wilderness Act of 1964 seeks "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."<sup>141</sup> Even the National Forest Management Act, which requires a greater degree of

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136. See William Bishop, *A Theory of Administrative Law*, 19 J. LEGAL STUD. 489, 498 (1990); see also Edward Foster, *The Balanced Budget Amendment and Economic Thought*, 2 CONST. COMMENTARY 353, 366 (1985) ("The theory of public choice rests on the assumption of self-interested behavior by all of the actors in the political process."). See generally William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988).

137. See Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 271-72 (1987-1988). The notion that "[p]olitics—the exercise of public will—was merely a means of accommodating private interests in a way that maintained public order while distributing public benefits and burdens," and that "[t]he purpose of the community was simply to give individuals the needed security (i.e., freedom) to pursue their private interests," can be traced to the philosophy of John Locke. Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 27 (1990).

138. *Light v. United States*, 220 U.S. 523, 537 (1911) (quoting *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160 (1890)).

139. 16 U.S.C. § 1a-1 (1994).

140. 16 U.S.C. § 460f-4.

141. 16 U.S.C. § 1131(a).

balancing between competing uses than these other statutes do, imposes on the Forest Service a responsibility for "assuring that the Nation maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity."<sup>142</sup> These declarations, which bear repeating, confound the proposition that the Congresses of the past century intended for short-term, localized resource needs to take precedence over the broader national interest in optimal resource allocation.

Finally, the notion that individual responsibility provides a counterweight to individual entitlement must be injected into the debate over how to allocate the federal land and resources. Professor Carol Rose of Yale has emphasized the importance of self-imposed citizen restraints for the sake of a common good, of which environmentalism is "a particularly pointed example."<sup>143</sup> Professor Eric Freyfogle of the University of Illinois, going one step further, has urged that lawmakers ensure that laws express communal values, and in particular, that they emphasize the responsibilities that individual land users have to fellow community members.<sup>144</sup>

Expecting disgruntled westerners to make voluntary sacrifices of their perceived private interests to the public good may seem utopian and foolish, and cramming civic virtue and responsibility down their throats may seem pointless. But the underlying notion of narrow self-interest being trumped by a broader public, environmental good is amply supported by precedent in American law. At the state level, the public trust doctrine has recognized the need for and the propriety of subordinating private property rights to the larger common good in limited contexts.<sup>145</sup> The public trust doctrine has made little headway as a principle that constrains federal land management decisions,<sup>146</sup> and may

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142. 16 U.S.C. § 1600(6).

143. Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 9-10 (1994).

144. See Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 96-101 (1995); Eric T. Freyfogle, *Water Rights and the Common Wealth*, 26 ENVTL. L. 27, 41 (1996).

145. See, e.g., *Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd.*, 901 P.2d 1251, 1260-61 (Colo. 1995) (state statute creates fiduciary duty in state water resources agency to protect the natural environment in its administration of private water rights); *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 727-28 (Cal. 1982) (private water rights in nonnavigable water bodies under state law are held subject to a public trust that protects the common heritage in streams, lakes, and tidelands). See generally Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970); Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980).

146. See 1 COGGINS & GLICKSMAN, *supra* note 23, § 8.07.

not be adequate to the task,<sup>147</sup> but the same statutes that dedicate public resources to uses that promote the national interest implicitly endorse the notion of communal values that, at least sometimes, outweigh even an aggregation of individual preferences.

Even if this last suggestion is nothing more than impractical dreaming, I make no apologies for it. It has always been my understanding that dreaming, among other things, is what educators—even law professors—are paid to do.

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147. See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 691-716 (1986) (arguing that continued reliance on the doctrine is ill-advised because it is too tenuous and threatens to impede environmental protection and resource conservation goals).