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PUBLIC LANDS AND AGRICULTURAL POLLUTION SYMPOSIUM EDITION:

STORMY WEATHER OVER THE MANAGEMENT OF FEDERAL PUBLIC LANDS AND THE FEDERAL AND STATE REGULATION OF AGRICULTURAL POLLUTION

Introduction

DALE D. GOBLE*

Agriculture has become controversial. The shift from subsistence family farming with its integration of various crops and livestock to the monocultural, market-based industrial farm, ranch, and feedlot has involved fundamental transformations between agriculturalists and the land they farm or ranch. While modern agriculture has brought cheap and abundant food to Europe and many of the lands Europeans overran and settled, while it has suspended the seasons to give us strawberries and tomatoes in December, while it has dissolved space to bring pineapples and mangoes to the local *supermarket*, while it supplies the disassembled and plastic wrapped meat of countless cows and pigs, chickens and sheep—while modern agriculture has produced all of these wonders and more, it has a dark side as well. Technology imposes a Faustian bargain.

The industrial transformation is epitomized by one fact: agriculture no longer produces more energy than it consumes. Approximately 9.8 calories of energy are required to produce and deliver one calorie of food.¹ To be blunt: American agribusiness is a mining operation.² In addition to mining fossil fuels for energy and

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1. Amory B. Lovins et al., *Energy and Agriculture*, in MEETING THE EXPECTATIONS OF THE LAND 68, 68-69 (Wes Jackson et al. eds., 1984).

2. *E.g.*, Miguel A. Altieri, *AGROECOLOGY* (1987); Eugene P. Odum, *Properties of Agroecosystems*, in *AGRICULTURAL ECOSYSTEMS* 5 (Richard Lowrance et al. eds.,

petrochemicals, the country is currently losing more topsoil than it did during the dust bowl days of the 1930s: intensive cultivation causes soil loss in excess of 4,000,000,000 tons annually,³ grazing has reduced willow-lined meadows to hard scabble cut-banks.⁴ Drained wetlands and trashed riparian zones, deforestation and desertification, chemical contamination of surface and ground waters—in the intense and often-acrimonious debate swirling around agriculture, farmers are no longer universally viewed as wise husbanders of nature's bounty, the cowboy mythology of the rancher has been tarnished.

The *Idaho Law Review's* Symposium for 1994—"Public Lands and Agricultural Pollution"—addresses two of sets of agricultural issues: the use of the public lands as a source of commodities and the statutory and common-law restrictions on agricultural activities.

I. PUBLIC LANDS

As Euro-Americans moved west during the nineteenth century, they grazed their livestock on the public domain that bordered their land claims. As land was taken up by subsequent settlers, the open range would disappear and cattle would eventually be fenced in.⁵ But the homestead laws — and the settlement patterns they envisioned — simply made no sense on most of the arid and semi-arid lands of the northern Great Plains and the Intermountain West. Nonetheless, strongly held national myths of the Jeffersonian yeoman farmer, precluded the federal government from changing the homesteading laws to reflect the drier reality.⁶ The mismatch of

1986); Stephen R. Gliessman, *An Agroecological Approach to Sustainable Agriculture*, in MEETING THE EXPECTATIONS OF THE LAND 160 (Wes Jackson et al. eds., 1984); Donald Worster, *Transformation of the Earth: Toward an Agroecological Perspective in History*, 76 J. AM. HIST. 1087 (1990).

3. David Pimentel et al., *Land Degradation: Effects on Food and Energy Resources*, 194 SCI. 149, 150-51 (1976).

4. E.g., CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN* 75-76 (1992).

5. E.g., *Buford v. Houtz*, 133 U.S. 320, 328 (1890); PAUL C. HENLEIN, *CATTLE KINGDOMS IN THE OHIO VALLEY, 1783-1860* at 19 (1959).

6. Congress did gradually increase the amount of land that a settler could obtain up to 640 acres under the Stock Raising Homestead Act of 1916. Act of Dec. 29, 1916, 39 Stat. 862 (formerly codified at 43 U.S.C. §§ 219-301), *repealed by* Federal Land Policy & Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787. John Wesley Powell, for example, recommended that unirrigated grazing lands should be available in units of 2,560 acres (four square miles). Wilkinson, *supra* note 4, at 237. On the congressional response to aridity, see PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 495-529 (photo. reprint 1979) (1968); George C. Coggins & Margaret Lindeberg-Johnson, *The Law*

myth and reality produced two results: massive fraud as ranchers sought to obtain sufficient land to compete in the international market for beef⁷ and large amounts of unclaimed land that ranchers used as a grazing commons.

The combination of commons and market produced overgrazing.⁸ In response, the federal government sought to "prevent[] overgrazing and soil deterioration . . . and to stabilize the livestock industry" with the enactment of the Taylor Grazing Act in 1934.⁹ The Act gave the Secretary of the Interior power to withdraw lands and to organize them into grazing districts; it established a preference permit system to allocate forage in the grazing districts; and created a new federal agency, the Grazing Division, to oversee the rangelands. The Grazing Division—renamed the Grazing Service in 1939—was merged with the General Land Office in 1946 to create the Bureau of Land Management (BLM).¹⁰ The merger was a catastrophe for range management: "four out of five employees engaged in grazing management were fired and many offices were closed."¹¹ For the next thirty years, the livestock industry dominated the agency and treated the publicly owned rangelands as a private fiefdom.

of Public Rangeland Management II: The Commons and the Taylor Act, 13 ENVTL. L. 1, 20-21 (1982).

7. As one observer commented, "Fraud in the disposal of the public domain is no new thing in the history of our public land policy. It never reached larger proportions, nor developed a greater wealth of ingenuity in the methods employed, than during the last half of the eighties." ERNEST S. OSGOOD, *THE DAY OF THE CATTLEMAN* 203 (1929). For a list of the possible methods of "establishing a ranch," see Coggins & Lindeberg-Johnson, *supra* note 6, at 24-27; see also *Lillis v. United States*, 190 F. 530 (9th Cir. 1911). For a discussion of the issues involved, see WILLIAM CRONON, *NATURE'S METROPOLIS* 207-59 (1991); GATES, *supra* note 6, at 466-68; ERNEST S. OSGOOD, *supra*, at 176-215; JAMES A. YOUNG & B. ABBOTT SPARKS, *CATTLE IN THE COLD DESERT* 89-100 (1985); Valerie W. Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 MONT. L. REV. 155, 159-71 (1967).

8. *E.g.*, ARTHUR F. MCEVOY, *THE FISHERMAN'S PROBLEM* 1-19 (1986); Dale D. Goble, *Introduction to the Symposium on Legal Structures for Managing the Pacific Northwest Salmon and Steelhead: The Biological and Historical Context*, 22 IDAHO L. REV. 417, 418 n.4 (1986).

9. Act of June 28, 1934, Pub. L. No. 482, 48 Stat. 1269 (currently codified as amended at 43 U.S.C. §§ 315-315r (1988)). On the Act and its implementation, see generally GATES, *supra* note 6, at 607-34; Coggins & Lindeberg-Johnson, *supra* note 6, at 48-60.

10. Coggins & Lindeberg-Johnson, *supra* note 6, at 61-62. It has been suggested—with substantial accuracy—that "BLM" actually is an acronym for the "Bureau of Livestock and Mining."

11. Coggins & Lindeberg-Johnson, *supra* note 6, at 61.

The enactment of the Federal Land Policy and Management Act of 1976 (FLPMA),¹² sought to reform the management of the public lands by requiring the BLM to engage in land use planning and management based upon multiple use, sustained yield principles.¹³ FLPMA's enactment is the background to the first group of articles.

A. Public Lands Grazing

Three of the symposium articles are concerned with grazing on public lands. Joe Feller's article is a status report on BLM's progress in implementing its multiple use planning and management responsibilities. He concludes that the agency has done a very poor job of managing the public grazing resource.

The next two articles are concerned with the nature of the grazier's interest in the public lands. This debate has a lengthy history. The questions do not arise—surprisingly—from a lack of congressional clarity. For once Congress was very clear of its intent: "[T]he issuance of a permit pursuant to the provisions of [the Taylor Grazing Act] shall not create any right, title, interest, or estate in or to the lands."¹⁴ Despite this clarity, the question is again being mooted about the West as some graziers argue that the permit was merely a recognition of a preexisting right that their predecessors in interest obtained by prior appropriation.¹⁵

Frank Falen and Karen Budd-Falen offer one such an argument. The Falens are among the leaders in the movement asserting that the grazing permit was a recognition of a preexisting right. Theodore Blank examines the arguments of another leader of the movement, Nevada rancher Wayne Hage. Mr. Blank concludes that Mr. Hage does not have a valid taking claim.

12. Federal Land Policy & Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (currently codified as amended at 43 U.S.C. §§ 1701-1784 (1988)).

13. 43 U.S.C. § 1712(c); see George C. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1 (1983).

14. 43 U.S.C. § 315b. Cf. *United States v. Fuller*, 409 U.S. 488, 494 (1973) ("The provisions of the Taylor Grazing Act . . . make clear the congressional intent that no compensable property right be created in the permit lands themselves as a result of the issuance of the permit.").

15. The most vociferous claimant is Wayne Hage. See WAYNE HAGE, *STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS* (1989). Cf. Dale D. Goble, *Prior Appropriation and the Property Clause: A Dialogue of Accommodation*, 71 OR. L. REV. 381 (1992) (contrasting the federal government's treatment of water and grazing).

B. Local Control over the Public Lands

The final two articles that are concerned with public land issues also have their genesis ultimately in the enactment of FLPMA. Enactment of FLPMA not only imposed multiple use mandates on BLM, it also marked a historic change in American policy on public lands. From the first land laws proposed under the Articles of Confederation by the United States in Congress Assembled down to FLPMA the federal government had followed a general policy of disposing of its lands.¹⁶ While lands had been withdrawn from disposal, such lands were the exception. In FLPMA, on the other hand, Congress declared that it was the policy of the United States that "the public lands be retained in Federal ownership."¹⁷

This policy change plus the Supreme Court's decision in *Kleppe v. New Mexico*¹⁸ prompted what became known as the "Sagebrush Rebellion"—a movement waggishly characterized as "The Great Terrain Robbery." The Rebels argued that the federal government lacked constitutional authority to hold lands as a proprietor and was therefore required to transfer title into state or private hands.¹⁹ While the Rebels were the newsworthy for their requisite fifteen minutes, both the media and the Rebels lacked historical perspective: the Sagebrush Rebellion was only the then-most-recent recurrence of tensions between local and national governments over control of the public domain.²⁰

16. GATES, *supra* note 6, at 59-772. Even the Taylor Grazing Act had authorized the withdrawal of the remaining public domain "pending its final disposal." 43 U.S.C. § 315.

17. 43 U.S.C. 1701(a)(1).

18. 426 U.S. 529 (1976). *Kleppe* explicitly silenced any remaining doubts that it was the federal government rather than the states that had the power to manage the public lands and their resources. The point was made very clear because the resource at issue was wildlife, an area where state powers have generally been at their most expansive. *Id.* at 539-41. See, e.g., *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978); *Geer v. Connecticut*, 161 U.S. 519 (1896), *overruled by Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

19. See Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 694 (1981). For various perspectives on the claims, see David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283 (1976); Dale D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENVER U. L. REV. 495 (1986); John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980); Richard D. Clayton, Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505; Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980).

20. There is no general history of such collisions of interest. The best review

For example, in 1799 the state of Tennessee asserted a claim to the public domain within its borders;²¹ the claim was rejected.²² In 1828, Governor Ninian Edward made comparable demands in an address to the Illinois General Assembly.²³ The following year, the Indiana General Assembly passed a resolution asserting that "this State, being a sovereign, free, and independent state, has the exclusive right to the soil and eminent domain of all unappropriated lands within her acknowledged borders."²⁴ In 1840, when Governor Edward's and Indiana's argument was advanced by Senator Thomas Hart Benton of Missouri, attorney for the defendant in *United States v. Gratiot*,²⁵ the United States Supreme Court dismissed it with the assertion that Illinois "surely cannot claim a right to the public lands within her limits."²⁶ When Congress adopted the Creative Act in 1891 authorizing the President to "set aside and reserve . . . public lands wholly or in part covered with timber or undergrowth . . . as public reservations,"²⁷ graziers throughout the Intermountain West protested vigorously²⁸ and challenged the constitutionality of the reserves and of the government's restriction of grazing within them; the Supreme Court again rejected the claims.²⁹ Such tensions

is to be found in GATES, *supra* note 6, at 5-30.

21. Act of Jan. 5, 1799, ch. 24, 1799 Tenn. Pub. Acts 54.

22. The claim was rejected by the United States Supreme Court, *see* *Burton's Lessee v. Williams*, 16 U.S. (3 Wheat.) 529 (1818), and the Tennessee Supreme Court. *E.g.*, *Lowry v. Francis*, 10 Tenn. (2 Yer.) 533 (1831); *Thompson v. Kendrick's Lessee*, 6 Tenn. (5 Hayw.) 113 (1818); *Miller's Lessee v. Holt*, 1 Tenn. (1 Overt.) 49, 111, 243, 308 (1807). Congress also rejected the claim in a committee report. *See* *Claim of the United States to Lands in Tennessee*, H.R. Rep., 8th Cong., 2d Sess. (Jan. 8, 1805), *reprinted in* 28 *American State Papers* [1 PUBLIC LANDS] No. 106, at 211, 212 (Washington D.C., Government Printing Office 1832).

23. *See* Governor Ninian Edwards, *An Address to the Illinois General Assembly* (Dec. 2, 1828), *reprinted in* *House Journal*, 6th Assembly, 1st Sess. 10-39 (Kaskaskia, Ill., Robert K. Fleming 1829); *see also* NINIAN W. EDWARDS, *HISTORY OF ILLINOIS FROM 1778 TO 1833*, at 105-23 (Springfield, Ill., Illinois State Journal Co. 1870).

24. Resolution of the General Assembly of the State of Indiana (Jan. 9, 1829), *reprinted in* 32 *American State Papers* [5 PUBLIC LANDS] No. 733, at 630 (Washington D.C., Government Printing Office 1832).

25. 39 U.S. (14 Pet.) 526 (1840).

26. *Id.* at 538.

27. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103, *repealed by* 90 Stat. 2792 (1976). Section 24 of the General Land Law Revision Act of 1891 is sometimes referred to as the "Creative Act." On the early history of forestry, *see* GATES, *supra* note 6, at 531-61; STEPHEN A. DOUGLAS PUTER, *LOOTERS OF THE PUBLIC DOMAIN* (1908); Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 ORE. L. REV. 1 (1985).

28. G. MICHAEL MCCARTHY, *HOOR OF TRIAL* (1977).

29. *Light v. United States*, 220 U.S. 523, 530 (1911). The plaintiff, Fred

between local and national has been the yin and yang of national politics.

These disputes are the ancestors of the current county sovereignty movement. As one county land use plan states,

We, the people of Boundary County, State of Idaho, accept, support and sustain the Constitutions of the United States and of the State of Idaho. We have demanded through our elected legislature and governor that the federal government comply with the Constitution of the United States, Article One, Section Eight, which limits the authority of the federal government to specific lands, and *we hereby reaffirm our demand that all lands in Boundary County not so specifically designated be relinquished to the citizens thereof.*³⁰

In one sense, of course, this history has been an extended commentary and counterpoint to Chief Justice John Marshall's decision in *M'Culloch v. Maryland*³¹ that "[t]he government of the Union, then, is emphatically and truly a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."³² As a government of the people rather than a government of the states, when the national government acts to achieve an objective within the scope of a constitutional power,³³ local assertions of authority must give way.³⁴ As the Constitution states: "This Constitution, and the Laws of the United States which shall be

Light, was "one of the most obdurate of all insurgents." MCCARTHY, *supra* 28, at 160.

30. Boundary County, Idaho, Ordinance 92-2, § 1 (Aug. 27, 1992) (emphasis added).

31. 17 U.S. (4 Wheat.) 316 (1819).

32. *Id.* at 404-05.

33. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but are consistent with the letter and spirit of the constitution, are constitutional." *Id.* at 421. *Cf.* *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805) (Marshall, C.J.) ("Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.")

34. "In the legislature of the Union alone, all are represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused." *M'Culloch*, 17 U.S. (4 Wheat.) at 435-36.

made in Pursuance thereof; . . . shall be the supreme Law of the Land."³⁵

While the Sagebrush Rebellion petered out after the election of Ronald Reagan, many of its foot soldiers—or their sons and daughters—have taken again to the field under the banner of the county movement. The leaders of this movement claim that county governments have the power to require the federal and state governments to comply with "land use plans" that codify a county's "customs and culture," that "county commissioners in Idaho have authority to resist constricting federal controls."³⁶

Scott Reed and Rene Erm provide divergent views on the constitutionality of this claim. Mr. Reed argues that the leaders of the county movement are peddling a "mendacious myth." Mr. Erm, on the other hand, seeks to provide a defensible legal basis for these county plans.

II. AGRICULTURAL POLLUTION

As agriculture has become an assembly-line operation dependent upon fossil fuels and chemical fertilizers and pesticides, it has also become increasingly a source of pollution. The Symposium examined two types of agricultural pollution: the odor, dust, flies, and related environmental disamenities associated with feedlots, and the pollution of groundwater by agricultural chemicals.

A. The Common Law of Feedlots

As agriculture has increasingly complied with the logic of Adam Smith's pin factory,³⁷ the various stages in producing meat have been increasingly separated and specialized. Cows, which have been bred or artificially inseminated, spend a summer with their calves grazing on rangelands or pastures; the calves are then trucked to

35. U.S. CONST. art. VI, cl. 2.

36. David Johnson, *Chenoweth Touts 'Home Rule' Concept*, LEWISTON MORNING TRIB. [IDAHO], Mar. 27, 1994, at 4B. Helen Chenoweth, a candidate for Congress from northern Idaho, also told the Gold Hill Resource Coalition that "the so-called 'home-rule' concept is valid and suggested federal laws like the Endangered Species Act require coordination with county governments. 'All we have to do is work on basic law,' said Chenoweth." *Id.*

37. Smith uses the pin factory as his example of the economic efficiency benefits of dividing a manufacturing operation into its constituent processes and separating those processes into separate, repetitive operations. ADAM SMITH, *THE WEALTH OF NATIONS* 4-5 (Edwin Cannan ed., Modern Library 1937) (1776).

feedlots for finishing before their final trip to the disassembly operation at the slaughterhouse.

The concentration of cattle at feedlots and the common law that is applicable to such operations is the topic of J. Walter Sinclair's article. The theme of Mr. Sinclair's article is the uncertainty inherent in common-law nuisance. His concern with uncertainty focuses on an inherent aspect of all adjudication based upon a reasonableness standard.³⁸

B. Water Pollution

Watersheds are the fundamental ecological unit. Creeks and rivers, ponds and lakes are intimately connected to the terrestrial ecosystems that enfold them. Human actions that affect land affect the waters that drain those lands. Changes in plant communities and land uses change the timing and velocity of run-off; they alter water temperature as well as water chemistry.

But the waters that we can see—the surface waters—are only the most visible component of the watershed. Surface waters are simply the exposed part of subsurface or ground waters. While the hydrological relationship among different types of ground water aquifers and surface waters is complicated, land uses also affect the quality of groundwater. For example, random testing of almost 1200 wells throughout the state of Idaho over the past 3 years has demonstrated problems particularly on the Snake River Plain of Southern Idaho where irrigation of crops and the use of pesticides is concentrated: "To date, about 9 percent of the sites tested had one or more constituents with concentrations exceeding an existing or proposed primary (maximum contaminant level)."³⁹

Richard Burleigh and Albert Barker examine the role that agricultural chemicals play in the contamination of groundwater. As they note, until comparatively recently groundwater contamination by agricultural chemicals was simply assumed to be impossible. One

38. The problem is the recurrent one in torts of choosing between rules—which produce greater certainty but also are perceived to create greater injustice—and standards—which are more finely tailored to individual cases but which impose greater costs and uncertainty. *E.g.*, Richard A. Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469, 469-77 (1987).

39. *Some Areas Have Contaminated Groundwater*, MOSCOW-PULLMAN DAILY NEWS [IDAHO], Apr. 5, 1994, at 4A (quoting Janet Crockett, groundwater analyst for the Idaho Department of Water Resources).

result of these assumptions is that studies on groundwater quality are only now being done.

Another result—and the one that is the focus of Burleigh's and Barker's article—consists of a patchwork of statutes originally intended to regulate other potential problems.⁴⁰ Given the importance of both public lands and agriculture to Western states such as Idaho, the Symposium's articles raise important and timely questions.

40. The authors discuss the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1988 & Supp. IV 1992), the Federal Water Pollution Control Act Amendments of 1988 (FWPCA), 33 U.S.C. §§ 1251-1387 (1988 & Supp. IV 1992), the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f-300j-26 (1988), the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV).