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COMMENT

IS THERE A MIDDLE GROUND? ONE APPROACH TO RESOLUTION OF LAND USE DISPUTES IN THE NORTHWEST

Cory R. Gangle*

I. INTRODUCTION

For approximately the last forty years, as environmental awareness has increased, and as natural resource depletion has become a reality, the courts have been busy attempting to resolve contentious issues raised by pitting the agricultural community and timber industry against animal rights activists, environmentalists, sportsman's societies, hunters and fishermen.

To date, there seems to have been little effort on the part of state and federal government to resolve the effects of legitimate regulation on the agricultural community. Ranchers and other similar agricultural producers are known for their bullheaded ways. Much of this is evident in the controversies over water use and open grazing. However, as the cases discussed in this article imply, the government at both the state and federal levels can demonstrate equal stubbornness. Radical

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environmental groups are often very obstinate too. The general consensus for each group seems to be “it’s my way, or the highway” and yet each group raises legitimate issues that must be resolved.

The thesis of this article is that far too many land and resource use issues generate costly, cumbersome, and drawn out judicial proceedings where there are ultimate winners and losers. The goal of this article is to suggest a middle ground for resolving land use and natural resource use disputes. The article proposes legislation designed to facilitate a compromise between the land owner and those parties who would challenge a current or proposed land use. Rather than depending on the courts as the primary mechanism to revolve the issues, the proposed legislation relies on an administrative process intended to resolve most land use disputes without court intervention. Specifically, the proposed legislation features an administrative process which first must be exhausted and then it provides for limited judicial review.

This article is based on five underlying premises. First, mankind owes a duty to promote a healthy and safe environment. Included in this duty is the responsibility to preserve, and if possible, reproduce resources rather than deplete them.¹ Second, property owners generally have the right to make productive use of their property, without undue interference from others. Third, government, in the exercise of its legitimate police power, may impose regulations on an individual’s use of land and resources. Fourth, compromise is preferable to any “I-win-you-lose” situation. Fifth, effective resolution of sensitive environmental and land use issues is not advanced by civil disobedience² (e.g., chaining one’s self to a tree

1. This concept is thousands of years old. Note the following quote from the Old Testament:

So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the seas, and over the fowl of the air, and over every living thing that moveth upon the earth.

GENESIS 1:27-28 (King James version). See also GENESIS 2:15: “And the Lord God took the man, and put him into the garden of Eden to dress and to *keep* it.” (emphasis added).

2. Extreme or radical environmentalism is not necessarily the answer. The word “extreme” is often defined by the measures an individual or group of individuals will take to stop or hinder certain activity. In addition, the word “environment” denotes a concern

selected for timber harvest) or inappropriate disruption of legitimate business operations. The law needs to provide the adhesive, bringing parties together to discuss differences and to forge compromise. Remedies should stem from equity rather than emotionalism, anxiety, or mere ignorance about the issues involved.

The dispute resolution process suggested in this article should not be construed to circumvent or undermine a government's police power or ability to regulate. There are regulations, statutes, and rules with which both citizens and business organizations must comply. However, the outcomes of many land use issues are not set in stone. For example, a landowner who is not happy with a particular zoning ordinance can request a variance from the ordinance that meets their particular needs. The variance process incorporates an informal dispute resolution process whereby each party has an opportunity to present its case and then the city, or county commissioners, or board of adjusters make a decision as to whether a variance should be granted. The point here is that government entities have the power and authority to bend the rules and allow for effective dispute resolution.

This article analyzes two cases, one from Oregon involving prohibitions on timber harvesting, and one from Montana involving prohibitions on sheep ranching, in which the land owner or interest holder unsuccessfully attempted to negotiate the issues and propose alternatives. The Oregon case involves real property owned by business, while the Montana case discusses a lease on state lands held in trust. There are vast differences between the two interests (outright ownership and lease interests), but in each case the interest holder has a reasonable expectation that he can use the property as he sees fit. The author submits that these two cases are representative of the multitude of land and resource use cases being litigated today.

not just for the classic example of illegal dumping toxic waste, but includes issues involving the use of forests, aesthetic values of national wildlife, wilderness use areas, etc.

II. JURISDICTIONAL PERSPECTIVES

A. *Ravalli County Fish and Game Assn., Inc. v. Mont. Dept. of State Lands.*

Prior to 1991 Robert Shoberg held grazing permits from the Department of State Lands (DSL) on school trust lands within the borders of the Sula State Forest.³ During this tenure Shoberg grazed cattle on the permit areas.⁴ In January 1991, Shoberg assigned his grazing permits to George Madden, who began grazing domestic sheep.⁵

Located within the Sula National Forest and other forest lands adjacent to the East Fork of the Bitterroot river was a herd of Bighorn Sheep.⁶ These sheep are native to much of Montana, and the records of pioneers and explorers (including Lewis and Clark) depict that Bighorn Sheep inhabited the East Fork area of the Bitterroot River in the early 1800s.⁷

Immediately after Madden began grazing sheep on lands which had a history of both cattle and sheep grazing, local sportsman's groups (Sportsmen) challenged his operations, contending that sheep ranching had potentially adverse effects on the Bighorn Sheep.⁸ The dissension escalated to the point that lawsuits were threatened if the DSL did not resolve the problem.⁹

On July 17, 1992, the DSL issued an environmental assessment (EA) which proposed six alternatives to Madden's grazing rights. After a public hearing and several revisions, the DSL Commissioner rendered notice that the EA process was over, and Madden was allowed to continue grazing under his leases until their renewal date in 1999. This use was based on the condition that he use sheep dogs to keep the sheep in a fairly confined area and to ward off both potential predators and

3. *Ravalli County Fish and Game Ass'n, Inc. v. Mont. Dep't of State Lands*, 273 Mont. 371, 376, 903 P.2d 1362, 1365 (1995).

4. *See id.* The permit under which Shoberg was operating was simply a grazing permit; it did not specifically delineate that it was for cattle only.

5. *Id.*

6. *Ravalli County*, 273 Mont. at 375, 903 P.2d 1t 1365.

7. Brief for Appellant at 4, *Ravalli County* (No. 94-564).

8. *Ravalli County*, 273 Mont. at 376, 903 P.2d at 1365-1366.

9. *Id.* There was evidence in the record (as stated by the Supreme Court) suggesting that mixing domestic sheep and Bighorn Sheep could decimate the Bighorn population through the spread of pneumonia and other diseases to the Bighorn. *Id.*

Bighorn Sheep.¹⁰ Additionally, the DSL imposed grazing dates to minimize contact with the Bighorn herds.¹¹

The Sportsmen were not satisfied with these alternatives, and on May 12, 1993, they filed suit against the DSL to enjoin Madden from grazing sheep on the leased land.¹² The Sportsmen lost at the district court level and appealed to the Montana Supreme Court contending that the DSL did not comply with MEPA, and that the DSL was under a fiduciary duty¹³ to protect of the Bighorn Sheep.¹⁴

The Montana Supreme Court recognized that MEPA policies were modeled after the National Environmental Policy Act (NEPA), and therefore the Court relied on federal case law as persuasive authority.¹⁵ The Court acknowledged that under the MEPA standards, the DSL has a duty to manage agricultural, grazing, and other surface leased land to both protect the best interests of the state and maximize multiple use, which includes considering potentially adverse consequences to wildlife and the environment.¹⁶ As the Court succinctly stated, when the DSL is aware of changes in the existing conditions or uses of a grazing lease or permit, and those changes have the potential to significantly affect the quality of the human environment, then the DSL must evaluate those changes for significant impacts.¹⁷

The Court found that the DSL failed to properly evaluate the potential effects Madden's sheep would have on the Bighorn population, and the DSL was ordered to comprehensively review these impacts by completing an Environmental Impact Statement (EIS).¹⁸ The Court did not mention who would pay for the EIS,¹⁹ nor did the Court discuss compensation for Madden for his loss of business income. The Court also failed to incorporate, or at least weigh, the alternative proposals that the

10. *Id.*

11. *Id.* These extra-remedial measures are the only hint of dispute resolution in this case.

12. *Id.*

13. This duty requires the management of agricultural, grazing, and other surface-leased land.

14. *Ravalli County*, 273 Mont. at 376-377, 903 P.2d at 1366.

15. *Id.*

16. *Ravalli County*, 273 Mont. at 379, 903 P.2d at 1368.

17. *Id.*

18. *Ravalli County*, 273 Mont. at 384, 903 P.2d at 1371.

19. Note that Environmental Impact Statements are notorious for their large costs.

DSL had imposed (sheep dogs, grazing dates, etc.). These alternatives would have allowed Madden to continue operations while still providing adequate protection for the Bighorn Sheep.

B. Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry.

In 1988, Boise Cascade Corp., (Boise) purchased 1770 acres of commercial timberland²⁰ in the northwestern coastal forests of Oregon with the reasonable expectation that it would harvest the existing timber and replant it with similar species for future harvest.²¹ Ironically, at approximately the same time, the Northern Spotted Owl was listed as a threatened species.

In 1990, the Oregon State Forester²² adopted an administrative policy prohibiting the harvest of timber within a seventy-acre buffer zone of the spotted owl's nesting site.²³ The policy required property owners to submit a written harvesting plan²⁴ to the State Forester for approval if the operations would threaten the spotted owl's nesting site.²⁵

Spotted Owls were discovered nesting in a 64-acre tract of Boise's Clatsop County property, commonly referred to as the "Walker Creek Unit," which consisted primarily of old growth timber considered to be the suitable habitat for spotted owls.²⁶

In 1991, Boise sold all of its commercial timberlands in Clatsop County with the exception of the Walker Creek Unit, which the buyer refused to purchase because of existing nesting sites.²⁷ Seeing no economical alternative, Boise Cascade filed a notice and a written harvesting plan²⁸ with the Oregon State

20. *Boise Cascade Corp. v. State ex rel. Or. State Bd. of Forestry*, 991 P.2d 563, 564 (1999).

21. *Boise Cascade Corp. v. Bd. of Forestry*, 886 P.2d 1033, 1036 (1994).

22. The State Forester is an agent of the Oregon State Board of Forestry.

23. *Boise Cascade Corp.*, 886 P.2d at 1036 (1994).

24. This plan was to address how operations would be conducted to provide the necessary 70-acre buffer zone of suitable spotted owl habitat surrounding the nest site, and how the harvesting would prevent disturbances to the owl during their critical nesting period.

25. OR. ADMIN. R. 629-655-0210(1) (2002).

26. *Boise Cascade Corp.*, 886 P.2d at 1036 (1994). See OR. ADMIN. R. 629-655-0210(3)(a) (2002). This section depicts the State Forester's policy that old growth timber is suitable habitat for the spotted owl.

27. *Boise Cascade Corp.*, 991 P.2d 564-565 (1999).

28. This plan included the provision that if there were owls present in the area, operations would not be conducted during their critical nesting period. See *Boise*, 886 P.2d at 1036. See also OR. ADMIN. R. 629-665-0210(1)(b), describing the critical nesting period as being between March 1st and September 30th of each year."

Forester indicating their intent to conduct harvesting operations in the Walker Creek Unit.²⁹

The State Forester denied the plan, alleging that it failed to address how operations within the Walker Creek Unit would maintain a 70-acre core area around the nesting site.³⁰ In 1992, Boise submitted an amended written harvesting plan, reporting that a pair of spotted owls were known to be nesting in a tree within the desired harvest area.³¹ Boise contended that although the area was not considered suitable habitat, they would not conduct operations while the owls were present during the designated nesting period.³² The amended plan further provided that there were more than 70 acres of commercial timberland immediately adjacent to the Walker Creek Unit owned by the State of Oregon that could provide the necessary habitat for the owls after Boise's property had been logged.³³

This plan was again denied by the State Forester, with the State finding that contrary to Boise's arguments, there were 56 acres of Walker Creek property which constituted critical owl habitat and were not susceptible to harvesting.³⁴ The Oregon Department of Forestry further related to Boise that the remaining acreage of the Walker Creek Unit was *not* designated as critical habitat and could be harvested, but only during periods when the owls were not nesting on the site.³⁵

Boise appealed the Forestry Department's denial of the amended plan to the Oregon State Board of Forestry. Boise claimed that the Forester's requirement to cease operations and set aside the major portion of the Walker Creek Unit for owl habitat rather than for commercial timber harvesting constituted a regulatory taking requiring just compensation under Article I, Section 18, of the Oregon Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.³⁶ After hearing the matter the Board upheld the

29. *Boise Cascade Corp.*, 886 P.2d at 1036.

30. *Id.*

31. This was not the same pair of owls that was discovered in 1990.

32. *Boise Cascade Corp.*, 886 P.2d at 1036. This amended plan was Boise's attempt to resolve the dispute equitably. It was truly a good faith effort at mediation without a third-party.

33. *Id.* Note that this modification would have accomplished the same purpose, and perhaps the owls would have had more suitable habitat on the State lands.

34. *Boise Cascade Corp.*, 886 P.2d at 1036.

35. *Id.* (emphasis added).

36. *Boise Cascade Corp.*, 886 P.2d at 1037.

State Forester's decision and refused to release the Boise property to commercial harvesting.³⁷

Subsequent to the Board's final determination, Boise filed suit in District Court alleging that a constitutional regulatory taking had taken place. The State filed a motion to dismiss on the grounds that the complaint failed to state a takings claim, and that the action brought against the state was not "ripe" because Boise had not filed for a federal incidental take permit.³⁸ The District Court agreed with the State and dismissed the complaint.³⁹

Boise appealed to the Oregon Court of Appeals, which subsequently reversed the trial court's decision and remanded the action for further proceedings.⁴⁰ The Court of Appeals rejected the State's argument that the issue was not ripe.⁴¹ The Court recognized that Boise presented two claims: (1) a taking had occurred on the 56 acres designated by the State Board of Forestry as critical habitat; and (2) a temporary taking had occurred by the Board's "temporal" restriction on the harvesting of the remaining acreage.⁴² Based on prior case law the Court ruled that Boise's allegations sufficed to constitute regulatory takings claims under both the Oregon Constitution and the United States Constitution.⁴³

The State Board of Forestry immediately appealed to the Oregon Supreme Court for review.⁴⁴ The Court held, assuming *arguendo* that the allegations were true, Boise's assertions regarding the refusal of the Board and the State Forester to allow Boise to harvest their 56 acres were sufficient to establish a takings claim.⁴⁵ The complaint for a temporary takings was not sufficient, however, to establish a claim upon which compensation could be granted.⁴⁶

The Court affirmed part of the Court of Appeals' ruling and remanded the case to the trial court.⁴⁷ On remand, the matters of damages and of whether a taking by "physical invasion" had

37. *Id.*

38. *Boise Cascade Corp.*, 886 P.2d at 1035.

39. *Id.*

40. *Id.*

41. *Boise Cascade Corp.*, 886 P.2d at 1040.

42. *Boise Cascade Corp.*, 886 P.2d at 1042.

43. *Id.*

44. *Boise Cascade Corp. v. Bd. of Forestry*, 935 P.2d 411 (Or. 1997).

45. *Boise*, 935 P.2d at 421.

46. *Id.*

47. *Boise Cascade Corp.*, 935 P.2d at 422.

occurred were submitted to a jury.⁴⁸ The jury returned a verdict in favor of Boise, entering judgment in the amount of \$2,279,223 for damages.⁴⁹

On appeal, the State contended that Boise had not exhausted all available administrative remedies prior to seeking damages in a takings claim.⁵⁰ The State again argued that Boise's claim was "unripe" because they had not made an effort to obtain an "incidental take" permit in accordance with 16 U.S.C. ' 1539(a).⁵¹

The Court of Appeals found for the State and concluded that Boise should have filed for an "incidental take permit" before bringing a takings claim in District Court.⁵² The Court rejected Boise's argument that during trial the exhibits presented by the State implied the State would have denied Boise's harvesting plan even if Boise had filed an application for an incidental take permit.⁵³

III. A CALL FOR LEGISLATION.

Although *Boise Cascade* and *Ravalli County* involve different property rights (real property vs. leased property) the interest holders in both situations were severely limited in their beneficial use of the property. While property interests can be acquired subject to various encumbrances and restrictions, there was no evidence of restrictive covenants in either *Boise Cascade* or *Ravalli County*. Accordingly, government or private interference with the use rights of the interest holders without reasons of public health or safety should result in compensation for the restrictions on use.⁵⁴ Alternatively, there could be a "round table"⁵⁵ method implemented by both the judicial and

48. *Boise Cascade Corp.*, 991 P.2d at 565.

49. *Id.*

50. *Boise Cascade Corp.*, 991 P.2d at 565.

51. *Id.* at 571. Under this provision the Secretary of the Interior may allow for an incidental take permit if the taking is incidental to and not the purpose of the proposed operations.

52. *Id.* at 574.

53. *Id.* at 573.

54. Note that reasonable compensation was not ruled out in *Boise Cascade*. The problem was that Boise had to start from scratch and file for an incidental take permit. If this permit was not granted, most likely there would have been reasonable compensation pursuant to the jury's original verdict.

55. A "round table" discussion is an important premise of this article. The parties need to sit down and work out their problems and disputes without rushing through a convoluted and lengthy court process. There is no question that such a method will not

legislative branches of government to resolve these issues, as opposed to rendering absolute “win-lose” decisions.

The Governor of Florida held similar views regarding land use disputes in Florida. In 1993 he established the “Governor’s Property Rights Study Commission II”⁵⁶ to “examine the current and potential effectiveness of Florida law in providing substantially affected persons with appropriate remedies of law to protect their private property rights and any changes necessary to assure meaningful and effective remedy to affected property amounts.”⁵⁷ The Commission ultimately proposed an informal, non-judicial “mediation-type proceeding” designed to resolve disputes between property owners and government regulators.⁵⁸ Unfortunately, this proposal failed to become law in the 1994 legislative session.⁵⁹

Subsequent to this study however, the legislature passed the Florida Land Use and Environmental Dispute Resolution Act (Florida Act) as an effort to advance the trend of using alternate dispute resolution procedures in public disputes.⁶⁰ The Florida Act set forth the following intent:

Any owner who believes that a developmental order, either separately or in conjunction with other development orders, or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of the owner’s real property, may apply within 30 days after receipt of the order or notice of the governmental action for relief under this section.⁶¹

Under the Florida Act an aggrieved party can appeal (free of charge) for relief from the entity issuing the injurious order or action. The parties would then agree on a “special master” and the case would be forwarded to the special master for review.⁶² The special master is required to “facilitate resolution of the conflict” so that either the property owner’s proposed use is modified or the departmental order is adjusted B either way,

work in every single case, but in many land use cases, such as those elucidated in this article, it appears that these procedures would work extremely well.

56. Dan R. Stengle, Wade L. Hopping, *Private Property Rights Protection*, FLA. EDPP S-19-1 § I (FLA. BAR 2000).

57. Dan R. Stengle, Wade L. Hopping, *Private Property Rights Protection* at § I.

58. *Id.*

59. *Id.*

60. *Id.* at § III(A).

61. *Id.* at § III(B), codified at FLA. STAT. ch. 70.51.

62. Dan R. Stengle, Wade L. Hopping, *Private Property Rights Protection* at § III(D).

this resolution requires both parties' mutual agreement.⁶³ In the event an agreeable resolution is not reached, the special master must consider the "facts and circumstances" of the situation and determine whether the government's imposition is "unreasonable or unfairly burdens the real property."⁶⁴ The special master then makes a recommendation. If the recommendation is not acceptable, the parties then proceed to court.

Although the impact of the Florida Act is unknown,⁶⁵ the process seems to promote equitable resolutions between parties in disagreement, while at the same time reducing costs and delays. For example, in the takings arena where the government must pay for taking one's property, one author states "one way that . . .takings claims could be avoided is by requiring that an aggrieved landowner first enter some form of alternative dispute resolution."⁶⁶

Many other states have adopted either mandatory or permissive mediation procedures to expedite land use and property rights issues. For example, in Oregon, land use decisions can be appealed to the "Land Use Board of Appeals."⁶⁷ The problem with both Oregon and Florida's dispute resolution process, however, is that parties are entitled to statutory forum shopping. There is no real pressure to actually resolve the dispute. Accordingly, the following legislation is proposed as a

63. *Id.* at § III(I)(4)(b). The special master is directed to mediate a mutually acceptable resolution of the dispute. FLA. STAT. ch. 70.51(17)(a).

64. *Id.* at § III(I)(4)(b).

65. There are only two cases that cite the Florida Act. In *Hanna v. Environmental Protection Comm.*, 735 So.2d 544 (Fla. 1999), a landowner alleged inverse condemnation against the Environmental Protection Commission (EPC) based on the EPC's response to his application to fill in a culvert and construct a driveway on his property. The EPC was concerned with potential effects on nearby wetlands. The land owner argued that the EPC's concern constituted a development order and therefore he was entitled to relief under the Florida Land Use and Environmental Act (Fla. Stat. § 70.51 et al). The Court said the EPC's response was not a development order and the case was not place within the purview of Florida's Act.

In *Scott, M.D. v. Polk County*, 793 So.2d 85 (Fla. 2001), a land owner invoked the Florida Act when the local board of county commissioners denied a Planned Unit Development (PUD) application. Eight days after invoking the Act, the land owner filed a lawsuit against the county commissioners. The trial court dismissed the special master proceedings and the land owner appealed. On appeal the court found that there was nothing to prevent the land owner maintaining a special master proceeding and a civil lawsuit against the government entity. *Scott*, 793 So.2d at 86-87.

66. Dwight H. Merricam, *Reengineering Regulation to Avoid Takings*, 33 URB. LAW. 1, 40 (2001).

67. OR. REV. STAT. § 197.830 (2001).

potential alternative to judicial review of land use and natural resource issues.⁶⁸

MONTANA LAND USE AND NATURAL RESOURCE

DISPUTE RESOLUTION ACT⁶⁹

Section I. General Provisions and Definitions

(1) This Act may be cited as the “Montana Land Use and Natural Resource Dispute Resolution Act.”

(2) Definitions. As used in this section, the term:

(a) “Challenge” means any contest of an existing or proposed land use, or any enforcement action taken by a government entity to enforce a restriction on a proposed or existing land use, or a development order or other permitted use.

Explanation. The purpose of this definition is to acknowledge that any party can protest a landowner’s use of their property. This includes, but is not limited to: government entities, private parties, citizens groups, sportsmens groups, etc. At the same time, a land owner has the right to challenge an enforcement action where a government entity is attempting to restrict an existing land use, or to limit a proposed use.

(b) “Challenging party” means any party who is challenging an existing or proposed land use, a restriction on a land use or natural resource issue, any development order, or any other permitted use.

(c) “Development order” means any order, or any notice of proposed local, state or regional governmental agency action, which is or will have the effect of granting, denying, or granting with conditions an application for a development permit. Actions by the state or a local government on comprehensive plan amendments are not development orders.

(d) “Development permit” includes, but is not limited to, any building permit, zoning permit, subdivision approval, certification, special exception, variance, or any other similar

68. It is important to note that the proposed legislation promotes mandatory dispute resolution rather than voluntary mediation as the appropriate ADR method. The real reason for this divergence from most legislative ADR schemes is that with mediation, there is no requirement that either party reach a resolution. If they are not satisfied with the outcome of the mediator’s recommendations, they can seek judicial remedies. The hope with the current proposal is to facilitate a desirable resolution, but if one is not reached, leave the “answer” in the hands of the settlement master who has become intimately involved with the facts, circumstances, and issues involved.

69. This proposed Act is modeled after Florida’s Land Dispute Resolution Act.

action of local government, as well as any permit authorized to be issued under state law by state, regional, or local government which has the effect of authorizing the development of real property.

(e) "Enforcement action" means any action taken by a government agency to enforce a Montana land use or natural resource statute, regulation, or ordinance.

Explanation. *This definition contemplates actions involving Montana state law. If the action involves a federal agency, the federal district court can require that the parties litigate their dispute through this Act, particularly if the action involves enforcement of Montana law by a federal agency.*

(f) "Existing land use" is any current land or natural resource use. This includes, but is not limited to, agricultural use, construction, timber harvest and mining.

(g) "Governmental entity" includes an agency of the state, a regional or a local government created by the state constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. This provision also includes those federal agencies, if any, that are subject to Montana law.

Explanation. *This definition contemplates actions involving Montana state law. If the action involves federal agency, the federal district court can require that the parties litigate their dispute through this Act, particularly if the action involves a question of Montana law.*

(h) "Land owner" or "Owner" means any a person with a legal or equitable interest in real property. This includes lessees of real property, such as federal or state leased land. This also includes a person with a legal right to withdraw natural resources from owned or leased real property.

(i) "Proposed land use" means any permit application or other notice of use filed by a land owner to develop his or her real property.

(j) "Real property" means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the owner has a relevant interest.

(k) "Special master" means a person selected by the parties to perform the duties prescribed in this section. The special master must be a resident of the state and possess experience in at least one of the following disciplines: land use, natural resource use, environmental permitting, land planning, land

economics, or local and state government organization and powers.

Explanation. *The special master needs to be someone qualified to review the issues contemplated under this Act. The purpose of this act would be defeated if an inexperienced or unqualified person was required to review complex land use and natural resource issues.*

(3) Relief under this Act applies to any challenging party who believes that a proposed land use is either unreasonable or unlawful. It also applies to any land owner who believes that a development order, developmental permit, or enforcement action is unreasonable or unfairly burdens the use of the owner's real property.

Explanation. *The underlying standard in this proposed Act is whether the proposed use is "unreasonable or unlawful" or whether the limitation on use constitutes an "unreasonable or unfair burden" on one's property. This is a broad standard but one that seems to be best suited (in the author's opinion) for this type of dispute resolution. If the parties cannot agree on a resolution, the special master may render a decision whether there is an unreasonable or unfair burden. It also allows the special master to impose alternatives to reduce or diminish the burden on the affected property and at the same time preserve the integrity and purpose of existing laws and regulations.*

Section II. Administrative Proceedings

(1) To initiate a proceeding under this Act, a challenging party must file a request in district court for administrative relief within 90 days from when the party discovered or should have reasonably discovered factors constituting an unreasonable or unlawful use of the property, or factors constituting an unreasonable or unfair burden on the property.

Explanation. *The purpose of this Act is to facilitate resolution between disputing parties and to avoid judicial litigation. However, it appears that the most convenient way to expedite this Act is to initially file a request for relief in district court. This provision imposes a fairly short statute of limitations for relief under this Act.*

(2) The challenging party must comply with the Montana Rules of Civil Procedure and the local district court rules for filing this action. The title of the request for relief shall be: "Request for Relief under Montana's Land Use and Natural Resource Dispute Resolution Act."

Explanation. *It is important to understand that this Act is*

not designed to be a formal civil action. However, the initial filing of a request for relief must be done in pleading form, and notice must be provided to all parties named in the request for relief, in accordance with Montana Rules of Civil Procedure, Rule 4.

(3) Contents of the Request for Relief:

(a) If the request is a challenge to an existing or proposed land use, the request must contain a summary description explaining the basis for alleging the use (or proposed use) is unreasonable or unlawful.

(b) If the request challenges a development order, enforcement action, or other limitation on an existing or proposed land use, the request must specify the basis for challenging the development order, enforcement action, or other limitation. A copy of the development order or notice of enforcement action must be attached to the request.

(c) The party requesting administrative relief under this Act must also include a statement outlining the potential or perceived impacts that the contested use or contested burden will have on their interests.

Explanation. *This provision requires the challenging parties to explain not only what they are challenging and why, but also requires them to include a description of how the activity they are challenging will effect them if it is allowed to continue or commence as proposed.*

(d) The request for relief must also include a certificate of service in accordance with Montana Rules of Civil Procedure, Rule 4. Each interested party must be served with the request for relief.

(4) Upon receiving the request for relief, the district court shall provide notice to each party named in the request that they have thirty (30) days to appoint a special master to proceed over their dispute. If the parties are unable to agree within 30 days on a special master, the person or entity seeking relief under this Act shall request that the court formally appoint a special master. The district court must appoint a special master within fifteen (15) days of receiving a request for appointment of a special master.

Explanation. *This is the beginning of communications between the parties. They must somehow work together to appoint an agreeable special master, or face the consequences of a court-appointed special master.*

(5) Once a special master is selected, the district court shall

issue an order submitting the dispute to the special master to proceed within the provisions of this Act.

(6) The special master may dismiss the case if the request for relief fails to include the information required in subsection (3). The party requesting relief may, within twenty (20) days of receiving notice that the request was inadequate, amend the request and refile directly with the special master. The procedures under subsection (3) must be followed, including notice and service of the amended request. Failure to file an adequate amended request within 20 days shall result in a dismissal with prejudice as to proceedings under this Act. A party desiring to appeal this dismissal may proceed under the appellate procedures outlined in Section III of this Act.

(7) The special master shall allow each party 20 days to file a statement of their position with both the special master and the opposing party. This document shall be entitled "Statement of Position" and shall include the following information:

(a) The history of the real property, including when it was purchased, how much was purchased, where it is located, the nature of the title, the composition of the property, and how it was initially used.

(b) The basis for the challenge, or basis for opposing the challenge.

(c) A list of all individuals and entities involved, including those individuals who may have information that would support the party's position.

(d) A description of potential adverse affects that the existing or proposed use will have on the environment and general public welfare.

(e) A description of proposed alternatives or measures each party is willing to undertake to resolve the dispute.

(f) Each party may attach supporting documentation and affidavits that further support their position.

Explanation. *This process varies somewhat from the Montana Rules of Civil Procedure governing briefing. Here, each party files only one document, outlining their position. There is no reply brief or response brief. Each party files their statement of position at the same time. This process also requires the party to consider and delineate possible alternatives or actions that can be taken to resolve the issues early in the process.*

(8) Upon receiving each party's Statement of Position, the special master may request additional documentation from any person or government agency to assist the special master in

understanding the dispute and facilitating or achieving a fair and desirable resolution.

(9) Within 10 days of receiving each party's Statement of Position and additional documentation as required, the special master shall organize an informal meeting where each party involved and the special master will discuss the dispute and potential alternatives. If possible, an equitable resolution of the dispute will be reached at this meeting.

Explanation. *This is the first meeting between the parties where they are required to discuss their position and perhaps reach an equitable agreement with regards to the existing or proposed land use. The goal is to reach an early disposition of the case.*

(10) If the initial meeting between the parties did not result in resolution of the issues presented, the special master shall permit each party to engage in a reasonable discovery process. The discovery process shall be governed in accordance with the Montana Rules of Civil Procedure and the Montana Rules of Evidence. To facilitate this process, the special master shall issue notice to each party explaining the results of the initial meeting, and authorizing each party to engage in a discovery process, to be concluded within 180 days of the notice. This discovery process does not allow for depositions or recorded oral testimony.

Explanation. *This provision allows each party to substantiate their position with additional information, which may be discovered after the Statement's of Position are filed. However, it precludes the parties from deposing witnesses. If there are any witnesses, they will be called by the special master at the next informal meeting and each party including the special master will be allowed to question the witness. See Subsection (14).*

(11) Any land owner who requests relief under this Act consents to grant the special master and the parties reasonable access to the real property with advance notice at a time and in a manner acceptable to the owner of the real property.

Explanation. *This provision contemplates that a land owner is willing to resolve the issue by allowing all parties involved to inspect his proposed use, his existing use, or other operations that are the subject of dispute. If the party requesting relief is not the land owner, they are precluded, without permission from the land owner, from intruding on the land owner's property.*

(12) Within five (5) days of discovery closure the special master shall provide each party with written notice of a second informal meeting. The meeting must take place within 30 days of discovery closure.

(13) Within fifteen (15) days of discovery closure, each party must submit an amended Statement of Position to the special master, as well as to the opposing party.

Explanation. *This provision allows the parties to incorporate their discovery efforts in their Statement of Position. This also allows the special master to ascertain the validity of each party's position.*

(14) At the second informal meeting each party will be allowed to present its position. In addition, each party may ask witnesses to speak on its behalf. These witnesses may be questioned by all parties present at the meeting, and also by the special master. Witness testimony shall be recorded by a Montana-licensed court reporter. Upon conclusion of the testimony and review of each party's position, the special master shall recommend possible solutions to resolve the issues presented. The parties are then required to discuss and either accept or reject the alternatives or proposals suggested by the special master.

Explanation. *This is the second informal meeting where the parties are required to sit across from each other and attempt to resolve the dispute. This process is meant to move along rapidly, as opposed to a slow and cumbersome judicial process.*

(15) If an amicable resolution is not met subsequent to the second meeting under subsection (14) above, the special master shall schedule a final meeting to commence within fourteen (14) days of concluding the second meeting. The object of this final meeting is to focus attention on the proposed use, challenges to the proposed use, potential impacts of the proposed use, and plausible alternatives. The first responsibility of the special master is to facilitate a resolution of the conflict between the owner and the challenging party or parties. This resolution may include some modification of the owner's proposed use of the property or adjustment in the development order or enforcement action or regulatory efforts by one or more of the challenging parties. Accordingly, the special master shall act as a facilitator between the parties in an effort to effect a mutually acceptable solution.

(16) If an acceptable resolution is not reached by the parties before or during the final meeting, the special master shall

consider the facts and circumstances set forth in the request for relief and any responses and any other information produced at each meeting in order to determine whether there is an unreasonable or unlawful land use (either existing or proposed) or determine whether there is an unreasonable or unfair burden on the existing or proposed land use. Additional facts and circumstances the special master may consider include, but are not limited to:

(a) The history of the real property, including when it was purchased, how much was purchased, where it is located, the nature of the title, the composition of the property, and how it was initially used.

(b) The history or development and use of the real property, including what was developed on the property and by whom, if it was subdivided, and how and to whom it was sold, whether plats were filed or recorded, and whether infrastructure and other public services or improvements may have been dedicated to the public.

(c) The history of environmental protection and land use controls and other regulations, including how and when the land was classified, how use was proscribed, and what changes in classifications occurred.

(d) The present nature and extent of the real property, including its natural or altered characteristics.

(e) The reasonable expectations of the owner at the time of acquisition.

(f) The public purpose sought to be achieved by the development order or enforcement action, including the nature and magnitude of the problem addressed by the underlying regulations on which the development order or enforcement action is based; whether the development order or enforcement action is necessary to the achievement of the public purpose; and whether there are alternative development orders or enforcement action conditions that would achieve the public purpose and allow for reduced restrictions on the use of the property.

(g) Uses authorized for and restrictions placed on similarly situated property.

(h) Any other information determined relevant by the special master.

Explanation. *Much of this information will be provided in each party's Statement of Position or otherwise obtained in discovery. If the special master requires more information, he*

may request this information from any party.

(17) Within 14 days after the final meeting, the special master shall prepare and file with the district court and all parties involved a decision regarding the dispute. The special master shall incorporate alternatives to the existing or proposed land use, and if applicable, proposals to lessen the burden of the development order or enforcement action. The special master shall clearly articulate each party's position, alternatives or proposals offered, discussed, and rejected, reasons the suggested alternatives or proposals were rejected, and the basis for the special master's decision.

(a) If the request for relief concerns a development order or enforcement action, and the special master finds that it does not unreasonably or unfairly burden either the land owner's existing or proposed use, the development order or enforcement action shall remain undisturbed and the proceeding shall end. Any party who is unsatisfied with this decision may proceed with the appellate procedures in Section III of this Act.

(b) If the request for relief challenges an existing or proposed land use, and the special master finds that the existing or proposed use is not unreasonable or unlawful, the land owner shall not be estopped from using his or her land in the existing or proposed manner and the proceeding shall end. Any party who is unsatisfied with this decision may proceed with the appellate procedures in Section III of this Act.

(c) If the special master finds that there is an unreasonable or unlawful use, or there is an unreasonable and unfair burden on real property, he may recommend one or more alternatives that protect the public interest served by the development order or enforcement action but still allow for reduced restraints on the use of the owner's real property, including, but not limited to:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.
2. Increases or modifications in the existing or proposed use.
3. The transfer of development rights.
4. Land swaps or exchanges.
5. Mitigation, including payments in lieu of onsite mitigation.
6. Location of operations (e.g., farming, grazing, timber harvest, construction) on the least sensitive portion of the property.
7. Conditioning the amount of development or use

permitted.

8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.

9. Issuance of the development order, a variance, special exception, or other extraordinary relief, including withdrawal of the enforcement action.

10. Purchase of the real property, or an interest therein, by an appropriate governmental entity.

11. Full compensation for the restrictions on use.

12. Partial compensation for partial restrictions on use.

(d) This subsection does not prohibit the parties from entering into an agreement as to the permissible use of the property prior to the special master rendering a decision. An agreement for a permissible use must be incorporated in the special master's decision.

Section III. Judicial Appeals.

(1) Any party who disagrees with the special master's decision may file a notice of appeal in district court. This notice must be filed within 30 days of receiving the special master's recommendation.

(2) Within 5 days of filing a notice of appeal to district court, the appellant shall file an appeal brief detailing its basis for the appeal. A copy of the brief shall be submitted to the district court, each interested party, and also to the special master.

Explanation. *The special master may be called on by the district court to provide more detail regarding his decision.*

(3) Within 20 days of receiving the appellant's brief, the non-appealing party (or parties) may file a response brief. The same procedures apply as for the appellants brief.

(4) The appellant may file a reply brief within 10 days of receiving the response brief. The same procedures apply as for the original appellant's brief.

(5) The administrative record and the special master's recommendations shall be filed with the district court.

(6) Within 180 days of receiving the notice of appeal, the district court will conduct a hearing. The court may require oral arguments from each interested party, and may also hear from the special master. Following review of the administrative record, the special master's recommendations, oral arguments from all represented parties, and the special master's testimony, the district court will render its findings of fact and conclusions of law.

(7) If the dispute is not resolved prior to the district court's

findings of fact and conclusions of law, and there is disagreement with the court's order, any party involved may appeal to the Montana Supreme Court.

Section IV. Withdrawal from Proceedings.

Any party at any time may request to withdraw from proceedings under this Act. The request to be withdraw must set forth facts and circumstances relevant to aid the special master in ruling on the request. Any party withdrawing from the dispute waives its rights to challenge an existing or proposed use or to challenge the applicable development order or enforcement action.

***Explanation.** This provision is not found in the Florida statutes and is incorporated into this proposal to account for any party dropping out of the proceedings. Under the Florida statute, when a land owner feels he has been harmed by a land use restriction, regulation, or enforcement action, he can institute a legal action in district court, or he can invoke the provisions of the Florida Act. Under the Montana proposed Act, however, once its provisions have been invoked, neither party can back out without waiving their rights to continue.*

Section V. Costs and Fees.

Each party is responsible for their costs incurred in resolving the dispute, including attorney's fees, administrative costs, and court costs if applicable. Special master fees will be divided equally among each party.

IV. REVIEWING *BOISE CASCADE* AND *RAVALLI COUNTY* THROUGH THE LENS OF THE PROPOSED MONTANA LAND USE AND NATURAL RESOURCE DISPUTE RESOLUTION ACT.

A. Boise Cascade

The dispute in *Boise Cascade* was initiated when Boise was denied the beneficial use of their land. It wanted to sell its forest property for timber harvest, but the buyer refused to buy it because there were Spotted Owls living in a certain section of the selected forest. If the Montana Land Use and Natural Resource Dispute Resolution Act (Act) was in place, here is an analysis of how the Act would be implemented.⁷⁰

70. The author recognizes that *Boise Cascade* was an Oregon case, and that the proposed Act is relevant at this point only to Montana. However, the facts and circumstances set forth in *Boise Cascade* could easily take place in Montana.

Boise would have first filed for administrative relief under the Act rather than file a takings claim in district court. The parties (Boise, State of Oregon, etc.) would have either mutually selected a special master, or they would have had one appointed by the court. Each party would have presented their statements of position to the special master, explaining the proposed use, the ramifications of the proposed use (in this case impacts on the Spotted Owl), and their positions regarding the use, as well as proposed alternatives.

It is important to remember that Boise's jury verdict for several million dollars was overturned simply because Boise failed to apply for a federal incidental take permit. Had this proposed Act been in place, Boise would have been able to (and would have discovered that they had to) file for that permit prior to incurring enormous fees and costs in litigating their takings claims. Although there was evidence in the record that an incidental take permit would not have been granted even had Boise applied, this factor is not dispositive, but is merely a factor for the special master to consider.

Boise Cascade offered several alternatives that to allow for both harvest (or sale of the land) and substantial compliance with the federal Endangered Species Act as well as Oregon law implementing the ESA. For example, Boise offered to harvest during the owl's non-nesting periods. Boise also contended that the owls could be moved to adjacent state land.

It is clear that the Oregon State Forester did not have to consider these alternatives, and therefore Boise was essentially forced to continue litigation. Had this proposed Act been in place, the State Forester would have been required to at least consider the proposed alternatives and then accept them, reject them, or propose additional options. This is the very purpose of the Act: to facilitate communication and negotiations, and also clarify each party's position and their reasons for rejecting alternatives and proposals by the other party.

Therefore, the State Forester would have been required to clarify their position, and upon failing to take affirmative steps to resolve the situation, the special master could step in and offered his own recommendations. Under the Act these recommendations are binding unless the special master's position is overturned on appeal. It is highly likely that had this Act been in place, Boise Cascade and the Oregon State Forester's Board could have worked out an amicable resolution, with each party taking something from the table, and also

perhaps leaving something. In other words, there would not be a win/lose outcome. In addition, a long court proceeding would have been avoided.

B. Ravalli County

This proposed Act does not discriminate between individuals holding legal title to real property and those merely holding an interest in the property. In *Ravalli County*, the interest at stake was a state land grazing permit.

To challenge George Madden's sheep ranching operations, the Sportsmen would invoke the provisions of this proposed Act by filing for administrative relief in the district court. As already explained under the *Boise Cascade* analysis, this Act would have required each party to submit their positions and their proposed alternatives. For example, the Sportsmen could have explained (perhaps through scientific evidence) that while domestic sheep often harbor diseases which are often fatal to Bighorn Sheep, they would be willing to pay for an Environmental Impact Statement or an Environmental Survey, to determine the affects of Madden's sheep on the local Bighorn Sheep herds.

George Madden could have offered to go back to cattle ranching, he could have offered to fence in his sheep, or he could have taken measures to ensure that his particular sheep did not carry diseases alleged to be harmful to the Bighorn Sheep.

In either event, there were alternatives that each party could have presented that were not even discussed. Under this proposed Act those options would not only be discussed, but each party would have to explain why they would or would not work. If the case did not resolve, the special master could make his recommendations. Most likely there would have been an agreeable resolution of this case without all the court costs and litigation expenses, and without a continuing controversy between agricultural producers and other members of society.

C. Conclusion

The plain language of both the U.S. Constitution and other state constitutions dictates that the ownership of land (or more appropriately, interests in the land) is a constitutional right that cannot be infringed absent just compensation. However, under a state's police power or power of eminent domain, a government entity or other challenging party can

contest a property owner's proposed use. This was evident in *Boise Cascade* where the State Forestry Board disallowed a timber company's proposed consumption of their privately-owned natural resource. In *Ravalli County*, the government, after being challenged by private interests groups, disallowed a sheep rancher's proposed use of state leased land. The problem in both cases, and perhaps in a plethora of others, was not necessarily that the proposed uses were denied; the concern was that the land owners and interest holders were not compensated for their loss or they were not allowed to propose alternatives that would allow them to continue their operations in a limited fashion.

The purpose of the proposed legislation is to give land owners an avenue of relief outside the judicial system; it effectively makes the two parties sit down at a table together and discuss alternatives and solutions to the disputed property use. The goal is to approach a middle ground that appeases both parties; as mentioned in the legislation itself, this may include modification of the land owner's proposed use, or may result in compensation or even purchase of the land owner's property. This type of legislation is not designed necessarily to make everyone "happy," but is simply proposed to facilitate equitable resolutions to land use and natural resource disputes.

