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Public Choice Theory and the Public Lands: Why "Multiple Use" Failed

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PUBLIC CHOICE THEORY AND THE PUBLIC LANDS: WHY "MULTIPLE USE" FAILED

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I. INTRODUCTION

Wallace Stegner, perhaps the greatest of western writers, passed away in April of 1993. In his writings, he characterized the West as the "geography of hope."[1] In one essay, Stegner wrote:

> Angry as one may be at what careless people have done and still do to a noble habitat, it is hard to be pessimistic about the West. This is the native home of hope. When it fully learns that cooperation, not rugged individualism, is the pattern that most characterizes and preserves it, then it will have achieved itself and outlived its origins. Then it has a chance to create a society to match its scenery.[2]

After Stegner's death, at a gathering to celebrate the writer's life and work, Interior Secretary Bruce Babbitt remarked:

> Stegner showed us the limitations of aridity and the need for human institutions to respond in a cooperative way . . . . We've never yet succeeded in finding this balance between exploitation and conservation of our natural resources; that duality, that tension, has never been resolved.[3]

In *Crossing the Next Meridian*, Charles Wilkinson argues that the West has failed to achieve this balance because of laws that subsidize local irrigators, ranchers, miners, and timber companies.

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1. WALLACE STEGNER, WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS: LIVING AND WRITING IN THE WEST xv (1992). *See* Donald Snow, *Wallace Stegner's "Geography of Hope"*, 24 ENVTL. L. xi (1994); *see also* Janet C. Neuman & Pamela G. Wiley, *Hope's Native Home: Living and Reading in the West*, 24 ENVTL. L. 293 (reviewing Stegner's last book, WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS: LIVING AND WRITING IN THE WEST (1992)).

2. WALLACE STEGNER, THE SOUND OF MOUNTAIN WATER 38 (1980). For a brief evaluation of Stegner's influence on the law of the West, see Charles F. Wilkinson, *The Law of the American West: A Critical Bibliography of the Non Legal Sources*, 85 MICH. L. REV. 953, 979–80 (1987).

3. *Quoted in Western Heroes*, NEW YORKER, May 10, 1993, at 41.

This system of subsidization has produced a western landscape characterized by depleted streamflows, overgrazed rangelands, unreclaimed mines, overharvested forests, and endangered salmon.[4] Calling the laws that permit these subsidies the "Lords of Yesterday," Wilkinson champions the rethinking of these laws and an end to subsidized environmental desecration.[5]

Laws which grant private property rights in water and mineral resources with little or no consideration of the public interest are a major cause of the enormous amount of environmental destruction in the West. In view of the immense social costs generated by the private rights systems that dominate Western water and mining law, it is unclear why anyone would ever call for privatization of the public lands.[6]

This Article, however, does not focus on the private rights systems governed by the prior appropriation principle of water law[7] or the 1872 General Mining Law.[8] Instead, it targets the concept of "multiple use," the driving force behind at least three of the legal regimes Wilkinson terms the "Lords of Yesterday": the laws that govern management of national forests, management of rangelands, and the development and operation of federal dams.[9]

Multiple use management purportedly allows simultaneous production of compatible resources through sound land use planning.[10]

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4. *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST (1992).

5. *Id.* at 3–27. Figures on the current carrying costs of environmental subsidies can be found in U.S. GENERAL ACCOUNTING OFFICE, NATURAL RESOURCES MANAGEMENT ISSUES, Transition Series, GAO/OCG-93-17TR (Dec. 1992) [hereinafter GAO REPORT].

6. Authors advocating the privatization of public lands include TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (1991) and GARY D. LIBECAP, LOCKING UP THE RANGE: FEDERAL LAND CONTROLS AND GRAZING (1981).

7. For an overview of prior appropriation water law, see 2 ROBERT E. BECK, WATERS AND WATER RIGHTS §§ 11.01–17.04 (1991); for a critical examination, see Charles F. Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, 24 LAND & WATER L. REV. 1 (1989).

8. 30 U.S.C. §§ 21–54 (1988); *see also* 2 GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW §§ 25.01–.02 (1994).

9. *See* WILKINSON, *supra* note 4, at 20–21, 75–218.

10. The classic definition of multiple use for the national forests promises consideration of a wide variety of renewable land uses and emphasizes administrative flexibility and long term productivity.

> "Multiple use" means: the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments

Multiple use has not delivered on this promise. Moreover, it has become clear that it cannot. Since multiple use is founded upon a standardless delegation of authority to managers of public lands and waters, congressional endorsement of multiple use has created the archetypal "special interest" legislation. Exposed to sustained pressure from local commodity interest groups, federal agencies frequently capitulate to these forces because of the lack of standards governing land and water decisionmaking. For example, because of pressure from stockmen's associations, multiple use on the public rangelands has produced overgrazing;[11] because of pressure from timber mills and timber-dependent communities, multiple use in the national forests has produced below-cost timber sales;[12] because of pressure from electric utilities and the aluminum industry, multiple use of Columbia Basin streamflows has made the Snake River salmon an endangered species.[13]

The power of these local interest groups should not be surprising. "Public choice" theory predicts that small, well-organized special interest groups will exert a disproportionate influence on policymaking.[14] This prediction is particularly relevant in the case of

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> in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

16 U.S.C. § 531(a); *see also* 43 U.S.C. § 1702(c) (similar definition in the Federal Land Policy and Management Act, listing both renewable and nonrenewable resources, and promising to meet both the present and future needs of the American people without "permanent" impairment of the productivity of the land and the quality of the environment).

11. *See* DENZEL FERGUSON & NANCY FERGUSON, SACRED COWS AT THE PUBLIC TROUGH (1983); *see also* Richard H. Braun, *Emerging Limits on Federal Land Management Discretion: Livestock, Riparian Ecosystems, and Clean Water Law*, 17 ENVTL. L. 43 (1986).

12. GAO REPORT, *supra* note 5, at 20 (stating that in 1990, federal government lost $35.6 million on below-cost timber sales); *see also* Michael F. Kline, *The National Chainsaw Massacre: Below Cost Timber Sales in the National Forests*, 13 B.C. ENVTL. AFF. L. REV. 553 (1986).

13. *See* Michael C. Blumm & Andy Simrin, *The Unraveling of the Parity Promise: Hydropower, Salmon, and Endangered Species in the Columbia Basin*, 21 ENVTL. L. 657 (1991).

14. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); *see also* Daniel A. Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI.-KENT L. REV. 161 (1989); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989).

public lands, where the interests of disorganized, distant public owners are regularly overshadowed by the opposing interests of locally concentrated commodity interests.

This Article explains why multiple use failed and illustrates why in fact it could not work. The Article concludes by suggesting that multiple use should be redefined to reflect national interests expressed in other statutory directives, such as the Endangered Species Act[15] and the Clean Water Act,[16] which narrow the discretion of those who manage public lands or waters. First, however, the Article examines the current carrying costs of the system of laws governing Western natural resources, Charles Wilkinson's "Lords of Yesterday."

II. The Current Carrying Costs of the "Lords of Yesterday"

In December 1992, the General Accounting Office ("GAO") studied the operation of the subsidies required to sustain the legal structures Wilkinson terms "Lords of Yesterday"[17] and concluded that reforms of the system could save an estimated four billion dollars between 1993 and 1997.[18] Additionally, GAO noted that appropriations for the agencies responsible for administering the subsidy system dropped in 1993 by more than one percent, and that further cuts were expected in the next two years.[19] These cuts are producing severe shortfalls in the administering agencies' capabilities. For instance, the Bureau of Land Management ("BLM") needs a fifty percent increase in its range management budget to restore riparian areas damaged by grazing practices.[20] Furthermore, the Forest Service needs roughly $650 million just to eliminate the backlog of maintenance and reconstruction work on trails and recreation sites.[21] It would cost millions more to develop and maintain

15. 16 U.S.C. §§ 1531–1544 (1988).
16. 33 U.S.C. §§ 1251–1328 (1988).
17. *See* Wilkinson, *supra* note 4, at 20–21, 75–218.
18. GAO Report, *supra* note 5, at 5–6.
19. *Id.* at 7.
20. *Id.* at 10.
21. *Id.* at 9.

new recreational areas, to regulate grazing, and to implement the wildlife actions called for by the Forest Service's land use plans.[22] GAO recommended that reforms aimed at achieving fair market returns for authorized uses of federal lands should be used to supplement, rather than to supplant, the currently inadequate congressional appropriations process.[23]

A brief look at the operation of the "Lords of Yesterday" reveals the enormous size of the subsidies they provide in sectors such as mining, livestock production, timbering, power production, and agriculture. For example, in the years since the enactment of the Mining Law of 1872,[24] the government has sold 3.2 million acres of land—an area the size of Connecticut—for less than five dollars an acre, roughly the fair market value for Western land in 1872.[25] Between 1970 and 1983, the government received less than $4,500 for twenty land patents estimated roughly to be worth between $14 million and $48 million,[26] a return of between .01% and .03% of the land's value. Finally, the government received nothing for the estimated $1.2 billion worth of minerals extracted from its lands in 1990 alone. Indeed, unless the Mining Law is amended, the government will receive nothing for the approximately $65 billion in minerals that remain on federal lands.[27]

Even though rangeland management does not cost the government as much as the operation of the Mining Law, grazing fees do not come close to covering the government's management and grazing land improvement costs.[28] In fact, in setting grazing fees, the government sometimes charges as little as ten percent of the fees that would be charged on similarly situated private lands.[29] Grazing affects more government land than any other commodity use, involving nearly 300 million acres.[30] A Congressional Budget Office ("CBO") study estimated that a one-third increase in grazing

22. *Id.*
23. *Id.* at 13.
24. 30 U.S.C. §§ 21–54 (1988).
25. GAO REPORT, *supra* note 5, at 14.
26. *Id.*
27. *Id.* at 15.
28. *Id.* at 20.
29. 2 COGGINS & GLICKSMAN, *supra* note 8, § 19.02[2].
30. *Id.*, § 19.01[1]; GAO REPORT, *supra* note 5, at 20.

fees for each of the next four years would be necessary to bring public grazing fees up to a fair market price.[31]

Timber subsidies have followed a similar pattern. In 1990, below-cost timber sales cost the government between $35 million and $112 million, depending upon how one computes these costs.[32] GAO estimated that eliminating below-cost sales in just three of the Forest Service's nine regions—where such sales have exceeded cash receipts by a three-to-one ratio—would save $230 million between 1993 and 1997.[33]

Another "Lord of Yesterday," the law governing development and operation of federal dams, has, among other things, crippled the Northwest's salmon runs.[34] These dams continue to operate with enormous taxpayer subsidies. In 1991, CBO estimated that Army Corps of Engineers' dams nationwide required a $700–800 million annual subsidy.[35] CBO suggested that increased user fees could reduce this subsidy by nearly $2 billion between 1993 and 1997.[36] Reducing these subsidies would also lower the annual costs of drawing down the lower Snake River reservoirs each spring, a proposal designed to give migrating salmon an environment more like a flowing river than a series of lakes.[37] A major impediment to such fish flows is the unwillingness of heavily subsidized agricultural shippers to lose Lewiston, Idaho as a deepwater port for two months of the year.[38]

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31. *See* GAO REPORT, *supra* note 5, at 20 (noting CBO estimates that $120 million would be raised by a one-third increase in fees each year between 1993 and 1997).

32. *Id.*

33. *Id.* at 20–21.

34. *See* Michael C. Blumm, *Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources for a Peaceful Coexistence with the Federal Columbia River Power System*, 11 ENVTL. L. 211 (1981).

35. *See* GAO REPORT, *supra* note 5, at 21.

36. *See id.* Coincidentally, the increase in user fees would cause shippers to use the most efficient routes rather than the most subsidized ones, which in turn would lead to reduced levels of both congestion and new construction. *Id.*

37. *See* 1992 Columbia River Salmon Flow Measures Options Analysis, 57 Fed. Reg. 35,796 (1992) (stating that draw-down creates a river environment for migrating salmon more like a natural stream). The federal dams which created the reservoirs that would be drawn down were built—despite the fact that the ratio of benefits provided to costs incurred was only 15 cents on the dollar in 1938—in order to provide subsidized slack water navigation and irrigation to farmers. *See* Michael C. Blumm, *Saving Idaho's Salmon: A History of Failure and a Dubious Future*, 28 IDAHO L. REV. 667, 672–73 (1991–92) [hereinafter Blumm, *Saving Salmon*].

38. *See* U.S. CORPS OF ENGINEERS, DEP'T OF THE ARMY, 1992 COLUMBIA RIVER SALMON FLOW MEASURES OPTIONS ANALYSIS—ENVIRONMENTAL IMPACT STATEMENT § 4 (1992) [hereinafter FLOW EIS] (stating that allowing salmon flows would adversely impact

Western water, the final resource subject to the control of the "Lords of Yesterday," is one of the most heavily subsidized resources. For example, by 1990, California irrigators using Central Valley Project water had been receiving federally subsidized water for forty years.[39] During that time, they had only repaid roughly one percent of total project costs.[40] The Bureau of Reclamation estimated that annual irrigation subsidies throughout the West totaled $2.2 billion in 1986.[41]

Perhaps not surprisingly, the effects of these subsidies are multiplied as the subsidized commodity moves through the various independently subsidized stages of production. For example, between 1976 and 1985, an average of about thirty-eight percent of the acreage served by Bureau of Reclamation water was used to produce crops eligible for subsidies under the Department of Agriculture's commodity programs.[42] Thus, federally subsidized water is used to produce federally subsidized crops which, after being shipped through federally subsidized navigation channels, are purchased through agricultural subsidy programs. Then the commercial shippers and the irrigators—many of whom also receive federally subsidized power rates to help them pump their federally subsidized water—claim that it is uneconomical to restore flows in the Columbia River for two months of the year to save endangered salmon species.[43] A better example of 'voodoo economics' could hardly be imagined.

Multiple use resource management promised the simultaneous satisfaction of a variety of human needs and wants. Yet multiple use has failed to fulfill this promise; instead, it has produced a costly system of subsidies that has encouraged the destruction of natural resources such as Columbia Basin salmon runs.

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shipping). *See also id.* at Appendix N, letter A13 (comments of Washington Association of Wheat Growers expressing opposition to reservoir drawdowns below minimum operating pool).

39. GAO REPORT, *supra* note 5, at 16.

40. *Id.*

41. *Id.* at 17. Note, however, that the Department of the Interior estimated the cost for the same subsidies in 1986 to be $534 million. *Id.*

42. *Id.*

43. *See* FLOW EIS, *supra* note 38, at Appendix N, Letter A13-2.

III. THE PASSING OF THE PUBLIC LAND SUBSIDY ERA

Mounting evidence signals the imminent decline and passing of Wilkinson's "Lords of Yesterday" and the system of subsidies which they mandate.[44] An optimistic forecast for the next four years might well include the following predictions: (1) grazing fees will rise significantly;[45] (2) below-cost timber sales will largely be eliminated;[46] and (3) the Mining Law will be reformed to ensure a better return for the government on sales of mineral resources.[47]

Unfortunately, it is less likely that the damage to salmon caused by federal dam subsidies will end.[48] Yet the Central Valley Project

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44. *See* WILKINSON, *supra* note 4, at 72 (advocating royalty payments and leasing system for hard rock mining on public lands); *id.* at 169–73 (discussing funding mechanisms that provide artificial incentives to overharvest federal forests); *id.* at 201–02 (estimating uncompensated costs of Northwest hydroelectric system on salmon runs); *id.* at 288–89 (calling for an end to water subsidies; quoting Wallace Stegner). Curiously, however, Wilkinson does not call for an end to public subsidies for grazing. *See id.* at 111–13 (calling instead for better rangeland management practices).

45. *See* 59 Fed. Reg. 14,314, 14,316, 14,335 (1994) (proposed Mar. 25, 1994) (discussing a rule which would double BLM grazing fees—from $1.98 per annual unit month ("AUM") to $3.96 per AUM over three years).

46. *See Clinton seeks elimination of below-cost sales*, PUB. LANDS NEWS, Mar. 4, 1993, at 6.

47. As of this writing, both the House of Representatives and the Senate had passed differing versions of Mining Act reforms. The House bill (H.R. 322) would place an eight percent royalty on gross profits, while the Senate bill (S. 775) would impose only a two percent royalty on net profits. The House bill would also ban patenting of public lands (patenting gives miners land ownership), while the Senate bill would continue patenting but require payment of fair market value. H.R. 322, 103d Cong., 1st Sess. (1993); S. 775, 103d Cong., 1st Sess. (1993); *see Mining Law Reform*, 24 Envt. Rep. (BNA) 1678 (Jan. 21, 1994); *see also Mine Law reform: A comparison of House and Senate bills*, PUB. LANDS NEWS, Dec. 9, 1993, at 5.

48. *See* Blumm & Simrin, *supra* note 13, 711–13 (detailing shortcomings of salmon restoration plan adopted under Northwest Power Act, 16 U.S.C § 839 (1988); *see also* Blumm, *Saving Salmon*, supra note 37, at 689–704, 712–13 (discussing weaknesses in 1991 amendments to Northwest Power Act's salmon restoration plan and potential of the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1988), to provide a more biologically sound restoration plan). Unfortunately, implementation of the Endangered Species Act no longer seems likely to produce a material improvement for the endangered and threatened Snake River salmon runs. For example, on the critically important issue of improving downstream salmon smolt migration to the ocean, a draft recovery plan includes no specific recommendations of spring and summer river flows. *E.g.*, SNAKE RIVER SALMON RECOVERY TEAM, DRAFT SNAKE RIVER SALMON RECOVERY PLAN RECOMMENDATIONS VIII-6 to VIII-10 (1993). The lack of specificity on flows in the draft recovery plan is especially curious, since the National Marine Fisheries Service, the agency responsible for Endangered Species Act consultation, is a longstanding member of a coalition of federal and state fish and wildlife agencies that in 1991 called for a specific schedule of spring and summer Snake River flows. *See* Blumm & Simrin, *supra* note 13, at 708 (chart with monthly flow levels recommended by the Columbia Basin Fish and Wildlife Authority, a coalition of the region's fishery agencies and Indian Tribes).

Improvement Act of 1992[49] ("CVPIA") did reduce subsidies for California irrigators while creating markets for water; now federal water can flow to those who value it the most instead of to those who are granted the most subsidies. CVPIA also ensures that a portion of Central Valley Project water will stay instream for fish and wildlife purposes.[50] Instream flows will benefit a number of endangered species, such as the Sacramento chinook salmon,[51] and will likely keep other species off the endangered list. Perhaps the CVPIA is a harbinger of things to come with respect to the Columbia Basin salmon.

The end of these subsidies may be on the short-term horizon. However, the "Lords of Yesterday" were not founded solely on the sales of underpriced minerals, timber, rangeland, and water. The concept of multiple use is an essential ingredient of the "Lords'" dominance.

Multiple use dominates land management on the vast majority of federal lands, including most of the lands administered by the Forest Service and BLM.[52] Although multiple use has been codified only in the last thirty years,[53] the concept has been a dominant force in the management of the national forests at least since 1905, when Gifford Pinchot was made Chief Forester of the newly cre-

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49. The Central Valley Project Improvement Act, Pub. L. No. 102-575, § 3406, 106 Stat. 4706, 4714–26 (1992). For overviews of this statute, see Robert Reinhold, *New Age for Western Water Policy: Less for the Farm, More for the City*, N.Y. TIMES, Oct. 11, 1992, at 18; Phillip A. Davis, *Water Bill Heads to Bush's Desk Over Farm Interests' Protests*, 50 CONG. Q. WEEKLY REP. 3150 (Oct. 10, 1992).

50. The Central Valley Project Improvement Act, Pub. L. No. 102-575, § 3406(b)(2), 106 Stat. 4706, 4715–16 (1992). *See* Harrison C. Dunning, *Confronting the Environmental Legacy of Irrigated Agriculture in the West: The Case of the Central Valley Project*, 23 ENVTL. L. 943, 960–63 (1993).

51. *See* Endangered and Threatened Species, Sacramento River Winter-Run Chinook Salmon, 55 Fed. Reg. 46,515 (1990). The National Marine Fisheries Service recently reopened the comment period to reclassify Sacramento Winter Chinook from threatened to endangered. Endangered and Threatened Species, Sacramento River Winter-Run Chinook Salmon, 58 Fed. Reg. 47,710 (1993). For a discussion of the imperiled state of Pacific salmon in the Northwest, see Willa Nehlsen et al., *Pacific Salmon at the Crossroads: Stocks at Risk from California, Oregon, Idaho, and Washington*, FISHERIES, no. 2 of 1991, at 24. The American Fisheries Society lists more than a dozen species of Columbia Basin salmon whose stocks are depressed and declining, two of which may be extinct or nearly extinct. *See id.* at 32–35.

52. 2 COGGINS & GLICKSMAN, *supra* note 8, § 16.01[1].

53. The legislative definition of the term "multiple use" first appeared in the Multiple Use, Sustained Yield Act of 1960 and is reprinted *supra* note 10. Congress reaffirmed that multiple use is in the national interest in the National Forest Management Act of 1976, 16 U.S.C. § 1600 (1988).

ated Forest Service.[54] Multiple use promises the greatest good to the greatest number over a long-term period; whether it is capable of delivering on that promise is debatable. Yet it is certain that multiple use means management by bureaucrats with little or no oversight from Congress.[55] In fact, multiple use is a wholesale delegation of authority to land managers to act in the public interest.

Multiple use promises the simultaneous satisfaction of a variety of desired uses of the land. Moreover, multiple use gives land managers the flexibility to adjust to changing conditions.[56] It has therefore served to defend federal land ownership from the attacks of those who advocate the privatization of federal lands to timber, mining, and grazing interests. Such a disposition into the hands of private entities would ensure that the lands were managed under dominant use principles. Dominant use management could perhaps allow for more production of a particular commodity or resource in a particular location. Yet multiple use always seemed to promise more: it promised that over the vast stretches of land managed under multiple use principles, simultaneous pursuit of the development of all resources and commodity outputs would, in the aggregate, be more productive than the management of many individual parcels according to dominant use principles.[57] This theory that the

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54. *See* James L. Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239, 267–68 (1978).

55. George C. Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. COLO. L. REV. 229, 230–31 (1982) [hereinafter Coggins, *Succotash*]; *see also* George C. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1 (1983); *cf.* George C. Coggins & Parthenia B. Evans, *Multiple Use, Sustained Yield Planning on the Public Lands*, 53 U. COLO. L. REV. 411, 411–13 (1982) (arguing that managerial decisions nonetheless are constrained by statutes and agency plans). Other discussions of multiple use in the legal literature include Steven E. Daniels, *Rethinking Dominant Use Management in the Forest-Planning Era*, 17 ENVTL. L. 483 (1987); Faye B. McKnight, *The Use of "Special Management Areas" as Alternatives to Wilderness Designation or Multiple Use Management of Federal Public Lands*, 8 PUB. LAND L. REV. 61 (1987); John D. Leshy, *Sharing Federal Multiple Use Lands: Historic Lessons and Speculations for the Future*, *in* RETHINKING THE FEDERAL LANDS 235 (Sterling Brubaker ed., 1984).

56. *See* James H. Magagna, *Is the Multiple Use/Sustained Yield Management Philosophy Still Applicable Today? Yes*, *in* COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, U.S. HOUSE OF REPRESENTATIVES, 102D CONG., 2D SESS., MULTIPLE USE AND SUSTAINED YIELD: CHANGING PHILOSOPHIES FOR FEDERAL LAND MANAGEMENT? at 89, 91 (Comm. Print No. 11, 1992) [hereinafter MULTIPLE USE PHILOSOPHY].

57. *See* Perry R. Hagenstein, *Some History of Multiple Use/Sustained Yield Concepts*, *in* MULTIPLE USE PHILOSOPHY, *id.*, at 31.

whole would be greater than the sum of the parts played a major role more than once in staving off efforts to sell the public lands.

When combined with widespread public participation and interest group pluralism, multiple use seemed to offer the best prospects for allowing democratic processes to decide how to allocate use of the public lands. Yet multiple use has not produced balanced results, as the cost figures reported by GAO indicate.[58] Moreover, public choice theory supports the proposition that multiple use cannot fulfill its promise because it is inherently biased toward commodity users.

IV. PUBLIC CHOICE THEORY

Public choice theory is a theory of public law that has gained increasing respect among legal scholars during the last decade, largely as a result of the law and economics movement. Briefly described, public choice theory applies the economist's methods to the political scientist's subject;[59] it is the economic study of certain types of decisionmaking ordinarily understood to be outside of the realm of the market. Although it was quite popular for some time outside of the legal world, public choice theory remained fairly obscure until James Buchanan was awarded the Nobel Prize in Economics in 1986.[60]

Since then, some legal scholars as well as certain judges (notably Judges Posner and Easterbrook of the Seventh Circuit)[61] have become quite interested in applying the lessons of economics to the making of public policy, with many scholars and judges focusing especially on legislation. This fusion of economics and political science has succeeded in challenging the assumption of Legal Process theorists that law is made by publicly interested legislators.[62] Instead, public choice analysis takes a more critical view of the making of public policy in a democracy. According to public

58. *See supra* notes 18–28, 31–33, 35–36, 39–42 and accompanying text.

59. FARBER & FRICKEY, *supra* note 14, at 1.

60. *See id.*

61. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992); Frank H. Easterbrook, *Some Tasks In Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284 (1992).

62. *See* HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958); *see also* FARBER & FRICKEY, *supra* note 14, at 22.

choice theory, legislators are self-serving individuals whose chief interest is not the fostering of the public's interests, but rather of their own reelection.[63] The branch of public choice theory called the "interest group theory" sees the legislature as either a playground of special interests or a passive mirror of self-interested constituents.[64]

A second branch of public choice theory, inspired by a theorem first stated by Kenneth Arrow,[65] views the legislative process as a slot machine insofar as its results are entirely unpredictable or arbitrary.[66] This latter branch emphasizes the fundamental arbitrariness of majority rule, claiming that results of majority rule are partly determined by the legislative agenda (the order in which alternatives arise for a vote).[67]

Although this Article emphasizes the interest group branch of public choice theory, both analytic branches may be applied to demonstrate that the phrase "the will of the people" has little real meaning in the making of public policy. Public choice theorists claim that civic republicanism, which praises legislatures as forums for public deliberation and civic virtue, falsely describes reality.[68] According to public choice theory, legislators are simply self-interested "rent-seekers."[69] The lessons of economics as applied to democracy therefore produce a dismal picture of the making of public policy.

Yet a couple of disclaimers should be added here. First, public choice theory is a positivist theory; it is merely descriptive, without normative aspirations. It should not be assumed that public choice theorists advocate that public policy reflect only the self-interest of policymakers. Rather, the assumption that politicians are self-inter-

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63. FARBER & FRICKEY, *supra* note 14, at 22.

64. *Id.* at 12–37.

65. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963); *see also* FARBER & FRICKEY, *supra* note 14, at 38–62.

66. FARBER & FRICKEY, *supra* note 14, at 7, 38.

67. *Id.* at 7, 38, 40.

68. *Id.* at 8.

69. Rent-seeking behavior employs the political process to produce results furthering individual or group interests. The rewards are "economic rents"—payment for use of an economic asset in excess of its market price. *See* Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 879–80 (1991) (outlining view that legislative process is controlled by rent-seeking efforts).

ested allows public choice theorists to understand and describe reality more accurately.[70]

Second, even the most rigorous public choice analyses do not claim that the concept of self-interest can explain all political decisionmaking. Unselfish ideological or other individual beliefs about the public interest do play an important and vital role in the formulation of public policy.[71] Thus, neither ideology nor self-interest should be considered an exclusive causal agent in the political arena.[72]

Most public choice legal studies have focused on legislatures.[73] This Article, however, uses public choice theory to examine two principal land management agencies which operate under the multiple use paradigm: the Forest Service and BLM.

As previously noted, the interest group branch of public choice theory contends that the results of the political process are the products of deals between self-interested actors who use public power to further private ends.[74] Consequently, the general public interest is inevitably and persistently sacrificed due to the power of organized special interests. These special interest groups engage in rent-seeking behavior; namely, they attempt to obtain economic benefits for themselves through government intervention in the market on their behalf.[75] Successful rent-seeking on the part of special interests results in government policies that cost the public more than they are worth, such as government programs that become too large, are wrongly directed, or produce perverse redistributions of wealth.[76]

The economic theory of interest group dominance can be traced to Mancur Olson's 1965 study, *The Logic of Collective Action*.[77]

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70. *See* FARBER & FRICKEY, *supra* note 14, at 1–11.

71. *See* Michael C. Blumm, *The Fallacies of Free Market Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 371, 372–73, 388–89 (1992).

72. *See* FARBER & FRICKEY, *supra* note 14, at 55–62.

73. *See, e.g.*, FARBER & FRICKEY, *supra* note 14, at 17–33 (citing numerous studies); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 883–906 (1987) (citing numerous studies).

74. *See* FARBER & FRICKEY, *supra* note 14, at 12–17.

75. *Id.* at 34. Economic rents may be defined as payments in excess of the market price for the use of an economic asset. *See supra* note 69.

76. *See supra* notes 25–41 and accompanying text.

77. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965). *See also* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990) (arguing that cooperative institutions organized and governed by resource users are a viable solution to this

The Olson study emphasized the futility of any individual's attempt to produce a collective good, such as a strong national defense, clean air, or ecologically sensitive public land management.[78] Since any single person's efforts will inevitably produce small effects, a self-interested and rational person in a democracy will choose to do nothing and instead take a "free ride" on the efforts of others. Olson asserted that because of this phenomenon, organizing large numbers of individuals seeking broadly dispersed public goods would be extremely difficult, and he predicted that political activity would be dominated by small special interest groups engaging in rent-seeking at the expense of the public.[79]

Thirty years later, Olson's study has a ring of truth, but it failed to anticipate the development of what has been called the "post-New Deal model of administrative law."[80] In enacting the array of legislation which comprised the New Deal, Congress gave administrative agencies broad—indeed, virtually standardless—mandates in an attempt to foster decisionmaking by scientific or technical experts insulated from accountability to either Congress or the courts.[81] The New Dealers assumed that by removing administrative policymakers from politics and, in particular, legislative logrolling, the administrators would be free to pursue the public interest.[82] Yet by the mid-1960s, when Olson wrote, the New Deal model instead had produced a widespread perception that administrative agencies were stagnant bureaucracies incapable of pursuing the public interest because of "capture" by organized interests or by constituents with narrowly defined economic concerns.[83] In the 1960s and 1970s, efforts were made to use legislative directives to overcome agency capture by formulating a new model for ad-

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problem); Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (arguing that government control and privatization are alternative solutions to the problem of management of common property resources).

78. *See* OLSON, *supra* note 77, at 13–16. Olson argued that "when a number of individuals have a common or collective interest . . . individual, unorganized action . . . will either not be able to advance that common interest at all, or will not be able to advance that interest adequately." *Id.* at 7.

79. *See id.* at 126–29. *See also* FARBER & FRICKEY, *supra* note 14, at 23.

80. *See* Bruce Ackerman & William Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466, 1474–79 (1980); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676–81 (1975).

81. *See* Ackerman & Hassler, *supra* note 80, at 1471–74.

82. *See generally* Stewart, *supra* note 80, at 1682–85.

83. *See id.*

ministrative agencies. Under this "post-New Deal"[84] model, Congress would supply more standards for agencies to employ in pursuit of the public interest, and the process of agency decisionmaking would be made more accessible to the public at large.[85]

Although Congress supplied a few new standards to the public land agencies, such as the directive to ensure "a diversity of plant and animal communities" in the National Forest Management Act of 1976 ("NFMA"),[86] these agencies were not extensively affected by the increased statutory specification of the post-New Deal model.[87] The operative management principle on the public lands remained the system of multiple use, a standardless delegation of authority to land managers that some commentators consider a "collection of vacuous platitudes."[88]

Most of the reforms of the 1960s and 1970s pertaining to public lands emphasized increasing public participation in public land management decisionmaking rather than providing more specific statutory mandates. The scope of public involvement increased first with the passage of the National Environmental Policy Act ("NEPA") in 1970[89] and continued to expand through implementation of the planning requirements of the Federal Land Policy and Management Act ("FLPMA")[90] and NFMA in 1976.[91] In these statutes, Congress attempted to overcome agency capture of public land management by broadening interest group competition, thereby evening the odds between the emerging environmental movement and the historically dominant commodity interest groups.[92] In theory, increased

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84. *See generally* Ackerman & Hassler, *supra* note 80, at 1474–76.

85. *See id.* at 1475–79 (increased standards); Stewart, *supra* note 80, at 1748–60 (increased citizen participation).

86. 16 U.S.C. § 1604(g)(3)(B) (1988).

87. *See generally* Huffman, *supra* note 54, at 272–78; *cf.* Coggins, *Succotash*, *supra* note 55, at 230–31, 250–79 (recognizing that many commentators believe that post-New Deal statutes were largely without legal content, but arguing that such laws created enforceable standards).

88. Comment, *Managing Federal Lands: Replacing the Multiple Use System*, 82 YALE L. J. 787, 788 (1973), *quoted in* Coggins, *Succotash*, *supra* note 55, at 230.

89. *See generally* 42 U.S.C. §§ 4321–4370(d) (1988). *See also Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act*, 20 ENVTL. L. 447–810 (1990) (assessing NEPA's history and current role in environmental protection).

90. *See* 43 U.S.C. §§ 1701–1784 (1988). *See also Symposium: The Federal Land Policy and Management Act*, 21 ARIZ. L. REV. 267–597 (1979).

91. *See* 16 U.S.C. §§ 1600–1614 (1988). *See also Symposium on Federal Forest Law and Policy*, 17 ENVTL. L. 365–766 (1987).

92. *See* John D. Leshy, *Is the Multiple Use/Sustained Yield Management Philosophy*

pluralism would provide checks and balances that would overcome the dominance of narrow special interest groups where appropriate.

An influential 1981 study, Paul Culhane's *Public Land Politics*, supported this theory of "balanced" pluralism, contending that the new public participation ushered in by NEPA and the land management statutes successfully reduced agency capture.[93] Culhane rejected the "capture" thesis that concluded land managers would inevitably be captured by the livestock and forest products industries which dominate the rural communities where the managers live. Although he conceded that well-organized local groups can have a significant influence on land management decisions, Culhane suggested on the basis of empirical studies that local constituencies are not exclusively composed of commodity users, but also include some conservationists and wildlife recreation enthusiasts.[94] This mixture of interest groups results in land managers being "variably" rather than uniformly captured:[95] in localities where environmentalists are strong, they can obtain wilderness designations; in localities where local commodity users are strong, they can maintain grazing allotments and timber sales. According to Culhane, "variable capture" satisfies both the mandate of multiple use and the pluralist vision of administrative responsibility by granting diverse opposing groups access to public land decisionmakers, and by ensuring that all organized groups are represented in public land decisionmaking processes.[96]

Public choice theory exposes the limitations of Culhane's thesis that interest group pluralism adequately protects the public interest. Public choice studies suggest that the influence of special interest groups will be strongest under three conditions: (1) when the group opposes changes to the status quo; (2) when the group's goals are narrow and have low political visibility; and (3) when the group has the ability to enlist support from an alternative friendly forum, such as a sympathetic Congressman or congres-

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Still Applicable Today?, *in* MULTIPLE USE PHILOSOPHY, *supra* note 56, at 112–13 (commenting on Congress's efforts to impose broad public participation requirements and procedural regularity on land management agencies).

93. *See* PAUL J. CULHANE, PUBLIC LAND POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT (1981).

94. *Id.* at 204–05.

95. *Id.* at 333–34.

96. *Id.*

sional committee.[97] These factors illustrate why interest group pluralism produces both poor economic and poor environmental results on multiple use lands. Commodity-based interest groups pressure land managers to maintain historic levels of grazing and timber harvesting in low visibility administrative decisions, such as grazing allotments or timber sales, in order to benefit their narrow economic concerns.[98] These groups frequently have been able to draw on the support of sympathetic western senators and congressmen, who view the support of rural communities as essential to their reelection.[99] For example, Wilkinson has recorded the effects of commodity-based interest group pressure on national forests, rangelands, and dam operations.[100] These effects also surfaced in the Clinton Administration's recent decision to drop attempts to raise mining and grazing fees as part of its deficit reduction package.[101] Culhane's claim that land managers are not inevitably captured may be right,[102] but generally managers produce more commodities under the rubric of multiple use than can be economically or environmentally justified.[103]

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97. FARBER & FRICKEY, *supra* note 14, at 19.

98. On grazing, see FERGUSON & FERGUSON, *supra* note 11; LYNN B. JACOBS, WASTE OF THE WEST: PUBLIC LANDS RANCHING (1991); George Coggins, *The Law of Public Range Land Management V: Prescriptions for Reform*, 14 ENVTL. L. 497 (1984). On below-cost timber sales, see generally Kenneth R. Barrett, Note, *Section 6(k) of the National Forest Management Act: The Bottom Line on Below-Cost Timber Sales?*, 1987 UTAH L. REV. 373 (analyzing section 6(k) of the National Forest Management Act, Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended at 16 U.S.C. § 1604(k) (1988)), as a foothold for challenging below-cost management plans); James F. Morrison, *The National Forest Management Act and Below Cost Timber Sales: Determining the Economic Suitability of Land for Timber Production*, 17 ENVTL. L. 557 (1987) (arguing that the Forest Service should reconsider its policy of "nondeclining even flow," which maintains harvest levels equal to or greater than the levels of previous decade).

99. *See* DANIEL MCCOOL, COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER 9, 28, 72–80 (1987) (discussing the domination by western congressmen of congressional committees responsible for authorizing and funding reclamation projects); MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 148 (1986) (quoting Sen. Paul Douglass of Illinois, who unsuccessfully opposed Colorado River storage project, as stating: "There exists an interesting tendency for Senators in those [western] States to congregate on the Committee on Interior and Insular Affairs and the Committee on Appropriations, which consider irrigation and reclamation bills. There is a sort of affinity, just as sugar draws flies"). *Id.*

100. *See* WILKINSON, *supra* note 4, at 75–174, 219–92.

101. *See* Richard L Berkle, *Clinton Backs Off From Policy Shift on Federal Lands*, N.Y. TIMES, Mar. 31, 1993, at A1; Dirk Johnson, *West that was turns its back on land-use fees*, OREGONIAN, Apr. 6, 1993, at A10; *Clinton agreement will make commodity reforms harder*, PUB. LANDS NEWS, Apr. 15, 1993, at 1.

102. *See* CULHANE, *supra* note 93, at 339–41.

103. *See supra* notes 24–41 and accompanying text.

There is another limitation on the Culhane thesis: interest group pluralism assumes that organized groups will accurately reflect the interests of the public at large.[104] Public choice theory, however, contradicts this notion, predicting that those who have an immediate economic stake in a particular outcome will be more willing to pay for political influence.[105] By contrast, broadly diffused interests—especially consumer interests in public goods like environmental quality—are likely to be underrepresented by organized groups because of the "free rider" problem, at least until neglect and mistreatment finally spur the public to organize.[106]

Yet another limitation of Culhane's thesis is implicit in his suggestion that public lands decisionmaking is the product of organized *local* interests.[107] That may be an accurate reflection of reality, but it raises a troubling question: why should public land management be a reflection of local struggles between commodity users and preservationists when the public lands belong to the entire nation? A theory that assumes organized local interests are a surrogate for the national public interest is a recipe for imbalance.

The present conception of multiple use should therefore be discarded insofar as it leads to economic exploitation of the nation's public lands by narrowly focused special interest groups. Instead of managing in the public interest, "captured" land managers serve factional interests, thus undermining the long term sustainability of public land resources.

V. Redefining Multiple Use

Application of public choice theory leads to the conclusion that the benefits of multiple use—its flexibility and its capability to adjust to changing conditions[108]—will be outweighed by the effects of land manager capture by local commodity interests. It is true that over the past twenty years, Congress has acted to curtail the excesses of multiple use by reducing the land base subject to multiple

104. *See* Culhane, *supra* note 93, at 340–41.
105. *See* Farber & Frickey, *supra* note 14, at 19–23.
106. *See id.* at 23, 37, 146.
107. *See* Culhane, *supra* note 93, at 332–34.
108. *See supra* note 56 and accompanying text.

use principles.[109] This land base reduction has been accomplished by legislation prescribing dominant use principles (mostly preservationist) for wilderness areas, for wild and scenic rivers, and for national recreational areas.[110] In addition, Congress has reined in multiple use by imposing some substantive limitations on land managers, such as the Endangered Species Act,[111] the Clean Water Act[112] and certain provisions in the NFMA (particularly the directive to produce diverse fish and wildlife populations).[113] Yet multiple use principles remain the status quo on most federal lands,[114] and the economic and environmental costs of these policies are high—too high to leave multiple use unchanged as we move into the twenty-first century. Eliminating subsidies for grazing, mining, timber harvesting, power production, and water use is only half the challenge for the future; redefining multiple use is the other half.

When redefining multiple use, Congress must also redefine its companion concept: sustained yield.[115] The term "sustained use" actually became a legislative directive before multiple use, and played an important role in the interpretation of multiple use. Some twenty-three years before Congress enacted the Multiple Use, Sustained Yield Act of 1960 ("MUSYA"),[116] the 1937 Oregon and California Lands Act ("OCLA") directed that BLM manage timber on OCLA lands of western Oregon on a sustained yield basis in order to provide both a permanent source of timber and economic stability to local communities and industries.[117] OCLA's authors

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109. *See* Leshy, *supra* note 92, at 111–12.

110. *See* Wilderness Act, 16 U.S.C. §§ 1131–1136 (1988 & Supp. IV 1992); Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287 (1988 & Supp. 1993); National Conservation Recreational Areas, 16 U.S.C. § 460(k)–460(k)(4) (1988).

111. 16 U.S.C. §§ 1531–1544 (1988). *See generally* DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION (1989).

112. 33 U.S.C. §§ 1251–1328 (1988). *See generally* H. Michael Anderson, *Water Quality Planning for the National Forests*, 17 ENVTL. L. 591 (1987).

113. 16 U.S.C. § 1604(g)(3)(B) (1988). Regulations implementing the diversity requirement appear at 36 C.F.R. § 219.27(g) (1993).

114. *See* Magagna, *supra* note 56, at 89–93.

115. 16 U.S.C. § 531(h) (1988). *See also* 16 U.S.C. § 529 (1988); 43 U.S.C. § 1732(a) (1988). The term "sustained yield" means "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources" of the public lands consistent with multiple use. 16 U.S.C. § 531(b) (1988); 43 U.S.C. § 1702(h) (1988).

116. 16 U.S.C. §§ 528–531 (1988).

117. Oregon and California Railroad Grant Lands Act, ch. 876, 50 Stat. 874 (1937) (codified as amended at 43 U.S.C. § 1181(a)–(j) (1988)). *See* Headwaters, Inc. v. BLM, Medford Dist., 914 F.2d 1174, 1183–84 (9th Cir. 1990) (affirming BLM's "dominant use" interpretation of OCLA); STEPHEN DOW BECKHAM, O & C SUSTAINED YIELD ACT: THE

intended federal timber to sustain existing mills and timber communities as timber from private lands was depleted.[118]

Seven years later, the 1944 Sustained Yield Forest Management Act introduced sustained yield practices to the national forests.[119] Although neither of these statutes defined sustained yield, in practice the concept meant sustaining timber harvests, not sustaining timber resources. Congress assumed that a sustained yield of timber (as opposed to the overcutting that characterized private timber lands) would also benefit wildlife, watersheds, and other forest resources.[120] But because they emphasized a sustained yield of timber and relegated other forest resources to the status of incidental benefits, the sustained yield statutes ought to be seen as a de facto ratification of dominant use principles—in this case, dominant timber use.

As for the public rangelands, there is no question that dominant use management prevailed in the 1940s. The hegemony of livestock grazing on public rangelands during those years is epitomized by the name of the government entity entrusted with regulating use of these lands, the Grazing Service (which in 1946 became the Bureau of Land Management).[121] The Grazing Service distributed grazing allotments on the basis of historic use, not on the basis of the carrying capacity of the lands.[122]

By the 1940s, then, sustained yield meant only the maintenance of a given level of periodic output of commodity products. Federal land management attempted to maintain historic levels of grazing on public rangelands, and also to maintain existing mills and dependent communities with timber from federal lands as private timber stocks declined. Sustained yield was not interpreted to focus on sustaining the underlying public land resources, however.[123]

LAND, THE LAW, THE LEGACY 11 (1987); Paul G. Dodds, *The Oregon and California Lands: A Peculiar History Produces Environmental Problems*, 17 ENVTL. L. 739 (1987).

118. *See* Dodds, *supra* note 117, at 759; Hagenstein, *supra* note 57, at 34–35.

119. 16 U.S.C. § 583 (1988); *see also* Hagenstein, *supra* note 57, at 35; Huffman, *supra* note 54, at 274.

120. Hagenstein, *supra* note 57, at 35.

121. *See* George Coggins, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 2 (1982); Valerie W. Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 MONT. L. REV. 155 (1967).

122. *See* 2 COGGINS & GLICKSMAN, *supra* note 8, § 19.01[3].

123. *See* R.W. Behan, *The Irony of the Multiple Use/Sustained Yield Concept:*

Public choice theory helps to explain how the statutory authorizations of sustained yield enacted a generation prior to congressional ratification of multiple use influenced the professional debate over the meaning of multiple use long before the latter term was actually codified in 1960.[124] One multiple use approach was championed by Forest Service silviculturalist G.A. Pearson. Pearson advocated spatial and temporal allocation of a variety of dominant uses. In other words, this "segregated multiple use" would give land managers broad discretion to allocate single uses to specific areas. When considered as a whole, the various areas with diverse dominant uses would theoretically be equivalent to multiple use within the entire system.[125]

Samuel Dana, Dean of the School of Natural Resources at the University of Michigan and editor of the *Journal of Forestry*, offered an alternative approach.[126] Contending that multiple use should be interpreted to mean that "more than one use would be made of each area of forest land," he argued that "various uses are seldom wholly incompatible," and that forests ought to be thought of as "communities" important not merely for timber production but also for the fish and wildlife habitat and scenic value they provide.[127] Dana's advocacy of "simultaneous production" of many resources on the same piece of land can be seen as a forerunner of modern concerns for ecosystem management.[128] If Dana's approach had been more influential, land managers might have defined multiple use to focus on ecological relationships, biodiversity maintenance, watershed boundaries, integrated management, and sensitivity to cumulative environmental impacts. Dana's interpretation of multiple use also would have emphasized the role of the professional biologists, rather than the professional foresters,[129] and would have

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Nothing is so Powerful as an Idea Whose Time Has Passed, *in* MULTIPLE USE PHILOSOPHY, *supra* note 56, at 95, 105–06.

124. 16 U.S.C. § 531(a).

125. *See* Hagenstein, *supra* note 57, at 32.

126. *See* SAMUEL T. DANA & SALLY K. FAIRFAX, FOREST AND RANGE POLICY (2d ed. 1980).

127. *See* Hagenstein, *supra* note 57, at 32.

128. *See, e.g.*, Robert B. Keiter, *Taking Account of the Ecosystem on the Public Domain: Law and Ecology in the Greater Yellowstone Region*, 60 U. COLO. L. REV. 923 (1989).

129. *See* Charles F. Wilkinson, *The Forest Service: A Call For a Return to First Principles*, 5 PUB. LAND L. REV. 1, 8, 27 (1984) (noting domination of Forest Service by professional foresters since its inception).

limited the discretion of land managers by requiring them to base their decisions on ecological principles. But, perhaps most significantly, Dana's interpretation conflicted with the emphasis that the already enacted sustained yield statutes placed on sustained outputs, commodity uses, and local economic concerns.[130] In the end, the debate over the interpretation of multiple use was heavily influenced by its predecessor, sustained yield, and Dana's theories were not widely accepted.

In retrospect, public choice theory explains why the professional interpretation of multiple use adopted the Pearson approach, and consequently, like its ideological stepfather, sustained yield, emphasized resource outputs.[131] Multiple use was to be achieved by the adjacent allocation of dominant uses to fulfill the preexisting commitment to sustained commodity production.[132] Public choice theorists might suggest that policymakers favored this arrangement because this system would serve the rent-seeking interests of local economic concerns.[133] It also maximized the administrative discretion of federal land managers, consistent with New Deal philosophy.[134] Finally, this approach made multiple use neatly compatible with the preexisting interpretation of sustained yield.

As a result, multiple use and sustained yield had a bias in favor of commodity production well in advance of the enactment of MUSYA.[135] In accordance with Pearson's vision of a patchwork of dominant use tracts, MUSYA legitimized the professional understanding of multiple use and sustained yield, particularly in its emphasis that multiple use be measured "over areas large enough to provide sufficient latitude for periodic adjustments" by the land managers.[136] The Act's statutory definition of multiple use instructed land managers that they did not have to emphasize "the greatest dollar return or the greatest unit output,"[137] but the momentum of the previous standard overwhelmed this advice. Also overlooked by land managers was the statutory directive that multiple use

130. *See* Hagenstein, *supra* note 57, at 32–41.
131. *See supra* notes 115–123 and accompanying text.
132. *See* Hagenstein, *supra* note 57, at 31–32.
133. *See* Farber & Frickey, *supra* note 69, at 879–80; *see supra* notes 63–64, 68–70, and accompanying text.
134. *See supra* notes 81–82 and accompanying text.
135. 16 U.S.C. §§ 528–531 (1988).
136. *Id.* § 531(a).
137. *Id.*

should not produce "impairment of the productivity of the land."[138] At the insistence of the land managers, this statutory promise of nonimpairment was never defined,[139] and it was regularly ignored over the next thirty years, as commitments to sustained commodity production, segregated landscapes, and maintenance of local economies took precedence.

Congress' decision to expand the multiple use concept to BLM lands in 1964,[140] and its subsequent decision to make multiple use and sustained yield permanent management directives in FLPMA,[141] did little to change these preexisting commitments. In fact, FLPMA's definition of sustained yield emphasizes a perpetually *high* output of resources.[142]

With regard to the national forests, the output orientation of sustained yield was insured by administrative interpretation of the 1974 Forest and Rangeland Renewable Resources Planning Act.[143] This statute called for the federal government to set national output goals to be produced by the national forest system taken as a whole.[144] These national goals, which in recent years have been set in appropriation statutes,[145] emphasize commodity outputs, such as board feet of timber. Over the two decades between 1974 and the present, board feet quotas became the driving force shaping the content of forest management plans called for by NFMA.[146]

Despite this persistent focus on a high output of resources, there are indications that changes in the system's focus on commodity production are possible. For example, although NFMA appeared to ratify the preexisting concepts of multiple use and sustained yield, it also sowed the seeds of a redefinition. Among other

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138. *Id.*

139. *See* Hagenstein, *supra* note 57, at 36–38.

140. Classification and Multiple Use Act of 1964, Pub. L. No. 88-607, 78 Stat. 986 (1964).

141. 43 U.S.C. §§ 1701–1784 (1988).

142. *Id.* § 1702(h) ("The term 'sustained yield' means the achievement and maintenance in perpetuity of a high-level annual or regular periodic *output* of the various renewable resources of the public lands consistent with multiple use." (emphasis added)).

143. 16 U.S.C. §§ 1601–1610 (1988).

144. *Id.* § 1602.

145. *See, e.g.*, Department of the Interior and Related Agencies Appropriations Act of 1989, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745–50 (1989); Continuing Appropriations for Fiscal Year 1986, Pub. L. No. 99-190, 99 Stat. 1185, 1226–27 (1985). *See also* Michael C. Blumm, *Ancient Forests and the Supreme Court: Issuing a Blank Check for Appropriation Riders*, 43 WASH. U. J. URB. & CONTEMP. L. 35 (1993).

146. 16 U.S.C. § 1604 (1988).

things, the statute directed the Forest Service to ensure that the forests "provide for diversity of plant and animal communities."[147] According to Judge William Dwyer of the Western District of Washington, this more specific instruction is judicially enforceable[148]—unlike MUSYA's statutory directive that land productivity not be impaired,[149] a mandate which the courts ruled was too vague to be judicially enforced.[150] Thus the Forest Service must now demonstrate how its land management plans will achieve the congressional commitment to diverse populations of fish and wildlife. This diversity requirement may lead the Forest Service to reinterpret sustained yield to mean sustained production of all forest resources, not merely of commodity outputs, and to reinterpret multiple use to encourage simultaneous use of all forest resources.

A changed definition of multiple use and sustained yield might also come about through the application of environmental statutes such as the Endangered Species Act[151] and the Clean Water Act.[152] We are seeing the effects of the Endangered Species Act in the Northwest with respect to efforts to preserve spotted owl habitat.[153]

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147. *Id.* § 1604(g)(3)(B).

148. Specifically, Judge Dwyer noted:

> [A]n agency cannot exempt itself from duties plainly imposed by law; it cannot decide that only one of two statutes governs its activities when the laws themselves, and the implementing regulations, clearly show that both apply. Moreover, if agency interpretation is determined by agency practice rather than by an argument raised in court, it is clear that the Forest Service has understood at all times that its duties under NFMA and [NEPA] are concurrent.
>
> The listing of the northern spotted owl as a threatened species did not relieve the Forest Service of its obligations under NFMA or NEPA.

Seattle Audubon Soc'y v. Robertson, 1991 WL 180099, at *7 (W.D. Wash. Mar. 7, 1991) (citations omitted).

149. 16 U.S.C. § 531(a) (1988).

150. *See, e.g.*, National Wildlife Fed'n v. U.S. Forest Serv., 592 F. Supp. 931, 938–39 (D. Or. 1984), *appeal dismissed as moot*, 801 F.2d 360 (9th Cir. 1987) (holding MUSYA's nonimpairment directive, 16 U.S.C. § 531(a) (1988), to be unenforceable).

151. 16 U.S.C. §§ 1531–1543 (1988).

152. 33 U.S.C. §§ 1251–1328 (1988).

153. *See* Michael C. Blumm, *Ancient Forests, Spotted Owls, and Modern Public Land Law*, 18 B.C. ENVTL. AFF. L. REV. 605 (1991). For a thorough overview of the requirements of the Endangered Species Act, codified at 16 U.S.C. §§ 1531–1544, see ROHLF, *supra* note 111. *See also* Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993); Robert L. Fischman, *Biological Diversity and Environmental Protection: Authorities to Reduce Risk*, 22 ENVTL. L. 435 (1992).

The existence of other potentially endangered and listed species, such as the Snake River salmon,[154] portends even more dramatic changes over a broader landscape. If rigorously enforced, the Clean Water Act's water quality standards[155] could impose a minimum watershed management standard that may dramatically affect public land management in the near future.[156] For example, the Ninth Circuit has on a number of occasions enjoined timber sales for violating water quality standards,[157] and the Clinton Administration's proposed rangeland reforms would establish compliance with state water quality standards as one of the national standards for grazing practices on public rangelands.[158]

VI. CONCLUSION

It is clear that the concepts of multiple use and sustained yield have failed to produce sustainable public land ecosystems supporting a variety of renewable resources. This failure is demonstrated by the enormous costs of the subsidy system as well as by that system's deleterious effects on wildlife, such as the decline in salmon populations.[159] Public choice theory explains that in its present form, multiple use cannot function as its proponents claim because it is inherently biased towards commodity users. The response to this failure, however, does not lie in opening the public lands to the benefits of the market through the privatization of the national forests and rangelands.[160] If we had privatized all timberlands in the Northwest, for example, the market would have produced no spotted owl habitat over which to argue. Even if we were to privatize public lands by giving equal amounts of federal land

154. *See* Blumm, *Saving Salmon*, *supra* note 38, at 696–704, 712–13.

155. 33 U.S.C. § 1313 (1988).

156. *See generally* Michael Anderson, *Water Quality Planning for the National Forests*, 17 ENVTL. L. 591 (1987); Richard H. Braun, *Emerging Limits on Federal Land Management Discretion: Livestock, Riparian Ecosystems, and Clean Water Law*, 17 ENVTL. L. 43 (1986).

157. *See* Marble Mountain Audubon Soc'y v. Rice, 914 F.2d 179, 182–83 (9th Cir. 1990); Oregon Natural Resources Council v. U.S. Forest Serv., 834 F.2d 842, 848–53 (9th Cir. 1987); Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 697 (9th Cir. 1986).

158. 59 Fed. Reg. 14,314, 14,353–54 (1994) (proposed Mar. 25, 1994).

159. *See supra* notes 13, 34–37, 43, 48, and accompanying text.

160. *See supra* note 6.

to the Nature Conservancy and the Weyerhaeuser Corporation,[161] privatization would serve only to increase the segregated, dominant use landscapes that characterize the forests and rangelands of the West today.[162]

Privatization is not the solution for the West of the twenty-first century. Arguably, the chief problem for the future of the West is to overcome a customary overemphasis on privatization.[163] After all, commodity use domination of multiple use land management is essentially a domination of private uses. Grazing and timber domination have been, as public choice theory would predict, the product of private rent-seeking behavior on the public lands.[164] As both Charles Wilkinson and Wallace Stegner conclude, what the West needs is more community decisionmaking, not more privatization.[165]

A redefinition of multiple use should be encouraged through the implementation of the Endangered Species Act,[166] the Clean Water Act,[167] and the National Forest Management Act's fish and wildlife directives.[168] This redefinition should emphasize the development of sustainable ecosystems and the simultaneous production of renewable resources that do not damage watersheds or fish and wildlife species. This result should be understood as the inevitable consequence of the influence of these other statutory commitments on the concepts of multiple use and sustained yield.

This reinterpretation of multiple use and sustained yield, though already underway, should be accomplished explicitly—namely, through legislative amendment to the definition of these terms. Congress should make clear that sustained yield means sustained production of *all* resources over the long term, and that multiple use means simultaneous resource management, not the landscape of segregated dominant uses we see today.

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161. *See supra* notes 6–8 and accompanying text.

162. *See supra* notes 125, 131–133 and accompanying text.

163. *See* Behan, *supra* note 123, at 105–06.

164. *See supra* notes 74–76 and accompanying text.

165. *See* WILKINSON, *supra* note 4, at 300–01 (advocating community planning to achieve sustainable resource use, and citing federal, state, and intergovernmental examples); STEGNER, *supra* note 2, at 32–37 (defending federal land management).

166. 16 U.S.C. §§ 1531–1544 (1988).

167. 33 U.S.C. §§ 1251–1328 (1988).

168. *See supra* notes 147–156 and accompanying text.

This redefinition would give rise to land management practices that protect the most vulnerable resources of the public lands, not the most remunerative. Modern salmon management, for example, is based on restricting harvests to protect the weakest stocks, not on producing the most remunerative harvest.[169] If the same principle were applied to public land management through a redefinition of multiple use and sustained yield, the public lands of the twenty-first century would have more viable populations of indigenous fish and wildlife, would have more ecologically vital watersheds, and would have greater utility to their owners—the national public—than do the public lands of today.

Nearly a decade ago, a well-known western governor made the following comments in an address to the Sierra Club:

> We . . . need a new western land ethic for non wilderness. The old concept of multiple use no longer fits the reality of the new west. It must be replaced by a concept of public use. From this day on, we must recognize the new reality that the highest and best, most productive use of western public land will usually be for public purposes—watershed, wildlife and recreation.
>
> . . . .
>
> We are now at the threshold of the final stage in the evolution of public lands policy. The great urban centers of the west are filled with citizens who yearn for solitude, for camping facilities, for a blank spot on the map, a place to teach a son or daughter to hunt, fish or simply survive and enjoy.
>
> The conflicts between public use and private exploitation—grazing, mining entry, and timber cutting—are becoming more intense each year.
>
> . . . [T]he multiple use concept is not adequate for public land management. Forest Service resources are devoted to accelerated logging while families search in vain for improved campsites on the National Forest. Frivolous and uneconomical min-

169. *See* Hoh Indian Tribe v. Baldridge, 522 F. Supp 683 (W.D. Wash. 1981) (ruling that ocean harvests must be predicated on run-by-run, river-by-river management to protect against overharvesting weak stocks, and rejecting Secretary of Commerce's proffered "aggregate" approach); Confederated Tribes of the Yakima Indian Nation v. Baldridge, 605 F. Supp. 833 (W.D. Wash. 1985) (order approving settlement). These cases and their predecessors are discussed in Lynne Heineman & Ken Rosenbaum, *Securing a Fair Share: Indian Treaty Rights and the "Comprehensive" Plan for the Columbia River*, ANADROMOUS FISH L. MEMO (Natural Res. L. Inst.), Mar. 1983, at 7–8.

> ing claims disrupt forest administration and recreational uses. Elk herds are reduced to make way for cattle which provide fewer economic benefits to local communities. Mining, logging and other commercial uses are subsidized while wildlife and recreational uses are ignored.
>
> The time is at hand to go beyond multiple use. Mining entry must be regulated, timber cutting must be honestly subordinated to watershed and wildlife values, and grazing must be subordinated to regeneration and restoration of grasslands. Many of the forest and BLM plans now being circulated ignore the primacy of public values. It is now time to replace neutral concepts of multiple use with a statutory mandate that public lands are to be administered primarily for public purposes.[170]

The speaker was Arizona Governor Bruce Babbitt, now Secretary of the Interior. My hope is that Secretary Babbitt will be able to redirect the management of public lands toward the "public use" paradigm he outlined. If he is successful, the beneficiaries will include not only the current generation of Americans but also future generations who will enjoy the wildlife, watersheds, and salmon runs of tomorrow.

170. Secretary Babbitt's remarks were made to the 1985 annual meeting of the Sierra Club and are reprinted in GEORGE COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 1080–81 (3d ed. 1993).