

may choose whether to receive or decline certain information is filled with difficulties. If the counselor describes these options, he unavoidably imparts some information the patient may not want to receive. On the other hand, if a counselor mentions information only when the patient requests it, he risks keeping the patient in ignorance of facts she would very much like to have but does not know enough to ask for.

Finally, difficult issues arise when patients accept, or acquiesce in, the judgments of others with respect to their reproductive decisions, or when they actively delegate control over these decisions to spouses, parents, in-laws, or religious leaders. The counselor must decide whether she respects her patient's autonomy more by deferring to the patient's willingness to let others make her decision or by insisting that the patient regard the decision as her own. Does she let the patient decide who will take part in the counseling session; does she intervene in the ensuing conversation to make sure that the patient expresses her own views? Should the counselor distinguish between patients who voluntarily delegate decision-making authority to others in order to escape responsibility, reduce anxiety, or circumvent weakness of will, and those who fail even to recognize that the decision is theirs to delegate?

The ideal of nondirective counseling takes us only so far in addressing such critical questions. What is needed is careful discussion about the meaning and relative weight of autonomy and other values central to counseling and health care. The demand for value neutrality only confuses the issues and poses obstacles to their resolution.

— Robert Wachbroit and David Wasserman

This article is adapted from an essay appearing in the *Stanford Law & Policy Review*, vol. 6, no. 2 (1995). Sources: Lori B. Andrews, et al., eds., *Assessing Genetic Risks: Implications for Health and Social Policy* (National Academy Press, 1994); Seymour Kessler, "Psychological Aspects of Genetic Counseling. VII. Thoughts on Directiveness," *Journal of Genetic Counseling*, vol. 1, no. 1 (1992); Angus Clarke, "Is Non-Directive Genetic Counselling Possible?" *Lancet*, vol. 338 (October 19, 1991); Dorothy C. Wertz, John C. Fletcher, and John J. Mulvihill, "Medical Geneticists Confront Ethical Dilemmas: Cross-cultural Comparisons among 18 Nations," *American Journal of Human Genetics*, vol. 46 (1990).

Public Lands in the Next Century

In remarks he made before the U.S. Senate in 1832, Henry Clay observed that "no subject which had presented itself to the present, or perhaps any preceding Congress, was of greater magnitude than that of the public lands." For most of our nation's history, his words would not have seemed an exaggeration. The acquisition of the Louisiana Territory, the railroad land grants, and the Homestead Act mark well-remembered stages in the development of the United States in the nineteenth century. At the opening of the twentieth century, the adoption of a dam-building and irrigation program and the creation of the U.S. Forest Service were leading elements in the Progressive agenda of Theodore Roosevelt. Over the past quarter-century, the designation of wilderness areas, the preservation of federal forest lands in the

Pacific Northwest to protect the habitat of the spotted owl, and the setting aside of public lands in new national parks and wildlife refuges in Alaska have been defining achievements of the environmental movement.

The public lands are engraved in our collective imagination; they have played a crucial part in shaping American culture. Yet this rich symbolism has not yielded corresponding benefits for the land. Despite the noble intentions of policymakers and legislators, the governance of the public lands over the past two centuries has seldom achieved its most ambitious goals.

The Homestead Act of 1862, for example, provided that each settler could acquire 160 acres of free public land by residing on and cultivating this land for five

years. As written, the Homestead Act embodied lessons from the settlement of the humid farming areas of the Midwest during the half-century preceding its passage. By the last third of the nineteenth century, however, few of these areas were still available for settlement. In Iowa, where the fertile lands had already been largely transferred to private ownership, only 2.5 percent of the state's territory was ever homesteaded.

As the frontier moved westward, moreover, it soon reached arid regions much less suitable for farming. In Wyoming, New Mexico, and other Western states, the best use of the land — and often the only feasible use in the absence of irrigation — was typically livestock grazing. But economical ranch operation required acreages much larger than the 160 acres allowed under the Homestead Act. Close observers of the public lands, including John Wesley Powell, soon realized that the Act was gravely flawed for those areas where new settlement would actually be taking place.

A member of the Public Lands Commission of 1879, Powell suggested 2,560 acres — huge by Eastern standards — as a suitable ranch size. He also promoted other reforms in recognition of the particular needs of the West. He outlined a comprehensive system of land classification, intended to allocate specific areas to the most appropriate uses, including mining and timber harvesting as well as livestock grazing. He wanted to abandon the rectangular layout of farms and ranches — a configuration based on survey methods dating back to the eighteenth century. He generally favored joint ownership of water sources and of the grazing areas that surrounded them.

Powell's arguments for these reforms were compelling on practical and scientific grounds, but unpersuasive to Congress. The Republican Party of the time saw the Homestead Act as one of its great accomplishments — a triumph for the little man, free-market individualism, and personal initiative. In the face of this romantic ideal, a contrary reality on the land, even when it was pointed out by people who really knew the West, carried little weight. The result, under the Homestead Act and other disposal legislation of the nineteenth century, was widespread farm failure in the arid West; large waste of timber, minerals, and other natural resources; and massive land-law fraud and abuse. The vindication of Powell's views did not occur until fifty years later, with the passage of the Taylor Grazing Act in 1934.

The Progressive Approach to Public Lands Management

In the early twentieth century, with the emergence of the Progressive movement, there was a turn from

nineteenth-century policies favoring disposal of the public lands. Officials now resolved to keep the lands under federal control. It is because of this shift that the federal government today still owns 47 percent of the land in the 11 westernmost of the lower 48 states. Nevada consists mainly of federal land, covering 83 percent of its total area, while 64 percent of Utah and 62 percent of Idaho is owned by the federal government.

American Progressives sought to introduce to government the same methods of modern management that were then transforming the private sector from a world of small entrepreneurs to one of large corporations. Progressives advocated a much more businesslike and efficient basis for government administration. In order to protect professional administrators from political interference, they argued that there must be a strict separation of administration and politics. The political process would set the broad policy objectives; after that, professional administrators

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applying technical management skills would take over and be responsible for implementing these objectives. New Progressive institutions such as the independent regulatory commission were designed specifically with the aim of insulating administrators from political interference.

The Progressive program for expanding the scope of government did not reflect a high level of confidence in democratic decision-making. Progressives, in fact, were distrustful of democratic politics. However, they argued that the routine tasks of government could be isolated from its harmful influence. They also believed that large-scale organizations went hand in hand with modern scientific management.

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The idea that government administration could be truly scientific played a critical role in this Progressive scheme of thought. Concerned to avoid abuses of the newly enlarged government powers, Progressives offered assurances that government administration would involve little, if any, leeway for the individual feelings, values, or emotions of the administrators. Science and technology would instead reveal the one correct answer that the experts would apply. Progressives regarded the "special interests" with particular disfavor; such groups sought to distort government decisions to their own advantage and against the valid goal of "the public interest."

Retention of public lands was desirable, according to the Progressives, for two reasons. First, the conservationists among them, such as Gifford Pinchot, believed that the government would do much better than the private sector in achieving the scientific management of natural resources. In part, Pinchot was reacting to the recent rapid depletion of wildlife, forests, and other natural resources by private individuals and companies. The private sector was considered too shortsighted to achieve rational and efficient development of natural resources over the long run.

The Progressives also believed that an expanded public sector was preferable to a large private one. As its trust-busting efforts suggested, Progressivism was hostile to large concentrations of private power, which it saw as a threat to American democracy. By retaining the public lands, Theodore Roosevelt and other Progressives hoped both to achieve the efficiency of scientific management for government lands and at

the same time to prevent large private landholdings that might frustrate traditional American egalitarian ideals.

These dual objectives, however, were sometimes in conflict. As Samuel Hays has written, "Roosevelt's emphasis on applied science and his conception of the good society as the classless agrarian society were contradictory trends of thought. The one, a faith which looked to the future, accepted wholeheartedly the basic elements of the new technology. The other, essentially backward-looking, longed for the simple agrarian arcadia which, if it ever existed, could never be revived."

The Failures of Scientific Management

If nineteenth-century efforts to dispose of the public lands were sometimes misguided and poorly implemented, the twentieth-century policy of retention and scientific management brought problems of its own. For example, Progressives tended to assume that all necessary economic information would be readily available to government decision-makers. In practice, however, important details were almost always missing, perhaps because they were too costly to justify obtaining. The central planning role for government envisioned by the Progressive theorists of scientific management was much more difficult to accomplish than they ever really understood.

The Progressives also had a flawed understanding of the relationship between science and politics. The Progressive scheme assumed that once society set clear goals through the political process, expert managers would separately and most efficiently realize these goals in the administrative process. But what if society could not agree on values in advance? What if decisions about means and ends could not actually be separated? In one of the most famous articles of post-World War II social science, Charles Lindblom raised just these concerns. He found that government worked by a process of "muddling through." The ends did not precede the means, as rational models of government decision-making supposed; instead, the ends were typically determined jointly with the means.

It has become apparent in recent years that the prospects for the Progressive governing scheme actually depended on something the Progressives mostly took for granted — the existence of a set of common values and a strong sense of national community in American life. This sense of community probably reached its peak in the United States during World War II, when a unified nation was able to undertake complex administrative tasks that would have been impossible in normal times. However, as the old value consensus in American society has given way to a new pluralism, the Progressive governing

scheme has become less and less workable. The idea of one set of values and one administrative design for all the United States not only seems flawed but increasingly an outright impossibility.

Meanwhile, the fragmentation of the body politic has encouraged local groups and private parties to assert new "rights" to government benefits. On the public lands, the result has been the creation of private rights, including grazing rights for ranchers, hunting and other recreation use rights for commercial outfitters, and the rights of wilderness advocates. The public lands have been carved up into many domains whose beneficiaries fight as fiercely as any private property owner to defend existing entitlements. It is a new form of range war, now fought in the political and judicial arenas, but with control over the use of the land still the object of the struggle. Like the old contests among homesteaders, cattlemen and sheep herders, the new range wars are often destructive to the land itself, as well as economically inefficient.

By 1964, the enactment of the Wilderness Act was signalling the emergence of the environmental movement as a powerful new force in public land management. Like the conservation movement early in the century, the environmental movement brought a moral vision and a crusading spirit to the public lands. Long-standing practices of the land agencies now came under strong attack. Demands for reform were pressed in many areas. In the 1970s, environmentalism provided much of the impetus to enact a new legislative foundation for the public lands, including the Endangered Species Act of 1973, the Forest and Rangeland Renewable Resources Act of 1974, the National Forest Management Act of 1976, the Federal Land Policy and Management Act of 1976, and the Public Rangelands Improvement Act of 1978. It was the greatest burst of legislative activity in the 200-year history of the public lands.

Yet the 1970s laws reflected more a demand for moral renewal and for better results than a clear diagnosis of why the original Progressive scheme had failed. Indeed, the old problems have persisted — high management costs, user charges well below fair market value, inefficient investments, environmental degradation, susceptibility to concentrated interest-group pressures. The efforts of Congress to guide the use of the public lands have once again proven ill-conceived and ineffective. At a recent conference sponsored by the Congressional Research Service, Frank Gregg, the former director of the Bureau of Land Management during the Carter administration, summarized the views of participants: "We have now amassed a considerable history in participating in and judging the revised system and we agree that we are in another generation of dissatisfaction. We have characterized the present as gridlock, polarization, so

extreme as to suggest extraordinary urgency in pondering what needs to be done."

A Different Sunset

Sally Fairfax has described public land management as "riding into a different sunset." Beyond the horizon, she suggests, the justifications for public land ownership inherited from the Progressive era will no longer suffice.

If we look behind the continuing formal adherence to Progressive ideas of scientific management, the real argument made today for having public lands is that they protect certain values and provide certain services that the private market neglects or ignores. The most important service provided by the public lands is the opportunity to hunt, fish, hike, explore, and participate in other forms of ordinary dispersed recreation.

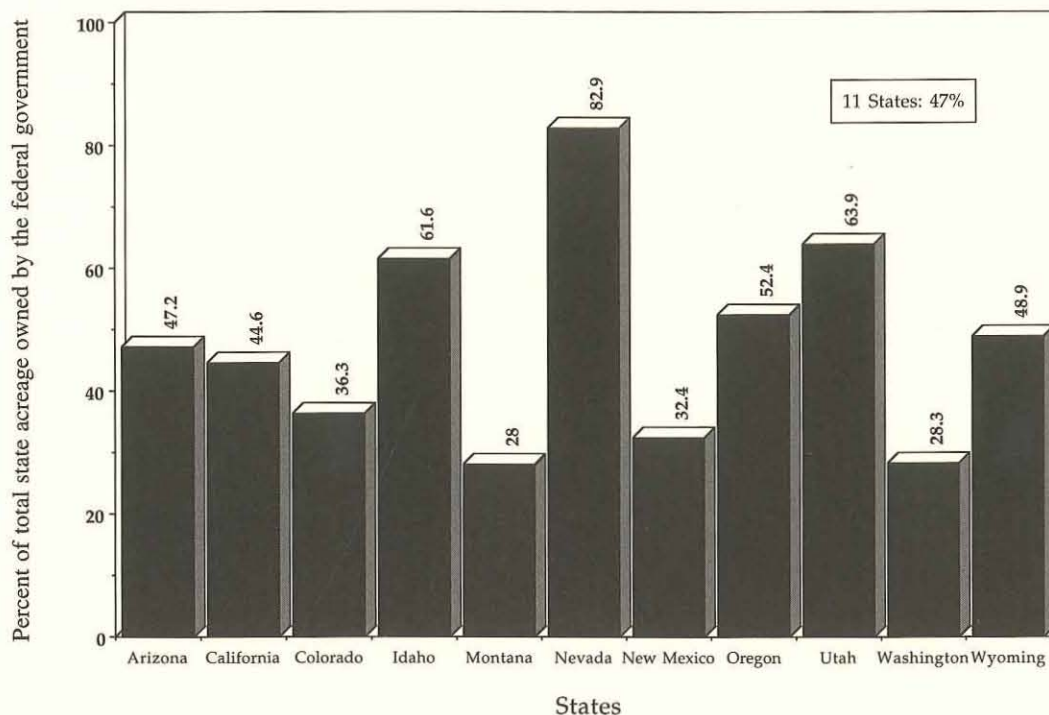
Of course, much recreation is provided privately through market incentives. Disney World did not require any government subsidy. A number of the recreational services now provided on the public lands could be provided by private owners as well. But a good analogy can be drawn here with the highway network for automobiles. Turnpikes between major cities can be provided privately (and have been on some occasions), but the general network of city streets is a public good; the collection costs and confusions of a pricing system for ordinary city streets would simply be too great. Public ownership of recreational land similarly avoids the large transaction costs that would be associated with any system of controlling access and charging for hiking, mountain biking, and many other activities that take place over wide areas of forests and rangelands.

Many people also make a value judgment that public ownership is desirable because it promotes social equality. Hunting clubs might well spring up on private lands; indeed, in the West property owners with control over entry to public lands in some cases already charge hunters and fishermen. However, government is expected to distribute goods and services on an equal basis to all citizens. For many people, the public lands are a powerful symbolic affirmation of the egalitarian ideal in a largely private market system.

State Ownership

Public lands thus can serve some of the same functions for the rural West that Central Park serves for the residents of New York City. Central Park, however, is locally owned, raising the question of the justification for federal ownership of the public lands, as opposed to ownership by states or lower levels of government.

Federal Ownership of Land in the Western States, 1991



*Public Lands Statistics 1993
U.S. Department of the Interior,
Bureau of Land Management*

One justification is that certain natural areas have features greatly valued by the whole nation. Some examples are familiar to everyone: the geysers of Yellowstone Park, the Grand Canyon, the Yosemite Valley, and the groves of the oldest redwoods and sequoias. Federal ownership of these areas declares a national commitment to protect and preserve them for future generations. There is little doubt that for most Americans such protection is a powerful motive for federal ownership of certain national parks and other areas with unique environmental assets.

However, states would also have strong reasons to protect such areas. The example of Adirondack Park in New York State is instructive. In 1894 a provision was added to the New York State constitution setting aside Adirondack Park in a permanently preserved status. The area included in the park covered more than three million acres — an area 35 percent larger than Yellowstone, making it the largest park in the United States. If these lands had been transferred to the U.S. Forest Service, they would no doubt have been used for timber harvesting — as Pinchot in fact argued at the time was the highest and best use of Adirondack forests.

In the West, recreationists point to management of lands owned by the states themselves as a demonstration that state governments are predisposed to favor livestock, mining and other commodity interests over recreation. A fear echoed repeatedly in Western commentary on the Sagebrush Rebellion was that states might well prove a go-between, turning lands received from the federal government over to private owners. As one Idaho newspaper editorial commented, "Most of us, actually, would probably rather see the great forests and range lands of the West remain the responsibility of the federal government than turned over to the questionable mercies of the states. It is quite clear out here, even if it is not well understood in the East, that the states have neither the money nor the administrative capacity to manage these lands properly."

While state management would no doubt be subject to strong interest-group pressures, the Western states are changing rapidly in their demographic and political makeup. The state government of California is today more oriented towards the recreation needs of Californians than is the federal government. In any case, management of major new land areas would

cause institutional changes to occur at the state level, significantly increasing the visibility of state land management, and thus creating new political pressures favoring recreational use of state lands. Meanwhile, the states currently manage 135 million acres of state "trust" lands that earn positive revenues, in strong contrast to the significant drain on the taxpayer represented by the federal lands. Grazing fees on most state lands are significantly higher than the current federal fees.

Taking all these considerations into account, the arguments for federal ownership are strong only for a limited set of lands. The federal government does in fact provide valuable consumer information in designating certain national parks, historic monuments, wilderness areas, and other categories of special recreational lands. Moreover, it provides widely desired guarantees that the nationally unique features of some of these lands will be protected, that the lands will not be sold off and carved into second-home developments. These lands are part of the collective cultural identity of most Americans.

As for less distinctive recreational lands used mainly for ordinary dispersed recreation, they should be transferred, I believe, to the states. The states could then make decisions as to whether they should be further transferred to local governments, contracted out to private managers, leased on a long-term basis to livestock and recreational users, or managed by the state to preserve them in their natural condition. It may well be that for many lands, the most appropriate level of governance will be local.

Some people will no doubt object that transferring public lands would be unfair to other sections of the country because it would confer a windfall on undeserving state governments in the West. The truth is that the public lands have long cost the federal government much more to manage than they have returned to the federal treasury in revenues. In terms of fiscal impact, it is the federal government that would be a gainer from a transfer. Indeed, in the past it has been the states that have been reluctant to accept new management responsibilities and costs that ownership of existing public lands might entail, fearing a potential "unfunded mandate." If serious transfer proposals arise, a major issue for states will be whether they can raise higher revenues and manage the lands more efficiently, thereby stemming the financial outflows that have been the historical experience under federal management.

Devolving Federal Responsibilities

In recent decades, federal ownership of almost half the land in the West has drawn the federal government into many fierce political disputes about proper land

use that are essentially state and local in nature. The federal government is a virtual planning and zoning board for the rural West. Involving the federal government in such contentious local matters creates a drain on federal resources and needlessly squanders federal political capital. There is little or no reason that essentially state and local questions should be decided in Washington as opposed to, say, Santa Fe, Sacramento, or Helena.

One hundred years ago, a philosophy favoring disposal of the public lands was abandoned for the Progressive goal of scientific management. This shift occurred at a time of great discontent with the workings of American institutions. Today, there is a similar level of discontent and again a willingness to rethink fundamental assumptions about the role of government.

On the public lands these developments may yield a new guiding vision and a new organizational structure in the next century. If Progressivism sought centralization, the land system of the twenty-first century is likely to be decentralized. If Progressivism sought expert management by value-neutral scientists, future land management decisions will have to be made by political officials recognizing that scientific and value considerations are inextricably interwoven. If Progressivism expected the experts to act in the name of achieving maximal efficiency in the use of the resources of American society, we can expect the Progressive "gospel of efficiency" — as historians have labelled it — to give way to a much greater pluralism of social and political values.

All this is likely to mean a smaller role for the federal government and a larger role for state and local governments. It will be a shift of authority to the state level perhaps more clearly justified in the area of land management than in any other area of current federal responsibility. The management and control of the use of ordinary land is, after all, historically the most local of all government functions in the United States.

— Robert H. Nelson

Robert H. Nelson is professor of environmental policy in the School of Public Affairs at the University of Maryland. This article is excerpted from *Public Lands and Private Rights: The Failure of Scientific Management*, by Robert H. Nelson, © 1995 by Rowman and Littlefield Publishers. Reprinted by permission.