

The Federal Estate: Opening Access to America's Resources

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The federal government owns nearly one-third of the United States, a percentage that continues to increase as federal bureaucracies expand their reach and the scope of their activities. Access to this public land is also becoming more difficult because of a flawed system of restrictions, regulations, and litigation. Not all public land is suitable for parks, wildlife refuges, recreation areas, and the like. On much of the other public land, some of our nation's richest natural resources are to be found. The current approach to managing the Federal Estate prevents good stewardship of these lands. Though a true solution ideally would come from devolving federal managerial power to the states, there are other policy decisions that could be made to further fruitful and responsible use of these federal lands.

The federal government owns nearly one in every three acres in the United States. Over 623 million acres make up this Federal Estate, which is located predominantly in the American West and

continues to grow.¹ The federal government also owns the Outer Continental Shelf (OCS), which reaches from beyond state waters to 200 miles offshore and covers more than 1.7 billion acres.² These lands and waters and their resources are herein referred to as “the Federal Estate.”

The Federal Estate contains huge and untapped quantities of oil, gas, water, timber, and minerals that, with responsible practices, could be used to enrich the U.S. economy and better the lives of all citizens. For example, there are 10.4 billion barrels of recoverable oil in the 2,000-acre slice of the Arctic National Wildlife Refuge (ANWR)—enough oil for roughly

1 million barrels per day, or 20 percent of American daily domestic production for *over 25 years* at current production rates.³ America imports about that much oil (1 million barrels) from Saudi Arabia every day.⁴ Yet the federal government denies American citizens the benefits of that oil because of allegations about the impact that development of ANWR's energy resources might have on wildlife.

A rational policy would insist that development take place and include appropriate remediation plans to minimize both short- and long-term environmental impact, but that is not how the Federal Estate is managed today. Instead, bureaucrats and politicians have stopped ANWR activities altogether despite substantial evidence that development would have minimal impact

1 “Federal Land Grab,” Heritage Foundation Infographic, September 16, 2009, <http://www.heritage.org/multimedia/infographic/2011/10/federal-land-grab>. See also U.S. Government Accountability Office, *Federal Land Management: Availability and Potential Reliability of Selected Data Elements at Five Agencies*, GAO-11-377, April 2011, <http://www.gao.gov/assets/320/317797.pdf> (accessed June 26, 2012).

2 Bureau of Ocean Energy Management, Regulation and Enforcement, “Offshore Energy and Minerals Management (OEMM),” <http://www.boemre.gov/offshore/> (accessed June 14, 2012).

3 Institute for Energy Research, “ANWR,” <http://www.instituteforenergyresearch.org/issues/anwr/> (accessed June 9, 2012).

4 U.S. Energy Information Administration, Petroleum and Other Liquids Database, “U.S. Net Imports by Country,” 2006 to 2011, http://www.eia.gov/dnav/pet/pet_move_netl_a_ep00_IMN_mbbldp_a.htm (accessed June 9, 2012).

on local wildlife.⁵ Blocking development of ANWR not only deprives Americans of the full potential of this country's natural resources, but also denies the federal government the financial resources that it needs to manage its own lands adequately. For example, the Forest Service, which manages millions of acres of forest lands, lost, on average, \$3.58 billion per year between 2006 and 2008.⁶ Not surprisingly, owners of state, tribal, and private forest lands do not lose money managing their timber lands.

This problem, however, can be fixed.

- First and foremost, Congress should return responsibility for many of our federal lands to states and private owners. Such a reform would give responsibility for managing the lands to those with the most knowledge of the land and the most to gain from its productivity.
- Reforms must also be put in place to ensure the rights of the individual to challenge the federal government's ability to take his land or to diminish the value of his land.
- This nation needs to affirm broad policies, expressing the

5 U.S. Department of the Interior, "Facts: Environmentally Responsible Energy Production in Alaska's ANWR," September 7, 2005, <http://www.doi.gov/initiatives/ANWRmediafactsheet.pdf> (accessed June 9, 2012).

6 Terry Anderson, "The Green Tea Party," Hoover Institution, *Hoover Digest*, 2012 No. 1, January 13, 2012, <http://www.hoover.org/publications/hoover-digest/article/105751> (accessed June 9, 2012).

overall national interest, to open access to its resources. Doing so will not only yield economic benefits, but also provide the means and motivation to advance conservation. The "national interest" needs to include considerations of the economy and jobs as well as national security.

- The regulatory process within those broad policies, while appropriately protecting the environment, should enable resources to be developed. It must cease to be a mechanism through which narrow (not national) interests are able to stop or severely delay all use or development of resources.

Needed: A New Steward

The federal government's numerous and overbearing restrictions on land use make the access, exploration, and development of resources exceedingly difficult. Such bureaucratic red tape also impedes this nation's ability to benefit economically from its resources—let alone to manage them wisely. Expecting the federal government to manage these resources is both bad policy and bad practice.

The very nature of the political process is such that a single hidebound bureaucracy is simply incapable of making action-oriented decisions. If anyone objects to any aspect of a decision, he can block it by litigation or by creating a political crisis. The result is that non-action is rewarded not because the bureau-

cracy is generally bad or incompetent, but because federal employees soon learn that taking no action is safe. Delay, study, hearings, and rehearings are acceptable activities. Deciding something may create a job-threatening political firestorm. The result? America's vast resources on federal land are inaccessible at a time when the poorest among us desperately need the relief they would provide.

There is scant evidence that the federal government is capable of responsibly managing the lands under its control. Consider a 2007 GAO report on "high risk" agencies as an example. This report stated that, while the Department of the Interior (DOI) spent \$1.6 billion on maintenance of public lands, it would take another \$9.6 billion to address all of the backlogged maintenance problems that the agency should have addressed *that year*.⁷

Federal control also leads to natural resources being either unduly restricted or overly stimulated. Even if the government did reach a proper equilibrium in its managerial philosophy, it is unlikely that such a harmonious condition would outlive many election cycles. Competing and partisan efforts pressure both America's elected leaders and the bureaucracy to enact policies that benefit special interests or powerful constituencies. Consequently,

7 U.S. Government Accountability Office, "Reducing Interior's Deferred Maintenance Backlog," January 2007, <http://www.gao.gov/highrisk/agency/doi/reducing-interiors-deferred-maintenance-backlog.php> (accessed June 9, 2012).

millions of people and our nation's natural resources are at risk of being captured by and subjected to a single-issue constituency or extreme resource management philosophy.

Devolution from Washington to the States

Reform begins with devolution of responsibility for management of the Federal Estate from Washington to the states. Overly prescriptive national regulations and mandates imposed from Washington preclude local creative problem solving and responsibility. The consequences of bad policy become much more difficult to reverse because they apply to the whole country, and the nation loses the benefit of experimentation and innovation that could be cultivated with a more decentralized approach.

For the sake of the management and protection of the lands themselves—the parks, wildlife refuges, open lands, and the like—a better approach would be to restore the proper relationship between the federal government and the states. Rather than one overriding entity, the states can function—as they originally were intended to function—with possibly different approaches to managing natural resources, environmental concerns, and economic problems and opportunities. Such localized management will result in a clash of ideas and philosophies, an explosion of creativity and competition that are more likely ultimately to produce policies that satisfy the

needs and desires of the American people as well as environmental concerns, all in accordance with the principle that the management of natural resources should be conducted on a site- and situation-specific basis.

For such a policy to succeed, Congress must exercise restraint and patience when an individual state acts contrary to congressional preferences. Actions that do not conform to the general ideas of a certain era are to be expected and desired. Some states will make mistakes in their management, being far too restrictive or far too lax, but such mistakes will provide great lessons to guide future policy decisions and will have far less adverse impact on the nation than would be the case if the same mistakes were made by the federal government.

Most likely, the majority of state actions will occupy a reasonable “middle ground.” At worst, the sum total of excesses from either policy direction—excessive regulation vs. too little regulation, for example—will demonstrate to most decision-makers the importance of wise and reasonable choices. Further, because renewable natural resources are resilient and respond positively to wise management, most mistakes are correctable and most damage is repairable, but if not, isn't it much, much better to have those mistakes made in a limited way, in a state or two, rather than across the board as occurs when the federal government is the instrument of error?

Protecting America's Most Precious Resource

Federal employees are public servants who hold the lands and resources of the Federal Estate in trust for citizens. They ought not to behave as arrogant owners or representatives of the “King” with little or no regard for the impact of their actions on local citizens. People, after all, are this nation's most important, valuable, and precious resource and should be treated with the respect that is due them.

As in no other country, the people—not the government—are the true owners of America's public lands. How the government manages the Federal Estate, a *national resource*, should reflect this fact, and insofar as possible, its goal should be the well-being of *all the people*. Resources needed for the benefit of the economy and national security need to be made available for appropriate development. While Congress should return responsibility for many of our federal lands to states and private owners, the Federal Estate must be properly managed, a continuum ranging from the development of valuable natural resources to restrictive preservation.

Finally, as long as the Federal Estate covers such huge swaths of our great nation, those Americans who live in it, live near it, or earn their livings from it should be treated as citizen-partners in the activities on those lands, and their well-being should be a major concern of the federal government.

Recommendations

Rein in the federal government.

The United States government must be prevented from using its huge economic and political power to violate the rights of individuals. When a victim of federal oversight attempts to defend himself against regulatory takings or burdensome regulations, the federal government can simply override and ignore anyone who lacks the immense resources needed to battle endlessly for his rights. The nation needs not only a way to restore the individual's rights, but also a mechanism for penalizing the agency and the people in the agency who perpetrate unjust actions.

Therefore, Congress and/or the Administration should:

- Review the suitability and terms of the Equal Access to Justice Act (EAJA). Government's abusive tactics need to be documented in detail. Such detail, in turn, will provide the foundation for action to reduce such abuse through hearings and litigation.

The EAJA was written originally to redress this imbalance by protecting small businesses and individuals from unreasonable regulatory and civil enforcement. However, its application has been distorted

and abused by extremists among the environmentalists at the same time that there has been an almost complete lack of transparency and reporting by the executive branch of payments made under the EAJA. Indeed, from the minimal reports that are provided, it is clear that large environmental groups use the EAJA to delay and, ultimately, prevent the federal government from taking action to allow development of natural resources—and those who abuse the act are richly rewarded by the EAJA for doing so through large awards of attorneys' fees that help fund their operating budgets.

Only entities and individuals that suffer real harm to their rights should get funds under the EAJA, not organizations that make a living by distorting the good purpose for which the act was created, and the executive branch should be required to make detailed annual reports to Congress of all settlements made pursuant to the statute.

- **Require proof of a "guilty mind" as an element of environmental crimes.** The abuses of federal prosecution—what Heritage calls "overcriminalization"—are outrageous. Congress should amend major environmental laws such as the Endangered Species Act, Clean Water Act, and Clean Air Act

to require proof of knowledge of illegality as an element of the crime. *Mens rea*, meaning "guilty mind," is the legal term requiring proof not only that a crime was committed, but also that there was criminal intent to commit the elements of a crime.

Environmental regulations are so confusing that people often do not even know that they have violated a regulation or, worse, committed a federal crime until the Environmental Protection Agency (EPA) or another federal entity issues a civil or even criminal citation. Few have the courage or the financial means to stand against a federal accusation, even if it is mistaken. The Supreme Court recently addressed such federal bullying tactics by the EPA encountered by Michael and Chantell Sackett.⁸ The outrage being perpetrated against Gibson Guitar for its alleged violation of the Lacey Act similarly dem-

⁸ Mike and Chantell Sackett of Priest Lake, Idaho, were told by the EPA that they could not get direct court review of the EPA's claim that their two-thirds-of-an-acre parcel was "wetlands." They were also facing up to \$75,000 in fines each day. In a unanimous opinion, the Supreme Court rejected the government's arguments and ruled that landowners have a right to direct, meaningful judicial review if the EPA effectively seizes control of their property by declaring it to be "wetlands." Pacific Legal Foundation, "PLF and the Sacketts Take EPA to the Supreme Court," <http://www.pacificlegal.org/page.aspx?pid=616> (accessed July 5, 2012).

onstrates the mindless power of federal agencies.⁹

Establish a Rational Regulatory Process.

Changes must also be made in the federal government's approach to regulation. Regulations must allow for resources management to be conducted on a site- and situation-specific basis, and science must be returned to its appropriate use as a tool for informing policy, not exploited as a delaying tactic founded on the "precautionary principle."¹⁰

With encouragement or, if needed, authorization from Congress, the Administration should, therefore:

- Create a digital, searchable database of past regulatory environmental studies. Since 1969, a huge number of studies have been performed on almost

every imaginable element of federal actions that may affect the environment. Computers now make a comprehensive and efficient database entirely possible and, in fact, a routine part of research.

- Allow Environmental Impact Statements to rely on prior studies.¹¹ There must be an end to duplicative environmental studies, administrative proceedings, and litigation regarding governmental decision-making. As it is, opponents of development are able to stretch out the permitting process with endless, often redundant environmental studies, Environmental Assessments (EAs), Environmental Impact Statements (EISs), administrative proceedings, and lawsuits. The resulting costs are horrendous both in dollars and in time, artificially increasing the expense of and even killing some projects that would otherwise benefit the entire nation. This problem is particularly acute where there is a group claiming to assert the "public" interest, which is in fact its own narrow interest, and there is no other group representing the general interest of the body politic at large to contest the matter.

One remedy is to establish the right to rely on prior studies that were deemed adequate when included in prior EISs. If a prior EIS that was deemed adequate exists and is cited and relied upon, the burden of proof that the study is not adequate and must be redone should be upon the objector.

- Refuse to reauthorize and appropriate funds for the Endangered Species Act (ESA) until sensible reforms are written into law. The ESA is out of control because it uses politicized science to bar activities on and the use of the Federal Estate. The listing decisions of the U.S. Fish and Wildlife Service (FWS) have no consistent thresholds and are highly subjective.

The reason for this subjectivity is simple: The FWS uses models and relies on studies that depend on other untested and unproven FWS studies and models of dubious accuracy or that are self-serving to the interest being represented by the FWS and for which the data are often not made public. The "experts" used by the FWS should be carefully weighed to represent a balance of the science in an area rather than one point of view. It is no surprise, therefore, that narrow, special interests have been able to use the ESA to kill projects, seize land, and harm local economies all across the country

⁹ Gibson Guitar has been accused by the Obama Administration of running afoul of the Lacey Act by having allegedly violated the laws of a foreign nation. The government alleges that Gibson Guitars may have been constructed of wood illegally harvested in Madagascar and India. Jim Roberts, "Regulatory Overreach: Obama Administration's Case Against Gibson Guitar Drags On," The Heritage Foundation, The Foundry, May 17, 2012, <http://blog.heritage.org/2012/05/17/regulatory-overreach-obama-administrations-case-against-gibson-guitar-drags-on/>.

¹⁰ The precautionary principle is an approach that allows policymakers to rely upon scientific unknowns or the mere, unmeasurable "potential" of risk inappropriately and to use these as justifications for doing nothing, allegedly to avoid some named risk but effectively in order to avoid the political risk of making a decision about a controversial issue.

¹¹ Environmental Impact Statements are statutorily required, thorough analyses of the effects on the "human environment" of a proposed major federal action, as well as an evaluation of alternatives to the proposed action.

but most significantly in the American West.

- Hold objectors financially responsible for unsustainable challenges. Though objectors can play an important oversight role, special interests too often use this option as a way to indefinitely delay and even kill projects. One way to help ensure that challenges to the EIS process are legitimate is to make objectors liable for the litigation cost of challenges that they lose. Legitimate questions can still be raised, but this reform would increase the cost of manipulating the system on unsubstantiated grounds.¹²
- End the irrational and endless wilderness review process. The wilderness review process has gone on in this country for 48 years. This process by which land is categorized as eligible or ineligible for wilderness designation by Congress must have a definitive end.¹³ Western states deserve an end to the federal wilderness study process on the ground that after all this time, all really deserving areas have long been officially identified as feder-

ally designated wilderness. Wilderness is the strictest land categorization in the Federal Estate. It includes unmanaged lands designated as preservation areas where no mechanized equipment is allowed.¹⁴ President Obama's 2009 Omnibus Public Lands Management Act added another 2 million acres to the already massive 100 million acres of wilderness area.

After federal agencies designate lands as "eligible" for wilderness designation by Congress, those lands are managed "as wilderness" and are unavailable for productive and even some recreational use until "released" by Congress. Additionally, some people continue to demand that more and more lands be designated as wilderness and to bar release of those lands already designated as "eligible for wilderness," effectively putting them off-limits to many legitimate uses.

Return Responsibility to the States.

It is our belief that transferring responsibility to the states

for managing many of the federal lands would address the problems of the Federal Estate most significantly. Not only would this reform relieve the federal government of huge expenses, but it would ultimately provide better care for these lands.¹⁵ Ownership inspires true stewardship.

Consequently, Congress and/or the Administration should:

- Charge states with setting policy and regulatory standards. Local knowledge is critical to understanding site-specific challenges, as well as the risks and rewards of different policies. A "one-size-fits-all" federal strategy forces state and local governments to figure out ways to circumvent federal rules and address economic and environmental concerns locally. Areas like national forests have become more of a financial and legal liability to the federal government because of its growing aversion to engaging in wise use of resources. In fact, states do a much better job of generating revenue from these lands. For example, for every

12 For a more in-depth discussion of EIS, see chapter 5.

13 Alexander Annett, "The Federal Government's Poor Management of America's Land Resources," Heritage Foundation *Backgrounder* No. 1282, May 17, 1999, <http://www.heritage.org/research/reports/1999/05/govts-poor-management-of-land-resources#pgfId=1020430>.

14 The absence of active land management caused by the wilderness area designation makes responding to environmental threats extremely difficult. For example, lacking any stewarding, the Wallowa-Whitman National Forest became infested with the western spruce budworm, which was allowed to wreak havoc for seven years before the regulations and comment period to address the issue finally closed.

15 Compared with other federal departments and agencies, those tending to America's natural resources, like the Bureau of Land Management and U.S. Forest Service, are relatively small entities that require disproportionately large budgets which are increasingly unavailable as the federal revenues are consumed on other priorities. The net effect is poorer and poorer management of these lands regardless of any good intentions of the agencies.

dollar spent on land management, states earn \$5.62 for school trust funds; the federal government earns a mere 76 cents.¹⁶

- **Encourage energy and mineral resource development.** In many cases, the federal government could turn water projects like managing hydropower projects and, where appropriate, fisheries over to states and communities for ownership and management. Those who benefit from these projects should enjoy the privileges and responsibilities of ownership and, ultimately, will take better care of them. The federal government's role would then be to enforce appropriate federal operating and environmental rules.
- **Allow states adjacent to the Outer Continental Shelf to manage those resources out to the full 200-mile limit.** States should be allowed to determine whether to pursue OCS exploration and development off their coasts. Giving states the freedom to manage these resources and to receive the majority of the royalty revenue would encourage development of America's rich energy resources.

- **Encourage private-sector ownership and management of public lands.** Ideally, for the sake of improving the care and protection of public lands, including parks and refuges, states should further seek to devolve ownership and management of wildlife reserves, parks, public lands, and resources to the private sector. One such success story is George Washington's estate, which has been operated privately by the Mount Vernon Ladies' Association since 1853.

Natural and historic sites under federal management can be privatized successfully and profitably. The next Administration should commence a study to include examples of successful state and private ownership or operation of various such lands and parks and from that develop a multi-year plan setting forth the standards and processes to determine the order and manner in which federal lands should be devolved to the states. The goals are multiple, but key among them are enhancement of the protection and development of what is currently the Federal Estate.

Open Access to Development.

Finally, pending devolution, the federal government should encourage the responsible use of the Federal Estate. To the extent that the federal government

continues to own and manage the Federal Estate, it should make the land available for wise use and defend those who use it properly from special-interest groups that would bar such development. Not only would this reform provide direct economic benefits to citizens and the government; it also would result in better-managed assets.

In order to open access to responsible development, Congress and/or the Administration should:

- **Revise and revoke unsupportable anti-development Department of the Interior Solicitor opinions.** Consistent with the proposals in this paper, there are scores of DOI Solicitor's opinions that need to be revised or revoked. These opinions, accumulated over many decades, are often contradictory and need to be consistent with any reforms made in the management of the Federal Estate.
- **Reverse the improper designation of "roadless areas."¹⁷** Roadless areas are specially designated undeveloped property where land use is severely limited. They generally exceed 5,000 acres and are managed by the U.S. Forest Service. In

16 Terry Anderson and Reed Watson, "From Parks to Pork," Hoover Institution, *Hoover Digest*, 2009 No. 4, October 9, 2009, <http://www.hoover.org/publications/hoover-digest/article/5471> (accessed June 9, 2012).

17 For a full description of roadless areas conservation, see United States Forest Service, "Roadless Areas Conservation," <http://www.fs.usda.gov/roadless/> (accessed June 9, 2012).

2011, the U.S. Court of Appeals for the Tenth Circuit reversed a Wyoming federal district court decision holding that President Clinton violated the Wilderness Act of 1964 by designating “roadless areas” under U.S. Forest Service control in which development is barred even though roads existed in some of these areas.¹⁸ This decision effectively denies states the opportunity to determine how best to manage massive swaths of undeveloped land within their borders. A new President should reverse that order.

- **Establish a user-friendly permitting process.** The federal government should encourage, not challenge, investment by being predictable and reasonable. Uncertainty is the enemy of investment. The National Mining Association estimates that there is \$6.2 trillion worth of undeveloped minerals in America, and yet the U.S. spends \$5.1 billion annually importing minerals, many of which can be found in the U.S.¹⁹ Regrettably, America

is ranked as the most investor-unfriendly country for mine permitting because of delays that, on average, stretch out seven to 10 years.²⁰

- **Help the Interior and Agriculture Departments to become good neighbors.** As under the Reagan Administration, a guiding principle for the Departments of the Interior and Agriculture should be to act as “good neighbors” to the people in the vicinity of the managed areas. The next Administration should attempt to deal with the problem that arises when the federal employee in an area is seemingly “permanent” and the highest-paid person in the community. Since power tends to corrupt, this person becomes someone whom a local citizen cannot afford to offend if he ever needs a permit regarding anything related to federal land.

A system that rewards employee performance that is sensitive to local needs and encourages optimal public use of the Federal Estate so that “public ownership” becomes a reality, not just a slogan, and similar behavior would be very useful in achieving this goal.

Some thought should be given to mechanisms for bringing federal pay for comparable work in a remote community in line with pay scales in the area as a means of reducing the “I am more important than you (because I make more money)” impulse that is common to human nature.

Finally, opportunities for citizens to interact with the federal land management employees should be increased. Public servants should be accessible to citizens in the communities affected by the federal property at times that are most convenient to the public and in places that are most easily accessed by them.

18 Bret Sumner and Bill Sparks, “The 10th Circuit Court of Appeals Issues Landmark Decision Regarding Roadless Land Designation by the U.S. Forest Service,” Beatty & Wozniak, P.C., *Energy News Alert*, 2011, <http://www.bwenergylaw.com/News/documents/The10thCircuitCourtOfAppealsIssuesLandmarkDecisionRegardingRoadlessLandDesignations-bytheUSFo.pdf> (accessed June 9, 2012).

19 National Mining Association, “Minerals Make National Security,” Fact Sheet, <http://mineralsmakelife.org/resources/fact-sheets/minerals-make-national-security> (accessed June 9, 2012).

20 America even ranks below Ghana and Papua New Guinea, which suffer from severe corruption in their permitting processes. Behre Dolbear Group Inc., “2012 Ranking of Countries for Mining Investment: Where ‘Not to Invest,’” <http://www.dolbear.com/news-resources/documents> (accessed June 9, 2012).