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Toward Jeffersonian Governance of the Public Lands

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A story is going around about a recent Interior Department hearing on proposed increases in public land grazing fees. A woman spoke out for going beyond simply raising grazing fees and urged that cows be removed from public lands entirely. Doing that, she said, would encourage us to eat vegetables as our food and thereby better serve both human health and the environment. The next speaker removed his cowboy hat as he approached the microphone, and, correcting the previous speaker, drawled, "Vegetables are not food; vegetables are what food eats."[1]

A sawmill spokesman told another story in which he recounted a brainstorming session in preparation for a hearing on a draft forest plan. "People came up with some neat ideas . . . such as writing their comments on two-by-fours and wheeling them in. They wanted to have some fun."[2] The hearing was ultimately canceled by the forest supervisor who became apprehensive about a "carnival atmosphere" and even possible violence.[3]

Although public land hearings are not always so entertaining, these two stories typify public participation in such hearings. The vegetarian, the cowboy, the loggers, and the butcher, the baker, and the candlestick maker, all get their platform, and after they have their say, land agency officials retire to decide the issues at hand behind closed doors. Those citizens who appear and speak at the hearings are not present at the final decision point, and skeptics are entitled to wonder whether the hearing testimony has any meaningful impact on the decision making.

This process encourages speakers at hearings to champion, with equal fervor, their positions on all the issues that are up for decision.

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* Partner, O'Melveny & Myers, Los Angeles. The Author of this Essay is particularly indebted to Daniel Kemmis for his provocative and helpful little book COMMUNITY AND THE POLITICS OF PLACE (1990). A Jeffersonian through and through, Mr. Kemmis points the way to how citizens can work together to accommodate their differences, reinvigorate government, and nurture their communities.

1. Former Interior Secretary Stewart Udall, Address at the Environmental Law Institute Annual Awards Banquet (Oct. 20, 1993).

2. Katharine Collins, *Explosive Atmosphere Snuffs out Hearing*, HIGH COUNTRY NEWS, Mar. 16, 1987, at 4.

3. *Id.*

Speakers do not tell the agency which positions they hold passionately and which positions they might be willing to compromise. Thus each speaker maintains ideological purity, saying only things that will please supporters or annoy adversaries.

Although the actors and the props may change, the scene at the grazing hearing exemplifies much of what has passed for public participation in federal land agency decision making during the quarter century that has passed since the enactment of the National Environmental Policy Act of 1969 (NEPA).[4] The Bureau of Land Management, the Forest Service, and the National Park Service, with varying degrees of effectiveness, seek out concerned citizens and give them opportunities to make their views known. But those agencies do not bring citizens together to work out their differences through meaningful dialogue with each other.

Although Thomas Jefferson might have been amused by the theatrics, he surely would not have approved this mode of government. He would, in fact, be appalled to hear such carnivals even characterized as "public participation." In writing to Uriah Forrest from Paris in late 1787, he expressed deep concern about the absence of more direct citizen roles in the Philadelphia draft constitution. He wrote that the goal should be to "[e]ducate and inform the whole mass of the people, enable them to see that it is their interest to preserve peace and order, and they will preserve it . . . . They are the only sure reliance for the preservation of our liberty."[5] Informed citizens, to the author of our Declaration of Independence, were the "most legitimate engine of government."[6]

Jefferson had no illusions that direct governance by the people would be easy, but he was willing to have it even at the cost of periodic rebellions and bloodshed.[7] Being so disposed, he would not have been impressed by the forest supervisor's fear of violence, and he would have denounced as meaningless a hearing at which citizens were merely expected to bray and then step back and accept a bureaucratic decision.

The thesis of this Essay is that a Jeffersonian approach to citizen participation should replace the public participation techniques now employed by federal land management agencies. More specifically, land agency officials should sponsor and participate in direct negotiations with representatives of citizen groups having opposing stakes in important

4. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C.A. §§ 4321-4370d (West 1985 & Supp. 1993)).

5. Letter from Thomas Jefferson to Uriah Forrest (Dec. 31, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON 478 (Julian P. Boyd ed., 1955).

6. *Id.*

7. *See id.*

public land decisions. Below I set forth reasons why both citizens and agency officials should be willing to experiment with such direct negotiations, and offer answers to some of the arguments that have been and will be raised against this approach.

At the outset we must acknowledge that citizens interested in public land decisions will not be willing to negotiate unless negotiations offer them some prospect of more acceptable outcomes. Citizens who are confident that the agency will see the issues entirely their way surely will prefer testifying in the usual manner and waiting for the good news. Citizens unsure about the outcome, however, will have reason to consider opportunities for give and take.

Even in the face of uncertainty about the outcome, however, there are some basic questions to ask before venturing into negotiations:

1. Does the impending agency decision raise a mix of issues of varying importance to opposing interest groups that afford the groups and the agency opportunities to find a mutually acceptable resolution?

2. Are knowledgeable and credible spokespersons for various interests open to possible compromise and willing to engage in good faith negotiations?

3. Finally, will the agency agree in some meaningful way to honor any agreement that might be achieved through negotiations?

In the case of the vegetarian and the cowboy at the grazing hearing, the needed mix of issues available for compromise seems lacking. After all, one who is dead set against eating cows and one who earns a living raising cows to eat will have problems agreeing on public land grazing policies. The same outcome could also be forecast whenever fundamental precepts are in opposition. The evolutionist and the creationist, for example, are unlikely to succeed in negotiating the high school science curriculum, and the pro-life and pro-choice camps will surely fail to reach a compromise on a national abortion policy.

In most public land and resource settings, however, the lines will not be drawn so neatly. In the grazing fee controversy there will, of course, be ranchers concerned about grazing costs, but there will also be sport fishers concerned about streams, conservationists concerned about wildlife habitat, and perhaps different conservationists concerned about restoration of overgrazed areas, and so on. It is possible that in a more complex brew of interests there will be viable trade offs. Although no interest group is likely to get everything it desires, each might hope to reach a mutually acceptable resolution.

For example, some groups might accept a smaller increase in grazing fees, or a phasing in of a higher fee structure, if coupled with restrictions to protect environmentally sensitive or overgrazed areas. Sport fishers might be willing to compromise if adequate protections are provided for trout streams. The agency itself might agree to smaller fee increases as a quid pro quo for an agreement by grazing permit holders to reclaim lands damaged by past overgrazing so that tax dollars will not have to be spent to reclaim them.

Most important policy decisions on federal public land use and management do in fact involve multiple issues, and the black and white views of the vegetarian and the cowboy present the unusual circumstance, not the norm. Interested citizens will usually find that their diverse agendas afford opportunities for creative problem solving. Assuming again that interested citizens lack confidence that the agency will see all the critical issues their way, each will have some incentive to participate directly in the process of fashioning compromises instead of rolling the dice in the hope the agency will make acceptable trade offs behind closed doors.

Turning to the second question, it is important that *all* significant interests be represented in the negotiations by knowledgeable and credible spokespersons who are willing to negotiate in good faith. An agreement struck in the absence of representatives of all legitimate interests will likely be unacceptable to those interests not represented and should be unacceptable to the agency as a matter of principle. Thus, the agency must painstakingly seek out all those who are interested and then work with those sharing common interests to select representatives to negotiate for them.

The process of "convening" negotiations—identifying the interests at stake and selecting negotiating representatives for differing points of view—will require resourcefulness and diligence on the part of the agency. It is unlikely, for example, that a single conservationist representative will have the confidence of all who might indiscriminately be labelled conservationists. There will be those whose primary concern is nature preservation, and they will likely have different agendas from those concerned about recreational pursuits or those concerned about cultural and historical values. Similarly, the varied commercial and commodity interests will not always be of a single mind on the issues at hand. Yet others will have more theoretical concerns such as market distortions from grazing fees on public lands that are lower than those on private lands. All these groups will need representatives who are knowledgeable and trusted by those for whom they speak.

Having identified those who should participate, it is essential to have a commitment from all participants to negotiate in good faith in quest of solutions that all can accept. If there are important interest groups with legitimate stakes in the outcome who will not agree to negotiate in this manner, then the negotiating process probably should not be attempted. The agency, therefore, should exert great effort in the convening stage to encourage citizens to see the potential benefits that can come from Jeffersonian citizens working together to resolve their differences.

Addressing the third and final question, the struggle to achieve a compromise can be worthwhile only if the participants are assured by the agency that their efforts will be meaningful. This raises the issue of exactly what the agency can offer consistent with its duties under the law. This is not an easy question because congressional charters rarely, if ever, allow agencies to delegate decision-making authority.

Although the land agencies must retain ultimate decision-making power, Congress has explicitly recognized the merits of negotiations among interest groups in the drafting of agency regulations in comparable circumstances. In the Negotiated Rulemaking Act of 1990,[8] Congress authorized and encouraged regulatory agencies to engage in negotiated rule making very much like the Jeffersonian decision-making mode advocated here. The law was passed after the Administrative Conference of the United States (ACUS) and the Environmental Protection Agency (EPA) and several other federal agencies achieved noteworthy successes in negotiating regulations.[9]

The EPA pattern is instructive. Interest group and EPA representatives negotiate *proposed* rules, which the EPA promises it will publish in the *Federal Register* for public comment. Although the EPA retains, as it must, the power to adopt the final rule, it nonetheless makes the negotiations meaningful by proffering the negotiated compromise for what it is—the product of trade offs negotiated in good faith by agency representatives and representatives of interest groups with varying and opposing stakes in the outcome.

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8. 5 U.S.C. §§ 561-570 (Supp. IV 1992).

9. *See generally* DAVID M. PRITZKER & DEBORAH S. DALTON, ADMINISTRATIVE CONFERENCE OF THE U.S., NEGOTIATED RULEMAKING SOURCEBOOK (1990). David Pritzker, an attorney for the Administrative Conference and a leading thinker on negotiated rule making since the early 1980s, played the primary role in the publication of this highly useful sourcebook. The Thomas Jefferson of negotiated rule making is Philip Harter of Washington, D.C., who has written and lectured widely on the subject. His seminal paper supported the early recommendations of the Administrative Conference, which are reprinted in the Sourcebook. *See* Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

Similarly, the federal land management agencies can offer compromises forged through negotiations as *proposed* forest plans or grazing fee solutions and publish them as such in the *Federal Register*. If the EPA experience holds true, the public comment process will often be quite tepid and do little more than endorse the accommodations reached through negotiations. When the requisite care has been taken in convening and conducting negotiations, concerned citizens and groups will ordinarily have been consulted and will already have concurred in the compromise.

Thus, the fact that the land management agency retains final decision-making power will not make the negotiated compromise unimportant. Because agency representatives participated in the negotiations, the agency is likely to give deference to the negotiated agreement.

If the interest group participation questions are answered satisfactorily, the additional questions the agency must examine can be reduced to just two. The first deals with logistics and the second with fundamental principle:

> 1. Does the agency have the resources needed to sponsor and carry out negotiations?
>
> 2. Is there a reasonable prospect that negotiated compromises will provide better short- and long-range solutions than those reached via the presently used notice-and-comment mode?

The first question is important but not complex. It is a near certainty that the resources required to reach a negotiated solution will exceed those required for the agency simply to follow the traditional public participation mode. Several resource-intensive steps must be added to effect a Jeffersonian administrative process.

As noted previously, an agency must expend considerable effort in assuring that all interests are identified and that knowledgeable and credible representatives are found to speak for them. In the case of diffuse citizen groups who lack significant economic stakes in the outcome, the agency may be required to provide funding to locate group representatives and enable them to devote the time and effort that will be needed.

There will also be educational roles that the agency must play to achieve Jefferson's ideal of governance by sufficiently informed citizens. Some and perhaps most of the interest group representatives may need help on relevant technical and scientific information.[10] On an even more

10. As a general proposition, public lands decisions will involve less scientific and technical complexity than regulatory decisions of the EPA. Citizen understanding of the basics of

elementary level, some representatives may need some very basic training in the art of negotiation: The qualities and experiences that make people suitable interest group representatives may not always equip them for negotiation.

Finally, in most cases there will be a need to retain a qualified person to serve as a neutral facilitator or mediator. The experience of the EPA in negotiated rule making demonstrates the benefits that come from having a skilled professional help articulate the issues and guide the representatives in working toward compromises.

As all of these practical requirements must be met, a land agency should not launch a negotiating process unless it knows the needed resources are available. If the required resources are in fact available, the remaining question is whether negotiations promise better public lands decision making. Land agency officials should not be expected to sponsor negotiations unless there is at least a reasonable prospect that better public land and resource policies will result in both the short and the long term.

Some will argue that only the agency should make land-use decisions because only the agency has the expertise and information required for such decision making. Even more fundamentally, some will argue that the agency has the sole duty to decide, and that it abdicates this duty when it stoops to bartering with interest group representatives. Neither of these arguments is ultimately persuasive.

Turning to the first argument, the agency's expertise and information can and should be made available to participants in negotiations. Indeed, consistent with Jefferson's letter to Forrest, one of the primary agency responsibilities should be to educate and inform citizens so that they can become effective engines of government. Throughout the course of negotiations, the agency should be attentive to the scientific and technical needs of the negotiators, and should provide instruction and materials to bring them to a level of understanding that will enable them to participate effectively.

It is even possible that the negotiating process will bring to bear more and better technical information than the agency alone can provide. The interest groups themselves will often have useful information, and

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forest planning, grazing, et cetera, is less often laden with the scientific imponderables involved in framing proposed regulations dealing with, for example, asbestos risks or air pollution abatement. Nonetheless, the *Negotiated Rulemaking Sourcebook* provides evidence that the EPA has been generally successful in helping citizen negotiators deal with the scientific and technical dimensions of their tasks. *See* PRITZKER & DALTON, *supra* note 9, at 235-36, 330-36.

they will have every incentive to present that which adds to their credibility. Subjecting such information to comparison and evaluation through an interactive process will discourage the offering of questionable or insupportable information. Thus, it is possible that the total available information would be more useful than that which the agency has accumulated and that which citizens now indiscriminately proffer in notice-and-comment proceedings. And, all else being equal, that better information should tend to bring about better decisions.

Some will contend, however, that regardless of any other considerations, the agencies alone have stewardship of public lands and that with the stewardship responsibility comes the sole duty to decide. In that strict view, an agency abdicates its responsibilities if it entrusts any part of its decision-making authority to partisan interest group representatives.

A respected scholar has argued that it is unseemly for an agency to "bargain and trade its 'interests' (the public interest) in the same way the other participants may trade their interests."[11] The underlying assumption, of course, is that the public interest is something distinguishable and apart from the interests advanced by other interest groups. What makes up this separate, platonic "public interest" that the agency alone seemingly must define and safeguard remains unexplained. But if the convening of negotiations has achieved the objective of bringing together representatives of all legitimate interests and if those representatives and agency representatives work out an acceptable compromise, is it not plausible that the compromise is in the public interest for the very reason that it has been found acceptable to affected citizens? Indeed, of what does the public interest consist if it is not some amalgam of citizen interests?

At bottom, our nay-saying scholar simply does not trust the convening process because he doubts that it is possible to achieve adequate representation for "all affected interests."[12] Specifically, he worries about the inability to secure representation of interests "not well defined, organized, or strong."[13] He fears that "the agency's responsibility for determining the public interest" would "no longer provide[ ] the safeguard otherwise available for unrepresented interests."[14]

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11. William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55, 93 (1987). This article is a superb piece of scholarship and no less so merely because I disagree with the author about regulatory negotiation.

12. *Id.* at 95.

13. *Id.*

14. *Id.*

The agency, however, has at least two ways that it can deal with this problem. First, the agency can be creative in seeking out spokespersons who have the vision and conscience to speak effectively even for those interests that are ill-defined, unorganized, or weak. Surely the agency can ordinarily find able and dedicated citizens who would strive mightily for interests that are worth protecting even though they may be ill-defined, unorganized, or weak.

The second way the agency can deal with the problem is the very way that our scholar would have the public interest safeguarded in traditional agency decision making. There is nothing in the negotiating calculus that bars the agency's representative from speaking up for interests that it perceives may have fallen through the cracks. Thus, our scholar is entirely correct that the agency should speak for such interests and is wrong only in contending that the agency must eschew the negotiating process to do so.

Although our scholar voices a number of thoughtful concerns calling for persuasive answers, he raises one concern that merits only summary rejection. He asserts that to repose power in citizen negotiators is to license a disregard of the law: "The law no longer directs or even necessarily constrains the outcome but has become merely a factor in the give-and-take necessary to achieve consensus."[15]

It is unworthy to suggest that agencies will be cavalier about congressional mandates. Indeed, we should expect that an agency's representatives will as a matter of course take the responsibility to caution other participants on the legal bounds that confine negotiated solutions. In the unlikely event that rogue agency representatives were to play fast and loose with the law, a check exists in the efforts of agency superiors and the self-interest or consciences of other participants.

Although it is far-fetched to assume that an agency will intentionally disregard its legal duties, it is not a far reach to worry about whether an agency will make the best and fairest public land decisions within the ambit of its statutory powers. The arguments against negotiated compromises simply assume that by acting alone the agency will arrive at better decisions than those negotiated by the agency and interest group representatives.

It would be easier to accept leaving sole governance of public lands to the agencies if we were unencumbered by the past performances of those agencies. The public land agencies have shown themselves unusually susceptible to being "captured" by those interests they are charged

15. *Id.* at 94.

to regulate or at least keep at arms length. Sometimes, in addition to becoming highly partisan, agencies have punished employees who question the agency's allegiance to favored commodity and commercial interests at the expense of the broader public interest.[16]

If the land agencies do in fact take sides, is it naive to expect them to experiment with more meaningful modes of public participation? Why, one might ask, would agency leaders adopt reforms that lessen their ability to control the final outcome for the benefit of the interests they like most? Those who take a jaundiced view of such matters can find ample reasons to be skeptical.

Such cause for hope as exists may be grounded in the very inadequacies of the public participation game as it is presently played. The meaninglessness of the carnival hearings of the past may contain the seeds of hope for a better future. All that is required is a sharing of Jefferson's vision of the worth of informed and functional citizens, and we ought to be able to expect at least that level of altruism in public land agencies.

16. The Forest Service has not at all times been the Forest Service of Teddy Roosevelt and Gifford Pinchot. Recently the publisher of *High Country News*, a highly respected biweekly environmental newspaper, wrote a piece headlined "It's Time to Clearcut the Forest Service." After recounting a succession of misdeeds blatantly favoring commodity and commercial interests, the publisher concluded:

> The Forest Service is beyond redemption, and should be abolished. It would not be a huge loss. There is little institutional or human memory in the agency, given the frequency with which employees are transferred, given how the agency has isolated itself from the ground and from communities, and given its contempt for science.
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> . . . .
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> The rule of life is "adapt or die." The Forest Service has failed to adapt. Therefore it must die.

Ed Marston, *It's Time to Clearcut the Forest Service*, HIGH COUNTRY NEWS, Sept. 20, 1993, at 13.