

Alternative Approaches to Natural Resources Study Commissions

April 10, 2015

Prepared by

Matthew McKinney, University of Montana
John Ruple, University of Utah

Introduction

The purpose of this document is to highlight different approaches to catalyze and coordinate systematic studies to examine natural resource law, policy, and governance. For each one of the following examples, we have tried to capture the origin, purpose, composition, and outcomes of the initiative. Given that our purpose is to stimulate thinking about the possibility of a public land law review initiative in the 21st century, the following narrative comes in at about the 30,000-foot level. *We can certainly consider other models identified by participants at the exploratory workshop as we move forward.*

Public Land Law Review Commissions

- Congress established the 1879-1881 commission to investigate the public land laws in response to widespread abuse and inconsistent implementation
 - Composed of two senior federal government officials and three civilians appointed by the President
 - JW Powell is widely considered to be the mastermind behind this commission, which was infused with his ideas and recommendations
 - The final report was almost completely ignored

- President Roosevelt created the 1903-1905 commission to address many of the same problems of abuse and inconsistent implementation as the first commission
 - The President appointed its three members, including Gifford Pinchot – the chief architect of the commission and its recommendations
 - The commission was never viewed as an impartial body, but rather as a vehicle for Pinchot to advance his ideas; consequently, its final report was largely ignored by Congress and others
 - That said, the commission and its report raised public awareness about natural resource exploitation and abuse of public land laws; in sum, it helped catalyze the growing conservation movement

- Congress authorized the 1930-1931 commission to examine the future disposition of unreserved lands and address a myriad of issues related to grazing, water, timber, and mineral resources
 - President Hoover appointed the 21-member commission, including representatives from federal government agencies, natural resource professions, and the political and journalism communities; one-half of the nominations were recommended by the governors of the 11 western states
 - Commission members broke into sub-groups, toured the West, convened public hearings, and convened to draft the final report
 - The over-arching recommendation was to transfer unreserved federal lands to the states, with subsurface mineral rights reserved to the federal government
 - Like the two previous commissions, these recommendations were largely ignored; there were no immediate or long-term results

- Congress authorized the 1964-1970 commission after President Kennedy and Representative Wayne Aspinall (Colorado) reached agreement on passing both the Wilderness Act and the Public Land Law Review Commission Act in 1964
 - President Johnson, honoring the agreement, signed both laws in September 1964
 - The PLLRC Act directed the commission to study existing policy relative to retention, management, and disposition of the public lands; examine [in so many words] the tension between legislative and executive authority; compile data to clarify various demands on public lands; and recommend modifications in law, regulation, policy, and practice
 - An 18-member commission was appointed jointly by Congress and the Administration; the 18-members then unanimously selected its 19th member as chair ... Rep. Wayne Aspinall
 - A core staff of 25 people, and an advisory council of 25 people (agency officials and representatives of various interest groups) plus representatives of Governors were appointed to assist the commission
 - The commission convened 11 national and regional hearings; heard testimony from over 900 people; produced 39 reports; held 19 meetings to identify problems, consider options, and make recommendations;
 - Scholars differ on whether the report emphasized “retention” or “disposal,” while industry largely support the report and the conservation community largely dubbed it an industry giveaway
 - The PLLRC released a final report *One-Third of the Nation's Land* with 17 general recommendations derived from 137 “major” recommendations on legislative and administrative changes; the final report included some “consensus” recommendations and “separate views” on other recommendations.
 - The PLLRC’s recommendations led, most notably, to enactment of FLPMA. FLPMA consolidated over 3,000 public lands laws into a single organic act for the BLM. Additional PLLRC recommendations were administratively adopted, taking on regulatory force and effect.
 - The PLLRC recommended (not necessarily in any order of priority):

1. Requiring “a continuing, dynamic program of land use planning,” that involves the public, and which was satisfied by FLPMA and NFMA. Plans were to be coordinated with “land use plans and attendant management programs of other agencies,” which plans do not always do well.
2. Giving state and local governments an effective role in planning. FLPMA, NFMA, and NEPA allow for state and local involvement but do not delegate authority. Major impediment seen as state and local capacity, as the Commission recommended federal grants to states. Capacity appears to remain an issue, especially for smaller rural counties.
3. Planning to “obtain the greatest net public benefit,” with “highest and best use of particular areas . . . dominant over other authorized uses.” FLPMA and NFMA include a multiple-use, sustained yield-mandate, but decisions such as resource protection and commodity production result in dominant use areas.
4. Increasing emphasis on environmental protection and stewardship.
5. Retaining public lands in federal ownership. FLPMA formally established the federal policy of retaining the remaining public lands in federal ownership unless disposal is in the national interest. Where disposal does occur, the US should apply restrictive covenants and deed restrictions, especially where local zoning is inadequate. Covenants and deed restrictions remain an underutilized tool.
6. That “no additional grants should be made to any of the 50 states.” For statehood land grants, limitations on use should be eliminated. Limitations set forth in grants generally remain in force.
7. That if federal public lands were never to become part of the local tax base, some compensation should be offered to local governments (generally counties) to make up for the presence of non-taxable land within their jurisdictions. This recommendation led to creation of the Payment in Lieu of Taxes (PILT) program. Notably, the PLLRC recommended that “payments should not attempt to provide full equivalency with payments that would be received if the property was in private ownership.”
8. That grazing should be conducted at “fair market value,” and that mineral “[p]atent fees should be increased and equitable royalties should be paid to the United States on all minerals produced and marketed whether before or after patent.” The PLLRC also recommended that minerals be reserved in all future public land disposals. Fair market value recommendations remain politically unpopular and have not been implemented.
9. That the DOI “have sole responsibility for administering mineral activities on public lands, subject to consultation with the department having management functions for other uses.” BLM retains the lead role, but USFS involvement increased with enactment of FOOGLRA.
10. That Congress should clarify the reserved water rights doctrine, as applied to federal reservations. Congress has not done so, leaving this responsibility to negotiations and the courts.

11. Cooperation with states regarding fish and wildlife management, charging fees to hunt and fish on federal land, and designating dominant use areas for key wildlife habitat areas. Coordination has increased, but user fees for federal land have been adopted inconsistently.
12. That the Homestead Act and Desert Lands Act be repealed and replaced with land sales where agriculture is the dominant use.
 - Responding to the PLLRC's main conclusion that the national legislature should take firmer control of public land and resources policy, Congress in FLPMA, carved out an ambitious future role for itself in classifying federal lands. Section 1714 of FLPMA lays out an elaborate procedural system for withdrawals and withdrawal revocations, with each major administrative action subject to hybrid forms of congressional oversight.
 - The PLLRC recommended transferring the Forest Service to the Department of the Interior, to be renamed the Department of Natural Resources. The similar land uses and management objectives for the BLM and Forest Service were cited as supporting rationale, but a merger of these two agencies was not explicitly proposed. No legislative proposals were presented to implement this recommendation.

Western Water Policy Review Commission (1995 -1998)

Congress authorized a presidential advisory commission in 1992 to examine western water policy. After some delay, the US Department of the Interior chartered the commission in 1995 to complete a comprehensive review of federal activities that influence the allocation and use of water resources in the 19 western states. It also examined the legal and institutional framework for water management and the performance of federal agencies.

The commission included 12 members of Congress (the ranking majority and minority members of the committees with the greatest jurisdiction over water), the Secretaries of the Army and the Interior Department, and 8 citizens appointed by the President. The Interior Department provided administrative resources, and an executive director and employees of the Bureau of Reclamation staffed the commission.

The commission accomplished its objectives over 24 months through meetings with the public, research, symposia, and the assistance of experts. It sought the opinions of people affected by western water policies through a series of public meetings and workshops across the West. The commission established a mailing list, sending newsletters and the draft report to approximately 3,000 individuals and organizations. In addition to seeking public comment, the commission contracted for a series of reports consistent with the mandate of the commission, including a series of basin studies that explored how various needs, interests, laws, policies, and practices play out in a particular basin.

In a notable departure from past commissions, all of the citizen appointees lived and worked in the West, and all but one of the commission's meetings were held in the West. It is also interesting to note that the chair of the commission and its executive director were

affiliated with public universities in the West. The commission catalyzed a robust, informed dialogue on water policy in the West; captured the status of the West's water problems and the pressures driving change in water management; documented how policies are changing in response to population growth and a changing economy; and identified what more needs to be done with respect to tribal water needs, riparian and aquatic ecosystems, agricultural practices, and federal agency coordination. While no single solution was identified for all of these complex challenges, the central theme that emerged in the report is that the federal government should support watershed and basin innovation -- a shift towards stakeholder involvement and coordination of agencies along hydrologic rather than political lines. This organizing theme was not a recipe for the creation of federal commissions in each basin. Rather, it endorsed the organic emergence of watershed and basin initiatives throughout the West as effective forums to integrate multiple needs, interests, and federal programs at different spatial scales. All of the recommendations in the report were presented explicitly within a framework respecting existing property rights in water.

Pew Oceans Commission (2000 - 2003)

Unlike the models presented above, the Pew Oceans Commission represents an alternative approach to catalyze and coordinate a comprehensive review of natural resource law, policy, and governance. After more than 30 years (1969) after the Stratton Commission (a Congressionally-chartered group to review ocean policy) issued its final report and recommendations on ocean policy and governance, the Pew Charitable Trust realized that the state of our oceans and coasts had changed somewhat dramatically. While some problems considered 30-years ago remained, new environmental, economic, and policy challenges had emerged – all of which exceeded the capacity of the existing governance arrangements. New knowledge about the complex interactions in marine ecosystems and the need to maintain the diversity and resilience of those natural systems further underscored the need for action.

In response, the Pew Charitable Trust created the Pew Oceans Commission, a bipartisan, independent group of 18 American leaders, to chart a new course for the nation's ocean policy. Its mandate was to identify policies and practices necessary to restore and protect living marine resources in U.S. waters and the ocean and coastal habitats on which they depend. The Commission was also charged with “raising public awareness of the principal threats to marine biodiversity and of the importance of ocean and coastal resources to the U.S. economy.”

The Commission brought together a diverse group of American leaders from the worlds of science, fishing, conservation, government, education, business, and philanthropy. It organized into four committees to review the core issues of governance, fishing, pollution, and coastal development; recruited leading scientists to clarify priority issues and to prepare reports summarizing the best scientific information available on those subjects; and also investigated marine aquaculture, invasive species, ocean zoning, climate change, science, and education.

For more than two years, the Commission conducted a national dialogue on ocean issues. It convened a series of 15 regional meetings, public hearings, and workshops to listen to those who live and work along the coasts. From Maine to Hawaii, Alaska to the Gulf of Mexico, the Commission spoke with hundreds of citizens, fishermen, scientists, government officials, tourism operators, and business leaders. Commissioners also held a series of 12 focus groups with fishermen. The Commission was deeply committed to learning from people who live and work along the coasts and around the country, and supplementing that knowledge by collecting the best scientific information available.

The Commission published its final report in 2003 and included several recommendations to ensure healthy, productive, and resilient marine ecosystems for present and future generations. Among other things, it argued that to achieve and maintain healthy ecosystems requires that we change our perspective and extend an ethic of stewardship and responsibility toward the oceans. Most importantly, it asserted, "we must treat our oceans as a public trust." In 2005, the Pew Oceans Commission joined forces with the US Oceans Commission (created by President George W. Bush in 2000) to further their overlapping and complementary recommendations and to unify their efforts. *[What, if anything, can be said about the tangible outcomes of this effort? Are oceans managed differently today because of this effort?]*

ESA @ 30 Project (2001 - 2006)

To help celebrate the 30th anniversary of the Endangered Species Act, Professor Dale Goble (University of Idaho) and other scholars and practitioners catalyzed and coordinated a systematic evaluation of the Endangered Species Act. The objective of the *ESA @ 30 Project*, as it was known, was to engage policy-makers, those impacted by the ESA, and those charged with its implementation to identify ways to improve its effectiveness.

The project began in the winter of 2001 when Professor Goble invited several other people to explore the merits of this idea. Housed at the Bren School of Environmental Science and Management, University of California, the organizers agreed to two guiding principles from the beginning: (1) all of the information and analyses of the ESA should be scientifically rigorous; and (2) the dialogue should engage the full spectrum of interests and perspectives on the ESA.

To achieve these objectives and principles, the organizers invited a select group of nearly thirty scholars and practitioners -- including biologists, economists, geographers, land-use planners, natural resource lawyers, philosophers, and policy analysts -- to a two-day discussion of the ESA in November 2002. To focus this discussion, the organizers also invited four individuals who have played significant roles in the evolution of the ESA. The discussion was further focused by three broad questions: (1) What have we learned from the ESA's successes and failures? (2) What are we seeking to protect and why? and (3) How can we maintain biological resources and services on the working landscape?

Following this initial meeting, the attendees drafted some 40 papers that addressed the three questions from multi-disciplinary perspectives. Following an initial round of peer review, these papers served as the analytical basis for a two-day conference held in Santa Barbara in November 2003. A group of nearly 100 individuals representing a diverse cross-section of the interests impacted by the ESA – including NGOs from both the conservation and development communities as well as federal, state, and local governmental representatives -- met to discuss the papers and share ideas. Several notable experts, such as Bruce Babbitt and Dirk Kempthorne, addressed the group.

The discussions produced a remarkable degree of consensus on potential avenues to improve the effectiveness of the ESA. These ideas were further refined at a series of topical workshops that were coordinated by four-person committee. Each workshop was hosted by a particular NGO, organized by agency personnel charged with responsibility for that topic, and included participants that represented the diversity of interests and viewpoints on that particular topic. The workshops developed more detailed proposals building on the points of consensus that emerged from the November 2003 conference. Workshops were convened on issues related to habitat conservation plans, state-based programs, ESA one-stop shopping, landowner incentives, and so on.

In addition to convening two national conferences and nearly a dozen smaller workshops, the project produced two books -- *The Endangered Species Act at Thirty: Renewing the Conservation Promise* (Island Press, 2006) and *The Endangered Species Act at Thirty: Conserving Biodiversity in Human-Dominated Landscapes* (Island Press, 2006). The organizers also participated in a series of briefings to groups including congressional staffs, the U.S. Fish & Wildlife Service, the Western Association of Fish and Game Administrators, The Nature Conservancy, the American Farm Bureau Federation, National Cattlemen's Beef Association, Plum Creek Timber Company, Environmental Defense, National Wildlife Federation, and the Center for Biological Diversity.