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### What a Federal Natural Resource Management Agency Can Do to Avoid Takings

John D. Leshy

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**WHAT A FEDERAL NATURAL RESOURCE MANAGEMENT  
AGENCY CAN DO TO AVOID TAKINGS**

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**Regulatory Takings and Resources:  
What are the Constitutional Limits?**

**Natural Resources Law Center  
University of Colorado School of Law  
June 13-15, 1994**

# WHAT A FEDERAL NATURAL RESOURCE MANAGEMENT AGENCY CAN DO TO AVOID TAKINGS

John D. Leshy

## I. INTRODUCTION

A more conservative judiciary interacting with more complex and disputatious agency responsibilities leads to the conclusion that more attention must be paid by federal natural resource agencies.

What follows is a view from the trenches, as a Department of the Interior retread, rather than from my previous perch in academia. The usual disclaimer about not speaking for the agency applies - these are musings, not policy. (Some of the examples and ideas that follow are found in Coggins, Wilkinson and Leshy, Federal Public Land and Resources Law (3d. ed. 1993), e.g., at pp. 227-251, 506-510, 570-80, 610-21, 694-702.)

## II. PROPERTY RIGHTS AND FEDERAL NATURAL RESOURCES AGENCIES - AN OVERVIEW

A. The Department of the Interior plays an array of roles in natural resources - as developer, as permittee of development, as regulator of public or private development, as trustee for tribes. Each role potentially implicates takings, but context can be crucial. I want to confine myself here basically to the role the Department plays as owner/manager of federal natural resources under its jurisdiction; timber, minerals, water, etc.

B. Although state law usually determines the parameters of property interests subject to Fifth Amendment protection, whatever private property interests exist in these federal natural resources are nearly always created in the first instance by federal law, contract, regulation, or some combination. (For an exception, consider the important, if murky, role state law plays in determining property interests conveyed in a federal contract to deliver water from a federal reclamation project.)

C. Some generic questions are implicated here; for example:

-- Should property interests in natural resources be treated differently from other property interests? Cf. John Muir ("Everything is hitched to everything else"); Sax, "Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council," 45 Stanford L. Rev. 1433 (1993).

-- Is there any case to be made for treating federally-owned natural resources differently? Is it significant that in mandating multiple use/sustained yield management on hundreds of millions of acres of federal land, Congress has recognized

the interaction of various uses and made sustainability a paramount management goal.

-- Apart from the specific terms of a statute or a lease or permit, what expectations may an owner of a property interest in a federal natural resource legitimately have? Cf. United States v. Locke, 471 U.S. 84 (1985) ("The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. ... Claimants thus take their ... interests with the knowledge that the Government retains substantial regulatory power over ... [them].")

### III. THE ROLES OF THE EXECUTIVE AND CONGRESS IN CREATING AND DEFINING PROPERTY INTERESTS IN FEDERAL NATURAL RESOURCES.

A. Sometimes Congress makes the matter clear; e.g., it has forbidden the Executive from creating a property interest in a grazing permit, see 43 U.S.C. 315b, although the matter continues to be debated in the political arena.

B. Sometimes Congress creates a fairly elaborate scheme for balancing property interests against governmental regulatory power. It has, for example, authorized the government to extinguish an opportunity to develop oil and gas resources on the Outer Continental Shelf previously allowed, and defined the measure of compensation in such circumstances with some specificity. OCS Lands Act, 43 U.S.C. 1334.

C. Sometimes Congress seems to cotemplate that some property interest will be conveyed by a legal instrument like a mineral lease, or the filing of a mining claim, but leaves up to the executive and the courts to figure out just what that interest is, and when it vests.

D. Sometimes Congress leaves the Executive with very broad power to determine what kind of property interest, if any, to convey in federal natural resources; e.g., FLPMA Title V right-of-way permit.

### IV. HOW SHOULD THE EXECUTIVE EXERCISE ITS AUTHORITY TO DEFINE PROPERTY RIGHTS IN FEDERAL NATURAL RESOURCES?

A. Subject to the variations and limitations already mentioned, there are, as a general matter, many circumstances in which the federal natural resources agencies currently have the legal authority to include, by regulation or as a term of a permit, contract or lease, what might be called an "environmental contingency" to help withstand takings challenges. This clause would, in effect, seek to preserve the agency's authority to

restrict or stop activities it previously authorized to develop those resources; e.g., oil production, coal mining, timber harvesting, or the use of water for such things as hydropower generation and agricultural irrigation. It seeks to more specifically define what legitimate, legally-recognized expectations are, and who bears the risk of what. In short, it seeks effectively to limit the property interests being conveyed, and by so doing defeat or at least substantially undercut takings claims.

B. There are a number of examples of such clauses in use - whether initially in statute, or found only in regulations. See, e.g., OCS Lands Act, 43 U.S.C. 1334; Forest Service timber harvesting regulation, 36 C.F.R. 223.116(a)(5). The idea goes quite a ways back; see the Federal Power Act of 1920, 16 U.S.C. 807.

C. Yet the natural resource agencies are not, in general, exercising this power nearly to the extent they could. Should they? What are the costs, and what are the benefits, to more widespread use of this approach in the current climate of "takings" sensitivities?

1. Political costs - it's better to leave matters vague and uncertain than to create controversy by trying to clarify them. Cf. the Forest Service's experience with its "contingent rights" stipulation in oil and gas leasing. Here the time lag (often many years) between the decision that may create a "taking" and the ultimate determination of whether a taking has occurred is especially influential. Also important here is the question of who pays within the executive branch - the program agency making the decision, or someone else? (Usually the answer is someone else; namely, the Judgment Fund, see 31 U.S.C. 1304.)

2. Economic costs - Leshy's paradox: The federal treasury may in some circumstances suffer more from winning a takings case than losing it. How does an "environmental contingency" announced up front affect bidding behavior, in those circumstances in which federal natural resources are subject to auction? Consider also here the developers' need for "certainty" - often genuine but often magnified; e.g., the Trans-Alaska Pipeline System; the American Barrick patent under the Mining Law.

3. Decisionmaking costs - is an environmental contingency merely an inducement to sloppy upfront decisionmaking by the federal agency? Can realistic forecasts be made about the likelihood of environmental harm in any event? Is too much demanded of NEPA in some contexts? In the oil and gas context, for example, it may take several decades to move from planning through leasing, exploration, and development. Trying to determine before leases are issued what

environmental consequences are "reasonably foreseeable" is a challenge, to say the least. See generally Land Use Planning and Oil and Gas Leasing on Onshore Federal Lands (National Academy Press, 1989), pp. 116-17.

D. Is there a way to design an "environmental contingency" stipulation that maximizes the benefits and minimizes these costs? Consider the OCS model, which limits the circumstances under which the reserved authority may be exercised, and defines a measure of compensation (the lesser of sunk costs or market value).

1. On the circumstances-limiting side, should such a contingency be limited to unforeseen environmental harm? Unforeseeable environmental harm? Cataclysmic harm? Major harm? If the government blew it in its NEPA analysis, who should pay, the developer or the Treasury? If we say the latter, are we encouraging the developer (who often participates heavily in the NEPA phase) to put its head in the sand?

2. On the defining-compensation side, how feasible are devices like bidding credits on future sales, or royalty credits on other leases? Exchanges of property interests for like interests elsewhere? Cf. Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991), and the use of "transferable development rights" now fairly common in zoning. A conventional answer is "great in theory, but nearly unworkable in practice," but is that because not enough effort has been made?

3. Should the agencies address the matter by generic regulation, by standard lease term, on a case-by-case basis, or in bargaining over individual leases or contracts? (Agencies vary considerably in how they approach such matters - some emphasize regulations; others have relatively few regulations or standard terms, and operate much more through negotiation with recipients.) Should the natural resources agencies try for a common approach (or should the White House address the issue in an Executive Order)? Or is "local control," variation and experimentation desirable?

E. In general, should compensation arising from a regulatory takings decision by an agency come, in whole or in part, from the agency's budget?

F. Consider the following variant on the defining-compensation issue: Should federal natural resource agencies adopt "variance" clauses giving them the right to choose to allow development to go ahead when the costs of effectively buying out property interests are deemed too high? Such clauses are nearly universal in zoning, and do appear in some contexts in some environmental regulatory statutes; e.g., the Clean Water Act. But they have generally been

resisted by environmental groups, on the ground that no exemption or waiver from an environmental standard is ever appropriate, or is too subject to abuse. Can such a waiver clause be designed to minimize opportunities for abuse?

G. If the executive agencies do become more aggressive in the use of "environmental contingency" stipulations, will the courts apply them? See, e.g., U.S. v. Appalachian Electric Power Co., 311 U.S. 377 (1940).

V. CONCLUSION - IS MUDDLING THROUGH INEVITABLE?