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### Property Rights and Public Resources

Mark L. Pollot

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**PROPERTY RIGHTS AND PUBLIC RESOURCES**

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**REGULATORY TAKINGS & RESOURCES:  
WHAT ARE THE CONSTITUTIONAL LIMITS?**

**Natural Resources Law Center  
University of Colorado  
School of Law  
Boulder, Colorado**

**June 13-15, 1994**

# PROPERTY RIGHTS AND PUBLIC RESOURCES

Mark L. Pollot

## I. Property Rights Basics

- A. Approximately 20 Provisions of Constitution Concerned with Property in One Form or Another
  - 1. Focus Here on Takings Clause
- B. Purpose of "Takings Clause" of Fifth Amendment is to Set Limits on Power of Eminent Domain
  - 1. Eminent Domain Power Permits Government to Obtain Resources for Public Uses
  - 2. Preserves Private Property Rights by Requiring Compensation
    - a) Specifically applies only to private property
    - b) Other "public" property protected by other provisions (e.g. "Enclave Clause" of Article I, Sec. 18)
  - 3. Limits Exercise of Power by Confining to Public Uses
- C. Exercise of Eminent Domain
  - 1. Two Ways
    - a) Direct (Condemnation Action)
    - b) Regulatory Takings
      - (i) Focus here on regulatory takings
- D. Three Components to Takings Clause
  - 1. Property
  - 2. Taking
  - 3. Compensation
- E. Focus Here is on Property Component
  - 1. In "public lands" or "public resources" debate, the real issue is whether the land or resource in question is truly public.
    - a) When the title to the property in question is in private hands, there is a tendency for those supporting the regulation of that property (e.g., wetlands) to characterize the regulation as being necessary to protect the "public resource" even though the title is clearly in private hands.
    - b) However, question becomes much more complex when there is at least an argument that the land is owned by the United States or another governmental body (e.g., the State). In this context, disputes over such activities as grazing, mining, and timbering occur. Will focus here on "federally owned, managed, and/or

occupied land."

## II. Private Activities on "Public Land"

### A. Misnomer

1. It is more accurate to refer to the federal "public lands" as federal lands, both historically and practically.
  - a) Public has no ownership interest in classical sense. No member of public may, for example, sell his or her "interest in the land" to third parties, nor does any member of the public have a right to enter into and use such lands.
  - b) Federal Enclave land must be purchased from the state with the consent of the state legislature. Over such lands, the U.S. has the power of "exclusive legislation." This power granted not so much to give "sovereignty" for the sake of sovereignty, but to prevent states from bringing federal governmental functions to a halt.
    - (i) However, states may permit purchase of such lands without giving up entire sovereignty over those lands.
    - (ii) Affected by *Dred Scott*.
  - c) Under so-called "Property Clause" of Article IV, the United States has the right to make "needful rules and regulations" over lands and territories "owned by" the United States.
    - (i) Much different language from that in enclave clause. The exact meaning of the differences is far from clear.
    - (ii) United States must show ownership to be able to exercise this power, however extensive it is.
    - (iii) In fact, on its face, this power seems no different from that owned by any other property owner with respect to his or her property. That is, you or I can do the same thing, but we are subject to the laws of the state and locality in which our property is located.
    - (iv) Since such lands are *not* subject to the power of exclusive legislation, the state seemingly can regulate activities on this land, and arguably may regulate the federal government itself on such land (given that the power of exclusive legislation was given to federal enclaves for the express purpose of freeing them from local interference.

### B. On Federal Land Untainted by Private Ownership of Any Kind

1. Is little question that government may impose any conditions it chooses on people it allows to use that land, just as any other landowner.
2. Problem is, once government begins to interact with others,

it begins to create both property interests and expectation in those others.

**C. Creation of Private Rights on Formerly Federal Lands**

1. Meaning, situation in which government retains fee title, but grants easements, recognizes water rights, enters into contracts, and the like.
  - (a) For example, the Act of July 26, 1866; grazing leases under the Taylor Grazing Act; mining patents; and timber leases, *inter alia*.
2. All acts regulating federal lands, including, *inter alia*, those creating national parks, national forests, and the Taylor Grazing expressly recognize that they are subject to existing valid rights.

**III. Public Resources and the Takings Clause**

**A. Takings Inquiries**

1. All takings cases require the establishment of a property right in the first instance.
2. Does Not Matter How the Right Was Created. Once Created, it is entitled to Constitutional Protection

**B. These Cases Arising On Federal Land Involve a Number of Statutes**

1. Taylor Grazing Act
2. Act of July 26
3. Federal Lands Policy and Management Act (FLPMA)

**C. Examples of Present Disputes**

1. *Hage v. United States/United States v. Hage*
2. Other Grazing Cases
3. Mining Cases
4. Timbering Cases

**D. Water at Heart of Many Disputes**

**IV. Implications for Property Rights and Federal Control of Lands**