

LAW, TERRITORY, AND SOVEREIGNTY. SOME ISSUES RAISED BY THE CORPORATE CONTROL OF LAND

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PROVOCATION

In late fall of 2008, during the final days of the George W. Bush administration, the Bureau of Land Management (BLM) released a series of maps designating over 100,000 acres of land to be leased to oil and gas companies in rural Utah. The designations were based on Resource Management Plans (RMPs) conducted by the Utah State Office of the BLM (BLM-Utah).¹ As the product of an administration led by oilmen who had advocated reforms to federal lands policies promoting fossil fuel development the land leasing program was, to say the least, controversial. Even more so in that the lands slated for auction abutted protected areas including Arches and Canyonlands National Parks and Dinosaur National Monument. The controversy only increased when, during the auction on December 19, 2008, Tim DeChristopher, a 27-year old activist and student at the University of Utah, entered the BLM office in Salt Lake City and proceeded to bid on the newly available lands. DeChristopher won over \$1.7 million in oil and gas leases, before being charged on two felony accounts of

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* Department of Geography, University of Georgia. I would like to thank Phil Stern, Rachel Brewster, and the members of the Sawyer Seminar on Corporations and International Law for allowing me to present a preliminary sketch of on-going research. Although they bear no responsibility for the prefatory and exploratory nature of this short essay, I'm very grateful to Amy Ross, Elizabeth Havice, Kate Derrickson, Lowery Parker, and Laura German for insightful conversations on corporations, sovereignty, and land.

1. See Bureau of Land Mgmt., Moab Field Office, BLM-UT-PL-09-001-1610, UT-060-2007-04, Record of Decision and Approved Resource Mgmt. Plan (2008); Bureau of Land Mgmt., Richfield Field Office, BLM-UT-PL-09-002-1610, UT-050-2007-090 EIS, Record of Decision and Approved Resource Mgmt. Plan (2008); Bureau of Land Mgmt., Monticello Field Office, BLM-UT-PL-09-003-1610, UT-080-2005-71, Record of Decision and Approved Resource Mgmt. Plan (2008); Bureau of Land Mgmt., Monticello Field Office, BLM-UT-PL-09-004-1610, UT-090-2007-40, Record of Decision and Approved Resource Mgmt. Plan (2008); Bureau of Land Mgmt., Price Field Office, BLM-UT-PL-09-005-1610, UT-070-2002-11, Record of Decision and Approved Resource Mgmt. Plan (2008); Bureau of Land Mgmt., Kanab Field Office, BLM-UT-PL-09-006-1610, UT-110-2007-022, Record of Decision and Approved Resource Mgmt. Plan (2008).

violating the 1987 Federal Onshore Oil and Gas Leasing Reform Act² and issuing false statements.³ After numerous delays, DeChristopher was brought to trial and convicted in March 2011, ultimately serving 21 months in federal prison.⁴

The auction and DeChristopher's activism received widespread media attention and have become central to debates concerning strategies for climate activists.⁵ They have also inspired other environmentalists to intervene in BLM auctions for leases, most directly Terry Tempest Williams and Brooke Williams's attempts to purchase BLM land up for auction in Utah by creating a corporation (the Tempest Exploration Company, LLC) and legally participating in the leasing process.⁶ What interests me about these events, however, is less the moment or even potential of civil disobedience than how we understand and analyze the routinized practices of public land management to which these acts of civil disobedience call attention. For instance, in rejecting the Tempest Exploration Company's noncompetitive lease application, Edwin Roberson, Director of BLM-Utah, highlighted Tempest Williams's writings and advocacy work with the Keep It in the Ground movement as indicating her company's intentions not to comply with "the diligent development requirement plainly set forth in your noncompetitive lease offers."⁷ This suggests that the BLM leasing program is not simply set up to enable private companies to produce oil and gas, but actively demands leasees to demonstrate their commitment, diligence, and intentions to do so. This is in spite of the fact that many public lands already leased to oil and gas companies are not ultimately used for production. Roberson and BLM-Utah thus seem to be drawing a tenuous distinction, based on the *intentions* of oil and gas companies,⁸ between valid leases of

2. 30 U.S.C. § 195 (2012) [Hereinafter 1987 Reform Act.].

3. 18 U.S.C. § 1001 (2012). For an account of these events, see OFFICE OF INSPECTOR GENERAL, U.S. DEPT. OF INTERIOR, INVESTIGATIVE REPORT: BLM UTAH LEASE SALE (2009).

4. See INVESTIGATIVE REPORT *supra* note 3.

5. For a smattering of the reportage, see *Utah Activist Disrupts Sale of Leases for Drilling*, N.Y. TIMES, Dec. 20, 2008; Kirk Johnson, *Legal Cost of Throwing a Monkey Wrench*, N.Y. TIMES, Oct. 9, 2009; Umbra Fisk, *Climate Activist Tim DeChristopher Talks about His Guilty Verdict*, THE GUARDIAN, Mar. 11, 2011; Abe Streep, *The Trials of Bidder 70*, OUTSIDE, Oct. 27, 2011.

6. For her own account of the process, see Terry Tempest Williams, *Keeping My Fossil Fuels in the Ground*, N.Y. TIMES, Mar. 29, 2016.

7. Letter from Edwin Roberson, State Director, Utah BLM, US Dept. of Interior, to Terry Tempest Williams, Tempest Exploration Co. (Oct. 18, 2016) (*available at* <https://assets.documentcloud.org/documents/3146518/Terry-Tempest-Williams-Letter.pdf>).

8. *Id.* As Roberson's letter stated, "Viewed objectively and in their totality, your express statements to date show intent to not diligently explore for and produce the oil and gas resources underlying the two lease parcels for which you have submitted noncompetitive lease offers." *Id.* Moreover, in gleaning intentions from Tempest-Williams's writing, Roberson conflates Tempest-Williams's statements as an individual with the intentions of her company, Tempest Exploration. *Id.*

lands that are undeveloped due to concerns about profitability versus invalid leases of lands that are undeveloped out of a different vision of resource extraction, production, and use.

QUESTIONS OF ANALYSIS

How then do we analyze this conjuncture concerning the leasing of public land for corporate-led resource extraction and development? Much of our understanding of the role of corporations in the use of public lands is highly specific, historical, and contextual. Accordingly, we might begin with the proximate political context in order to grasp the conflicts over oil and gas leases in Utah. To be sure, as already noted, the vicissitudes of federal policy did seem to shape the decisions on which parcels of land were put up for sale and when. Following the disrupted auction, a temporary injunction on the BLM leases was issued in a U.S. District Court⁹ and, in February 2009, incoming Interior Secretary Ken Salazar initiated a special review of the December 19th auction.¹⁰ The final report suggested problems with the speed by which lands were brought to auction and the process of soliciting input from the National Parks Service and other stakeholders, including environmental groups.¹¹ In response, Salazar voided the sales. The fact that the Trump administration seems interested in returning these lands back to market¹² bolsters the notion that this is a story of contemporary political conflict between business-friendly Republicans and Democratic environmentalists.

Although such a story is plausible, particularly in relations to the controversial sales in Utah, it fails to account for the much larger consensus on corporate-led resource development as a fundamental principle of U.S. public land law. Certainly the Obama administration's reprieve on the Utah leases was a victory for conservationists, but conservationists have also noted that the aggregate record of the Obama administration on public land resource development was mixed and far from the radical departure from existing practices of resource development and public land management that environmentalists desired.¹³ Moreover, the legal framework enabling the

9. *Southern Utah Wilderness Alliance v. Allred*, No. 08-2187, 2009 WL 765882, at *3 (D. D.C. Jan. 17, 2009).

10. BUREAU OF LAND MGMT., FINAL BLM REVIEW OF 77 OIL AND GAS LEASE PARCELS OFFERED IN BLM-UTAH'S DECEMBER 2008 LEASE SALE (2009).

11. *Id.*

12. U.S. DEPT. OF INTERIOR, SECRETARIAL ORDER NO. 3354, SUPPORTING AND IMPROVING THE FEDERAL ONSHORE OIL AND GAS LEASING PROGRAM AND FEDERAL SOLID MINERAL LEASING PROGRAM (2017).

13. See Jessica Goad & Christy Goldfuss, *President Obama Needs To Establish A Conservation Legacy In Addition To A Drilling Legacy*, CTR. FOR AM. PROGRESS (Jan. 10, 2013), available at

transfer of public lands to private companies was not a new creation of the George W. Bush administration. As the charges against DeChristopher make clear, the current leasing system for public lands is based on the above-mentioned 1987 Reform Act, itself a law updating and amending the 1920 Mineral Leasing Act (MLA).¹⁴

Historian Paul Sabin has argued that the 1920 MLA emerged at a moment of transition between two property regimes on public lands. Prior to the 1920 Act, resource development on public lands was a component of a broader commitment by both the federal government and states and localities to using an array of state powers to promote settlement, agriculture, and economic development.¹⁵ Sabin has characterized the period as one of “free mining” in which policy promoted fee simple transfers of land to individuals, a system that was codified in the General Mining Act of 1872.¹⁶ Although the 1920 Act was meant to create a stronger national system of land controls, Sabin has shown the pivotal role of the oil industry in structuring the legislation.¹⁷ The leasing system created by the MLA ended the practice of easy land sales and had the potential to raise revenues for the federal government. However, it was less a departure from the free mining period than a “reorganization of land and development rights” that, through the new leasing system, “protected most corporate claims to the public oil lands.”¹⁸ Much the same could be said for the 1987 Reform Act, which did not seek a total overhaul of public lands policies in relation to resource development as much as it attempted to increase revenues by transforming the non-competitive aspects of the leasing process.¹⁹ As such, the 1987 Reform Act

<https://www.americanprogress.org/issues/green/news/2013/01/10/49105/president-obama-needs-to-establish-a-conservation-legacy-in-addition-to-a-drilling-legacy/>.

14. Federal Onshore Oil and Gas Leasing Reform Act, Pub. L. 100-203, 101 Stat. 1330-260 (1987) (the session law of the 1987 Reform Act); INVESTIGATIVE REPORT *supra* note 3.

15. PAUL SABIN, *CRUDE POLITICS: THE CALIFORNIA OIL MARKET, 1900-1940* 16 (2005). Sabin notes that states and the federal government “distributed land, corporate charters, tax exemptions, rights to levy tolls and dam streams, and other benefits” as part of this project of development through the promotion of private property. My own account of this property regime, focused on the granting of corporate charters, is in Chapter 2 of *CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM* (2013). Much of this research harkens back to classic work in U.S. legal history, from the commonwealth studies of the 1950s to the work of scholars such as J. Willard Hurst, Harry Scheiber, and Charles McCurdy. See generally JAMES HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY* (1956); Harry Scheiber, *Government and the Economy: Studies of the “Commonwealth” Policy in Nineteenth Century America*, 3 J. INTERDISC. HIST. 135 (1972); Harry Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217 (1984).

16. SABIN, *CRUDE POLITICS*, *supra* note 13, at 17.

17. *Id.* at 4-5.

18. *Id.* at 41.

19. Prior to the 1987 Reform Act, leases were issued on a non-competitive first-come, first-served basis, except for lands with a “known geological structure” (KGS) which went through a competitive bidding process. Lacking the scientific resources to establish whether or not lands held significant

maintained the commitment to the broader use of public lands for resource extraction, while also attempting to foster a competitive market in the distribution of lands. For this reason, Abraham Haspel, at that time Chief Economist at the Department of Energy, referred to the 1987 Reform Act as “a modest victory for the marketplace and competition.”²⁰

These continuities in public land policies on resource development suggest the need to situate the contemporary policies of public land use within a broader framework than one focused solely on the shifting politics of competing federal administrations. One framework, prominent across the social sciences, has been to view the leasing of public land as a form of privatization and a component of a more extensive process of neoliberalization. A now wide-ranging and somewhat unwieldy literature, neoliberalization has been used to describe predominantly two interrelated phenomena. The first refers to a set of policy proscriptions and regulatory practices, including privatization, deregulation, trade liberalization, and attacks on labor protections and the social welfare state, aimed at easing the geographical mobility of capital as it scours the earth looking for profitable investments.²¹ This analysis of neoliberalization locates the emergence and adoption of neoliberal policies in a variety of jurisdictions as a response to a series of systemic crises within the capitalist world system beginning in the 1970s.²² The second, closely connected with the first, involves a more generalized form of governmental rationality in which individuals, states, and society more broadly are subjected to a range of new techniques and practices of knowledge production and information gathering, which are in turn intended to foster “efficient” and “entrepreneurial” forms of self-government.²³ Whether considered as a policy project or a form of

reserves of oil and gas, the vast majority of lands lacked the KGS designation and were thus leased in a non-competitive process. The Reform Act eliminated the KGS designation, subjecting all leases to a first run of competitive bidding, before turning over non-claimed lands to a first-come, first-serve leasing process. See Patricia J. Beneke, *The Federal Onshore Oil and Gas Leasing Reform Act of 1987: A Legislative History and Analysis*, 4 J. MIN. L. & POL’Y 11, 13–15 (1988).

20. Abraham E. Haspel, *Drilling for Dollars: The New and Improved Federal Oil Lease Program*, 13 REG. 62, 62 (1990).

21. For a classic summation of this approach, emphasizing the class dimensions of the neoliberal project, see generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005). See also Jamie Peck & Adam Tickell, *Neoliberalizing Space*, 34 ANTIPODE 380 (2002). For the legal dimensions of policy transfers, see generally YVES DEZALAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (William M. O’Barr & John M. Conley eds., 2002).

22. See generally HARVEY, *supra* note 18.

23. On this dimension of neoliberalism, see generally MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978-1979* (Michel Senellart ed., Graham Burchell trans., 2008); Wendy Larner, *Neo-liberalism: Politics, Ideology, Governmentality*, 63 STUD.

governmental rationality, both conceptualizations of neoliberalization are united in the elevation of the market as a model for and mode of social discipline and regulation.²⁴ Scholars are also quick to note that, far from seamless, both neoliberal policies and forms of knowledge and subjectivity are riven by internal failures and contradictions, as neoliberal commitments to market-based governmental practices rely on and deploy multiple forms of state power and violence.²⁵

Arguments about neoliberalization have had particular purchase in explaining changing approaches to land and resources. In cases ranging from the enclosures of lands and oceans to the privatization of drinking water to the rise of economic frameworks and metrics to deal with environmental issues such as ecosystems services, carbon emissions, or biodiversity, neoliberal policies and practices have been viewed by critical social scientists as key elements in contemporary transformations in the conceptualization and use of natural resources, as well as the political and ecological consequences of these new regimes.²⁶ Moreover, one of the great benefits of neoliberalization as a conceptual framework is the way it can explain and synthesize empirically diverse cases concerning the corporate control of land. Thus events as distinct as privatization within U.S. public land policies, massive land-grabs for agricultural production and the revival of plantation economies in many places across the global South, and the rise of export processing zones and other enclaves associated with trade liberalization can all be considered within a broader historical account about the transformations in contemporary capitalist social relations.²⁷

POL. ECON. 5 (2000); WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION (2015).

24. Here, too, there is a stylized historical account of the origins of neoliberalism within a "thought collective" running from the German ordoliberals to the Austrian and, later, Chicago Schools of Economics. *See generally* PHILIP MIROWSKI & DIETER PLEHWE, THE ROAD FROM MONT PÈLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE (Philip Mirowski & Dieter Plehwe eds., 2009). On the uneasy and contradictory ways corporations are presented in these models of market-based government, *See* Joshua Barkan, *Corporate Power and Neoliberalism*, in SAGE HANDBOOK OF NEOLIBERALISM (Damien Cahill et al. eds., 2018).

25. *See generally* HARVEY, *supra* note 18; Peck, *supra* note 18; DEZALAY, *supra* note 18; FOUCAULT, *supra* note 20; Larner, *supra* note 20; BROWN, *supra* note 20.

26. *See generally* NEOLIBERAL ENVIRONMENTS: FALSE PROMISES AND UNNATURAL CONSEQUENCES (Nik Heynen, James McCarthy, Scott Prudham, & Paul Robbins eds., 2007) (for collected essays). On the application of economics to biodiversity, *See generally* JESSICA DEMPSEY, ENTERPRISING NATURE: ECONOMICS, MARKETS, AND FINANCE IN GLOBAL BIODIVERSITY POLITICS (2016). On neoliberalism and the biopolitics of oil in the United States, *See generally* MATHEW T. HUBER, LIFE BLOOD: OIL, FREEDOM AND THE FORCES OF CAPITAL (2013).

27. *See generally, e.g.*, SASKIA SASSEN, EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY (2014); Nancy L. Peluso & Christian Lund, *New Frontiers of Land Control*, 38 J. PEASANT STUD. 667 (2011).

The 1987 Reform Act is readily legible in terms of neoliberalism. A transformation of an old mining law that sought to create a more efficient distribution of land and a more productive system of extraction through the creation of a competitive market for oil and gas leases, the 1987 Reform Act has all of the hallmarks of the neoliberalization of nature. In addition, a narrative about neoliberalization also helps us to make sense of the harsh sentence DeChristopher received, as his activism subverted the central mechanism of market-based government that structures the current leasing system.

However, the notion that corporate land enclosures are relatively recent phenomena of post-1970s political and economic transformations obscures some of the important continuities in the ways law has promoted the corporate control of land. This, of course, is not only true in terms of the BLM leasing program but also holds for many of the most worrying corporate acquisitions of land across the globe. As White *et al.* note, “[m]ost regions of the global South, as well as the global North, have a long history of land ‘grabbing’ on a large scale.”²⁸ Recognizing as much, White *et al.* suggest that the global phenomena of contemporary corporate land deals is structured by “six trends which promote various mechanisms of accumulation through land investment, some of which repeat historical manoeuvres from the colonial handbook while others involve new configurations of old relations.”²⁹ These trends make up less a theory of corporate land control than a “contextual” account of the dynamics shaping a process playing out in a variety of locations within the global political economy.³⁰ White *et al.* attend primarily to the disparate effects of these new enclosures in terms of the changes they bring to agrarian relations, such as the conditions of work, systems of land tenure, and patterns of food provisioning, a focus consonant with much of the theoretically sophisticated and empirically expansive work on corporate land deals coming from agrarian and development studies.³¹

28. Ben White, et al., *The New Enclosures: Critical Perspectives on Corporate Land Deals* 39 J. OF PEASANT STUD. 619, 619 (2012).

29. *Id.* at 627.

30. *Id.* at 629. The six trends include: the anticipation of 1) food and 2) fuel insecurity, 3) the emergence of new environmental imperatives of conservation, 4) the incorporation of peri-urban areas into Special Economic Zones, 5) the creation of new financial instruments, and 6) the promotion of large-scale land investments by international multilateral institutions. *Id.* at 627–30.

31. See, e.g., Sassen, *supra* note 24; *Special Issue: The New Enclosures: Critical Perspectives on Corporate Land Deals*, 39 J. OF PEASANT STUD. 619 (Ben White et al. eds., 2012); *Special Issue: Governing Global Land Deals: the Role of the State in the Rush for Land* 44 DEV. & CHANGE 189 (Wendy Wolford et al. eds. 2013).

The ways corporations are empowered to enclose, control, manage, and govern land is equally important for understanding some basic questions about the relations between law and society and the role of land and territory in legal concepts of sovereignty, state power, and justice. For instance, to return to the case of the BLM oil and gas leases, perspectives focused on either the proximate historical context of the end of the Bush administration or the broader dynamics of neoliberalism present the routinized selling off of public lands to extractive industries as a usurpation of public goods for private interests. It is this framework that subtends the aforementioned dashed hopes of environmentalists for transformational progressive change.³² However, if the general trajectory of public land law has long been linked to promoting corporate control of land under a vision of capitalist development, the present is less an aberration than a continuation of the territorial dynamics of older practices of corporate sovereignty. Furthermore, such a perspective raises profound questions about the limits of law to address practices of enclosure that are foundational to liberal legality within capitalist regimes.

Studying these relations between law, territory, and sovereignty thus requires attention to the longer history of corporate enclosure, and useful precedents exist for such inquiries. For instance, foundational text in legal history – from J. Willard Hurst’s monumental account of the legal foundations of the Wisconsin lumber industry to E.P. Thompson’s history of the emergence of property rights over Windsor Forest to Morton Horwitz’s elaboration of the origins of instrumental conceptions of law – all focused, to various degrees, on the control of land as central to the ways law organizes society.³³ Likewise, legal historian Christopher Tomlins has more recently suggested that colonization offers a new metanarrative for U.S. legal history.³⁴ For Tomlins, this in part means attending to longer historical trajectories of U.S. law that stretch into the colonial period, while also focusing on the legal dimensions of territorial expansion. These works not only provide both theoretical and methodological resources that could

32. See Goad, *supra* note 11; Michael Klare, *How Obama Became the Oil President*, MOTHER JONES (Sept. 12, 2014), <http://www.motherjones.com/environment/2014/09/how-obama-became-oil-president-gas-fracking-drill/>.

33. See J. WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915* (1964); E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

34. See Christopher Tomlins, *American Legal History in Retrospect and Prospect*, 28 *LAW & SOC. INQUIRY* 1135, 1142 (2003); Christopher Tomlins, *In the Wilderness of Tigers: Violence, the Discourse of English Colonizing, and the Refusal of American History*, 4 *THEORETICAL INQUIRIES L.* 451, 453 (2003).

contribute greatly to our understanding of the ways law facilitates corporate enclosures.³⁵ They also allow us a framework to consider the ways such processes stretch into the contemporary period, as colonial forms of legality continue to structure the thought and practice of liberal law, not only in the creation of state territoriality, but also in privatized forms of enclosure.

35. For a theoretical elaboration of Hurst's conception of the legal constitution of capitalism, see William Novak, *Law, Capitalism, and the Liberal State: the Historical Sociology of James Willard Hurst*, 18 *LAW & HIST. REV.* 97, 98 (2000).