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Sovereignty Without Property? Recent Books in Public Lands Scholarship

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BOOK REVIEWS

THE STATE OF THE NATURAL RESOURCES LITERATURE

Leigh Raymond* on *Sovereignty Without Property? Recent Books in Public Lands Scholarship*

Books reviewed in this essay:

Thomas C. Beierle & Jerry Cayford. *Democracy in Practice: Public Participation in Environmental Decisions* (Resources for the Future Press 2002)

Daniel Kemmis, *This Sovereign Land: A New Vision for Governing the West* (Island Press 2002)

Karen R. Merrill. *Public Lands and Political Meaning: Ranchers, the Government, and the Property Between Them* (California 2002)

Eric W. Mogren. *Warm Sands: Uranium Mill Tailings Policy in the Atomic West* (University of New Mexico 2002)

Thomas Michael Power & Richard N. Barrett. *Post-Cowboy Economics: Pay and Prosperity in the New American West* (Island Press 2001)

Should local people be given the authority to solve their own environmental problems? Or are national and even international institutions of power essential for sound resource management and ecological protection? This tug of war between local and national control is a long-standing struggle in U.S. environmental policy, dating at least back to the Progressive Era. In recent years, however, locals have been pulling harder. From watershed initiatives to Resource Advisory Councils, collaborative groups of public land users are asserting more influence over the management of the federal estate. While the experiences of these groups have been a mixed bag to date, the movement toward greater local control is unmistakable.

Of course, participants in the ongoing struggle over public lands policy are of two minds regarding this trend, with some celebrating the emergence of a new, more direct form of democracy and others decrying

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the loss of national sovereignty over land belonging to all citizens of the United States. Within this conflict, one of the more reasonable voices supporting a radical change towards localism has been that of Daniel Kemmis. A former Montana State Legislator and Mayor of Missoula, Kemmis has thoughtfully argued for greater community influence over public policy for more than a decade. His 1990 book *Community and the Politics of Place* was an early exposition of the advantages of local governance that anticipated (and perhaps to some extent even inspired) the rapid development of watershed councils and other local collaboration groups in the 1990s. Now, more than ten years later, Kemmis has written another book on the same subject, *This Sovereign Land*. Both more provocative and more pragmatic than his earlier text, *This Sovereign Land* explicitly advocates the devolution of much of the federal estate to the authority of local, watershed-based councils representing diverse western interests. While not a detailed policy proposal, the book does lay out a number of arguments in favor of devolution, as well as dedicating a chapter to exploring what such a locally-oriented system of public land management might look like.

In the polarized world of public land policy, such a proposal could easily be dismissed as another Wise Use attempt to seize public resources for private gain. Indeed, given their resistance to existing collaboration efforts, it is hard to imagine environmentalists lining up for autographed copies at a Kemmis book-reading (despite the volume's publication by the green-friendly Island Press). Nor is it easy to imagine the federal government voluntarily ceding control of most of the land it currently owns in the West, even in the current Republican era of tax cuts and smaller government. Many public lands users who might be expected to support a large-scale devolution proposal have displayed a decided reluctance to change existing tenure arrangements that, despite repeated protestations and complaints, in many ways seem to serve them quite well. Given the unhappy fact that no one, therefore, is likely to agree with it, one might wonder whether Kemmis's book matters at all.

In fact, this essay argues that his book matters a great deal. The reason why is found in Kemmis's own refreshingly candid statement of purpose. *This Sovereign Land* does not offer a fixed and dogmatic agenda for changing public land governance. Rather, its stated purpose is "to invite discussion and debate about the shifts in sovereignty over western public lands that Americans have ever greater reason to expect in the coming decades."¹ It is in this respect that the book serves as a worthy starting point for a broader review of recent books relevant to public land policy. Because Kemmis's book raises so many useful and provocative questions, it inspires the reader to review the literature for other perspectives and answers.

Fortunately, that literature includes a number of recent books that add important ideas to the conversation. Like any good host then, this essay will endeavor to get the discussion started by suggesting some of the most promising connections and shared insights among these authors. The dialogue begins with a critical review of Kemmis's case for localism as advanced in *This Sovereign Land*. It then explores the basic socioeconomic changes in the West that are central to his thesis through the book *Post-Cowboy Economics*, by Thomas Power and Richard Barrett. Next comes *Democracy in Practice*, a recent work by Thomas Beierle and Jerry Cayford of Resources For the Future that both confirms and challenges Kemmis's optimism about the benefits of direct public participation in environmental policy making. On the other hand, Eric Mogren's environmental history of the western uranium milling industry, *Warm Sands*, reminds us of the continuing importance of federal involvement in solving seemingly intractable environmental problems. Finally, Karen Merrill's *Public Lands and Political Meaning*, a thoughtful and detailed history of public lands ranching, adds an important topic—property rights—that is otherwise surprisingly absent from the conversation.

The dialogue among these authors both confirms some of Kemmis' ideas and raises new questions as well. The West is undergoing significant socioeconomic changes, and the trend towards greater public participation in environmental policy seems promising. Kemmis's eagerness to eliminate *any* role for federal governance over these lands feels premature, however, and perhaps unduly pessimistic about the prospects of a more equal mix of federal and local authority. More significantly, his proposal gives relatively little attention to a key relationship in any shift of authority over public lands—the connection between property rights and claims of political sovereignty. Progressive Era legal scholar Morris Cohen noted in the early twentieth century that property rights could represent a form of private sovereignty by the wealthy over the poor—a degree of personal control that rivaled the most coercive authority of any government.² Merrill's book extends Cohen's idea to argue convincingly that ownership claims have underwritten the conflicting legal and political arguments about public lands sovereignty from *Camfield v. U.S.* to the present.³ What Kemmis risks suggesting, in light of these ideas, is a form of "sovereignty without property"; that is, a proposal to expand local control over public lands without clarifying or unraveling the many private and public claims of ownership that demarcate them. Without a more direct consideration of what role conflicting property claims and ideas will play in his system, Kemmis's proposal remains thought-provoking but also incomplete.

But the conservation is running ahead of itself here; it is better to explore the specifics of Kemmis's work in more detail before moving on

to such abstruse conclusions. *This Sovereign Land* really makes both a normative and a predictive argument about the future of public lands: that westerners should take greater control over their own land base, and that over time they will do just that. Most of the first part of the book is dedicated to the latter proposition: that in the near future "the West will figure out how to be in charge of the West."⁴ Kemmis bases this prediction on several trends. Westerners have never fully accepted the sovereignty of the federal government over the public lands, he claims, as attested by the perpetual cycle of rebellion and protest documented in chapter three. From anti-Pinchotism and the "land grab" era to the Sagebrush Rebellion and the Wise Use and County Rights movements, westerners have resisted federal authority in a series of legal and political battles that reveal how the issue of sovereignty "remains unresolved in the minds of many" even today.⁵ Furthermore, the federal agencies responsible for the majority of the western public lands—the Forest Service and the Bureau of Land Management (BLM)—are losing public legitimacy (as well as funding) in the face of tighter budgets and fierce interest group politics. At the same time, the forces of globalization are rendering national boundaries increasingly irrelevant and making political and economic organization based on natural borders and connections (like watersheds or even continents in the case of trade agreements like NAFTA) far more important.

In contrast to this weakening of federal power, Kemmis is quite sanguine about the West's growing ability to govern itself. He describes the thriving corpus of resident western intellectuals: poets, historians, and others who are helping the region to develop its own distinctive "voice" to support a growing sense of regional independence and maturity. More specifically, his enthusiasm for new western efforts at collaboration and resource management at a local or regional level knows no bounds. In chapter six, he describes in great detail the apparent success of these new "coalitions of the unlike": partnerships of former adversaries like ranchers, farmers, environmentalists, recreationists, timber companies, and so forth working together to craft mutually agreeable policies for a given ecological zone.

Central to Kemmis's argument is the belief that these groups do best "by working together outside the established, centralized government framework."⁶ This is bad news for the federal land management agencies, he argues, since they view collaboration as a promising ticket out of the bruising interest-group politics currently running them into the ground. While Kemmis professes to be amenable to federal agencies working closely with collaboration groups, he is clearly skeptical of the BLM or Forest Service having a viable place at the table in the long term. In the end, he concludes, the key to any collaborative effort is ultimate authority, or sovereignty. No one will

want to do the hard work of collaboration only to have federal bureaucrats overturn or ignore their decisions. And this conflict over sovereignty, between federal agencies and local collaborators, looks like a struggle between opposing “quantum principles” that cannot be reconciled.⁷ Drawing a comparison to the nineteenth century tensions over slavery, Kemmis concludes that the current conflict may be equally “irrepressible.”⁸

The alternative presented here, however, is not one of the usual suspects: devolution to the states, say, or the privatization of public lands favored by the PERC-set. Instead, Kemmis turns to John Wesley Powell’s nineteenth century vision of watershed councils as the inspiration for his proposal. Emulating both Powell’s historical ideas and modern collaboration efforts, Kemmis envisions major stakeholders in a watershed mutually working out their collective goals and plans for the local ecosystem over a number of years. Finally, when their plans are complete, this “compact” of stakeholders would form an “interstate management group” to take control over all the Forest Service and BLM lands in the region. With congressional approval, and a guarantee of continued public ownership in perpetuity, this compact of local stakeholders would directly manage the relevant public lands for the goal of “sustainable ecosystem health.” The Feds would no longer have a role, and no state government would be running the show either—instead, the regional council itself would be directly in charge.

The scope and complexity of such a proposal is breathtaking, and Kemmis does not offer many details on how these regional councils would function. This invites immediate criticism from the naysayers, as he freely admits. Simply deciding who would get a seat at the regional council table (And for how long? Based on what appointment process? Using what decision rules within the council itself?) could be an intractable obstacle to implementation. Complaints about unrepresentative membership and undemocratic procedures are a common refrain already among environmentalists and other critics of high-profile collaboration efforts like the Quincy Library Group.⁹ They seem likely to intensify under a plan like Kemmis’s that gives locals a degree of authority Tom Nelson and Mike Jackson could only dream about.

Nor does Kemmis offer much concrete evidence that the watershed movement has been a smashing success to date—in his own words, there remains a “relative lack of documentation” of the eventual outcomes of these collaborative initiatives.¹⁰ This makes it harder to support a more radical proposal like his on faith. Indeed, in the absence of clear evidence of success his arguments seem to overreach at times, ignoring well-known potential pitfalls of local control like a lack of adequate resources or expertise to handle complex management issues,

or economic pressure resulting in a “race to the bottom” among local environmental standards. More fundamentally, Kemmis never fully explains why he believes that *proximity* qualifies a person to be a more effective manager of natural resources, all other things being equal. Nor, finally, is it clear why sovereignty over these lands is such a black-and-white issue for Kemmis, who states at one point that one cannot be “a little bit sovereign.” This seems too simple; surely there are examples of shared sovereignty over land—where national and state or local forces are indeed each “a bit sovereign”—that are also promising models of governance for the West.¹¹

But as noted above, the importance of *This Sovereign Land* is not so much in the details of its proposal as in the issues it raises. Making us think about the appropriate definition of democracy in the public lands context, about what the collaboration movement might ultimately look like, or even about the historical contingency of federal control over public lands in the first place, is an extremely useful accomplishment. The questions Kemmis asks are intriguing and important, even if his own answers remain necessarily speculative and still in progress. The book is well written, with a style that is easy to read but not overly simplistic. At several points it provides valuable historical perspectives on modern policy conflicts, including a fascinating discussion of the similarities and differences between Thomas Jefferson and Theodore Roosevelt as builders of the American “empire.” In short, it is a worthy rumination on public lands policy: past, present and future.

One of the central themes of *This Sovereign Land* is the changing nature of western society and politics. At several points, the book touches on the economy of the “New West,” in which traditional natural resource extraction industries have a diminished role and forces of globalization are increasingly influential. This economic transition is discussed in greater detail by University of Montana economists Thomas Michael Power and Richard N. Barrett. Their book, *Post-Cowboy Economics: Pay and Prosperity in the New American West*, welcomes the new western economy and argues against those who think the West is losing ground. In fact, they argue, the West has moved from a “cowboy” economy based on resources extraction to a stronger “post-cowboy” order relying more on service industries and environmental amenities. While some mistakenly bemoan this shift as evidence of a “region in decline,” Power and Barrett urge the opposite view—the new western economy is healthier than the cowboy economy before it, and those seeking to revive the region’s traditional resource extraction industries are making a terrible mistake.

Post-Cowboy Economics starts with a few uncontested facts that seem to indicate a faltering western economy. Wages in the West are lower than in the rest of the nation, on average, and the gap has been

getting worse, not better, in the past two decades. Meanwhile, natural resource industries represent a declining percentage of the region's job base, while service industry positions are growing rapidly. These statistics have created fear of a "servant economy" developing in the West, where former lumberjacks and miners now clean hotel rooms and work at Wal-Mart for \$6/hour. Believers in this trend may then argue for policies attempting to revitalize natural resource industries, including doing away with numerous environmental regulations in the hopes of stimulating new mining, timber, or grazing initiatives.

Despite its popularity, Power and Barrett reject this interpretation of what is happening in the western economy. Using a wide range of data on regional wages and employment, they conclude that while wages per job are down in the West, income per person is actually higher (due to more people entering the workforce or holding more than one job). While many decry the rise of part-time work as a further blow to western workers, they cite statistics that indicate 90 percent of those working part time do so voluntarily. Nor are we seeing a new "servant economy"—while the service sector is growing, jobs in the retail sector (those dreaded Wal-Mart positions) are flat as a percentage of total jobs. Instead, they argue, wages in the west are lower for two far more innocent reasons: a lower cost of living, and the greater environmental amenities of living in the area. Western workers, in other words, draw what the authors call a "second paycheck" in the form of cheaper prices, cleaner air, less congestion, and beautiful scenery that makes up for their relatively lower cash wages.¹²

Power and Barrett also focus on larger economic forces as a key reason for a drop in western wages in the last two decades. Their claim is that national economic forces and trends are very hard to escape locally, since labor moves relatively freely around the nation. Thus, national trends like declining wages for less-educated workers, a declining real minimum wage, and a reduction in the number of unionized jobs are largely responsible for the drop in real wages in the West, rather than any local trend away from natural resource industries.¹³ In this respect, they are in close agreement with Kemmis regarding the importance of larger economic forces on the West's political economic situation (although clearly they disagree over how much *national* economic policies still matter). Furthermore, Power and Barrett conclude that western policy makers would err terribly in easing environmental protections, since the amenities of a cleaner environment are a key part of the "second paycheck" driving Western economic growth. Kemmis echoes this point, arguing that in a globalizing world, the relatively pristine nature of the western environment is a key comparative advantage for the region that should be protected and exploited, rather than frittered away.¹⁴

In reaching these conclusions, *Post-Cowboy Economics* makes a convincing argument against the blind pursuit of more resource extraction employment, and for the idea that national economic trends are primarily responsible for the regional decline in wages. It brings a refreshing dose of evidence and data to a controversy that is frequently discussed in terms of anecdotes and conventional wisdom. It is clearly presented and documented for both economists and non-economists alike and is highly relevant to public lands scholars in terms of clarifying the modern economic outlook for the American West.

Beyond these solid achievements, however, the book may be a little unsatisfying for those with an interest in the process of globalization. Unlike Kemmis, the authors seem relatively unconcerned with the larger impacts of globalization on the region. They do not discuss *why* unions are atrophying and wages are falling in the United States in general, or what that larger trend means for the West in the long term. While they dismiss the fear of an economy in *regional* decline, in fact their data show that life is getting more difficult for the average *American* worker in the age of open markets and global competition. The fact that these trends are national and not regional is important, but it does not moot the fear and anger expressed in western protests like the Jarbidge shovel brigade (wherein westerners sent more than 10,000 shovels to Jarbidge, Nevada, to help "reopen" a recently-closed Forest Service road, and more generally to protest the decline of natural resource industry jobs in the region). A loss of high-paying, natural resource jobs for less-educated workers may not be due to local environmental regulations, in other words, but the kinds of jobs available to people like those protesting at Jarbidge have changed, generally for the worse.

Kemmis, by contrast, seems more interested in the regional impact of the larger forces of global economic competition, and how the West must respond to them. He also discusses the Jarbidge protest (and others like it), but with a somewhat different interpretation. No sagebrush rebel, Kemmis calls such protests against federal and international institutions "increasingly pathetic" and ultimately ineffectual.¹⁵ Unlike Power and Barrett, however, Kemmis has a deeper sympathy for the basic worries of these protesters regarding the forces of global competition. Rather than saying that such protesters are simply misguided in their views, Kemmis seems to conclude that they are essentially correct in their fear of certain structural shifts in their economy, but mistaken in their prescribed cure. Burning UN flags and forcibly reopening Forest Service roads will not help their cause, in other words, but taking stronger control of the region's own political destiny just might.

Finally, while Power and Barrett's empirical conclusions are illuminating and insightful, their policy recommendations are less edifying. If Kemmis's policy prescriptions seem too sweeping, Power and Barrett's may be too cautious. Their overriding conclusion is that there is little local policy makers can do to address pockets of economic decline in the West. While they are quite clear that rolling back environmental regulations would be counter-productive, otherwise they conclude that "modesty is a virtue" in local policy making.¹⁶ Given the dominant influence of larger national/global trends, there is relatively little Western communities can do to influence their economic future. While refreshingly humble, this advice may seem too fatalistic for those who are hurting in the new western economy. Another recommendation that leaves the reader thirsting for more is that governments should "define the public interest carefully."¹⁷ While hard to argue with, this conclusion may not give policy makers much traction without a little more guidance toward achieving such an elusive goal. In this respect, Kemmis's ideas could be seen as taking up where the economists leave off, offering a more concrete (if still partial and controversial) vision of *how* to define and pursue the public interest of the region most appropriately.

Two authors who directly tackle the problem of defining the "public interest" through participatory democracy are Thomas C. Beierle and Jerry Cayford of Resources for the Future (RFF). In their book *Democracy in Practice: Public Participation in Environmental Decisions*, Beierle and Cayford explicitly define a successful effort to increase public participation in environmental decisions as having five qualities:

- (1) It incorporates public values into decision,
- (2) it improves the substantive quality of the decision,
- (3) it resolves conflict among competing interests,
- (4) it builds trust in the relevant public institutions; and,
- (5) it educates and informs the public.

Using these five goals as their criteria, the RFF scholars evaluate the success or failure of more than 200 existing case studies of public participation in environmental policy. The result is a careful, quantitative analysis of a large set of qualitative data coded by the authors into more than 100 variables regarding the context, process, and outcomes of each case. Overall, their findings are quite promising for public participation initiatives: more than 60 percent of the cases studied score "high" on an overall variable summing up performance on the five criteria above and are declared by the authors as "an overall success."

Using multivariate regression, Beierle and Cayford also isolate key predictors of positive outcomes. What emerges from this second level of analysis is that success depends greatly on changes in process

but not in context. The type of environmental issue under consideration, for example, and the scope of the problem (narrow or broad) are not important to predicting success.¹⁸ The type of process, however, is crucial. In general, the more "intensive" the participation process, the greater chance of success. Thus, public hearings are least likely to meet the five criteria, while advisory committees perform better and directly negotiated regulations do better still. In addition, the responsiveness of the lead agency, the motivation of the participants, and the "quality of the deliberations" are other process factors that make success more likely as well.¹⁹

These findings are deeply relevant to Kemmis's agenda, and indeed to scholars of public participation and localism in general. Here is a more comprehensive validation of the participatory approach to policy-making missing from *This Sovereign Land*. In this way, *Democracy in Practice* clearly bolsters Kemmis's enthusiasm for watershed collaborations as an improved form of democratic governance. Beierle and Cayford are optimistic about public participation and insist that such efforts should be expanded in environmental policy. But they also share Kemmis's concern that administrators ultimately will be unable to embrace this new perspective, noting that public participation has gained only a "grudging acceptance" to date. This worry is especially relevant in the public lands context, since their findings identify federal agencies as being more likely to fail at collaborative management projects than their state and local brethren.²⁰ In the end, the authors urge a more radical change that resonates with the arguments advanced in *This Sovereign Land*. "Rather than seeing policy decisions as fundamentally technical with some need for public input," they conclude, "we should see many more decisions as fundamentally public with the need for some technical input."²¹

That said, supporters of localism should refrain from breaking out the champagne and declaring intellectual victory just yet. Despite its optimism, *Democracy in Practice* offers a number of caveats. Of particular importance is the finding that for many cases the exclusion or absence of a key interest group was critical to the effort's overall success. In terms of the goal "resolving conflicts among interests," for example, *one-third* of the cases measured on this variable omitted a key issue or party in order to ease tensions and aid agreement.²² This is a major qualification to the overall rate of success. As the authors note, collaborations that lack a key interest group or issue may find their recommendations harder to implement politically once the internal discussions are complete.²³ Similarly, many groups in the study were quite small, and their successes in terms of building trust and educating the public did not extend to the larger polity. Thus, the book's rather glowing endorsement of participatory decision making contains a rather important

qualification: the process generally works for those invited, but in many cases not everyone important is in attendance or even on the guest list. Whether watershed councils or other forms of local governance would work so well if forced to include all key interests, or to consider all key issues (as Kemmis's proposed councils would have to do), is much less clear.

Finally, the RFF authors also make an observation about bottom-up versus top-down collaboration that seems to counter one of the main points of *This Sovereign Land*. Recall that Kemmis favors the watershed council approach in large part because it is "bottom up"—initiated and directed by locals rather than federal agencies. This "organic" nature of these groups, he claims, is a key part of their success. Perhaps surprisingly, Beierle and Cayford find that the "organic" nature of the cases they studied did not matter much in terms of outcomes.²⁴ In other words, efforts initiated and controlled by the lead agency fared as well as those organized independently from the ground up. This result seems to reject both conventional wisdom and Kemmis's explicit belief that local initiative and control are essential to the success of localism efforts. It is important not to overstate the disagreement here; Beierle and Cayford later conclude that agencies must give "adequate" authority to the public in order for any such participatory process to be successful.²⁵ But it does not seem evident that these efforts must originate at the grassroots, nor that the abdication of power by the lead agency must be as complete as Kemmis is inclined to think.

Indeed, the discussion of implementation in chapter six of *Democracy in Practice* adds even more complexity to the top-down versus bottom-up question. Here Beierle and Cayford note that enhanced public participation does not itself predict a greater chance of successful policy implementation. This is clearly a major obstacle for collaboration efforts; if their decisions remain unlikely to be put into action, their efforts risk being wasted. The key to successful policy implementation is, of course, solid support and backing by those with political authority—politicians and agency administrators. So one priority for a successful participatory process is to get strong political backing from the start. This seems eminently reasonable advice, but it weakens the case for a local decision-making process conducted largely *apart from* the relevant government agencies. Organic, bottom-up procedures may be preferable in some ways, but if they risk greater ineffectiveness at the implementation stage then it is less clear on what basis one would ultimately recommend them. Kemmis, of course, solves this problem by transferring political authority from the relevant agencies directly to the watershed councils. But this, as was discussed above, seems a long-shot proposition for the near term at least. In the meantime, those favoring greater local control over policy might look more closely at systems of "mixed" sovereignty

that retain the backing and involvement of the relevant state and federal powers in order to enhance their chances of seeing change occur on the ground.²⁶

Historian Eric W. Mogren also explores the tension between local and national control over environmental policy, but in an entirely different context. *Warm Sands* is Mogren's history of federal policy regarding the issue of uranium mill tailings in the western United States. The book describes the full arc of the uranium mining industry, from early twentieth century efforts to extract radium to the boom and eventual bust of the domestic uranium industry from the 1950s to the 1980s. In particular, the book focuses on the public health threat posed by one aspect of uranium mining: the massive piles of low-level radioactive tailings left behind by the process of milling raw uranium ore into a more concentrated form of "yellowcake" used by reactors around the nation. The Atomic Energy Commission (AEC) plays a key role in the story for its failure to address the mill tailings problem throughout the 1950s and '60s. Eventually, in the wake of a media-fed crisis over the use of radioactive tailings as building material for thousands of homes and buildings in Grand Junction, Colorado (leading to its unfortunate nickname, "America's most radioactive city"), Congress became directly involved with the problem. In 1978, the Uranium Mill Tailings Radiation Control Act (UMTRCA) started a massive federal clean up of the problem, bringing the history to a close twenty years later when the last of the piles was contained.

Warm Sands tells an engaging and interesting story that includes several common themes from the literature on public lands. Mogren's description of the rise and fall of the uranium mining industry is fascinating (especially the "boom" in the 1950s when Geiger counters flew off the shelves of Sears and Montgomery Ward and seemingly everyone was prospecting for radioactive ore).²⁷ The eventual decline of the uranium industry is also, of course, a case-in-point of the "post-cowboy economics" that have become the norm in the western U.S. And in its criticisms of the AEC, the book echoes the frustrations of Kemmis and many other scholars with federal agencies that fail to regulate effectively in the public interest. The story of the AEC's conflict with the public over uranium tailings management is much the same, in this sense, as that of the Forest Service and clear cutting or of the Bureau of Land Management and overgrazing, among many other well-known controversies.²⁸ In other words, the book is a lesser-known example of a well-known problem—agency stonewalling and reluctance to acknowledge new problems or concerns expressed by the public.

But if Mogren's criticisms are similar to Kemmis's, his conclusions are startlingly different. The only proper answer in the uranium mill tailings debacle, he argues, was strong federal authority

and control. Indeed, Mogren criticizes the Feds for failing to take responsibility for the issue sooner, and says that only federal money and expertise could adequately solve what was, at heart, a national problem created by national demand for atomic fuel.²⁹ Although certain states tried to remedy the tailings problem with limited success, in the end only coordinated federal action in the guise of UMTRCA was able to end the dispute. Thus *Warm Sands* raises a sharp challenge to the advocates of localism everywhere even as it joins in their chorus of complaints. In the end, the book argues, it takes the massive resources of the federal government to solve the biggest environmental problems we face on the public lands and elsewhere.

Of course Mogren's argument for federal involvement is not directed specifically at localism advocates like Kemmis. His main target is federal bureaucracies like the Atomic Energy Commission and their expert managers. Nor is his argument completely airtight in its own conclusions. For example, Mogren asserts that a federal clean-up effort is justified in part because no one could reasonably blame local governments like Grand Junction for permitting the use of uranium tailings as building fill out of ignorance. Yet in a subsequent chapter, he describes how Salt Lake City rejected a similar request to use tailings as construction material, based on explicit (and ultimately accurate) health concerns.³⁰ Given what seems like a very reasonable level of caution expressed by other western governments, one might at least ask why Grand Junction or the state of Colorado could not be held more responsible for their own risky choices. Frustratingly for the localism advocate, this is a question Mogren does not consider in his assertion of federal responsibility. Nevertheless, despite minor concerns like this *Warm Sands* offer a useful perspective on the localism question, if only to force us to remember that while the federal government has created more than its share of environmental messes, it is also the main source of funding and expertise for cleaning them up. Those supporting local authority must recognize that it may seem far less appealing when, as in the case of Grand Junction, local communities may be left holding the bag.

Few episodes in public lands history are more evocative of the conflict between federal and local control than the struggle over grazing policy. Unfortunately, the importance of this story has been obscured by oversimplifications of greedy cattle barons and captured federal agencies.³¹ A new book by Williams College history professor Karen Merrill, however, helps to rectify this situation and make the grazing case more directly relevant to debates over public land sovereignty. In *Public Lands and Political Meaning*, Merrill brings a refreshing new perspective to the story of public lands grazing policy: a focus on the key role of property rights. Starting with the initial efforts to regulate grazing

in the Forest Reserves, her book traces the history of conflict between public lands ranchers and agencies through the New Deal and the McCarran era of the 1940s, concluding with the post WWII "land grab" controversy that so exercised Bernard De Voto. Relying substantially on livestock association records, as well as other primary and secondary sources, Merrill weaves a compelling and theoretically sophisticated narrative. Even more importantly, she correctly emphasizes the key role played by dueling ideas of property and ownership during the struggle.

The history of public lands grazing is so deeply grounded in conflicts between local and national sovereignty that it could hardly be more relevant to Kemmis's agenda. And indeed, Merrill's book holds several implications for modern advocates of devolution and localism. For one thing, it raises the vital distinction between private and local interests. Traditionally, one school of thought regarding localism has been that it is simply a "fig leaf" for control of the public agenda by narrow private interest groups.³² This argument has tended to cite federal grazing policy as the leading example of "agency capture" by private groups (the livestock industry) under the guise of local control. And similarly, skeptics of modern devolution proposals argue that control by private, special interests is either the real agenda, or at least the likely outcome.³³ Setting aside the empirical question of whether public lands grazing is actually a meaningful example of agency capture (a question over which Merrill seems to hesitate), *Public Lands and Political Meaning* does emphasize the crucial point that local (or state) and private (or individual) control are not the same thing and often coexist in an uneasy relationship.³⁴ Local sovereignty, in other words, is not the same as private sovereignty. In fact, ranchers in Merrill's history rarely speak with one voice over whether they want private ownership, devolution to the states, or continued federal authority over the public grazing lands. Given this historical pattern, one has to wonder whether they will be any more clear regarding a proposal like Kemmis's.

More importantly, Merrill's book expresses how central property rights and ownership claims are to any understanding of public lands politics. Specifically, she draws on Morris Cohen's connection between property and sovereignty in explaining the conflict. Cohen, as noted at the outset of this essay, made the important argument that ownership of private property can lead to a degree of control over the choices of others that would rival the power of many governments. In this respect, the private right of property can lead to a very public power of sovereignty over one's fellow citizens. In an innovative extension of this idea, Merrill applies Cohen's argument to the issue of sovereignty on *public* lands. She notes that private ranchers based their claims of authority or sovereignty over the public range in large part on their assertions of private ownership. Similarly, and more surprisingly, the federal government

responded by grounding their own arguments in favor of national sovereignty on the basis of federal ownership of the land, rather than on some other compelling notion of the public interest. Thus, in the controversy over public lands grazing, both sides used ownership of the land as the fundamental basis for their claims of sovereignty. While Cohen's argument originally applied to a sort of *implicit* power of sovereignty based on ownership, Merrill shows how the actors in this struggle used property as an *explicit* basis for authority and control over land.

Indeed, there is a lovely discussion in *Public Lands and Political Meaning* of land ownership as a prerequisite to "manhood," or the full expression of control over one's destiny. Thus, much as Jefferson sought a nation of land-owning farmers who would resist public tyranny through self-sufficiency, western states in the 1920s and later compared themselves to "grown men" who were able and entitled to own all the land within their borders.³⁵ This is remarkably evocative of Kemmis's claim eighty years later that the West has "matured" as a region to the point where it is "ready" to assume full responsibility and control over all the lands within its borders. Ownership, it seems, is not only a path to sovereignty but also a symbol of maturity and full membership in society for states and for regions as well as for individuals.

The strong connection between property and sovereignty raises more questions for participants in the dialogue over public lands policy. Beierle and Cayford, for example, speculate about missing variables that would make "context" a more important predictor of participatory policy outcomes.³⁶ Perhaps the varieties of private property arrangements in each case could be just such a variable? Kemmis, meanwhile, might consider after reading Merrill's book how his watershed councils will deal with the multiple (and conflicting) private ownership claims that demarcate the public lands at present. Indeed, some would argue (including the present author) that much of the federal estate is so shot through with private claims as to be more accurately described as only "nominally" retained in federal ownership at all.³⁷ Merrill makes what seems like a related point at the end of her book, observing that "the hardness of the property divide between ranchers and the federal government has also made it difficult to forge new management techniques that could stand outside this model."³⁸ In other words, until we untie (or at least honestly recognize) the Gordian knot of conflicting ownership claims on the public domain, we may have great difficulty moving the policy debate forward toward devolution or any other option. Watershed councils may have an easier time wrestling with these private claims than the federal government has, of course, but why this would be more than wishful thinking on the part of localism advocates remains unsaid.

All of this is not to say that the provocative and praiseworthy discussion of property and sovereignty in *Public Lands and Political Meaning* lacks any difficulties of its own. Although the book is quite sophisticated in its discussion of property theory in general, it offers little discussion of certain key authors. Given how central John Locke's ideas have been to American public land policy in general, and the ownership claims of public lands ranchers in particular, it might have been helpful to see his theory play a more prominent role in the discussion. In addition, and more trivially, the book uses the term "rights" frequently, without always being entirely clear whether this is just shorthand for property rights or some other distinct concept not fully defined. Given the proliferation of "rights talk" in U.S. politics, careful specification of the word in a given context is extremely helpful.

More importantly, the book sometimes seems to overstate the important relationship between property and sovereignty, or ownership and control as one might also phrase it. A key strategy in public lands management has always been the pursuit of effective control without the burdens of actual ownership. While Merrill is quite cognizant of this fact, at times she seems reluctant to accept that ranchers might have been seeking such an outcome. She is especially puzzled, for instance, as to why public lands ranchers were so vociferous in their demands for privatizing the public lands in the 1940s, when their deal with the federal government at the time was on such good terms. Yet a logical explanation seems to be that ranchers figured the best defense is a good offense—that the best way to maintain effective control without actual ownership of the public domain was to continue banging the drum of privatization, eventually backing off in favor of lower fees and weaker administrative oversight. And indeed, this seems to be exactly what happened with the demise of the Grazing Service and the birth of the BLM in the late 1940s.

Despite these minor criticisms, however, Merrill's book represents a worthy addition to the literature on public lands and is arguably the most important history of public domain grazing since E. Louise Peffer's work. In addition, it should inspire devolution advocates to tease apart local and private interests carefully, while paying close attention to the ongoing dialogue and conflict over private property rights in environmental policy. It is most interesting, for example, that Kemmis requires the federal lands managed by his new watershed councils to remain in public ownership "in perpetuity." Unfortunately, he says little more about why he includes this requirement, or what link it has to his vision of local sovereignty. While its practical intent may be simply to reduce fears of local control turning into domination by private interests, the idea actually opens a Pandora's box of perplexing issues regarding ownership and control. Will a watershed council, in the end,

have any more luck with controversies over private grazing permits than the BLM? Regardless of the answer, one thing seems certain: any attempt to assert a new form of sovereignty over the public lands without addressing the connection to property rights head-on is likely to fail. "Sovereignty without property," as it were, seems an unlikely outcome in the public lands context.

In conclusion, then, I fear that Kemmis's book may suffer the unkind fate of many thoughtful books—by raising more questions than it can possibly answer, it risks being dismissed. Yet that would be truly unfortunate, given the conversation he has helped structure in this essay. The West is clearly changing, as Kemmis describes, and increased local control is a promising new political force that is a big part of those changes. Yet those who predict the demise of federal involvement in public lands policy may speak too soon. It is not clear, in the end, that the elimination of a federal role in governing these lands is either inevitable or desirable. Rather, a mixed form of sovereignty, recognizing the valid claims of private individuals, local communities, and national constituencies may be the preferred path. While designing such a mixed system poses as many or more challenges as the devolved authority suggested by Kemmis, in the end it may still be the best option on the table. To do otherwise is potentially to ignore the fragmented and complex nature of both ownership and control over the public lands today, to the ultimate detriment of everyone involved.

ENDNOTES

1. DANIEL KEMMIS, *THIS SOVEREIGN LAND: A NEW VISION FOR GOVERNING THE WEST* 191 (2002).
2. MORRIS COHEN, *Property and Sovereignty*, as reprinted in Cohen's *LAW AND THE SOCIAL ORDER* (1967).
3. *Camfield v. United States*, 167 U.S. 518 (1897).
4. KEMMIS, *supra* note 1, at 6.
5. *Id.* at 63.
6. *Id.* at 118.
7. *Id.* at 153.
8. *Id.* at 159-63.
9. See, for example, Michael McCloskey, *The Skeptic: Collaboration Has Its Limits*, 28 *HIGH COUNTRY NEWS* (1996); or Reza I. Steinzor, *The Corruption of Civic Environmentalism*, 30 *ENVTL. L. REP.* 10909 (2000).
10. KEMMIS, *supra* note 1, at 146.
11. For more on this topic, see Leigh Raymond, *Localism in Environmental Policy: New Lessons from an Old Case*, 35 *POL'Y SCI.* 179-201 (2002).
12. THOMAS MICHAEL POWER & RICHARD N. BARRETT, *POST-COWBOY ECONOMICS: PAY AND PROSPERITY IN THE NEW AMERICAN WEST* 104-05 (2001).
13. *Id.* at 91-96.
14. KEMMIS, *supra* note 1, at 194-95.
15. *Id.* at 68.
16. POWER & BARRETT, *supra* note 12, at 138.

17. *Id.* at 139.
18. THOMAS C. BEIERLE & JERRY CAYFORD, *DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS* 36-41 (2002).
19. *Id.* at 44-54.
20. *Id.* at 39, 102. Beierle and Cayford go on to conclude in their appendix that the relatively poor performance of federal initiatives is interesting given that "one would expect federal-led processes to have more resources and more political clout than their state and local counterparts. Instead, the state and local cases perform better—a good sign, if trends toward devolution and local decision making continue." This finding is clearly music to Kemmis's ears.
21. *Id.* at 75.
22. *Id.* at 29.
23. *Id.* at 60-61.
24. *Id.* at 40.
25. *Id.* at 64.
26. Raymond, *supra* note 11
27. ERIC W. MOGREN, *WARM SANDS: URANIUM MILL TAILINGS POLICY IN THE ATOMIC WEST* 61-66 (2002).
28. Lest anyone fear that the Atomic Energy Commission (AEC) was a relatively minor agency of little relevance to these other examples, it is worth noting Mogren's claim that at one time the AEC owned more property than General Motors, more buses than the city of Philadelphia, and more land than the state of Rhode Island. *Id.* at 39.
29. *Id.* at 14, 161, and elsewhere.
30. *Id.* at 146-47.
31. Raymond, *supra* note 11.
32. For instance, see GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1967); THEODORE LOWI, *THE END OF LIBERALISM* (1969); or PHILIP O. FOSS, *POLITICS AND GRASS* (1960).
33. Steinzor, *supra* note 9.
34. For example, KAREN R. MERRILL, *PUBLIC LANDS AND POLITICAL MEANING: RANCHERS, THE GOVERNMENT, AND THE PROPERTY BETWEEN THEM* (2002), 124-25 (discussing issue of states' rights).
35. *Id.* at 128.
36. BEIERLE & CAYFORD, *supra* note 18, at 76.
37. As argued in Leigh Raymond & Sally K. Fairfax, *Fragmentation of Public Domain Law and Policy: An Alternative to the 'Shift-to-Retention' Thesis*, 39 NAT. RESOURCES J. 649 (1999).
38. MERRILL, *supra* note 34, at 209.

REVIEWS

Tritium on Ice: The Dangerous New Alliance of Nuclear Weapons and Nuclear Power. By Kenneth D. Bergeron. Cambridge, MA: The MIT Press, 2002. Pp. 234. \$24.95 hardcover.

Tritium on Ice questions the U.S. Department of Energy's (DOE) decision to produce tritium at the Tennessee Valley Authority (TVA) commercial nuclear power reactors and raises concerns as to the potential effects on national security and the safety of placing defense technology activities in a commercial setting. By way of background,