

FEDERAL PUBLIC LAND  
AND  
RESOURCES LAW

FIFTH EDITION

GEORGE CAMERON COGGINS

CHARLES F. WILKINSON

JOHN D. LESHY

UNIVERSITY CASEBOOK SERIES

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# FEDERAL PUBLIC LAND AND RESOURCES LAW

FIFTH EDITION

*by*

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## PREFACE

Public land and resources law has been basically reordered in modern times. Among other developments, discussed more fully in chapter one, doctrines involving resources that traditionally have been treated separately are coalescing, and a variety of concerns reflecting the public interest are being infused into the legal process.

We have attempted to synthesize these developments in this book. It has been customary to treat some public land issues in separate courses, such as water law or mining law; this volume is not an attempt to supercede any of those specialized subjects. Rather, in our view, modern public land law demands a coordinated treatment of the various legal doctrines applicable to all public resources and their interrelationships.

We believe that this book, though a considerable departure, nevertheless is the logical extension of previous casebooks on natural resources. In 1951, Clyde Martz published *CASES ON NATURAL RESOURCES*, the first comprehensive effort to organize and integrate teaching materials on that subject. The Martz casebook was succeeded and updated in 1965 by Professors Trelease, Bloomenthal, and Geraud in the publication of *CASES AND MATERIALS ON NATURAL RESOURCES*. These pioneering casebooks included some public issues, but both were largely devoted to "private law;" that is, they dealt primarily with issues relating to whether a private entity could use or acquire ownership of federal land or resources. In each, heavy emphasis was placed on the fields of water law, mining law, and oil and gas law. That neither work paid much attention to "public law" or "public interest litigation" is not a criticism because, for all practical purposes, such public law issues had not yet surfaced on the public lands. We have made a determined effort to outline the historical context of recent disputes, but the great bulk of cases reprinted in this volume were decided since 1970. The legal doctrines that they represent have supplemented or replaced prior law.

This book's approach to federal land and resources law is the product of many years' development. Each of these editors independently concluded that major public resource themes were related and could be grouped around the concept of federal land ownership. Each of us taught courses in 1975 that sought to investigate federal regulation of the federal resources. Those crude efforts gradually evolved through the development of separate classroom materials until several colleagues familiar with our efforts urged us to pool our resources, natural and otherwise. With assistance from the Rocky Mountain Mineral Law Foundation, we did so, making available the first edition of this casebook in 1980.

The more we study this field, the more it becomes apparent that public land law has been fundamentally altered and that changes are accelerating. Even so, there is a commonality in the usual issues that cuts across traditional subject matter lines. Federal vs. state regulatory power, federal reserved rights or interests, multiple use management problems, withdrawals and reservations, judicial review notions—all of these are common threads running through legal consideration of all of the major resources. Recent enactments recognize and further the unification of federal natural resources law.

The first four chapters are devoted to the historical background, the constitutional underpinnings, and the administrative systems governing public land policy. Chapter one is an overview of federal lands and resources; it concludes with several perspectives on the bases of federal land policy. The history of public land law, treated in chapter two, remains a matter of vital interest today because ancient notions, doctrines, and problems refuse to be relegated to molding archives: several sections conclude with recent Supreme Court decisions and another outlines the contemporary “Sagebrush Rebellion,” a movement rooted in history whereby some states have sought to divest federal ownership of lands within their borders. The chapter is lengthy, reflecting our view that history is a fundamental component of modern public land law.

Chapter three follows by analyzing the respective constitutional powers of the federal and state governments over activities on the public lands. Although the federal government usually can preempt state authority, the more difficult question to be investigated is whether, in any particular instance, Congress intended to do so. The fourth chapter introduces the student to several basic problems that permeate all that follows: executive withdrawals and reservations; judicial review of land management agency decisions; and administrative planning mandated by novel statutes, especially the National Environmental Policy Act of 1969.

The remaining seven chapters take up the law of the seven major federal resources in this order: water, minerals, timber, range, wildlife, recreation, and preservation. Case selection and placement is necessarily arbitrary to some degree, for resource conflicts almost always involve more than one resource or value. Thus, a case in which a timber contract is enjoined because it would alter the wilderness characteristics of an area could as well go into the Timber Resource chapter as the Preservation chapter, and so forth on down the line. The second maxim of ecology, that everything is related to everything else, is both trite and true.

We have strived to make this treatment as readable and enjoyable as we think it is worthwhile. It is, of course, just a casebook and subject to all of the limitations of that art form, so complete success is virtually impossible. But the subject matter itself, from the exciting Gold Rush to the progress of settlement by homesteading, from the great railroad land grabs to the episodic range wars, from the Alaska Pipeline to the Snail Darter, cannot help but interest and delight all but the most jaded of students.

A word about the editing form and style used throughout. We have sought to be rigorous in eliminating irrelevant or tangential matters. Discussions of repetitive procedural defenses, common statements of law (particularly boilerplate recitations on NEPA), and string citations were more often than not axed. Thus, any case or article reproduced below is not necessarily complete—it probably is not—and the researching student is advised to consult the original.

Most original footnotes have also been omitted. Where footnotes are retained, they still bear the court's or author's original number. Footnotes inserted by the editors are preceded by a lower case letter instead of a number. Textual deletions are indicated by “\* \* \*,” but omissions of authorities have not been signalled.

We of course accept full responsibility for the inevitable errors, omissions, and lack of foresight commonly associated with these ventures. We would caution that some selectivity on the part of the instructor is assumed; the materials in these pages are more than is necessary for a normal one-semester course.

Expressing gratitude to those who have assisted an endeavor such as this is a dangerous business, for often one is left out who should be included. With a blanket “thanks” to the many who have contributed, we single out first our research assistants. Debra Arnett, Michael Axline, Kurt Burkholder, Derb Carter, Susan Driver, Parthenia Blessing Evans, and Martin Miller all contributed to the first edition. At that time, we predicted that all would make their own marks on public land law and, six years later, our forecast has proved to be accurate. We give our thanks and our similar high regard to those students who worked on this edition: Alexandra Callam, Jeremy Firestone, Sandy Hoffman, Stephanie Matthews, Doris Nagel, and Matt Selby. The typing was done by Marcea Metzler, Joan Wellman, and Mary Jo Guy. Dean Mike Davis of the University of Kansas has provided us with invaluable support over the years. Dean Chapin Clark of Oregon walked the extra mile to provide us with resources for the first edition. Professor Wilkinson was a visiting professor at the University of Michigan Law School during the preparation of this second edition and both of us extend our appreciation for the inordinately generous assistance provided by Associate Dean Edward H. Cooper and Dean Terrance Sandalow. We are also grateful to the Rocky Mountain Mineral Law Foundation for its support, and the advice of its members, on both the first and second editions. Finally, we appreciate the helpful suggestions of several colleagues, including Gail L. Achterman, Harrison C. Dunning, Kent Frizzell, David H. Getches, Arthur D. Smith, Sally K. Fairfax, H. Michael Anderson, Maryanne Chambers, Cameron LaFollette, and Darius M. Adams.

GEORGE CAMERON COGGINS  
CHARLES F. WILKINSON

October, 1986



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## PREFACE TO THE THIRD EDITION

With this edition, the original editors welcome a third editor, John D. Leshy, who has been involved in public lands issues for two decades; almost five years with the Natural Resources Defense Council, three-plus years with the Department of the Interior, and the last dozen with Arizona State University's College of Law. Prior users will find intact the focus and much of the organization of the first two editions. The discussion of editing form and style in the preceding preface is still pertinent. The material has been thoroughly updated and reworked to reflect emerging trends as much as possible; for example, a new section on access has been added at the end of chapter two to capture some of the burgeoning litigation in this area; and a new section on takings has been added at the end of chapter three. We have tried to keep the length manageable (only slightly longer than the second edition) and to maintain the teachable quality of the earlier editions. As always we welcome feedback from users.

Thanks in the preparation of this edition go to Dean Richard Morgan of the A.S.U. College of Law for his support; Donna Larson Bennett, Marianne Alcorn, and Susan Brodsky of the A.S.U. College of Law Library for indefatigable assistance; A.S.U. law student research assistants Michael Brown and Nancy LaPlaca; Carolyn Landry and Fran Kendall for help in preparing the manuscript; Kaid Benfield, Grove Burnett, Joe Feller, Larry McBride, Zygmunt Plater, Deborah Reames and Johanna Wald for some helpful information; and to Helen and Alec for their patience and support.

GEORGE CAMERON COGGINS  
CHARLES F. WILKINSON  
JOHN D. LESHY

June 1992

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## PREFACE TO THE FIFTH EDITION

An unusually large number of important judicial opinions have made their appearance in the area of federal public land and resources law in the last couple of years. A flurry of activity at the end of the Clinton Administration produced a number of initiatives worthy of treatment, including a spate of new national monuments and new regulations on national forest roadless areas, national forest planning, hardrock mining on public lands, and the use of snowmobiles and personal watercraft in the national park system. The Park Service also adopted new policies interpreting its Organic Act. The Bush (II) Administration's reexamination of a number of these initiatives furnishes some nice opportunities for exploring transitions in federal land policymaking. All these are addressed in this new edition.

Besides being thoroughly updated, this edition reflects some substantial reorganization. A new chapter 5 pulls together material on the public trust doctrine, the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA), and also provides a new generic overview of federal land management agencies' planning processes. In earlier editions NEPA and, to a lesser extent, the ESA, were treated in cases scattered throughout the last half of the book. This consolidation has enabled the subsequent subject matter chapters, especially on minerals, timber and grazing, to be reduced somewhat in size. New sections have been added on contract rights and remedies (at the end of chapter 3); federal hydropower relicensing (in chapter 6); and the Migratory Bird Treaty Act, recently a very fertile field for litigation (in chapter 10). In addition, more materials on cultural resource preservation (addressing the increasing attention being paid to Native American concerns) have been added to chapter 12.

While modestly shorter than the previous edition, we believe the new material will provide users more flexibility regarding coverage. In particular, this edition reflects the increasingly national scope of federal lands and resources law. Footnotes inserted by the editors are indicated by an asterisk; footnotes retained from original court opinions or other excerpted material bear their original number. Textual deletions are indicated by “\* \* \*,” but omissions of authorities are not generally indicated.

Thanks in the preparation of this edition go to Kelly McDonald, a third year student at Hastings College of the Law, who provided estimable research assistance, and to a number of colleagues and friends who made good suggestions and provided some helpful information: Molly McUsic, Michael Anderson, Bob Keiter, Federico Cheever, David Watts, Bruce Kramer, Henry Smith, Joe Feller, Patty Beneke, Ken Weiner, Armin Rosen-

craz, Amy Kelley, Peter Appel, Bob Anderson, and Jamie Grodsky. And much appreciation to Helen for her toleration of this enterprise. Errors of course are ours (especially Leshy's). As always we welcome feedback from users (send to [leshyj@uchastings.edu](mailto:leshyj@uchastings.edu)).

GEORGE CAMERON COGGINS  
CHARLES F. WILKINSON  
JOHN D. LESHY

May 2002

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