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## **New Directions for Public Land Law**

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## Executive Summary

This paper examines the role and characteristics of public land law as the basis for public land management in Canada. It argues that the establishment of coherent legal regimes for public land management should involve much more than simply the aggregation of discrete statutes and regulations dealing with land use, resource management, and environmental protection. In order to meet the needs of present and future generations of Canadians, public land law in each jurisdiction should constitute a unified body of substantive and procedural requirements that provides the basis for the *integrated* management of public land and resources. In particular, public land law should establish: (1) a clear set of principles, objectives and standards to guide decision-making; (2) a comprehensive land use planning process; (3) a logical decision path, from broad land use policy to project-specific review and regulation; and (4) mechanisms for interjurisdictional and interagency coordination. All of these elements, it is argued, should have a solid legal foundation reflecting the important functions of law as an instrument of public policy.

The paper begins by identifying the principal challenges for public land management that underlie the widespread conflicts regarding land and resource use across Canada's public domain. These challenges relate to the diverse values and interests of those affected by public land management, the increasing demands being placed on public land and resources, the complexity of human-ecological interrelationships, and the institutional and political factors that influence decision-making in this area of public policy. Particular emphasis is placed on the interconnected problems of institutional fragmentation, incremental decision-making and cumulative impacts. A principal goal of integrated public land law is to overcome these problems in order to ensure that public land management reflects the full range of relevant values and interests and achieves economic, social and environmental sustainability over the long term.

Turning to the first attribute of public land law – its normative basis – the paper examines the multiple use approach and ecosystem management as competing general principles for public land management. The predominance of multiple use management in North America is briefly noted, following which three principal criticisms of this approach are outlined. These criticisms focus on: (1) the inconsistency between the virtually unconstrained administrative and political discretion that frequently accompanies multiple use regimes and basic tenets of democracy and the rule of law; (2) the weak normative basis of multiple use in a context where public lands and resources are subject to increasing demands and ecological processes are at risk; and (3) the tendency of multiple use regimes to accord undue weight to narrow, well-organized interest groups in determining the use of public land and resources.

Ecosystem management is then examined as an alternative normative basis for managing the public domain. The discussion begins by delimiting this concept,

noting that ecosystem management is not a technical exercise of structuring decision-making around self-defining ecosystems, a code word for absolute preservation, or a cookbook-type recipe for controlling land and resource use. Rather, ecosystem management is a set of normative principles and operational guidelines for managing human activities in a way that permits them to coexist, over a specified management area, with ecological processes deemed to be worth protecting over the long term. More specifically, ecosystem management embodies a 'land ethic', gives rise to a series of substantive goals for public land management, requires the integration of science and public policy, takes account of the role of humans in ecosystems and the importance of human values in land and resource management, and has important implications for institutional arrangements and decision-making processes. On the latter point, the need for intergovernmental and interagency coordination is clear. A two-level model for implementing ecosystem management is also reviewed. This model involves an initial determination of the amount of disturbance that can be sustained within a given management area without destroying ecosystem viability, followed by a second level choice regarding the appropriate mix of land uses to be permitted.

The second key attribute of public land law is a comprehensive planning process. The paper argues that a properly designed and executed planning process can improve public land management in a number of respects. In particular, planning has the potential of focusing decision-makers on the long-term sustainability of land and resources, reducing the risk of incrementalism and associated cumulative impacts, enhancing the information base for decisions, and improving the fairness, consistency, legitimacy, predictability and efficiency of public land management. To achieve these benefits, both the planning process and the resulting land use plans should have a firm basis in law.

Third, public land law should ensure a measure of integration among the stages of decision-making. Most decisions regarding public land and resources can be located at some point along the following continuum: (1) the establishment of broad policy directions and priorities; (2) land use planning; (3) rights disposition (i.e., the granting of private rights in public land and resources); and (4) project-specific review and regulation. The paper reviews a number of advantages for public land management if these stages are integrated so as to constitute a logical decision path. In particular, decision-making processes can be tailored to the types of issues that arise at each stage, certainty in public land management can be increased, the progressive narrowing of issues provides direction to decision-makers, and the likelihood that important issues will be overlooked or addressed too late in the process will be reduced.

The fourth area where public land law has an important role to play is in relation to interjurisdictional and interagency coordination. This role reflects the undeniable fact that ecosystems do not respect administrative or jurisdictional boundaries. Since decisions in one area or by one set of managers frequently have implications for land management objectives pursued by others, overarching institutional

arrangements or clear mandates requiring interagency and interjurisdictional coordination are necessary if an integrated approach to public land management is to be achieved.

Throughout this paper the important role of law in public land management is a recurring theme. This issue is addressed directly towards the end of the paper in a section that focuses on the functions of law as an instrument of public policy. The four functions that are discussed are: (1) law making as a deliberative process; (2) law as a means of increasing predictability; (3) law as a constraint on the exercise of public powers and as an accountability mechanism; and (4) law as a means of structuring decision-making processes. These functions explain why democratic societies establish legal mechanisms to achieve policy objectives. All of them reinforce the rationale for developing a legal basis for public land management.

The paper concludes by reviewing the proposed template for the development of public land law that is worthy of our public lands. Without a concerted effort to move in this direction, decisions regarding the use of public lands and resources are likely to result in continuing pressure on natural ecosystems and an erosion of the ability of Canada's land and resource base to produce the full range of benefits for Canadians over the long term.



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# 1. Introduction

Canada's natural resources and physical landscape are central to the economic opportunities, cultural identity, lifestyle choices, and spiritual well-being of many Canadians. This country is endowed with a tremendous wealth of renewable and non-renewable resources, diverse and spectacular scenery, and some of the world's largest and most pristine wilderness areas. All of these features place Canada in an enviable position globally, and all are likely to become increasingly scarce – and correspondingly more valued and valuable – as economic growth and intense population and development pressures are experienced world-wide.

The management of Canada's abundant heritage of land and resources gives rise to a distinctive set of opportunities and challenges. Canada has an advanced industrial economy that, nonetheless, remains heavily dependent on both renewable and non-renewable resource sectors. Unlike many other developed countries, Canada also has large areas where relatively undisturbed natural ecosystems continue to function. A major question for the coming decades is whether Canada can continue to enjoy this 'best of both worlds.'<sup>1</sup> As a wealthy and stable democracy, Canada has the advantages that come with mature political and legal systems, an educated population, and broad societal awareness of economic and environmental issues relating to land and resource use. Canadians also have access to specialized public and private sector expertise and to technology that provide considerable latitude to use land and natural resources without doing irreparable harm to the ecological underpinnings of natural ecosystems and human society. Canada is therefore in a particularly advantageous position internationally in terms of its potential to fashion a society exhibiting both economic and environmental sustainability. With much of Canada's land and resource base in public ownership, primary responsibility for achieving this objective rests with governments, acting as owners – in trust for the public – and as regulators.

Despite Canada's impressive list of positive attributes, it faces a daunting set of challenges in moving towards the goal of sustainability. These challenges, some of which are discussed below, have scientific and technical dimensions that reflect the complexity of ecological processes and human impacts upon them. From a public policy perspective, many of the challenges lie in overcoming obstacles to sustainability within the political, social, economic and legal systems through which Canadians conduct their affairs and seek to achieve their individual and collective aspirations. The transition to sustainability will require concerted efforts to confront these challenges, whether through a series of incremental adjustments or through a more fundamental metamorphosis of societal attitudes and behaviour. Whatever

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1 The need to act quickly in order to forestall potentially significant ecological and cultural losses for present and future generations of Canadians is widely recognized. See, for example: Canadian Environmental Advisory Council, *A Protected Areas Vision for Canada* (Ottawa: Ministry of Supply and Services Canada, 1991) at 12-17.

route is taken, a convincing case can be made that significant changes in public land management<sup>2</sup> will be required if Canada is to achieve its potential to become a model of sustainability.

This paper argues that the development of public land law should play a key role in bringing about the changes alluded to above. The establishment of coherent legal regimes for public land management requires that public land law be much more than simply the aggregation of discrete statutes and regulations dealing with land use, resource management, and environmental protection. In order to meet the needs of present and future generations of Canadians, public land law in each jurisdiction should constitute a unified body of substantive and procedural requirements that provides the basis for the integrated management of public land and resources. The purpose of this paper is to define the principal elements that, taken together, would constitute public land law worthy of our public lands.

The paper is organized as follows. Section 2 provides a brief survey of the principal challenges for public land management in Canada. The paper then turns, in Section 3, to a discussion of the normative basis for public land law, focusing particularly on the distinction between the multiple use approach and ecosystem management<sup>3</sup> as sources of guiding principles. Section 4 makes the argument that public land law should provide for comprehensive land use planning as the strategic framework for decision-making. Two types of integration that should be achieved in public land decision-making are then outlined in Section 5. In Section 6, the rationale for public land law as the basis for public land management is explored through a

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- 2 The term 'public land management' is used here to refer to decision-making regarding:
- (1) the use of the resources that are on, under or move across public lands (e.g., forests, rangeland, minerals, water, wildlife); and
  - (2) the other uses of public land (e.g., recreation, tourism, ecosystem and biodiversity preservation, protection of aesthetic values and wilderness).
- 3 The term 'ecosystem management' has been the subject of some controversy and alternative formulations have been proposed. For example, Cheri Burda *et al.* make a distinction between "managing the structure of the ecosystem as an adjunct of exploitation [ecosystem management] and managing the institutions of exploitation to maintain ecosystem integrity [ecosystem-based management]" (Cheri Burda *et al.*, *Forests in Trust: Reforming British Columbia's Forest Tenure System for Ecosystem and Community Health*, Report Series R97-2 (July 1997), Eco-Research Chair Environmental Law & Policy, Faculty of Law & Environmental Studies Programme, University of Victoria, at 7-8). In the proposed Alberta Forest Conservation Strategy the term 'ecological management' is used instead of 'ecosystem management' in order to underline the point that what is being managed is not the forest ecosystem, but "our own activities in the forest to ensure that they do not interfere with the ecosystem's ability to manage itself" (Alberta Forest Conservation Strategy Steering Committee, *Alberta Forest Conservation Strategy: A New Perspective on Sustaining Alberta's Forests, Final Report* (Edmonton: May 1997) at 7). While these distinctions should not be dismissed as merely semantic, the term 'ecosystem management' is used throughout the discussion that follows in order to maintain consistency with the terminology that is most common in the literature on public land management. As used in this paper — and in the literature that is cited — ecosystem management clearly implies a focus on the management of human activities in accordance with the value of ecosystem integrity.

review of the principal functions of law as an instrument of public policy. The key attributes of an integrated body of public land law are summarized in Section 7, followed by brief concluding comments in Section 8.

## 2. Survey of Current Challenges

There is ample evidence that public land management in Canada is going through a period of considerable controversy, if not outright crisis. The adequacy of current legal and policy regimes is increasingly called into question by both business and environmentalists, with the former arguing that regulatory processes are unacceptably inefficient, uncertain and time-consuming,<sup>4</sup> and the latter criticizing the effectiveness of these processes in mitigating the negative environmental consequences of development and in protecting areas judged to be ecologically and aesthetically significant.<sup>5</sup> This debate is being played out against a backdrop of growing demands on public lands from a wide spectrum of users, changing public values, and irrefutable evidence of increasing pressure on natural ecosystems, illustrated most strikingly by the global biodiversity crisis from which public lands in Canada are not immune.<sup>6</sup>

### 2.1 Land Use Conflicts and their Origins

The intense pressures on public lands have crystallized in highly publicized conflicts triggered by various land and resource uses, including forestry (Temagami, Ontario<sup>7</sup> and Clayoquot Sound, B.C.<sup>8</sup>), mining (Windy Craggy, B.C.,<sup>9</sup> BHP

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4 See, for example: Allan Howatson, *Lean Green: Benefits from a Streamlined Canadian Environmental Regulatory System* (Ottawa: Conference Board of Canada, April 1996). The concerns of the mining sector regarding regulatory efficiency and related issues are documented in: Intergovernmental Working Group on the Mineral Industry, *Canada's Environmental Regulatory Systems: Current Issues* (Ottawa: Energy Mines and Resources Canada, September 1993) at 27-44. Similar views have been expressed by representatives of other resource sectors.

5 The environmentalist perspective on public land issues is clearly articulated in the regular newsletters of advocacy groups such as the Canadian Parks and Wilderness Society, Sierra Legal Defence Fund and the Alberta Wilderness Association.

6 As of March 1997, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) had listed 276 species as at risk. See, Committee on the Recovery of Nationally Endangered Wildlife, *RENEW Report #7 1996-97* (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 3.

7 Bruce W. Hodgins & Jamie Benidickson, *The Temagami Experience: Recreation, Resources, and Aboriginal Rights in the Northern Ontario Wilderness* (Toronto: University of Toronto Press, 1989).

8 Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, *A Vision and Its Context: Global Context for Forest Practices in Clayoquot Sound* (March 1995).

9 *Commission on Resources and Environment, Interim Report on Tatshenshini/Alsec Land Use, Volume One — Report and Recommendations* (January 1993).

Diamonds, N.W.T.<sup>10</sup> and Voisey's Bay, Newfoundland & Labrador<sup>11</sup>), petroleum exploration and development (Amoco Whaleback, Alberta<sup>12</sup>), and recreation and tourism (development in Banff National Park<sup>13</sup>). Opposition by environmentalists to specific projects has been matched by the well-orchestrated campaigns by other user groups against proposals to increase the level of environmental protection, or the extent of strictly protected areas, on public lands. This opposition is illustrated by the negative reaction of forestry interests to recommendations for protected areas contained in the regional land use plans produced by British Columbia's Commission on Resources and Environment<sup>14</sup> and by the hostility in some circles to any significant increase in parks and wilderness designation under Alberta's modest protected areas initiative, *Special Places 2000*.<sup>15</sup> It is also reflected in the campaign by industry and certain provincial governments against the proposed federal *Endangered Species Protection Act*.<sup>16</sup> In addition to the numerous land use controversies that have achieved national profile, there is a multitude of regional and local conflicts regarding public land use across Canada. The potential for significant land and resource use conflicts is present in every jurisdiction in Canada.

These conflicts are the product of the differing interests and values of those with a stake in particular land use decisions. They are also symptomatic of the fundamental challenges confronting public land management throughout Canada. These challenges include:

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- 10 Canadian Environmental Assessment Agency, *NWT Diamonds Project: Report of the Environmental Assessment Panel* (Ottawa: Ministry of Supply and Services Canada, June 1996). For a detailed review of the BHP regulatory process, see: Canadian Institute of Resources Law, *Independent Review of the BHP Diamond Mine Process* (30 June 1997), available from Mineral Resources Directorate, Department of Indian Affairs and Northern Development, Ottawa.
  - 11 The proposed Voisey's Bay mine has not yet been subject to environmental assessment and regulatory processes. The aboriginal and environmental concerns raised by this project have, however, received extensive press coverage. See, for example: John Gray, "Innu fear the impact of Voisey's Bay" *The [Toronto] Globe & Mail* (1 April 1997) A6.
  - 12 Energy Resources Conservation Board, *Application for an Exploratory Well, Amoco Canada Petroleum Company Limited, Whaleback Ridge Area*, ERCB Decision D 94-8 (6 September 1994). For a commentary on this decision, see: Steven A. Kennett, "The ERCB's Whaleback Decision: All Clear on the Eastern Slopes?" (1994) 48 *Resources* 1.
  - 13 Banff Bow Valley Study, *Banff-Bow Valley: At the Crossroads, Summary Report of the Banff-Bow Valley Task Force* (Ottawa: Ministry of Supply and Services Canada, October, 1996).
  - 14 See, for example, the reaction to the Commission's *Cariboo-Chilcotin Land Use Plan* (July 1994): Miro Cernetig, "Loggers protest job-loss threat" *The [Toronto] Globe & Mail* (15 July 1994) A1. The Commission's land use plans for Vancouver Island and the East and West Kootenay regions were also criticized by forestry interests.
  - 15 The policy document establishing *Special Places 2000* itself reflects a lack of commitment to the creation of protected areas. See Steven A. Kennett, "Special Places 2000: Protecting the Status Quo" (1995) 50 *Resources* 1.
  - 16 This Act [Bill C-65] received first reading in the House of Commons on 31 October 1996 but died on the order paper when a federal election was called.

- C the challenge of distilling broad societal values and objectives and the preferences of the various public land communities, defined according to geographic and interest-based criteria, into an overall vision for the use of public lands and resources;<sup>17</sup>
- C the challenge of managing the steadily increasing – and often conflicting – demands that a wide range of user groups are placing on a fixed land base and shrinking stock of natural resources;<sup>18</sup>
- C the challenge of identifying and mitigating the impacts of complex patterns of human activity on even more complex and interconnected ecological processes;
- C the challenge of adjusting the spatial and temporal scales of political and economic decision-making to take account of ecological processes and long-term societal interests;
- C the challenge of balancing democratic accountability, transparency and predictability in decision-making with the need for managerial flexibility to respond to differing local conditions, new scientific information, and changing public values;
- C the challenge of protecting non-economic values in a political climate which favours market-driven approaches to public governance and a fiscal environment where the capacity of governments to manage public land and resources may be significantly eroded;
- C the challenge of ensuring reasonable regulatory efficiency and predictability in an area where baseline and project-specific information is often incomplete and where value- and interest-based conflicts are intense; and
- C the challenge of designing institutions and processes that address problems of fragmentation, incrementalism, and cumulative impacts in public land management.

This list of challenges, though far from all-inclusive, provides an indication of why public land management constitutes a highly contentious and critically important area of public policy. While each of these challenges could be the subject of detailed analysis and lively debate, the interrelated problems of fragmentation,

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17 For a useful discussion of this issue in the American context, see: Sarah F. Bates, “Public Land Communities: In Search of a Community of Values” (1993) 14 Public Land Law Review 81.

18 See, for example: Monique Ross & J. Owen Saunders, eds., *Growing Demands on a Shrinking Heritage: Managing Resource-Use Conflicts* (Calgary: Canadian Institute of Resources Law, 1992).

incrementalism and cumulative impacts are worthy of special note. These problems arise in relation to a number of the other challenges listed above and they focus attention on policy issues that are particularly germane to the argument developed in this paper.

## **2.2 Fragmentation, Incrementalism and Cumulative Impacts**

Fragmentation of decision-making in public land management is a problem because the geographic, jurisdictional and administrative lines that define the authority of decision-makers often appear arbitrary in terms of the issues that require their attention.<sup>19</sup> Provincial, territorial and national boundaries frequently cut across ecosystems, with the result that land use decisions taken by one jurisdiction can have significant transboundary implications which decision-makers may have little incentive to taken into account.<sup>20</sup> Within jurisdictions, resource management statutes and the mandates of the departments and agencies that administer them have tended to be sector specific despite the fact that cross-sectoral effects and linkages are well recognized. Furthermore, the processes and outcomes of various stages of public land management may be poorly coordinated in the absence of an overall legal and administrative framework. The result is that public land managers often find themselves ill-equipped to address the multitude of problems that arise from the interconnectedness of land and resource uses across broad landscapes.

The problems resulting from institutional fragmentation in the context of interconnected policy issues are related to – and accentuated by – problems associated with incrementalism and cumulative impacts. Incrementalism in public land management consists of decision-making on a project-by-project basis, without clear direction as to long terms objectives. As will be argued in more detail below, public land management in the absence of a developed “land ethic,”<sup>21</sup> a clearly defined set of guiding principles and objectives, and a strategic framework based on land use planning is likely to be largely reactive. Decision-making focuses on the attributes of individual projects or candidate sites for protected areas as they are presented, rather than on the overall pattern of land use across large spatial and temporal scales. As a result, broader land use issues risk either being ignored or dealt with in an *ad hoc* manner in the context of project reviews. In practice, incrementalism is likely to predominate because of the sequential nature of project approvals, the narrow mandates of individual decision-makers, and the cost

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19 For a general discussion of this problem and its implications for sustainable development, see: World Commission on Environment and Development (the Brundtland Commission), *Our Common Future* (Oxford: Oxford University Press, 1987) at 37-41, 310.

20 For a discussion of this issue in relation to water, see: Steven A. Kennett, *The Design of Federalism and Water Resource Management in Canada*, Research Paper No. 31 (Kingston: Institute of Intergovernmental Relations, 1992).

21 The concept of a ‘land ethic’ received its most influential exposition in Aldo Leopold, *A Sand County Almanac* (New York: Ballantine Books, 1970) at 237-264.

implications for proponents and regulatory agencies of dealing with broad policy issues at the project review stage.

The strongest arguments against exclusive reliance on incrementalism in public land management relate to the problem of cumulative impacts.<sup>22</sup> This problem arises when a number of individual decisions, whether sequential or simultaneous, result in a significant combined impact on the surrounding environment. As the intensity of development on public lands (and on adjacent private lands) increases, the need for public land managers to take cumulative impacts into account is increasingly recognized. There is little consensus, however, on how this objective is best achieved. Attention to cumulative impacts has focused largely on environmental assessment and, in particular, on the technical and administrative issues raised by cumulative effects assessment.<sup>23</sup> This focus reflects the fact that environmental assessment is generally the most developed, open and transparent stage in the decision-making continuum that extends from the establishment of broad land use policies and priorities to the detailed regulation of particular activities. It also reflects the project-specific incrementalism, noted above, that dominates public land management. The problem of cumulative impacts is, however, undeniably germane to other stages of decision-making as well. Identifying and assessing the cumulative impacts of various land and resource use scenarios is arguably the essence of land use planning and one would expect that resource disposition decisions would also take into consideration the cumulative impacts of the land uses that are anticipated at that stage. There is a strong argument, therefore, that cumulative impacts should be viewed as a general issue for public land management rather than simply as an add-on to environmental assessment.

### **2.3 Irreversibility and the Pro-Development Ratchet Effect in Public Land Management**

The dominance of incrementalism in public land management and the consequent problem of cumulative impacts are particularly pernicious because many public land decisions are either largely or completely irreversible – at least in the short run – in terms of their environmental effects. For example, decisions to develop an open-pit mine, clear-cut an old grown forest, build a four-season resort in

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22 See, for example: George L. Hegmann & G.A. Yarranton, *Cumulative Effects and the Energy Resources Conservation Board's Review Process*, Macleod Institute Working Paper #1 (July 1995); Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* (January 1997).

23 See, for example: Alan J. Kennedy, ed., *Cumulative Effects Assessment in Canada: From Concept to Practice* (Calgary: Alberta Association of Professional Biologists, 1994); William A. Ross & Philip S. Elder, "Defining the Scope of Environmental Assessment Reviews" in Steven A. Kennett, ed., *Law and Process in Environmental Management* (Calgary: Canadian Institute of Resources Law, 1993) at 79-80; See also Hegmann & Yarranton and Council on Environmental Quality, *ibid.*

a mountain valley or establish a network of access roads through previous roadless land may all have significant long term environmental impacts. Once public land is allocated to these uses, there are often significant economic, political, technical and ecological obstacles to returning the affected areas to their natural (or pre-development) conditions within a time frame that may, depending on the circumstances, be measured in years, decades, or perhaps centuries. Consequently, these land use decisions cannot easily be undone if they are found to have been based on faulty assumptions or inaccurate information or if societal values change over time.

This characteristic distinguishes public land management from many other areas of public policy – including much environmental policy – where decisions can be reversed relatively easily through fiscal or regulatory means.<sup>24</sup> The normal democratic process of policy adjustment is therefore truncated in the area of public land management because a new government may be powerless to alter public land decisions made by its predecessors and the range of options available to future generations may be significantly and irrevocably narrowed by current land and resource choices. In fact, public land management is arguably a particularly problematic area of policy from the perspective of democratic theory because the fundamental principle that a legislature cannot bind its successors is systematically violated in practice. Furthermore, while there is still much scope for learning by doing in public land management, by the time many of the important site-specific lessons are learned it may be too late for them to be of much use. In few other areas of public policy do the choices of any one set of decision-makers cast such a long shadow.

This difficulty of reversing land and resource allocations produces a pro-development ratchet effect that pervades public land management. A decision not to develop an area almost always leaves open the opportunity for pro-development decisions later on, whereas much development has the effect of severely limiting the possibilities for other land use options, some of which may be more environmentally and economically sustainable over the long term. This asymmetry between development and no-development decisions means that an alternation between pro-development and pro-conservation governments over time is likely to lead to a steady erosion of the public land base retained in its natural condition. Since the pro-development option is never definitively precluded, it need only remain on the table until the opportunity arises for a 'favourable' decision, whereupon a new non-negotiable baseline level of development is established as the starting point for the 'give and take' debate over other proposals. This ratchet effect is reinforced by the tendency of many pro-development decisions to create their own constituencies for further development, either to maintain and improve existing facilities and operations

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24 Success stories in reducing emissions of various types of non-persistent pollutants and in restoring air quality and aquatic ecosystems illustrate the reversibility of regulatory policies that were found to be too permissive.

or to expand them in order to remain competitive. This phenomenon is common on public lands throughout Canada, and is nowhere more evident than in the continuous appeals by commercial interests within western Canada's mountain parks to increase the size of their facilities and the range of services and products on offer.<sup>25</sup> Similarly, once a mining or forestry operation is in place, there is a tremendously strong local constituency to press for access to new lands as the resource base is depleted.<sup>26</sup>

There is no doubt that public lands throughout Canada will continue to be used for a wide spectrum of purposes, ranging from intensive resource extraction, through recreation and tourism, to strict preservation of natural ecosystems. The long-term implications of many public land choices suggest, however, that a measure of prudence is required in making pro-development decisions. They also underline the desirability of an integrated approach to decision-making, incorporating the full range of values and addressing the complex interrelationships that characterize land and resource management on the public domain.

The challenges confronting public land management are thus multiple and complex. Responding to them will clearly require a range of political, economic, social and legal initiatives. The following sections focus on the legal dimension, arguing that public land law must be developed in a number of new directions if these challenges are to be met. In particular, public land law should provide public land management with a normative basis, a strategic framework for decision-making, and integrative mechanisms at the operational level. Progress in all of these directions would contribute to addressing the full range of challenges listed above and is particularly crucial to counter the threats of fragmentation, incrementalism, and cumulative impacts that imperil economic, social and ecological sustainability in the management of our public lands.

### **3. The Debate over Principles: Multiple Use versus Ecosystem Management**

The starting point for charting new directions for public land law is at the level of general principles for public land management. These principles should constitute the normative basis for public land law, providing direction to decision-makers and establishing objectives and standards for the use of public land and resources. The

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25 See, Banff Bow Valley Study, *supra* note 13 at 15-19, 30-31, 54-56.

26 This pressure was well illustrated in relation to the recently approved Cheviot Coal Project, a large open-pit mine to be developed in close proximity to Jasper National Park. The Cheviot mine is intended to replace the existing Luscar mine, where coal reserves will be exhausted by 2001-2003. See, Alberta Energy and Utilities Board and Canadian Environmental Assessment Agency, *Report of the EUB-CEAA Joint Review Panel, Cheviot Coal Project, Mountain Park Area, Alberta* (June 1997).

debate over principles can be framed by contrasting the traditional ‘multiple use’ approach with the emerging paradigm of ‘ecosystem management.’ A proposal for implementing ecosystem management will also be briefly reviewed.

### **3.1 The Multiple Use Approach**

Multiple use has been the dominant paradigm for public land management throughout North America for most of this century.<sup>27</sup> Its origins go back at least to the utilitarian land use philosophy of Gifford Pinchot, founding Chief of the U.S. Forest Service, who argued that public land should be managed for “the greatest good of the greatest number in the long run.”<sup>28</sup> Multiple use is based on the premise that public lands have a variety of values and can simultaneously meet the needs of many users. The objective is to encourage complementary uses and balance competing uses in order to maximize aggregate benefits.

Multiple use has been the *de facto* guiding principle for much public land management in Canada, reflected more often in practice and policy than in explicit legislative provisions. For example, references to multiple use can be found in various policy documents describing the management of public lands in Alberta.<sup>29</sup> The multiple use approach is arguably also implicit in the statutory mandates of Alberta’s two quasi-judicial tribunals charged with project review and regulation, since both have broad discretion to weigh economic, social and environmental factors when determining whether particular uses of public lands and resources are in the ‘public interest’.<sup>30</sup>

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27 See, for example: Sarah Bates, *Discussion Paper: The Changing Management Philosophies of the Public Lands*, Western Lands Report No. 3 (Boulder: Natural Resources Law Center, University of Colorado School of Law, 1993); George Cameron Coggins, “Of Succotash Syndromes and Vacuous Platitudes: The Meaning of ‘Multiple Use, Sustained Yield’ for Public Land Management” (1981) 53 *University of Colorado Law Review* 229; Pierre Walther, “Against Idealistic Beliefs in the Problem-Solving Capacities of Integrated Resource Management” (1987) 11 *Environmental Management* 439 at 442. Public lands where primary or ‘dominant’ uses have been formally designated — notably national and provincial parks — have also existed over this time.

28 Quoted in Scott W. Hardt, “Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship” (1994) 18 *Harvard Environmental Law Review* 345 at 356.

29 For example: Alberta Forestry Lands and Wildlife, *Alberta Public Lands* (Edmonton: September 1988) at 2; Alberta Forestry Lands and Wildlife, *Integrated Resource Planning in Alberta* (Edmonton: September 1991) at 3; Alberta Environment, “Water Management Policy for the South Saskatchewan River Basin”, Fact Sheet (Edmonton: May 1990); Environment Council of Alberta, *The Environmental Effects of Forestry Operations in Alberta, Report and Recommendations* (Edmonton: February 1979) at 6, 85-86.

30 *Energy Resources Conservation Act*, R.S.A. 1980, c. E-11, s. 2.1; *Natural Resources Conservation Board Act*, S.A. 1990, c. N-5.5, s. 2.

In the United States, in contrast, multiple use has been accorded explicit legislative status in statutes such as the *Multiple-Use, Sustained-Yield Act*<sup>31</sup> (1960), governing the U.S. Forest Service, and the *Federal Land Policy and Management Act*<sup>32</sup> (1976) which applies to the operations of the Bureau of Land Management (BLM). The multiple use philosophy has also been firmly and visibly entrenched in the organizational cultures of these agencies.<sup>33</sup> Despite its venerable history and wide-spread practice, however, multiple use as a principle of public land management has generally failed to produce clear, let alone enforceable, standards for decision-making. This vagueness is at the heart of the major weaknesses that have been identified with the multiple use approach.<sup>34</sup> Although this critique has been developed largely in the United States, it is directed at aspects of multiple use management that are equally – if not more – problematic in the Canadian context.

### 3.1.1 *The Critique of Multiple Use*

Criticisms of the multiple use approach focus primarily on the largely unfettered discretion that it confers on public land managers.<sup>35</sup> According to Robert Nelson, an economist from the U.S. Department of the Interior:

Although the principle of multiple use is sometimes said to provide an actual basis for making decisions, most students of public land management have concluded that it is in fact amorphous and offers little substantive guidance. Multiple use management is really management by agency administrative discretion in response to individual proposals. The land managed under multiple use can be considered the public-land equivalent of the industrial or unrestricted zones commonly found in municipal zoning ordinances.<sup>36</sup>

While the flexibility inherent in this principle may appeal to some managers and to user groups that have ready access to the corridors of power, it leaves multiple use open to criticism on three grounds.

The first is that the relatively unfettered discretion of public land managers is inconsistent with basic tenets of democracy and the rule of law. In the words American public lands law scholar George Cameron Coggins:

the notion that bureaucrats, however expert, can unilaterally decide allocation questions unconstrained by legal standards is antithetical to all democratic theories and concepts.

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31 16 U.S.C. § 528 et seq.

32 43 U.S.C. § 1701 et seq.

33 Bates, *supra* note 27 at 12-15.

34 George Cameron Coggins, "Commentary: Overcoming The Unfortunate Legacies of Western Public Land Law" (1994) 29 Land and Water Law Review 381 at 388-390.

35 Bates, *supra* note 27 at 14-15; Comment, "Managing Federal Lands: Replacing the Multiple Use System" (1973) 82 The Yale Law Journal 787.

36 Quoted in Bates, *ibid.* at 22.

Multiple use as practised is government by men, not by law, and it can be just as harmful to land users as environmentalists.<sup>37</sup>

The rationale for using law as an instrument of public policy and the specific implications of this rationale for public land management are addressed in more detail in Section 6 of this paper.

The second ground for criticizing the multiple use approach is that it fails to provide the normative basis for decision-making – in the form of substantive management objectives and procedural guidance – that is required by public land managers. In its pure form, multiple use articulates no vision for public land management other than the satisfaction of whatever wants and needs appear relevant to decision-makers at a particular point in time. When uses conflict with each other or with the integrity of ecological processes, it provides no clear guidance for setting priorities. There is a risk, therefore, that decisions will tend to be *ad hoc*, unprincipled, and more attuned to the specific preferences and pressures that impinge on individual decisions than to broader public values and a longer-term vision for the public domain.

In principle, of course, a more solid normative basis could be incorporated into the multiple use model of public land management. For example, non-economic values could be explicitly recognized by specifying that sustaining biodiversity and ecological processes should be included among the potpourri of uses that may be taken into account by decision-makers. It is also possible to specify that multiple use decisions should achieve sustained yield or should coordinate various uses “without impairment of the productivity of the land.”<sup>38</sup> While several of the American land management statutes contain language that applies this type of gloss the multiple use approach, they have nonetheless been consistently criticized for the broad discretion that remains. In addition, as noted in the passage from Nelson quoted above,<sup>39</sup> multiple use encourages incrementalism by promoting a reactive management style that focuses on particular projects.

An unstructured multiple use approach therefore provides an inadequate foundation for public land management in an era where land and resources are subject to increasing demands and ecological processes are at risk. Those responsible for public land management are often without sufficient guidance, or substantive legislative and policy backing, when confronted with hard choices. As a means of confronting the key challenges to public land management enumerated in Section 2 of this paper, the multiple use principle is often little more than rhetorical camouflage for ‘black box’ decision-making.

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37 Coggins, *supra* note 34 at 389.

38 This language is found in two American multiple use statutes: the *Multiple Use-Sustained Yield Act*, s. 531(a) and the *Federal Land Policy and Management Act*, s. 1702(c).

39 *Supra*, note 36.

The third basis for criticising the wide discretion inherent in multiple use is that its practical effect is to tilt the playing field in favour of certain types of interests and values. Michael Blumm provides a particularly clear statement of this argument in an article entitled “Public Choice Theory and the Public Lands: Why ‘Multiple Use’ Failed”.<sup>40</sup> Blumm’s article discusses the U.S. experience with multiple use legislation but his argument is equally germane to the broad statutory and policy-based land management mandates that are more typical in Canada. He argues that “the standardless delegation of authority to managers of public lands and waters” that is contained in much U.S. public land law constitutes “the archetypal ‘special interest’ legislation.”<sup>41</sup> The result, in his view, is a situation where well-organized interest groups, primarily representing locally concentrated commodity producers, frequently dictate how public lands and resources are used with little regard to the broader public interest.

Blumm notes that this outcome is consistent with public choice theory, which predicts that when policy conflicts emerge between narrow, concentrated and easily organized interests with much at stake and a more diffuse and less intense but broader set of interests, the former will generally prevail.<sup>42</sup> While concentrated interests have strong incentives to organize and devote resources to applying political pressure, those sharing broader and more diffuse interests have logistical obstacles to organization and may be plagued by a ‘free rider’ incentive structure that induces individuals to withhold effort in the hopes that others will step forward to bear the costs of representing their point of view. In particular, states Blumm:

Public choice studies suggest that the influence of special interest groups will be strongest under three conditions: (1) when the group opposes changes to the status quo; (2) when the group’s goals are narrow and have low political visibility; and (3) when the group has the ability to enlist support from an alternative friendly forum, such as a sympathetic Congressman or congressional committee. These factors illustrate why interest group pluralism produces both poor economic and poor environmental results on multiple use lands. Commodity-based interest groups pressure land managers to maintain historic levels of grazing and timber harvesting in low visibility administrative decisions, such as grazing allotments or timber sales, in order to benefit their narrow economic concerns. These groups frequently have been able to draw on the support of sympathetic western senators and congressmen, who view the support of rural communities as essential to their reelection.<sup>43</sup>

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40 Michael C. Blumm, “Public Choice Theory and the Public Lands: Why ‘Multiple Use’ Failed” (1994) 18 *Harvard Environmental Law Review* 405.

41 *Ibid.* at 407.

42 *Ibid.* at 407-408. For a general discussion of interest group behaviour and its implications for public policy, see: Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Massachusetts: Harvard University Press, 1965).

43 *Ibid.* at 420-421.

Blumm concludes that “public choice theory supports the proposition that multiple use cannot fulfill its promise because it is inherently biased toward commodity users.”<sup>44</sup>

Although the precise political dynamic may well be different in Canada, Blumm’s key insight is that this facially neutral land management principle risks being anything but neutral in its application. The multiple use approach has a tendency to reduce public land management to a process of generally low-profile administrative and political decision-making that confers decisive advantage on well-connected and well-organized interest groups, often – but not invariably – representing those with a direct financial stake in the use of public land and resources. While the influence of organized interests in politics is both inevitable and desirable, since it provides a means of factoring intensity of preference into decision-making, vigilance is also required to ensure that the power of narrowly focused interest groups does not overwhelm the more broadly defined public interest. One way to achieve this objective is ensure that decision-makers have clear substantive and procedural mandates, reflecting public policy objectives developed through open and representative democratic processes and institutions. In other words, the public purposes to be achieved in areas such as public land management should be specifically defined in law and policy. Multiple use, whether explicitly mandated by statute (as in the United States) or established through policy direction and highly discretionary grants of statutory authority (as is typically the case in Canada), often does precisely the opposite.

### 3.1.2 *The Legacy of Multiple Use*

This three-fold critique of the multiple use approach to public land management goes some way to explaining the dissatisfaction in many quarters with the practical results achieved under this guiding principle. This criticism has been most clearly formulated in the United States, where there is a widely held view among commentators that multiple use management, despite its beguiling utilitarian veneer, has failed to protect the broader public interest in important respects. In particular, it leaves political and administrative decision-making at the mercy of short-term pressures and narrow interests in a context where competing demands on public land and resources, increasing evidence of stress on ecological processes and changing public values all require a new and clearly defined long-term vision for the use of public lands. The legacy of multiple use management in the United States is well documented and includes environmental degradation, subsidized commodity production from public lands, and a panoply of outmoded legislation.<sup>45</sup> Not surprisingly, there is increasing evidence that the days of multiple use are finally

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44 *Ibid.* at 415.

45 See: Coggins, *supra* note 34; Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (Washington, D.C.: Island Press, 1992).

nearing an end. In the words of Bruce Babbitt, former Governor of Arizona and now Secretary of the Interior in the Clinton administration:

The time is at hand to go beyond multiple use. Mining entry must be regulated, timber cutting must be honestly subordinated to watershed and wildlife values, and grazing must be subordinated to regeneration and restoration of grasslands. . . . *It is now time to replace neutral concepts of multiple use with a statutory mandate that public lands are to be administered primarily for public purposes.*<sup>46</sup>

The experience with multiple use in Canada is less well documented and there is no systematic critique along the lines of the American public land literature. Nonetheless, the legacy of multiple use for public land management north of the 49th parallel has much in common with that observed in the United States. Decision-makers in Canada continue to operate under broad mandates, seeking to balance a range of competing interests and uses without clear statutory guidance. Furthermore, there are indications that the result, as in the United States, is increasingly intense conflicts over land and resource uses and growing evidence of stress on natural ecosystems. While much of the criticism of public land management is directed at specific projects and processes, there is some recognition of the underlying problems that stem from the multiple use principle. For example, the sustainability of public land management as practised under the multiple use approach in Alberta has recently been singled out for criticism not only by environmentalists,<sup>47</sup> but also by a quasi-judicial regulatory tribunal<sup>48</sup> and an independent task force charged with identifying priorities for making sustainable development a reality in this province.<sup>49</sup> Certain commodity and other interests may be more supportive, since they stand to gain the most in the short run from an unstructured policy regime, but multiple use can be a double-edged sword if the result is unpredictability and a regulatory process that lacks clear objectives and procedures. In sum, the Canadian and American experiences with public land management, although different in many respects, both point to the conclusion that multiple use has outlived its usefulness. To meet present and future challenges, the rhetoric of multiple use – and the largely unfettered administrative and political discretion that accompanies it – must give way to a new set of guiding principles for public land management.

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46 Quoted in Bates *supra* note 27 at 22-23 (emphasis added). Coggins, *supra* note 34 at 389, argues that “multiple use as an operational standard is already dying a slow death, even without statutory repeal or revision.”

47 See, for example: Vivian Pharis, “Can ‘Special Places 2000’ Protect the Eastern Slopes?” (July/August 1993) 28 *Environment Network News* 25; Reg Ernst, “Is Public Land Management Effective?” (January/February 1996) 43 *Environment Network News* 11.

48 Natural Resources Conservation Board, *Application to construct Recreational and Tourism Facilities in the West Castle Valley, near Pincher Creek, Alberta*, Decision Report #9201, December 1993, at 9-72 - 9-74, 10-10 - 10-11, 11-2, 12-5 - 12-6.

49 Future Environmental Directions for Alberta Task Force, *Ensuring Prosperity: Implementing Sustainable Development* (Edmonton: Environment Council of Alberta, March 1995) at 52-54.

### 3.2 Ecosystem Management

The leading candidate to provide a new conceptual basis for managing public land and resources is ecosystem management. This approach has been developed, in part, as a response to perceived deficiencies of the multiple use principle, with its focus on public lands as sources of commodities (e.g., fibre, food, water and minerals) and as settings for “recreational, spiritual, aesthetic, and educational experiences.”<sup>50</sup> Advocates of ecosystem management argue that the commodity and amenity values of public lands should be viewed in a broader ecological context. This ecological perspective provides a normative basis for public land management and has important practical implications for institutional arrangements and decision-making processes.

The extensive literature on ecosystem management contains numerous accounts of what it is intended to achieve and how it should be implemented.<sup>51</sup> The key ideas are well articulated by Winifred Kessler *et al.*, who characterize ecosystem management in the forestry context as a new paradigm that:

would involve a view of forest lands—including soils, plants, animals, minerals, climate, water, topography, and all the ecological processes that link them together—as living systems that have *importance beyond traditional commodity and amenity uses*. In this view management that optimizes production of one or a few resources may compromise the balance, values, and functional properties of the whole. If it is the entire system and its continued productivity for a wide array of uses and values that we desire, then production goals for individual resources, in and of themselves, might not point a path toward sustainability. We need instead objectives that relate to ecological and aesthetic conditions of the land—a desired future condition if you will—and that sustain land uses and resource yields compatible with those conditions.<sup>52</sup>

In short, ecosystem management recognizes the importance of the products and services provided by public lands, but views them “within a broader ecological and social context.”<sup>53</sup>

To identify the implications of ecosystem management for the law, policy, and decision-making processes governing public lands, it is useful to start by delimiting this concept. The discussion will then turn to the attributes of ecosystem

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50 Winifred B. Kessler *et al.*, “New Perspectives for Sustainable Natural Resources Management” (1992) 2(3) *Ecological Applications* 221 at 221.

51 See, for example: R. Edward Grumbine, “What Is Ecosystem Management?” (1994) 8(1) *Conservation Biology* 27; Reed F. Noss, “Some Principles of Conservation Biology, As They Apply to Environmental Law” (1994) 69 *Chicago-Kent Law Review* 893; Robert B. Keiter, “Beyond the Boundary Line: Constructing a Law of Ecosystem Management” (1994) 65 *University of Colorado Law Review* 293.

52 Kessler *et al.*, *supra* note 50 at 222 (emphasis in original).

53 *Ibid.*

management that are essential to its successful implementation. To begin, there are at least three things that ecosystem management does not purport to be.

### 3.2.1 *Delimiting Ecosystem Management*

First, ecosystem management is not an exclusively technical or scientific process that consists simply of identifying ecosystems as they exist ‘out there’ and then managing human impacts upon them. The term ‘ecosystem’ is a scientific concept which, in Eugene Odum’s classic definition, refers to units “of biological organization made up of all the organisms in a given area interacting with the physical environment so that a flow of energy leads to characteristic trophic structure and material cycles within the system”.<sup>54</sup> The definition of any particular ecosystem is thus a function of the specified organisms and geographic area, selected either because of their inherent value or because they provide an indicator of broader ecological conditions. Ecosystems are thus nested and interacting natural processes which can be separated out, to some extent arbitrarily, for purposes of study or management. This process necessarily involves a selective and value-laden exercise of human judgement. Bruce Goldstein summarizes how this process might work as follows:

There can be no rigid boundaries for an ecosystem because energy and nutrients are exchanged throughout—and in some cases beyond—the globe. For the purposes of conservation, an ecosystem can be defined as the area in which natural processes can be maintained over a long time period, with a minimum of human assistance. Planners also take the needs of human communities into account, perhaps by including enough area within the ecosystem boundary to permit the long-term maintenance of logging or ranching operations. Prospects for long-term stability and security of land tenure and ownership also need to be considered. The period of time chosen and the natural processes and economic practices that are monitored require judgement, which is by necessity based on mutable human values. In addition, the value of the landscape to a particular organism or natural process will vary over time, and will probably not conform to a neat two-dimensional boundary line.<sup>55</sup>

Ecosystems, then, are not self-defining as focal points for public land management. From a management perspective, they are human constructs designed to capture ecological processes and relationships that are deemed to be important.

Second, ecosystem management is not a code word for the preservation of all public lands in pristine condition. The commentary on ecosystem management

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54 E.P. Odum, *Fundamentals of Ecology* (Philadelphia: W.P. Saunders Company, 1971), quoted in Bruce E. Goldstein, “Can Ecosystem Management Turn an Administrative Patchwork into a Greater Yellowstone Ecosystem?” (1992) 8 *The Northwest Environmental Journal* 285 at 295-296.

55 *Ibid.* at 296.

recognizes that human uses of land and resources are valuable in their own right and, furthermore, that humans are an integral part of the matrix of living relationships that shape ecological processes. This point is underlined in a thoughtful paper by Scott Hardt on the implications of ecosystem management for public lands in the United States.<sup>56</sup> The general analysis and conclusions contained in this paper are equally applicable to public land management in Canada. Hardt argues that the maintenance of viable ecosystems should be the overriding management principle for public lands, but that this principle takes account of human uses. In fact, balancing commodity uses and preservation is, in Hardt's view, an essential element of public land management. He describes the ecosystem focus of public land management as follows:

Ecosystems are dynamic systems that are constantly changing because of interactions between their component parts. As a result of our dependence on resources harvested from our environment, human society is a significant force in shaping the world's environment and must be considered part of the ecological community being managed. Healthy ecosystems, to varying degrees, can withstand some disturbance while maintaining their integrity. Consequently, human use of natural resources and the creation of human-induced successional stages should be considered an appropriate element of ecosystem management, as long as essential ecological links are not destroyed by human activities.<sup>57</sup>

To provide a concrete example, properly managed ranching operations in western North America can perpetuate complex ecological relationships between grassland and grazing animals that go back well beyond the cattle industry to the days of free-ranging herds of buffalo. In addition, the effects of human resource uses that do not approximate natural processes can often be mitigated so that, over the broader landscape, the long-term viability of these processes is not compromised. Ecosystem management of public lands thus accommodates human uses and recognizes the diverse values of public lands communities. Furthermore, the adoption of ecosystem management does not require that all natural ecological process be operating on all areas of public land.

Third, ecosystem management is not a cookbook approach that promises particular outcomes if only the right steps are taken in the appropriate order. Rather, it is a set of normative principles that provides a general framework and some fairly specific guidance for public land management. Given the complex ecological, social, institutional and political context of public land management, it is unrealistic to expect anything more at the level of general principles and concepts. Those who criticize ecosystem management for not providing a more clearly defined management formula or a blueprint for resolving land use conflicts are therefore guilty of setting an unreasonably high standard. Managing human activities in a way that meets a range of human needs and respects ecological processes is a complex

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56 *Supra* note 28.

57 *Ibid.* at 392 (references omitted).

exercise that will require a sophisticated and nuanced approach. The value of ecosystem management is that it provides some core guiding principles.

### 3.2.2 *What is Ecosystem Management?*

If ecosystem management is not a technical exercise of structuring decision-making around self-defining ecosystems, a code word for absolute preservation, or a cookbook-type recipe for controlling land and resource use, what is it and what are its implications for public land management? In a nutshell, ecosystem management is a set of normative principles and operational guidelines for managing human activities in a way that permits them to coexist, over a specified management area, with ecological processes deemed to be worth protecting over the long term. No capsule definition of ecosystem management can, however, fully capture the normative and operational content of this term or its implications in the wide range of circumstances where it may be applied. A more productive approach is to distill a set of key principles, policy objectives and management attributes that are generally recognized as embodied in the term ecosystem management.

The normative basis of ecosystem management is what Aldo Leopold referred to as a 'land ethic.'<sup>58</sup> Ecosystem management prescribes land and resource uses consistent with the long-term viability of natural processes because these processes and their persistence over time are deemed to be valuable. According to Goldstein:

Using ecology to redefine land management implies an ethical reorientation. When maintenance of natural processes and linkages becomes the management goal, the ecosystem is valued as an object of respect and admiration, worth preserving for its history, complexity, beauty, and cultural significance. At the same time, protecting ecosystem processes can ensure a lasting supply of the material things that people value.<sup>59</sup>

Ecosystem management thus imposes a normative framework, defined in relation to ecological processes, on the human-centred utilitarianism of multiple use.

This normative basis gives rise to the distinctive substantive goals of ecosystem management. Robert Keiter argues, for example, that a "primary goal of ecosystem management is to 'protect or restore critical ecological components, functions, and structures in order to sustain resources in perpetuity.'"<sup>60</sup> More specifically, this goal involves "maintaining the ecological integrity of native ecosystems over broad spatial and temporal scales, including viable species

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58 *Supra* note 21.

59 Bruce Goldstein, "The struggle over ecosystem management at Yellowstone" (1992) 42(3) *BioScience* 183 at 184.

60 Robert B. Keiter, "Ecosystem Management: Exploring the Legal-Political Framework" in R. Gerald Wright, ed., *National Parks and Protected Areas* (Cambridge: Blackwell Science, 1996) 63 at 68 (reference omitted).

populations, evolutionary processes, and a full range of ecosystem types.”<sup>61</sup> The goal of maintaining ecological integrity – as evaluated using specified management indicators such as measures of biological diversity – operates as a constraint on the permissible combinations and intensity of other uses. This constraint need not be particularly tight if ecosystem management is practised over a large landscape, thereby permitting intensive uses in certain areas without compromising key ecological indicators in the broader region, and if these other uses are relatively benign in environmental terms. Nonetheless, unlike the pure multiple use approach, ecosystem management has a firm normative foundation that imposes an ecological ‘bottom line’ on decision-makers. Subject to meeting this bottom line requirement, ecosystem management accommodates the full range of other objectives for land and resource management that spring from human need and imagination.

The goal of maintaining ecological integrity places the linkage between science and public policy at the centre of ecosystem management. Since an understanding of ecological systems is essential in order to evaluate the potential of human activities to disturb natural processes, ecosystem management depends on integrated and interdisciplinary scientific research to develop management objectives, measure progress, and make corrective adjustments.<sup>62</sup> Furthermore, in the face of inevitable uncertainty and the experimental nature of much of the accompanying science, ecosystem management must be adaptable to reflect changes in scientific knowledge.<sup>63</sup> A process of adaptive management is thus called for and land managers should “adopt cautionary, risk-averse policies and strategies that are framed at appropriate spatial and temporal scales.”<sup>64</sup>

As noted above, however, ecosystem management is not a scientific or technocratic formula for land and resource management. Advocates of ecosystem management generally recognize both the role of humans within ecosystems and the importance of human values in defining land and resource management policies. Keiter summarizes this view as follows: “[S]ince people must be considered an important part of most ecosystems, ecosystem management must promote sustainable resource development activities compatible with prevailing natural processes to ensure viable communities and economic opportunities.”<sup>65</sup> In practice, “ecosystem management must accommodate human interests and afford widespread public involvement in planning and decision-making processes.”<sup>66</sup>

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61 *Ibid.*

62 *Ibid.* at 69.

63 *Ibid.*

64 Robert B. Keiter, “National Parks, Ecosystem Management, and the Law” 1995 15 *Journal of Energy, Natural Resources and Environmental Law* 249 at 259. For a discussion of adaptive management, see: Kai N. Lee, *Compass and Gyroscope: Integrating Science and Politics for the Environment* (Washington D.C.: Island Press, 1993).

65 Keiter, *supra* note 51 at 303.

66 Keiter, *supra* note 60 at 68-69.

Finally, ecosystem management has important implications for institutional arrangements and decision-making processes. In particular, intergovernmental and interagency coordination is a key component of ecosystem management because neither species nor ecological processes tend to confine themselves within conventional jurisdictional boundaries.<sup>67</sup> Keiter summarizes the management implications as follows:

As a general principle, ecosystem management views public lands and resources from a regional or resource system perspective; it regards natural phenomena, such as watersheds, airsheds and wildlife habitats, as the appropriate focus for management decisionmaking. . . . In short, management priorities—set in accordance with ecological principles—should transcend jurisdictional boundaries and reflect *an overarching commitment to an integrated public domain*.<sup>68</sup>

The unifying thread that runs through all of the attributes of ecosystem management is captured in Keiter's final sentence. Ecosystem management provides a conceptual foundation for a truly integrated approach to public land management. While it does not, in itself, resolve all conflicts or prescribe precise management options, it does provide both the normative basis and a number of key structural elements – in the form of operational objectives and guidelines – around which an integrated regime for public land management could be constructed.

### 3.2.3 *Implementing Ecosystem Management*

The attributes summarized above constitute the core content of ecosystem management but reveal little about how decision-making might be structured in order to implement this approach to public land management. One model has been suggested by Hardt, who proposes that decisions should proceed at two levels within an ecosystem management framework.<sup>69</sup> The first level involves applying ecological principles to determine the amount of disturbance that can be allowed within a given management area without destroying ecosystem viability. This determination is essentially scientific, although clearly the determination of the appropriate management area and the menu of possible disturbances to be canvassed will reflect political, economic, and social considerations. The second level of decision-making involves the determination of the appropriate mix of uses to be allowed within the ecosystem viability ceiling. Hardt proposes that this determination should be made by an interdisciplinary team of land managers, engaged in a planning process based upon public input. This second level of decisions, which Hardt terms the “lifestyle prong,” requires political choices based on public preferences (e.g., whether more commodity production or greater

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67 Keiter, *supra* note 51 at 302.

68 Robert B. Keiter, “NEPA and the Emerging Concept of Ecosystem Management on the Public Lands” (1990) 25 Land and Water Law Review 43 at 45 (emphasis added).

69 Hardt, *supra* note 28 at 391-396.

wilderness recreation is desired). Hardt emphasises, however, that the lifestyle decision should not override the determination of ecosystem viability. In this way, short-term lifestyle decisions will not be permitted to cause long-term ecological damage.

Since ecosystems are generally not closed systems, the objective in defining a management area should be to identify “‘administrative ecosystems’ so that the primary energy and nutrient links within a given biological community are managed comprehensively.”<sup>70</sup> Hardt suggests that watersheds may be used to define ecologically based management areas, although others have noted that this delimitation may not be appropriate for migratory wildlife and animals, such as wolves or grizzly bears, with large home ranges. Clearly, there is no general formula or set of criteria for identifying ‘administrative ecosystems.’ Their boundaries must be defined through the identification of management objectives and indicators, based on the application of ecological principles to determine the time scales, landscapes and natural processes that should be the focus of decision-making.<sup>71</sup> In this way, Hardt’s concept of an ‘ecosystem viability ceiling’ on disturbance can be translated into practical management directives.

Given the inevitable controversy regarding both the defining characteristics and extent of ecosystems for land management purposes and the assessment of preconditions for ecosystem viability, Hardt regards a clear legislative mandate for land managers as essential. Otherwise, political pressure from the extremes (i.e., those promoting preservation or development ‘at all cost’) may frustrate attempts to strike an appropriate balance. Hardt recommends legislation establishing a comprehensive ecosystem management mandate for land management agencies that will “require the maintenance of ecosystem viability and the designation of a broad array of management indicators to implement that mandate.”<sup>72</sup> Defining these indicators requires primarily scientific information, although public input would also be appropriate “to the extent that it provides factual information bearing on the determination of the administrative ecosystem boundaries or the ecosystem viability ceiling.”<sup>73</sup> The definition of management indicators provides both the flexibility required to tailor land management to particular circumstances and the possibility of concrete and, ultimately, enforceable directives to managers. According to Hardt:

While ecosystem viability would be the mandated policy objective, protection of management indicators would be the substantive legal standard. Any litigation

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70 *Ibid.* at 395.

71 Considerable work on the development of management indicators has been undertaken in relation to sustainable forestry. See, for example: Canadian Council of Forest Ministers, *Criteria and Indicators of Sustainable Forest Management in Canada: Progress to Date* (1997) and Canadian Council of Forest Ministers, *Criteria and Indicators of Sustainable Forest Management in Canada: Technical Report* (1997).

72 Hardt, *supra* note 28 at 393.

73 *Ibid.* at 397.

concerning violation of the ecosystem viability ceiling would focus on the effects that challenged actions would have on the management indicators; courts would not be required to examine unquantifiable ecosystem impacts. This would allow for meaningful judicial review rather than broad judicial deference to agency expertise.<sup>74</sup>

In this way, flexibility regarding the ‘life-style prong’ of decision-making would be constrained by a firm legal mandate requiring maintenance of ecosystem viability as measured by management indicators.

Although still in its formative stages in terms of both conceptual definition and practical applications, ecosystem management constitutes a promising normative basis on which to define a new set of legal and policy directions for integrated public land management. It embodies an ethical premise – the value of ecosystem integrity – and a set of objectives for the management of public lands and resources. It thus provides a structure for the balancing of multiple uses that is inevitable in making what Hardt terms “lifestyle” choices regarding the use of public land and resources. For ecosystem management to have a practical impact on public land management, however, it must be reflected at both the strategic and operational levels of decision-making. The next two sections focus on these issues, looking first at the strategic role of land use planning.

## 4. The Role of Planning

The importance of land use planning, like most legal and policy issues in public land management, has received much more detailed and systematic analysis in the United States than in Canada. Aside from a sparse literature,<sup>75</sup> some of the most useful analysis of this issue in southern Canada has occurred in the context of provincial government initiatives intended to address protracted land use conflicts in British Columbia.<sup>76</sup> In the North, comprehensive planning is a fundamental element

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74 *Ibid.* at 398.

75 One example of attention to this issue in Canada is: Nigel Richardson, *Land Use Planning and Sustainable Development in Canada* (Ottawa: Canadian Environmental Advisory Council, 1989).

76 See, for example: Commission on Resources and Environment, *Report on a Land Use Strategy for British Columbia* (August 1992) and Commission on Resources and Environment, *Planning for Sustainability: The Provincial Land Use Strategy*, Volume 2 (November 1994). Also noteworthy are the first three (of six) tenets of the vision for sustainable forest practices in Clayoquot Sound proposed by the Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, *supra*, note 8 at 31. These tenets are: (1) “the key to sustainable forest practices lies in maintaining functioning ecosystems”; (2) “hierarchical planning is required to maintain ecosystem integrity from the sub-regional down to the site-specific levels, and to ensure that the intent of higher level plans is reflected in lower level plans”; and (3) “planning must focus on those ecosystem elements and processes to be retained rather than on resources to be extracted.”

of the integrated regimes for land and resource management established under modern land claims agreements.<sup>77</sup>

Among American commentators, there has been widespread recognition for some time that land use planning is essential for the long term sustainable management of the public domain. For example, this view received a strong endorsement in 1970 from the U.S. Public Land Law Review Commission, which concluded that:

The implementation of policies concerning timber, minerals, outdoor recreation, maintenance of environmental quality, and all of the other various aspects of public land policy is vitally dependent on the planning process and how well it works. When resources were abundant and demands upon them were relatively free of conflict, the nation may have been able to afford the luxury of an unplanned, crisis-oriented public land policy. But those days are far behind us. We are convinced that effective land use planning is essential to rational programs for the use and development of the public lands and their resources.<sup>78</sup>

Subsequent legislation in the United States significantly increased planning requirements for the key federal public land agencies.<sup>79</sup> Nonetheless, commentators continue to call for greater attention to this area.<sup>80</sup>

To provide but one illustration, the argument for land use planning is eloquently stated by Charles Wilkinson in the concluding pages of his magistral tour through “the lords of yesterday”, his term for the anachronistic legal regimes that continue to govern much land and resource use in the western United States.<sup>81</sup> Turning his mind to the future, Wilkinson asks:

How, then, might sustainable use work in the West? After identifying all economic, environmental, cultural, and abstract—call them spiritual—elements that need to be sustained, it seems to me inevitable that westerners increasingly will turn to various forms of planning. When I say planning, I mean it in the broadest sense: the process of a community coming together; identifying problems; setting goals—a vision—for a time period such as twenty or forty years; adopting a program to fulfill those goals; and modifying the program as conditions change. Some developers, imbued with the traditional *carte blanche* attitude so evident in the lords of yesterday, try to paint any form of planning as a straitjacket. But sensible yet visionary planning is the opposite: it can open our minds to the possibilities for our communities—our neighborhoods, schools,

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77 See, for example: *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, The Minister of Indian Affairs and Northern Development and Tunngavik Federation of Nunavut*, 1993.

78 Public Land Law Review Commission Report, *One Third of the Nation's Land* (1970), quoted in Jerome C. Muys & John D. Leshy, “Whither the Public Lands?” (1995) 41 Rocky Mountain Mineral Law Institute 3-1 at 3-26 - 3-27.

79 George Cameron Coggins, “The Developing Law of Land Use Planning on the Federal Lands” (1990) 61 University of Chicago Law Review 307.

80 For example: Hardt, *supra* note 28 at 400-402; Keiter, *supra* note 51 at 330-331.

81 Wilkinson, *supra*, note 45.

businesses, environment, and culture—so that we can build flexible arrangements for trying to achieve and sustain those possibilities. All across the West, stresses have built to the point where it is hard to imagine a sustainable future without some form of planning.<sup>82</sup>

Planning as envisioned by Wilkinson and others committed to the sustainable use of public lands and resources is thus a means of incorporating core values and an overarching vision for public land management into a strategic framework to guide decision-making. It is no accident that advocates of ecosystem management, such as Hardt, view planning as essential in order “to guarantee ecosystem viability and an appropriate balance of uses.”<sup>83</sup>

An extended discussion of the theory and practice of land use planning is beyond the scope of this paper. The principal advantages that a planning framework can bring to public land management will be described, however, and a few comments made on the key attributes of an effective planning process. To begin, the case for planning as a key component of public land management rests on seven principal arguments.

#### **4.1 The Benefits of Land Use Planning**

First, since planning by definition requires a forward-looking orientation on the part of decision-makers, it can be used to focus on the long-term sustainability of land and resource uses, ecological processes and public land communities. As Keiter notes:

Regardless of one's predispositions, comprehensive, ecosystem-level planning forces everyone—land managers, communities, and environmental activists alike—to address the future in terms of maintaining a sustainable resource base. Planning to ensure nonimpairment of ecosystems is directly related to sustainability and community stability; without healthy, functioning ecological systems as the resource base, public land communities cannot hope to achieve long term stability.<sup>84</sup>

A comprehensive planning process can thus provide some hope that the decisions regarding the use of public land and resources will be based on a time scale that reflects values of community and ecological sustainability, in addition to the inevitable short-term political and economic considerations. The discipline and transparency of planning may also reduce the risk of a one-way ratchet of public land decisions that, over time, systematically favours intensive development at the expense of other values.

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82 *Ibid.* at 300.

83 Hardt, *supra* note 28 at 400.

84 Keiter, *supra* note 51 at 331, footnote 213.

Second, planning has the potential to avoid some of the pitfalls of incrementalism and cumulative impacts, notably in relation to biodiversity. Jerome Muys and John Leshy argue that the experience with the *Endangered Species Act* in the United States confirms that “it is more sensible and effective to take reasonable preventive action to protect critical wildlife habitat in the planning stage than to play ‘catch up’ after species have become threatened or endangered and more draconian recovery or mitigation measures are required.”<sup>85</sup> Implementing preventive measures through planning is likely to be both more effective and less costly, in the long run, than a remedial approach. A similar argument is made by Kelly Nolen when discussing the value of planning by the Bureau of Land Management (BLM):

[C]omprehensive planning requires BLM to take a proactive approach to resource management by setting goals and strategies, both for today and the future. Such an approach is surely preferable to a reactive management style, in which BLM merely resolves issues as they arise, without coordination or long-range vision. Forward-looking planning is also the best way to avoid future endangered species ‘train wrecks,’ such as that initiated by the listing of the spotted owl in the Pacific Northwest. Considering wildlife in the planning process enables BLM to take steps to preserve species *before* they are on the brink of extinction.<sup>86</sup>

Since planning can be an antidote to incrementalism and the resulting cumulative impacts on biodiversity, it provides a means of furthering one of the principal objectives of ecosystem management. It offers similar benefits in relation to a wide range of related objectives, from ensuring the sustainability of renewable resource use to maintaining the aesthetic value of broad landscapes, that are vulnerable to the tyranny of unplanned incrementalism and the cumulative impacts that accompany it. To achieve these objectives, planning should have a sufficiently broad geographical scope – or be sufficiently well integrated with planning processes in adjacent areas – to ensure that decision-making reflects ecosystem considerations and avoids spill-over effects that are at cross-purposes with land and resource uses in other management units.

A third potential benefit of planning is a formal requirement of systematic data collection and analysis regarding baseline environmental, social and economic conditions, current and potential uses of land and resources, and the array of values and interests that are relevant to public land management in a given area.<sup>87</sup> Planning can therefore lay the groundwork for better decision-making and provide an accountability mechanism to ensure that adequate information is in place on which to base management choices. This focus on information is consistent with the central role of science in ecosystem management.

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85 Muys & Leshy, *supra* note 78 at 3-29.

86 Kelly Nolen, “Residents at Risk: Wildlife and the Bureau of Land Management’s Planning Process” (1996) 26 *Environmental Law* 771 at 782 (emphasis in original).

87 *Ibid.*

Fourth, planning should formalize the “rules of the game” for public land management with a view to providing greater “legitimacy, consistency, fairness, and accountability in the decision-making procedures.”<sup>88</sup> In particular, a comprehensive planning process exposes public land management to broad public scrutiny, thereby reducing the risk that undue pressure from single interest groups will skew objectives or implementation. An open, transparent and legally structured planning process has the potential to address concerns with ‘black-box’ administrative or political decision-making regarding projects on public lands.<sup>89</sup> While not everyone will agree with the outcome of particular planning processes, the basis for final decisions should be evident to all interested parties. Planning can thus democratize public land management and increase the legitimacy of decisions.

A fifth, and related, benefit is that a properly structured planning process can provide an opportunity for direct public input into public land management at a point in time when there remains significant scope to establish objectives and priorities regarding land and resource use. In addition, the planning process should force most of the competing interests and agencies into a single arena so that, as Coggins argues, “[t]he Forest Ranger cannot ignore the effect of a timber sale on wildlife habitat, and the wilderness advocate cannot pretend that preservation can be isolated from other human activity.”<sup>90</sup> One advantage of bringing the full range of perspectives together in a planning process is that it makes the trade-offs faced by public land managers more explicit and obliges advocates of narrow interests to broaden their focus if they are to participate effectively. While this approach may highlight or even accentuate conflicts at the outset, it also offers the potential to build broader consensus through a process of education and mutual accommodation. The consultative and deliberative process required by a formal planning exercise thus provides an opportunity to build a broad base of support for the final plan. To achieve this potential, the planning process should involve advocates for the full range of land and resource uses and values.

A sixth benefit of planning is that it can increase predictability in public land management. Legally enforceable plans would ensure that management actions are not arbitrarily affected by changes in personnel or political agendas. Since actions inconsistent with these plans could be enjoined, significant changes in land and resource management would require formal changes to the plans. The objective is not, of course, to freeze planning decisions for all time, rendering public land management unresponsive to changes in governments, public values or other circumstances. What planning should guarantee, however, is a fair and predictable process involving due deliberation and public input for making fundamental changes in public land management. Increased predictability will provide a basis for

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88 Paul Mohai, “Rational Decision Making in the Planning Process: Some Empirical Evidence From RARE II” 17 *Environmental Law* 507 at 526-527.

89 Nolen, *supra* note 86 at 782.

90 Coggins, *supra* note 79 at 351.

interested parties to develop, and rely on, reasonable expectations regarding the level of preservation and types of permitted uses in given areas. For project proponents, planning should permit more accurate predictions regarding the likelihood of regulatory approval, the terms and conditions that might be imposed on their activities, and the time frame for decision-making, all of which are relevant to project expenditures and financing. A proper planning process should also reduce the risk that a company will find itself quite far down the project development and expenditure road before it is stopped in its tracks. For other users, planning should reduce the risk that regulatory treatment of individual development proposals will result in arbitrary and unexpected changes in land use. The role of planning in infusing more predictability into public land management will, according to Hardt, have the added benefit of resulting in more active participation in the planning process by all interested parties.<sup>91</sup>

Finally, comprehensive planning holds the promise of greater efficiency at other stages in public land management. In the absence of a strategic framework for decision-making, pressure from the diverse interests with a stake in public lands will build at the points within the legal and institutional framework where leverage can be exerted and public debate focused. One place where these pressure points may occur is at the project review stage. Hardt argues that, in the United States, the environmental assessment process under the *National Environmental Policy Act* has “been seriously abused by interests opposing proposed projects on federal lands.”<sup>92</sup> Stanley Dempsey also takes the view that the absence of a comprehensive federal land use planning law in the United States has resulted in environmentalists relying on “environmental laws as indirect controls on the use of public lands”; he argues that while “this may be an effective way of delaying projects and bringing public attention to impacts of a project, it is not necessarily the most efficient or desirable way of doing business.”<sup>93</sup>

Concerns regarding the use of environmental assessment and environmental protection statutes to fight public land battles in the United States have a Canadian analogue in the reliance on environmental assessment processes to address a range of broad policy issues, often extending well beyond the scope of the particular project under review.<sup>94</sup> While environmental assessment is a vital component of any legal regime for land and resource management, it cannot be expected to cover the entire spectrum of issues that arise when resource development or other uses are proposed for public lands. Rather, environmental assessment should be one step – albeit a critically important one – in a decision-making continuum that moves from

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91 Hardt, *supra* note 28 at 401.

92 *Ibid.*

93 Stanley Dempsey, “From the Yellowstone Ecosystem and Nye County to Where – Changes in Public Lands Management” (1996) Rocky Mountain Mineral Law Institute 5-1 at 5-22.

94 For discussions of this issue in the context of two major project reviews in Canada, see: Canadian Institute of Resources Law, *supra* note 10 at 64-74 (BHP Diamond Mine, Northwest Territories); Kennett, *supra* note 12 at 4-5 (Amoco Whaleback, Alberta).

the general (e.g., the establishment of broad objectives and standards for the use of public land and resources) to the specific (e.g., the detailed regulatory requirements for individual projects). Debate on broad policy issues should arguably occur in political and legislative forums or at the land use planning and resource disposition stages, while many technical matters can be left to detailed project-specific regulation. In the absence of an integrated framework of public land law that includes an effective planning component, however, environmental assessment processes that are relatively well developed and open inevitably become the focal points for public land management.

The results are threefold. The first is to increase the costs and uncertainty for participants in the regulatory process, since important issues are unresolved until relatively late in the planning of a project. Second, excessive demands are put on environmental assessment. These demands – and the disappointed expectations that they engender – explain some of the recent criticism of environmental assessment from both industry and environmentalists.<sup>95</sup> Finally, the absence of an integrated process creates a real risk of bad decision-making. Important issues may slip between the cracks or may be addressed either too early or too late in the process.

The efficiency argument for planning is that once a plan passes scrutiny, projects that it explicitly anticipates or that are consistent with it should generally proceed in an expedited manner. A planning framework for public land management may thus relieve some of the pressure on environmental assessment, thereby addressing the concerns of project proponents who argue that this stage of the regulatory process is too expensive, time-consuming and unpredictable. Planning would also provide a forum for debate, deliberation and priority setting on broad policy issues, as opposed to telescoping these issues into project-specific processes which often lack the information base and procedural attributes to address them adequately and where the costs of public deliberation may be borne, directly or indirectly, by project proponents.

The advantages of planning clearly show that it has considerable potential to contribute to improved public land management, but care has been taken to state all of these benefits in conditional terms. Needless to say, they remain contingent on the effectiveness and efficiency of the planning process and on the translation of the results of that process into concrete management decisions. While some of the desirable attributes of the planning component of public land management have been alluded to above, a full discussion of this issue is beyond the scope of this paper. There is, however, one general feature of planning that is particularly relevant to the argument developed in this paper.

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95 A number of these criticisms are summarized in: Andrew Kikiforuk, *The Nasty Game: The Failure of Environmental Assessment in Canada* (Toronto: Walter & Duncan Gordon Foundation, January 1997).

## 4.2 *The Legal Basis for Land Use Planning*

The argument that planning should have a legal basis if it is to be effective is a recurring theme in the literature on public land management. In particular, the role of public land law in planning should be to establish:

- C the mandatory duty of those responsible for managing public lands and resources to engage in an integrated planning process;
- C the guiding principles and broadly defined objectives to be achieved through planning and the specific matters that must be considered in the planning process and reflected in final plans;
- C the procedural attributes of planning necessary to ensure a fair, open and transparent process; and
- C the legal status of the land use plans that emerge from that process.

The last of these points warrants brief emphasis. While a legal basis for the process is a necessary condition for effective planning, it is not a sufficient one. If the plans themselves are not legally enforceable and can be easily modified through the exercise of administrative discretion or ignored in subsequent decision-making on specific land and resource uses, they will be unlikely to have a significant impact. Without legal status for plans, planning risks becoming all process and no substance or, in the words of one commentator, an exercise where participants view “the process to be the product.”<sup>96</sup> Other commentators have underlined the need for a legal basis to permit independent oversight of planning and its implementation, since land managers may face incentives to subvert the process or its specific outcomes.<sup>97</sup>

According legal status to land use plans requires, of course, a balance between certainty and flexibility. The need to strike this balance reflects the unavoidable tension in public land management between the desirability of an adaptive approach that can respond to changes in scientific information and public values and the dangers of unfettered administrative discretion and directionless incrementalism. In striking this balance, however, a measure of legal enforceability for plans is essential

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96 Bruce Mitchell, “The Evolution of Integrated Resource Management” in Reg Lang, ed., *Integrated Approaches to Resource Planning and Management* (Banff: The Banff Centre School of Management, 1986) 13 at 23.

97 George Cameron Coggins & Parthenian Blessing Evans, “Multiple Use, Sustained Yield Planning on the Public Lands” (1982) 53 *University of Colorado Law Review* 411 at 468.

if they are to operate as meaningful constraints on decision-making. As stated by Hardt:

While . . . legally enforceable plans should allow land managers some flexibility to adjust to changing conditions and new information as proposed projects develop over the life of the plan, they should contain legally enforceable standards to ensure that subsequent project decisions neither impair ecosystem viability nor destroy the reasonable economic expectations of commodity interests through *ad hoc* environmental restrictions.<sup>98</sup>

Plans that do not have binding force are vulnerable to the pressures for incrementalism that planning is intended to counteract.

Land use planning thus has the potential to overcome many of the deficiencies of the highly discretionary multiple use approach to public land management. As a mechanism for integrated decision-making whereby long-term economic, social and ecological effects and opportunity costs are evaluated before resource commitments are made, it can provide the strategic framework required to implement ecosystem management on public lands. Planning is not, however, a panacea. It will not eliminate conflict and may, in fact, throw conflicting visions and interests into sharp relief. Furthermore, planning is only the beginning of the process; for plans to achieve concrete results they must be implemented in a rigorous manner, allowing sufficient flexibility for inevitably changing circumstances. In a Canadian study on land use planning and sustainability, Nigel Richardson underlined the importance of implementation, stating that “land use planning is not to be seen as a sort of free-standing magic formula, but as an intermediate stage in a continuum extending from societal goals to particular administrative acts.”<sup>99</sup> Having proposed an approach to public land management that adopts ecosystem management as the organizing principle for societal goal setting and land use planning as a means of establishing the strategic framework for decision-making, the discussion now turns to the implementation end of the continuum.

## 5. Integration of Public Land Decision-Making

Many of the challenges for public land management enumerated at the beginning of this paper are variations on a common theme: the need for greater integration in decision-making. As noted above, integration at the conceptual and strategic levels can be achieved by adoption of ecosystem management as a set of guiding principles for public land management and by the implementation of land use planning in order to ensure an appropriate spatial and temporal time frame for decisions and as a means of reducing the harmful effects of incrementalism and unanticipated cumulative impacts. Effective public land management requires,

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98 Hardt, *supra* note 28 at 400.

99 Richardson, *supra* note 75 at 6.

however, that the theme of integrated decision-making be carried through to the implementation phase. Two principal types of integration are required: integration among stages of decision-making and integration across jurisdictions and agencies.

### **5.1 *Integration Among the Stages of Decision-Making***

Integration of the first type focuses on the linkages among the stages of decision-making regarding public land and resources. Most decisions can be located at some point along the following spectrum: (1) the establishment of guiding principles, broad policy directions, and more specific objectives and priorities for the use of public land and resources; (2) land use planning; (3) rights disposition (i.e., the granting of private interests in public land and resources); and (4) project-specific review (e.g., environmental assessment) and regulation (e.g., licensing and permitting). It would seem a common sense proposition that these stages should, taken together, constitute an integrated decision-making process.

One would expect, for example, that overall objectives for land and resource management would be clearly established at the outset through a deliberative process that incorporates extensive public participation and examines a broad range of options for land and resource use. These objectives, in turn, would constitute the basis for planning decisions regarding the appropriate range of uses for particular management units. The planning process would provide for public and expert input regarding the competing values and interests, the baseline environmental and socio-economic data, and the range of possible land and resource uses that should be considered. In comparison with the preceding stage, its focus would be narrowed both geographically and in terms of the relevant interests and options. With this planning framework in place, decisions on rights issuance and on individual projects would proceed with input from interested parties. At these stages, however, there would be a reasonable measure of certainty regarding the acceptable parameters for development and there would, in general, be no need to revisit fundamental questions regarding land use objectives and priorities. Rather, the focus would be on the particular attributes of the activity or project in question and its likely impacts.

In practice, a logical progression of this type could not function properly without internal feedback loops to review and adjust broad policy and planning directions in light of changing circumstances. The value of certainty and predictability must be balanced against the need for an adaptive approach to land and resource management that permits adjustments in light of changes in scientific information, public values, socio-economic conditions, resource development technology and the viable array of options for the use of public lands and resources. Nonetheless, a basic adherence to the logical progression in decision-making sketched above has several advantages.

First, as just noted, it allows decision-making processes to be tailored to the types of issues that arise at each stage. For example, the formal public hearing process in which expert witnesses and interested parties appear and give evidence has proven to be a useful vehicle for evaluating the merits of a specific projects. This process is relied on for the environmental assessment of major projects throughout Canada and is also used for many regulatory processes. Project-specific public hearings may, however, be an unwieldy forum for fostering debate and building consensus on broad issues of public policy regarding land and resource use. Particularly if the project-specific and general policy functions are combined, the burden on the public review process and on the participants – notably, but by no means exclusively, the project proponent – may be excessive. From the point of view of regulatory efficiency, there are important advantages if project review is undertaken in an environment where many of the fundamental policy issues regarding land and resource use have already been resolved in a satisfactory manner and need not be revisited. These broader policy issues, in turn should be addressed through a different set of political, administrative and participatory mechanisms.

The second advantage of a logical progression of decision-making is that it can increase the level of certainty for all those with an interest in public land management. This advantage is particularly important for businesses that depend on access to public land and resources. In the absence of authoritative guidance regarding broad land use policy, a project proponent may find itself faced with a considerable outlay of time and money before reaching a point in the regulatory process where it knows whether or not the project is acceptable in principle.<sup>100</sup> This uncertainty is further exacerbated if proponents receive explicit or tacit approval at early stages, only to be faced with questions regarding the overall appropriateness of their proposed activities at a later stage. If these fundamental questions are not addressed in an appropriate manner early on, however, it is inevitable that interested parties will seek to raise them at the point in the decision-making continuum where they have access and can exert some leverage. In most cases, this point is at the project review stage. Since a refusal to examine these issues at this stage could seriously undermine the legitimacy of the project-review process, certainty and legitimacy find themselves in conflict in the absence of a well structured decision-making continuum.

A third advantage is that the cascading effect of decision-making provides a means of establishing constraints on the exercise of administrative discretion. Since the exercise of judgement in public land management is inevitable and since flexibility and adaptability are essential, an important challenge is to establish checks to ensure accountability and prevent the abuse of discretion. As argued in Section 6 of this paper, an important function of law in democratic society is to provide these kinds of checks. Public land law can play this role by integrating the stages of public

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100 For an illustration, see Kennett, *supra* note 12 (Amoco Whaleback, Alberta).

land management. General policy directions, if given legal effect, can provide direction for the planning process. In turn, land use plans can establish legally-binding parameters for decision-making at the rights disposition and project review stages. Finally, terms and conditions attached to rights disposition or developed through project review could provide a basis for project-specific regulation. In this way, the discretion of decision-makers at each stage would be constrained and they could be held accountable through judicial review if they failed to discharge their responsibilities in accordance with previously established and legally enforceable directives.

A fourth reason for a logical continuum of decision-making is that a failure to address certain types of issues at the outset may undermine the ability of public land management to achieve important societal objectives. The cumulative impacts of incremental decision-making are a significant challenge for public land management that cannot easily be addressed on a project-specific basis. In particular, if public land management is to reflect the value of maintaining natural ecological processes over the long term, there is a need to ensure that decisions regarding individual projects are made with some reference to the aggregate human impact in a given area that is consistent with ecosystem integrity. This two-level process requires the determination of societal goals for public lands and their incorporation into a planning framework before decisions are made regarding the socially desirable mix of land uses.<sup>101</sup> A progression of this type is necessary for ecosystem management which, as argued in Section 3 of this paper, provides the essential normative basis for the sustainable use of public lands and resources.

While the arguments for integration among the stages of decision-making in public land management are convincing, there are clear indications this integration is not always achieved in practice. Public land management regimes in Canada often have weak or non-existent land use planning and the processes for deciding on resource disposition tend to be highly discretionary and often opaque. Project review and regulatory processes tend to be more formal, open and transparent, often involving legislated environmental assessment processes and subsequent regulatory proceedings governing the issuance of permits and licences. As illustrated by a number of recent, high-profile conflicts regarding land and resource use – notably petroleum<sup>102</sup> and recreational development<sup>103</sup> in Alberta and mineral development in the Northwest Territories<sup>104</sup> – the absence of an integrated decision path can have undesirable consequences from the perspective of project proponents, intervenors, regulators and the broader public.

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101 See Hardt, *supra* note 28 at 392-396 (discussed above in Section 3.2.3).

102 Amoco Whaleback, Alberta, *supra* note 10.

103 West Castle recreation and tourism facilities, Alberta, *supra* note 48.

104 BHP Diamond Mine, Northwest Territories, *supra* note 10.

In order to address these problems, an integrated approach is required that infuses general societal objectives regarding public land management into a coherent strategic framework at the land use planning stage and then proceeds through a series of decision-making processes that focus on progressively more specific issues. Decision-makers at each stage would evaluate proposals for land and resource use and either reject them or grant them approval, subject to whatever terms and conditions are appropriate at each stage and subject to a clearly understood obligation on the part of the proponent to satisfy the requirements at all stages before final authority to proceed is issued. Well defined legal relationships between the stages should be established in order to provide greater certainty regarding the rights and obligations of all parties and to ensure that higher level decisions (e.g., planning decisions) are binding at subsequent stages.

## **5.2 Interjurisdictional and Interagency Coordination**

The second type of integrated decision-making required for public land management involves interjurisdictional and interagency coordination when issues and policies exhibit spill-over effects. Although it is commonly recognized that ecosystems do not respect administrative or jurisdictional boundaries, this fact has yet to be fully reflected in the legislation and policies governing those responsible for managing public lands.<sup>105</sup> Within governments, responsibilities for public lands and resources are frequently divided along sectoral lines. The situation is further complicated when adjacent lands are managed under discrete management regimes, sometimes controlled by different political authorities, without adequate attention to coordinating land use decisions.

While numerous examples could be cited of this type of jurisdictional and agency fragmentation in public land management throughout Canada, a particularly clear illustration of this problem was highlighted in the report of the federal Banff Bow Valley Task Force. Although the Task Force's mandate was restricted to the portion of the Bow Valley within Banff National Park, it argued that regional coordination is essential because "events in one area can have a significant impact on the whole ecosystem, inside and outside park boundaries."<sup>106</sup> The report noted that:

In the past, individual jurisdictions tended to address issues in isolation. Today, people are beginning to recognize that few pressures are unique to one jurisdiction. They understand that cooperation increases the chances of dealing with these issues successfully.<sup>107</sup>

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105 Richardson, *supra* note 75 at 42.

106 Banff Bow Valley Study, *supra* note 13 at 61.

107 *Ibid.*

The Task Force stated that it had found “a great deal of evidence supporting the need for a more integrated approach to planning, management and decision-making in the [Bow] Valley” as a whole and concluded that, despite some ongoing cooperative efforts, “the situation in the region demands a more urgent and directed approach.”<sup>108</sup>

The need for interjurisdictional and interagency coordination in public land management has been widely discussed in the literature on integrated resource management and the principal obstacles to achieving this result have been identified. As Bruce Mitchell notes in an article that traces the origins of integrated resource management in Canada and the United States back to the beginning of this century: “the concept of integration has a long history even though successful implementation of it has been infrequent.”<sup>109</sup> Mitchell offers several explanations, including the resistance of line managers to comprehensive planning and the fact that plans may be outdated by the time they are completed, excessively vague, or unrealistic relative to available resources.<sup>110</sup> Furthermore, he argues:

the sensitivity of line agencies and interests can be a substantial barrier to sharing and coordination. Existing agencies have little incentive to give up responsibility or authority; they will remain as a fundamental barrier to any initiative which seeks to reduce the scope of their influence or power. Perhaps one reason for the shortcomings of comprehensive resource management in Canada has been the unwillingness to create coordinating mechanisms with actual power. Instead, the usual procedure has been to rely on informal inter-agency coordination which often is ignored or blocked by existing line agencies.<sup>111</sup>

Achieving integration in practice thus requires formal structure, either through new institutional arrangements or new mandates for existing agencies. Relying on interagency coordination within existing legal and institutional regimes is unlikely to achieve the desired result.<sup>112</sup>

This analysis is corroborated by a number of other commentators on the generally dismal record of integrated resource management. Pollution control measures in England are examined by Nigel Watson *et al.*, who note that the institutional factors that inhibit integrated resource management include “overlapping agency responsibilities, fragmented administrative structures, weak legislation, inadequate financial provision, limited public participation and entrenched

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108 *Ibid.*

109 Mitchell, *supra* note 96 at 22.

110 *Ibid.* at 23.

111 *Ibid.*

112 Keiter also underlines this point in his discussion of ecosystem management, *supra* note 51 at 320-321. For a general critique of the use of informal interagency and intergovernmental agreements in Canada, see: Franklin S. Gertler, “Lost in (Intergovernmental) Space: Cooperative Federalism in Environmental Protection” in Kennett, *supra* note 23 at 254.

organizational cultures.”<sup>113</sup> A review of the experience in western Canada led Pierre Walther to conclude that integrated resource management (IRM) “requires power to set direction and to establish order” and that, if sectoral decision-making power is maintained, “IRM becomes nothing more than a forum for discussion and coordination of administrative activities, with little impact on major decisions.”<sup>114</sup> Implementation of an integrated approach requires, he concluded, “a clear political or legal commitment.”<sup>115</sup> Similar conclusions with respect to the American experience are reached by Keiter, who frames the discussion in terms of several of the key concepts examined earlier in this paper. Referring specifically to land and resource management in the ‘Greater Yellowstone’ region of the western United States, Keiter argues that “the problem of cumulative impacts can be resolved only by way of interagency coordination and a substantive commitment to integrate ecological principles into management policies.”<sup>116</sup> He concludes that:

The true test of an administratively constructed ecosystem management scheme is the formulation of comprehensive transboundary resource management policies predicated upon sound ecological principles and the confirmation of substantive governing standards through legally binding commitments.<sup>117</sup>

All three of the sources just referred to identify the need for greater integration in land and resource management. In addition, all three highlight the importance of law, either as a source of the underlying problem or as an essential element in its resolution. Watson *et al.* point to administrative fragmentation and “weak legislation” as factors contributing to a lack of integration and both Walter and Keiter use almost identical language, referring to the need for binding legal commitments in order to achieve the desired objective, be it integrated resource management or ecosystem management.

This observation sets the stage for the final step in sketching out new directions for the management of public lands and resources: a discussion of the role of public land law. The case for legal reform includes, but goes far beyond, the need identified in the preceding paragraphs to impose a broader perspective on decision-makers in line agencies. The rationale for public land law as the basis for public land management relates to the fundamental functions of law as an instrument of public policy.

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113 Nigel Watson *et al.*, “Integrated Resource Management: Institutional Arrangements Regarding Nitrate Pollution in England” (1996) 39(1) *Journal of Environmental Planning and Management* 45 at 48.

114 Walther, *supra* note 27 at 439, 444

115 *Ibid.* at 445.

116 Robert B. Keiter “Taking Account of the Ecosystem on the Public Domain: Law and Ecology in the Greater Yellowstone Region” (1989) 60 *University of Colorado Law Review* 923 at 943.

117 *Ibid.* at 1001.

## 6. Implementation through Public Land Law

Even if one accepts the approach to public land management outlined above, the role of law may not be immediately obvious. While some statutory authority is essential for government to exercise most of its functions, law need not play a major role in public governance. It is possible to imagine a system where many of the activities of government are authorized through broad grants of power to Ministers and officials. For example, much public land management could be carried out under a statutory provision stating simply that: “The Minister may authorize, prohibit or impose conditions on proposed and ongoing uses of public lands and resources as he or she sees fit.” Under this model, day-to-day decision-making would be highly discretionary and democratic accountability would be ensured by periodic elections when, presumably, governments that mismanaged public lands might be replaced by others promising to do better.

While this model cannot be dismissed out of hand, highly discretionary public land management raises what one American commentator has characterized as “ancient and continuing problems about adherence to law, the extent of executive authority to interpret as well as execute the laws, the appropriate scope of executive discretion, and the proper role of judicial review.”<sup>118</sup> One is led, inevitably, to consider the democratic principle of the ‘rule of law’ and its applicability to the management of public lands and resources. This topic can be explored in a practical manner by focusing on the principal functions of law as an instrument of public policy.

The four functions of law to be examined here are: (1) law making as a deliberative process; (2) law as a means of providing predictability and stability, particularly where important rights, obligations, interests and expectations are at stake; (3) law as a check on administrative discretion and as an accountability mechanism; and (4) law as a means of structuring decision-making processes. These functions warrant brief comment since they provide a rationale for developing a coherent and integrated legal regime for public land management and suggest some of the characteristics that such a body of public land law should exhibit.

### 6.1 *Law Making as Public Deliberation*

First, law making itself is a deliberative process that provides a relatively open and transparent means of setting societal goals and priorities and addressing important issues of public policy. Unlike low-profile administrative and ministerial

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118 William J. Lockhart, “‘Faithful Execution’ of the Laws Governing Greater Yellowstone: Whose Laws? Whose Priorities?” in Robert B. Keiter & Mark S. Boyce, eds., *The Greater Yellowstone Ecosystem: Redefining America’s Wilderness Heritage* (New Haven: Yale University Press, 1991) 49 at 61.

decision-making, the process of formulating and enacting legislation focuses public, political and expert attention on broad policy questions and specific options for responding to them. This deliberative process is valuable for its substantive contribution to improving policy decisions and as a means of encouraging participation in democratic decision-making and enhancing the legitimacy of the resulting policy outcomes.

Public land management is undeniably a matter of sufficient economic, environmental and social importance throughout Canada to warrant careful and open deliberation regarding general priorities and objectives, strategic options for management and regulation, and specific implementation mechanisms. One would therefore expect to see the fundamental issues surrounding the use of public land and resources debated in political and public forums, not made the subject of decision-making behind closed doors. Furthermore, once these deliberative processes are completed one would expect to see the results enshrined in legislation, not merely incorporated into policy documents having no legal force and subject to change at the discretion of ministers or officials. In a democratic society, there is no substitute for the legislative process as a vehicle for articulating a clear vision for the use of public lands and resources and then creating a framework of substantive regulation and decision-making procedures designed to achieve that vision in practice.

## **6.2 *Law and Predictability***

The second important function of law as an instrument of public policy is to provide a measure of predictability for those whose rights and interests are affected by government decision-making. By making policy goals explicit, establishing clearly defined rights and obligations, setting standards and rules of conduct, and ensuring due process for decision-making, law has the potential to provide much greater certainty than does unstructured discretionary decision-making. Law allows people to know in advance the 'rules of the game' and it provides a basis on which legitimate expectations can be founded. It is this function that explains why 'secret law' is a virtual oxymoron, and why unconstrained administrative decision-making is anathema to a society that respects the rights of its citizens.

The importance of predictability to many users of public lands underlines the value of a coherent framework of public land law. Commercial users of public lands such as ranchers and forest companies require some continuity in tenure and certainty regarding their rights and obligations in order to plan their business operations and justify the necessary capital investments. Other resource-based industries, notably in the mining and petroleum sectors, may expend considerable sums of money searching for minerals and assessing the technical, economic and environmental feasibility of resource extraction. The willingness of companies to make these up-front expenditures depends on a reasonable measure of certainty

regarding access to public land and resources and the regulatory regime that will govern operations. Similarly, tourism operators who depend on a relatively undisturbed landscape and on certain public infrastructure to attract their clientele require some assurance that their interests will be protected over the long term if they are to make significant investments. For all private sector users of public lands, the efficiency and fairness of regulatory processes are significant concerns. Finally, recreational users of public lands and the public at large, on whose behalf these lands are held, have a legitimate right to know how this land will be managed in relation to their very real concerns and interests. A strong argument based on the importance of predictability can therefore be made for grounding the rights, obligations and processes relating to public land management firmly in law.

It is true, of course, that law does not always increase predictability, especially in the short run when new laws and processes are created. There is almost always a transitional period when issues of interpretation and administrative procedure are worked out. Conversely, an informal process may work well for some time for interests that enjoy favourable treatment and have privileged access to decision-makers. Nonetheless, even for the powerful and well-connected the risks of unpredictability stemming from an unstructured regime remain significant, particularly in the longer term. What is done through informal arrangements can often be undone in the same way. Where important public values and private rights are at issue, as in the case of public land management, all interests stand to gain over the long run if a regime of substantive standards and decision-making processes is put in place and shown to operate in a fair and effective manner. Predictability in public land management must, of course, be balanced against the right and responsibility of governments to change policies and laws in response to their electoral mandates and their determination of the public interest. On fundamental issues where important individual and societal interests are at stake, however, these changes should arguably be accomplished through legislative processes rather than through *ad hoc* administrative actions. This measure of continuity and predictability can best be ensured by a developed legal framework for public land management.

### **6.3 Law, Discretionary Powers and Accountability**

The third key function of law is to serve as a check on the potential abuse of discretion and to provide a means of ensuring the accountability of those entrusted with public powers and functions. The exercise of technical and political judgement is, of course, an essential part of governance and it is neither realistic nor desirable to attempt to anticipate every possible contingency in legislation. Nonetheless, the democratic principle of the rule of law is based on the premise that powers should be bounded and directed by law, not simply exercised according to the preferences of individual decision-makers.

It is worth emphasising the important function of law as an adjunct to electoral accountability, particularly in a climate where it is popular among some politicians to argue that the courts are intruding excessively into the domain of political choice. As one American commentator has noted, infusing democratic accountability into agency – or even ministerial – decision-making carried out under broad delegations of discretionary power is only possible “if workable legal or political devices can convert faceless institutional decisions into focal points of policy accountability.”<sup>119</sup> Since elections rarely hinge on single issues, they represent a relatively crude political means of ensuring accountability for many of the activities of government.

Public land management is particularly difficult to police through political and electoral channels because of the incremental nature of many decisions, the intense competition for space on crowded political agendas, and strong incentives for effective back-room lobbying by concentrated interests. In practice, governments are unlikely to be held directly accountable through the electoral process for their broad public land policies, let alone the details of decisions on individual projects. Judicial review to ensure that decision-making reflects substantive policy directions and guarantees of due process established by law constitutes a much more focused and exacting accountability mechanism. This legal mechanism is particularly valuable because the use of public lands and resources and the rights of particular groups and individuals are often determined through discrete and often low profile administrative, political or quasi-judicial decisions on particular projects. While these decisions may have limited electoral salience, their individual and cumulative impacts are such that effective means of ensuring accountability are desirable. In the absence of recourse to the courts to ensure that due process and the substantive requirements of public land policy were respected, many of these decisions may, in practice, escape accountability altogether.

The risk of arbitrariness and the potential for abuses of authority in public land management also support the establishment of legal checks on political and administrative decision-makers. The value of legal accountability mechanisms is underlined by the risk that regulatory agencies will be captured by concentrated interests and by the temptation for politicians and officials to use the disposition of interests in public land and resources as a means of distributing largesse. The point here is simply that public land management is an area of government activity where the potential for abuse of discretionary powers exists and where the negative consequences of such abuses for the public interest can be significant. Public land law therefore has an important role to play in constraining the exercise of discretion and providing a basis for judicial review as a means of ensuring accountability.

Giving effect to the rule of law does not, of course, imply a judicial usurpation of the legislature’s role in making the rules governing the exercise of public functions. The judicial role is to enforce the rules that are, by and large, established and

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119 *Ibid.* at 60.

changed from time to time by elected representatives through democratic processes.<sup>120</sup> Those who oppose this judicial oversight may argue disingenuously – or naively – that shielding ministerial and bureaucratic decision-making from judicial review is democratically defensible because it favours the setting of rules by elected politicians, as opposed to unelected judges. In fact, the practical result of this line of argument is that there are frequently few or no rules at all, and precious little accountability at the level of individual decisions.

#### **6.4 Law and the Structure of Decision-Making**

The fourth role of law as an instrument of public policy is to structure decision-making processes, establishing the procedure to be followed in exercising governmental authority and determining, where appropriate, the relationships among various policy directives and stages of decision-making. More specifically, law provides a means of ensuring that the institutions of public governance function according to pre-determined patterns in order to meet reasonable standards of efficiency and fairness.

As noted above, there is a need to ensure a logical progression along the continuum of broad land use policy, land use planning, rights disposition, and project-specific review and regulation. Furthermore, integrative mechanisms are required to ensure formal coordination among jurisdictions and resource management agencies in order to coordinate regulatory processes and ensure that policy spill-overs are properly addressed. Given both the complexity of the regulatory regimes that apply to public lands and the range of interests that have a stake in many decisions, there is a strong argument that a legal framework is required in order to ensure that all the pieces of the management puzzle fit together in a coherent manner. Otherwise, public land management is likely to be little more than a series of discrete events or transactions, with conflicts and uncertainties addressed in an *ad hoc* manner.

#### **6.5 The Role of Law in Public Land Management**

The four key functions of law as an instrument of public policy are thus particularly applicable to the role of law in public land management. There is, of course, considerable room for debate regarding the appropriate level of detail to be prescribed in law and regulation and the extent to which decisions should be left to

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120 Two exceptions should be noted. First, the courts have developed procedural principles and standards of natural justice in the area of administrative law through common law adjudication. These principles and standards are, however, often subject to a statutory overlay (e.g., *Administrative Procedures Act*, R.S.A. 1980, c. A-2) and can, in any case, always be modified through legislation. The second exception is the role of judicial oversight based on constitutional principles, notably those established under the Charter of Rights and Freedoms.

broad political and administrative discretion. Clearly, there is a need for managerial flexibility and professional judgement in many aspects of land and resource management. Public lands exhibit a wide variety of market and non-market values, and there is no objective or quantitative means to determine the appropriate trade-off where these values conflict. Furthermore, project-specific decisions will inevitably reflect circumstances particular to the proposed activity and its location. Nonetheless, public land management requires policy decisions which, because of their importance and their character, should be made within a well developed legal framework.

Public land management is an area where vitally important public values and private interests are at stake. It is also characterized by overlapping institutional mandates, diverse objectives and priorities, and an array of practical problems that stubbornly refuse to conform to jurisdictional and administrative pigeon-holes. The political and economic context of public land management is one where the potential for abuse of discretion is significant, where different groups in society have manifestly unequal access to decision-makers and where the power of concentrated interests risks overshadowing the broader public interest. In addition, it is an area where incremental decisions have important individual and cumulative implications for broadly-held public values and for the interests of future generations, but only rarely constitute focal points for political accountability. As a result, there is a strong case for the development of public land law as a coherent and purposive instrument of public policy.

## **7. Public Land Law Worthy of Our Public Lands**

Public lands throughout Canada are among our most important assets from economic, social and ecological perspectives, yet there is growing evidence that they are all too often taken for granted and over-exploited for short-term profit. The patch-work quilt of law, policy and unstructured discretionary powers that governs these lands and resources appears increasingly inadequate to meet current challenges. While there is no panacea for this complex set of problems, the argument developed in this paper is that a critical step is for governments throughout Canada to develop public land law as the basis for an integrated approach to public land management. The four key characteristics of public land law can be summarized as follows.

First, public land law should include clear substantive principles, objectives and standards for public land management, necessarily defined with reference to ecosystem values. A legally entrenched normative basis for public land management is essential if public lands are to be managed in a sustainable fashion and if broad public values – particularly longer term non-monetary and non-commodity values – are to be accorded significant weight in management decisions.

The principles and management imperatives suggested by the concept of ecosystem management provide the most promising conceptual basis for this legal definition of broad policy objectives for managing public lands.

Second, public land law should establish a comprehensive planning process to provide an integrated strategic framework for public land management. Through planning, the appropriate uses of public lands and resources should be defined with a view to the spatial and temporal scales that reflect scientific understanding of natural ecosystems and the interests of present and future generations. Both the planning process and the substantive plans that it produces should have legal status.

Third, public land law should include mechanisms to improve the integration among stages in the decision-making continuum in order to establish a logical decision path that progresses from the establishment of broad policy priorities to the details of project-specific regulation. This progression of decision-making should improve the effectiveness, efficiency and predictability of public land management, reducing the risk that important issues or interests will fall between the cracks and that certain stages in the process will be subject to excessive pressures because of deficiencies elsewhere.

Fourth, public land law should require interagency and interjurisdictional coordination on issues that require an integrated approach. Problems associated with spill-over effects are well recognized in public land management, as are the legal and institutional obstacles to addressing them. Given the limitations of reliance on line agencies and informal administrative arrangements in this area, clear legislative direction is in order if ecosystem management and integrated resource planning are to become more than facades for a business-as-usual approach.

In respect of each of these characteristics, a firm legal basis for public land management is essential. The central theme running through this paper is that public land law should constitute an integrated body of statute law and regulation that fully reflects the key functions of law in a democratic society. The process of establishing public land law should be open, inclusive and deliberative, and should result in clear substantive direction and transparent decision-making processes for public land management. Once in place, public land law should increase predictability, ensure accountability, and structure decision-making processes.

The challenge of creating a satisfactory legal basis for public land management throughout Canada should not be underestimated. Clearly, there is no sure formula for success, nor could one be expected given the complicated scientific and technical issues involved and the range of values and interests at stake. Designing and implementing public land law along the lines sketched out in this paper will require a wide-ranging public debate on societal objectives and priorities and a rethinking of both institutional mandates and management practices. None of these

steps will be easy, and success will depend on the skill, patience, political savvy and commitment of those involved in the process. Without a concerted effort to move in this direction, however, decisions regarding the use of public lands and resources are likely to result in continuing pressure on natural ecosystems and an erosion of the ability of Canada's land and resource base to produce economic and other benefits over the long term. Given the values that are at stake, it seems well worth the effort required to provide Canadians with public land law worthy of their public lands.<sup>121</sup>

## 8. Conclusion

This paper attempts to define, in fairly broad terms, a set of new directions for public land law throughout Canada. As such, it represents at most a preliminary step in a broader re-evaluation of how Canadians manage their public land and resources. In addition to a wide-ranging debate over general issues such as those raised above, there is also a need for more focused analysis of the existing legal and policy regimes that govern public land and resources under federal, provincial and territorial authority. This second level of analysis should be directed towards evaluating the extent to which current arrangements constitute, or could be developed into, coherent legal regimes for public land management. An example of this type of analysis is presented in a companion paper, entitled *In Search of Public Land Law in Alberta*.<sup>122</sup> Taken together, these two papers are offered as contributions to the ongoing debate about how Canadians should make the transition to sustainable use of their precious heritage of public land and resources. This issue will not go away, regardless of the priority currently accorded to it at the political level. The longer that measures to address the challenges of public land management are deferred, the more difficult these challenges will ultimately become and the more likely it is that certain options for the use of public lands and resources will be irrevocably foreclosed.

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121 Those who argue that establishing an integrated legal basis for land and resource management is utopian would do well to examine the New Zealand law reform initiative that culminated in the Resource Management Act (1991). This Act replaced or incorporated a number of pre-existing statutes with the objective of creating what one commentator describes as "a comprehensive and integrated system of environmental planning and natural resource management at all levels of administration, regulation and operational decision-making." See: David Grinlinton, "Natural Resources Law Reform in New Zealand—Integrating Law, Policy and Sustainability" (1995) 2 *Australasian Journal of Natural Resources Law and Policy* 1 at 36. For a discussion of this legislation by its principal architect, see: The Right Honourable Sir Geoffrey Palmer, "Sustainability — New Zealand's Resource Management Legislation" in Ross & Saunders, *supra* note 18 at 408.

122 Steven A. Kennett & Monique M. Ross, *In Search of Public Land Law in Alberta*, CIRL Occasional Paper #5 (Calgary: Canadian Institute of Resources Law, January 1998).



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