



Spring 2004

Limited Propsects for Privatization of Public Lands: Presidio and Valles Caldera May Be as Good as It Gets

James L. Huffman

Recommended Citation

James L. Huffman, *Limited Propsects for Privatization of Public Lands: Presidio and Valles Caldera May Be as Good as It Gets*, 44 NAT. RESOURCES J. 475 (2004).

Available at: <http://digitalrepository.unm.edu/nrj/vol44/iss2/7>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu.

JAMES L. HUFFMAN*

Limited Prospects for Privatization of Public Lands: Presidio and Valles Caldera May Be as Good as It Gets

Sally Fairfax, Lauren Gwin, and Lynn Huntsinger report interesting and revealing stories of the Presidio Trust and the Valles Caldera National Preserve. The stories are interesting as political theater and revealing of the likely roles for market approaches on the stage of public lands management. Although the market is the star in the Presidio Trust drama, its role is tightly constrained. Only time and perspective will tell whether it is hero or villain. In the Valles Caldera, the market has only a bit part.

If markets are meant to be the main plot in these two stories, in the end there is a subplot that steals the show. While markets are constricted in both tales and pushed to the sidelines in Valles Caldera, decentralization of government authority emerges as a central theme in both. Although decentralized government does not bring all of the benefits of markets, it allows resource management decisions to be made closer to those most directly affected.

The first act of the Valles Caldera plot is simple, and recurrent in public lands history. Competing federal agencies covet control of land. In the second act, however, private investors intervene by purchasing the land in question with development in mind. Although some development takes place, in the final act the acquisitive government agency persists and eventually acquires the land to serve as a "model for sustainable land development and use."¹ Rather than integrate the land into a larger management unit, Congress decides to pursue an experiment in public lands management and create the Valles Caldera Trust.

The Presidio's story is more complicated, although the theme of competing government agencies is again central to the plot. As the name suggests, the military occupied the land for many decades. It was included in a national recreation area in the early 1970s,² but the military held its ground for the most part. Then in a brief moment of self-imposed reason and discipline, Congress enacted base closure legislation that engulfed the Presidio along with several other military

* Dean and Erskine Wood, Sr., Professor of Law, Lewis & Clark Law School.

1. Sally K. Fairfax et al., *Presidio and Valles Caldera: A Preliminary Assessment of Their Meaning for Public Resource Management*, 44 NAT. RESOURCES J. 445, 460 (2004).

2. Golden Gate National Recreation Area was established on October 27, 1972. 16 U.S.C. § 460(bb) (2000).

establishments.³ The scramble was on and the Presidio Trust was created.

As Fairfax, Gwin, and Huntsinger demonstrate, these congressional inventions are trusts in name only.⁴ They do not have the most basic characteristics of the traditional common law trust or of the trusts that govern many lands managed by state governments. The fact that these lands are to be managed in the public interest does not distinguish them from any other public lands, so the use of the term trust is apparently intended to convey that the management is for particular purposes, and perhaps to underscore that the land managers will be scrutinized with unusual attention.

The Valles Caldera and Presidio Trusts are, say Fairfax, Gwin, and Huntsinger, "wholly owned government corporations," but "what that means is not clear."⁵ What is clear is that they are both "agenc[ies] of the federal government"⁶ as opposed to private entities in any meaningful sense. Perhaps a good analogy is to charter schools, which are usually created to meet a specialized need, or in response to general dissatisfaction with the public schools. Charter schools are financed with tax dollars but are free from some of the constraints and controls imposed by the states and the public school bureaucracy. If they are successful, it is usually because of the flexibility that comes with greater local control. But they remain public schools and can be closed by the state on a moment's notice.

Like the public schools that have suffered for decades from the effects of school district consolidation and centralization, federal public lands management has experienced the same limitations of centralization. The parallel is more than coincidental. In both cases there is an inevitable tension between local and state or national interests. Total local control came at the expense of broader interests, but in an effort to give these interests a say, the balance has shifted almost entirely to the center at the expense of effective and efficient management. Public schools were originally consolidated in the name of economy but have since become ever more centralized in the name of a standardized curriculum. This one size fits all mentality has also pervaded public lands management in pursuit of various national goals with little regard for the significant differences that exist on the ground or for the impact on local communities.

3. DEP'T OF DEF., DEF. SEC'YS COMM'N, BASE REALIGNMENTS AND CLOSURES 55 (1988).

4. Fairfax et al., *supra* note 1, at 466.

5. *Id.*

6. *Id.*

At the beginning, the federal public lands were held by the government in anticipation of privatization. But by the late nineteenth century, a federal bureaucracy emerged to manage the expanding withdrawals from the public domain. Central among these bureaucracies was the Forest Service. For several decades, the National Forests had the benefit of significant regional and local autonomy under the direction of forest rangers who were as much a part of the local community as of a national bureaucracy.

But beginning with the Multiple Use Sustained Yield Act of 1960,⁷ the management of the National Forests became ever more centralized with succeeding congressional enactments designed to serve a variety of national objectives. The same trend has affected the Bureau of Land Management and other federal departments with resource management responsibilities. The National Park Service has been affected somewhat less by the centripetal forces of federal control due to the often unique resources of particular parks, but even the Park Service has suffered from the narrow vision of centralization, as the emphasis by many on protecting nature in the urban setting of the Presidio evidences.

Recognizing that there are national interests that warrant federal involvement in resource management and even occasional dictates from Washington, the presumption should be in favor of decentralization. The local variation in the resources and character of public lands, the wide array of interests in the use of those lands, the dependence of many local communities on public lands resources, and the lessons to be learned from comparative evaluation of alternative approaches all combine to make significant local control a better approach in most cases. The two cases of Valles Caldera and the Presidio suggest several challenges facing those who would decentralize federal public lands management through privatization, quasi-privatization, and other forms of decentralization.

Political decentralization and privatization are always difficult to achieve. Once control over resources is vested in the federal government, interest groups will resist any changes that threaten to diminish whatever political influence they have or hope to have. The prospect that local communities may favor development over preservation, for example, assures that proponents of preservation will resist any shift of authority. Because exhaustive (one might say exhausting) planning in the context of some variation on multiple use remains the dominant management approach on most public lands, interest groups are likely to prefer their chances in a political free for all to taking the risk of being cut out by a special use designation or local control of particular lands.

7. Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §§ 528–531 (2000).

The result is that "trust" arrangements like Valles Caldera and Presidio are most likely to arise from existing special use lands already in federal ownership or where lands are acquired for special uses. Even then, as in the Presidio case, there may still be interagency competition for control combined with pressures to impose general management formulas with little relation to the resources and land in question. The essential point is that it will be difficult to decentralize or privatize management of lands already subject to general legislative mandates.

Lands with narrow management mandates, particularly where, like the Presidio, the historic purpose has been abandoned, will be more easily carved out for special consideration. At the same time, privately held lands like Valles Caldera are unlikely to be acquired unless for a narrow and specific purpose. Although the various privatization movements of the last century have gone nowhere, there is little broad based political support for garden-variety additions to the public domain.

While special use designation is politically necessary to achieving decentralized management, it does limit significantly the operation of market forces. Use-specific reserves are a contradiction of basic market principles because they do not allow for allocation to the most valued use, unless that use happens to coincide with the special use designation. In the Valles Caldera case, for example, those who might value the land for development are excluded from participating in the market.

Market benefits might nonetheless be realized if the designated uses are achieved with greater efficiency. Looking again to the Valles Caldera example, if the "trust" arrangement results in greater net benefits (in the form of timber, range, recreation, etc.) than would have been realized by inclusion of the land in the general stock of public lands, we might conclude that the limited market aspects of the "trust" have been worthwhile. If we achieve greater net benefit or some previous level of benefit at less cost, it is difficult to understand why anyone would object.

But, as Fairfax, Gwin, and Huntsinger observe,⁸ there are objectors. It is objected that markets, and particularly profits, are not appropriate to parks and other public lands. This view is widely held among environmentalists and seems to be rooted in a belief that private resource management has been the principle cause of environmental harm and in a communitarian confidence that the public good is morally superior to the private interest. Measuring the adequacy of public

8. Fairfax et al., *supra* note 1, at 456-57.

management against the crass and unforgiving standards of markets is thought to demean the public ends sought to be served.

We might debate whether the public good is of a higher order, but even accepting that the public good is nothing more than an aggregation of private goods, there can be little argument that, in at least some circumstances, net social welfare will be maximized through public management. Acknowledging that public control will sometimes yield greater aggregate benefits than will private management does not argue, however, against reliance on market mechanisms where they yield greater net benefits. So the objection to profits in the parks comes down (rises up?) to a moral argument and nothing more (or less?). Beyond trying to persuade market antagonists that they have it wrong on the moral question, there is little to say, although those claiming a moral high ground must be prepared to acknowledge the costs to individuals of inefficient resource allocations.

If our goal is efficient resource allocation and not some different or higher public good, the Presidio model is superior to the Valles Caldera trust. The Presidio Trust must be self-sufficient at a date certain. If it is not, the land and improvements are to be transferred to the General Services Administration for disposal. Prior to the date certain, the Presidio resources are not subject to the full price-clearing forces of the market because only some uses are permitted, but if by that date the Trust is not self-sustaining (and assuming Congress does not intervene), the full forces of the market come into play. Under these circumstances (assuming the Trust managers do not anticipate congressional intervention), the incentives to achieve self-sufficiency are very real.

While the limits on acceptable resource uses disadvantage the managers in the market, there are significant benefits to being a government corporation, not the least of which are being exempt from taxation and possibly from some regulations. As long as these market distortions exist there is no way of knowing whether the Presidio Trust will be truly self-sufficient when government subsidies are finally cut off, but at least there is a level of inefficiency below which the Trust will not be permitted to fall. At that point, all of the market distortions disappear and the resources become available to the highest bidder.

If efficient resource allocation is our objective, the Presidio Trust model will work in the long run. However, if preservation of some or all of the existing resource uses at the Presidio is our objective, the model is a risky one. It is possible that the threat of sale at a date certain will lead to more effective management, and the generation of revenues will provide some of what is needed to run the place, but if Congress really means to turn it all over to the real estate folks at the General Services

Administration if self sufficiency is not achieved, there is a good chance the Presidio will not be preserved.

With respect to the Presidio, Fairfax, Gwin, and Huntsinger state that “[t]here is a risk that preservation and public access will be compromised as the Board pursues...[self-sufficiency].”⁹ This suggests that preservation is the real goal, in which case the prospect of sale is largely empty. The government has abandoned very few preservation efforts even where management has been detrimental to the protected resources. If Congress is open to reconsideration when it appears the Presidio Trust is not achieving self-sufficiency, the pressures to extend the subsidies or amend the legislation will be even more intense than those that accompanied the enactment of the original legislation.

The Valles Caldera model is better suited to preservation, while still gaining some of the benefits of markets and decentralized management. Because the Valles Caldera managers are not permitted to fail, their incentives to achieve self-sufficiency are limited. Their prospects for self-sufficiency are further dimmed by the smorgasbord of objectives they are expected to achieve and the constituency of the board, which has more to do with the representation of political interests than the management of natural resources. Indeed, there is much about the Valles Caldera “trust” that resembles the failed multiple use model that has dominated public lands management for the past half century. The fact that it is a decentralized version of multiple use, combined with its authorization to engage in market transactions for the use of its resources, makes it a useful experiment in public resource management. But it remains, as Fairfax, Gwin, and Huntsinger conclude, an agency of the federal government subject to the ambiguous constraints of multiple use management.

That is probably as it should be given the objectives set forth in the organic legislation.¹⁰ One of the purposes of the Valles Caldera Trust is “to promote long term financial sustainability consistent with the other purposes of this act,”¹¹ which are the multiple uses referred to above. In authorizing the exchange of services, the Act calls for the optimization of “the generation of income based on existing market conditions, to the extent that it does not unreasonably diminish the long-term scenic and natural values of the area, or the multiple use and sustained yield capability of the land.”¹² Self-sufficiency is clearly not the core objective.

9. *Id.* at 470.

10. Valles Caldera Preservation Act, 16 U.S.C. § 698v (2000).

11. Fairfax et al., *supra* note 1, at 461. See 16 U.S.C. § 698v(b)(4) (2000).

12. Fairfax et al., *supra* note 1, at 462 (emphasis added). See 16 U.S.C. § 698v-6(d)(6) (2000).

If preservation of the many values thought to exist on the land is the objective, as it appears to be, the Presidio model would not be acceptable.

Fairfax, Gwin, and Huntsinger suggest that "sacred shrines" like Faneuil Hall, Mount Vernon, and Fort Ticonderoga might be successfully preserved by entirely private means, but private preservation on a larger scale seems unlikely.¹³ Markets are, by nature, dynamic. Preservation is by definition static, and therefore only assured by government, either through ownership or regulation. Beyond the foregoing observations about the politics of public lands privatization and the narrow prospects it holds for preservation efforts in particular, the Presidio Trust and Valles Caldera cases suggest a few other general conclusions. First, there are potential efficiency gains even where so-called private approaches are really only decentralized public entities. The hesitancy to truly privatize these public resources merely confirms that, while we seek some of the allocational efficiency benefits of the market, we also want to preserve at least some of the distributional possibilities of politics.¹⁴

Second, concerns about wealth distribution are always present, though often unspoken, in public lands politics and proposals for privatization or decentralization. Whether the disagreement is between national and local interests, one federal agency and another, or development and preservation advocates, it is usually more about wealth distribution than efficient resource allocation. The only time the wealth distribution aspect of public lands politics surfaces is when it appears that bringing profit to the parks will exclude low income users of the parks. Because this legitimate concern is easily remedied by means-tested subsidies, it is not unfair to conclude that even in these situations rent seeking is the best explanation for public lands politics.

Finally, we might identify several factors that augur against privatization of public land resources:

- Private resource owners may resist privatization to the extent public resources are being held out of the market and thus making the privately held resources more valuable.
- Resource developers may resist privatization if public resources are made available at subsidized cost as, for example, with public grazing lands.

13. Fairfax et al., *supra* note 1, at 470-71.

14. The "we" I refer to in this statement is that reflected by the outcomes of existing public lands politics. I do not intend to suggest that those political outcomes can be defended on other than empirical grounds.

- Beyond the simple rent seeking of public lands politics, there does appear to be a widely held belief that profit in the parks is inappropriate, if not immoral. The oft repeated notion that “the public lands are *our* lands” is a powerful factor in public lands politics.
- Since the creation of the very first forest reserves, there has been strong resistance to special use withdrawals because of lost private development opportunities. While this concern does not argue against true privatization, it does lead to opposition in cases like the Presidio and Valles Caldera where permitted uses are limited.
- Concerns for good stewardship (which Fairfax, Gwin, and Huntsinger express¹⁵) tend to favor public resource management because those expressing the concern have a particular objective in mind, which is usually not well-managed or even sustainable commercial use.

15. Fairfax et al., *supra* note 1, at 464.