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I. INTRODUCTION

As the western frontier was opening up for settlement in the middle of the 19th century, lands and waters were primarily publicly owned.[1] By 1853 the Federal Government had legal claim to most of the West through treaties and purchase agreements with England, Mexico, and the Republic of Texas.[2] The Federal Government viewed land and water in essentially the same way it viewed other resources of these newly acquired territories—as government property. The prevailing policy of the United States was to hold land, water, and other resources only until they could be disposed of to private settlers.[3] The means of dispersing land[4] differed, however, from the methods of water

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1. In speaking of the western frontier, I refer to the lands west of the Louisiana Purchase. By public lands I mean lands to which the Federal Government held title. Before entering the Union, Texas had distributed approximately 30 million acres of land to private individuals, while retaining some 200 million acres under the act of admission. Throughout the West there were numerous private land claims, under grants made by the countries controlling the area previously, which had to be resolved. Nevertheless, most land on the western frontier was owned by the Federal Government. *See generally* E. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN (1972); R. ROBBINS, OUR LANDED HERITAGE, (rev. 2d ed. 1976); and THE PUBLIC LANDS (V. Carstensen ed. 1968). The best single work in detailing these matters is probably P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968), written for the Public Land Law Review Commission.

2. P. GATES, *supra* note 1, at 80-86.

3. P. Mogren, The Development of a Philosophy of Land Reservation on General Land Office, United States Forest Service, and National Park Service Lands, 1787 to 1947 (Dec. 1980) (Unpublished Ph.D. dissertation in University of Utah Library). *See also* 17 JOURNALS OF THE CONTINENTAL CONGRESS, 806-08 (1780); R. ROBBINS, *supra* note 1, at 3-19; Trent, *Origin of the National Land System under the Confederation*, in THE PUBLIC LANDS 7 (V. Carstensen ed. 1968); Greene, *Promised Land: A Contemporary Critique of Distribution of Public Land by the United States*, 5 ECOLOGY L.Q. 707 (1976).

4. Methods used at various times for the disposal of land included outright sales (both cash and credit), preemption (the preferential right of settlers on the public domain to buy their land at a low price), several homesteading measures, military land bounty acts, grants to states, and grants to companies in exchange for building railroads

allocation.[5] Thus, though originally land and water were held the same way, disparate treatment of the disposition of land and water eventually gave rise to two distinctly different sets of property law.

As they were granted statehood, the western states received significant portions of the public domain.[6] Further transfers of land from federal to state control occurred as the new states matured. Even more extensive were the transfers from the Federal Government to private settlers through sale or gift.[7] Eventually land in some states, like Iowa and Nebraska, was almost fully removed from federal ownership.

Much of the government land holdings in the states west of the 100th meridian,[8] however, remained in federal ownership. Because mountain and desert lands were not suitable for traditional farming activities, large portions of the federal public domain were never transferred to private ownership. Thus, the lion's share of all federal public lands are located in the eleven western states, in which the Federal Government still holds from 29% to more than 87% of the land.[9]

It is important to note that most land dispositions and allocations were total. The settler or state purchasing or receiving the land held full legal title just as if the land had been transferred by a private citizen. Some mineral reservations and exceptions became common in the 20th century,[10] but the private

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or other improvements. *See infra* notes 39-44 and accompanying text.

5. Water in the eastern portion of the United States has traditionally been dealt with under the common law system of riparian rights, while in the western states the doctrine of prior appropriation has prevailed. C. MYERS & A. TARLOCK, WATER RESOURCE MANAGEMENT 51-136 (2d ed. 1980); F. TRELEASE, WATER LAW 10-13 (3d ed. 1979); J. SAX, WATER LAW, PLANNING & POLICY 1-3 (1968); R. CLARK, 1 WATERS AND WATER RIGHTS § 4 (1967).

6. P. GATES, *supra* note 1, at 285-319.

7. *Id.* at 121-284, 387-530.

8. *See generally* W. STEGNER, BEYOND THE HUNDREDTH MERIDIAN (1954); P. GATES, *supra* note 1, at 635-98.

9. The Federal Government owns 44% of Arizona, 46.6% of California, 35.5% of Colorado, 63.7% of Idaho, 29.7% of Montana, 86.1% of Nevada, 33.2% of New Mexico, 52.4% of Oregon, 63.6% of Utah, 29.2% of Washington, and 48.6% of Wyoming. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 238 (1980).

10. Prior to 1846 mineral reservations in land grants were common. It was not until 1865 that the law of possession was recognized as applying to mines on federal public lands. The Mining Act of 1866, ch. 262, 14 Stat. 251, extended preemption and homestead doctrines to mineral lands. This was the case until 1920, when the Federal Government began leasing oil and gas lands rather than granting them in fee. P. GATES, *supra* note 1, at 706-45.

title otherwise was in fee simple absolute.

Water allocation developed in a manner markedly different from land allocations. At first, riparian water law of the eastern states provided governing principles.[11] Under these doctrines, landowners had legal rights to use the water in streams passing through or touching their lands, subject only to a similar right in all other riparian landowners. Because the Federal Government owned everything in the West, it had full rights to all the water as well as ownership of the land. It soon became clear, however, that riparian water principles were not sufficient to meet the problems faced in these western lands, where water resources were often scarce.

The initial innovations came from mining camps, where the mining law's priority system, providing that the first in time have first rights, was utilized as the governing principle for water law distributions.[12] From that beginning, the western water law system of prior appropriations for a beneficial use[13] was developed in early court decisions in western states and territories.[14] Not only were landowners without streamside prop-

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11. The common-law system of riparian rights now includes the rights of the owners of the banks of flowing waters and of seas and lakes (the latter were previously called littoral rights). The right is to a reasonable use of the waters of the stream, considering the rights of other riparian owners. He cannot, however, sever or divert part of the stream. 78 AM. JUR. 2d *Waters* §§ 260-308 (1975). Thirty-one states have some form of riparian water law system, although in many of them regulatory statutes, as a practical matter, control the use of water. F. TRELEASE, *supra* note 5, at 10-13. Riparian rights have come under attack recently, and proposals for change have been presented for eastern water law. F. MALONY, R. AUSNESS & J. MORRIS, A MODEL WATER CODE at v (1972).

12. McGowen, *The Development of Political Institutions on the Public Domain*, 11 WYO. L.J. 1, 14 (1956).

13. Prior appropriation water rights go, not to the owner of the banks of streams or lakes, but to the first person to put the water to beneficial use. Originally, this gave priority strictly according to the "first-in-time, first-in-right" principle, but today most prior appropriation states use some form of state-regulated permit system. *See generally* 78 AM. JUR. 2d *Waters* §§ 316-45 (1975); F. TRELEASE, *supra* note 5, at 18-251. Nine states (Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming) use pure prior approriation systems, while ten others (California, Nebraska, Kansas, Mississippi, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington) combine riparian rights and prior appropriation, with appropriation doctrines dominant.

14. The first case in California to deal directly with prior appropriation was Irwin v. Phillips, 5 Cal. 140 (1855). The parties to the suit were squatters without title and therefore could not have any riparian rights. But the California Supreme Court upheld the squatters' prior appropriation rights. *But see* Crandall v. Woods, 8 Cal. 136 (1857), in which the same court held that settlers not yet having title to land had good title as against all but the government and were entitled to all the privileges and appurtenances of ownership, including riparian rights. This case marked the beginning of the "Califor-

erty given water rights based on priority of their claim and use, but even trespassers on the public domain were able to establish rights in the water they had diverted and put to beneficial use.[15] Typically, the landowner losing rights to these prior appropriators was the Federal Government, which under the riparian doctrine had initially held rights to all water flowing through and past its lands. Yet, from an early time, both the federal courts and the Congress seemed to acquiesce in the new system being applied by western states to allocate water.[16]

The character of water rights in individual western states also differs significantly from ownership rights in land. Both water and land rights can be viewed as private property that can be exchanged and transferred under traditional market systems.[17] But the water permit system[18] provides considerably

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nia doctrine" of a dual system of water rights. This opinion was somewhat clarified in Lux v. Haggin, 68 Cal. 255, 10 P. 674 (1886), in which the court held that persons acquiring federal lands got the riparian rights also, subject to previous appropriations on the public domain.

The mountain states followed the "Colorado doctrine" of pure prior appropriation. The archetypal Colorado case on the subject is Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882), in which the Colorado Supreme Court held that not only was prior appropriation the then current basis for state water law, but it had been so from the time the first appropriation of water was made. *See also* Basey v. Gallagher, 87 U.S. (20 Wall.) 670 (1874); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); Smith v. Logan, 18 Nev. 149, 1 P. 678 (1883); Seaweard v. Pacific Livestock Co., 49 Or. 157, 88 P. 963 (1907); Scherck v. Nichols, 55 Wyo. 4, 95 P.2d 74 (1939).

15. *See* Irwin v. Phillips, 5 Cal. 140 (1855).

16. Congress acted in the Mining Act of 1866, known officially as "An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes," ch. 262, 14 Stat. 251. This act specifically recognized prior appropriation water rights. The Supreme Court noted in Kansas v. Colorado, 206 U.S. 46, 93 (1907), that each state could determine what system of water rights it wanted to use. The issue was dealt with directly in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 153 (1935), where the Court held that a federal patent conveyed only land, and that water rights were determined by state law. F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 27-28 (National Water Comm'n Legal Study No. 5 (Review Draft) 1971). In a recent opinion, California v. United States, 438 U.S. 645 (1978), the Supreme Court gave the states even greater power when it held that the Federal Government must comply with state water law. However, since the Court based its decision on its interpretation of the Reclamation Act of 1902, 43 U.S.C. §§ 272-383 (1976), Congress could change the balance of power in this area if it chooses to do so. *Cf.* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (the Court upheld the dismissal of a federal suit that dealt with the same water law issues as a prior state suit).

17. *See* Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 578-79, 272 P.2d 629, 631 (1954). *See also* C. MEYERS & R. POSNER, MARKET TRANSFERS OF WATER RIGHTS: TOWARD AN IMPROVED MARKET IN WATER RESOURCES (National Water Comm'n Legal Study No. 4 (Review Draft) 1971).

18. The agencies which regulate the appropriation and distribution of water generally have the power to approve or disapprove changes and transfers. ARIZ. REV. STAT.

more public control over water than does the land recording system.[19] No public official has the authority to approve or disapprove a change in land ownership; the record title holder can make any transfer desired, and the purchaser or donee will have full legal title by the mere recording of the relevant title documents. The recorders merely serve as depositories for the documents; they are not empowered to exercise any discretionary control over the process.[20] It is true that specific uses of the land may be prohibited under zoning laws or other land use plans,[21] but zoning officials have no power to control who owns the land itself. On the other hand, the state water engineer is empowered to administer a permit system[22] that allows him to determine who will be designated as the owner of a specific property interest in water.

In recent years considerable pressure has been generated for divestiture of public domain lands[23] presently owned and managed by the Federal Government. One voice is raised by numerous western states under the banner of the "Sagebrush Rebellion."[24] This challenge to the retention of large federal holdings within the individual states has resulted in the introduction of "Sagebrush Rebellion Acts" in at least seven western state legis-

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ANN. § 45-172 (1956 & Supp. 1981-1982); CAL. WATER CODE §§ 1700-1706 (West 1971 & Supp. 1981); IDAHO CODE § 42-222 (1977 & Supp. 1981); KAN. STAT. ANN. § 82a-708b (1960); MONT. CODE ANN. §§ 85-2-402 to -403 (1981); N.M. STAT. ANN. § 72-5-23 (1978); N.D. CENT. CODE §§ 61-04-15 to -15.1 (1960 & Supp. 1981); OR. REV. STAT. §§ 540.510-.550 (1979); UTAH CODE ANN. § 73-3-3 (1980); WASH. REV. CODE ANN. § 90.03.380 (1962); WYO. STAT. § 41-3-103 to -104 (1977). *See also* Clark v. Brisco Irrigation Co., 200 S.W.2d 674, 682 (Tex. Civ. App. 1947).

19. All appropriation states except Colorado use permit systems exclusively. Representative statutes include IDAHO CODE §§ 42-103, 42-201 to -221 (1977 & Supp. 1981); MONT. CODE ANN. §§ 85-2-301 to -401 (1981); UTAH CODE ANN. § 73-3-2 (1980). Some riparian states also have permit systems. MD. NAT. RES. CODE ANN. §§ 8-801 to -814 (1974 & Supp. 1981); MINN. STAT. ANN. §§ 105.38-.55 (West 1977 & Supp. 1981); WIS. STAT. ANN. § 30.18 (West 1973 & Supp. 1981-82). *See also* F. TRELEASE, *supra* note 5, at 138-41 and 398-99.

20. *Cf.* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 279-85 (1975); 6A R. POWELL, THE LAW OF REAL PROPERTY §§ 912-18 (P. Rohan rev. ed. 1975). Neither of these authors states directly that recording systems do not provide any significant controls over land, but the element of control is conspicuously absent from their extensive discussions of the purposes of recordation.

21. *See* J. CRIBBET, *supra* note 20, at 397-472.

22. UTAH CODE ANN. § 73-3-5 (1980).

23. *See* Note, *The Sagebrush Rebellion: Who Should Control the Public Lands,* 1980 UTAH L. REV. 505.

24. *Id.*

latures[25] and the filing of a companion bill in the United States Senate.[26] The most recent Senate bill[27] would shift public lands from federal to state ownership, provided each state could show its ability to adequately administer and manage the lands transferred to it.[28] The state would then be subject to the same restrictions on further dispositions of these lands to private entities that the Federal Government is currently subject to.[29] Lands would primarily remain in the public domain, but state government, rather than the Federal Government, would be the legal owner and manager of the lands.[30]

A more radical shift in public land law is being advocated by a group of economists and scholars who argue for large-scale allocations of land from public to private ownership.[31] They argue that the most efficient economic use of the lands results from the self-interest and market mechanisms triggered by private ownership. Contrary to many critics of private ownership, who emphasize the unbridled development and exploitation potential of private markets, these advocates of large-scale allocations maintain that the long-term environmental, recreational, and aesthetic characteristics of land and natural resources would be enhanced by turning the lands over to private interests. The basis of their argument is the "Tragedy of the Commons" theory expounded by Garrett Hardin.[32] As Hardin demonstrated, publicly held resources are subject to being overexploited by the general public having access to them because each person, acting in his own self-interest, will increase his use of the resource since he can receive the benefits of that use, while the costs are spread

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25. Act of Apr. 15, 1980, ch. 38, 1980 Ariz. Sess. Laws 52; Act of June 2, 1979, ch. 633, 1979 Nev. Stat. 1362; Act of Mar. 5, 1980, ch. 153, 1980 N.M. Laws 675; Act of Feb. 14, 1980, ch. 79, 1980 Utah Laws 441; Act of Mar. 10, 1980, ch. 116, 1980 Wash. Laws 358; Act of Mar. 10, 1980, ch. 53, 1980 Wyo. Sess. Laws 264; Cal. A.B. 2302, 1980 Cal. Legis. Serv. 2636 (West).

26. S. 1680, 96th Cong., 1st Sess. (1979).

27. S. 1245, 97th Cong., 1st Sess. (1981).

28. 127 CONG. REC. S5380-82 (daily ed. May 20, 1981) (statement of Sen. Hatch).

29. *Id.*

30. Some expect that there would be an increase in the number of transfers to private individuals under such a plan, since state rather than federal officials would determine which lands fit in disposal categories.

31. *See* Bish, *Environmental Resource Management: Public or Private?* in MANAGING THE COMMONS 217 (G. Hardin & J. Baden eds. 1977). *See generally* MANAGING THE COMMONS (G. Hardin & J. Baden eds. 1977); ECONOMIC FOUNDATIONS OF PROPERTY LAW (B. Ackerman ed. 1975).

32. Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243-1248 (1968), *reprinted in* MANAGING THE COMMONS 16 (G. Hardin & J. Baden eds. 1977).

over the entire public; no one user has sufficient reason to conserve or preserve the land's values because he cannot claim it solely.[33]

Western water law, as it has developed over the past 125 years, may provide a useful model for compromise between the three possible approaches to the future of the public domain—continued federal ownership, transfer to state ownership, or transfer to private ownership. Water law has the advantage of creating private ownership rights which are freely transferable in the marketplace but which are not as unfettered as traditional ownership claims in land. The marketplace is the primary arbiter for determining the allocation of the water resource. On the other hand, private owners must meet certain publicly imposed expectations in order to obtain or retain their water rights. This Article will trace the parallel historical developments of these two strands of basic property law—the law pertaining to public lands and to western waters—and then address the possibility of applying a system derived from a water law model as a solution to the issue of disposing of federal public lands.

II. The Development and Character of Western Land Law

A. *Historical Sketch of Public Land Law*

The United States acquired lands beyond the original colonies beginning with the Louisiana Purchase in 1803[34] and culminating with the purchase of Alaska from Russia in 1867.[35] In the interim, the northwestern area became U.S. territory through the Oregon Compromise in 1846,[36] and the southwest lands were added through treaties with and purchases from Mexico and

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33. In the case of federal lands, Hardin's theory leads to the argument that government-owned property is administered by bureaucrats who can tap tax dollars to pay for agency programs and then attempt to enhance their self-interest by increasing the size and power of their agency. It is also argued that bureaucrats are unduly influenced by special interest pressure groups and by political shifts. *See, e.g.*, Shanks, *Dams and Other Disasters: The Social Costs of Federal Water Development Policies*, Earth Day Reconsidered (J. Baden ed. 1980). The Army Corps of Engineers and the Bureau of Reclamation had been pushing their respective water development plans for the Missouri River Valley. However, when President Franklin D. Roosevelt proposed TVA type authority for the valley, the two agencies, in response to this political shift, came up with a joint proposal within two days. The proposal may not have been the best plan, but it kept the two agencies from losing control of the project.

34. J. Sax, *supra* note 5, at 284-87.

35. *See* P. Gates, *supra* note 1, at 85. Although Hawaii and other properties were added later, they did not add to the public domain.

36. *Id.* at 84.

Texas.[37] Outside of Texas, which negotiated entry into the United States from its position as an independent state,[38] virtually all the land in the entire West was originally owned by the U.S. Government.

1. Disposal of land by the Federal Government

The General Land Office, created in 1812, was given the assignment of supervising the disposition of federal lands.[39] After initial attempts to sell the land on credit were unsatisfactory, cash sales through public auctions and private sales became the chief means of transferring the federal interests to individuals.[40] Upon their admission, many states received generous land grants for internal improvements and for schools.[41] Railroads also received large land grants[42] through congressional programs developed to promote the building of the nation's rail systems. Other lands were distributed through military bounty policies.[43] Long-standing claims by persons who originally entered the land as trespassers or squatters ripened into legal title through congressional approval of the claimants' right to preemption—the right to buy at a modest price the land they had settled.[44]

Homesteading property by establishing a residence and cultivating the land became a congressionally approved means of achieving title to federal lands in 1862.[45] After the requisite five

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37. *Id.* at 80-85.
38. *Id.* at 82.
39. *Id.* at 127-28.
40. *Id.* at 145-218.
41. *Id.* at 285-318.
42. *Id.* at 341-86.
43. *Id.* at 249-84.
44. *Id.* at 219-47.
45. *Id.* at 387-434. The lands open to homesteading were restricted to those that had been surveyed. *Id.* at 394. Mineral lands were generally excluded. The means adopted for dealing with mineral lands came to parallel the free-entry sale system of earlier preemption acts. For many years after the California gold rush, Congress debated but failed to act upon measures for regulating mineral lands. Some proposed that these lands be sold like other lands; others favored retention of title by the Federal Government with grants of possessory rights for mining purposes. Finally, with the Mining Act of 1866, ch. 262, 14 Stat. 251, *amended by* Act of July 9, 1870, ch. 235, 16 Sat. 217, and Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C. (1976)), Congress made exploration of the public lands for minerals "free and open," thus legalizing the former trespasses of mining prospectors. A mining land patent system resulted, permitting a miner to obtain title to the mining claim. For lode or vein minerals, the patent covered the mine shaft no matter what surface area was involved, but for placer mining, the patent to the placer location could not exceed 160 acres. P. GATES, *supra* note 1, at 723. In contrast, the fuel minerals legislation finally enacted as the Mineral

years of residence and the proper filing and payment of service fees, the homesteader received title to the land. Homesteading was restricted to a single parcel of 160 acres.[46] The basic homesteading pattern was expanded and liberalized in subsequent years under particular conditions despite congressional repeal of many of the original land disposition measures in a reform movement in 1891.[47] For example, under the Timber Culture Act[48] land could be obtained by planting trees and cultivating them. In the West, the Desert Land Act of 1877[49] opened up a means of obtaining up to 640 acres at a nominal price for those settlers who would develop arid lands through irrigation. Further liberalization came between 1904 and 1916 in a series of acts including the Kinkaid Act,[50] the Enlarged Homestead Act,[51] and the Stock-Raising Homestead Act[52] which permitted acquisition of 640 acres through settlement and improvements.[53] Al-

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Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 (current version in scattered sections of 30 U.S.C. (1976)), allowed developers to lease federal lands, but did not allow actual purchases. Thus the government retained title to major parcels of coal, oil, and natural gas lands. P. GATES, *supra* note 1, at 741-45.

Initially coal lands had been treated the same as other hard rock mineral lands, but later President Theodore Roosevelt made massive withdrawals of coal, reserving it to the United States for separate disposal. Act of Mar. 3, 1909, ch. 270, 35 Stat. 844 (current version at 30 U.S.C. § 81 (1976)).

Other lands not available for homesteading were those lands already sold and those that had been given away to the states and railroads.

46. The Homestead Act, ch. 75, 12 Stat. 392 (1862) (codified as amended at scattered sections of 43 U.S.C. (1976)), *repealed by* Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2787 (1976).

47. The movement included repeal of the Timber Culture Act, the Preemption Act, the cash sales system, and auctions of land. Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095.

48. Ch. 277, 17 Stat. 605 (1873), *repealed by* Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095.

49. Ch. 107, 19 Stat. 377 (1877) (current version at 43 U.S.C. §§ 321-323, 325, 327-329 (1976)).

50. Ch. 1801, 33 Stat. 547 (1904), *repealed by* Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2744, 2787 (1976).

51. Ch. 160, 35 Stat. 639 (1909). These statutes were repealed by the Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2744, 2787 (1976). Provisions of the Act—originally applied to Arizona, Colorado, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming—were extended to cover Idaho by Act of June 17, 1910, ch. 298, 36 Stat. 531; California and North Dakota by Act of June 13, 1912, ch. 166, 37 Stat. 132; Kansas by Act of Mar. 3, 1915, ch. 84, 38 Stat. 953; and South Dakota by Act of Mar. 4, 1915, ch. 150, 38 Stat. 1162.

52. Ch. 9, 39 Stat. 862 (1916), *repealed by* Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2744, 2787 (1976).

53. Even these enlarged opportunities fell far short of Major Powell's suggestion that stockmen should have the right to 2,560 acres because of the need for large tracts to make cattle operations economically feasible. J. POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES 22, 28-37 (2d ed. 1879). Some few were able to put

though most agriculturally productive lands east of the 100th meridian had been removed from the public domain by the 1880's, homesteading in the West continued to gain momentum. In fact, the year 1910 was the high point in the nation's history for the number of original land entries.[54]

Although homesteading was a possible means of acquiring public lands until 1976,[55] such disposition of public lands had by that time almost ceased everywhere except in Alaska[56] because of the withdrawal of most public land from entry. Following the 1946 consolidation[57] of the General Land Office and the Grazing Service, the newly created Bureau of Land Management took over the responsibility for public lands other than national forests, national parks, and other special federal enclaves.

2. *Federal land management*

In the closing decades of the 19th century, the need arose for institutional management agencies to care for the public lands. Preservationist movements were successful in establishing Yellowstone National Park[58] and reserving the large amounts of timber land which eventually came under the jurisdiction of the U.S. Forest Service.[59] A new conservation management agency—the Division of Grazing in the Interior Department—was set up under the 1934 Taylor Grazing Act.[60] With the establishment of grazing districts, homesteading on the lands withdrawn for grazing was brought to a close.[61] The Forest

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together large farms and ranches despite the acreage limitations through a combination of "homesteads, preemptions, timber culture claims, desert land entries, and purchases from railroads and of school sections" from the states. *See also* P. GATES, *supra* note 1, at 466.

54. P. GATES, *supra* note 1, at app. A.

55. The Homestead Laws were repealed by the Federal Land Policy and Mangement Act, Pub. L. No. 94-579, 90 Stat. 27 (1976).

56. *Cf.* E. PEFFER, *supra* note 1, at 304. World War II veterans hoping to homestead land were told that Alaska was one of the few areas with opportunity for them. However, homesteading was never a truly successful program in Alaska. R. ROBBINS, *supra* note 1, at 469.

57. *See* E. PEFFER, *supra* note 1, at 336.

58. *See* P. GATES, *supra* note 1, at 567.

59. The Forest Service was established in 1905. Act of Feb. 1, 1905, ch. 288 (current version in scattered sections of 16 U.S.C. (1976)).

60. Ch. 865, 48 Stat. 1269 (current version in scattered sections of 43 U.S.C. (1976)).

61. Although this action was accomplished under the authority of the Taylor Grazing Act, *id.*, the actual withdrawal came when President Franklin D. Roosevelt withdrew lands from classification, and therefore from entry. Exec. Order No. 6910, 54 Interior Dec. 539 (1934); Exec. Order No. 6964, 55 Interior Dec. 188 (1935). *See* E. PEFFER, *supra*

Service and the Division of Grazing approached their managerial responsibilities over these lands from a multiple use, sustained yield philosophy[62] which contrasted significantly with the policy applied to the national parks of preservation and protection against development of natural resources. As a result of these institutional changes, public lands are now held in three categories: (1) the national parks administered by the National Park Service (NPS), (2) the national forests under the control of the U.S. Forest Service (USFS), and (3) the remaining federal lands managed by the Bureau of Land Management (BLM).[63]

Until 1976, the express policy and the management philosophy of each of these public land managers was markedly different from the others. The oldest of the agencies, the General Land Office (the predecessor to the Bureau of Land Management),[64] had traditionally adopted a distribution philosophy. Its role until the 1930's was to facilitate and administer transfers of lands from the federal public domain to maturing states and to private entities.[65] During most of this century, the BLM and the U.S. Forest Service have shared basically the same conservation philosophy[66] of promoting multiple use of the lands for the development and harvesting, on a sustained yield basis where possible, of grazing, timber, and other resources. The National Park Service, in contrast, developed very early a preservationist philosophy[67] with the ultimate goal of preserving the land against private adverse exploitation, holding the land and its resources for enjoyment by future generations. Since 1976, the BLM's policy, as mandated by congressional action in the Federal Land Policy and Management Act (FLPMA),[68] has broken away entirely from its prior role as the nation's land transfer agency. The general goal and philosophy has now become one of retention and management of federal lands instead of disposition.[69]

It can be expected that public land law reform will not af-

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note 1, at 224.

62. P. Mogren, *supra* note 3, at 198-99.

63. *Id.* at 175-208.

64. The General Land Office was established in 1812. Act of Apr. 25, 1812, ch. 68, 2 Stat. 716.

65. P. Mogren, *supra* note 3, at 39.

66. *Id.* at 121.

67. *Id.* at 165.

68. Pub. L. No. 94-579, 90 Stat. 2743 (1976).

69. *See generally* Carver, *Federal Land Policy and Management Act of 1976: Fruition or Frustration,* 54 DEN. L.J. 387 (1977).

fect national parks, military installations, or federal buildings because these land holdings are designed to serve specific national purposes. For the national parks, these purposes include meeting the nation's recreational and aesthetic needs as well as preserving wildlife and natural resources in their undisturbed state for the enjoyment of unborn generations.[70] Some lands held by the U.S. Forest Service may also fit into this category of lands that will, in all probability, remain in federal ownership.[71] The BLM lands,[72] however, will be subjected to major changes. These are the lands in the public domain that were never appropriated to individual states or private interests; nor were they ever specifically reserved by the Federal Government for special national purposes as were national forests and national parks. These unappropriated lands are true leftovers, remaining federal property by accident rather than by design.

Anyone familiar with the western states, especially the arid desert country of the Great Basin States of Nevada, Utah, Arizona, New Mexico, and Colorado, can understand why large amounts of land have remained in federal ownership. It is estimated that only 3.3% of Utah's land area is cultivated;[73] Nevada's proportion of cultivated land is undoubtedly even less.[74] But as much as 33% of Utah lands and 13% of Nevada lands were distributed to nonfederal owners partially because the

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70. P. Mogren, *supra* note 3, at 163.

71. The marginal forest lands, however, which are not productive for successful timber harvests from a business standpoint and which fall short of attracting sufficient use for travel and recreation, may like most BLM lands be prime targets for transfer to state or private ownership. *See* Hyde, *Compounding Clearcuts: The Social Failures of Public Timber Management in the Rockies,* in EARTH DAY RECONSIDERED 43 (J. Baden ed. 1980).

72. The Federal Land Policy and Management Act of 1976 defines public lands as those which are administered by the BLM. The Act excludes lands administered by the U.S. Forest Service and National Park Service as well as other agencies. This leaves the BLM with those lands which no one brought or homesteaded and which no other agencies have obtained. Carver, *supra* note 69, at 388.

73. Major Powell had reported that less than three percent of the area of the Utah Territory was potentially irrigable. J. POWELL, *supra* note 53, at 9. In 1945 the cultivated area of Utah, including dry farms, was 3.3%. W. STEGNER, *supra* note 8, at 225. In 1968 the cultivated area was approximately 4 percent, although the total of arable land, including areas used at that time for granting, was 10.6 percent of the state's area. L. WILSON, J. HUTCHINGS, & P. SHAFER, ARABLE LAND RESOURCES OF UTAH 13 (Utah Resources Series 42, 1968).

74. Data on rainfall in selected cities shows Salt Lake City, Utah, with a normal annual rainfall of 15.17 inches, while Reno, Nevada, has only 7.20 inches. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 226 (1980).

area's early Mormon settlers and their successors developed and reclaimed large areas of land through irrigation,[75] especially under large reclamation projects financed through the Federal Government.[76] In addition, a major portion of present nonfederal lands in these two western states was transferred out of the federal domain to the states as school grant lands.[77] Yet, today there is ever increasing interest in the remaining federal lands. Large deposits of coal, gas, and oil, plus additional areas containing oil shale and tar sands from which synthetic fuels could be manufactured,[78] are located on BLM lands in these two states and throughout the West.

B. Ownership Characteristics of Land Acquired from the Public Domain

1. The acquisition of private rights in land previously part of the public domain

By acquiring lands from other nations and resolving territorial disputes by treaty, the Federal Government vested in itself full legal title to most of the land in the West. Unlike the allocation of water, the disposition of these lands to the states was by traditional methods, including deeds, and involved either the transfer of full legal title or, occasionally, transfer with certain well-accepted conditions, such as the reservation of mineral rights.[79] A recorded patent from the government is generally

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75. L. ARRINGTON, GREAT BASIN KINGDOM 45, 51, 224 (1958).

76. Bagley, *Utah's Water Development Framework,* UTAH WATER SYMPOSIUM 1, 19-35 (1979).

77. In Utah, for instance, one-ninth of the land was allocated to the state upon its admission to the Union; four sections of each township were given to the state for support of the schools. P. GATES, *supra* note 1, at 314. However, many of these school lands were preempted by private settlers or taken by the Federal Government for other purposes. Under an 1859 law, Act of Feb. 26, 1859, ch. 58, 11 Stat. 385 (current version at 43 U.S.C. §§ 851-852 (1976)), the states have the right to select "other land of equal acreage" to replace the land taken. Utah attempted to select some potentially extremely valuable oil shale lands in equal acreage. In Andrus v. Utah, 446 U.S. 500 (1980), the Supreme Court held that lands must be replaced by value and not gross acreage. *See* Comment, *The Loss of the States' Right to Indemnify Preempted School Land Grants on the Basis of Equal Acreage:* Andrus v. Utah, 1981 UTAH L. REV. 409.

78. Utah is located on a geologic overthrust, where one geologic formation has ridden up on another. These overthrusts, especially along the "hingeline" where the two formations meet, are potentially rich sources of oil and gas deposits. Utah and Nevada both have some oil, gas, and coal, and Utah has 90 to 95% of the U.S. mapped resources of oil impregnated rocks. *See* OIL, SHALE, AND TAR SANDS, (J. Smith and M. Almond eds. 1976).

79. *See supra* note 45 and accompanying text.

considered a sufficient beginning for a valid private chain of title. Most abstracts tracing the "genealogy" of title to private property begin with the original government patent.[80]

2. The nature of the property right

To lay a basis for comparison between private ownership rights in land acquired from the Federal Government and private ownership rights in water, it is helpful to outline the rights and characteristics associated with land title ownership. Fee simple absolute title represents the maximum rights one can legally hold in real property. Holders of this type of fee ownership who additionally record their evidence of title receive the fullest protection of the law. Characteristics often associated with fee title to real property include the unencumbered right to exclusive possession of the property for a potentially infinite duration. If the owner never sells the property or disposes of it in a will, it will automatically descend to his heirs. The owner has power to exclude others, to transfer all or part of the property (measured in duration or space), and, of course, to use and enjoy the property to the maximum extent legally permissible. Prior transferors, including the government, have no further ownership claims to the property unless they somehow reserved specific interests or rights of use in the initial conveyance, like a right-of-way or easement.

When the initial transfer from the federal domain was to a state, the same rights granted to private acquirers typically became vested in the state; the state was equally free from ownership claims of the federal government if an unlimited fee title grant was made. The property remained public, but in the hands of a different entity.

3. Conveyancing of acquired rights in land

The law of land conveyance has developed in a way that involves essentially no government intervention. The validity of the conveyance is determined by the actions of the parties. For a transfer to be effective and binding between the immediate seller and purchaser, there normally must be a written document signed by the transferor.[81] Besides the written transfer in-

80. J. CRIBBET, *supra* note 20, at 294.

81. This requirement had its origins in the 17th century Statute of Frauds. Act for the Prevention of Fraud and Perjuries, 29 Car. 2, ch. 3 (1677). Even without the requisite

strument, a valid conveyance requires delivery,[82] a legal act which depends on a determination of the transferor's intent. In most real property conveyances the parties routinely fulfill these necessary requisites and accomplish the transfer without the intervention or supervision of any public office. If a dispute arises between the parties, a court may settle the controversy, but only when one of the parties requests judicial intervention. The crucial characteristic to keep in mind when comparing land title transfers with transfers of water rights is that neither party to the land conveyance needs to obtain approval from a government official to participate in the conveyance; neither party needs to obtain a permit or license to hold, use, enjoy, or transfer the land.

Although a land conveyance between private parties is automatic and self-executing without any government involvement, one public office is involved in virtually every land transfer—the county recorder's office. It should be noted, however, that the recorder's role is custodial in nature; he is not empowered to exercise any discretionary authority in accepting or rejecting documents that are properly submitted for recording.

Recording is not necessary to validate or complete a conveyance, but it may be required for protection against claims of others. The recording system[83] is designed to give notice to all the world that the documented real estate transaction has taken place. The law provides generally that persons dealing with real property have constructive notice of the contents of recorded instruments. Once a party, *X*, has notice of a conveyance from *A* to *B*, the party can no longer claim to be a purchaser in good faith if *A* subsequently purports to convey the same property to *X*. If, however, the original *A*-to-*B* conveyance is unrecorded, *X* may qualify as an innocent purchaser in good faith of the same property. Most recording statutes provide that if party *B* has not recorded, *B* loses all rights in the property to a subsequent purchaser, even though *B* was the first to receive a conveyance from *A*, if the subsequent purchase was for value and in good faith.

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written evidence of the transfer, however, courts of equity have traditionally come to the aid of a party who can show sufficient acts of part performance connected with an alleged transfer agreement to satisfy the court that the transfer should take place. J. CRIBBET, *supra* note 20, at 130-32.

82. *But see* R. BOYER, SURVEY OF THE LAW OF PROPERTY 415-18 (3d ed. 1981).

83. Most prior-appropriation water law states have a race-notice statute, so that the first purchaser in good faith to record his interest will prevail in a lawsuit. 6A R. POWELL, *supra* note 20, §§ 912-918.

Thus, a purchaser must record the conveyancing instrument immediately to be fully protected as title owner. The recorder, however, has no power to determine who should be the title owner; nor may the recorder set limits or requirements for the ownership and use of the land. Thus, ownership determinations are made without governmental involvement unless the parties turn to courts to help them settle legal disputes regarding title.[84]

4. Restrictions on land use

Although a state or private party may acquire full legal title from the Federal Government, it is not absolutely free to do anything and everything with the property. Every landowner is subject to liability for using property in a way that unreasonably damages a neighbor.[85] Actions for nuisance, trespass, or to recover for intentional or negligent injuries on property owners' lands are potential liabilities that place limits on the extent of both public and private entities' property rights.[86] In addition to these common law doctrines, governments have imposed numerous constraints and limitations on a owner's property rights in land. Even though someone has absolute, unencumbered legal title to property, the land may be subject to regulations and controls, including (1) zoning and other land use regulations, (2) taxation, (3) eminent domain (condemnation), (4) a variety of curative title acts, (5) claims of adverse possession, (6) environmental laws, and (7) criminal codes.

a. Zoning regulations. Zoning regulations are generally imposed by local city and county governments.[87] A specific zoning requirement may impact ownership rights dramatically, particularly as measured by the value of affected land. For example, property within an area zoned for only single family dwellings will be valued to reflect that zoning status. If the zoning had been agricultural, the price for the same quantity of property would have been lower; if the zoning were commercial or indus-

84. Other government officials may become involved in land use regulation, but their role has nothing to do with determining who has title to property.

85. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 57 (4th ed. 1971).

86. There are, however, lingering remnants of sovereign immunity doctrines, which in earlier times protected governments from liability for injuries. Although these doctrines were once a major factor in property law, modern statutes and judicial decisions have largely eroded this special governmental immunity because of the inequitable burdens imposed on injured parties. *Id.* § 131.

87. C. HAAR, LAND-USE PLANNING 156-58 (2d ed. 1971).

trial the property probably would have cost more. Thus, existing zoning regulations are generally no problem for the landowner acquiring property because its anticipated use fits the zoning system imposed on that land.

However, zoning laws may significantly harm landowners whose specific development plans are blocked by zoning requirements, imposed subsequent to purchase of the property, that prohibit the very use the landowner anticipated. In such cases, serious compensation questions arise under the Constitution. The fifth amendment assures landowners, "nor shall private property be taken for public use, without just compensation."[88] In general, courts have ruled that a taking does not arise merely because a particular valuable use of the property is denied by new zoning laws.[89] Thus, a land developer who had planned to build a large apartment complex on property but was blocked by a newly adopted zoning regulation limiting buildings on his property to single family dwellings may not be able to realize the same overall profits from his neighborhood of custom-built homes as would have been possible from an apartment complex. Nonetheless, that landowner would not receive compensation from the government imposing the regulation because the landowner was not fully deprived of his property. On the other hand, a swampland owner who was blocked from draining his property for development because of a locality's open space zoning policy may be able to show a sufficient taking of property to require compensation under the Constitution.[90]

A landowner faced with a zoning restriction that impedes his desired use of the property has several possible escapes. First, if the use on the property antedates the restriction, the landowner may be exempt from the zoning requirement under a grandfather clause for preexisting conditions.[91] Second, zoning

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88. U.S. CONST. amend. V.

89. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

90. In City of Crookston v. Erickson, 244 Minn. 321, 327-28, 69 N.W.2d 909, 914 (1955), the city condemned a neighbor's property and part of the plaintiff's land for a sewage plant. Although the plant was not to be built on the land acquired from the plaintiff, it would render plaintiff's remaining land unsuitable for its most profitable use as a suburban residential development. The court held that, in at least some circumstances, such action could constitute a "taking" of property, and that the city would be liable for resultant damages.

91. In Jones v. City of Los Angeles, 211 Cal. 304, 321, 295 P. 14, 22 (1930), the court found that the enforcement of a zoning ordinance to stop uses antedating the ordinance was unconstitutional. But in City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 461, 274 P.2d 34, 45 (1954), the court upheld a statutue requiring the termination of a noncon-

boards and planning commissions often have the power to grant a variance from specific restrictions upon application by the landowner involved. Third, as a part of the political process, the landowner may petition to have the zoning regulation modified or to have the affected property totally removed from the zoning restriction. This may be possible through concerted petitions by adjacent landowners or through a change of responsible officials in the next election. Finally, the zoning restriction may be challenged and overturned in court, though such challenges are rarely successful.[92]

Ownership rights have a longer duration than the constantly changing zoning and land use regulations governing property use. Sometimes a landowner must simply endure specific zoning rules, which may ultimately be changed or eliminated. Landowners, as the persons primarily affected, are given a voice in determining and changing the restraints placed on land use in a particular area or neighborhood.

b. Taxation. Taxing powers are vested in elected officials controllable by the general public through the ballot box. Many local and state governments impose a variety of *ad valorem* taxes on private property within their jurisdictions.[93] Constitutional requirements protecting individual taxpayers must be met. With regard to real property, the assessments in a given area must be uniformly based on the value of the property. Public assessments, opportunities for protests and equalization hearings, and ultimate accountability to the electorate are characteristic of most property taxing systems.

It is important to note that local taxation powers are not applied equally to public and private lands. One major difference between land owned by a state or by the Federal Government and privately owned land is the inability of local governments to impose taxes on state and federal land. The Federal Government often makes "in lieu payments" to local governments to offset revenues the locality loses because lands within its jurisdiction are publicly, rather than privately, held.[94] But since these payments are determined by Congress, local governments cannot exercise the kind of control over them that is exer-

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forming use within 5 years.

92. *See* I BRIGHAM YOUNG UNIVERSITY LEGAL STUDIES, SUMMARY OF UTAH REAL PROPERTY LAW § 5.9 (1978).

93. *See, e.g.*, II *id.* § 15.16.

94. 31 U.S.C. §§ 1601-1602 (1976).

cised over property taxes. This lack of control prevents effective long range planning.

c. Eminent domain. Every landowner must ultimately bow to the eminent domain powers held by various levels of government and by certain private entities which need specific property for public use.[95] When land is condemned for public purposes, the landowner has no choice but to accept the proferred or adjudicated compensation and give up ownership of the property. Of course the dispossessed landowner may immediately invest the condemnation award in another piece of property and attain fee title ownership status in the new parcel.

d. Adverse possession. All property owners must maintain sufficient possessory activities on the land or face the possibility of losing title to an adverse possessor.[96] An adverse party can gain valid ownership through adverse possession by entering and using another's property for the statutory period, typically twenty years.[97] During that time the adverse possessor's activities on the property must be exclusive, open, continuous, and hostile to the other party's title. The adverse possessor takes advantage of the state's statute of limitations which requires the actual owner to bring an action to remove the adverse possessor from the property within the twenty year period or forever be blocked from initiating such legal action.

This is one of the few land law limitations that has any control over beneficial utilization of property; except for the possibility of losing property through adverse possession, there is no law that requires owners to actually *do* anything with land. But even this requirement is limited; the owner need only *prevent* others from possessing the land, and need not use the land himself. Even though total nonuse of land is socially nonproductive, the landowner has that option.

e. Curative title acts. In the past twenty years numerous jurisdictions have adopted a variety of curative title acts[98]

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95. *See* J. CRIBBET, *supra* note 20, at 425-29.

96. *Id.* at 300-06. One important limitation to title by adverse possession is that most governments are exempt from application of the statutute of limitations and therefore cannot lose property by adverse possession. *See, e.g.,* UTAH CODE ANN. § 78-12-13 (1977). *See also* 7 R. POWELL, *supra* note 20, ¶ 1020.

97. Many states have a shorter, seven-year statute of limitations that allows the recognition of title by adverse possession if the adverse possessor has entered the property under some claim of right or color of title and has paid the taxes for the property over that period. *See, e.g.,* J. CRIBBETT, *supra* note 20, at 304-05.

98. Merchantability of Title Acts are the most common form of curative title acts.

designed to negate stale claims and encumbrances which otherwise may cloud a landowner's title. Some legislation, like the "reverter acts," eliminates the effect of all conditional conveyances after a specified period of time. These statutes apply to those conditions by which the original grantor retained a property interest called a "possibility of reverter" or "power of termination."[99] For example, many school districts received conveyances of property upon the condition that they continually be used for school purposes. If the property were ever put to another use, it would automatically revert back to the original grantor. Now, fifty, seventy, or a hundred years later, the school district has closed the school and seeks to sell the property to a commerical developer. Under the terms of the original conveyance the proposed transfer cannot be made. In fact, the closing of the school has probably raised the status of the claim of remote descendants of the original grantor from a worthless future interest to present possessory title ownership. To prevent this kind of unanticipated windfall, and to preserve the school district's power to alienate its property free of ancient restrictions that have outlived their purpose, legislatures have enacted reverter acts. Typically, this type of curative legislation declares all reversionary interests void after forty or fifty years.[100]

One reason reverter acts are necessary is that certain types of property claims cannot be removed through adverse possession doctrines. Statutes of limitation do not begin to run against property claimants until their property interest has become possessory. Possibilities of reverter, powers of termination, and remainder interests are future interests which represent present property rights but which have not yet ripened into possessory claims. These future interests, and other claims held by minors or incompetents, who are immune to statutes of limitation until their disability is removed, are incapable of being eliminated by an adverse possessor.[101]

Another form of curative title legislation is the "marketable title act," now operative in a majority of the states.[102] This form of legislation is not limited to removing specific title defects, but

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These acts cut off potential conflicting claims which do not appear of record after a cut-off date. *See id.* at 324-28. *E.g.*, UTAH CODE ANN. §§ 57-9-1 to -10 (1974).

99. *See* J. CRIBBET, *supra* note 20, at 325.

100. *Id.* at 324-38; *e.g.*, UTAH CODE ANN. § 57-9-1 (1974).

101. 7 R. POWELL, *supra* note 20, ¶ 1022.

102. *See* J. CRIBBET, *supra* note 20, at 324-28.

reaches nearly all types of old claims that otherwise would reduce the marketability of titles. A title based on a chain of conveyances which reaches back to a conveyance that is, for example, at least forty years old, is deemed to be free of almost all claims that predate the so-called "root of title."[103] There typically are exceptions for certain easements, mineral claims, water rights, and government claims. A person with an old claim or encumbrance can preserve it by recording within a forty-year period the document that gave rise to the claim.[104]

f. Environmental laws. The Federal Government became actively involved for the first time in regulations affecting private land use with adoption of the National Environmental Policy Act of 1969.[105] Air quality and water quality controls are now enforced by a combination of federal and state agencies in this major new legal field. Many private uses of land are now limited solely because of adverse impacts on the surrounding environment. Environmental controls are in a way an extension and an elaboration of traditional principles of public nuisance. The environmental laws also require extensive "environmental impact statements" for all "major federal actions significantly affecting the quality of the human environment."[106] Many private owners who use governmental funding for development projects fit within a category which requires the preparation of an environmental assessment report before their projects can proceed.

g. Criminal codes. The last in this list of limitations on the rights of ownership of land are the prohibitions against conducting criminal activities on the property. Leases, for instance, of property for the purpose of running a gambling hall or a house of prostitution are in most states void and unenforceable.[107]

The categories of limitations make a considerable dent in the so-called fee simple absolute title to lands. Yet, we can still speak of relatively free and unrestricted powers associated with land ownership in America. Many of our legal and constitutional doctrines were designed to protect a property owner's rights, and

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103. *Id.*

104. *E.g.*, UTAH CODE ANN. §§ 57-9-4 to -5 (1974).

105. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (current version at 42 U.S.C. § 4321 (1976)).

106. 42 U.S.C. § 4332(2)(C) (1976).

107. *See* 6 R. POWELL, *supra* note 20, ¶ 864. *See also* J. CRIBBET, *supra* note 20, at 212-13.

private property remains an American ideal. As the study of legal institutions and systems regarding water law will show, traditional private ownership of land is remarkably unfettered and uncontrolled in comparison with ownership of water.

III. The Development and Character of Western Water Law

A. Historical Sketch of Western Water Law

In general, western water law is based on the doctrine of prior appropriation for beneficial use. Each of the seven western states, however, has its own distinct water law code.[108] The oldest statutes come from the states of Colorado[109] and California,[110] where early judicial decisions were codified by the territorial legislatures. The most recent comprehensive water code was adopted in Alaska.[111] Other recent water law statutes have been enacted in Colorado[112] and Arizona.[113] Colorado's scheme has modernized the procedure for allotting and adjudicating water rights by establishing a specific system of water law courts to administer water appropriations in state water districts.[114] Arizona's new ground water law is the nation's most comprehensive approach to the special conservation concerns surrounding un-

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108. California is generally recognized as having the first water statutes in the region, enacted in 1854. However, in Utah, the"State of Deseret" had passed statutes assuming state ownership of water with disposal by grant as early as 1850, even before Utah was, for practical purposes, part of the United States. About half of the western water law states—Arizona in 1864, Colorado in 1861, Idaho in 1881, Montana in 1885, New Mexico in 1897, Oklahoma in 1897, and Wyoming in 1886—passed some form of appropriation water law prior to statehood. California was already a state when it passed its first appropriation statutes in 1854, as was Kansas in 1886, Nebraska in 1889, Nevada in 1899, North Dakota in 1905, Oregon in 1864, South Dakota in 1907, and Texas in 1889. Washington enacted a fairly complete system in 1889 as it was becoming a state. F. Trelease, *supra* note 16, at 28-29.

109. Act of Aug. 15, 1862, 1862 Colo. Sess. Laws 44.

110. Act of May 15, 1854, ch. 47, 1854 Cal. Stat. 76.

111. Alsaka Stat. §§ 46.15.010-.270 (1977 & Supp. 1980). The Alaska statute borrowed heavily from other models but also addressed several current concerns in unique ways. Dean Trelease, at that time at the Wyoming School of Law and a prolific writer on water law issues, served as Alaska's key advisor.

112. *See generally,* Colo. Rev. Stat. tit. 37 (1973 & Supp. 1980). Numerous sections of Colorado water law were revised between 1975 and 1980.

113. The Groundwater Management Act, ch. 1, 1980 Ariz. Sess. Laws 1339, created the Department of Water Resources and completely revised Arizona water law. Ariz. Rev. Stat. Ann., tit. 45 (1956 & Supp. 1981-1982).

114. Colo. Rev. Stat. §§ 37-92-201 to -306 (1973 & Supp. 1980).

derground water resources.[115] Faced with serious depletions of available groundwater, Arizona has mandated utilization plans which aim to replenish the underground water supply by the year 2025.[116]

It is useful for illustrative purposes to focus on the current statutory framework for water law in one of the representative western states, Utah. The system in Utah, as in Idaho, Nevada, Arizona, Colorado, New Mexico, Wyoming, and Montana, has been based on prior appropriation doctrines from the first.[117] The system made sense in an area with scarce water resources. Utah's Mormon settlers were the first Americans to develop a free flowing, gravity based irrigation system.[118] Water was found in mountain streams but was needed in arid valleys in order to permit agricultural development. As with early mining sites, agriculturally workable lands in the valleys were not usually adjacent to sources of water, so the water was brought to the lands. Those who first put the water to beneficial uses, such as irrigation in farming or use in mining enterprises, were given first rights to the water source. Early judicial decisions recognized these prior appropriation rights and rejected the claims of streamside property owners who urged recognition of the principles of traditional riparian rights used in the eastern United States.[119]

In the early territorial period, Utah law did not require adherence to any administrative requirements; a person obtained water rights by self-help. So long as an actual diversion of water for a beneficial use had been accomplished, later appropriators were subject to the earlier appropriators' rights. There were no forms to fill out, no prior permission was required, and no writ-

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115. ARIZ. REV. STAT. ANN. §§ 45-401 to -637 (1956 & Supp. 1981).

116. *Id.* § 45-562.

117. *See, e.g.,* Gunnison Irrigation Co. v. Gunnison Highland Canal Co., 52 Utah 347, 354, 174 P. 852, 854 (1918). The Utah Supreme Court declared in another case that prior appropriation had always been the law in Utah. Whitmore v. Salt Lake City, 89 Utah 387, 396, 57 P.2d 726, 731 (1936), *appeal dismissed,* 300 U.S. 644 (1937). *See* HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES (U.S. Dep't of Agriculture Misc. Publ. No. 1206, vol. 1, 1971 & vol. 2, 1974).

118. Although the Mormons were the first "Americans," in the sense of United States citizens, to develop this type of irrigation, Southwestern Indians and Spanish missionaries had used it earlier, although they had not stored water for irrigation as the Mormons did. *See* P. GATES, *supra* note 1, at 636.

119. In Oldroyd v. McCrea, 65 Utah 142, 151, 235 P. 580, 584 (1925), the Utah Supreme Court said that beneficial use was the exclusive means of acquiring rights in a stream.

ten documentation of the initial diversions existed unless the matter had been adjudicated in the courts and testimony of the claimants and their witnesses had resulted in a court decree.[120]

Utah's current administrative system began with the establishment of the State Engineer's office in 1897.[121] However, the particular powers and methods of establishing water rights were not specified until other statutes were passed in 1903.[122] In 1919, the legislature clearly declared the waters of the state to be the property of the public,[123] subject to rights already acquired by those who had appropriated water for a beneficial use. To illustrate the ultimately public nature of water rights, full rights to water are to revert back to the public upon the owner's failure to use an existing right within a five year period.[124] When this statutorily declared abandonment of water rights occurs, the state once again obtains the right to direct the appropriation of the public waters for the public interest. Under the statutory framework, the state engineer has general administrative powers to supervise the waters of the state, including responsibility for the "measurement, appropriation, apportionment and distribution" of state waters.[125]

In place of the self-administered means of obtaining water rights, the legislature established an application and permit system through the office of the State Engineer. The process for obtaining new rights in unappropriated waters is initiated by the filing of an application with the State Engineer.[126] The permit application declares the use to be made of the water, the name of the applicant, the quantity, source, and point of diversion of the water, and the place of the proposed use.[127] If the State Engineer determines there is water in a stream in excess of existing rights, then so long as the proposed use is determined to be a beneficial use of the water, he will issue the applicant a certifi-

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120. W. HUTCHINS & D. JENSEN, THE UTAH LAW OF WATER RIGHTS 10-15 (1965).

121. Jensen, *The Legal Framework of Utah's Water Resource Management—Its Development, Present Status, and Future Prospects*, UTAH WATER SYMPOSIUM 52, 54 (1979).

122. *See id.*

123. Act of Mar. 13, 1919, ch. 67 § 1, 1919 Utah Laws 177 (current version at UTAH CODE ANN. § 73-1-1 (1980)).

124. UTAH CODE ANN. § 73-1-4 (1980). However, it is possible to get an extension of up to five years.

125. UTAH CODE ANN. § 73-2-1 (1980).

126. UTAH CODE ANN. §§ 73-3-1 to -2 (1980). This has been the case since 1903.

127. *Id.* § 73-3-2.

cate of appropriation[128]—the functional equivalent of a state deed or patent to land.

B. Ownership Characteristics in Western Water Law

The western water law system of prior appropriation developed to accomplish optimum allocation of a valuable and scarce natural resource. The characteristics of the property law institutions for water are a unique blend of private rights, which are transferable in market transactions, and public controls, which are actively applied in determining who has water rights. The contrasts to land ownership are numerous and significant.

1. Creation of water rights

a. The state certification requirement. After adoption of the permit system for granting water appropriations, water rights could no longer be acquired from the state by mere use. The new system not only involved the state in adjudicating private disputes over rights to water, but also required state approval for the initial creation and acquisition of a water right. The State Engineer was given the responsibility of and guidelines for approving applications for water allocation.

Generally certificates of appropriation are granted as a matter of course by the State Engineer provided there are still unappropriated waters available from the requested source. The statute requires the State Engineer to publish notice of pending applications for appropriation[129] and provides for the consideration of protests prior to approval or rejection of an application.[130] Aside from these formal steps in the permit application process, the State Engineer has quite broad discretionary powers which in practice have rarely been utilized but which theoretically provide a crucial and unique means of public control over private property rights in water.

Before approving an application the State Engineer must determine that (1) there is unappropriated water in the proposed source, (2) "[t]he proposed use will not impair existing rights," (3) the proposal will not "interfere with the more beneficial use of the water," (4) "[t]he proposed plan is physically and economically feasible," (5) "[t]he applicant has the financial

128. *Id.* §§ 73-3-5 & 73-3-8.
129. *Id.* § 73-3-6.
130. *Id.* § 73-3-7.

ability to complete the proposed works," and (6) "[t]he application was filed in good faith and not for purposes of speculation or monopoly."[131] The first two of these requirements are nondiscretionary, but the other four invite the State Engineer to exercise judgment in a discretionary manner. The third criterion, focusing on a hierarchy of beneficial uses, is further defined in the statute:

> [W]here the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to believe that an application to appropriate water will interfere with its more beneficial use for irrigation, domestic or culinary, stock watering, power or mining development or manufacturing, or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it shall be his duty to withhold his approval or rejection of the application until he shall have investigated the matter. If an application does not meet the requirements of this section, it shall be rejected.[132]

It is fair to say that these very broad categories for rejecting an application have, as a practical matter, almost never been used. But the basis for injecting significant public policy considerations into the permit process is clearly available. The list of possible uses that may be considered most beneficial under specific circumstances is not written as a graded set of preferences and should not be read as setting any gradation of priorities among the listed uses.[133] It is clear, however, that the State Engineer has the statutory power to prefer one application over an earlier one on the sole basis that public welfare would benefit by overturning the usual first in time, first in right system.[134] The Utah legislature has considered but failed to adopt more specific criteria for the State Engineer to consider in deciding whether an application is in the public interest.[135]

The state Engineer is guided in his priority decisions by the basic philosophy underlying the prior appropriation system—a philosophy which is solidly prodevelopment. This approach not only permits water use and development but actively encourages full utilization of water resources for beneficial purposes. The

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131. *Id.* § 73-3-8.
132. *Id.*
133. *See* Tanner v. Bacon, 103 Utah 494, 509, 136 P.2d 957, 963-64 (1943).
134. *See generally* UTAH CODE ANN. § 73-3-1 (1980).
135. S. 291, 41st Leg., Gen'l Sess. (1975).

philosophy has been expressed by the Utah Supreme Court as "ensuring highest possible development and . . . most continuous beneficial use of all available water with as little waste as possible."[136] The enumerated beneficial uses, previously limited to farming, household, power production, mining, and manufacturing, have been broadened in recent years to encompass current interests in recreational and environmental purposes.[137] The state's underlying prodevelopment policy requires that the benefit of the doubt in close application situations be given to approving an appropriation.[138]

The State Engineer's means of enforcing this policy are not restricted to simply approving or disapproving applications. For example, he may grant limited water rights by specifying the duration of a water appropriation certificate. For nonagricultural uses such as industry, power production, mining, or manufacturing, the State Engineer may approve an appropriation "for a specific and certain period from the time the water is placed to beneficial use," so long as the application is not "granted for a period of time less than that ordinarily needed to satisfy the essential and primary purpose of the application."[139] After the limited time period ends, the water right so allocated reverts to the state for reappropriation.[140] This provision gives the State Engineer a measure of flexibility to deal with projects with a fixed or limited life.

If an application is rejected by the State Engineer, the applicant may seek judicial review of the State Engineer's decision.[141] Opponents of an approved appropriation have the same recourse available. Under the statute, the court is to conduct a trial de novo,[142] hearing all the evidence of the parties before arriving at its decision. A decree of the court in favor of the appropriation gives the applicant the same rights as if a certificate of appropriation had been granted in the first instance, including, in most cases, a relation back for priority purposes to the

136. Wayman v. Murray City Corp., 23 Utah 2d 97, 100, 458 P.2d 861, 863 (1969).

137. UTAH CODE ANN. § 73-3-8 (1980). Recreational and environmental uses were added in 1971. *Id.*, Compiler's note.

138. Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 248, 289 P. 116, 118 (1930); Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co., 104 Utah 202, 212, 135 P.2d 108, 113, *reh'g denied,* 104 Utah 216, 140 P.2d 638 (1943).

139. UTAH CODE ANN. § 73-3-9 (1980).

140. *Id.*

141. *Id.* § 73-3-14.

142. *Id.* § 73-3-15.

date of the application's filing.[143]

b. Diversion for beneficial use. Replacement of the original, pure "prior use" approach to water allocation with a system of state certification did not mean the "use" requirement was abandoned. The water right still is not established, despite the grant of a certificate of appropriation, until the actual diversion and physical appropriation of the water and its beneficial use is accomplished. Although for priority purposes the crucial date is that of the application,[144] the priority remains tentative until the appropriator perfects its water right by making use of the water.[145]

Despite the importance of actual diversion, diversion without application is clearly not enough. The statutes specifically declare that rights cannot be obtained in either appropriated or unappropriated waters through adverse possession or on principles of prescriptive use,[146] although Utah courts have ruled that as between *private* claimants, water rights can be acquired by adverse use and possession.[147]

The rights must be used on land, but it is not necessary for the appropriator to show title to the land on which the water is to be used.[148] Even if the appropriator loses possession of the land upon which the water was used, the water right remains the property of the appropriator, who may divert and use the water elsewhere[149] or may sell or transfer the water right to someone other than the rightful owner of the land.[150]

There are questions regarding the "beneficial uses" for which the State Engineer may allocate water. An appropriation has traditionally required a physical diversion of the water.[151]

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143. *See* United States v. District Court of the Fourth Judicial Dist., 121 Utah 1, 7, 9, 238 P.2d 1132, 1135-36 (1951).

144. UTAH CODE ANN. § 73-3-18 (1980).

145. *Id.* § 73-3-17.

146. *Id.* § 73-3-1.

147. *See, e.g.*, Hammand v. Johnson, 94 Utah 20, 66 P.2d 894 (1937), *explained in* Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co., 104 Utah 448, 137 P.2d 634 (1943), *reh'g denied*, 104 Utah 498, 143 P.2d 278 (1943).

148. East Grouse Creek Water Co. v. Frost, 66 Utah 587, 596, 245 P. 338, 341 (1926).

149. The right to divest, sell, or transfer is subject to some limitations. *See infra* notes 165-74 and accompanying text.

150. However, at the time of application, the appropriator must have some kind of possessory right in the land where the water is to be used. Lake Shore Duck Club v. Lake View Duck Club, 50 Utah 76, 82, 166 P. 309, 311 (1917).

151. Wrathall v. Johnson, 86 Utah 50, 77, 40 P.2d 755, 767 (1935) (quoting C. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS 339-40 (2d ed. 1912)); Bountiful City v. De Luca, 77 Utah 107, 118, 292 P. 194, 199 (1930).

Interference with the water's natural course in order to divert the water onto land for irrigation is clearly a diversion. But such a diversion may not be sufficient to qualify as an appropriation. Some have asked, for example, whether storage of water in a reservoir is sufficient. The statute answers that query affirmatively.[152] An unresolved appropriation question in Utah is whether preservation of the instream flow—a use which does not require diversion—can qualify nonetheless as an appropriation for a beneficial use.[153] The issue has been raised in the context of attempts by environmental groups to preserve minimum stream flows for aesthetic and wildlife preservation purposes. A number of western states have ruled in favor of recognizing these environmental interests in maintaining minimum stream flows as permissible appropriations even though no physical diversion of natural stream flow is involved.[154]

Concern has been raised over the requirement that the water allocated must be placed in a beneficial use within the time specified by the State Engineer or the appropriation will lapse.[155] As in most western states, the water law of Utah has progressively increased the time allowed for completion of construction work required for putting the water to a beneficial use.[156] These changes were made to accommodate the increasing complexity, size, and cost of water reclamation projects. Initially, the general rule under prior appropriation principles was that the appropriation had to be accomplished before any rights arose. With the adoption of the permit system in 1903, actual appropriation was required within a reasonable time after the application gained approval from the State Engineer, or within a time specifically fixed by the State Engineer.[157] Now the time

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152. "The storage of water by means of a reservoir shall be regarded as a diversion." UTAH CODE ANN. § 73-3-2 (1980).

153. *See generally* Rampton, *Local, State, and Federal Rules in Water Resource Management* in UTAH WATER SYMPOSIUM 105, 108 (1979).

154. *See, e.g.*, State Dep't of Parks v. Idaho Dep't of Water Admin., 96 Idaho 440, 443-44, 530 P.2d 924, 927-28 (1974). The State of Washington has established environmental controls by requiring impact statements on all major water appropriations. Oregon has given appropriations for in-stream flow, though its statutory language also speaks of diversion. Most states also have provisions that allow the rejection of an application for a water right if granting the application would be against the public interest, which could be defined to require the maintenance of minimum stream flows. Sherton, *Preserving In Stream Flows in Oregon's Rivers and Streams*, 11 ENVTL. L. 379 (1981).

155. UTAH CODE ANN. § 73-3-12 (1980).

156. *Id.* § 73-3-12, Compiler's Notes.

157. Act of Mar. 13, 1919, ch. 67, 1919 Utah Laws 177, 193.

allowed is to be fixed by the State Engineer and may be extended "on proper showing of diligence or reasonable cause for delay" for a period not exceeding fifty years.[158]

Long waiting periods are endemic when a system, fraught with uncertainty as to the amounts of water in the source and the extent of outstanding claims of prior appropriators, must parcel out precise measurements of water interests. Because there may be a lengthy period between the date an appropriation application is approved by the State Engineer and the time the actual appropriation takes place, Utah law defines the status of ownership in terms of an inchoate interest that becomes perfected upon appropriation and then, for purposes of priority, relates back to the date the application was received by the State Engineer.[159] The statute expressly provides that even before the State Engineer acts on the application, rights claimed under it "may be transferred or assigned by instruments in writing."[160] A prospective appropriator can thereby acquire another, earlier application in order to gain the earlier date for priority purposes.

Once water has been diverted and stored, the statute permits nonmunicipal entities and individuals extended periods of nonuse, beyond the general five-year limit, in certain situations of "[f]inancial crisis, industrial depression, operation of legal proceedings or other unavoidable cause."[161] But even in these cases applications for extension must be granted by the State Engineer and are limited to further periods "not exceeding five years each."[162] Often cities expand water storage systems in anticipation of future growth. In order to accommodate the needs of municipal growth, the statute treats "the holding of a water right without use by any municipality" as a reasonable cause for nonuse.[163]

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158. Originally the extension period stipulated was 14 years, UTAH REV. STAT. § 100-3-12 (1933); then in later amendments it was increased to 20, Act of Mar. 11, 1936, ch. 130, § 100-3-12, 1937 Utah Laws 237, 239; then 40, Act of Mar. 13, 1941, ch. 97, § 100-3-12, 1941 Utah Laws 202, 202; and finally 50 years in 1947, Act of Mar. 13, 1947, ch. 142, § 100-3-12, 1947 Utah Laws 449, 449. UTAH CODE ANN. § 73-3-12 (1980).

159. Tanner v. Provo Reservoir Co., 78 Utah 158, 170, 2 P.2d 107, 111 (1931); Robinson v. Schoenfeld, 62 Utah 233, 239-40, 218 P. 1041, 1043-44 (1923). *See* UTAH CODE ANN. § 73-3-18 (1980).

160. UTAH CODE ANN. § 73-3-18 (1980).

161. *Id.* § 73-1-4.

162. *Id.*

163. *Id.*

2. The nature of the right to water

After the water right has been created, the holder is able to enforce it against others who would use the water. But there are limits: the statute sets priorities to be used by courts in deciding water cases, and some changes in use may require a new state certificate.

a. Priorities. One of the most valuable aspects of an appropriator's water rights is the priority position it enjoys against subsequently granted rights in the same source. In general the highest priority appropriation will be completely satisfied "before any subsequent appropriator shall have any right."[164] Thus, in times of scarcity the priority position held by an appropriator can be crucial. The statutes make exceptions to the general priority system by giving special preference to domestic uses against any others, regardless of the domestic appropriation's priority position.[165] A preference is also given to agricultural uses over appropriations for any purposes other than domestic use.[166]

When disputes arise among appropriators as to the extent or priority of their individual interests, the issues are adjudicated by the courts rather than the State Engineer.[167] Any party may bring a nonstatutory private suit on water rights, a suit similar to the quiet title action in land law.[168]

b. Changes in use; reuse; abandoned water. Even after obtaining a vested water right, an appropriator has only limited rights to make a change in the place of diversion or the place or nature of use. If the vested rights of other water users would be impaired in any way by the change, a new application must be filed with the State Engineer.[169]

The rights to an appropriator's waste water have been dealt with in numerous cases, which present illuminating perspectives

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164. *Id.* § 73-3-21.

165. *Id.*

166. *Id.*

167. *See, e.g.,* United States v. District Court of Fourth Judicial Dist., 121 Utah 1, 238 P.2d 132, *reh'g denied,* 121 Utah 18, 242 P.2d 779 (1951); Nephi Irrigation Co. v. Jenkins, 8 Utah 369, 31 P. 986 (1893).

168. Spanish Fork West Field Irrigation Co. v. District Court of Salt Lake County, 99 Utah 558, 561, 110 P.2d 344, 344-45 (1941). As an alternative remedy, a private party may submit a verified petition of "five or more or a majority of water users upon any stream or watersource," upon the receipt of which the State Engineer must file a general determination suit if he finds it is justified. UTAH CODE ANN. § 73-4-1 (1980).

169. UTAH CODE ANN. § 73-3-3 (1980).

of the interrelationship of appropriation rights and the effect of their abandonment.[170] The appropriator's right is a right to use the water, as opposed to a proprietary interest in the water itself. Since water flows and is continually being replenished, the same water can be used by numerous individuals before it has been consumed. In irrigation much of the water needed to flood a farmer's field will flow back into the stream as waste to be used by downstream appropriators. Yet, water that is appropriated to one farmer, although part of it is allowed to run back to the stream as waste, cannot be appropriated by another unless the owner intentionally abandons the right or fails completely to apply the runoff to a beneficial purpose within the statutory forfeiture period.[171] Thus, the farmer has the right to capture the waste water and reuse it on the same parcel for which the appropriation was made.[172] The appropriator may lose a portion by extended nonuse or by intentional abandonment. No other person has a right to use the farmer's water under a legally recognized appropriation until the full or partial appropriation somehow reverts back to the public, and even then the right to use abandoned water can only be initiated by making a new application for appropriation. On the other hand, the original appropriator is not automatically permitted to capture waste water that is part of the original appropriation and apply it to a beneficial use on a new parcel of land. In order to change the place of use of part of the appropriated water to a new parcel, the appropriator must once again apply with the State Engineer.[173] Such a change may not be approved "if it impairs any vested right without just compensation."[174] Thus, if any other appropriators will be damaged by the proposed change, the change cannot be made without just compensation even though the original appropriation may have been prior to the rights of the injured appropriators.

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170. McNaughton v. Eaton, 121 Utah 394, 242 P.2d 570 (1952); Smithfield West Bench Irrigation Co. v. Union Central Life Ins. Co., 105 Utah 468, 142 P.2d 866 (1943), *aff'd on rehearing*, 113 Utah 356, 195 P.2d 249 (1948); Torsak v. Rukavina, 67 Utah 166, 246 P. 367 (1926); Stookey v. Green, 53 Utah 311, 178 P. 586 (1919).

171. Torsak v. Rukavina, 67 Utah 166, 170, 246 P. 367, 368-69 (1926).

172. Stookey v. Green, 53 Utah 311, 319, 178 P. 586, 589 (1919).

173. UTAH CODE ANN. § 73-3-3 (1980).

174. *Id.*

3. Conveyancing of acquired water rights

All aspects of water law discussed thus far have been related to the initial allocation of unappropriated water within the state. Public controls and regulation are the essence of this creation stage of water rights. Water law has another side that relies heavily on private market forces in maximizing the *private* nature of water rights, although it retains the unique *public* character of water rights.

Up to the time a water right in previously unappropriated water is first established, water law must be characterized as a publicly administered system. The role, function, and influence of the State Engineer practically ceases, however, once the initial appropriator's water right is granted. The courts have noted that "the purpose of the law is to endow the appropriator of the water with all the insignia of private ownership."[175] Like a Dr. Jekyll-Mr. Hyde relationship, the system governing the ownership, transfer, and continuing use of water in the hands of assignees and successors to the original appropriator bears little resemblance to the public application process that gave rise to the original appropriation. With a few important exceptions,[176] the owner of water rights is in no different position than the owner of land. Each can convey and feel secure as owner, knowing there will be a minimum of public management of the process. Limitations arise naturally from the market system of exchange rather than from imposition by public decisionmakers.

The Utah statute provides, "Water rights, whether evidenced by decrees, by certificates of appropriation, by diligence claims to the use of surface or underground water, or by water users' claims filed in general determination proceedings, shall be transferred by deed in substantially the same manner as real es-

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175. Lake Shore Duck Club v. Lake View Duck Club, 50 Utah 76, 81, 166 P. 309, 311 (1917).

176. Special restrictions on the transfer of water rights often arise as a result of major federal reclamation projects. From an early date, for example, federal reclamation law limited water availability to owners of land with less than 160 acres. Act of June 17, 1902, ch. 1093, §§ 3 & 5, 32 Stat. 388, 388-89. However, the Supreme Court held in Bryant v. Yeller, 447 U.S. 352 (1980), that in at least some circumstances the limit is not enforceable. Federal water-development contracts with water conservancy districts may limit availability of water to individuals owning land within the boundaries of the district because the project is to be paid in part through general property assessments within the district. *See* Act of June 17, 1902, ch. 1093, § 6, 32 Stat. 388, 389. Thus, rights in federal reclamation projects are probably not as freely transferable as land titles.

tate. . . ."[177] As with land deeds, instruments transferring water rights are recorded in the county recorder's office.[178] This action is necessary in order to protect the owner of the water right against subsequent claimants by imparting to all potential claimants notice of the existence of the right.

Several special considerations arise in the conveyance of water rights. Normally, a water right is viewed as being appurtenant to the land on which the water is applied. The statutes expressly provide that a deed transferring land also conveys the water appurtenant to that land.[179] An appropriator desiring to convey land without the appurtenant water rights must expressly reserve the water interest so the grantee will be clearly notified that water rights were not included in the conveyance. An exception to this rule is made for water rights that are represented by shares of stock.[180] "[S]uch a water right, even though not expressly reserved in the deed, would not pass to the grantee in the absence of clear and convincing evidence that the grantor so intended."[181]

As with land interests, a water right is subject to being lost to a subsequent bona fide purchaser who first records an instrument conveying the same water right.[182] Also, water rights transferred in a land deed are insurable by title insurance companies.[183] Because deeds transferring water rights are filed with the County Recorder, abstracts prepared by title companies can trace the lineage of water rights as well as land title, and an attorney's opinion based on a study of the abstract is obtainable. A person whose water rights may be subject to certain defects of record can often defeat private claims based on those flaws through adverse possession,[184] although a quiet title action will be necessary to make it part of the record.[185]

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177. UTAH CODE ANN. § 73-1-10 (1980).

178. *Id.*

179. *Id.* § 73-1-11.

180. *Id.* § 73-1-10.

181. Brimm v. Cache Valley Banking Co., 2 Utah 2d 93, 100, 269 P.2d 859, 864 (1954).

182. UTAH CODE ANN. § 73-1-12 (1980).

183. Water rights not reserved to a mortgagor or conveyed to another are included in the mortgage and pass with the land as being appurtenant to it. Thompson v. McKinney, 91 Utah 89, 63 P.2d 1056 (1937).

184. As between *private* claimants, title can be acquired by adverse possession. Hammond v. Johnson, 94 Utah 20, 28, 66 P.2d 894, 900 (1937).

185. Despite the apparent similarity, recording of water rights is somewhat different from recording of rights in land. Some curative statutes available to provide greater as-

4. Restrictions affecting water rights

Special public restrictions affecting all water rights do exist. For example, the private rights are subject to being lost if the water is no longer used for beneficial purposes.[186] Landowners can allow land to sit unused indefinitely, but water rights automatically revert to the state if left unused for a five-year period. Another limitation has to do with changes in the nature or place of water use. So long as a conveyance does not result in a change in the water use, the transfer does not require approval by the State Engineer. But the administrator's control is triggered if the nature or place of water use is to be affected by a transfer.

IV. Potential Models from Western Water Law for Public Land Law Reform

A. Contrasting the Water and Land Laws in the Public Land Law Reform Context

Western water law has provided a viable, proven system for over 100 years. In general, the approach adopted has proven successful in accomplishing the essential purposes ascribed to the administrative processes involved; i.e., it has "maintain[ed] order and efficiency in the appropriation, distribution and conservation of water and allow[ed] as much water to be beneficially used as possible."[187] The task of developing a scarce and valuable public resource has been proceeding well and can be expected to continue. Major public concerns, such as conservation, are continuously addressed through a system that punishes nonuse by declaring appropriations forfeited if beneficial uses cease.[188] The system also appears to be flexible enough to promote new values in response to changing conditions. The list of beneficial uses, for example, was extended in 1971 beyond its exclusively development orientation when the Utah Legislature added public recreation and natural stream environment as pre-

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surance to land titles are of no help to water rights owners because water rights are excepted from the claims cut off by the statutes. For example, water rights claims preceding the root of title in Utah's Marketable Record Title Statute are still valid despite the elimination of most other ancient claims. Utah Code Ann. § 57-9-6 (1953).

186. Utah Code Ann. § 73-1-4 (1980).

187. Bullock v. Hanks, 22 Utah 2d 308, 311, 452 P.2d 866, 868 (1969) (quoting United States v. District Court of Fourth Judicial Dist., 121 Utah 1, 12, 238 P.2d 1132, 1137 (1951)).

188. Utah Code Ann. § 73-1-4 (1980).

scribed considerations that are not to be unreasonably affected by proposed water appropriations.[189] The basic objectives and legal institutions in western water law have remained the same over time.

Public land law started out with purposes similar to water law. Large stretches of land were initially held by the public under a guiding policy that favored productive use through distribution to private individuals. One marked difference between water and land distribution systems was the level of government which took responsibility for administering disposition of the respective resources. Congress retained federal control over disposition and administration of public lands. On the other hand, the states and territories have from the beginning asserted authority over the appropriation of water, with passive acquiescence and a policy of noninterference by the federal Congress. One of the keys to the continuing success of water law systems is probably this local control characteristic. Each state or territory is allowed to administer water resources in a manner tailored to fit local conditions. Two distinctly different doctrines—riparian and prior appropriation systems—grew to meet specialized needs of the East and the West. The standardization which resulted from having all land programs administered from Washington, D.C. under general land laws applicable to all parts of the nation undoubtedly accounts for many of the differences between federal public land law and state water law.

The conditions under which federal land law developed have changed. In many areas, undeveloped land, historically readily available, has become a scarce and extremely valuable resource. In the same way that western water law grew out of special adaptations for allocating a very scarce resource, we might fully expect land laws to change and become more restrictive in an effort to more effectively use the available land resources, especially those which remain undeveloped.

1. The application of water law principles to the concerns to be addresed in land law reform

It may be expected that as lands in the public domain are disposed of for development, some new forms and means of ownership—some kind of modified private property rights—will be developed. The increasing scarcity of undeveloped land requires

189. *See supra* note 137.

that new laws affecting distributions of land from the public domain be designed, as was water law, to reduce and eliminate abuses found on private land holdings under existing land laws. Some of the main concerns to be addressed by new laws are (1) speculative purchases and nonuse of productive property, (2) overexploitation of natural resources for current profits with inadequate consideration of future consequences, (3) absentee ownership, (4) monopolization or wealth accumulation, and (5) environmental depredations.

a. Speculation and nonuse. Speculative land purchases are a significant problem. This practice allows investors to purchase land without any intent of putting property to a productive use that will benefit society. Rather, the sole purpose is to hold the property until its market value has appreciated significantly so that the investor can make profits by selling the land. Such owners are able to take advantage of the market system for land transfers, reaping windfall profits from the mere investment of capital without doing anything to improve the property's intrinsic value. Society loses the benefits of the land's potential yields during the period of nonuse. Speculation is tolerated in our land law system now, but it causes inefficiencies in an economy where the demand is great enough that other investors are readily available who would put the land to a beneficial use. There is no means in current land law by which such inefficiencies can be eliminated.[190]

In western water law, problems of nonuse and speculative holdings are significantly reduced through the principle that an applicant for a water allotment must show that the water will be put to a beneficial use. Even after the water right has been obtained, the owner must continue to beneficially use the water or he will lose the water right through abandonment. The owner will transfer the right to another rather than lose it through nonuse. Because of that impetus to transfer the right to someone who will use it, the market system mechanism may be relied upon to place the scarce water resource in its most valuable use. But there are two problems associated with the beneficial use prerequisite for water rights ownership. First, the owner's water right is generally limited to use on a specific parcel of land if it is being used for irrigation. Owners thus generally have no in-

190. The only check on these abuses is the public power to tax lands, which reserves some benefits for the public from those parcels that are privately owned but unused.

centive to improve the efficiency of their irrigation systems to reduce evaporation and seepage losses because any water saved must be returned to the stream for use by other appropriators.[191] A second concern, arising more forcefully in recent years, is the emergence of new nonagricultural uses for water. For example, coal-powered and nuclear power plants need large quantities of water to cool power generators.[192] Because developers of such uses are willing to pay more for water rights than agricultural users will pay, water transfers will be made to the more profitable power uses.[193] Many voice concern that the agricultural resources needed to keep a region self-sufficient will be lost as water rights are transferred to the power industries, resulting in the destruction of entire social patterns and lifestyles of a region with too little water to serve both energy and agricultural needs. In the case of water law, however, these concerns can be alleviated by legislation that extends the existing public control system to preserve the interests of the public when threatened by the market system. Without such public involvement, the market would dictate a shift from agricultural to industrial uses.

Some areas of the country allocate water that is too scarce to meet all agricultural, industrial, and other demands by ranking specific uses in a preference order.[194] For example, a jurisdiction decides that the first priority use of water is for municipal purposes, the second for agricultural uses, the third for industrial needs, and the fourth for recreational benefits.[195] Lower ranking priorities cannot be satisfied as long as higher preferences remain unfulfilled. The market system allocates water within a given preference grouping, but shifts from one type of use to another are restricted and cannot be accomplished with-

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191. *Cf.* Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1974); C. MEYERS, *supra* note 5, at 134-36. Some jurisdictions do permit irrigators who make improvements in their ditches and watering systems to keep whatever water they save for use on new parcels of land or sale to other water users.

192. Reynolds, *Power Plant Cooling Systems: Policy Alternatives,* 207 SCIENCE 367 (1980). Both coal-fired and nuclear plants generate electricity with steam. In systems that pass outside water once through the system, 40% of the heat is dissipated by evaporation. In cooling tower systems, this figure is 80%. In both cases tremendous volumes are necessary for the cooling process. These uses are consumptive; once the water evaporates it canot be recaptured. *Id.* at 371.

193. Bagley, *supra* note 76, at 37.

194. *See* Thomas, *Appropriations of Water for a Preferred Purpose,* 22 ROCKY MTN. L. REV. 422 (1950).

195. *See* Fisher, *Western Experience and Eastern Appropriation Proposals, The Law of Waste Allocation in the Eastern United States* 75 (Haber & Bergen eds. 1958).

out a change of use permit.

b. Overexploitation of natural resources. Another serious problem associated with land ownership is the potential that the profit motive will lead to overexploitation of natural resources without adequate consideration of future consequences.[196] The danger of overexploitation exists to the degree private owners are permitted to do anything they wish with their property. At one time it may have been possible for private landowners to overgraze or erode their lands through unwise farming or ranching practices, inasmuch as they could leave the abused land behind and find new parcels of virgin land to exploit. Now, however, the same farmers would have to reckon with the fact that they cannot simply leave their old land and move to new land without cost. This constitutes an increased incentive to wisely husband and conserve the property to the degree renewable resources can be harvested on a sustained yield basis. With depletable resources an owner must carefully calculate the potential reduction in the value of the land in determining whether present consumption of the resources is desirable.

Exploitation is also a problem for publicly owned but privately used lands. It is persuasively argued that public ownership, in which natural resources are available to all, results in even greater exploitation of resources than private ownership because the present profits obtainable are enjoyed fully by the developer while the costs of consumption are spread across society as a whole.[197] Thus, individuals acting in their own self-interest will tend to use presently as much of the common resource as they can because the benefits they receive for increased use are high, while the future costs of increased use to them are nominal. The natural consequence of this predictable course of events is called the "tragedy of the commons."[198]

Although problems of overexploitation are addressed in prior appropriation systems, western water laws have not succeeded in equitably resolving all of those problems. For example, most states have applied the same prior appropriation principles

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196. *See* N. WOOD, CLEARCUT 56-80 (1980). This Sierra Club diatribe against the logging industry presents in a fairly articulate way the concerns of environmentalists with the depredations they preceive to be a result of the profit motive.

197. Baden, Simmons & Fort, *Environmentalists and Self-Interest: How Pure Are Those Who Desire The Pristine?* in EARTH DAY RECONSIDERED 13 (J. Baden ed. 1980).

198. *See supra* note 31 and accompanying text.

to both ground water and surface water.[199] The problem is that ground water may or may not replenish itself. The prior appropriation system is well-designed for allocating a renewable resource by setting up a priority distribution scheme. It is not suited, however, to meet the conservation or preservation needs which many feel must be met in the case of ground water.[200] Arizona, which is heavily dependent on ground water, especially in the major municipal areas around Phoenix and Tucson, has adopted a strict new ground water law that places severe limits on the amounts of water that can be mined.[201] The approach is a major deviation from prior appropriation doctrines and will undoubtedly be copied in other jurisdictions facing dangerous reductions of ground water resources.[202]

Lessons from water law suggest that in dealing with some aspects of land use and ownership it may be appropriate to apply general water law doctrines such as prior appropriation and beneficial use limitations, particularly if the land resource is not permanently depletable. But for the land resources which are fully and irretrievably consumable, such as hard minerals, or oil and gas, other property systems may have to be developed.

c. Absentee ownership. Land, unlike many other types of real or personal property, cannot be removed from its location. Although the land's natural resources may be mined and exported, an owner of land must enjoy and possess the land where it is or not at all. Unlike water, land cannot be sold out from under a state or local jurisdiction; i.e., it cannot be removed and used someplace else. Nonetheless, there is concern about increased ownership of land by nonresidents. A jurisdiction is naturally jealous of the control it can exercise over the land within its borders. When the owners are local residents, the jurisdiction's control extends not only to the land itself but also to its occupants and owners. Local owners are personally and economically affected by the services rendered by the state or locality and are thus vitally interested in the quality of those services. Absentee owners, on the other hand, will be concerned not with the quality of life in the jurisdiction, but only with the impact of local decisions on the value of their investment in land.

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199. *See, e.g.*, F. TRELEASE, *supra* note 5, at 448-50.

200. *Id.* at 462-65.

201. ARIZ. REV. STAT. ANN. §§ 45-401 to -631 (1956 & Supp. 1981).

202. *Arizona Enacts Ground Water Management Law*, 8 WATER LAW NEWSLETTER No. 3 (1980).

Water rights may also be obtained by absentee owners, but such owners do not escape the law's beneficial use requirement. In general, water is used on land or in an industry in the vicinity of the source of the water. When water is to be used outside state boundaries, the state from which the water is diverted may lose some control over that water. Some courts have declined to permit a state to limit the use of its waters on lands in an adjacent state.[203] So long as the water is being used beneficially, the location of the land being benefitted becomes irrelevant.[204] Thus, while it is clear that water law does not prevent, and may in fact encourage, sale of water rights to outsiders, under a prior appropriation system, anyone owning water rights must place the water in a beneficial use approved by some jurisdiction.

d. Monopolization. Throughout the history of land disposal to private citizens, Congress has guarded against the undue concentration of land holding in the hands of a wealthy few. In order to make land available to a large number of individuals on an equitable and democratic basis, the homestead laws limited the amount of land an individual could obtain.[205] Because land is sold on private markets, however, the land policy goal of avoiding monopolization by preventing accumulations of large land areas by a few wealthy individuals was not fully realized.

Water law provided tools by which the problems of concentration of water resource rights in the hands of a few could be prevented. As huge water reclamation projects became possible, means were developed to pool the financial resources of many to pay for dams, pipelines, and ditches. Thus joint stock companies and other cooperative groups of water owners joined forces in early frontier days to develop projects too big for the individuals by themselves.[206] Later, political subdivisions for water projects were developed.[207] These water districts could reach not only the

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203. *E.g.*., City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966).

204. These kinds of transbasin, interstate transfers of water are increasingly common, as are interstate compacts allocating water among states through which a stream flows. F. TRELEASE, *supra* note 5, at 669-71.

205. *See* P. GATES, *supra* note 1, at 393-94. An exception to this general policy was the grant of huge amounts of land to private railroad companies as a subsidy and incentive for railroad expansion. It was anticipated, however, that the railroads would turn around and sell most of this land to private individuals. Also, in certain areas the amount of land initially allocated to individuals was directly related to the amounts of land they could reasonably improve and cultivate. *Id.* at 393-99.

206. *See* P. GATES, *supra* note 1, at 635-38.

207. *See* F. TRELEASE, *supra* note 5, at 614-18.

water owners in the area for financial support, but also had taxation and property improvement assessment powers, and other traditional forms of political power ordinarily granted to cities, counties, and other political entities. The shift from private forms of cooperative enterprise to quasi-public forms of obligation has allowed maximized development, distribution, and use of water resources in a way that prevents individuals from accumulating or controlling large amounts of water rights.

e. Environmental depredations. The final category of enumerated concerns is environmental depredation. Neither land nor water ownership systems have any built-in controls against such abuse, although specific legislation has been developed imposing environmental regulations on all owners of land and water in an attempt to protect the quality of the air, water, and environmentally sensitive features of the land itself.[208]

An attempt has been made in water law systems to allocate water directly to environmental purposes. Permits have been sought for the specific purpose of maintaining minimum flows in a river or stream.[209] When such permits are granted and the appropriations receive special priority, appropriation rights with lower priorities must go without their allotted shares once the stream drops below a specified minimum flow. To ward off attacks by opponents of this use of appropriation principles, some states have found it necessary to amend their water statutes or enact constitutional provisions to achieve environmental objectives by including preservation of minimum flow levels as a beneficial use for water.[210] Congress has also used its jurisdiction over navigable streams and waterways[211] to prevent environmentally objectionable activities on interstate waters.[212]

2. *An area of additional concern: federal water rights*

In its efforts to avoid problems in future public land dispo-

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208. *Id.* at 540-89.

209. *In re* Donald E. Bevan v. Washington Dep't of Ecology, Washington Pollution Control Hearings Board No. 48 (1972).

210. *See, e.g.,* WASH. REV. CODE ANN. § 90.22.010 (1962 & Supp. 1981). *See also* OKLA. STAT. ANN. tit. 82, §§ 1451-1458 (West 1970 & Supp. 1981).

211. This power is based upon the congressional power to regulate commerce, U.S. CONST. art. I, § 8, cl. 3, and arises from treating navigable waters as highways.

212. Under 33 U.S.C. § 701a (1976), navigation improvement and flood control projects were to be approved only if benefits equal costs. Nonreimbursable items such as fish and wildlife improvement must also be subjected to this benefit-cost analysis. F. TRELEASE, *supra* note 5, at 753.

sition programs, Congress should also give attention to a major flaw in western water law systems. The Federal Government's passive acquiescence in state water law administration has given rise to serious, unresolved clouds on water rights in all the western states. Congress should, for the sake of making property institutions in western water law secure, make an unequivocal grant, transfer, or release of federal claims to water rights other than those federal appropriations that have already been made or applied for.

Without having ever received any type of full conveyance, western states have proceeded to assign water interests to appropriators as if the individual states legally owned the waters within their borders. Although Congress undoubtedly has the power to strip states of any authority over their water resources, it has been reluctant to interfere with state water appropriation systems because of the upheaval and disruption such a challenge would cause. Individuals and organizations that have received appropriation rights in water from the states would initiate difficult controversies under the assertion that their property had been taken and that they are entitled to just compensation. This practical limit on congressional power is probably sufficient assurance that existing water rights systems will never be challenged in any general way, but the uncertainty generated by the undefined status of federal rights in water resources is sufficient to require that any forthcoming public land law reform measure adopted by Congress deal with water by expressly conveying to the states all interests in water beyond those which have already been claimed and recognized.

a. History of federal rights to western water. A brief historical overview of the conflict concerning federal-state jurisdictional powers over water law will illustrate the problem that currently exists. The states unilaterally began to assert jurisdiction over water allocations in disregard of any federal powers. In fact, state decisions setting up a prior appropriation policy granted property rights that under riparian doctrines would have belonged to the Federal Government. The first United States Supreme Court case to deal with the question of state versus federal jurisdiction over water on the public domain was *California-Oregon Power Co. v. Beaver Portland Cement Co.*[213] The Oregon landowner of streamside property challenged the Oregon prior

213. 295 U.S. 142 (1935).

approriation doctrine on the ground that the federal land patent under which he owned the land included the common-law rights of a riparian owner to the stream running alongside the land. The Supreme Court denied the owner's claim and upheld the right of the state to choose its own water law doctrines, even though adoption of the prior appropriation doctrine would give the Federal Government or patentees of lands originally owned by the Federal Government no special right to water ahead of the state-designated appropriators.

The holding of the case rested on construction of the Desert Land Act of 1877, in which Congress, as in the public land acts of 1866, 1870, and 1872, affirmed the view that private water rights on federal land were to be governed by state and local law and custom.[214] Each of these acts, dealing with disposition of lands or mining claims in the federal public domain, expressly deferred to the laws and customs of the individual states on water allocation issues. However, none of the acts contained any clear-cut conveyance or release of the federal claims to the water itself. Unlike the title to land resources, the Federal Government did not assert title claims to water, nor did it take control of the disposition of water as it had with land under the administration of the General Land Office.

The Federal Government has, however, asserted some rights dealing with water. One recognized limitation to state power over water resources is federal control over navigable waterways. Congress has power under the commerce clause of the Constitution to "secure the uninterrupted navigability of all navigable streams within the limits of the United States."[215] Acts of Congress interfering with the current system of state-aministered water allocations may be justified by other constitutional powers as well, including those under the property clause,[216] the common defense clause,[217] and the general welfare clause.[218] Congress has used these powers to preempt state water law systems in particular cases of individual reclamation projects and developments[219] and in specific interstate apportionment laws.[220] For

214. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154-56 (1935).

215. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).

216. U.S. CONST. art. IV, § 3, cl. 2.

217. *Id.* art. I, § 8, cl. 1.

218. *Id.*

219. *See, e.g.*, First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152, 171 (1946).

example, Congress ended the major argument concerning division of Colorado River water by adopting the Boulder Canyon Project Act of 1928.[221] In theory, Congress could completely take over the administration of all water law programs and invalidate all state legislation regarding water rights.

b. Current federal-state relationships: cooperative federalism. Congress has, to date, restricted its use of the powers available under the Constitution and instead adopted a system of concurrent state and federal jurisdiction over water, with a history of federal approval or acquiescence in state activities. The current status of what the Supreme Court referred to as "cooperative federalism" was delineated in the reclamation project context in the 1978 case of *California v. United States.*[222] There the Federal Government sought an order declaring that the United States "can impound whatever unappropriated water is necessary for a federal reclamation project without complying with state law."[223] The Ninth Circuit had affirmed the trial court's decision that the United States must follow the state's appropriation application procedure but that the state may not impose any conditions in granting the appropriation if unappropriated water is available. In an opinion by Justice Rehnquist, the Supreme Court reversed the holding "that California cannot condition its allocation of water to a federal reclamation project."[224] The decision did not rest on the permissible extent of congressional power, which as noted above is unquestionably broad enough to justify total federal preemption of state law in connection with federal water projects. Rather, the Supreme Court construed the Reclamation Act of 1902 in declaring:

> [I]t is clear that state law was expected to control in two important respects. First, . . . the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law. . . .
>
> Second, once the waters were released from the Dam, their distribution to individual landowners would again be con-

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220. Arizona v. California, 373 U.S. 546, 585-86 (1963).

221. Ch. 42, 45 Stat. 1057 (codified at 43 U.S.C. §§ 617-617t (1976)). Congress ended only part of the argument by dividing the waters of the Colorado between the Upper and Lower Basin states. The other Lower Basin states, Arizona and Nevada, still were not guaranteed specific apportionments. California was, however, given a limit. The waters were not finally allocated until the division in Arizona v. California, 373 U.S. 546 (1963).

222. 438 U.S. 645 (1978).

223. *Id.* at 647.

224. *Id.*

trolled by state law.[225]

An important caveat to this congressional position "of purposeful and continued deference to state water law"[226] is that "state water law does not control in the distribution of reclamation water *if* inconsistent with other congressional directives to the Secretary."[227]

This position does pose a threat to the security of state water law systems, however, by leaving important water rights vulnerable to a change in congressional policy. The existence of the immense potential powers of Congress to upset these property institutions makes it preferable for the Federal Government to expressly affirm the "deference to state water law" doctrine by directly granting the ownership of water resources to the states. If a transfer of large portions of federal lands in the public domain ever materializes, a clarifying transfer of federal claims in nonnavigable waters should also be made to the states. In that way the historical pattern of allowing states to take control of water administration would be set on a firmer basis.

c. The federal reserved water rights doctrine. In addition to the problem caused by the uncertain division between federal and state control of the allocation of water rights, the Federal Government can make many potentially open-ended claims as a proprietor with a superior priority position relative to other appropriators. This is the issue raised by the federal reserved water rights doctrine, originated in the 1908 Supreme Court case *Winters v. United States.*[228] The Court held that land reserved by the United States as an Indian reservation carried with it by implication a reservation of enough water to meet the purposes for which the land was withdrawn from the public domain. Thus, the Indians were given a right in the water, dating from the creation of the Indian reservation, that was superior to the claims of subsequent appropriators. Later, the *Winters* doctrine was extended to all federal reservations and enclaves, including army bases, national forests, and wildlife refuges.[229]

Particularly since the 1963 *Arizona v. California*[230] decision, the potential effect of extensive claims based on federal reserved

225. *Id.* at 665, 667.
226. *Id.* at 653.
227. *Id.* at 668 n.21.
228. 207 U.S. 564 (1908).
229. F. TRELEASE, *supra* note 5, at 792-811.
230. 373 U.S. 546 (1963).

water rights has been a serious concern. A major problem is that the measure of potential reserved rights has rarely been quantified. State appropriations must proceed on the basis of granting permits subject to existing rights, which might include some unquantified federal Indian or non-Indian reserved rights. Are the rights measured by the needs of the reservation at the time of its creation, or may new uses that may not have been foreseen at the time of creation qualify for priority treatment today?[231] Are the reserved rights owned by an Indian or a tribe transferrable? Are reserved rights permanent, immune from the usual doctrine of abandonment or statutory forfeiture?

Two recent Supreme Court cases have helped reduce the potential problem posed by the reserved water rights doctrine. First, in *Colorado River Water Conservation District v. United States*,[232] the Court determined that state courts could adjudicate all water rights claims on a river system. Thus, even owners of federal reserved rights, in this case Indians, are subject to state court determinations. As a result of this decision, state administrators can seek to obtain by court decree a definite quantification of each claimant's rights, including the extent of any reserved rights of those claiming under the United States. This brings a degree of certainty necessary in order for a state to properly administer a comprehensive priority system of water rights.

In 1978, the Supreme Court placed additional limits on the reserved rights doctrine in *United States v. New Mexico*.[233] The U.S. Forest Service sought an expansive determination of its reserved rights, including the recognition of "aesthetic, recreational, and fish-preservation purposes"[234] where such water uses now exist. The Court held that although the water rights were

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231. Some answers to the question have been suggested by Colville Confederated Tribes v. Walton, 460 F. Supp. 1320 (E.D. Wash. 1978), *rev'd in part*, 647 F.2d 42 (9th Cir. 1981). In that case the district court upheld, under the reserved rights doctrine, an increase in the amount of water used for irrigation as the tribe expanded its agricultural production, reasoning that the water rights were reserved for the purpose of allowing a nonagricultural tribe to develop an agricultural society. However, the court declined to uphold an appropriation of water for a trout spawning ground. It found that the spawning ground was not necessary; thus, since it was a new use arising well after the establishment of the reservation, it was not entitled to a priority appropriation dating back to the reservation's establishment. The Ninth Circuit reversed that portion of the decision, holding that the tribes could have the water necessary for trout spawning.

232. 424 U.S. 800 (1976).

233. 438 U.S. 696 (1978).

234. *Id.* at 705.

reserved at the time the national forest was set aside from other public lands, the early priority position applied only to such water "as may be necessary for the purposes for which [the land was] withdrawn."[235] Those purposes were only "to conserve the water flows, and to furnish a continuous supply of timber for the people."[236] New, expansive purposes established later could not be counted in measuring the extent of the federal reserved water rights. The Court described the doctrine of federal reserved water rights as one "built on implication, [which] is an exception to Congress' explicit deference to state water law in other areas."[237]

It is obviously preferable for all parties involved to quickly resolve and quantify any outstanding reserved rights. These two decisions will ease the administration of the water systems by eliminating the disruption caused by unascertainable federal rights.

d. The "unreserved" water rights doctrine. Despite the assurance found in the decisions, the potential uncertainty of state-granted water rights was again demonstrated by a 1980 proposed opinion by the Interior Department Solicitor[238] which theorized an even larger federal claim to water under the so-called unreserved water rights doctrine. The basic thesis is that the Federal Government remains the owner of all unappropriated water because it has never given up its rights as original owner of all land and water in the West. The opinion was retracted before it had been officially issued,[239] but the argument remains a potential problem. As with other areas of potential federal-state conflicts, the best solution here would be an explicit transfer to the states of all federal claims to water except those which have been applied for or appropriated to the United States by the states or which have previously been reserved.

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235. *Id.* at 698.

236. *Id.* at 707.

237. *Id.* at 715.

238. *Solicitor Issues Opinion on Federal Water Rights,* ROCKY MTN. MINERAL LAW FOUND. WATER LAW NEWSLETTER, Vol. XII, No. 3, p. 1, (1979); Comment, *Federal Non-Reserved Water Rights,* 1980 LAND & WATER L. REV. 67, 72.

239. *See Solicitor's Opinion on Non-Reserved Rights Amended,* ROCKY MTN. MINERAL LAW FOUND. WATER LAW NEWSLETTER, Vol. XIV, No. 2, p. 1 (1981).

3. The ability of land and water law systems to meet defined objectives.

Unlike the relatively stable approach that characterizes water law, public land law has undergone major shifts in goals and approaches. The distribution policy that governed public land systems throughout the 19th century was officially replaced in the 1976 Federal Land Policy and Management Act by a policy generally favoring retention.[240] This made statutory a major shift in direction that had been gaining momentum throughout this century as conservation, preservation, and environmental protection philosophies tempered the exploitation and "development-at-any-cost" extremes of earlier generations.

Distribution of public lands to private interests for development was nearly complete in states and territories east of the Great Plains. The fact, however, that the Federal Government still holds one-third of the nation's lands, principally large portions of many of the western states,[241] is evidence of the failure of federal programs to complete the once-mandated disposal objective. The combination of cash and credit sales, recognition of public land squatters' preemption rights, and the idealized national homesteading programs were sufficient to accomplish the 19th century federal disposition goals in states as far west as Nebraska and Kansas. But no amount of tinkering with homesteading regulations was successful in disposing of much of the desert and mountain lands in the West to private ownership and development.[242]

Conservation and environmental protection advocates likewise contend that public land administration has fallen far short of accomplishing adequate protection of public lands.[243] On those lands that have been distributed, renewable resources like timber and grazing lands have been overexploited by settlers and developers who ravished the land as much as they could and then moved on leaving wastelands behind them.[244] Public administrators have been accused of mismanaging retained public lands.[245] Inconsistent approaches and shifting policies have re-

240. 43 U.S.C. § 1701(a)(1) (1976).

241. *See supra* note 9 and accompanying text.

242. *See* P. GATES, *supra* note 1, at 495-529, 635-98.

243. *See* N. WOOD, *supra* note 196; D. BARNEY, THE LAST STAND (1974); LAND USE CONTROLS IN THE UNITED STATES (E. Moss ed. 1977).

244. N. WOOD, *supra* note 196.

245. D. BARNEY, *supra* note 243, at 69-131.

sulted from changing political appointments.[246]

It appears that public land law has been far less successful than western water law in achieving the objectives of two competing basic philosophies—development and conservation. The debate seems to be growing as to which should be emphasized in public land law. Western water law seems to have achieved a reasonable balance, satisfying both of these competing policies without resorting to the extremes of promoting either development or preservation to the general exclusion of the other.

B. Current Developments in Public Land Law Reform

1. Federal developments: The Federal Land Policy and Management Act of 1976

Currently, public land law is undergoing close reexamintion and challenge. Congress began this process in 1964 when, acknowledging the need for a comprehensive review of public land laws, it authorized creation of the Public Land Law Review Commission.[247] In 1970 the Commission published a report making numerous reform recommendations.[248] The congressional response to the report was the Federal Land Policy and Management Act of 1976 (FLPMA).[249]

In several ways the FLPMA marked a new direction for public land law. For example, Congress adopted the Public Land Law Review Commission's recommendation that

> the policy of large-scale disposal of public lands reflected by the majority of statutes in force today be revised and that future disposal should be only of those lands that will achieve maximum benefit for the general public in non-Federal ownership, while retaining in Federal ownership those whose values must be preserved so that they may be used and enjoyed by all Americans.[250]

The general premise of land law was changed from disposition to preservation.[251] In general, however, the FLPMA appeared to

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246. *Id.* at 106-31.

247. Act of Sept. 19, 1964, Pub. L. No. 88-606, § 3, 78 Stat. 982 (originally codified at 43 U.S.C. § 1391 (1964)) (omitted when commission expired).

248. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970).

249. Federal Land Policy & Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744.

250. PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 48, at 1.

251. Current economic and political pressures are encouraging some changes in this

freeze the status quo until management agencies could complete the mandated classifications of public lands,[252] formulate statements of purposes for federal lands,[253] and promulgate new rules for managing retained lands[254] and disposing of lands[255] where such disposition would maximize public objectives.

The result of the FLPMA has been widespread analysis and evaluation of existing public land administration. It remains to be seen what actual changes will be made in specific rules and programs. Claims by some angry critics[256] that the FLPMA was designed to permanently place public lands in federal ownership and to lock out private interests from traditional opportunities to enter, use, and purchase lands in the public domain are overreactions to the Act's attempts to halt former disposal options pending the assessment of past programs, present concerns, and future needs.

2. *State pressures: the "Sagebrush Rebellion"*

The western states have also directly challenged the basic approaches to public land law through a series of legislative actions popularly known as "Sagebrush Rebellion" bills.[257] Proponents of the bills contend that the states rather than the Federal Government should control the public lands. Typically the measures provide that all public lands "not previously appropriated are the property of the state . . . and subject to its jurisdiction and control."[258] Acts declaring the state as owner of all BLM lands and wilderness areas[259] have been adopted in Nevada, Utah, Wyoming, Washington, New Mexico, and Arizona.[260] The Colorado legislation was vetoed by the governor.[261] Nevada has

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approach. A proposal to sell public lands in order to retire the national debt is being considered by the Reagan Administration and has already drawn considerable criticism from environmental groups. *See* Salt Lake Tribune, Feb. 18, 1982, at 16A, col. 1.

252. PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 248, at 2.

253. *Id.*

254. *Id.* at 2-3.

255. *Id.*

256. *See* Smith, *The Tragedy of the Commons, The Public Domain, and Private Ownership of Natural Resources,* in PROCEEDINGS OF THE NATIONAL CONFERENCE ON STATES' RIGHTS 320 (1980).

257. *See supra* note 25.

258. Nev. A.B. 143, § 5.1 (1979).

259. This declaration is by negative implication, since these lands are not among those exempted from the Act. *Id.* § 52.

260. *See supra* note 25.

261. Deseret News, June 6, 1981, at B3, col. 6.

prepared for possible litigation to test its claim against the Federal Government.[262]

Various bills have been introduced in Congress by Sagebrush Rebellion proponents. The first of these proposals, the Western Lands Distribution and Equalization Act of 1979,[263] would establish procedures for transferring federal public lands to the eleven states west of the 100th meridian. The newest revised bill is entitled the Public Land Reform Act of 1981.[264] It would give western states the right to apply to have certain public lands turned over to state ownership. In response to major concerns raised over the former proposal, this new bill would restrict subsequent transfers of public lands to private interests. Private disposals and sales would be restricted under the same guidelines[265] that presently limit transfers from the public domain in the Federal Land Policy and Management Act.

C. *A Proposal for Applying Water Law Principles to Public Land Law Reform*

During this period of public land law reform, careful attention must be given to institutional and procedural systems that could serve as appropriate vehicles for effecting needed reforms. If pressures for transfer of major portions of federal public lands to the state bear fruit, then means must be developed by which the states may decide issues regarding distribution or retention of state public lands. Because the western states have successfully administered their public water resources over the years, it seems natural to find in western water law systems a model for administering utilization and ownership of public lands as well.

1. *Creation of "private 'public' lands"*

Land now transferred from the public domain to private interests is stripped of all its public character and treated the same as any other private lands. But there is no reason why a middle ground between public and private domain could not be created. In addition to retaining public and private land designations, it would be possible to create a new category, perhaps

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262. Note, *supra* note 23 at 512-13, 515-25. Litigation is being delayed as states await congressional action.

263. S. 1680, 96th Cong., 1st Sess. (1979).

264. S. 1245, 97th Cong., 1st Sess. (1981).

265. 127 CONG. REC. S5380 (daily ed. May 20, 1981) (statement of Sen. Hatch).

called private "public" lands, to cover private interests hereafter created in lands now within the public domain. Like water, a resource statutorily declared to be public property, these private "public" land interests could be considered to be private interests in a public resource and subjected to a different statutory system than traditional private land titles.

A purchaser of private "public" lands would obtain a fee "use" interest. The reason it would be referred to as a fee interest is that it would constitute a constitutionally protected property right. An example might be a fee grazing interest in land. Whereas under the present system the government can terminate a grazing permit administratively, even though such permits are very valuable and are calculated into the price of ranches when they are sold, under a fee system the owner could not be deprived of his interest, even in theory, without due process of law and just compensation. However, his interest would be merely a use interest, not a fee simple; though he owned the grazing rights, he could not, for instance, strip mine the land. Therefore, though the private individual owned a use interest in fee, the public would retain the remainder use interests unless they too were sold. Hence, the land, though privately held for some uses, would still be "public" as well.

All future transfers from the public domain could be structured so the private interests created would fall into either the existing private property category or the new private "public" interest category. Guidelines could be established in the federal laws delineating requirements for transfers into either of these groups. The general rules should place most future public land dispositions into the private "public" land category to take advantage of the specific public controls retained over such properties. Exceptions could be allowed for specific properties, perhaps based on parcel size, the nature of the probable uses, or the value per acre of the property at the time of its transfer. For example, all agriculturally useful lands purchased by private entities from the public domain for more than a specified price per acre and in excess of a prescribed number of acres could become purely private property.

Private property interests in the form of use rights would arise in those who received use rights and placed the land to a beneficial use. As with water, the private use rights would revert back to the state if the beneficial use of the land ceased. However, as with water rights, actions would be initiated by those

who wished to challenge the right-holder's beneficial use rather than by the state, allowing the system, after initial creation of the right, to virtually run itself.

This approach would require the development of an appropriation system to give private property interests in these "public" lands to those who will put the lands to a beneficial use. The system could be administered by a State Public Lands Administrator, whose functions in land matters would be similar to those of the State Engineer in water matters. Applications to the Administrator would be required in order to qualify for a certificate of land use. The approval to use the land for any beneficial purpose would be granted if there were no protests filed, provided the State Administrator determined the land appropriation would be in the public's interest.

The application and certificate would be necessary prerequisites to obtaining private "public" land interests, but the right would not come into being until the actual beneficial use was accomplished. Any change in the nature of the land use would require an application and approval by the State Administrator. The application would have to be denied if other private "public" land interests were impaired.

2. *Allowing for multiple uses*

A major benefit of this proposed private "public" land system would be the possibility of allowing multiple uses of the same property.[266] One person might obtain a grazing right, another could have a recreation use right, and a third might have the oil and gas development rights for the same parcel. The State Administrator could grant all three interests so long as it appeared that none of the interests would unduly interfere with the others.

There would need to be a recognized priority system imposed on the land for those occasions when the land uses that had been granted could not all be accommodated. The date each land user's interest arose would determine the general priority position each enjoyed relative to the others. A preference system could be superimposed on the general priority positions, so that

266. While present federal policy is to promote multiple use, the federal version envisions continued federal management, 43 U.S.C. § 1701(a)(7) (1976), with its attendant costs. The proposal in this paper presupposes very low administration costs once the system is set up, since challenge to existing uses will be mounted by private individuals.

specific uses would be satisfied first no matter what priority position they enjoyed on the basis of their application dates. Thus, an oil and gas development interest in private "public" lands could totally exclude others from the specific land surface where oil rigs and equipment were located, but the lands could otherwise be opened up for multiple uses so fishing, hunting, cattle grazing, lumbering and farming operations could all continue on the same land, with each enjoying a specific area exclusively as well as having rights in common areas not needed for the exclusive use of any of the others. The first of those persons holding interests would be able to stake out its area and nature of use. The next in line would never obtain any rights in the hand unless he could show that a second use could be carried out without impairing the use rights of the first appropriator, and so on down the line. The latter applicant would have to purchase rights to the prior use or seek to acquire the use by eminent domain if its proposed use was found to impair the prior appropriator's rights.

The State Administrator could fashion special limits in granting a specific land use appropriation. The limitation could be as to time—the grant could be for only the time period needed for the applicant to adequately complete the proposed use of the land.[267] Or there could be spatial limits. For example, a mining operation could have exclusive rights resembling traditional private rights in certain parcels of a general area, with broad rights of access and exploration rights over a common area. A farmer might have an exclusive right to a specific part of the same general area for a homestead and for farm buildings, but the area for fields might be shared in common with others; specified border areas around the fields would remain accessible to recreation users, and the non-farmed areas in the draws and hilly portions of the general area would be available for a separate appropriator for timber purposes.

3. *The nature of the interest held by the private owner*

Once the public administrator approved a specific private "public" land interest, the appropriator would have an interest that could be transferred on the market like other private interests. Its value would be determined by natural market forces, with potential buyers and users determining that value by tak-

267. *Compare* UTAH CODE ANN. § 73-3-12 (1980).

ing into consideration the type of interest and the priority position it enjoyed in relation to other interests in the same land. The transfer of interests from the first appropriator and subsequent grantees would be by deed or other instrument, which would be recorded for protection against subsequent purchasers. From the time of its creation the private "public" land interests would have the same characteristics of other private rights except that it would be subject to loss for extended nonuse, and any change in the nature of use would have to receive advance approval from the State Administrator. Also, the interest would always remain subject to any special limitations placed on the original certificate of land use.

Federal land laws are already administered on a multiple use philosophy.[268] There is a major difference, however, between the present system and the creation of permanent private interests in these multiple uses. If the private use interest were established, public administration would take a noninterfering backseat role, and the private market system would be permitted to take over as the invisible decision maker. This approach to public land law reform is designed to maximize private property institution characteristics and mechanisms. Public land law would thereby be moved closer to traditional American institutions which preserve and promote private property and would use the market economy as the preferred means of control and regulation, as opposed to a system of administrative or centralized bureaucratic controls.

Under a system of private "public" land interests, the private owners would have more incentive than in the current system to invest in extensive development of their interests. They could act without the fear of losing the interest without just compensation. For example, a rancher with a grazing permit from the Bureau of Land Management lacks security that the permit will remain available in the future. He has practically no incentive to improve the range land, which is owned by the federal government. If the same grazing right were to be granted as a permanent land use interest, the rancher, viewing himself as an owner, would take more personal interest in the development, upkeep, and conservation of the land, relying on the assurance that he could benefit in the future from his efforts. Financial resources of the owner and of lenders would be more readily

268. 43 U.S.C. § 1701(a)(7) (1976).

available for the development of the land if the property interests were secure and predictable. The fact that other, multiple interests may share the same land should not reduce the private property advantages, so long as the extent of each interest was well defined and the user was given a judicial remedy against encroachment by others.

4. The nature of the interest retained by the public

The attractiveness of the proposed private "public" land system as compared to the pure system of private ownership, which is currently the only alternative to retaining lands in the public domain, is the availability of a greater degree of public control. Many abuses associated with private ownership could be tempered or limited by the proposed model, both by the limits placed on the original land appropriations and by the condition constantly underlying this appropriation system—that the land continue in a beneficial use, or the land use interest reverts back to the state for reappropriation to the next applicant who will make beneficial use of the land. Special extensions of time during which nonuse may be excused would be available through proper application to the State Administrator.

5. Implementing the proposal

Not all federal or state public lands would need to be included in this new, middle status of private "public" land interests. It would seem appropriate, however, to move toward placing disposal of most lands currently held by the U.S. Forest Service or the BLM in this new category. Private rights to take part in multiple use activities on these lands are already being granted through a variety of permit, lease, and contract methods.[269] Replacement of those programs with a unified property system that streamlines and simplifies the procedures, administration, and effect of the numerous approaches currently being utilized seems appropriate.

The method for choosing the original appropriators could vary according to the circumstances. A parcel of land for which the demand was relatively high could be sold at a private or public sale. A remote, arid piece of property, which might not attract any user if there were a purchase price attached to it,

269. P. Mogren, *supra* note 3, at 121-74.

could be disposed of through generous grant programs similar to railroad grants of the nineteenth century. Some lands otherwise left over could be granted to private conservation and environmental protection organizations like the Sierra Club or the Audubon Society to be preserved in private hands as wilderness areas, which could be designated as an appropriate, beneficial use of land.[270] These organizations could then take advantage of uses, like production of oil and gas or mining, that are eventually discovered on their property by having first option to apply for a change of land use certificate for development of that resource by themselves; otherwise, the interest would be sold to purchasers who would pay the market price for the development rights. If the public officials determined more land needed to be withdrawn and returned to the purely public domain for aesthetic, recreation, wilderness, or other purposes, they could reobtain property through eminent domain. Private interests affected would receive just compensation for giving up their rights.

V. Conclusion

In summary it can be shown that water law systems as developed in the West have been well suited to avoid many of the abusive aspects associated with the ownership of land. These features from water law are suitable responses to conditions of scarcity of a vital natural resource. Land law, developed under conditions of abundance, has served well in facilitating the expansion and development of our land resources. The remaining undisposed land in the public domain is being retained by the government in part because of the concern that disposal to private interests would result in unreasonable exploitation and abuse of the nation's valuable resources. As has been indicated, there are many ways that public controls are placed on private use of land. All of these limitations, however, are imposed upon what otherwise is a full and unconditional title ownership. Water law rights of ownership, on the other hand, are conditioned on the continued beneficial use of water. The public review process that precedes a water permit is a vehicle by which public controls and limitations can be exercised as the initial owner of the water rights seeks the rights in the first instance.

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270. Forberg, Howard & Sauer, *Alternatives to Federal Management of Public Lands*, in Proceedings of the National Conference on States' Rights *supra* note 256 at 291.

Applying the prior appropriation doctrine's approach to modify public land law would allow increased and more secure private use of public lands, yet at the same time provide adequate public controls to prevent the abuses characteristic of some private land development. A new category of land ownership—private "public" ownership—would allow the government to dispose of specific uses of public domain lands without giving up fee simple title. The land use would then have to take place—as does water use—within a specific time period or the right would be lost. Since transfers of the right subsequent to its creation would be totally private acts, market forces like those now involved in water rights transactions would be predominant. Such an approach would promote the efficient use of our increasingly scarce land resources.