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## The Field of Public Land Law: Some Connecting Threads and Future Directions

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# THE FIELD OF PUBLIC LAND LAW: SOME CONNECTING THREADS AND FUTURE DIRECTIONS

Charles F. Wilkinson\*

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The pace of change in public land law has been dizzying over the last ten years. To be sure, we have seen a decade of rapid development in many areas of the law. But public land law has undergone a comprehensive reformation that sets it apart. Basic tenets have been rejected or reshaped, and new congressional and judicial premises have been established. This article examines some of the forces that caused this evolution, identifies several of the central concepts in the field today, and attempts to assess probable further developments in the essential doctrines of public land law.

We can gain perspective on where the field is, and where it is going, by looking at public land law as it stood ten years ago. In 1970, the Public Land Law Review Commission was nearing the end of its task.<sup>1</sup> Much of its time during early 1970 was spent on chapter 4, Environmental Protection. This chapter on environmental issues was one of

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1. The Public Land Law Review Commission was established by Congress in 1964. Act of Sept. 9, 1964, P.L. 88-606, 78 Stat. 982. The Commission was directed to study existing statutes, to review the policies and practices of agencies administering public lands, to compile data to determine present and future demands on public lands, and to make recommendations on modifications in the laws and policies so as to provide maximum benefit to the public from the public lands. *Id.* at § 4. The Commission was terminated when its work was reported in the volume, UNITED STATES PUBLIC LAND LAW REVIEW COMMISSION, ONE-THIRD OF THE NATION'S LAND (1970) [hereinafter cited as PLLRC Report].

the last additions made by the Commission.<sup>2</sup>

The environmental chapter was not treated at the last moment because of some intrinsic defect in the Commission. Instead, the Commission was reacting to the surge of environmental activism that did not peak until the late 1960's. Certainly, environmentalists had obtained some major victories on the public lands during the 1960's; the best example was the Wilderness Act of 1964.<sup>3</sup> But broad-based public awareness had not previously focused on the public lands.

The Public Land Law Review Commission's report, which may have had considerably more impact that its critics would admit,<sup>4</sup> is something of a museum piece today because many aspects of modern public land law barely existed, or did not exist at all, when the report was filed in June, 1970. In 1970 there were thousands of laws relating to the public lands on the books. The great bulk of those laws, however, were characterized by broad delegations of authority to land management agencies. Leading examples are the Forest Service Organic Act of 1897,<sup>5</sup> the Taylor Grazing Act of 1934,<sup>6</sup> and the Multiple-Use Sustained-Yield Act of 1964.<sup>7</sup> There were relatively few statutes that set administrative standards and prohibitions in the style of modern legislation. The National Environmental Policy Act,<sup>8</sup> called the "Sherman Act of environmental law,"<sup>9</sup> did not become effective until January 1, 1970 and other major federal legislation followed during that decade.<sup>10</sup>

Today there is a large case load of public lands litigation involving major public issues, but this kind of litigation is a recent development.

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2. R. JOHNSON, ANALYSIS OF THE REPORT OF THE PUBLIC LAND LAW REVIEW COMMISSION 44 (1975) (unpublished manuscript) reprinted in G. COGGINS & C. WILKINSON, CASES AND MATERIALS ON FEDERAL PUBLIC LAND AND RESOURCES LAW 64 (1980) [hereinafter cited as G. COGGINS & C. WILKINSON]. This is not to suggest that the Commission had ignored environmental issues during the early years of its work; rather, the necessity for environmental study had been identified but "it was necessary to have a much larger study in environment than had been contemplated." Pearl, *Discussion: Introduction and Overview*, VI LAND & WATER L. REV. 33, 37 (1970).

3. 16 U.S.C. §§ 1131-1136 (1976).

4. As Professor Johnson explains, federal land management agencies administratively adopted many recommendations in the report. See R. JOHNSON, *supra* note 2. In addition, the PLLRC Report provided much of the impetus for the adoption of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 and scattered sections of 7, 10, 16, 22, 25, 30, 40, 48, 49 U.S.C. (1976) [hereinafter referred to as FLPMA]. See generally, Muys, *The Public Land Law Review Commission's Impact on the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 301 (1979).

5. 16 U.S.C. §§ 473-478, 479-482, 511 (1976).

6. 43 U.S.C. §§ 315-315r (1976).

7. 16 U.S.C. §§ 528-531 (1976).

8. 42 U.S.C. §§ 4331-4361 (1976).

9. W. RODGERS, ENVIRONMENTAL LAW 697 (1977).

10. See, e.g., notes 31-38 *infra*.

The Bureau of Land Management, for example, had virtually no "public" litigation before 1970. The BLM has always had a substantial case docket, but traditionally it consisted almost entirely of private litigation involving individual rights to mining claims, mineral leases, grazing permits, and homestead patents. The historic lack of public-issue litigation is even more pronounced in the Forest Service. As of 1970, the Forest Service had appeared in the Supreme Court on anything approaching a major policy issue only once<sup>11</sup> since *Light v. United States*<sup>12</sup> was decided in 1911. Moreover, it appears that the first injunction ever issued against Forest Service activities in any reported case was handed down by a district judge in Colorado later in 1970.<sup>13</sup> The paucity of cases raising major public issues is due in part to the fact that most of the highly successful environmental law firms were recently founded—the Natural Resources Defense Council in 1969, the Environmental Defense Fund in 1969, the Sierra Club Legal Defense Fund in 1971, and the Resources Defense Division of the National Wildlife Federation in 1971.

Thus, as of 1970, public land law was a field stamped with broad administrative discretion. The public, the courts, and even Congress had asserted little institutional power.

The status of the public lands in Alaska, the largest public lands state,<sup>14</sup> was markedly different in 1970. The initial discovery of oil at Prudhoe Bay had just been confirmed.<sup>15</sup> Furthermore, the claims of the Alaska Natives had not yet been resolved, with the result that the United States had not yet "cleared" title to its immense holdings in Alaska.<sup>16</sup> In the lower forty-eight states, the federal government had

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11. *Hunt v. United States*, 278 U.S. 96 (1928).

12. 220 U.S. 523 (1911).

13. *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971).

14. Excluding off-shore lands, the United States today owns about 740 million acres or, as is commonly said, approximately one-third of the nation's total land area of 2.3 billion acres. About 365 million acres, or slightly less than one-half of the total federal holdings, are located in Alaska. *See generally*, G. COGGINS & C. WILKINSON, *supra* note 2, at 23-29.

15. M. BERRY, *THE ALASKA PIPELINE* 1 (1975).

16. When the United States acquired land from foreign nations by treaty, it obtained less than fee title to those lands. Most land within the continental United States was subject to "Indian title," or the right of Indians, including Alaska Natives, to occupy their aboriginal land. Indian title can be extinguished by the United States, and the extinguishment can be made without the requirement of paying compensation under the Fifth Amendment, but Indian title is good against all parties other than the federal government. Transactions by Indian tribes, without approval of the United States, are void. *See* 25 U.S.C. § 177 (1976) and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 503 (1823). These principles are the basis for the land claims of several eastern tribes and formed the basis for Alaska Native claims before 1971. *See generally*, Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 MAINE L. REV. 17 (1979).

been relatively assiduous in settling most Indian title questions through treaties or other means by the early twentieth century.<sup>17</sup> Few legal developments in public land law are so dramatic as the policy void that caused the United States to wait more than a century after the Treaty with Russia of 1867 before resolving the legal claims of the Alaska Natives.

The events in public land law during the last ten years have changed much of this. The era was unsettling and disruptive; old policies were discarded and institutions were fundamentally altered. Many observers would complain that the main features are red tape and delay that have seriously impaired prompt and efficient administration. Others view the period as being a progressive one in which outmoded policies were replaced and administrators were forced to become more responsive to public concerns. Still others, including this writer, see the era as a time of consolidation that has resulted in a more unified and comprehensive approach toward managing the diverse resources on the public lands. Whatever value judgments one may draw, the sweeping nature of the reordering cannot be denied.

The courts became involved in public land management issues with a vengeance. In part the judiciary was implementing court decisions, not involving the public lands, interpreting the Administrative Procedure Act.<sup>18</sup> Important to that broader development were statutes allowing for more liberal judicial review of all federal agencies<sup>19</sup> and amendments to the Freedom of Information Act, itself a part of the APA.<sup>20</sup> The 1970's produced public lands litigation of a kind never seen before: controversy over the Alaska pipeline,<sup>21</sup> the Alaska lands

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17. Clinton & Hotopp, *supra* note 16. Recent study, however, has disclosed many situations in which Indian title may not have been effectively extinguished. See, S. REP. NO. 569, 96th Cong., 2d Sess. (1980).

18. The judicial review provisions of the APA are found at 5 U.S.C. §§ 701-706 (1976). A leading case is *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). On developments in administrative law during the modern era see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

19. Several important amendments were made to the APA in 1976. A complaint today may be directed simply against the United States or the administrative agency; individual officers may be named, but it is not necessary to name them or, therefore, to substitute names as officials change positions. 5 U.S.C. § 703 (1976). If an injunction is issued, however, it may be directed to a named official, even if that person was not originally named as defendant in the action. 5 U.S.C. § 702 (1976). Sovereign immunity of the United States was waived for most purposes. *Id.* See also, S. REP. NO. 94-996 ON S. 800, 94th Cong., 2d Sess. (1976). Access to federal courts was also increased by legislation in 1976 eliminating the \$10,000 minimum amount in controversy in federal question cases involving review of federal agency decisions. 28 U.S.C. § 1331 (1976).

20. 5 U.S.C. § 552 (1976).

21. See *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973) (*en banc*), *cert. denied*, 411 U.S. 917 (1973).

withdrawals,<sup>22</sup> national clearcutting policy,<sup>23</sup> national wilderness policy,<sup>24</sup> policy dealing with off-the-road vehicles on the public domain,<sup>25</sup> grazing policy,<sup>26</sup> endangered species,<sup>27</sup> water resources development policy,<sup>28</sup> and others. The environmental litigation also dealt with regional and local issues to an unprecedented extent.<sup>29</sup> Much of the litigation during the period developed along lines that are already almost classic: a national or regional natural resource law firm would bring the action; the Freedom of Information Act would be used to obtain information in bulk from the federal agency; expert witnesses from various disciplines would be used to provide an interdisciplinary approach; an injunction would be issued; and, finally, legislation would be passed giving both sides "half a loaf" but requiring environmental standards far exceeding those that existed when the issue first reached the courts.<sup>30</sup>

Thus Congress has also become involved, and also with something of a vengeance. The FLPMA of 1976<sup>31</sup> stands today as perhaps the dominant statute in the field. The NFMA of 1976<sup>32</sup> was a fundamental reform in on-the-ground forest policy. Wildlife issues have been addressed in a number of acts.<sup>33</sup> Alaska lands were the subject of the Alaska Native Claims Settlement Act of 1971.<sup>34</sup> The Forest and Range

22. *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alas. 1978).

23. *See West Virginia Division of the Izaak Walton League of America v. Butz*, 522 F.2d 945 (4th Cir. 1975).

24. *See, e.g., Parker v. United States* 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); *Sierra Club v. Butz*, 3 Envir. L. Rep. 20071 (N.D. Cal. 1972).

25. *See, e.g., National Wildlife Federation v. Morton*, 393 F. Supp. 1286 (D.D.C. 1975).

26. *See, e.g., National Resources Defense Council v. Morton*, 388 F. Supp. 829 (D.D.C. 1974).

27. *See, e.g., Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

28. *See, e.g., California v. United States*, 438 U.S. 645 (1978); *County of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977).

29. *See, e.g., Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292 (8th Cir. 1976); *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908 (D. Ore. 1977).

30. Examples of this phenomenon are numerous. For example, the injunction against clear-cutting in *West Virginia Division of the Izaak Walton League of America v. Butz*, 522 F.2d 945 (4th Cir. 1975), led to the adoption of the National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified in scattered sections of 16 U.S.C.) [hereinafter cited as NFMA], which allowed clear-cutting but required a wide variety of environmental controls. *See generally, Hines, Monongahela and the NFMA of 1976*, 7 ENV. LAW 356 (1977). After the issuance of permits for the Alaska Pipeline was enjoined, *Wilderness Society v. Morton*, *supra* note 21, Congress extended the width limitation that had been the subject of the litigation but also added new provisions concerning environmental protection and public participation. 30 U.S.C. § 185 (1976).

31. *See* note 4 *supra*.

32. *See* note 30 *supra*.

33. *See generally, M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW* (1977).

34. 43 U.S.C. §§ 1601-1628 (1976).

Land Renewable Resources Planning Act of 1974<sup>35</sup> is not likely to be a lawyer's act, but it offers the hope of improved long range forest and range planning.<sup>36</sup> Several individual wilderness acts have expanded the wilderness system.<sup>37</sup> Important mineral leasing provisions were adopted.<sup>38</sup>

Most of these acts share a common legislative philosophy. Their central thrust is not to delegate broad authority to land management agencies but rather to limit administrative discretion by requiring public participation and establishing prohibited acts. If these statutes are violated, there is ample basis for enforcement by the public in the courts. This amounts to a reallocation of power from the agencies to citizens, the courts, Congress, and the states.

Public land law will always be dominated, as it is today, by the land management agencies. The quantum of the power shift away from them can be seen as slight. But the subtle movements away from administrative absolutism are significant. Decisions today are made in different ways and are affected by different forces. We are guilty of understatement if we fail to recognize the scope of the revolution of the 1970's.

There is yet another revolution, a quieter one, in public land law today. It is a movement toward cohesion, toward identifying concepts that are common to all of the public lands and their resources. Historically, it could be said that there was no defined body of "public land law." Separate attention was focused on the discrete bodies of law that had developed around the specific "economic" resources on the public lands—water, hardrock minerals, fuel minerals, forage, and timber.<sup>39</sup> Today, public land law is a coalescing body of law, rather than a loosely connected series of laws dealing with separate resources. Today, for the first time, public land law is truly a field.

The remainder of this article will deal with some of the doctrinal developments—in most cases common to all of the public lands and

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35. 16 U.S.C. §§ 1600-1610 (1976).

36. Judicial review under the Resources Planning Act is likely to be very narrow. *Cf.*, *National Wildlife Federation v. United States*, 8 *Envir. L. Rep.* 20651 (D.D.C. 1978). On the planning aspects of the Act see Note, *The National Forest Service and the Forest and Range Land Renewable Resources Planning Act of 1974*, 15 *NAT. RES. J.* 603 (1975).

37. *E.g.*, Endangered American Wilderness Act of 1978, Pub. L. 95-237, 92 Stat. 40.

38. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. I 1977); Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. §§ 191, 201, 202, 204, 207, 208 (1976).

39. Traditionally, the "economic" resources listed in the text have commonly been referred to as "resources" on the public lands. Today, Congress has recognized at least three additional resources on the public lands—wildlife, recreation, and preservation. See notes 232-38 *infra*.

resources—that have impelled the movement toward a unitary body of public land law.

### I. PREEMPTIVE CONGRESSIONAL AUTHORITY ON THE PUBLIC LANDS

The starting date for the state-federal conflict over management of the public lands might be fixed at 1872, when Yellowstone National Park was established as a federal “pleasuring ground.”<sup>40</sup> Since then, as the disposition of public lands has been replaced by a formal policy of retention,<sup>41</sup> tensions between state and federal governments have steadily mounted. Today, we are in a full-scale imbroglio in the eleven western states and Alaska.<sup>42</sup>

One nub of contention is the nature and extent of federal power over the public lands. Essentially, those supporting states’ rights and the “Sagebrush Rebellion” base their position upon what can be called the “traditional” view of federal powers.<sup>43</sup> This viewpoint assumes that the United States’ powers on most of the public lands are the limited powers of a proprietor, or property owner, not a sovereign. Although the federal government can always exercise the enumerated constitutional powers it has over all the geographic area of the United States,<sup>44</sup> the United States would have no general sovereign police power to leg-

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40. 16 U.S.C. § 21 (1976).

41. The leading history on the evolution of public land law is P. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968), which was prepared for the Public Land Law Review Commission. See also S. DANA & S. FAIRFAX, *FOREST AND RANGE POLICY* (2nd ed. 1980); G. COGGINS & C. WILKINSON, *supra* note 2, at 83-248. Retention of lands in federal ownership was formally declared as federal policy in 1976 in the Declaration of Policy in FLPMA: “[T]he Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest . . . .” 43 U.S.C. § 1701(a)(1) (1976).

42. The “Sagebrush Rebellion” is a movement that seeks to divest federal ownership over much of the public lands, or at least to increase substantially state control over public lands. See generally, G. COGGINS & C. WILKINSON, *supra* note 2, at 117-31. A great amount of research is presently being conducted by the states and by scholars on the subject. Apparently several theories are being developed, including: (1) public lands passed to the states at the time of statehood pursuant to the “equal footing” doctrine; (2) title did not pass to the states immediately at the time of statehood, but the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, requires that the federal government develop a program to dispose of the federal lands within a reasonable time; (3) the “equal footing” doctrine is not violated per se simply because some public lands are located within a new state, but the amount of public lands in the western states is so great as to amount to a violation; and (4) the federal government may constitutionally continue to own public lands, but the Constitution requires that the states have greater control than is the case under current statutes. No attempt is made here to evaluate those theories until research has been completed and published.

43. The best analysis is in Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976) [hereinafter referred to as Engdahl].

44. Engdahl, *supra* note 43, at 324-29.



islate over all persons and activities on the public lands. Thus, although federal laws are superior to those of the states under the Supremacy Clause,<sup>45</sup> very limited federal sovereignty on the public lands would mean that federal laws would seldom override or preempt conflicting state laws. Furthermore, the United States as a proprietor would normally be subject to state laws on the public lands much like other landowners.

This traditional model is based upon the juxtaposition of the two dominant constitutional clauses affecting public land law, the Jurisdiction Clause<sup>46</sup> and the Property Clause.<sup>47</sup> Traditionalists argue the Jurisdiction Clause is the only basis upon which the federal government can exercise sovereignty today. Further, they would conclude that the Jurisdiction Clause can cover only a limited class of lands: they must be lands acquired with the consent of the state and they must be used for military bases or similar functions. Thus sovereignty could be exercised by the United States only over a very narrow class of lands and federal sovereignty could be established initially only with the consent of the state. This would mean that federal sovereignty would extend only to a small amount of federal land held as "federal enclaves."<sup>48</sup>

45. U.S. CONST., art. VI, cl. 2.

46. U.S. CONST., art. I, § 8, cl. 17:

The Congress shall have Power . . . To exercise *exclusive Legislation* in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to *exercise like Authority* over all Places *purchased* by the *Consent* of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and *other needful Buildings*. (emphasis supplied).

47. U.S. CONST., art. IV, § 3, cl. 2: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory of other Property belonging to the United States . . . ."

48. Traditionally, federal jurisdiction on the public lands has been divided into four categories: (1) "exclusive jurisdiction," where the state has ceded jurisdiction and has not reserved any jurisdiction other than the right to serve criminal or civil process in the federal enclave for litigation involving activities occurring outside of any federal enclave; (2) "partial jurisdiction," where the state has ceded jurisdiction to the United States except for specified subject matter areas, such as the right to tax personal property and the right to tax business activity; (3) "concurrent jurisdiction," where the state has ceded jurisdiction to the United States but has reserved full concurrent jurisdiction; and (4) "proprietary jurisdiction," which refers to those lands over which there is no specific cession of jurisdiction by the states. As of 1969, there were 5.9 million acres under exclusive federal jurisdiction, 12.4 million acres under partial jurisdiction, 24.1 million acres under concurrent jurisdiction, and 728.1 million acres under proprietary jurisdiction. Thus by far the greatest among of public lands is not subject to any specific state cession. *See generally*, UNITED STATES DEPARTMENT OF JUSTICE, LAND AND NATURAL RESOURCES DIVISION, REPORT PREPARED FOR THE PUBLIC LAND LAW REVIEW COMMISSION, FEDERAL LEGISLATIVE JURISDICTION (1969) [hereinafter referred to as PLLRC JURISDICTION REPORT].

The approach used here is to divide federal jurisdictional holdings into two categories: (1) federal enclaves, *i.e.*, those areas subject to specific cessions by the states and (2) all other federal lands. The first category would include areas under exclusive, concurrent, and par-

Under this traditional model, the Property Clause is secondary and minor. Federal governmental authority could only be exercised during transition periods when territorial governments, not state governments, existed on the public lands. Once statehood was granted, governmental authority over almost all of the federal lands would be transferred to the state by the operation of the "equal footing" doctrine.<sup>49</sup> Under a more extreme reading of the Property Clause, the federal government is then required to dispose of the public lands within the boundaries of the former territory to the state or to private citizens.<sup>50</sup> Obviously, the traditional model would mean broad state authority and very limited federal authority.

It must be emphasized, as Engdahl's thorough scholarship indicates,<sup>51</sup> that indeed this traditional model may have been what the framers of the Constitution intended. The concept of sovereign jurisdiction is alluded to only in the Jurisdiction Clause.<sup>52</sup> The Property Clause,<sup>53</sup> on the other hand, first refers to the power of the federal government to "dispose" of this land, and can be read as providing for federal sovereign authority only over territories.<sup>54</sup> Thus this model might well have reflected the original constitutional intent, although

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tial jurisdiction for the reason that the issue in each case is to determine the terms of the specific state cession. The second category would then be by far the largest, constituting more than 90% of all public lands; the phrase "proprietary" should probably not be applied since the Supreme Court has found in *Kleppe v. New Mexico* 426 U.S. 529 (1976) that the United States exercises governmental, as well as proprietary, powers over such lands. *See generally*, G. COGGINS & C. WILKINSON, *supra* note 2, at 249-315. Thus, as used here, "federal enclave" refers to any federal area in which a state has expressly ceded some jurisdiction to the United States.

49. *See generally*, Engdahl, *supra* note 43, at 290-304, placing heavy reliance on *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836) and *Pollard v. Hagen*, 44 U.S. (3 How.) 212 (1845). This approach assumes that western states cannot be on an "equal footing" with the original thirteen colonies if there are large holdings of federal lands under federal governmental authority since that situation did not exist in the original thirteen colonies. "Equal footing" cases to date, however, have held that the doctrine requires only that the new states have the same governmental powers as the original states. *See, e.g.*, *Coyle v. Smith*, 221 U.S. 559, 566-67 (1911). *See generally*, Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519 (1951).

50. *See* OFFICE OF THE ATTORNEY GENERAL, STATE OF NEVADA, THE EQUAL FOOTING DOCTRINE AND ITS APPLICATION BY CONGRESS AND THE COURTS (1977). *See also* note 42 *supra*.

51. *See* note 43 *supra*.

52. The Jurisdiction Clause never uses the word "jurisdiction," instead referring to Congress' "power to exercise exclusive legislation." *See* note 46 *supra*. The Supreme Court, however, has treated the phrase "exclusive legislation" as being synonymous with "exclusive jurisdiction." *See, e.g.*, *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885).

53. *See* note 47 *supra*.

54. There is no question about the power of the United States to establish territorial governments on open and unclaimed public lands before statehood. *Simms v. Simms*, 175 U.S. 162 (1899); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). Governmental authority could then be transferred when a new state was created. *See* note 49 *supra*.

debates at the Constitutional Convention and other early interpretations are not especially illuminating.<sup>55</sup>

The case law has not reflected the traditional view. Court decisions over the last century have generally reflected and affirmed the transition of congressional policy from disposal to retention. The importance of the Jurisdiction Clause has greatly declined while the significance of the Property Clause has vastly increased.

The Jurisdiction Clause is subject to five narrow constructions which, taken together, would result in a very limited federal authority on the public lands. Each of these interpretations, however, has been rejected.<sup>56</sup> First, because there is a reference to "consent" by the state in the acquisition of land, the clause can be construed as allowing a state veto over the acquisition of land by the federal government. That construction was rejected a century ago when the Court held that the federal government could unilaterally obtain land by eminent domain.<sup>57</sup> Second, the Jurisdiction Clause, and thus the exercise of exclusive jurisdiction and sovereignty in general, can be limited by defining Jurisdiction Clause lands narrowly to consist almost solely of military lands, dockyards, and federal office buildings.<sup>58</sup> That construction has also been rejected and the courts have found that the "other needful buildings" reference should be expansively read in determining which lands are properly subject to Jurisdiction Clause transactions.<sup>59</sup> Third, the Jurisdiction Clause can be read as requiring exclusive federal jurisdiction and voiding transactions that provide for less than exclusive jurisdiction. That interpretation has been rejected in decisions upholding the creation of enclaves involving various reservations of jurisdiction by states.<sup>60</sup> Fourth, the Jurisdiction Clause can be interpreted to mean that federal enclaves can be established only on lands

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55. See PLLRC JURISDICTION REPORT, *supra* note 48, at 4-17 and Engdahl, *supra* note 43, at 288-93.

56. On construction of the Jurisdiction Clause, *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 254-56 (1978).

57. *See, e.g.*, Kohl v. United States, 91 U.S. 367 (1876); United States v. Gettysburg Electric Railway Co., 160 U.S. 668 (1896).

58. The Jurisdiction Clause authorizes the exercise of exclusive jurisdiction over the District of Columbia and over "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. . . ." U.S. CONST., art. I, § 8, cl. 17.

59. In James v. Dravo Contracting Co., 302 U.S. 134 (1937) the Court found that locks and dams were "other needful buildings" within the meaning of the Jurisdiction Clause, reading the Jurisdiction Clause broadly to include "whatever structures are found necessary in the performance of the functions of the Federal Government." *Id.* at 143.

60. Apparently all federal enclaves are subject to reservations by the states for the service of civil and criminal process. *See* note 48 *supra*. Other cases have sustained much broader reservations of jurisdiction in transfers under the Jurisdiction Clause. *See, e.g.*, Silas Mason Co. v. Tax Commission, 302 U.S. 186 (1937) (reservation of concurrent jurisdiction by state). *See also* Collins v. Yosemite Park and Curry Co., 304 U.S. 518 (1938), quoted in note 61 *infra*.

“purchased” by the United States. This construction has also been rejected, and many federal enclaves not complying with the literal requirements of the Jurisdiction Clause have been sustained.<sup>61</sup>

Finally, and perhaps most importantly, the Jurisdiction Clause can be read as being the only basis for the exercise of federal sovereignty on the public lands, with federal power over all other lands being limited to proprietorship.<sup>62</sup> That proposition seems to have been rejected squarely in *Kleppe v. New Mexico*,<sup>63</sup> which upheld broad federal governmental powers under the Property Clause. The case is especially noteworthy because it upheld federal preemption of state law in the area of wildlife, long assumed to be subject to exclusive state jurisdiction.<sup>64</sup> In dictum, the Court went far beyond the facts of the case and variously stated that the federal government possesses “complete power,”<sup>65</sup> “plenary power,”<sup>66</sup> “police power,”<sup>67</sup> “power . . . without limitations,”<sup>68</sup> and “the powers . . . of a legislature over the public domain.”<sup>69</sup> *Kleppe* thus completes the long evolution from the traditional model, which would relegate all exercises of police power to Jurisdiction Clause lands only, to a broad federal preemptive authority under the Property Clause. The current importance of the Jurisdiction Clause would seem to be very limited.

*Kleppe* could take any of several directions in the future. The opin-

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61. The leading case on this point, and on liberal construction of the Jurisdiction Clause generally, is *Collins v. Yosemite Park and Curry Co.*, 304 U.S. 518 (1938), involving the establishment of Yosemite National Park. The Court found that “the States of the Union and the National Government may make such mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. . . . [The Jurisdiction Clause] has not been strictly construed. . . . The clause is not the sole authority for the acquisition of jurisdiction.” *Id.* at 528. See also, *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885) (Fort Leavenworth Military Reservation); *Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929) (Hot Springs National Park); and *Yellowstone Park Transp. Co. v. Gallatin County*, 31 F.2d 644 (9th Cir. 1928), *cert. denied*, 280 U.S. 555 (1929) (Yellowstone National Park). This principle has been especially important in establishing exclusive federal jurisdiction in national parks; many of those parks involved cessions of jurisdiction by the states to the federal government, but they did not come within the express terms of the Jurisdiction Clause because in many cases the land was always within federal ownership and thus not “purchased by the consent” of the state. As of 1969, the National Park Service held some 12.2 million acres as federal enclaves, i.e., under either exclusive or partial federal jurisdiction. See, PLLRC JURISDICTION REPORT, *supra* note 48, at 163.

62. See text accompanying notes 43-50 *supra*.

63. 426 U.S. 529 (1976).

64. See *Geer v. Connecticut*, 161 U.S. 519 (1896). After *Kleppe* was handed down, *Geer* was overruled in *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

65. 426 U.S. at 540.

66. *Id.*

67. *Id.*

68. *Id.* at 539.

69. *Id.* at 540.

ion could, as some commentators have urged, be overruled.<sup>70</sup> *Kleppe* was apparently poorly briefed<sup>71</sup> and can be criticized as a departure from traditional doctrine.<sup>72</sup> The overturning of this unanimous opinion, however, is highly improbable since earlier cases have stood for federal regulatory authority under the Property Clause;<sup>73</sup> the somewhat more expansive view of Federal regulatory power in *Kleppe* is no more unusual than the evolution of the Commerce Clause.<sup>74</sup> Second, *Kleppe* could be confined and limited to its particular context. Most particularly, the Wild Free-Roaming Horses and Burros Act of 1971<sup>75</sup> included strong, express congressional findings of compelling need for the legislation<sup>76</sup> and was based on a powerful legislative history.<sup>77</sup> Thus proponents of a relatively narrow federal power under the Property Clause could argue in future cases for a "strict scrutiny" test that would not be inconsistent with *Kleppe*.<sup>78</sup>

At the other extreme, the broad language of *Kleppe* could be taken literally, and power under the Property Clause could be truly "plenary"<sup>79</sup> and "without limitations."<sup>80</sup> Such a reading is unlikely. Other constitutional powers have been said by the courts to be "plenary," but have been found to be less than complete upon further analysis in more difficult cases.<sup>81</sup>

70. See, e.g., Engdahl, *Some Observations on State and Federal Control of Natural Resources*, 15 HOUSTON L. REV. 1201 (1978).

71. Engdahl, *supra* note 43, at 351.

72. See text accompanying notes 51-55 *supra*.

73. See, e.g., *Camfield v. United States*, 167 U.S. 518 (1897); *Hunt v. United States*, 278 U.S. 96 (1928); *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955).

74. See generally, J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 128-63 (1977).

75. 16 U.S.C. §§ 1331-1340 (1976).

76. The Court emphasized the Congressional Declaration of Policy that these animals "contribute to the diversity of life forms within the Nation and enrich the lives of the American people" and that the animals are "living symbols of the historic and pioneer spirit of the West." 16 U.S.C. § 1331 (1976). 426 U.S. at 535-36.

77. For example, the legislative history expressly stated that the Act, which was designed to protect wild horses and burros, was necessary because they have been "cruelly captured and slain and their carcasses used in the production of pet food and fertilizer. . . . [T]his bloody traffic continues unabated, and it is the firm belief of the committee that this senseless slaughter must be brought to an end." S. REP. NO. 92-242, 92nd Cong., 1st Sess. 2 (1971). 426 U.S. at 536.

78. If narrowly read in this fashion, *Kleppe* would be similar to the holding in *Hunt v. United States*, 278 U.S. 96 (1928), where the Court upheld the power of Forest Service officials to harvest game, in spite of state law prohibiting hunting, because of the Forest Service's need to protect the forage resource in the area.

79. See note 66 *supra*.

80. See note 68 *supra*.

81. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall described federal power over commerce as "complete" and "plenary." *Id.* at 196-97. Obviously today the scope of the Commerce Clause remains extremely broad, see, e.g., note 74 *supra*, but there remains some subject matter which is within interstate commerce yet beyond the reach

A more likely analysis lies between those extremes. Federal exercises of power over the public lands would not be absolute, but rather would be required to have a rational tie to the development or preservation of the federal land and resources.<sup>82</sup> This more limited view of the Property Clause would be complemented by a preemption test, discussed below,<sup>83</sup> and it would result in exercises of federal power being more narrowly read by the courts than the language of *Kleppe* might indicate.

Important unresolved issues may turn on which view of *Kleppe* is taken by future courts. An example is the question of whether the Property Clause reaches activities not located on public lands, an issue expressly reserved in *Kleppe*.<sup>84</sup> In *United States v. Brown*,<sup>85</sup> a federal regulation prohibiting hunting was held to apply to nonfederal land. *Brown*, however, was a relatively easy case because it involved a lake, which the state claimed to own, inside of a National Park. A more difficult question will focus around federal power over areas outside of the exterior boundaries of public land holdings. Examples would be federal statutes or regulations under the Property Clause exercising jurisdiction over herds of migrating wildlife during those seasons when they are not located on public lands, regulating traffic on adjacent nonfederal lands, making rules concerning noise and air pollution on adjacent lands, and establishing federal "zoning" on adjacent private lands near federal installations such as national parks and national seashores. There are clear suggestions that federal power under the Property

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of federal power under the Commerce Clause. *National League of Cities v. Usery*, 426 U.S. 833 (1976). Similarly, cases under the Indian Commerce Clause have referred to federal power over Indian affairs as being "plenary." *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Recently, however, the Court has noted that broad congressional power under the Indian Commerce Clause "does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny . . ." *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977).

The Court in *Kleppe* relied upon numerous older cases standing for "absolute" or "total" federal power over the public lands. 426 U.S. at 539-41. While congressional and executive authority on the public land remains broad today, such older authorities should not be taken literally because of stricter modern judicial review, *see* text accompanying notes 18-29 *supra*; the decline of the political question doctrine, *see, e.g., Henkin, Is There a "Political Question" Doctrine?*, 85 *YALE L. J.* 597 (1976); and the general judicial and congressional movement away from administrative absolutism on the public lands, *see* text accompanying notes 18-39 *supra*.

82. On the use of the rational relationship test to measure exercises of congressional power under the Commerce Clause *see* L. TRIBE, *CONSTITUTIONAL LAW*, 450-53 (1978).

83. *See* text accompanying notes 117-49 *infra*.

84. 426 U.S. at 546.

85. 552 F.2d 817 (8th Cir. 1977). *See also* *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979). The court in *Lindsey* held that federal regulatory authority extended to individuals who violated Forest Service regulations notwithstanding the fact that the violations occurred on state land. The violation occurred completely within the exterior boundaries of the national forest on the bed of a navigable river owned by the state of Idaho.

Clause can be extended to non-federal lands, but there is no definitive ruling.<sup>86</sup> The Commerce Clause, by analogy, has been held to extend to trade that was concededly not within interstate commerce; the Court's reasoning was that the trade had an impact on interstate commerce and was thus subject to federal preemptive power.<sup>87</sup> It would follow that the Property Clause supports federal regulatory authority over non-federal lands if there is a rational basis for controlling those activities in order to preserve and protect federal lands and resources.

Although several issues remain to be resolved, the broad outlines of federal authority in public land law have been settled. Federal authority includes governmental power and is not limited to the rights of a property owner.<sup>88</sup> Federal sovereign authority can be exercised pursuant to the Property Clause, which encompasses all of the public lands, and not just pursuant to the Jurisdiction Clause, which covers only a limited number of federal enclaves.<sup>89</sup> Although no case has finally resolved the longstanding dispute between the legislative and executive branches, it seems certain that federal power over public lands is lodged ultimately with Congress under the Property Clause, not with the President.<sup>90</sup> Congress' power is preemptive and overrides

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86. See, e.g., *id.*; *Camfield v. United States*, 167 U.S. 518 (1897); *United States v. Alford*, 274 U.S. 265, 267 (1927). Federal regulatory authority of the public lands is discussed in Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 939 (1976).

87. In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court upheld congressional regulation of production of wheat by a farmer not involved in interstate commerce, because such wheat "competes with wheat in commerce." *Id.* at 128. See also, *Katzenbach v. McClung*, 379 U.S. 294 (1964).

88. See text accompanying notes 62-69 *supra*.

89. *Id.*

90. In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), the Court upheld an executive order by President Taft withdrawing some three million acres of public lands from mineral entry. There was no express delegation of authority from Congress to the President. The government argued that the President had such power as Commander in Chief, U.S. CONST., art. II, § 2, cl. 1, and as a matter of inherent executive power under U.S. CONST., art. II, § 1, cl. 1. The Court refused to consider the matter of whether the President had such constitutional authority under Article II. 236 U.S. at 469. The withdrawal, however, was upheld on the notion that Congress had never objected to such withdrawals and that its silence amounted to "acquiescence" of such executive withdrawals. *Id.* at 469-72.

Even after the passage of the Pickett Act in 1910, 43 U.S.C. §§ 141-143 (1964), the Attorney General found that the Pickett Act limited the President's authority only in regard to temporary withdrawals, and that the President could continue to make permanent withdrawals without statutory authority. 40 Op. Atty. Gen. 73 (1941). When FLPMA was passed in 1976, Congress included a provision to "repeal" any implied authority of the President to make withdrawals pursuant to the reasoning of *Midwest Oil*. See § 704(a) of FLPMA, *supra* note 4. No case has ever affirmed inherent constitutional authority of the President to make withdrawals. See generally, Wheatly, *Withdrawals Under the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 311 (1979). See also, *Portland Gas & Electric Co. v. Kleppe*, 411 F. Supp. 859 (D. Wyo. 1977).

inconsistent state laws pursuant to the Supremacy Clause.<sup>91</sup> Finally, since congressional authority can validly be delegated to administrative agencies, a state law can be preempted by a validly adopted administrative regulation.<sup>92</sup>

These conclusions, which parallel the development of the Commerce Clause, are not likely to change. However, we are in an era of "co-operative federalism," and that policy, coupled with the politics of the "Sagebrush Rebellion," may well mean that Congress will grow increasingly reluctant to *exercise* its authority on the public lands. In addition, as the following section will indicate, the courts may adopt a judicial approach which narrowly construes federal statutes and regulations when the preemption of state law is involved.

## II. STATE POLICE POWER ON THE PUBLIC LANDS

Historically, state laws have not been thought of as a major force in the development of resource policy on the public lands. The focus has been on the federal agencies and on private interest groups that have developed resources on the public lands. Today the states are moving on several fronts to extend their laws to the federal lands. General rules can and should be developed to help resolve issues of state jurisdiction on the public lands.

The applicability of state laws can be approached by a three-step question analysis. First, does the state action unreasonably interfere with the administration of the public lands to such an extent that it is barred by the doctrine of intergovernmental immunities? Second, is the area involved a federal enclave and is the state law in question excluded by the terms of the cession governing the enclave? Third, if neither of the above applies, has the state law been preempted by federal law? As will be seen by the following analysis, each of these issues has been construed in a manner allowing for relatively broad state authority.

### A. *Intergovernmental Immunities*

The Supreme Court in *Fort Leavenworth R. R. v. Lowe*,<sup>93</sup> stated in

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91. See generally, *Kleppe v. New Mexico*, 426 U.S. 529 (1976); text accompanying notes 62-69 *supra* and 117-49 *infra*.

92. In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1976), the Court found that "[i]t has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.' This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause." *Id.* at 295-96. Many of the preemptive actions in public land law are accomplished by means of agency regulations implementing general authority delegated to the agency by statute. See, e.g., *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977).

93. 114 U.S. 525 (1885).



dictum that federal installations on the public lands must be "free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purpose designed."<sup>94</sup> This was an early statement, in the public lands context, of the doctrine of intergovernmental immunities.<sup>95</sup>

Several cases have given content to the rule that states cannot "interfere" with the federal lands and their management. Federal lands and buildings may not be directly taxed by the states.<sup>96</sup> State adverse possession laws do not operate against the United States.<sup>97</sup> State eminent domain laws do not apply.<sup>98</sup> Title to federal real property will normally not be affected if federal employees engage in conduct that might amount to laches or estoppel if those acts were done by private persons.<sup>99</sup> State law can have no effect on federal employees carrying out their duties, such as harvesting wildlife,<sup>100</sup> in furtherance of federal land and resource management objectives.<sup>101</sup>

In several other cases, however, courts have decided that certain state activities are not unreasonably burdensome and thus not prohibited by the intergovernmental immunities doctrine. States may usually tax private activities on the public lands.<sup>102</sup> Recently, the Court went a step further and allowed non-discriminatory local taxation of leasehold

94. *Id.* at 539.

95. The doctrine traces to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), striking down a discriminatory state tax on the Bank of the United States, where Mr. Chief Justice Marshall made his famous statement "[t]hat the power to tax involves the power to destroy . . ." *Id.* at 431. Often the doctrine is analyzed largely in terms of federal immunity from state taxes. See J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 367-74 (1978). The doctrine can, however, also prohibit state regulation not involving taxation. See generally, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 391-401 (1978) and Engdahl *supra* note 43, at 371-76.

96. *E.g.*, *Van Brocklin v. Tennessee*, 117 U.S. 151 (1876).

97. *E.g.*, *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917).

98. *E.g.*, *id.*; *Minnesota v. United States*, 305 U.S. 382 (1939).

99. See, *e.g.*, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917). A few recent cases have upheld private claims to land title on the basis of serious misconduct by administrative officials. See, *e.g.*, *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970).

100. See, *e.g.*, *Hunt v. United States* 278 U.S. 96 (1928).

101. State interference with activities of federal officials can be viewed as either an intergovernmental immunity or preemption question. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 391 (1978).

102. See, *e.g.*, *United States v. Boyd*, 378 U.S. 39 (1964); *United States v. City of Detroit*, 335 U.S. 466 (1958). The intergovernmental immunities doctrine "was once much in vogue," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150 (1973), but modern cases have seldom invoked the doctrine to bar state action. See Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633 (1945); Ratchford, *Intergovernmental Tax Immunities in the United States*, 6 NAT. TAX J. 305 (1953). A major reason for the infrequent application of the doctrine is that the Court has found that private operations on federal lands are not federal instrumentalities, so that such activities by private entities do not invoke the doctrine of intergovernmental immunities. Even in federal enclaves, which are

interests held by Forest Service employees in public buildings on public lands.<sup>103</sup> Furthermore, direct state regulation of a federal installation is not *per se* impermissible if Congress allows the regulation.<sup>104</sup>

Thus only a narrow range of state laws is barred as unreasonably "interfering" with federal interests under the intergovernmental immunities doctrine.<sup>105</sup> In public land law, the doctrine seems to bar only state taxation of federal property, state laws that directly affect title to federal property, and state laws that would make illegal the conduct of a federal official acting pursuant to a valid federal statute or regulation.

### B. Federal Enclaves

If a state law is not barred by the intergovernmental immunities doctrine, the next question is whether the land in question is designated as a federal enclave.<sup>106</sup> Federal enclaves include military bases, certain national parks, national monuments and similar installations, and some federal office buildings. They amount to less than ten percent of the public lands.<sup>107</sup> Apparently all federal enclaves were created with the consent of the applicable state, although a broad reading of *Kleppe v. New Mexico*<sup>108</sup> would suggest that exclusive federal jurisdiction could be created unilaterally by Congress.<sup>109</sup>

Federal enclaves are governed by the terms of the cession of juris-

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often not subject to state law, Congress has by statutes extended state law to many private activities. See note 114 *infra*.

103. *United States v. County of Fresno*, 429 U.S. 452 (1977). The Court found that "[t]he 'legal incidence' of the tax involved in this case falls neither on the Federal Government nor on federal property. The tax is imposed solely on private citizens who work for the Federal Government." *Id.* at 464.

104. See, e.g., *California v. United States*, 438 U.S. 645 (1978), upholding state restrictions on the operation of a federal reclamation project.

105. Modern opinions have typically used a preemption analysis, not the doctrine of intergovernmental immunities, in determining whether state laws are valid as against private activities on public lands. See notes 117-49 *infra*. In light of the decline of the intergovernmental immunities doctrine, see note 102 *supra*, and the increased reliance on preemption, see notes 117-49 *infra*, this trend is likely to continue. Today, for example, courts might treat *United States v. City of Detroit*, 355 U.S. 466 (1958), discussed in note 102 *supra*, as a preemption case since the case involved a state tax on a private lessee of federal property.

106. Federal enclaves are defined here as any federal lands that are subject to a specific cession agreement from the state. Thus federal enclaves include all of those areas which have been described as being under "exclusive," "concurrent," and "partial" federal jurisdiction. See note 48 *supra*.

107. *Id.*

108. 426 U.S. 529 (1976).

109. It has been directly held that exclusive federal jurisdiction may be established by procedural methods other than those specified in the Jurisdiction Clause. See note 61 *supra*. If, as stated in *Kleppe*, congressional power over the public lands really is "complete," or nearly so, see notes 65-69 *supra*, then Congress may well have the power simply to enact a statute establishing a federal enclave within a state. But it appears that Congress has never acted in this fashion.

diction from the state to the United States.<sup>110</sup> The Court has deferred to the highly political nature of these jurisdictional accommodations and has affirmed "arrangements" expressly made by the two sovereigns.<sup>111</sup>

Where the terms of the cession are not explicit the Court has been generally liberal in allowing the application of state law on federal enclaves. The Court has recognized that federal enclaves are not literally extraterritorial to the states and that many state and local laws do in fact apply in federal enclaves; the "fiction of a state within a state" has been rejected.<sup>112</sup> There is sound policy for this reasoning: although Congress has provided for a comprehensive criminal code in federal enclaves by the simple and appropriate expedient of assimilating state criminal laws,<sup>113</sup> no analogous comprehensive action has been taken in regard to civil laws. Congress has by statute extended selected state regulatory laws onto federal enclaves,<sup>114</sup> but many substantive regulatory areas have not been considered. The situation in private litigation is even worse: state common law *at the time of the cession of jurisdiction by the state* controls until it is altered by Congress.<sup>115</sup>

Thus the law on public enclaves is fraught with voids and archaic provisions. The courts should, as seems implicit in most of the opinions, liberally construe state reservations of jurisdiction as to federal enclaves to allow for the development of a reasonably consistent, com-

110. See note 61 *supra*.

111. *Id.*

112. See, e.g., *Howard v. Commissioners of Louisville*, 344 U.S. 624, 627 (1953); *Evans v. Cornman*, 398 U.S. 419, 421 (1970).

113. The Assimilative Crimes Act, 18 U.S.C. § 13 (1976), makes state criminal law applicable in federal enclaves if there is no relevant federal statute. The Assimilative Crimes Act was held to be constitutional in *United States v. Sharpnack*, 355 U.S. 286 (1958).

114. The Buck Act allows states to collect sales, income, gasoline, and use taxes in federal enclaves, 4 U.S.C. §§ 104-110 (1976), although the Act does not permit taxation of the United States or federal instrumentalities. See 4 U.S.C. § 107(a) (1976); *United States v. Mississippi Tax Comm'n*, 412 U.S. 363 (1963). State unemployment laws, 26 U.S.C. § 3305(d) (1976), and workers' compensation laws, 40 U.S.C. § 290 (1976), also are extended by statute to federal enclaves. See generally, *Evans v. Cornman*, 389 U.S. 419, 424 (1970).

115. In *Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929), for example, the applicable substantive law governing a law suit filed in the 1920's was found to be the law in effect in 1904, when the federal enclave was established. State law at that time provided for strict liability of innkeepers for damage to personal property of guests due to fire. A 1913 state statute, relieving innkeepers from strict liability and establishing negligence as the standard, was inapplicable because state civil law at the time of the transfer in 1904 governed. The reasoning is based upon a principle of international law "that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign." *Chicago, Rock Island & Pacific R.R. v. McGlinn*, 114 U.S. 542, 546 (1885). See also *Pacific Coast Dairy, Inc. v. Department of Agriculture of California*, 318 U.S. 285, 294 (1943).

prehensive, and current body of law on federal enclaves.<sup>116</sup>

### C. Federal Preemption

The special body of law dealing with federal enclaves is inapplicable to most public lands. The two major multiple-use agencies, the Forest Service and the Bureau of Land Management, manage little acreage in federal enclaves.<sup>117</sup> And it is on the remaining 90% or more<sup>118</sup> of the public lands not in federal enclaves where the difficult state-federal issues will most often be raised, because it is there that the various user groups most often collide over competing resource uses. In those cases, the question is whether federal law has preempted state law.

The leading case is *Kleppe v. New Mexico*,<sup>119</sup> where the Court upheld the Wild Free-Roaming Horses and Burros Act of 1971.<sup>120</sup> As noted, the case confirmed federal power on the public lands over wildlife, an area traditionally left to state control.<sup>121</sup> The *Kleppe* Court held that the Property Clause gave Congress the power to preempt state laws. As a result, New Mexico estray laws did not apply because the 1971 act had made other provisions for these strays.

On one level, *Kleppe* can be read to stand for drastically limited state power on the public lands. The Court expressly analogized the sovereign power of Congress under the Property Clause to that of the states under the Tenth Amendment.<sup>122</sup> If read expansively, *Kleppe* means that state police power is subject to federal preemption in over one-third of the land area in the United States, plus adjacent areas.<sup>123</sup>

The practical impact of *Kleppe* is not nearly as great as the above analysis might suggest. *Kleppe* speaks only to the potential and theoretical range of congressional power. In fact, Congress has chosen to exercise that power sparingly. There are, of course, severe political constraints whenever any broad exercise of the power is considered. Congress has more often deferred to state law on the public lands and state law remains applicable when it has not been preempted by federal

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116. The real burden to undertake reform, of course, is on Congress. The job of assimilating state civil law into federal enclaves is a delicate one. For example, account must be made for the proper operation of federal activities. Nevertheless, Congress should consider the merits of an "Assimilative Civil Law Act," to resolve the current crazy-quilt. Congress certainly has the power to pass such an act. See note 113 *supra*.

117. PLLRC JURISDICTION REPORT, *supra* note 48, at 163.

118. *Id.*

119. 428 U.S. 529 (1976), discussed at notes 63-83 *supra*.

120. 16 U.S.C. §§ 1331-1340 (1976).

121. See note 64 *supra*.

122. 426 U.S. at 540-41.

123. The reach of the Property Clause over non-federal lands adjacent to public lands is discussed in the text accompanying notes 84-87 *supra*.

law. Thus substantive state laws apply to many private activities on the public lands, and most controversies—criminal and civil—will be heard in state court.<sup>124</sup>

Even on issues of resource management and allocation, Congress has often deferred to state law. The basic structure of the Hardrock Mining Law of 1872<sup>125</sup> allows states to establish the basic elements of a valid mining claim on the federal lands.<sup>126</sup> Water law provides another example of deference to state law. The great gold strikes occurred on the public lands<sup>127</sup> and water was necessary to develop those discoveries. When faced with private litigation over water rights, the courts upheld the application of state law on the public lands.<sup>128</sup> They were correct: state law applies on the public lands unless it is preempted by federal law, and there was no federal preemption as to water law in those situations.<sup>129</sup>

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124. On most of the public lands, state judicial and regulatory law will have wide application. There is no federal question, for example, under 28 U.S.C. § 1331 (1976) for the purpose of federal judicial jurisdiction simply because public lands are involved. Thus 16 U.S.C. § 480 (1976), providing that states retain civil and criminal jurisdiction over national forests, is probably surplusage. Unless there are intergovernmental immunities or a federal enclave involved, *see* sections IIA and IIB *supra*, state laws continue to apply until they are preempted.

Federal enclave law should be considered a special circumstance applied only to a limited number of federal installations. Attempts by advocates to extend federal enclave law to other federal lands has been a confusing factor present in a considerable amount of public lands litigation. *See, e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 541-44 (1976); *State ex rel. Cox v. Hibbard*, 31 Ore. App. 269, 570 P.2d 1190, 1193 n. 5 (1977); and *Texas Oil & Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366, 368-69 (W.D. Okla. 1967), *affirmed*, 406 F.2d 1303 (10th Cir. 1969).

125. 30 U.S.C. §§ 22-54 (1976).

126. *See, e.g.*, 30 U.S.C. §§ 24, 26, 28, 28b, 38 and 43 (1976). State laws are collected in ROCKY MOUNTAIN MINERAL LAW FOUNDATION, DIGEST OF MINING CLAIM LAWS (R. Pruitt, Jr., ed. 1977). *See generally*, L. MALL, PUBLIC LAND AND MINING LAW, ch. 6-8 (1979).

127. *See, e.g.*, R. PAUL, CALIFORNIA GOLD: THE BEGINNING OF MINING IN THE FAR WEST (1947).

128. *See, e.g.*, *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

129. In *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), the Court construed the Desert Land Act of 1877, 43 U.S.C. § 321 (1976), as severing any water rights that might have accompanied federal patents on non-navigable waters: "What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states. . . ." 295 U.S. at 163-64. Two earlier acts, not limited to non-navigable waters, had also protected existing water rights as against the United States, Act of July 26, 1866, ch. 262, 14 Stat. 251, and as against subsequent patents, Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218. But these three acts leave numerous questions open. For example: What law applied on the public lands before 1877? Or 1870? Or 1866? What law applies to navigable waterways on the public lands? What law applies to public lands located in the states not subject to the Desert Land Act? The answer on all counts (assuming that there is no special federal action, such as a federal reserved water right, *see* note 222 *infra*) is that state or territorial law, which often incorporated local customs, has always controlled be-

Similarly, despite *Kleppe*, Congress has seldom preempted state wildlife law on the public lands. *Baldwin v. Montana Fish and Wildlife Comm'n*,<sup>130</sup> is instructive. Montana required a \$225 fee for out-of-state big game hunters, while Montana residents were required to pay a fee of only nine dollars. To a large extent, this licensing structure applied to the public lands, because much of the hunting in Montana occurs on the public lands.<sup>131</sup> The Court upheld the non-resident fee, in part because Congress had not enacted any contrary law to preempt the state law.<sup>132</sup>

*Baldwin*, rather than *Kleppe*, represents the actual situation concerning on-the-ground wildlife management on the public lands. The Endangered Species Act<sup>133</sup> and other special acts<sup>134</sup> are important, but their impact on the total number of animals on the public lands is minimal. State law applies to all other wild animals unless there is a conflicting federal law, a necessity since there are only 200 federal wildlife enforcement officials compared to 6,000 state wildlife employees.<sup>135</sup> State wildlife law applies, with some exceptions, on national wildlife refuges.<sup>136</sup> FLPMA provides that state licensing laws will be respected on Forest Service and BLM lands and that most state fish and wildlife laws will continue to apply on the public lands.<sup>137</sup> Thus federal *power* exists over wildlife on the public lands, but the federal power has been sparingly *exercised*. Taking the public lands as a whole, state law regarding wildlife dominates over federal law.

The tradition of deference to state law in public land law may prove to be important in analyzing preemption cases on the public lands.<sup>138</sup> Although Congress sometimes spells out its intent to exclude state law with some particularity, the tough cases involve questions of whether Congress intended to override state law in specific instances

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cause state law was never preempted. The three acts only confirmed existing law. See F. TRELEASE, *FEDERAL-STATE RELATIONS IN WATER LAW*, REPORT PREPARED FOR THE NATIONAL WATER COMMISSION 147b-147h (1971). Thus state courts were correct from the beginning, see *Irwin v. Phillips*, 5 Cal. 140 (1855), in applying state water law on the public lands.

130. 436 U.S. 371 (1978).

131. *Id.* at 390-91 n. 23.

132. *Id.*

133. 16 U.S.C. §§ 1531-1543 (1976), as amended by Pub. L. No. 95-632, 92 Stat. 3751.

134. See generally, Coggins, *Federal Wildlife Law Achieves Adolescence: Developments in the 1970's*, DUKE L. J. 753 (1978).

135. GOTTSCHALK, *The State-Federal Partnership in Wildlife Conservation* in WILDLIFE IN AMERICA 302 (Council on Environmental Quality 1978).

136. 16 U.S.C. § 668dd(d) (1) (1976).

137. 43 U.S.C. § 1732(b) (1976).

138. On preemption generally, see Note, *Pre-emption As A Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959); Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L. Q. 295 (1977); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 376-404 (1978).

when congressional intent is ambiguous or when there is no legislative history at all. Rather than articulating a single general rule for preemption, the Court has developed different rules of construction to resolve the questions involved in the many different bodies of law where preemption questions arise.<sup>139</sup> For example, the Court has been relatively quick to find federal preemption in areas that are "traditionally federal,"<sup>140</sup> such as foreign affairs,<sup>141</sup> communications,<sup>142</sup> treasury regulations,<sup>143</sup> and Indian law,<sup>144</sup> where federal interests are sufficiently ingrained that it may reasonably be presumed that Congress intended broad federal power because of the historic pattern of federal supremacy.<sup>145</sup> In other areas, the federal interest has traditionally not been so pervasive and the courts have been more reluctant to find a congressional intent to preempt state law.<sup>146</sup> The Court seems to have adopted a presumption in favor of state law in such subject matter areas when congressional intent to preempt is ambiguous.<sup>147</sup>

These principles indicate that, except in those few cases involving intergovernmental immunity or federal enclaves, public land law may be an appropriate field in which to apply a presumption in favor of state law when difficult preemption cases arise. Although there are numerous examples of pervasive federal regulation,<sup>148</sup> traditionally Con-

139. Note, *The Preemption Doctrine: Shifting Perspectives On Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

140. See *Hines v. Davidowitz*, 312 U.S. 52 (1941).

141. *E.g., id.* (registration of aliens); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (sedition laws).

142. *E.g., Farmers Educ. & Corroborative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959).

143. *E.g., Free v. Bland*, 369 U.S. 663 (1962).

144. *E.g., Bryan v. Itasca Co.*, 426 U.S. 373 (1976).

145. In addition to analyses that seem to be based upon the peculiar subject matter, the Court has used other rationales, including a presumption in favor of federal preemption when the national interest in uniformity is so strong that Congress will be deemed to have "occupied the field." *E.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (labor relations); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (aviation regulation).

146. See generally, Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197 (1978).

147. An example is *New York State Dept. of Social Service v. Dublino*, 413 U.S. 405 (1973), where the Court upheld state work rules conditioning receipt of federal AFDC benefits upon fulfillment of an additional state requirement. The Court found a presumption in favor of the state legislation: "If Congress is authorized to act in a field it should manifest its intention clearly . . . . The exercise of federal supremacy is not likely to be presumed." *Id.* at 413. See also, *e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 621 n. 4 (1978) (state retail gas marketing law). As suggested, this presumption does not operate across the board; traditional federal subject matter areas, for example, would be excluded. See notes 140-44 *supra*. The commentators, however, have properly noted a trend in favor of the validity of state laws in preemption contexts. Note, *The Preemption Doctrine: Shifting Perspectives*, 75 COLUM. L. REV. 623, 651-54 (1975).

148. Federal regulation seems to be especially comprehensive in the area of grazing

gress has often deferred to state law and has seldom chosen to exercise the full reach of its power under the Property Clause.<sup>149</sup> Any presumption in favor of state law would, of course, be obviated by express statutory language, by clear legislative history, by valid administrative regulations inconsistent with state law, by a compelling need for national uniformity, or by a statutory or regulatory scheme that occupies the field.

### III. THE ROLE OF THE JUDICIARY IN PUBLIC LAND LAW

#### A. *Judicial Review of Administrative Action*

The courts, which have proved to be so important in the modern era of public land law,<sup>150</sup> will continue to be called upon to make still more major decisions over the next several years. Many older statutes<sup>151</sup> contain general language that will inevitably require interpretation in the context of current issues. Recent major legislation has received little or no construction from the Supreme Court: examples are the Multiple-Use Sustained-Yield Act,<sup>152</sup> the Wilderness Act,<sup>153</sup> the Resources Planning Act,<sup>154</sup> the National Forest Management Act,<sup>155</sup> and FLPMA.<sup>156</sup>

Many of the issues are likely to center upon the scope of administrative discretion. The Administrative Procedure Act provides general guidelines, but in fact the courts have tended to develop different approaches toward different subject matter in different agencies.<sup>157</sup> In re-

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policy, *see* note 6 *supra*; timber policy, *see* notes 32 and 35 *supra*; and mineral leasing, *see* note 38 *supra* and *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd*, 100 S. Ct. 1593 (1980). Even in those areas, however, there may be room for federal regulation on those issues not specifically addressed by federal statutes or regulations. *See, e.g., Texas Oil & Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366 (W.D. Okla. 1967), *affirmed*, 406 F.2d 1303 (10th Cir. 1969).

149. *See* text accompanying notes 125-37 *supra*. A recent case noting the deference to state law in the area of water resources, describing it as "cooperative federalism," is *California v. United States*, 438 U.S. 645 (1978).

150. *See* notes 18-30 *supra*.

151. *See, e.g.,* notes 5-7 *supra*.

152. 16 U.S.C. §§ 528-531 (1976).

153. 16 U.S.C. §§ 1131-1136 (1976).

154. *See* note 35 *supra*.

155. *See* note 30 *supra*.

156. *See* note 4 *supra*.

157. The scope of judicial review of administrative adjudications is dependent on the "substantial evidence" test, 5 U.S.C. § 706(2)(E) (1976). There is no indication that factual determinations by administrative law judges should be reviewed in a different manner by the courts depending upon the specific agency or subject matter involved. But only a small percentage of administrative decision making is made in adjudications; policy is often developed by informal rule making and by far the largest amount of agency decisions involves what Professor Davis calls "discretionary justice," involving neither adjudications nor rule making. *See generally, K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY*



viewing adjudicatory action by land management agencies, courts could adopt at least three different models of review, which might be called Deferential Review, Neutral Review, and Trust Review.

Deferential Review would provide for limited judicial review of decisions made by land management agencies. There are sound policy reasons for according broad administrative leeway in this field. Public land and resource decisions are heavily factual, often involving complex economic, technological, and scientific issues; these are the kinds of decisions that courts most often leave to administrative expertise.<sup>158</sup> Many public land decisions support Deferential Review, the approach taken by most courts prior to 1970.<sup>159</sup> Furthermore, many would argue

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(1969). The "substantial evidence" test does not apply to judicial review of informal rule making or other administrative decisions not made in adjudications. Review of these other classes of decisions often proceeds under the APA's rubric of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976).

The "arbitrary and capricious" standard is a general formulation of the notion that courts must allow deference to agency decisions to which the test applies. But no single definition of a standard of review is adequate to the task: federal administrative agencies, the subject matter they deal with, and the varied kinds of decisions they must make (leaving aside adjudications) are simply too diverse. Thus courts have implicitly refined the "arbitrary and capricious" standard by giving especially broad deference in areas involving complex technological issues, national security, or old and respected administrative agencies. Examples of subject areas involving broad administrative power, and concomitantly diminished judicial scrutiny, are: the admission of aliens, *e.g.*, *Hampton v. Mow Son Wong*, 426 U.S. 88, 101 n. 21 (1976) ("The power over aliens is of a political character and therefore subject only to narrow judicial review."); health, *e.g.*, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); banking, *e.g.*, *Fahey v. Mallonee*, 332 U.S. 245 (1947); military affairs, *e.g.*, *Parker v. Levy*, 417 U.S. 733 (1974); prosecutorial discretion, *e.g.*, *Dunlop v. Bachowski*, 421 U.S. 560, 574 (1975) (brief statement of reasons to explain decision required, but instances involving more substantial judicial review "should be rare indeed."); and foreign affairs, *e.g.*, *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969). On the other hand, the courts seem to have allowed less administrative discretion, and have engaged in greater judicial scrutiny, where the issue involves, for example, public participation in the administrative process, *e.g.*, *National Welfare Rights Organization v. Finch*, 429 F.2d 725 (D.C. Cir. 1970) and *Office of Communication of United's Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); Indian law, *e.g.*, *Morton v. Ruiz*, 415 U.S. 199 (1973); free expression, *e.g.*, *McGee v. United States*, 402 U.S. 479 (1971); and race, *e.g.*, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). The notion that federal judicial review of administrative action may vary according to the circumstances is explored in Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 366, 377-95 (1968), and K. DAVIS, *ADMINISTRATIVE LAW* TEXT 551-56 (1972).

158. See note 157 *supra*.

159. See, *e.g.*, *Udall v. Tallman*, 380 U.S. 1 (1965); *Sierra Club v. Butz*, 3 E.L.R. 20292 (9th Cir. 1973); *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alas. 1971); *Dorothy Thomas Foundation, Inc. v. Hardin*, 317 F. Supp. 1072 (W.D. N.C. 1970). One doctrine that has played a significant role in public lands litigation is that judicial review can be eliminated entirely for those matters "committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1976). Many of those cases are collected in Comment, *The Conservationists and the Public Lands*, 68 MICH. L. REV. 1200, 1236-42 (1970), although the Court has since found that there is a presumption of judicial review and that review should be precluded only when there is a clear showing of congressional intent. See *Dunlop v. Bachowski*, 421 U.S. 560 (1975); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). The pervasiveness

that Deferential Review must be accorded to most complex administrative decision-making since the decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.<sup>160</sup>

Neutral Review means that courts would approach public lands cases by analyzing only the words of the specific statute in question without looking at the broader context of the field. There would be no presumptions or biases in any direction. Neutral Review in many respects is well suited to public land law. It is a heavily statutory field. Many statutes were, in fact, adopted on an ad hoc basis without a view toward the broader dimensions of the field; indeed, the inconsistency and lack of unity in the field was a primary theme of the report of the Public Land Law Review Commission.<sup>161</sup> It was not until the Multiple Use—Sustained Yield Act of 1960,<sup>162</sup> and particularly the Resources Planning Act of 1974<sup>163</sup> and FLPMA of 1976,<sup>164</sup> that Congress began a serious drive toward order and unity in public land law. In this setting, a good case can be made that courts should simply interpret each statute by itself, in a neutral way, without looking to the larger dimensions of the field.

There is yet another approach, which can be termed Trust Review. Such an approach would narrow administrative discretion and increase judicial scrutiny based upon the public trust doctrine or upon analogies to that doctrine.

The public trust doctrine traces its beginnings to early Roman and English law.<sup>165</sup> It operated as a restraint on the Crown by placing limi-

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of the notion that courts should play little or no role in public lands issues is evidenced in one case, *involving judicial review of a fact issue in an adjudication*, where the government made this argument in its brief: "[T]he Secretary is the guardian of the public domain and the administrative officer who must, by law, determine whether the congressional directives have been complied with. . . . [T]he finding of fact on this point is one within the exclusive authority of the Secretary. This is not open to question." *Stewart v. Penny*, 238 F. Supp. 821, 826-27 n. 3 (D. Nev. 1965).

160. 435 U.S. 519 (1978). Compare, e.g., Note, *Administrative Law—Vermont Yankee "Maximum Procedural Requirements" Rule*, 27 KAN. L. REV. 183 (1979) with Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L. J. 699 (1979). Professor Davis concludes that "the law in the long run will reject the *Vermont Yankee* opinion and is even tending to do so in the short run." Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3.

161. See, e.g., PLLRC REPORT, *supra* note 1, at 42 ("A Congressional statement of policy goals and objectives for the management and use of public lands is needed to give focus and direction to the planning process."). The act establishing the Public Land Law Review Commission specifically declared that a "comprehensive review" of public lands legislation and regulations was necessary because those laws "are not fully correlated with each other" and because administration of the public lands has been divided among several federal agencies. Act of September 19, 1964, § 2, 78 Stat. 982.

162. See note 7 *supra*.

163. See note 35 *supra*.

164. See note 4 *supra*.

165. The public trust doctrine is explored in the influential article, Sax, *The Public Trust*

tations on the granting away of rights to shores and rivers. Apparently the public trust doctrine was not intended to be a restraint on Parliament, the legislature.<sup>166</sup>

In the United States, the public trust doctrine has developed separately in different states as a matter of internal state law.<sup>167</sup> Federally, the leading case is *Illinois Central Railroad v. Illinois*.<sup>168</sup> Upon statehood, Illinois received title to the beds of navigable waterways pursuant to the public trust doctrine. The state granted away more than 1,000 acres to the railroad company—"nearly the whole of the submerged lands of the [Chicago] harbor."<sup>169</sup> This extraordinary grant was struck down as being contrary to the public's interest in the water and land. Since navigable water and public trust lands are "held in trust for the people,"<sup>170</sup> the Court concluded that the grant was so extreme that it amounted to an abdication of the state's responsibility.

There is uncertainty as to the application of the public trust doctrine to the public lands. One commentator has argued for a "public land trust,"<sup>171</sup> but a completely convincing case was not made. It is true that the Supreme Court said in *Light v. United States*<sup>172</sup> and other early cases<sup>173</sup> that the public lands were held in "trust" for the people. Those statements, however, were loose dictum and actually stand for broad, not limited, administrative discretion.<sup>174</sup> Cases relying upon the

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*Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). On the Roman and Common Law roots see 1 R. CLARK, WATERS AND WATER RIGHTS Ch. 3 (1967); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. STATE L. REV. 511 (1975); and 1 H. FARNHAM, WATER AND WATER RIGHTS § 36 (1904).

166. Sax, *supra* note 165, at 476.

167. Authorities are collected in Sax, *supra* note 165, and W. ROGERS, ENVIRONMENTAL LAW, § 2.16 (1977).

168. 146 U.S. 387 (1892).

169. *Id.* at 451.

170. *Id.* at 460.

171. Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586 (1977).

172. 220 U.S. 523 (1911).

173. See, e.g., *United States v. San Francisco*, 310 U.S. 16, 28 (1940); *Camfield v. United States*, 167 U.S. 518, 524 (1897); *Knight v. United States Land Assn.*, 142 U.S. 161, 181 (1891); and *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890).

174. The essence of the public trust doctrine in public land law is that it would impose responsibilities on administrative agencies or, more remotely, on Congress. The early cases using trust language, however, upheld a broad federal power—especially in the areas of protecting federal land and in disposing of federal land. See *Light v. United States*, 220 U.S. 523 (1911) (power to prohibit unauthorized grazing by private parties on the public lands); *Camfield v. United States*, 168 U.S. 518 (1897) (power to prohibit private parties from fencing that would deny access of other private parties to the public lands); *Knight v. United States Land Assn.*, 142 U.S. 161 (1891) (broad power to dispose of federal lands); and *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160 (1890) (power to dispose of public lands). These cases, then, use the public trust—the public interest—to justify a virtu-

federal trust responsibility for Indian lands are unpersuasive in light of the early, special, and separate doctrinal development in Indian law.<sup>175</sup>

Two important lower court cases<sup>176</sup> involving the Redwood National Park do squarely invoke the public trust doctrine as to public land. That litigation, however, involved unique and extreme facts.<sup>177</sup> Further, the *Redwood Park* cases were based upon two strong statutes, the National Park Service Organic Act<sup>178</sup> and the Redwood Park

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ally plenary congressional (and administrative) authority on the public lands. There was no suggestion that the public trust could be used to limit federal power.

175. *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972), which has been cited to support a public trust doctrine in public land law, involved the question of whether a 99-year lease of Indian lands was subject to NEPA. The opinion included dictum that "all lands of the United States are held by it in trust for the people of the United States." *Id.*, 469 F.2d at 597. *Davis* and other Indian law cases, however, are not on point. The trust duty to Indians was first set forth in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and has since developed as a highly specialized doctrine based upon the United States' unique obligations to Indians. *See generally*, Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975). There is no "public" trust involved in Indian lands because those lands are held in trust for specific Indian tribes and individuals. Recognizing this factor, Congress expressly excluded Indian lands when public lands were studied by the Public Land Law Review Commission. *See* Act of September 19, 1964, Section 10, 78 Stat. 982. Thus, for example, Indian lands are not subject to disposition under general public land laws such as the homestead acts. *See Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Cramer v. United States*, 295 U.S. 103 (1935).

176. *Sierra Club v. Department of Interior*, 398 F. Supp. 284 (N.D. Cal. 1975); *Sierra Club v. Department of the Interior*, 376 F. Supp. 90 (N.D. Cal. 1974). The litigation involved a request by the Sierra Club that the Department of Interior, acting through the National Park Service, use its powers to prevent damage allegedly caused to Redwood National Park from logging on private lands adjacent to the park. In the first opinion, the court denied the government's motion to dismiss and alternative motion for summary judgment. In doing so, the court found that there were "general fiduciary obligations of the Secretary of the Interior" in regard to managing the public lands. 376 F. Supp. at 93. The court cited *Knight v. United States Land Assn.*, 142 U.S. 161 (1891), discussed in note 174, *supra*; *Utah Power & Light v. United States*, 243 U.S. 389 (1916), which used trust language only in passing; and *Davis v. Morton*, 469 F.2d 592 (10th Cir. 1972), discussed in note 175 *supra*. The court also relied upon the National Park Service Organic Act, 16 U.S.C. § 1 (1976) and the Redwood National Park Act, 16 U.S.C. §§ 79a-79j (1976). In the second opinion, the court considered the merits of the case and ordered wide-ranging declaratory and injunctive relief, directing the Department of Interior to take action to protect park resources. In a third opinion, the court later found that the Department had taken the action required by the injunction and released the government from the terms of the injunction. *Sierra Club v. Department of the Interior*, 424 F. Supp. 172 (N.D. Cal. 1976). In 1978, Congress added some 48,000 acres of land to the Park. *See*, P.L. No. 95-250, 92 Stat. 163 (1978).

177. Redwood National Park includes scattered parcels, many of which are very narrow. In particular, the "Worm" area along Redwood Creek was little more than an extended buffer zone. Numerous studies conducted by the National Park Service showed that clearcutting of redwoods on steep slopes on adjacent private lands would cause severe erosion, including slides in some areas, and would deteriorate water quality. In addition, the remaining old growth redwoods in the park would be subject to wind throw after the adjacent trees on private lands were removed. *See generally* 389 F. Supp. 287-88.

178. 16 U.S.C. § 1 (1976) provides that the purpose of the National Park System is "to conserve the scenery and the natural and historic objects and the wildlife therein and to

Act.<sup>179</sup> Both of these statutes contain language that can be read as imposing an express trust, rather than an implied trust that would apply to the public lands generally. Finally, the fact remains that the leading case, *Illinois Central Railroad v. Illinois*,<sup>180</sup> may have involved former public lands underlying public water, but the trustee in that case was a state, not any federal entity. The Supreme Court has not based any holding on the public trust doctrine since *Illinois Central* was decided in 1892. There have been few lower court cases since *Redwood Park*.<sup>181</sup>

The uncertain posture of the public trust doctrine on the public lands today hardly means that Trust Review is inappropriate in the evolving field of public land law. Elevated standards of judicial scrutiny have been applied, without express statutory direction, to such diverse entities as private trustees,<sup>182</sup> common carriers,<sup>183</sup> superior parties executing adhesion contracts,<sup>184</sup> and, as noted, to the role of the United States in Indian law<sup>185</sup> and to the states' administration of land subject to the public trust doctrine.<sup>186</sup> All of these doctrines developed as a matter of common law. All developed because the courts recognized that special subject matter was involved and highly protective judicial treatment was essential.

There are compelling justifications for requiring a high degree of administrative care and judicial scrutiny in the administration of the

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provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

179. 16 U.S.C. § 79a (1976) provides that the purpose of the Redwood National Park is "to preserve significant examples of the primeval coastal redwood . . . forests and the streams and seashores with which they are associated for purposes of public inspiration, enjoyment, and scientific study." Under the Act, the National Park Service is accorded specific management powers, including the powers "to acquire interests in land from, and to enter into contracts and cooperative agreements, with, the owners of land on the periphery of the Park . . . ." Such actions are to be taken "in order to afford as full protection as is reasonably possible to the timber, soil, and streams within the boundaries of the Park . . . ." *Id.* on the powers of the National Park Service see Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 639 (1976).

180. 146 U.S. 387 (1892).

181. See, e.g., *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1283 (9th Cir. 1980) (discussed at notes 242-47 *infra*); *Commonwealth of Massachusetts v. Andrus*, 594 F.2d 872, 890-92 (1st Cir. 1979) (trust notions used as partial support for environmental protection measures for oil drilling on outer continental shelf); *United States v. Ruby Co.*, 588 F.2d 697, 704-05 (9th Cir. 1978) (trust used as justification for inapplicability of estoppel against the federal government). When this article was in galleys, *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.D.C. 1980), *appeal pending*, was handed down. It held that the 1978 amendment to 16 U.S.C.A. § 1a-1 (West Supp. 1980) eliminated any non-statutory trust duties of the National Park Service and that the Bureau of Land Management has no separate trust duties apart from statute.

182. See, e.g., *Meinhard v. Salmon*, 249 N.Y. 258, 164 N.E. 545 (1928) (Chief Justice Cardozo).

183. See, e.g., *Pennsylvania Co. v. Roy*, 102 U.S. 451 (1880).

184. See, e.g., *Gray v. Zurich Ins. Co.*, 65 Cal.2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

185. See note 175 *supra*.

186. See notes 167-70 *supra*.

public lands. The recent dominant statutes in the field repeatedly underscore the complex matrix of factors that, taken together, form the overriding "national interest."<sup>187</sup> Although there is a dearth of clear federal precedent on the subject, several state court decisions invoking the public trust doctrine<sup>188</sup> easily lend themselves to application to the public lands, which hold so much economic wealth and which are so intertwined with our national spirit. And, as one scholar has noted in a related context, strict judicial scrutiny of public resource issues "plays no favorites; it is advanced as enthusiastically by industry as it is by environmentalists."<sup>189</sup>

Special rules tend to develop around special subject matter and the public lands certainly qualify. We can expect further judicial development of some form of Trust Review to test the decisions of public land managers.

### B. *Judicial Construction of Congressional Intent: The Reserved Rights Cases*

Modern public lands statutes almost invariably carry with them a rich and thorough legislative history. Views on different issues may vary—indeed there may be an abundance of conflicting views—but hardly a stone is left unturned by senators and representatives, congressional staffers, administrative officials, and representatives of the many special interest groups that invariably testify on legislative proposals. In addition, modern public lands legislation, like modern legislation generally, tends to be relatively specific. Often the tough issues are compromised out in specific provisions in the statute itself.

A recurring problem in the field of public land law revolves around the fact that older public lands statutes present little guidance to the courts. Many of the dominant statutes in the field are marked by a spareness that could exist only in a simpler, and perhaps happier, time.<sup>190</sup> Similarly, the legislative history of the older statutes is frequently skimpy. Today, as the volume of litigation multiplies, courts are repeatedly faced with the task of analyzing broad statutory language against a backdrop of legislative history that amounts to a blank slate.

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187. *See, e.g.*, 43 U.S.C. § 1701 (1976) (FLPMA); 16 U.S.C. § 1600 (1976) (National Forest Management Act of 1976).

188. *See, e.g.*, *Gould v. Greylock Reservation Commission*, 350 Mass. 410, 215 N.E.2d 114 (1966) (lease by state park management agency for large skiing development struck down because of a lack of "clear or express statutory authorization"); *United Plainsmen Assn. v. North Dakota State Water Conservation Commission*, 247 N.W.2d 457 (N.D. 1976) (public trust doctrine requires "some planning" and "analysis of present supply and future need" before the State Engineer may issue water permits for large coal related power and energy production facilities). *See also* note 167 *supra*.

189. *Rodgers, A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L. J. 699, 706 (1979).

190. *See* text accompanying notes 5-10 *supra*.

A number of recent cases involving federal reserved rights demonstrate the need for canons of construction that will allow courts to approach public lands statutes with a reasonable degree of uniformity and predictability. *United States v. Union Pacific Railroad Co.*<sup>191</sup> involved an attempt by the railroad to drill for oil and gas on the right-of-way granted to it by section 2 of the Union Pacific and Central Pacific Railroad Act of 1862.<sup>192</sup> There was no express federal mineral reservation in section 2, dealing with the right-of-way. However, section 3 of the statute did provide for a reservation of minerals by the United States by specifying that "all mineral lands shall be excepted from the operation of this act."<sup>193</sup> As the dissent demonstrated,<sup>194</sup> there was good reason to believe that the mineral reservation language was not intended to apply to the right-of-way itself; rather, the provision in section 3 may well have been intended only as a directive to the Secretary of Interior to make a determination of the mineral character of the alternate sections also granted to the railroad<sup>195</sup> and, if known mineral land existed, to provide "in lieu" selections for those alternate sections containing minerals.<sup>196</sup> However, Justice Douglas, writing for the majority, concluded that the federal mineral reservation applied to the right-of-way as well as to the grant of alternate sections. He reasoned that any other construction would assume that the Thirty-Seventh Congress was "profligate"<sup>197</sup> and that Congress intended to "endow the railroad with the untold riches underlying the right-of-way."<sup>198</sup>

The fact, of course, is that Congress was in many ways "profligate" with the public lands during the 19th century<sup>199</sup> and seemingly did in-

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191. 353 U.S. 112 (1957).

192. Act of July 1, 1862, 12 Stat. 489, 491.

193. *Id.*

194. 353 U.S. at 120-37.

195. The 1862 Act provided that, in addition to the grant of the right-of-way on which the line would be located, a grant would be made of the alternate, odd-numbered sections of land for ten miles on each side of the tracks. See note 192 *supra*. The Act was amended in 1864 to provide for grants of alternate sections for twenty miles in both directions. Act of July 2, 1864, 13 Stat. 356.

196. The Court had earlier held that minerals under patented land were not reserved by the government if minerals were subsequently discovered on such lands after the Secretary's initial determination of non-mineral character had been made. *Burke v. Southern Pacific R. Co.*, 234 U.S. 669 (1914).

197. 353 U.S. at 117.

198. *Id.* at 116.

199. Congress generally sought to open the West to settlement during the 19th and early 20th centuries through a broad based program of subsidies to the settlers: free land to the railroads, nearly free land to the homesteaders, free minerals to miners, free grazing to ranchers, and below-market water to irrigators under the reclamation acts. Obviously, Congress' program succeeded and had the beneficial purpose of opening vast new lands to the expanding population. On the other hand, the project was so great that it was virtually impossible to administer the program effectively, with the result that fraud and sharp deal-

tend to endow the railroads with untold riches.<sup>200</sup> Such incentives seemed necessary at the time in order to promote the settling of the West. The following observation, though not made in regard to any of the railroad acts, probably reflects the mood of the time far better than Douglas' conclusions:

[If we do not open the West] these prairies with their gorgeous growth of flowers, their green carpeting, their lovely lawns and gentle slopes, will for centuries continue to be the home of the wild deer and wolf; their stillness will be undisturbed by the Jocund song of the farmer, and fertile soil unbroken by the ploughshare. Something must be done to remedy this evil.<sup>201</sup>

Douglas was a bad historian but a good judge. The statute was not clear on its face as to the mineral reservation, and there was no legislative history directly on point. As a result, he relied upon a fundamental rule of construction in public land law: "if there are doubts they are to be resolved for the government, not against it."<sup>202</sup> Because these were *national* resources, Douglas assumed that Congress was prudent and that it was careful to preserve the nation's assets.

The Ninth Circuit followed the same approach in *United States v. Union Oil Co.*<sup>203</sup> A homestead had been patented under the Stock-Raising Homestead Act of 1916<sup>204</sup> and the patent included a reservation by the United States of "all coal and other minerals." The homestead at issue contained "The Geysers" in northern California, an area of valuable geothermal resources. The court found that the elements in a geothermal system—magma, porous rock, strata, and water—are all "minerals" and therefore the geothermal system had been reserved.<sup>205</sup>

There was no express intent in the legislative history of the Stock-Raising Homestead Act to reserve geothermal resources—the commer-

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ing abounded. See, e.g., P. GATES, *supra* note 41, at 47-82, and S. DANA & S. FAIRFAX, *supra* note 41, at 24, 35-36, 47-50, 81.

200. The railroads grants totaled more than 131 million acres. Ninety-four million acres went directly to the railroads and an additional 37 million acres were granted to states for the benefit of the railroads. See, e.g., S. DANA & S. FAIRFAX, *supra* note 41, at 19-20.

201. CONG. GLOBE, 28th Cong., 2d Sess., 52 (remarks of Rep. Orlando B. Ficklin of Illinois).

202. 353 U.S. at 116.

203. 549 F.2d 1271 (9th Cir. 1977), *cert. denied sub nom. Ottoboni v. United States*, 435 U.S. 911 (1977). See also *Western Nuclear, Inc. v. Andrus*, 475 F. Supp. 654 (D. Wyo. 1979).

204. 43 U.S.C. §§ 291-302 (1976) (repealed by Act of Oct. 21, 1976, Tit. 7, § 702 Pub. L. 94-579, 90 Stat. 2787).

205. On development of geothermal resources see Olpin, Tarlock & Austin, *Geothermal Development and Western Water Law*, 1979 UTAH L. REV. 773. Water is an integral part of the geothermal resource, which was held reserved in *Union Oil*. Water is not, however, a mineral for purposes of the Hardrock Mining Act of 1872. *Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 604 (1978).



cial development of geothermal energy was not contemplated at the time. The court, however, construed the Act and the patent in favor of the United States<sup>206</sup> and held that geothermal resources were reserved. As in *Union Pacific*, the court applied a fiction: by looking to Congress' "general purpose" of keeping subsurface mineral resources for public ownership and conservation,<sup>207</sup> the court implicitly found that Congress intended to be highly protective of federal resources and to retain them in federal hands. The result in both cases is to impute to Congress an intention to promote sound national development and conservation of federal resources.

The third major reserved rights case is *Leo Sheep Co. v. United States*.<sup>208</sup> Congress has granted odd-numbered sections near Seminoe Reservoir in Wyoming to the Union Pacific Railroad in 1862.<sup>209</sup> The United States had retained the even-numbered sections, thus creating a "checkerboard" ownership pattern. The Leo Sheep Company had succeeded to the railroad's ownership of the odd-numbered parcels. The Bureau of Land Management built a dirt road to the reservoir, necessarily crossing the corners of some of Leo Sheep's sections. The principal question was whether the United States had impliedly reserved an easement, for which no compensation would be paid, across the odd-numbered sections to provide access for public recreation at Seminoe Reservoir.<sup>210</sup> The Court referred to the rule that grants from the United States should be construed in favor of the United States but refused to apply the maxim with "full vigor" because railroad grants are "quasi-public" and stand on a higher plane than "private grants."<sup>211</sup> The Court did not discuss *Union Pacific*, where the Court had earlier applied the liberal rule in favor of the United States to the same statute.<sup>212</sup> The Court then held that the implied easement had not been reserved on the primary ground that "the easement is not ac-

206. 549 F.2d at 1273 n.5.

207. *Id.* at 1275.

208. 440 U.S. 668 (1979). The case is analyzed in Note, *Problems in Acquiring Access to Public Lands Across Intervening Private Lands*, *Leo Sheep Co. v. United States*, 15 *LAND & WATER L. REV.* 119 (1980) and in Note, *Was an Easement by Necessity Impliedly Reserved in the Checkerboard Land Grants: Leo Sheep Co. v. United States*, 1 *PUBLIC LAND LAW REVIEW* 112 (1980).

209. The Act is discussed in notes 195 and 196 *supra*. The Act had earlier been construed in *United States v. Union Pacific R. Co.*, 353 U.S. 112 (1957), discussed at notes 191-202 *supra*.

210. The United States also argued that an easement had been reserved by the doctrine of easement by necessity and that the right to cross private lands was a privilege recognized by the Unlawful Enclosures Act of 1885, 43 U.S.C. §§ 1061-1066 (1976). The Court rejected both arguments. 400 U.S. at 681 and 685.

211. 440 U.S. at 682-83, citing *United States v. Denver and Rio Grande R. Co.*, 151 U.S. 1, 14 (1893).

212. *See* notes 191-202 *supra*.

tually a matter of necessity in this case because the government has the power of eminent domain."<sup>213</sup>

Leaving aside the surprising failure even to cite *Union Pacific*, the specific result in the *Leo Sheep* litigation is supportable. Following the above analysis, the Court should have assumed that Congress' purpose was to act as a prudent manager of federal resources. Recreation is a federal resource<sup>214</sup> but there was no overriding need to imply a reservation for access to that resource—access can be obtained, although with some administrative inconvenience, by exercise of the power of eminent domain.<sup>215</sup> Since the implied easement by reservation would be of limited value to the United States in the management of its resources, there is no compelling justification for impressing implied easements, with no compensation to private landowners, on tens of millions of acres of western lands.<sup>216</sup>

The fact that the United States does not hold the reserved easement argued for in *Leo Sheep* should not control the related issue of whether individual members of the public have implied licenses to cross private lands to use checkerboarded public lands. An earlier case, *Buford v. Houtz*,<sup>217</sup> had upheld such implied licenses, finding that private ranchers had the right to herd their sheep across private lands in order to graze on public lands.<sup>218</sup> The Court in *Leo Sheep* did not overrule *Buford v. Houtz* but rather distinguished it on the ground that the ranchers' access in *Buford* was supported by "custom and necessity."<sup>219</sup> The opinion in *Leo Sheep* also emphasized that the BLM was asserting a wideranging power to "construct public thoroughfares without compensation."<sup>220</sup> Whether there will be different results in future cases involving access over trails or lesser roads by hunters, fishers, ranchers, miners, and other customary users of public lands remains to be resolved.<sup>221</sup>

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213. 440 U.S. at 680.

214. See notes 234-36 *infra*.

215. 440 U.S. at 680. The BLM does have legal authority to acquire such rights-of-way; the actual expenditure of federal funds to obtain the necessary real property interests is not likely to be great, but BLM administrators indicate that time-consuming planning and surveying is involved. See Note, *Problems in Acquiring Access to Public Lands Across Intervening Private Lands: Leo Sheep Co. v. United States*, 15 LAND & WATER L. REV. 119, 130-33 (1980).

216. 440 U.S. at 685.

217. 113 U.S. 320 (1890).

218. See also *Mackay v. Uinta Development Co.*, 219 F.116 (8th Cir. 1914).

219. 440 U.S. at 687 n.24. Similarly, the Court declined to overrule *Camfield v. United States*, 167 U.S. 518 (1897), upholding federal power to prohibit private fencing that limited access by ranchers to checkerboard public lands.

220. *Id.* at 687.

221. One recent decision, though it deals with a construction of the Surface Resources and Multiple-Use Act of 1955, stands for broad public access to the federal lands for recrea-

The reasoning in the fourth reserved rights case, *United States v. New Mexico*,<sup>222</sup> cannot be so easily justified. The question was whether the reservation of land for the Gila National Forest in New Mexico impliedly reserved instream flows in the Mimbres River for wildlife preservation, recreation, aesthetic purposes, and stock watering. The most important statute was the Forest Service Organic Act of 1897,<sup>223</sup> which defined the purposes for which national forests were to be established. Congress did not expressly reserve water in the 1897 Act, but the statute provided that the purposes of the national forests were "to improve and protect the forest within the boundaries, [and to] secur[e] favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . ."<sup>224</sup> As in the other three cases, the result turned on the intent that should properly be imputed to Congress.

*United States v. New Mexico* is a close and difficult case. The quarrel here is with the method of statutory construction used by the Court.<sup>225</sup> In finding no implied reservation for wildlife and recreation, the Organic Act was effectively construed strictly against the United States.<sup>226</sup> The accepted approach, however, is to construe federal reser-

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tion. See *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277 (9th Cir. 1980), discussed in notes 242-47 *infra*.

222. 438 U.S. 696 (1978). The most thorough analysis of the opinion is Fairfax and Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 511 (1979). See also Note, *Reserved Water Rights on National Forests After United States v. New Mexico*, 1979 UTAH L. REV. 609; Case Comment, *Water Rights and National Forests—Narrowing the Implied Reservation Doctrine*, 40 OHIO S. L. J. 729 (1979). The litigation is also discussed in Note, *New Mexico's National Forests and the Implied Reservation Doctrine*, NAT. RESOURCES J. 975 (1976), which was written before the Supreme Court decision.

Following the decision in *United States v. New Mexico*, the solicitor's office of the Department of Interior issued Solicitor's Opinion No. M-36914 (June 25, 1979) on the extent of reserved water rights on non-Indian federal lands. The opinion is discussed in Freudenthal, *Federal Non-Reserved Water Rights*, 15 LAND & WATER L. REV. 67 (1980). See generally Ranquist, *The Winters Doctrine and How it Grew: Federal Reservation of Rights to the Use of Water*, 1975 BYU L. REV. 639; and Note, *Water in the Woods: The Reserved-Right Doctrine and National Forests Lands*, 20 STAN. L. REV. 1187 (1968).

223. 16 U.S.C. §§ 473-475, 477-482, 551 (1976). The Court also construed the 1891 Creative Act, 16 U.S.C. § 471 (1976), which first authorized the President to set aside national forests. The Gila National Forest, at issue in *United States v. New Mexico*, was reserved in 1899. 438 U.S. at 698.

224. 16 U.S.C. § 475 (1976).

225. The Court's reading of the relevant legislative history is discussed and criticized in Fairfax and Tarlock, *supra* note 222, at 533-49.

226. The Court made it clear that there was no question of Congress' ability to make the reservation: "the question posed in this case . . . is a question of implied intent and not power." 438 U.S. at 698. In construing the scope of the grant, the Court focused upon language from *Cappaert v. United States*, 426 U.S. 128, 141 (1976): "the Court has repeatedly emphasized that Congress reserved 'only that amount of water necessary to fulfill the purpose of the reservation, no more.'" The *Cappaert* opinion also stated that intent to re-

vations in favor of the United States.<sup>227</sup> The Court should have applied that canon of construction and infused it with the notion that Congress is prudent and foresighted—that Congress has a generalized intent to protect public resources. Wildlife and recreation are important federal resources.<sup>228</sup> Unlike the implied easement for recreation purposes in *Leo Sheep*, the reservation of water is essential to the preservation of the wildlife resource and cannot today be inexpensively obtained by the United States. The approach suggested here would support the reserved instream flows for wildlife advocated by the four dissenting judges in *United States v. New Mexico*.<sup>229</sup>

These divergent opinions on federal reserved rights should be reconciled so that judges will be able to operate from a common ground in analyzing the extent of implied federal reservations of resources on the public lands. First, the Supreme Court should adopt the unspoken but implicit premise of the *Union Pacific*<sup>230</sup> and *Union Oil*<sup>231</sup> opinions: lacking clear legislative history, Congress should be presumed to have considered all of the ramifications of its decisions and to have taken

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serve water "is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." 426 U.S. at 139. In *United States v. New Mexico*, the Court adopted, for the first time, a distinction between "primary purposes" and "secondary purposes" of the reservation. The Court found that the primary purposes of the 1897 Act were only to furnish a continuous supply of timber to the nation and to maintain national forests as watersheds to prevent floods and encourage stream flows for private water users. Later, the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528-531 (1976), did expressly mention recreation, wildlife, and fish as being purposes for which the national forests are established. The Court found that those purposes expressed in the 1960 Act were only "secondary" and did not expand the two purposes—enhancement of water supply for private users and timber preservation—that had been established in the 1897 Act. 438 U.S. at 718.

227. See *United States v. Union Pacific R. Co.*, 353 U.S. 112 (1947), discussed at notes 191-202 *supra*; *United States v. Union Oil Co.* 549 F.2d 1271 (9th Cir. 1977), *cert. denied sub nom.* *Ottoboni v. United States*, 435 U.S. 911 (1977), discussed at notes 203-07 *supra*; and *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), discussed at notes 208-21 *supra*. It should be noted that those cases involved a different kind of "reservation" than did *United States v. New Mexico*. *Union Pacific*, *Union Oil*, and *Leo Sheep* involved reservations by the United States in bilateral transactions—railroad grants and homestead patents. Other examples of reservations in bilateral transactions include transactions with the states and with Indian tribes. *United States v. New Mexico* involved a "reservation" in a different sense, namely the unilateral congressional reserving, or a setting aside, of public lands for a specific purpose; the reservation of lands for national forests involved no party other than the United States. This distinction would not seem to lead to a different judicial approach: unilateral reservations and bilateral reservations both involve federal land use decisions which, presumably, are made in the context of an overriding public interest. Furthermore, although no private party is directly involved in the unilateral reservation of a national forest, it is obvious from controversy in *United States v. New Mexico* that many nonfederal interests are involved.

228. See text accompanying notes 233-38 *infra*.

229. 438 U.S. at 718-25.

230. 353 U.S. 112, discussed in text accompanying notes 191-202 *supra*.

231. 549 F.2d 1271, discussed in text accompanying notes 203-07 *supra*.

whatever prudent action is appropriate for the reasonable, long-term protection and preservation of the public lands and resources. Second, courts should be quicker to recognize that the public lands offer wealth other than traditional economic resources: timber, minerals, water, and forage. Congress has long recognized that recreation and preservation are valuable resources.<sup>232</sup> Federal wildlife law has deeper roots than is commonly appreciated.<sup>233</sup> Recent public lands legislation has uniformly recognized the non-economic resources.<sup>234</sup> In FLPMA, Congress likewise defined "resources" broadly<sup>235</sup> and went further, directing the administration to identify "new and emerging resource and other values."<sup>236</sup> Congress, in other words, has squarely recognized, as the dissenting opinion in *United States v. New Mexico*<sup>237</sup> put it, that the public lands are not "still, silent, lifeless places . . . [They] consist of the birds, animals, and fish—the wildlife—that inhabit them, as well as the trees, flowers, shrubs, and grasses."<sup>238</sup>

Such an approach would give content to the public trust language that has long been found in judicial opinions in the field of public land law.<sup>239</sup> Just as the public trust doctrine can be relevant in judicial review of agency action,<sup>240</sup> trust theory can be valuable in analyzing Congress' intent.<sup>241</sup> If Congress is viewed as holding the public lands and their resources as a trustee for the public, then congressional pur-

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232. Yellowstone National Park was set aside in 1872, *see* note 40 *supra*, and Yosemite National Park was established in 1891, Act of March 30, 1891, 26 Stat. 1565. By the turn of the century, seven national parks had been set aside, G. COGGINS & C. WILKINSON, *supra* note 2, at 206 and 46 million acres had been reserved from the public domain as forest reserves. P. GATES *supra* note 41, at 580.

233. Hunting was prohibited in Yellowstone National Park in 1894, Act of May 7, 1894, 28 Stat. 73. The first wildlife refuge was established on Afognak Island in Alaska in 1892, Proclamation No. 39, 27 Stat. 1052 (1892), and many other refuges followed in the early 20th century. M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 126-27 (1977). On the development of federal wildlife law, *see generally id.* and Coggins, *Federal Wildlife Law Achieves Adolescence: Developments in the 1970's*, 1978 DUKE L. J. 735.

234. *See, e.g.*, the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 531 (1976) (including recreation, fish and wildlife as resources); the National Forest Management Act of 1976, 16 U.S.C. § 1604(e)(1) (1976) (requiring that planning include co-ordination with recreation, wildlife and fish, and wilderness). Of course, the "non-economic" resources in fact generate substantial economic activity in terms of user fees, license fees, and industries supporting various forms of outdoor recreation.

235. 43 U.S.C. § 1712(c) (1976) (including as "resources," recreation, wildlife and fish, and "natural scenic, scientific, and historical values").

236. *Id.* at § 1711(a).

237. 438 U.S. 696 (1978).

238. *Id.* at 719 (dissenting opinion).

239. *See* notes 171-76 *supra*.

240. *See* Section III A *supra*.

241. No suggestion is made here that the public trust doctrine operates as a substantive constraint on Congress when exercising its broad power under the Property Clause. *See* text at notes 79-83 *supra*. The doctrine can properly be used, however, to determine congressional intent in implementing its constitutional authority.

pose in ambiguous statutes can better be understood. If the duty is one of a trustee, the courts should properly assume that Congress intended to fulfill that duty in a prudent manner.

One recent case following this approach is *United States v. Curtis-Nevada Mines, Inc.*<sup>242</sup> Unpatented mining claims had been located during 1970 and afterward. The Surface Resources and Multiple Use Act of 1955,<sup>243</sup> however, had provided that claims located after the passage of the Act would be subject to surface use by the United States and "its permittees and licensees." The question was whether the claims could be closed off to recreational users who had no specific written licenses or permits.

The *Curtis-Nevada* court initially invoked trust concepts, finding that "historically, the United States has managed the lands within the public domain as fee owner and trustee for the people of the United States."<sup>244</sup> Further, public lands have traditionally been left open for public recreation without any license.<sup>245</sup> Since there was no showing that there had been any actual interference with mining operations by the recreationists,<sup>246</sup> the Ninth Circuit was able to take a broad view of the issues and reach a holding that reconciled the trust duty both to the mining claimant and to the public at large:

The historical principle that no formal permission, permit, or license is required for use of public lands for general recreational use or access to adjoining lands was formalized by the Forest Service with regard to National Forests in 1942 . . . .

A similar policy of holding public lands open for recreational use has been followed by the Bureau of Land Management . . . .

These regulations confirm a traditional policy for the use of public lands allowing the public to use lands within the public domain for general recreational purposes without holding a written, formal permit, except as to activities which have been specifically regulated.

The Multiple Use Act was designed to open up the public domain to greater, more varied uses. To require that anyone desiring to use claimed lands for recreation must obtain a formal, written license would greatly restrict and inhibit the use of a major portion of the public domain.<sup>247</sup>

Thus the Ninth Circuit used the public trust to synthesize and reconcile the clashes among resource uses that constantly recur in public

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242. 611 F.2d 1277 (9th Cir. 1980).

243. 30 U.S.C. §§ 611-612 (1976).

244. 611 F.2d at 1283.

245. *Id.*

246. *Id.* at 1286.

247. *Id.* at 1284-85.

land law. The public trust doctrine forces analysis and balancing of the interests of all users and all resources. Ultimately, in situations where Congress has not spoken, the doctrine calls on courts to assume the best of the national legislature: to presume that Congress considered all aspects of its responsibility to the public and that it took appropriate action for long-term protection and preservation of the public lands and resources.

#### IV. CONCLUSION

During the 1970's, public land law provided a fascinating study in law, one that promises to continue. There was extensive legislative and judicial oversight of issues normally left to the executive—complex questions of technology, economics, and on-the-ground administration of natural resources. Whatever rubric the respective institutions used, Congress and the federal courts acted for three basic reasons. First, the public—industry, environmentalists, whatever—came to place a high priority on the public lands and resources. Second, though the magnitude varied, there were administrative abuses. The coordinate branches were reluctant to intervene—and they nearly always said so—but they were moved to action.

Third, there developed a widely-accepted recognition that resources on the public lands are too interrelated to allow for a narrow view of decision-making. It is invariably a misnomer to refer to a wilderness proposal, or a mining issue, or a water project. One resource use always implicates another and often several others. Congress, recognizing this broad range of philosophical views and relevant disciplines, called for increased public access to information, interdisciplinary planning, public participation in decision-making, and stricter judicial review. Similarly, litigation raised issues dealing directly with the interrelatedness among the resources; in response, the courts began to develop various doctrines. These emerging judicial rules include the public trust doctrine and a canon of construction that Congress presumptively intended to protect the public lands and resources in situations involving resource conflicts.

These developments, together with the ever-present backdrop of history, encompass all of the public lands and resources and provide a context for analysis. Not answers, a context. The answers come only incrementally for this is no easy or quick process. But the move toward an ordered synthesis is a healthy, necessary, and significant step toward eliminating the voids and inconsistencies that have existed for too long on these lands that mean so much to the spirit and economy of the nation.

# IMPLIEDLY RESERVED FEDERAL WATER RIGHTS: A STATUS REPORT

Albert W. Stone\*

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## I. INTRODUCTION

On June 6, 1978, President Carter issued his *Water Policy Statement*,<sup>1</sup> directing federal agencies to facilitate the resolution of water right disputes involving state interests, federal lands and Indian rights. He directed federal agencies (1) to identify federal reserved rights in consultation with the states and water users; (2) to quantify federal reserved water rights through administrative action directed toward negotiation and settlement rather than litigation which is a last resort; and (3) to use a reasonable standard reflecting true, or realistic federal needs, rather than hopes or desires. Indian water rights are also to be quantified in accordance with the documents establishing each reservation, but again, the approach is primarily one of negotiation rather than litigation. If adjudication becomes necessary the President recommends that it be done in the federal courts.

On July 12, 1978 the President assigned primary responsibility to the Secretary of the Interior. He directed the federal agencies to prepare a report of their plans and actions toward implementation of his *Water Policy Statement* by June 6, 1979.<sup>2</sup>

On November 16, 1978, the Comptroller General issued a *Report to Congress*<sup>3</sup> covering the same subject as the President's Statement.

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1. PRESIDENT'S WATER POLICY STATEMENT ON FEDERAL AND INDIAN RESERVED WATER RIGHTS, Appendix II, p. 70, COMPTROLLER GENERAL REPORT TO CONGRESS, *Reserved Water Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution*, November 16, 1978.

2. COMPTROLLER GENERAL'S REPORT, *supra* note 1, p. 54.

3. *Id.*



While this report is in agreement with the President's statement that there is an urgent need to quantify federal and Indian water rights in order to reduce or eliminate uncertainties and conflicts, it is skeptical toward the notion that this need can be satisfied within a reasonable time by means of negotiation and litigation alone. Ultimately, the Comptroller General's Report asserts, a legislative solution is required.

This paper will attempt to provide some background information regarding these federally reserved water rights and report as to their current status.

## II. HISTORICAL BACKGROUND

### A. *Early Background*

After the Louisiana Purchase of 1803, the Oregon Compromise of 1846, the Treaty of Guadalupe Hidalgo in 1848, and the Gadsden Purchase of 1853, the United States had power of both a sovereign and that of a proprietor over the land and water throughout its subject territories.<sup>4</sup> Although there were Spanish and Mexican settlements, Indian pueblos and occupancies, and a number of nomadic Indian tribes, the land was largely unoccupied.<sup>5</sup> The young United States attempted to raise revenue by sale of its unoccupied lands, and so the acquisition of land by mere settlement or occupancy was prohibited by statute in 1807.<sup>6</sup> The *General Pre-emption Act of 1841*<sup>7</sup> later permitted the purchase of non-mineralized lands. These laws were, however, among the very few through this point in our history affecting the public domain and there was no coherent national policy.

Since there wasn't much movement toward the Far West, the need for laws and policies was not pressing. That situation changed rapidly and dramatically once gold was discovered by John Marshall at Sutter's lumber mill on the South Fork of the American River at Coloma, California. Within a few years, the population of California increased a hundredfold;<sup>8</sup> most of the California settlers occupied federal public lands and appropriated public water without any authority, and in clear violation of the 1807 statute.<sup>9</sup>

While the federal government was arguing and debating over what to do about the situation, and whether to permit "free mining" or to find some means of raising revenue from this Western invasion, two

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4. Clyde, *ch. 10*, in 2 R.E. CLARK, *WATERS AND WATER RIGHTS*, 376 (1967).

5. *Id.*

6. Act of Mar. 3, 1807, Ch. 46, 2 Stat. 445.

7. Act of Sept. 4, 1841, Ch. 16, 5 Stat. 453.

8. See Field, J., in *Jennison v. Kirk*, 98 U.S. 453, 457 (1879); California "increased its population within 3 or 4 years from a few thousand to several hundred thousand."

9. *Supra*, note 6.

events of major significance occurred. The Comstock Lode, the richest lode ever of precious metals, was discovered at Virginia City, Nevada in 1859; shortly thereafter the Civil War broke out. The Civil War temporarily diverted attention away from the West and its land, water and mineral problems. The War also affected the political situation and made an increase in the number of Senators supportive of the North's Reconstruction policy politically desirable. Nevada, which the Comstock Lode made attractive and well-suited to this political purpose, was admitted to the Union in 1864.

Senator William M. Stewart was one of Nevada's first Senators. Senator Stewart pushed the *Lode Mining Act of 1866*<sup>10</sup> through Congress, which confirmed Western water rights already recognized by local law and custom. In two cases arising in Montana—*Atchison v. Peterson*<sup>11</sup> and *Basey v. Gallagher*<sup>12</sup>—the United States Supreme Court stated that the *Lode Mining Act of 1866* was a recognition of the existing appropriation system, and applied it to irrigation as well as to mining. In a third case, *Broder v. Natoma Water & Mining Co.*,<sup>13</sup> the Court said that the Act "was [more] a voluntary *recognition of a pre-existing right* . . . than the establishment of a new one."

The *Lode Mining Act* was followed by the *Desert Land Act of 1877*,<sup>14</sup> which had the effect of severing the unappropriated waters of the public domain from the land, and allowing the states to regulate the appropriation of water.<sup>15</sup> The Act stated:

[A]ll surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.

The foregoing acts did not, however, divest the federal government of rights in and to the water on the remaining unsettled public domain. In the 1899 case, *United States v. Rio Grande Dam & Irrig. Co.*,<sup>16</sup> the Supreme Court said:

[I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States

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10. Act of July 26, 1866, Ch. 242, 14 Stat. 251 (current version at 30 U.S.C. § 51 (1976)).

11. 87 U.S. 507 (1874).

12. 87 U.S. 670 (1875).

13. 101 U.S. 274, 276 (1879) (emphasis in original).

14. Act of Mar. 3, 1877, Ch. 107, 19 Stat. 377 (current version at 43 U.S.C. § 321 (1976)). It should be mentioned that the Placer Mining Act of 1870, 16 Stat. 218 (current version at 30 U.S.C. § 52 (1976)) put homesteaders on notice that they would take subject to prior water uses.

15. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

16. 174 U.S. 690 (1899).

as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property . . . .<sup>17</sup>

A construction of the *Lode Mining Act* and the *Desert Land Act* which would allow a State to divert water from the tributary streams of a navigable waterway and thus destroy its navigability was held untenable and in derogation of the interests of all of the people of the United States.<sup>18</sup>

B. *Development of Indian Water Rights Prior to Arizona v. California*

In 1874 the United States Congress and Senate "set apart for the use and occupation of the Gros Ventre, Piegan, Blood, Blackfeet, River Crow, and such other Indians as the President may, from time to time see fit to locate thereon . . ." a large tract of land, extending from the Dakotas to the crest of the Rockies, and from the Canadian border to the Missouri River, the Marias River, and up Birch Creek toward the crest of the Rockies.<sup>19</sup>

In 1888 Congress approved an agreement between the United States Commissioners and the several Indian tribes affected by the 1874 Act, by which the Indians were to reside on several smaller separate reservations, relinquishing the lands "not herein specifically set apart and reserved as separate reservations for them" and "reserving to themselves only the reservations herein set apart for their separate use and occupation."<sup>20</sup> The Fort Belknap Reservation, between the Milk River and the Little Rocky Mountains, was one of the reservations carved out of the larger 1874 reservation.

An Indian irrigation project on the Fort Belknap reservation required 5,000 miners' inches of water from the Milk River; but, upstream several non-Indian individuals and a cattle company were already diverting some 5,000 miners' inches from the river, leaving insufficient water for the Indian irrigation project. The United States sued to enjoin the upstream water users from interfering with the flow of 5,000 miners' inches of water to the Fort Belknap project giving rise to the landmark case, *Winters v. United States*.<sup>21</sup>

17. *Id.* at 703.

18. *Id.* at 706. The Court said:

To hold that Congress, by these acts, meant to confer upon any State the right to appropriate all of the waters of the tributary streams which unite into a navigable watercourse and so destroy the navigability of that watercourse in derogation of the interests of all of the people of the United States, is a construction which cannot be tolerated.

19. Act of Apr. 15, 1874, V. 3, Ch. 96, 18 Stat. 28.

20. Act of May 1, 1888, Ch. 213, 25 Stat. 114.

21. 207 U.S. 564 (1908).

The trial court issued an interlocutory order enjoining the defendants from interfering "with the use of 5,000 inches of the waters of [the] Milk River . . . ." <sup>22</sup> The order was appealed; but the circuit court affirmed saying that the Indians had reserved the water "at least to an extent reasonably necessary to irrigate their lands . . . ." <sup>23</sup> The case went back to the district court, which issued a permanent injunction to the same effect as the interlocutory order. This decision was also appealed, was again affirmed by the circuit court in a brief opinion, <sup>24</sup> and then further appealed to the United States Supreme Court.

There is a duality in the reasoning used by the Supreme Court in *Winters* in affirming the lower courts. On the one hand support can be found in the decision for the proposition that the *Indians* reserved to themselves the water which they already had. For, the Court recognized that two conflicting constructions were possible, but that the construction implying retention of the water by the Indians was of greater force than that implying its cession. <sup>25</sup> The language of the treaty creating the Fort Belknap reservation is consistent with this view since it provides that "the said Indians hereby cede and relinquish to the United States . . . reserving to themselves only the reservation set apart for their separate use and occupation." <sup>26</sup> On the other hand, however, the decision also offers support for the proposition that it was the *United States* which reserved the water for the Indians when it created the reservation. For the Court also said: "The power of the *Government* to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. That the government did reserve them we have decided, and for a use which would necessarily continue through years. This was done May 1, 1888 . . . ." <sup>27</sup>

If the Indians reserved the water to themselves, then, it is argued, their "priority date" is aboriginal and immemorial, and the quantity unspecified and uncertain. Note that it could also be logically argued that if the Indians reserved water rights, those rights stemmed from the cession of land and water to them by the Act of 1874, which was not a treaty but which created the original, larger reservation from which Fort Belknap was carved and withdrawn in 1888. This latter argument would result in a priority date of April 15, 1874, and a probable division of the waters comparable to the division of the land; thus far, how-

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22. 143 F. 740, 741 (9th Cir. 1906).

23. *Id.* at 749.

24. 148 F. 684 (9th Cir. 1906).

25. *Winters v. United States*, 207 U.S. 564, 576 (1908).

26. Act of May 1, 1888, Ch. 213, Art. II, 25 Stat. 114.

27. *Winters*, 207 U.S. at 577. (Emphasis added, and citations omitted).

ever, this proposition has not appealed to either side of the conflict and has been largely ignored.

The few United States Supreme Court decisions which indicate which theory will predominate,<sup>28</sup> suggest that the dominant language is: "That the government did reserve them we have decided . . . This was done May 1, 1888 . . ." <sup>29</sup> This language would fix the priority date, but not the quantity of water reserved.

The *Winters* decision focussed on the fact of water reservation, rather than on the quantity reserved, because it was not a water rights adjudication suit, but rather, an action to enjoin a particular interference with an Indian irrigation project. The injunction simply prohibited interference with the Fort Belknap reservation's use of the 5,000 miners' inches of water needed for its agricultural development and made no attempt to apportion the water rights of various users of the stream.

Within the half century following the *Winters* decision, a handful of cases were decided by lower federal courts which were wrestling with the meaning of the case. These decisions are neither consistent, nor definitive. Some recognize an aboriginal priority date,<sup>30</sup> while in others the creation of the reservation<sup>31</sup> establishes priority. There is no agreement among the decisions as to the quantity of water, either. One early case assigned a precise quantity "subject to modification should the conditions . . . require,"<sup>32</sup> while another awarded the Indians all of the water, subject only to a water right acquired by some white settlers in a contract with the Bureau of Indian Affairs.<sup>33</sup> Still other decisions awarded a specific quantity of water to the Indians.<sup>34</sup> These decisions left the issues of the priority date and the quantity of the water rights reserved to the Indians in doubt.<sup>35</sup>

28. The cases will be discussed herein at a later point.

29. *Winters*, 207 U.S. at 576.

30. *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 326 (9th Cir. 1956); *Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921); *United States v. Hibner*, 27 F.2d 909, 911 (D. Idaho 1928). See also *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979) finding immemorial rights to water necessary to preserve hunting and fishing rights.

31. *United States v. Hibner*, *supra*, also at 911; *United States v. Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939) (not an Indian treaty case); *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908) (by implication); and also the more recent case, *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1327 (E.D. Wash. 1978) (not a treaty case).

32. *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908).

33. *United States v. Ahtanum Irrig. Dist.*, 330 F.2d 897 (9th Cir. 1964).

34. *United States v. Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939); *United States v. Hibner*, 27 F.2d 909, 911 (D. Idaho 1928); *United States v. Wightman*, 230 F. 277 (D. Ariz. 1916); *Colville Confederated Tribes v. Walton*, 460 F. Supp. at 1330.

35. During this period the Supreme Court decided *United States v. Powers*, 305 U.S. 527 (1939), holding that under the Treaty of 1868 waters were reserved on the Crow reserva-

C. *Other Developments During the Period.*

As was noted earlier, the *Desert Land Act of 1877*<sup>36</sup> provided that the non-navigable waters on the public domain "shall remain and be held free for the appropriation and use of the public . . ." It did not specify how the public was to acquire such rights, and in the absence of a federal system or procedure, the states filled the void by continuing to administer their own systems. In *California-Oregon Power Co. v. Beaver Portland Cement Co.*,<sup>37</sup> the plaintiff was a successor to an 1885 patentee under the *Homestead Act of 1862*, and asserted a riparian right to the flow of the Rogue River against the defendant, who, pursuant to Oregon appropriation law, was commencing to construct a hydroelectric dam and impoundment. The Supreme Court held that the plaintiff had not acquired any riparian right with its homestead land. The Court based its decision on the *Desert Land Act* and said:

As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named . . . . [T]he authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred cannot be doubted.<sup>38</sup>

What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states. . . .<sup>39</sup>

That decision led Western water lawyers to believe that all water rights, except for Indian reserved rights, were derived from the states, and that Indian water rights were simply an anomaly. The case of *United States v. Rio Grande Dam & Irrig. Co.*<sup>40</sup> was viewed as simply dealing with the federal navigation servitude, and so did not alert them to the fact that the United States had not quitclaimed all of its water rights.

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tion for the equal benefit of all tribal members, that allotments conveyed a portion of those rights to the Indian allottees, and that this portion of the reserved rights passed to subsequent non-Indian grantees. The case was not specific with respect to quantity.

36. Act of Mar. 3, 1877, Ch. 107, 19 Stat. 377 (current version at 43 U.S.C. § 321 (1976)).

37. 295 U.S. 142 (1935).

38. *Id.* at 162.

39. *Id.* at 163-64.

40. 174 U.S. 690 (1899); *See* text accompanying notes 16 through 18.

But then came the *Pelton Dam* case<sup>41</sup>—a shock to many Western water lawyers. In that case, lands on both sides of the Deschutes River had been withdrawn from settlement, i.e., reserved by the United States. The Supreme Court held that the Federal Power Commission could license the construction of a dam across the river (not found to be navigable) over state protest. It held that the *Acts of 1866, 1870 and 1877*<sup>42</sup> “are not applicable to the reserved lands and waters here involved.”<sup>43</sup> The implication was clear: there was no severance of lands and waters with respect to reserved lands; the reservation of lands was also an implied reservation of federal water rights for the use of those lands.

The magnitude of federal reservations is immense. Within the eleven Western States from the Rockies to the Pacific, half the land is federally owned. Much of it, including all of the national forests, military reservations, national parks, wildlife refuges, Indian reservations and national monuments, is in reservations with impliedly reserved water rights. While the amount of water required for these lands may not be a magnitude which corresponds to their acreage, it is unquantified and uncertain.

### III. THE DEVELOPMENTS MEET IN ARIZONA V. CALIFORNIA

In *Arizona v. California*<sup>44</sup> the Supreme Court reaffirmed *Winters*, reviewing it in these terms:

The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by *reserving for them* the waters without which their lands would have been useless. *Winters* has been followed by this Court as recently as 1939 in *United States v. Powers*. *We follow it now and agree that the United States did reserve* the water rights for the Indians effective as of the time the Indian Reservations were created. . . .<sup>45</sup>

And as to quantity: “We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.”<sup>46</sup>

This language, assigning a priority date (“effective as of the time the Indian Reservations were created”) and a quantity (measured by irrigable acreage) was clearly reflected in and illuminated by the decree

41. Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).

42. *Supra*, notes 10 and 14.

43. Federal Power Comm'n, 349 U.S. at 448.

44. 373 U.S. 546 (1963).

45. *Id.* at 600 (emphasis added).

46. *Id.* at 601.

which was announced in the case a year later.<sup>47</sup>

The quotation from that decree which follows may require some preliminary explanation. It starts out sounding as though it is principally a restraint upon the United States: "II. The United States . . . are hereby severally enjoined . . ." <sup>48</sup> This language is, however, just a matter of form. The Secretary of the Interior (who is in charge of the Hoover Dam and who, through the Bureau of Reclamation, must carry out the Boulder Canyon Project Act) is here directed to deliver Colorado River water to various entities. Although there are some important entities with which we are not now concerned (e.g., the states of Arizona, California and Nevada) we *are* concerned about water rights for federal and Indian reservations. By employing the language of an injunction, the Court effectively placed a limit upon the water rights of those entities, and in so doing, defined their maximum rights. The quoted portion of the decree deals first with the water rights of Indian reservations, and then with those of other federal reservations. So, excerpting heavily, but not unfairly or out of context, this part of the decree reads:<sup>49</sup>

II. The United States, its officers, attorneys, agents and employees be and they are hereby severally enjoined:

. . . .

(D) From releasing water controlled by the United States . . . except in accordance with the allocations made herein . . . :

(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre feet of diversion from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;

(2) The Cocopah Indian Reservation . . . (i) 2,744 acre feet . . . or (ii) the quantity . . . necessary to supply the consumptive use required for irrigation of 431 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of September 27, 1917;

[(3), (4) and (5) are similar allocations and priorities for three other Indian reservations].

(6) The Lake Mead National Recreation Area in annual quantities reasonably necessary to fulfill the

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47. *Arizona v. California*, 376 U.S. 340 (1964).

48. *Id.* at 341.

49. *Id.* at 341-46.



purposes of the Recreation Area, with priority dates of March 3, 1929 for land reserved by the Executive Order of said date (No. 5105), and April 25, 1930, for lands reserved by the Executive Order of said date (No. 5339);

(7) The Havasu Lake National Wildlife Refuge in annual quantities reasonably necessary to fulfill the purposes of the Refuge, not to exceed (i) 41,839 acre feet of water diverted from the mainstream or (ii) 37,339 acre feet of consumptive use of mainstream water, whichever of (i) or (ii) is less, with a priority date of January 22, 1941 for lands reserved by the Executive Order of said date (No. 8647), and a priority date of February 11, 1949, for land reserved by the Public Land Order of said date (No. 559). . . .

Federal and Indian reserved rights were treated similarly by the Court's decree with respect to both the quantification of water rights and the assignment of priority dates. In a subsequent *Supplemental Decree* the Court said that the use of "irrigable acres" is a "means of determining quantity . . . but shall not constitute a restriction of the usage of them to irrigation or other agricultural application."<sup>50</sup>

None of the Indian reservations involved in the foregoing *Colorado River* case<sup>51</sup> were created by treaty. The possibility that treaty Indian reservations would be treated differently remained open. There is, however, nothing in the decision to suggest any difference between treaty and non-treaty reservations. In fact, an inference can be drawn that the Court would not recognize any differences: First of all, no significance was attributed to the fact that these were non-treaty reservations and secondly, the Court said: "*Winters* has been followed by this Court as recently as 1939 in *United States v. Powers*. *We follow it now*. . . ."<sup>52</sup> *Winters*<sup>53</sup> involved a treaty reservation. The apparent implication is that there is no distinction.

This proposition finds further support in the recent Supreme Court decision of *Cappaert v. United States*:<sup>54</sup>

[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the

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50. *Arizona v. California*, 439 U.S. 419, 422 (1979).

51. I.e., *Arizona v. California*, 373 U.S. 546 (1963).

52. *Arizona v. California*, 373 U.S. at 600 (emphasis added).

53. *Winters*, 207 U.S. at 576.

54. 426 U.S. 128, 138 (1976).

date of the reservation and is superior to the rights of future appropriators. . . . The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Although the *Cappaert* case did not involve Indian water rights, the Court supported the foregoing statement by citing *Arizona v. California*,<sup>55</sup> *United States v. Powers*,<sup>56</sup> and *Winters v. United States*,<sup>57</sup> among other authority. The Court, thus, appears to deal with treaty and non-treaty Indian cases indiscriminately. In discussing the *Winters* case, the Court in *Cappaert* concluded: "The Court held [in *Winters*] that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation."<sup>58</sup>

This language not only implies that all Indian reservation priority dates are based on the dates of creation of the various reservations, but it also suggests that Indian water rights are limited in quantity to an amount "sufficient to accomplish the[ir] purposes." It further suggests an answer to another issue which lingers after the *Colorado River* decision: whether the quantity of water for Indian reservations should be measured according to the purposes of the reservation as envisioned at the times of their creation, or at some later date, *e.g.*, the date of a court decree, or at the time or times that new uses of water may be developed.

*Arizona v. California*<sup>59</sup> was certainly not "open ended" as to future uses and development, although it did utilize modern criteria for determining irrigable acreages and their water requirements. In *United States v. New Mexico*<sup>60</sup> the Supreme Court held that the quantity of water reserved from the Mimbres River for the Gila National Forest was to be gauged by the purposes of the reservation as of the time of its creation. Those purposes are to be found exclusively in the *Organic Administration Act of 1897*.<sup>61</sup> The broader purposes of the *Multiple Use-Sustained Yield Act of 1960*<sup>62</sup> resulted in no additional reservation of water, but if it had, "the rights would be subordinate to any appropriation of water under state law dating to before 1960."<sup>63</sup> Although this was not an Indian water rights case, the Court cited and relied

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55. 373 U.S. 546 (1963).

56. 305 U.S. 527 (1939).

57. 207 U.S. 564 (1908).

58. *Cappaert*, 426 U.S. at 139.

59. 373 U.S. 546 (1963).

60. 438 U.S. 696 (1978).

61. Act of June 4, 1897, Ch. 2, 30 Stat. 34 (current version at 16 U.S.C. § 473 (1976)).

62. Act of June 12, 1960, P.L. 86-517, 74 Stat. 215, (current version at 16 U.S.C. § 528 (1976)).

63. 438 U.S. at 713, n.21.

upon the *Winters* case,<sup>64</sup> *Arizona v. California*,<sup>65</sup> and *Cappaert v. United States*.<sup>66</sup> It therefore implicitly suggests that Indian water rights may be similarly gauged.

In general, then, federally reserved rights have a priority date as of the date of the creation of the reservation, for a quantity of water required for the purposes of the reservation as perceived at that time.

#### IV. ADJUDICATION

In 1952, Senator McCarran added a rider to the *Department of Justice Appropriation Act*,<sup>67</sup> which amended the federal public land laws, and is referred to as "*the McCarran Amendment*".<sup>68</sup> It states:

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty. . . .

In two cases in 1971, known as the *Eagle County* case<sup>69</sup> and the *Water Division No. 5* case,<sup>70</sup> the Supreme Court interpreted this language to mean that the United States is amenable to state court water adjudications, including adjudications of federal reserved water rights. Neither of these cases involved federal Indian reserved rights, but they led to a case which did seek to adjudicate Indian reserved rights, the *Colorado River Water Conservation District v. United States*<sup>71</sup> case, also known as the "*Mary Akin*" case. It involved the *Southern Ute Indian Tribe* and the *Ute Mountain Ute Indian Tribe*, who are successors to the bands and parties to the "*Treaty With the Ute, 1868*"<sup>72</sup> which established reservations for the named tribes.

In the *Akin* case, the Supreme Court followed the *Eagle County*

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64. 207 U.S. 564 (1908).

65. 373 U.S. 546 (1963).

66. 426 U.S. 128 (1976).

67. Dept. of Justice Appropriation Act, 1953, Act of July 10 1952, Ch. 651, sec. 208 (a-c), 66 Stat. 549 (current version at 43 U.S.C. § 666 (1976)).

68. 43 U.S.C. § 666 (1976).

69. *United States v. District Court for Eagle County*, 401 U.S. 520 (1971).

70. *United States v. District Court for Water Div. No. 5*, 401 U.S. 527 (1971).

71. 424 U.S. 800 (1976).

72. 15 Stat. 619 (1868).

and *Water Division No. 5* cases, saying:<sup>73</sup>

Though *Eagle County* and *Water Division No. 5* did not involve reserved rights on Indian reservations, viewing the Government's trusteeship of Indian rights as ownership, the logic of those cases clearly extends to such rights. Indeed, *Eagle County* spoke of non-Indian rights and Indian rights without any suggestion that there was a distinction between them for purposes of the Amendment.

Not only the Amendment's language, but also its underlying policy, dictate a construction including Indian rights in its provisions.

If, then, Indian reserved rights (treaty and non-treaty) are to be subject to adjudication in state courts, it seems implicit that the extent and the limits of those rights are also to be determined. Otherwise the inclusion of those rights in the adjudication would be both confusing and meaningless, as well as inconsistent with the Supreme Court's interpretation of the purpose of the *McCarran Amendment* set forth in the *Akin* case.

#### V. MONTANA AND THE AKIN CASE

On April 5, 1979, the United States filed four lawsuits in federal courts in Montana: to adjudicate the Flathead River system, the Marias River system, the Milk River system, and the Poplar River system. The suits name a total of perhaps 8,000 defendants. Their purpose is to adjudicate in federal courts all federal and Indian reserved water rights in relation to the named defendants. They will also involve adjudicating the relative rights of the defendants among themselves.

Shortly after these suits were filed, the Montana legislature passed *Senate Bill No. 76*,<sup>74</sup> dividing the State into four water divisions, providing for the designation of four water judges and water masters, and for the commencement of massive adjudication proceedings in each of the four divisions. Those proceedings have commenced, and consequently, motions to dismiss were made in each of the federal suits, in reliance upon the *Akin* case.<sup>75</sup> There are, however, significant differences between the *Akin* case and the Montana situation.

The *Akin* case started out in the *federal* district court, as a suit by

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73. 424 U.S. at 810 (citations omitted).

74. Passed April 19, 1979, approved by the Governor May 11, 1979, Chapter 697, *Laws of Montana* (1979) (codified at MONTANA CODE ANNOTATED §§ 85-2-211 *et seq.* (1979)).

75. 424 U.S. 800 (1976). The motions to dismiss were granted on November 26, 1979 by order of Judges Battin and Hatfield. (CV-79-40-BLG, CV-79-21-GF, CV-79-22-GF and CV-79-33-M). Also dismissed were three earlier cases, CV-75-6-BLG, CV-75-20-BLG and CV-75-34-BLG.

the United States against some 1,000 water users, listed alphabetically, as *United States v. Mary Akin, et al.*<sup>76</sup> The suit was for the purpose of adjudicating federal and Indian reserved rights in relation to the thousand defendants. One of the defendants brought an action in the Colorado state court for Water Division No. 7, making the United States a defendant. Its purpose was the same as the federal suit. Thereafter, a motion to dismiss the federal suit was granted by the federal district court, but that was reversed on appeal by the Tenth Circuit Court of Appeals.<sup>77</sup> The United States Supreme Court granted certiorari, reversed the Court of Appeals, and affirmed the district court order of dismissal of the original federal suit.<sup>78</sup>

The *Akin* case was decided by a margin of six to three. The majority admitted that there were special circumstances in the case, and that it was a close call. Of the approximately seven special circumstances that were described in the decision, four should be noted here. They were: (1) Colorado had both a well established system and long history of water rights adjudication under the *Colorado Water Rights Determination and Administration Act*; (2) the Colorado State Engineer administered and managed the adjudication of water rights; (3) the District Court in Denver was on the other side of the Continental Divide and some 300 miles away from Water Division No. 7 in Durango where the state suit had been filed; and (4) the United States was already participating in proceedings in other Colorado water divisions.

Montana's first general stream adjudication law, on the other hand was enacted in 1973,<sup>79</sup> and the first adjudication under it, the adjudication of rights on the Powder River, is still in its beginning stages, a half dozen years after its commencement. That law was replaced by the 1979 legislation calling for four water rights decrees which will encompass the entire state.<sup>80</sup> These suits will be massive, complex, and greatly protracted. They are hardly comparable to the simple supplemental adjudication in Colorado within a long-standing system of orderly adjudication. Colorado pioneered in water rights adjudication and administration.<sup>81</sup> It established an adjudication system by special statutory procedures enacted in 1879 and 1881<sup>82</sup> which remained basically unchanged until 1969, when the system was overhauled and modernized.<sup>83</sup> But by 1969 the task of adjudicating Colorado water rights

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76. 504 F.2d 115 (1974).

77. *Id.*

78. 424 U.S. 800 (1976).

79. *Laws of Montana* (1973) ch. 452.

80. *Supra*, note 74.

81. COLO. LAWS. 1879, p. 94; 1881, p. 119; 1881, p. 142; 1887, p. 295.

82. *Id.*

83. COLO. REV. STAT. §§ 37-92-101 *et seq.* (1974).

had essentially been accomplished long ago. In Montana, by comparison, water rights adjudication is still in its infancy.

Once a general stream adjudication is completed Montana will have a system for the administration and management of water rights. It has none now. Furthermore, the inconvenience to Montanans of participating in federal district courts in Missoula, Great Falls and Billings is generally not as great as the inconvenience to water users in the Durango area of having to participate in a suit in Denver.

These distinctions are especially significant in light of the fact that the *Akin* case was decided by a bare majority of the Court and that majority found it to be a close call. The dismissal of the Montana cases is now on appeal to the Ninth Circuit.

As was pointed out by Ms. Sharon Morrison,<sup>84</sup> the *Federal Enabling Act for the State of Montana*<sup>85</sup> contains a disclaimer of any state jurisdiction with respect to Indian lands, which is paraphrased in the *1889 Constitution*<sup>86</sup> and adopted by reference in the *1972 Montana Constitution*.<sup>87</sup> Colorado has no such provision, so the issue was not raised in the *Akin* case. But the *New Mexico Constitution* does have such a clause<sup>88</sup> which the trial judge in a recent New Mexico case<sup>89</sup> invoked to dismiss the United States (as trustee representing the Mescalero Apache Tribe) from a general adjudication of the Rio Hondo River System. The New Mexico Supreme Court reversed, saying that the disclaimer clause does not prohibit state adjudication of Indian water rights because "[t]he state is not asserting a proprietary interest in Indian lands" and because the federal government has granted jurisdiction through the *McCarran Amendment*.<sup>90</sup> There remains, nevertheless, a question as to whether a state with such a disclaimer in its constitution has authority to exercise jurisdiction over Indian realty and its appurtenances.

There is, however, one impelling practical consideration favoring a continuation of the Montana state court proceedings and a dismissal of the four federal suits. The four federal suits are *in personam* actions, that is, they are binding only upon those persons who are actually

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84. Morrison, *Comments on Indian Water Rights* (May, 1979) (unpublished Independent Study Research Paper, Law School, University of Montana). The paragraph in the text (above) is taken from her ideas and research, with her permission.

85. Act of Feb. 22, 1889, Ch. 180, sec. 4, part 2, 25 Stat. 676.

86. MONT. CONST. of 1889, ord. 1, sec. 2.

87. MONT. CONST., 1972, art. I. For some purposes water rights are considered to be real property, *Brady Irrig. Co. v. Teton County*, 107 Mont. 330, 85 P.2d 350 (1938); or an appurtenance to real property, *Leggat v. Carroll*, 30 Mont. 384, 76 P. 805 (1904).

88. NEW MEXICO CONST., art. XXI, sec. 2.

89. *State ex rel. Reynolds v. Lewis*, 545 P.2d 1014 (N.M. 1976).

90. *Id.* at 1015.

served with process as parties to the cases. They cannot bind, they cannot be *res judicata*, and they cannot settle the relative water rights of persons not named, not served, and who have not had their day in court. At great expense in time and money, the suits will, therefore, fail to fulfill their purpose in large measure. They will fail because some claimants to Montana water rights are exceedingly hard to find. Until 1973, on most streams in Montana, a water right could be acquired simply by using the water—without filing anything, posting anything, or telling anyone.<sup>91</sup> Yet there is a water right. There are very many such rights, and it is quite unlikely that all of these water right owners will be joined and served in the federal actions.

In contrast, Montana has a statute which converts the water right adjudications into *in rem* actions, that is, it authorizes notice by publication in order to bind everyone, whether personally served or not.<sup>92</sup> Hence a decree under the Montana statute would be conclusive, would settle the relative rights of all persons, and would accomplish its purpose.

## VI. STATUS AND CONCLUSION

Several important questions were raised by the Comptroller General in his Report to Congress.<sup>93</sup> They are essentially these:

(1) What are the purposes for which a reservation was established and do these purposes limit the uses of water claimed under the reservation doctrine?

(2) Where the quantity of waters on a reservation are insufficient to fulfill the purposes of the reservation, may waters be reserved in a distant stream to meet the needs?

(3) May reserved water be used off the reservations?

(4) Should a holder of a junior state-conferred water right be compensated when a senior federal reserved right is exercised?

(5) Are Indian reserved water rights limited to water uses envisioned when the reservation was established, or are those rights expansive, encompassing rights to meet all potential future uses of water?

(6) Do reserved rights apply to groundwater in cases where no such intent existed at the time of the reservation?

(7) What are the priority and quantity rights of Indian allottees and their non-Indian successors?

Answers to some of these questions seem forecast by statements of the Supreme Court in decisions reviewed in this article. Square hold-

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91. *Murray v. Tingley*, 20 Mont. 260, 50 P. 723 (1897).

92. *Supra*, note 74.

93. COMPTROLLER GENERAL'S REPORT, *supra* note 1, at 16, 17 and 25.

ings on these issues would, nevertheless, remove undesirable uncertainties and it appears that many of the uncertainties will be resolved by one or more means.

The Comptroller General reports: "As of August 1978, there were 44 court cases pending concerning federal and Indian reserved water rights."<sup>94</sup> As these cases are decided, and some find their ways to appellate courts, including the Supreme Court, questions will be answered and some uncertainties resolved. But the process is notoriously slow, and very costly to all involved.

The President's *Water Policy Statement*<sup>95</sup> requires the federal agencies to commence quantifying all federal reserved rights. This too may remove some of the uncertainties. In response to the President's directive of June 6, 1979, Leo Krulitz, Solicitor of the Department of the Interior, on June 25, 1979, issued an opinion discussing federal water rights.<sup>96</sup> The report contains a description of the bases for claiming federal reserved rights for the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management. It is a beginning.

The Comptroller General hopes that the courts and the administration will soon provide answers to the questions and remove the uncertainties. But his report reveals impatience, and therefore skepticism that these processes will work within a reasonable time. It appears that he stands ready to offer one or more legislative solutions.

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94. *Id.*, at 30.

95. *Supra*, note 1.

96. SOLICITOR'S OPINION M-36914 (June 25, 1979).



