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Real Property

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REAL PROPERTY

INTRODUCTION

The Tenth Circuit Court of Appeals decided three noteworthy cases in the area of real property during the 1994-1995 survey period.[1] These cases address issues of eminent domain, public lands, and water courses.

Part I of this Survey discusses third party authority to condemn property under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[2] In *United States v. Hardage*,[3] the Tenth Circuit followed the Supreme Court and at least two other federal circuits by using CERCLA to interpret a federal statute's permanent taking authority. Part II considers the valuation of undeveloped subsurface minerals for admittedly "taken" property. *United States v. Consolidated Mayflower Mines, Inc.*[4] solidified current Tenth Circuit law despite seemingly contrary Supreme Court and circuit authority. Part III addresses an ambiguous land grant from the federal government. Circuit courts disagree as to whether state or federal law controls this issue. In *Koch v. United States Department of Interior*,[5] a case of first impression, the Tenth Circuit utilized state law to interpret an ambiguous federal land grant.

I. EMINENT DOMAIN AND THIRD PARTY AUTHORITY TO CONDEMN: *UNITED STATES V. HARDAGE*[6]

A. *Background*

1. Congressional Grant of Condemnation Power

The United States Constitution reserves to the government the right to take property for public use when it justly compensates the owner.[7] Congress may confer this power of eminent domain upon whatever entity it selects.[8]

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1. This Survey covers cases decided from September 1994 to September 1995.
2. 42 U.S.C. §§ 9601-9675 (1988).
3. 58 F.3d 569 (10th Cir. 1995).
4. 60 F.3d 1470 (10th Cir. 1995).
5. 47 F.3d 1015 (10th Cir.), *cert. denied*, 116 S. Ct. 303 (1995).
6. 58 F.3d 569 (10th Cir. 1995).
7. U.S. CONST. amend. V. For a theoretical overview of eminent domain, see Marla Mansfield, *When "Private" Rights Meet "Public" Rights: The Problems of Labeling and Regulatory Takings*, 65 U. COLO. L. REV. 193 (1994). *See generally* George W. Miller & Jonathan L. Abram, *A Survey of Recent Takings Cases in the Court of Federal Claims and the Court of Appeals for the Federal Circuit*, 42 CATH. U. L. REV. 863, 863 (1993) (surveying cases decided by the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit in 1991 through 1993); Sidney Z. Searles, *The Law of Eminent Domain in the U.S.A.*, C975 ALI-ABA 333, 333-57 (1995) (providing an overview of the history of eminent domain and offering recommendations to promote a more equitable balance between the interest of the public at large and the individual property owner).
8. 1A JULIUS L. SACKMAN, NICHOLS' ON EMINENT DOMAIN § 3.03(3), at 3-58 to 3-76 (rev. 3d ed. 1995) (noting that the party must be bound to use the property taken for public use).

The grant of condemnation power, however, must exist in express statutory terms.[9] In addition, no one with a special grant of eminent domain power may delegate that authority without a legislative designation.[10] Most importantly, an exercise of condemnation power must derive its source from a statute.[11]

2. The All Writs Act[12] Power of Condemnation

If the legislature makes no affirmative grant of authority, the judicial branch may effect a condemnation through the federal "All Writs Act" (AWA).[13] In order to broaden judicial condemnation power through the AWA, an issuance: (1) must be appropriate to aid the court's existing jurisdiction; and (2) comply with "the usages and principles of law."[14] The AWA does not grant independent jurisdiction; it only strengthens condemnation power that independently preexists.[15]

The AWA authorizes a taking under certain highly specific circumstances. The most expansive interpretation of the AWA is found in *United States v. New York Telephone Co.*[16] In *New York Telephone*, the Supreme Court invoked AWA authority to allow a partial, temporary taking by physical occupation of a company's phones lines.[17]

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9. *Id.* The courts may also read a grant into a statute through "necessary implication" when the grant would be without force in the absence of an implication. Pennsylvania R.R. Company's Appeal, 93 Pa. 150 (1878) (finding that an act granting the railroad right-of-ways was impotent without condemnation power); *see* 1A SACKMAN, *supra* note 8, § 3.21.4, at 3-62 (noting that the party must have no control over the situation creating the necessity).

10. Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 594, 598, 603 (1904) (holding that the lessee of a corporation with power of eminent domain cannot exercise that right).

11. 1A SACKMAN, *supra* note 8, § 3.03(12), at 3-194 to 3-195 (noting that Congress may grant the power of eminent domain to an individual, but the delegation must be explicitly granted by statute).

12. 28 U.S.C. § 1651 (1994). "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

13. 28 U.S.C § 1651.

14. *Id.*; *see also* Board of Educ. v. York, 429 F.2d 66, 69 (10th Cir. 1970) (granting an injunction to solve segregation problems as pursuant to the AWA "necessary and appropriate" standard), *cert. denied*, 401 U.S. 954 (1971).

15. 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3932, at 185 (1977). There are two requirements under the AWA: (1) the case has some potential for an independent source of jurisdiction, and (2) the writ will aid that jurisdiction. *Id.* at 188; *see* Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34-37 (1980) (reversing mandamus to restore a jury verdict because parties may not immediately appeal an order granting a new trial). The Supreme Court has said that the AWA is not a jurisdictional blank check, and thus, "it does not authorize [courts] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." Pennsylvania Bureau of Correction v. United States Marshals Serv., 474 U.S. 34, 43 (1985) (holding the district court's use of the AWA improper absent a showing of "exceptional circumstances").

16. 434 U.S. 159 (1977).

17. *New York Tel.*, 434 U.S. at 176-78. FBI officials had probable cause to believe that illegal gambling was occurring by telephone. The telephone company refused, however, to comply with a court order requiring it to lease the telephone lines to the FBI for surveillance purposes. *Id.* at 161-62. The Supreme Court held that although "unreasonable burdens may not be imposed" under the AWA, the AWA authorized commands to thwart frustration of a prior court order. *Id.* at 172. The Court found especially persuasive the circumstances where: (1) the company allowed the illegal actions; (2) the company had a public duty; (3) the order was not burdensome; and (4) the FBI had no alternative method to accomplish its goals. *Id.* at 174-75.

The AWA may also force compliance with a previous court order frustrated by the acts of an individual.[18] Occasionally, this power can extend to individuals who "have not taken any affirmative action to hinder justice."[19] Frustration traditionally includes wrongful obstruction of an order or public duty by one party.[20]

3. Congressional Grant of Condemnation Power: CERCLA

CERCLA[21] provides for condemnation of Superfund cleanup sites and adjacent land.[22] Although commentators and courts interpret this provision liberally in order to secure beneficial environmental goals,[23] the statutory language does not grant condemnation powers to third parties.[24] Trustees with the power to bring a CERCLA damage claim include local governments, states, and federal government departments.[25] Consequently, the private party charged with cleaning up a hazardous site has no power under CERCLA to procure any necessary private property.

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18. *See id.* at 172 (noting repeated Supreme Court recognition of the AWA grant of power to prevent frustration of prior orders); Kemp v. Peterson, 940 F.2d 110, 113 (4th Cir. 1991) (finding no abuse of discretion in an order intending to facilitate monitoring of compliance with an earlier order).

19. *New York Tel.*, 434 U.S. at 174 (allowing a court to find frustration if people, "though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order"); *see also* United States v. Field, 193 F.2d 92, 96-97 (2d Cir.) (finding that third parties must answer questions and produce books despite self-incrimination privilege), *cert. denied*, 342 U.S. 894 (1951), *cert. dismissed*, 342 U.S. 908 (1952); United States v. McHie, 196 F. 586, 587-88 (N.D. Ill. 1912) (finding power in the AWA to impound books illegally seized by the government where they were necessary evidence).

20. Frustration is more readily found when one party has a public duty to protect the public interest. *See New York Tel.*, 434 U.S. at 174 (finding that the telephone company had taken on a public duty); Federal Trade Comm'n v. Dean Foods Co., 384 U.S. 597, 608 (1966) (preventing the consummation of an illegal merger); Public Util. Comm'n v. Capital Transit Co., 214 F.2d 242, 245 (D.C. Cir. 1954) (granting an injunction based on the Public Utilities Commission's ties to Congress).

21. 42 U.S.C. §§ 9601-9675 (1995). The original proceeding in *Hardage* came under 1980 CERCLA, 42 U.S.C. §§ 9601-9657 (Supp. IV 1980), as opposed to the Superfund Amendments and Reauthorization Act of 1986)

22. 42 U.S.C. § 9604(j) (1988). *See generally* Bruce P. Howard & Kevin E. Solliday, *CERCLA and Similar State Laws: Overview and Current Developments*, 797 Prac. L. Inst./Corp. L. & Prac. 39 (1992) (describing the basic fundamentals of Superfund sites). A Superfund site contains hazardous waste, is designated to receive federal funding for cleanup, and imposes liability for most of the costs on private parties once owning the land. *Id.* at 39-40.

23. Dedham Water Co. v. Cumberland Farms Dairy, 805 F.2d 1074, 1081 (1st Cir. 1986) (interpreting CERCLA to eliminate a "procedural obstacle that would otherwise hamper the efforts of private parties"); *see also* New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985) (refusing to interpret CERCLA to frustrate the environmental goals of the statute without affirmative congressional intent).

24. Although the original 1980 CERCLA made no provision for condemnation, the amendments provide for presidential condemnation authority. 42 U.S.C. § 9607(j)(1) (providing that "[t]he President is authorized to acquire, by purchase, lease, condemnation, donation, or otherwise, any real property or any interest in property that the President in his discretion determines is needed to conduct a remedial action under this chapter"). *See generally* Carter H. Strickland, Jr., *The Scope of Authority of Natural Resource Trustees*, 20 COLUM. J. ENVTL. L. 301, 303 (1995) (providing background on authority to condemn under CERCLA).

25. Strickland, *supra* note 24, at 303-04. The Environmental Protection Agency (EPA) may condemn a piece of property for public use as a CERCLA Superfund site, but third parties have no statutory authority to do the same. 42 U.S.C. § 9604(j)(1).

B. United States v. Hardage[26]

1. Facts

The United States filed suit under CERCLA to compel the Hardage Steering Committee (HSC) to implement remedial cleanup of a Superfund site.[27] The cleanup order necessitated the acquisition of the neighboring property, owned by Mr. Whitehead.[28] HSC failed to negotiate a price for forty acres of Mr. Whitehead's dairy farm, and instead initiated a third party complaint seeking to take the land.[29] HSC cited ancillary jurisdiction for condemnation authority under the inherent powers of the court through CERCLA and the AWA.[30] The trial court compelled the condemnation through the AWA.[31]

2. Decision

The Tenth Circuit refused to extend the AWA to provide authority for a permanent taking because CERCLA does not grant such power.[32] Determining that the broadest application of the AWA granted authority for only a temporary physical occupation,[33] the court found nothing in the language of the AWA that would vest district courts with such extensive condemnation jurisdiction.[34] For such an extension, the AWA would require a finding that Mr. Whitehead frustrated the previous order.[35] The Tenth Circuit refused to find frustration based only upon the failure of negotiations.[36]

The decision also reaffirmed the court's view that Federal Rule of Civil Procedure 71A guarantees the right to a jury in a condemnation proceeding.[37]

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26. 58 F.3d 569 (10th Cir. 1995).
27. *Hardage*, 58 F.3d at 571.
28. *Id.*
29. *Id.*
30. *Id.*; *see* 28 U.S.C. § 1651(a) (1994). Alternatively, HSC asserted a private right to eminent domain under an Oklahoma law providing condemnation power for a "sanitary purpose," but the district court held that these grounds were not necessary because the AWA grounds determined the case. *Hardage*, 58 F.3d at 571-73; *see* OKLA. STAT. ANN. tit. 27, § 6 (West 1991). HSC launched its claim that the Whiteheads do not have the right to a jury trial based upon this state law claim. *Hardage*, 58 F.3d at 576.
31. *Hardage*, 58 F.3d at 573-74.
32. *Id.* at 573. HSC's counsel admitted that the EPA would have condemnation power in the instant situation, but that HSC was not linked to the EPA. *Id.* at 572; *see* Commercial Sec. Bank v. Walker Bank & Trust Co., 456 F.2d 1352 (10th Cir. 1972) (limiting the AWA to preserving jurisdiction, not granting jurisdiction over people or property).
33. *Hardage*, 58 F.3d at 574-75 (citing *New York Tel.*, 434 U.S. at 168-78).
34. *Id.* at 575.
35. *Id.* at 575-76.
36. *Id.*
37. *Id.* at 576. Rule 71A(h) states that if a tribunal is not specifically provided for by an act of Congress, a party *may* have a jury trial. FED. R. CIV. P. 71A(h) (emphasis added). The Supreme Court, however, has declared that "there is no constitutional right to a jury in eminent domain proceedings." United States v. Reynolds, 397 U.S. 14, 18, 20 (1970) (providing that "[t]he rule gives the trial court discretion to eliminate a jury entirely"); *see also* 12 WRIGHT ET AL., *supra* note 15, § 3051, at 123-25 & n.56 (1977 & Supp. 1995) (noting that the landowner may demand a jury, but that the court may refuse); Searles, *supra* note 7, at 356-57 (stating that federal claimants have a right to demand a jury trial unless the court appoints a commission).

The Tenth Circuit, in *Hardage*, recognized certain exceptions to the jury right, and stated that the district court did not make appropriate findings for exceptions. *Hardage*, 58 F.3d at 576 n.5. The trial court did appoint a commission for the valuation. *Id.* at 573. The Tenth Circuit also

Federal law governs a CERCLA action; therefore, the court determined that Mr. Whitehead was due a "panoply of due process rights" under the Fifth Amendment.[38]

C. *Analysis*

The Tenth Circuit's decision to limit the jurisdiction of the AWA was reasonable.[39] First, the AWA itself does not explicitly mention power of condemnation.[40] The Tenth Circuit correctly relied upon *New York Telephone*, which recognized that "unreasonable burdens may not be imposed," to determine the AWA's boundaries.[41] *New York Telephone* relied on the AWA for a partial, temporary taking, as opposed to the "full-blown eminent domain proceeding" in *Hardage*, which imposed severe burdens on the innocent neighbor to the Superfund site.[42] The Supreme Court has not extended the AWA to allow a permanent taking, primarily because CERCLA's congressional intent was not to allow third party condemnation authority.[43] Indeed, the Supreme Court cautioned against the inherent dangers in expanding the AWA too far.[44]

Second, the Tenth Circuit realistically considered that failed negotiations may not necessarily be an attempt to thwart a judicial order.[45] The new test for finding frustration, as articulated in *Hardage*, requires proof of either: (1)

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noted that both attorneys misled the trial court as to the jury trial right offered in its circuit. *Id.* at 576. In addition, the court noted that HSC's argument on appeal—that the Whiteheads simply failed to demand a jury—was disingenuous because the trial court determined that the Whiteheads could not have a jury prior to the point at which they could have demanded one. *Id.*

38. *Hardage*, 58 F.3d at 576.

39. The courts have traditionally used the AWA for the following procedural injunctive actions and writs of mandamus: protecting the right to a jury trial; staying proceedings; denying a stay of proceedings; reviewing orders compelling discovery; motions to dismiss; new trials; class actions; reviewing requests for judge disqualification; transfers; and writs of habeas corpus. 16 WRIGHT ET AL., *supra* note 15, §§ 3932, 3935.

40. 28 U.S.C. § 1651(a) (1994).

41. *New York Tel.*, 434 U.S. at 172 ("We agree that the power of federal courts to impose duties upon third parties is not without limits . . . ."); *see supra* note 17 and accompanying text.

42. *Hardage*, 58 F.3d at 575. Many other important distinctions exist between *Hardage* and *New York Tel.*: (1) the phone company was not innocent like Whitehead; (2) unlike Whitehead, the phone company had a public duty; (3) the phone company's burden was minor, whereas Whitehead risked becoming landlocked; (4) the FBI had no other manner in which to accomplish its investigation, whereas the government could use the EPA to obtain Whitehead's land; (5) unlike HSC, the FBI needed assistance with law enforcement; and (6) the Supreme Court found congressional intent to allow the FBI access to phone lines, whereas CERCLA does not grant third party condemnation power. *Id.* at 569-74; *New York Tel.*, 434 U.S. at 174-76.

43. The AWA does not allow "exercise of a specific nonexistent power." 16 WRIGHT ET AL., *supra* note 15, § 3933, at 225.

44. De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945) ("While courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."). *See generally* Paul Ganson, *The SEC Speaks in 1995: Recent Judicial Developments*, 880 PRAC. L. INST./CORP. L. & PRAC., 613 (1995) (noting that a recent case denied use of the AWA to base a sua sponte exercise of jurisdiction over a person who was not a party to the action).

45. *Hardage*, 58 F.3d at 575 (stating that "the 'frustration' of [the] prior order was simply the product of the inability of either side to agree upon a fair price"). A court traditionally finds frustration when a direct order is thwarted, even by a third party. *Id.* The *Hardage* order, however, compelled HSC to acquire the land, not to condemn the land. *Id.* at 571.

intentional refusal to bargain in good faith; or (2) intentional balking to obstruct a court order.[46]

D. *Other Circuits*

The Tenth Circuit's refusal in *Hardage* to expand the substantive berth of the AWA in a condemnation proceeding is consistent with case law in other circuits.[47] The narrow definition of "frustration" of a court order is also in accord with other circuits, where courts traditionally limit frustration to situations in which the obstruction had a taint of wrongdoing or when law enforcement required assistance.[48]

II. EMINENT DOMAIN AND VALUATION OF SUBSURFACE MINERALS: *UNITED STATES V. CONSOLIDATED MAYFLOWER MINES, INC.*[49]

A. *Background*

1. Valuation of Taken Property: The Highest and Best Use Test

Once a court determines that the government has taken property from an individual with adequate authority, the government must give "just compensation."[50] Determination of "just compensation" involves the land's market value as determined by the "highest and best use" test.[51] This test compensates the landowner for only the most worthwhile use of the property.[52] Under *Olson v. United States*,[53] the government must consider all uses[54] where

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46. *Id.* at 575 (stating that "both parties must bear some responsibility for their negotiating failure").

47. *See* Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283, 1289-90 (9th Cir. 1979) (limiting the AWA to provide jurisdiction for technical assistance to law enforcement, and not authorizing the power "to order a party to bear risks not otherwise demanded by law"). At least one other circuit has used the AWA to enforce condemnation orders, but not to authorize a third party's power to condemn without a statutory grant. Cole v. United States, 657 F.2d 107, 109 (7th Cir.) (finding injunction proper to prohibit condemnee interference with government possession), *cert. denied*, 454 U.S. 1083 (1981).

48. *See supra* notes 18-20 and accompanying text. The Sixth Circuit found frustration when the EPA refused to comply with an order forcing promised funding of a municipal sewer project. Michigan v. City of Allen Park, 954 F.2d 1201, 1216-17 (6th Cir. 1992); *see also* National Org. for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 544 (9th Cir. 1987) (holding that an appointment of a master to monitor compliance with an order was permissible under the AWA).

49. 60 F.3d 1470 (10th Cir. 1995).

50. U.S. CONST. amend. V.; U.S. CONST. amend. XIV, § 1. For recent in-depth discussions of just compensation, see Michael Debow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579 (1995); Clynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721 (1993).

51. Sidney Z. Searles, *Highest and Best Use: The Keystone of Valuation in Eminent Domain*, C791 ALI-ABA 315, 315 (1993) (discussing the highest and best use doctrine: its meanings, origins, and effects on value).

52. *Id.* at 318 (quoting the earliest appearance of the test in *In re* Furman Street, 17 Wend. 669 (N.Y. Sup. Ct. 1836)). Current use of the land does not dictate the outcome of the doctrine. Boom Co. v. Patterson, 98 U.S. 403, 408 (1878) (providing that "property is not to be deemed worthless because the owner allows it to go to waste"). Important factors to determine highest and best use include land availability, land adaptability, need or demand for a use, and other possible uses. Searles, *supra* note 51, at 321.

53. 292 U.S. 246 (1934).

54. *Olson*, 292 U.S. at 255. The Supreme Court has stated that compensation includes the

there is a reasonable probability that the property will adapt to that use, and a demand for that use in the "reasonably near" future.[55] The government does not consider any remote and speculative uses dependent upon extrinsic conditions in the valuation.[56]

2. Valuation of Undeveloped Subsurface Minerals

Due to the inherently speculative nature of interests in undeveloped mineral deposits, complex valuation doctrines become even more difficult to apply in mineral valuation disputes.[57] For example, strict adherence to the *Olson* test of "reasonable probability in the reasonably near future"[58] would disallow compensation for any speculative mineral deposit.

The United States Supreme Court has noted that speculative values for undeveloped minerals are inevitable and yet may be compensable if (a) they have an ascertainable market value and (b) extraction is the highest and best use for the land.[59] This realization in *Montana Railway v. Warren*[60] directly conflicts with the *Olson* "reasonably probable" standard for compensation. Under *Montana Railway*, a court may consider a speculative use in valuation either before the vein has been fully exploited or the use is "reasonably probable."[61]

The tension between *Olson* and *Montana Railway* causes complex valuation disputes, exacerbated because the rule set forth in *Olson* did not involve a subsurface mineral valuation.[62] *Montana Railway* held that even though the undeveloped mine in question was "only a prospect," mining prospects are subjects of business transactions and, therefore, affect market value of compensation.[63]

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land's "fair market value for all available uses and purposes." United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 80-81 (1913).

55. *Olson*, 292 U.S. at 255-57 (disallowing a valuation based upon use of shoreland as a reservoir where the landowner has little possibility of acquiring all other lands necessary for that use); *see* 4 SACKMAN, *supra* note 8, § 12B.12, at 12B-90 (discussing the prominence of the *Olson* test); Searles, *supra* note 51, at 322 (discussing methods of proving highest and best use).

56. *Olson*, 292 U.S. at 256. *Contra* Montana Ry. v. Warren, 137 U.S. 348, 352-53 (1890) (allowing valuation for a speculative mining use). Possible uses that "have no perceptible effect upon present market value" will not be compensated, but if extrinsic conditions are probable and affect market value, they may be considered. 4 SACKMAN, *supra* note 8, §§ 12B.12, 12B-113.

57. *See* Joseph M. Montano, *Valuation of Lands with Mineral Deposits*, C791 ALI-ABA 269, 271-73 (1993) (discussing various solutions to the problem of speculative mineral values).

58. *Olson*, 292 U.S. at 255-57.

59. *Montana Ry.*, 137 U.S. at 352-54 (allowing compensation for in-place minerals); Montano, *supra* note 57, at 272 (noting a number of different valuation doctrines used to compensate for speculative mineral deposits).

60. 137 U.S. 348 (1890).

61. *Montana Ry.*, 137 U.S. at 352.

62. *Olson*, 292 U.S. at 248-55 (considering the possibility of using shoreland as a reservoir).

63. *Montana Ry.*, 137 U.S. at 352. This recognition of the "market value" concept in mineral rights was reiterated as recently as 1989, after the *Olson* opinion, with regard to mineral lease appraisals. ASARCO, Inc. v. Kadish, 490 U.S. 605, 628 n.3 (1989). The Tenth Circuit noted this affirmation, despite that court's contrary outcome. United States v. Consolidated Mayflower Mines, Inc., 60 F.3d 1470, 1476 (10th Cir. 1995).

B. United States v. Consolidated Mayflower Mines, Inc.[64]

1. Facts

To relocate a highway, the government used eminent domain powers to take 18.22 acres of land owned by Consolidated Mayflower Mines, Inc. (CMMI).[65] The government argued that it should base compensation on the land's use for recreational home development.[66] CMMI argued for compensation based upon access to its Mayflower Mine.[67] CMMI's mine leases were subject to the consent of the current surface property owners, Stitching Mayflower Mountain/Recreational Fonds (Stitchings), who had refused to consent to mining activities.[68] CMMI and the government differed as to the profitability of the mining venture.[69] The jury indicated that, based on the *Olson* test, the highest and best use for the land was home development.[70]

2. Decision

The Court of Appeals noted that the *Olson* requirement excludes unexploited mineral deposits under the taken land.[71] The court further stated that *Olson* conflicts with *Montana Railway*, where speculative mining "prospects" were determined to have market value.[72] Despite this discord, the Tenth Circuit followed *United States v. 494.10 Acres of Land*,[73] a decision where the court adopted the *Olson* "reasonably near future" requirement for mineral evaluation.[74] Consequently, the Tenth Circuit currently requires a finding of reasonably probable mineral values in order to qualify for compensation.[75]

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64. 60 F.3d 1470 (10th Cir. 1995).

65. *Mayflower*, 60 F.3d at 1471.

66. *Id.* at 1471-72.

67. *Id.*

68. *Id.* at 1472. CMMI brought a second ground for appeal based upon Stitchings' "double-teaming" with the government. *Id.* at 1477-78. Although Stitchings' standing was limited to protection of their royalty rights, its stance was adverse to CMMI. *Id.* at 1478. For example, Stichings "often sounded as if [it] were seeking an injunction against a mining operation about to begin" and testified that they would not have consented to the operations. *Id.* The court found no basis for CMMI's claim because Stitchings' influence was minimal. *Id.* The court noted in dicta, however, that it thought the district court abused its discretion by allowing Stitchings to exceed their standing limitations. *Id.*

69. *Id.* at 1472-74.

70. *Id.* at 1475. The instructions also provided that the "[m]ere possibility of a use is not enough" and "[s]peculative schemes of the owner or witnesses are to be excluded from your consideration." *Id.*

71. *Id.* at 1476.

72. *Id.* at 1476-77 (citing *Montana Ry.*, 137 U.S. at 353).

73. 592 F.2d 1130, 1132 (10th Cir. 1979) (refusing to compensate for speculative underlying sand and gravel value).

74. *Mayflower*, 60 F.3d at 1477. Thus, the jury instructions were not prejudicial according to de novo review. *Id.* at 1475-77 (citing Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1262 (10th Cir. 1995)). The court also noted that a change in the instructions would not have altered the jury verdict due to the tenuous nature of development. *Id.* at 1477.

75. The Tenth Circuit Court of Appeals relied upon several other opinions utilizing the *Olson* standard. None of these, however, involved mineral valuations. *See* United States v. 77,819.10 Acres of Land, 647 F.2d 104, 110 (10th Cir. 1981) (applying the test in a farmland condemnation case contemplating a hunting use), *cert. denied*, 456 U.S. 926 (1982); United States v. 46,672.96 Acres of Land, 521 F.2d 13, 15 (10th Cir. 1975) (applying the test in a condemnation case contemplating use for a missile range); Wilson v. United States, 350 F.2d 901, 908 (10th Cir.

C. *Analysis*

This case confirms the Tenth Circuit's willingness to apply the *Olson* test to value unexploited minerals, despite the tension between the *Olson* test and the holding in *Montana Railway*. This decision may give the government an unfair advantage in condemnation proceedings because the value and nature of most mineral deposits have an inherently speculative nature.[76] The decision in *494.10 Acres* initially adopted the *Olson* "reasonably *likely* to take place in the near future" requirement,[77] and *Mayflower* consummates the adoption by embracing the "reasonably *probable*" standard for minerals.[78] *Mayflower*, therefore, reinforces the trend from *Montana Railway* to *Olson*,[79] despite the appearance that *Montana Railway* governs the issue.[80]

D. *Other Circuits*

The Fourth and Eighth Circuits have applied the *Olson* test to evaluate unexploited subsurface minerals despite the conflict with *Montana Railway*.[81] Other circuits follow *Olson* in condemnation proceedings, but have yet to apply *Olson* to an unexploited mineral case.[82]

The Fifth, Ninth, and, to some extent, Eleventh Circuits have applied the *Montana Railway* standard to compensate for unexploited minerals.[83]

1965) (applying the test in a ranchland condemnation case contemplating severance damages).

76. Montano, *supra* note 57, at 271-72.

77. *494.10 Acres*, 592 F.2d at 1132 (holding that the near future "element of use" was significant) (quoting *Olson*, 292 U.S. at 255) (emphasis added). This decision conflicted with a prior holding allowing speculative valuations of minerals. United States v. Silver Queen Mining Co., 285 F.2d 506, 510 (10th Cir. 1960) ("[R]equired proof need rise no higher than the circumstances permit. Some speculation is inherent in the ascertainment of value of all resource property . . . ."). Indeed, even after *494.10 Acres*, the Tenth Circuit recognized that awards may still be granted to speculative mineral deposit holders. United States v. 179.26 Acres of Land, 644 F.2d 367, 372-74 (10th Cir. 1981) (holding no error in consideration of underlying limestone while relying on *Silver Queen Mining*, 285 F.2d at 510).

78. *Mayflower*, 60 F.3d at 1476-77 (emphasis added).

79. *Silver Queen Mining* relied heavily upon the *Montana Ry.* allowance of speculative valuations for subsurface mineral condemnation. *Silver Queen Mining*, 285 F.2d at 510.

80. *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 628 n.3 (1989) (citing *Montana Ry.*, 137 U.S. at 352-53) (noting that "whatever the difficulties may be in making [mineral] appraisals with complete accuracy, it does not defeat the existence of a 'market value' in mineral rights").

81. *See* United States v. 69.1 Acres of Land, 942 F.2d 290, 293-94 (4th Cir. 1991) (finding that the highest and best use of the condemned land was the potential use for sand mining based on a commercially exploitable amount); United States v. 91.90 Acres of Land, 586 F.2d 79 (8th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979). Although the Eighth Circuit did not cite *Olson* in this opinion, it did require a market for the minerals, which is tied to the "reasonably probable in the reasonably near future" test. *Id.* at 86; *see supra* text accompanying notes 57-63.

82. *See* United States v. 27.93 Acres of Land, 924 F.2d 506, 514 (3d Cir. 1991) (excluding compensation based on prospect of rezoning as speculative); United States v. 47.3096 Acres of Land, 583 F.2d 270, 272 (6th Cir. 1978) (excluding evidence based upon the *Olson* standard for demand in the near future in a residential land takings case).

83. *See* St. Genevieve Gas Co. v. T.V.A., 747 F.2d 1411, 1413-14 (11th Cir. 1984) (holding that the district court did not err in finding that no potential for production existed); Cal-Bay Corp. v. United States, 169 F.2d 15, 19 (9th Cir.) (taking judicial notice of the fact that land with even a "prospect[] of possible successful development" has a market value), *cert. denied*, 335 U.S. 859 (1948); Eagle Lake Improvement Co. v. United States, 141 F.2d 562, 564 (5th Cir. 1944) (allowing compensation for "reasonable possibilit[ies] of production in paying quantities"). CMMI re-

Furthermore, in *Phillips v. United States*,[84] the Ninth Circuit noted that "[t]he Supreme Court has answered [the unexploited mineral valuation] question" in *Montana Railway*.[85] The Eleventh Circuit applied the probable standard to a taken mineral lease, but noted that the lease would not have survived scrutiny even under the less arduous possibility standard.[86] Although a recent Supreme Court case cited the *Montana Railway* approach, the circuits remain split as to which Supreme Court authority to follow.[87]

III. TITLE TO ISLANDS UNDER AMBIGUOUS FEDERAL GRANTS: *KOCH V. UNITED STATES DEPARTMENT OF INTERIOR*[88]

A. *Background*

1. Origin of Title

Until all of the states became part of the Union, the federal government held, in trust, those lands not possessed by the original thirteen states.[89] The "equal footing doctrine" allowed each new state to enter the Union with the same rights as original states; as a result, the new state took the shores, beds, and submerged lands of navigable waters upon entry into the Union.[90] The United States, however, retained the islands in navigable rivers.[91] Land in non-navigable waters did not pass to the states under the equal footing doctrine.[92] The federal government may pass title to these lands along with a

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quested an instruction based upon *Cal-Bay. Mayflower*, 60 F.3d at 1475.

84. 243 F.2d 1 (9th Cir. 1957).

85. *Phillips*, 243 F.2d at 5. The court held that the trial court erred in relying solely on highest and best use because "where there is a reasonable POSSIBILITY of production in paying quantities, [and] mineral rights are a common subject of barter and sale," a reasonable probability of successful development exists. *Id.* at 6 (quoting *Eagle Lake*, 141 F.2d at 564) (emphasis in original).

86. *St. Genevieve Gas*, 747 F.2d at 1413 n.4 (finding the substantial unprofitable development conclusive that mining was not compensable). The court adopted the Fifth Circuit view, as per the circuit split in 1981, but seemed uncertain as to what that view entails. *Id.*

87. *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 628 n.3 (1989) (citing *Montana Ry.*, 137 U.S. at 352-53) (noting that "whatever the difficulties may be in making [mineral] appraisals with complete accuracy, it does not defeat the existence of a 'market value' in mineral rights").

88. 47 F.3d 1015 (10th Cir.), *cert. denied*, 116 S. Ct. 303 (1995).

89. *See generally* David W. Gross, *Examining Aboriginal Rights in Submerged Lands:* Coeur D'Alene Tribe v. Idaho, 30 IDAHO L. REV. 139 (1993) (discussing the equal footing doctrine).

90. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370-71 (1977); Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 425-26 (1867); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845). The equal footing doctrine derives from the United States Constitution. Denise Dosier, Note, *The Clouds Are Lifting: The Problem of Title to Submerged Lands in Alaska*, 8 ALASKA L. REV. 271, 273 & n.10 (citing U.S. CONST. art. IV, § 3). For a discussion of the equal footing doctrine, and navigability theories of ownership, see Phillip W. Lear, *Accretion, Reliction, Erosion, and Avulsion: A Survey of Riparian and Littoral Title Problems*, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 265, 270-73 (1991).

91. Kemp Wilson, *Ownership of Mineral Interests Underlying Inland Bodies of Water and the Effects of Accretion and Erosion*, 30 ROCKY MTN. MIN. L. INST. 14-1, 14-4 to 14-5, 14-22 (1984) (discussing exceptions to the equal footing doctrine).

92. *See* United States v. Holt State Bank, 270 U.S. 49, 54-57 (1926) (applying navigability standards to determine that a lake was in fact navigable, and therefore, it belonged to the state); Gross, *supra* note 89, at 145 n.48. For a discussion of tests determining navigability for purposes of riverbed ownership, see Wilson, *supra* note 91, at 14-7 to 14-15.

patent to surrounding riparian lands, or keep them as public land as expressed in the surrounding land grant itself.[93]

The government passes title by surveying land, by including that survey in an official plat, and then incorporating that plat into a grant by reference.[94] When a plot of land borders a stream or river, the surveyor "meanders" that river by following the turnings of the river to set a record of its course.[95] Unsurveyed lands, those islands not meandered, remain the property of the United States and cannot pass from federal ownership.[96]

2. Omission or Ambiguous Description of Islands

Occasionally, a survey will omit an island, or will contain ambiguous or erroneous information about the island.[97] Over time, the Supreme Court has constructed a twisting course of authority to manage this problem, leading to varying interpretations.[98] First, courts generally use two interpretive doctrines: (1) that no property right passes by implication;[99] and (2) that "nothing passes but that which is conveyed in clear and explicit language."[100]

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93. *See* Oklahoma v. Texas, 258 U.S. 574, 594-95 (1922).

94. Snake River Ranch v. United States, 542 F.2d 555, 556 (10th Cir. 1976); *see* Jefferis v. East Omaha Land Co., 134 U.S. 178, 194-95 (1890) (finding that an incorporated plat includes accretion to the land up to the date of the plat); Walton v. United States, 415 F.2d 121, 123 (10th Cir. 1969) (noting that because a plat omitted riparian fast land, land belonged to the United States).

95. *See* Hardin v. Jordan, 140 U.S. 371, 380 (1891) (holding that meander lines merely ascertain what lands are to be paid for, they do not limit the title to their lines); George J. Morgenthaler, *Surveys of Riparian Real Property: Omitted Lands Make Rights Precarious*, 30 ROCKY MTN. MIN. L. INST. 19-1, 19-10 & nn.19-21 (1984) (providing that "for various reasons, meander lines are inherently inaccurate, meant only to approximate the course of a water body"); *see also* Whitaker v. McBride, 197 U.S. 510, 512 (1905) (stating that the meander helps fix a price). *But cf.* Niles v. Cedar Point Club, 175 U.S. 300, 306 (1899) (holding that a surveying error "does not enlarge the title conveyed by the patents").

96. *See* United States v. Northern Pac. Ry., 311 U.S. 317, 344 (1940) (finding that unsurveyed and ambiguous grants retain title in the United States); Jeems Bayou Fishing & Hunting Club v. United States, 260 U.S. 561, 564 (1923) (holding that ordinary rules do not apply where land was unsurveyed); *Watton*, 415 F.2d at 124 (noting that omitted and unsurveyed lands remained in the possession of the United States). The Bureau of Land Management has consistently applied this principle to riparian island disputes. *See* Loyla C. Waskul, 102 I.B.L.A. 241 (1988); Emma S. Peterson, 39 PUB. LANDS DEC. 566 (1911).

97. *Jeems Bayou*, 260 U.S. at 563-64 (finding that 500 acres missing from initial survey was an omission). Islands are considered omitted when they are permanent, dry, and "large enough that a reasonable surveyor would consider it surveyor error if the island were omitted in a survey." Lear, *supra* note 90, at 274-75.

98. Bourgeois v. United States, 545 F.2d 727, 730 (Ct. Cl. 1976) (noting that navigability may play a key role in determining the ownership of the island). However, the factor tests discussed later seem to be more prevalent. For a discussion of these factors, see *infra* notes 101-08 and accompanying text.

99. *See* MacDonald v. United States, 119 F.2d 821, 825-26 (9th Cir.) (applying rule to a statute to dismiss appeal), *cert. granted sub nom.* Great N. Ry. v. United States, 314 U.S. 596 (1941), *modified*, 315 U.S. 262, 272 (1942); Caldwell v. United States, 250 U.S. 14, 20-21 (1919) (dismissing appeal based on rule). The interpretive doctrine against implication may originate in the desire to retain sovereign power "to achieve important public purposes." Joseph L. Sax, *Rights That "Inhere in the Title Itself": The Impact of the* Lucas *Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 948 (1993).

100. *Caldwell*, 250 U.S. at 20. Many, sometimes conflicting, interpretive doctrines for riparian land disputes exist, including: reliability of patents; patents favor the United States; patents favor the grantee; no implied government reservations; no implied government grants; and the govern-

Second, several factors indicate the intention to either exclude or include islands in the grant.[101] The Supreme Court, in *United States v. Lane*,[102] found value, location, size, terrain, and presence or absence of fraud persuasive elements in assessing intent to dispose of the land.[103] Courts also interpret grants as passing title when the surveyor excluded the land due to its valuelessness at the time of the survey.[104] Courts generally include unsurveyed lands in patents,[105] except for unusually large islands likely omitted by error.[106] The Surveyor General's instructions on meandering also relieve ambiguity in a grant: instructions to find lands suitable for cultivation will pass "inconsequential fragments,"[107] while instructions to note the existence of any islands will retain federal possession.[108]

The third signpost on the Supreme Court's winding road consists of two cases: *Moss v. Ramey*[109] and *Scott v. Lattig*.[110] These cases held that the existence of a mistake or error, rather than an ambiguity, demonstrates federal intent to keep title.[111] Fourth, deliberate fraud perpetrated by the surveyor to take land from the government demonstrates federal retention of possession.[112] These four elements show the government's intent with respect to possession of excluded islands.

Additionally, a choice of law problem arises with ambiguous or mistaken title disputes.[113] In *Moss* and *Scott*, the Supreme Court applied federal law in

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ment must produce clear and convincing evidence. Morgenthaler, *supra* note 95, at 19-44 to 19-50.

101. Morgenthaler, *supra* note 95, at 19-50 (noting that courts often resort to factual tests for riparian land disputes). Some important factual tests are: (1) whether occupation, improvement, and use demonstrate intent; (2) survey accuracy; (3) value; (4) size; (5) government acceptance of the survey; and (6) historical evidence. *Id.* at 19-50 to 19-55.

102. 260 U.S. 662 (1923).

103. *Lane*, 260 U.S. at 665; *see* Ainsa v. United States, 161 U.S. 208 (1896) (applying the "substantial area test" to determine that the actual number of acres surveyed and included on the plats limited that plat); Thomas B. Bishop Co. v. Santa Barbara County, 96 F.2d 198 (9th Cir.) (including an adjacent sandpit overlooked in the meander, based on the *Lane* factors), *cert. denied*, 305 U.S. 623 (1938).

104. *See* United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447, 451 (1908) (noting that "[t]he islands are little more than rocks, rising very slightly above the level of the water"); Whitaker v. McBride, 197 U.S. 510, 511 (1905) (concerning small islands, "frequently covered with water," that the Land Department refused to survey); Grand Rapids & I.R. Co. v. Butler, 159 U.S. 87, 89 (1895) (addressing a low sandbar usually covered with water).

105. *Lane*, 260 U.S. at 664-65 (citing Mitchell v. Smale, 140 U.S. 406, 414 (1891)).

106. *Id.* (citing *Jeems Bayou*, 260 U.S. at 563). The prominence of the factual situations may be the only way to reconcile the conflicting decisions because courts interpret the navigability factor in conflicting ways as well. Morgenthaler, *supra* note 95, at 19-28 (noting that a navigable river case is routinely applied to non-navigable disputes).

107. *Whitaker*, 197 U.S. at 513.

108. Scott v. Lattig, 227 U.S. 229, 241 (1913) (using surveying instructions and size of island in question to show surveyor error).

109. 239 U.S. 538 (1916).

110. 227 U.S. 229 (1913).

111. *Moss*, 239 U.S. at 546 (distinguishing *Whitaker* based on that case's unstable land and the Land Department's refusal to survey); *see Scott*, 227 U.S. at 241-43 (finding that an error in the survey did not work to dispose of the large quantity of land while holding that "[t]itle to islands remains in the United States, unless expressly granted"). *But see Jordan*, 140 U.S. at 400 (requiring extraordinary proof to show mistake and finding none in regard to large spit concerned).

112. Morgenthaler, *supra* note 95, at 19-31 to 19-41.

113. Federal law considers omitted islands government property, whereas state law grants the

the wake of a mistaken survey,[114] whereas in *Oklahoma v. Texas*,[115] the Supreme Court applied state law to an overtly ambiguous grant.[116] These divergent results demonstrate that considerable conflict exists regarding the application of federal law to previously private or state owned lands.[117] The Supreme Court, in *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co.*,[118] held that state law governs riparian lands not passed under the equal footing doctrine.[119] The Supreme Court, however, has also stated that the United States retains title to islands not expressly granted, a result which may conflict with state law.[120] Thus, tension remains as to whether state law will always apply to riparian lands,[121] or whether federal law applies according to the *Lane* factors for erroneous surveys.[122]

B. Koch v. United States Department of Interior[123]

1. Facts

An initial survey of the Colorado River described nine islands on a non-navigable portion of the river. The survey, however, did not meander the islands and, as a result, they remained officially unsurveyed.[124] The parties

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riparian landowner title to the center of the water body. Lear, *supra* note 90, at 272-75. Basic property rights are a traditional state area of law. Frank E. Maloney, *The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line*, 13 LAND & WATER L. REV. 465, 476 (1978).

114. *See Moss*, 239 U.S. at 546; *Scott*, 227 U.S. at 241-42.

115. 258 U.S. 574 (1922).

116. *Oklahoma*, 258 U.S. at 594-95 (issuing an ultimatum that absent contrary intent, state law applies to all conveyances); *see also Corvallis*, 429 U.S. at 377 (holding that state law applied to navigable riverbed lands passed in an ambiguous grant); Hardin v. Shedd, 190 U.S. 508, 519 (1903) (stating that state law applied to a non-navigable lakeside property dispute and requiring extraordinary proof to apply federal law). The factors used to interpret an ambiguous grant may also be used to determine if error exists. *See supra* text accompanying notes 101-12.

117. John A. Lovett, Comment, *Batture, Ordinary High Water, and the Louisiana Levee Servitude*, 69 TUL. L. REV. 561, 598-603 (1994).

118. 429 U.S. 363 (1977). Although courts may overlook these authorities in a non-navigable water dispute because they concern navigable waters only, the court does not limit itself in this way; nor do commentators suggest that the distinction would change the principles applied. *See Corvallis*, 429 U.S. at 378 (speaking expansively of all land not passed under the equal footing doctrine); Morgenthaler, *supra* note 95, at 19-28 (noting that a navigable river case is routinely applied to non-navigable disputes).

119. *Corvallis*, 429 U.S. at 378. The Court first extended federal law application to any land that passed under the equal footing doctrine. Lovett, *supra* note 117, at 599-600 (citing Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 319 (1973)). Later, the Court overruled *Bonelli Cattle*, stating that state law applied after the state had entered the Union. *Id.* at 600 (citing *Corvallis*, 429 U.S. at 370-71). It remains unresolved whether *Corvallis* overruled only the equal footing portion of *Bonelli Cattle* or also implicitly overruled the entire doctrine that applies federal law to federal grants. Maloney, *supra* note 113, at 485. The Eleventh Circuit recently held that "state law governs the disposition of property held by a state regardless of whether or not the state acquired the property as sovereignty land under the equal footing doctrine." Lovett, *supra* note 117, at 603 (quoting Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419, 425 (11th Cir. 1982)).

120. Texas v. Louisiana, 410 U.S. 702, 713 (1973) (citing *Scott*, 227 U.S. at 242-43) (applying federal law to a navigable river dispute). One commentator notes that *Scott* is routinely applied to non-navigable river disputes. Morgenthaler, *supra* note 95, at 19-28.

121. *Corvallis*, 429 U.S. at 378.

122. *See supra* notes 101-08 and accompanying text.

123. 47 F.3d 1015 (10th Cir.), *cert. denied*, 116 S. Ct. 303 (1995).

124. *Koch*, 47 F.3d at 1017-18. The survey was intended to locate saleable land in order to

stipulated that the original survey did not meander the islands because they lacked value at that time.[125] The Bureau of Land Management (BLM) asserted that the United States owned the islands because they were not officially surveyed, that they existed when the survey was conducted,[126] and that the government is not bound by ambiguous grants.[127] Koch claimed ownership of six of the islands based on patents incorporating the survey/plat by reference.[128] The district court, applying state law, determined that Koch held title to the island.[129]

2. Decision

The Tenth Circuit found that because the islands exist in a non-navigable part of the river, the islands did not belong to the State of Colorado under the equal footing doctrine.[130] Additionally, the court refused to apply the general rule of construction in favor of the government,[131] despite a finding that the patent recorded did not demonstrate intent by the federal government to either convey or keep the islands.[132] Recognizing that choice of law was an issue of first impression in the Tenth Circuit,[133] the Court of Appeals relied on *Oklahoma* and utilized state law to interpret the ambiguous federal grant.[134] Finally, Colorado state law vested title in the riparian land owner.[135]

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reduce the federal government's deficit, under the order of President Van Buren. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 178 (1968).

125. *Koch*, 47 F.3d at 1017. The islands may now have value as critical habitats for endangered species. Brief for Appellant at 2, *Koch*, 47 F.3d 1015 (No. 93-1298). The government also noted that this decision will cast doubt about the ownership of thousands of islands with valuable mineral resources. *Id.*

126. Some commentators agree that these facts vest title in the government. *See* Lear, *supra* note 90, at 274-75 (discussing possession of omitted islands).

127. *Koch*, 47 F.3d at 1018. The last of these grounds is merely a general rule of construction, not a rule of law. *Id.* at 1019-20.

128. *Id.* at 1017.

129. *Id.* at 1018.

130. *Id.* at 1019 (citing Dimidowich v. Bell & Howell, 803 F.2d 1473, 1477 n.1 (9th Cir. 1986) (recognizing the stipulations of the parties that the river is non-navigable, and noting that "a court is not bound by stipulations of the parties as to questions of law")). The court reviewed all questions of law de novo. *Id.* at 1018.

131. *Id.* at 1019-20 (citing *Oklahoma*, 258 U.S. at 595).

132. *Id.* at 1019 (basing the decision upon the islands' low value, lack of access to the islands, and silence in the patents as to the islands).

133. The court conceded that "the law of this circuit was unclear before this case" and that "other circuits had disagreed over whether state law applied under these circumstances." *Id.* at 1021. Two Tenth Circuit cases relied upon in the parties' briefs were not mentioned in the opinion since they pertained to riverbeds or submerged lands; in addition, neither explicitly dealt with the choice of law problem. *See* Bradford v. United States, 651 F.2d 700, 706-07 (10th Cir. 1981) (holding that the government must expressly reserve land); Snake River Ranch v. United States, 542 F.2d 555, 557-58 (10th Cir. 1976) (applying meander doctrines to determine a boundary).

134. *Oklahoma*, 258 U.S. at 595.

135. More v. Johnson, 568 P.2d 437 (Colo. 1977) (accepting as settled the proposition that Colorado state law vests title in the riparian land owner). The district court result was not disputed. *See also Jordan*, 140 U.S. at 383-84 (stating the common law rule recognizing the riparian landowner's possession of the non-navigable riverbed to the center); United States v. Goodrich Farms Partnership, 947 F.2d 906, 908 (10th Cir. 1991) (applying Colorado law conveying land to the non-navigable stream's center).

C. *Analysis*

The Tenth Circuit has interwoven several Supreme Court "interpretive techniques" to advance the rights of private riparian land owners against the government. First, *Koch* limited the general rule of construction in favor of the government to grants not involving patents on islands in adjacent waters.[136] The Tenth Circuit then distinguished *Moss*: *Moss* applied federal law only to mistaken surveys, rather than ambiguous surveys such as the survey in the instant dispute[137] which concerned purposely overlooked islands.[138] The *Koch* opinion is also significant because it determined that state law controls riparian grants.[139] This result complies with the dictum in *Corvallis* that state law controls all riparian disputes when the equal footing doctrine is inapplicable.[140] Moreover, the *Koch* opinion evaded the factors test,[141] indicating that the Tenth Circuit may have simply adopted the maxim that state law applies to all riparian land controversies.[142]

The facts of *Koch*, however, are consistent with the factual tests used to apply state law, namely low value, small size, an absence of fraud, and surveying instructions based on the need for saleable land.[143] Thus, the Tenth Circuit has probably decided that state law applies to ambiguous grants and federal law applies to erroneous surveys.

D. *Other Circuits*

Different circuits have reached seemingly disparate results for choice of law problems involving riparian land disputes. These differences, however, may be distinguished upon factual circumstances.[144]

The Sixth Circuit and the Federal Court of Claims have both applied state law to ambiguous grants with regard to islands adjacent to the granted

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136. Koch v. United States Dep't of Interior, 47 F.3d 1015, 1020 (10th Cir.) (citing *Oklahoma*, 258 U.S. at 595), *cert. denied*, 116 S. Ct. 303 (1995)).

137. *Id.* at 1020 n.5. The court noted the Sixth Circuit's rationale that *Moss* determines that mistaken surveys do not affect the intent of the government to retain the lands. *Id.* (citing Wolff v. United States, 967 F.2d 222, 225 (6th Cir.), *aff'd*, 974 F.2d 702 (6th Cir. 1992)). Although the Tenth Circuit did not distinguish *Scott*, it also involved a mistaken survey. Scott v. Lattig, 227 U.S. 229, 242-43 (1913).

138. *Koch*, 47 F.3d at 1017. The surveyors did describe the islands in their notes; they simply did not meander them because of their low value. *Id.*

139. *Id.* at 1020.

140. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977); *see also* Lovett, *supra* note 117, at 600-01 (discussing the possible effects of *Corvallis*).

141. The Tenth Circuit relied upon these factors in a past case determining the ownership of fast land on the Snake River, and applied federal law. Walton v. United States, 415 F.2d 121, 124 (10th Cir. 1969).

142. *See Corvallis*, 429 U.S. at 378. "This Court has consistently held that state law governs issues relating to this [navigable river bed], like other real property, unless some other principle of federal law requires a different result." *Id.*

143. *Koch*, 47 F.3d at 1017-18; *see supra* notes 101-08 and accompanying text. Keep in mind that the Tenth Circuit itself did not focus on these factors, but merely relied on persuasive authority that did consider the factors.

144. The Tenth Circuit did not note these factual differences, leaving open the questions of whether federal law applies to all riparian land disputes and whether facts involving surveyor error will be treated differently. *Koch*, 47 F.3d at 1021 (noting a disagreement in the circuits).

shoreland.[145] The Sixth Circuit carefully distinguished *Moss*, *Scott*, and similar opinions as dealing with mistakes, omissions, unheeded survey instructions, and large valuable islands.[146] The Court of Claims applied state law by first applying federal common law,[147] then by interpreting *Scott* as placing only navigable river islands in governmental ownership,[148] and finally by deciding to apply state law to non-navigable islands.[149]

Both the Seventh and Ninth Circuits have interpreted *Scott* to mandate the application of federal law to large or valuable mistakenly omitted islands.[150] The Ninth Circuit also left the government intent issue open to a case-by-case analysis, suggesting that intent to retain possession may be tied to surveyor error and value of islands.[151]

CONCLUSION

The Tenth Circuit Court of Appeals made significant changes in the law of real property during this survey period. Based on the outcome in *Hardage*, parties responsible for cleaning Superfund sites must enlist the EPA's help to condemn land in conjunction with a cleanup plan. Thus, the Tenth Circuit protected the individual's ownership of property and also allowed good faith negotiation failures without entailing the concept of "frustration" of a court order. Although *Mayflower* limited an individual's right to compensation for nonspeculative mineral rights, one may question the stability of this decision

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145. *Wolff*, 967 F.2d at 224; Bourgeois v. United States, 545 F.2d 727, 731 (Ct. Cl. 1976).

146. *Wolff*, 967 F.2d at 225-26 & n.3 (applying state law to both navigable and non-navigable rivers); *see also Wolff*, 974 F.2d 702, 704-05 (relitigating the navigability issue by determining that state law applies to non-navigable rivers, and that land in navigable rivers passed to the state under the equal footing doctrine); *accord* Oklahoma v. Texas, 258 U.S. 574, 594-95 (1922) (applying state law absent intent in grant to keep land); United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447, 452 (1908) (passing "unsurveyed islands and neglected fragments"); Whitaker v. McBride, 197 U.S. 510, 511-12 (1905) (passing unsurveyed island to private landowner under state law); Hardin v. Jordan, 140 U.S. 371, 384 (1891) (applying state law to grants lacking government reservation).

147. *Bourgeois*, 545 F.2d at 729-30 (citing Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 320-21 (1973) as authority that federal law governs federal grants).

148. *Id.* at 730. The Court of Claims is the only court to interpret *Scott* in this manner; the Sixth Circuit expressly rejected this interpretation, holding that state law applies regardless of the river's navigability. *Wolff*, 967 F.2d at 226 n.3. The Court of Claims also characterized *Oklahoma*, *Jordan*, and *Mitchell* as mandating the application of state law only for the beds of non-navigable streams. *Bourgeois*, 545 F.2d at 730. The Court of Claims stands alone in this contention as well. *See generally* Morgenthaler, *supra* note 95, at 19-28 (noting "[t]he river [in *Scott*] is navigable at the point in question, but the navigability does not affect the application of the principles announced in the case to non-navigable waters").

149. *Bourgeois*, 545 F.2d at 731 (citing no authority for its position).

150. Ritter v. Morton, 513 F.2d 942, 946 (9th Cir.), *cert. denied*, 423 U.S. 947 (1975) (stating that federal law applies to federal grants, and citing *Borax*); United States v. Severson, 447 F.2d 631, 634-35 & nn.3-5 (7th Cir. 1971) (citing *Scott*, 227 U.S. at 242-43) (distinguishing *Grand Rapids*, *Chandler-Dunbar*, and *Whitaker* as applying state law to valueless islands), *cert. denied*, 404 U.S. 1039 (1972). Both of these cases predate the overruling of *Borax* by *Corvallis*. *See supra* note 119 and accompanying text.

151. Ritter v. Morton, 513 F.2d 942, 948 (9th Cir.) (holding that "[w]e emphasize again the need to view the factual circumstances in their totality"), *cert. denied*, 423 U.S. 947 (1975). This Survey intends to reconcile the holdings of the different circuits, but they may simply represent a circuit split.

based upon the circuit split and recent Supreme Court dicta affirming the value of speculative mineral rights. Finally, the government attempted to repossess ambiguously granted islands, but *Koch* supported an individual's ownership by applying state law. This outcome may represent a maxim that applies state law to all disputes, or perhps an implicit reliance on the factor test that reflects the government's intent to grant the omitted islands. Together, these cases demonstrate the Tenth Circuit's willingness to protect individual property rights, except in the controversial area of compensation for minerals.

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