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LANDS AND NATURAL RESOURCES

OVERVIEW

As the United States enters the fuel-scarce 1980's, national attention centers on the energy-rich West. Vast amounts of coal, oil, natural gas, uranium, and oil shale lie untapped in the region encompassed within the Tenth Circuit's jurisdiction. Full-scale development of these minerals will significantly strain existing environments. Many mineral deposits occur on federal lands subject to numerous federal environmental and multi-use statutes. Preserving valuable park and wilderness areas while extracting a sufficient amount of energy fuels presents both a challenge and a dilemma. As the pace of mineral development quickens, legal conflicts will develop between and among producers, distributors, carriers, environmental groups, Indian tribes, private land owners, and federal, state, and local governments.

Increasingly, these disputes are being litigated in the federal courts. During the past year, the Tenth Circuit Court of Appeals decided nineteen cases involving natural resources issues. Several of the cases were of major importance. Issues associated with the use and control of Indian lands were addressed in six Tenth Circuit decisions. A Tenth Circuit case wherein the court of appeals upheld the right of Indian tribes to place a severance tax on minerals removed from reservation lands, if upheld by the United States Supreme Court, will greatly increase tribal revenues for those tribes located on mineral-rich lands. Attempts to alter the terms of existing natural gas contracts also occupied the court's time. In a decision with potentially far-reaching consequences, the Tenth Circuit cleared the way for coal slurry pipeline companies to obtain rights of way across railroad lands.

This survey will examine the rationale employed by the Tenth Circuit in deciding these natural resource issues. A more extended analysis will accompany the discussion of those decisions of major significance.

I. INDIAN LANDS

A number of important issues relating to Indian lands and Indian rights were presented to the Tenth Circuit Court of Appeals during the past term. The right of executive-order reservation tribes to impose mineral severance taxes upon non-Indians, state criminal jurisdiction over Indian hunting and fishing activities on trust lands, the effect of anti-alienation statutes on allotted lands, the scope of responsibility of the Secretary of the Interior under the Southern Paiute Judgment Distribution Act, the necessity of joining the United States in municipal easement condemnations of reservation lands, and the jurisdiction of state courts to determine Indian water rights were among the plethora of legal issues addressed by the court during the past year.

A. *Validity of Indian Severance Taxation*

Perhaps the most significant public lands decision of the Tenth Circuit was *Merrion v. Jicarilla Apache Tribe*,[1] a case wherein the court upheld the right of Indian tribes to impose a mineral severance tax on non-Indians producing oil and gas from leases on executive-order reservation lands.[2] This holding will, in all probability, allow Indian tribes on mineral-rich reservations to vastly increase their revenues.

Merrion, under federal leases, produced oil and gas from wells located on the Jicarilla Apache tribe's reservation in northern New Mexico. In 1976, the Jicarilla Tribal Council passed an ordinance imposing a severance tax on all oil and gas extracted and removed from the reservation. The ordinance was passed pursuant to a revised tribal constitution adopted in 1968,[3] which, in turn, was adopted under authority granted by the Indian Reorganization Act of 1934 (1934 Act).[4] After the ordinance was approved by the Secretary, Merrion and other federal oil and gas lessees with wells on the reservation sought declaratory and injunctive relief in the United States District Court for the District of New Mexico. These lessees brought the action in order to prohibit enforcement of the tax.

After a hearing on the merits, the trial court issued a preliminary injunction prohibiting enforcement of the tax, declaring it illegal and unconstitutional. The lower court could find no express congressional authority for the tax and determined that there was no inherent sovereign power in the tribe to impose the tax. Furthermore, the trial court held that the tax was an unconstitutional burden on interstate commerce and that the tribal tax had been preempted by an express congressional grant of authority to New Mexico to impose severance taxes on oil and gas production within executive-order reservations under provisions of section 398c of Title 25 of the United States Code.[5]

1. 617 F.2d 537 (10th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3208 (U.S. Oct. 6, 1980) (No. 80-11).

2. The tax is imposed at the time of severance, is payable monthly, and is assessed per million Btu of natural gas and per barrel of crude oil taken off the reservation. Oil and gas used as royalty payment to the tribe is exempt from the tax. *Id.* at 539.

3. Article XI, section 1(e) provides:

> Taxes and Fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes, and fees on non-members of the tribe doing business on the reservation.

(quoted in 617 F.2d at 539).

4. 25 U.S.C. § 476 (1976) provides, in part:

> Any Indian tribe or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult members residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe.

5. 617 F.2d at 540. 25 U.S.C. § 398c (1976) provides:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is authorized and directed to cause such taxes to be paid out of the tribal

Upon the tribe's appeal to the Tenth Circuit, the court, per Judge Logan, addressed the following three issues: 1) whether sovereign immunity precluded suit against the tribe;[6] 2) whether the tribe possessed inherent power to impose the severance tax;[7] and 3) whether the tax violated the commerce clause.[8]

The preliminary jurisdictional issue was discussed first. Noting that sovereign immunity generally prevented suit against the Indian tribes absent their consent,[9] the court of appeals found that the Jicarilla Apache tribe had expressly waived its immunity in a provision of a recently passed tribal ordinance. Under the 1934 Act, broad powers of self government were granted to the tribes, powers broad enough to allow them to waive their immunity. To deny the tribe this right of waiver would, the appellate court reasoned, contradict both the terms and the intent of the 1934 Act. Moreover, the court concluded that by approving the ordinance, the Secretary had ratified the waiver provisions contained therein; therefore, the express waiver of immunity found in the tribal ordinance was valid.[10]

After disposing of the jurisdictional question, the court of appeals addressed the crucial issue of the case—whether executive-order reservation tribes possess *inherent* power to impose a mineral severance tax on non-Indians operating on reservation lands. The court stated that "the case . . . presents the bald issue of an Indian tribe's taxing power without benefit of reservations of authority in a treaty."[11]

The Tenth Circuit court discussed the problems posed by the quasi-sovereign status of the Indian tribes. Certain powers are denied to the tribes because exercise of these powers would in some way infringe on the superior rights of the United States. Thus, the Indian tribes have no right to independently transfer land,[12] to deal with foreign nations,[13] or to assert criminal jurisdiction over non-Indians.[14] The court of appeals, however, found that the tribe's enactment of the mineral severance tax did not interfere with any federal right. The federal taxing power remained unscathed since the United States could "tax non-Indians or Indians within the reservation whether or not the Tribe levies this tax."[15] Neither did the tax violate the protection afforded by the fifth and fourteenth amendments, because, according to the court of appeals, the tax was not so severe as to constitute a deprivation of property.[16]

The remaining aspect of this issue, and the central one, was whether

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funds in the Treasury: *Provided*, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

6. 617 F.2d at 540.
7. *Id.* at 541.
8. *Id.* at 544.
9. *E.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940).
10. 617 F.2d at 540.
11. *Id.* at 543.
12. Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).
13. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 9, 17-18 (1831).
14. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
15. 617 F.2d at 542.
16. *Id.*

taxation is one of those inherent powers surrendered by Indian tribes when they acquire their quasi-sovereign status. While recognizing that recent Supreme Court decisions have limited the inherent powers of the tribes because of the current dependent status of Indians,[17] the Tenth Circuit pointed out that the test employed by the Supreme Court in making these determinations was not based upon the degree of a tribe's dependency, but rather the Court examined whether the exercise of a certain power by the tribes would interfere with the sovereignty of the United States. If dependency were the test, the court of appeals reasoned, then consistency would dictate that the tribes exercise no powers over either non-members or members, ultimately conditioning the very existence of the tribes upon congressional approval. This would reduce the tribes to private, voluntary associations, a status expressly rejected by the Court in *United States v. Mazurie*.[18]

In finding that taxation is an inherent power retained by the Indian tribes, the Tenth Circuit relied upon Supreme Court decisions which have held that territoriality is one of the sovereign powers which the Indian tribes have not surrendered. The court of appeals concluded that this fact justified the imposition by the tribes of a tax on the extraction and removal of minerals by non-Indians from Indian territory.[19]

The court of appeals focused on section 16 of the 1934 Act, which section recognized generally the sovereign powers of the tribes. Noting that Congress was aware of the holding in *Buster v. Wright*,[20] wherein the Court had affirmed the right of the Creek Nation to impose a tax on non-Indians doing business on its reservation, the Tenth Circuit found implicit congressional approval of the Indian taxing power because no express provisions limiting the taxing power had been included in the 1934 Act.[21] Further support for this interpretation was found in an opinion by the Solicitor of the Department of Interior, issued shortly after passage of the 1934 Act. Com-

17. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Wheeler, 435 U.S. 313 (1978).

18. 419 U.S. 544 (1975).

19. *E.g.*, Williams v. Lee, 358 U.S. 217 (1959); Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

20. 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). The court of appeals had held:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.

Id. at 950.

Other cases upholding the right of tribes to impose taxes on non-Indians doing business within Indian reservations include Morris v. Hitchcock, 194 U.S. 384 (1904) (grazing tax); Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied* 358 U.S. 932 (1959) (non-Indian cattle grazing lessee cannot raise constitutional claims of deprivation of property without due process of law because Indian tribes are not states or other political subdivisions of the United States); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 99 (8th Cir. 1956) ("Inasmuch as it has never been taken from it, the defendant Oglala Sioux Tribe possesses the power of taxation [on the privilege of grazing livestock] which is an inherent power incident of its sovereignty.").

21. 617 F.2d at 544.

menting on section 16, the Solicitor stated that "chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation."[22] The court of appeals reasoned that this contemporaneous interpretation of the meaning of section 16, by the agency charged with its enforcement, should be given great weight.[23]

After finding that the tribe had an inherent power to tax mineral lessees doing business on the tribe's reservation, the Tenth Circuit addressed the trial court's finding that the tax violated the commerce clause. In rejecting the trial court's conclusion that the tax was discriminatory because it did not apply to oil and gas royalty production transferred to the tribe, the court of appeals pointed out the purposeless and self-defeating nature of the imposition of a tribal tax on its own resources.[24] In addition, the court found that no burden was imposed upon interstate commerce by the severance tax *per se*. In support of this conclusion, the Tenth Circuit noted a line of cases which have held that a tax on local activity, levied before a product enters the stream of interstate commerce, is not categorically subject to commerce clause restrictions.[25]

It was more difficult for the court of appeals to justify the tax as not imposing a multiple burden on interstate commerce, since the State of New Mexico also taxes the oil and gas produced on the Jicarilla reservation. The court divided this issue into two questions: 1) whether New Mexico's tax interfered with the United States interest in allowing the tribe to enact its tax, and 2) whether Congress had preempted the tribe's power to tax oil and gas lessees by expressly granting to the states the power to tax lessees on executive-order reservations under section 398 of Title 25.[26] It is significant that the court of appeals declined to consider the first issue. Moreover, the manner in which the question was phrased indicates that, if the issue is raised in subsequent litigation, the appellate court may find that state severance taxes on minerals extracted from Indian lands are an unconstitutional intrusion into the federal government's power to regulate Indian affairs.[27]

22. 55 Interior Dec. 14, 46 (1934). *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 142 (1942), wherein the author states that "one of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed."

23. 617 F.2d at 544.

24. *Id.* at 545.

25. *E.g.*, Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923).

26. 617 F.2d at 546.

27. For a discussion which concludes that states do not have the power to preempt Indian mineral taxation, *see* Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. PA. L. REV. 491 (1975). The author argues that state taxation of Indian reservation mineral lessees is invalid because: 1) it reduces the income to the tribe, thereby impairing its ability to function as a governmental entity; and 2) it interferes illegally with the tribe's sovereign right to impose taxes. *Id.* at 507. *But see* Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949), wherein the Court held that states could tax oil company income derived from mineral production activities on reservation leaseholds, even though it might interfere with tribal royalty payments. *See also* Agua Caliente Band of Mission Indians v. County of Riverside, 306 F. Supp. 279 (C.D. Cal. 1969), *aff'd* 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972), wherein a state possessory interest tax on non-Indians was upheld even though it imposed a burden on the tribe's only source of income.

Though recognizing the express language in section 398 authorizing state taxation,[28] the court of appeals reasoned that, by not specifically prohibiting Indian taxation of the minerals, Congress did not preempt the power of executive-order Indian reservation tribes to enact severance taxes.[29] In reaching this conclusion, the appellate court followed the well-settled principle that statutes affecting Indians are to be construed so that ambiguities are resolved in their favor.[30]

The court of appeals inferred that because Congress failed either to explicitly permit or to prohibit the levying of Indian severance taxes, Congress did not consider the issue at the time of the enactment of section 398. The court also employed this reasoning to support its conclusion that the provision in section 398c, for royalty and bonus payments to Indians through the leasing process, was not meant to preclude the enactment of a severance tax by executive-order tribes.[31] The crucial part of the 1934 Act, according to the majority, was the section allowing Indians to determine for themselves what leasing regulations to enact.[32] The court noted that the Department of the Interior had implemented this provision in its leasing regulations.

Two lengthy and vigorous dissents were filed by Chief Judge Seth and Judge Barrett. Chief Judge Seth's analysis centered upon the particular history of the Jicarilla tribe and its nomadic nature.[33] Because of this, Chief Judge Seth reasoned that the Jicarillas never exercised the territoriality which he felt would have justified the imposition of the tax.[34] He noted that the historical sovereign in this geographic area was Mexico, which ceded the territory to the United States in the 1848 Treaty of Guadalupe Hidalgo. Although the treaty provided for certain previously existing property rights, the Jicarilla tribe was not mentioned among those with claims to the land. Chief Judge Seth distinguished the nomadic Jicarilla tribe from the settled Pueblo Indians and noted that the creation of the Jicarilla reservation by executive order did not bestow any territorial rights upon the tribe. The chief judge concluded that the tribe's property rights were no different from

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28. *See* note 5 *supra* for the text of section 398c.

29. In British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), the Court held that section 398c applied to unallotted tribal trust lands and that "Congress assents to taxation by the State of the production of oil and gas through a lease given under [section 398c's] provisions." *Id.* at 166. The Court, however, had determined earlier in the decision that the reservation was of congressional origin, rather than a creature of executive order. Since section 398c pertains specifically to executive-order reservations, the Court may have misapplied the statute. In addition, the *British-American* Court did not reach the issue of the exclusivity of the state tax.

30. *E.g.*, Bryan v. Itasca County, 426 U.S. 373 (1976) (citing Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976) and Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)).

31. 617 F.2d at 547-48.

32. 25 U.S.C. § 396b (1976) provides, in part:

> [T]he foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to *lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe* . . . .

(emphasis added).

33. 617 F.2d at 551 (Seth, C.J., dissenting).

34. *Id. But see* the concurring opinion of Judge McKay, in which he states that the concept of tribal sovereignty is not dependent on the exercise of territorial rights. *Id.* at 549.

those of any other socio-economic group[35] and, therefore, the 1934 Act did not create a status in the tribe which had not existed previously. Although conceding that the 1934 Act granted to the tribes power over the internal and social relations of tribal members, such as criminal jurisdiction and inheritance distribution, Chief Judge Seth stated that these rights did not include the independent power to tax as a sovereign nation.[36]

Judge Barrett, in his dissent, emphasized that the Jicarilla reservation was created by executive order and that there were, therefore, no treaty rights involved in the Jicarillas' attempt to exercise taxing powers. Judge Barrett noted that past cases which upheld the power of the tribes to enact taxes on non-Indian activities were based on specific grants in individual treaties, statutes, or agreements. Since there had been no express grant of taxation authority to the Jicarilla tribe, the judge argued that a "balancing of interests" test had to be applied.[37] Judge Barrett then interpreted section 398c as demonstrating a clear congressional intent to reserve to state and local governments the right to levy and collect taxes on production from oil and gas wells within executive-order Indian reservations.[38]

The Tenth Circuit decision in *Merrion v. Jicarilla Apache Tribe* has the potential of allowing any Indian tribe to enact severance taxes on mineral production within reservations created by executive order or by treaty. Since the Tenth Circuit court found sufficient legal justification for the imposition of a severance tax by tribal governments on executive-order reservations, despite express statutory provisions granting to the states the power to tax mineral production on these lands, there is little doubt that similar taxes enacted by tribes living on treaty-created reservations, which reservations do not have corresponding statutory provisions permitting state severance taxes, will be upheld.[39]

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35. This statement appears to be at odds with the Supreme Court decision in United States v. Mazurie, 419 U.S. 544, 557 (1975), wherein the Court stated that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *See also* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973); United States v. Kagama, 118 U.S. 375, 381-82 (1886) ("[Indian tribes are] a separate people, with the power of regulating their internal and social relations"); Worcester v. Georgia, 31 (6 Pet.) 515, 557 (1832) ("[T]he several Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.").

36. 617 F.2d at 553-54.

37. *Id.* at 557-59 (Barrett, J., dissenting).

38. For a discussion of congressional history relative to section 398c, *see* Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. PA. L. REV. 491, 520 n.175 (1975). *See also* Comment, *Tribal Power to Tax Non-Indian Mineral Lessees*, 19 NAT. RESOURCES J. 969, 989-90 (1979), which discusses the confusing congressional history of section 398. It is interesting to note that the authors of these two comments come to completely opposite conclusions regarding congressional intent over executive-order Indian reservation tribal power to tax mineral lessees.

39. There are several current federal district court cases on this issue. However, the tribe involved in these cases is a treaty reservation tribe—the Navajos. *See, e.g.*, Phillips Petroleum Co. v. Navajo Tribe of Indians, No. 79-0153 (D. Utah, filed Mar. 15, 1979); Salt River Project Agricultural Improvement and Power Dist. v. Navajo Tribe of Indians, No. 78-352 (D. Ariz., filed July 11, 1978).

See also Ames, *Tribal Taxation of Non-Indian Mineral Lessees: An Undefined Inherent Power*, 6 J. CONTEMP. L. 55 (1979). Ames argues that the power to tax mineral lessees on reservation land is an inherent power of tribal sovereignty.

The weakest part of the majority's opinion appears to be in its conclusion that the express congressional grant of authority to the states to tax mineral production on executive-order reservations did not preempt tribal taxation of the same production.[40] The *Merrion* decision places oil and gas and other mineral lessees operating on Indian reservations in the economically disadvantageous position of paying severance taxes on the same mineral production to both the state and Indian governmental bodies. This double taxation may become so onerous as to constitute either an unconstitutional taking of property or an undue burden on interstate commerce.

A related, and as yet unanswered question, which will likely arise in future litigation, is whether a *state* severance tax on Indian reservation minerals is an unconstitutional intrusion on the powers of the federal government. In the *Merrion* case, the federal government had specifically granted to the states the authority to tax oil and gas production from the Jicarillas' executive-order reservation. If a state were to tax mineral production from Indian reservations created by treaty, in which case section 398 would not apply, the state might be guilty of unduly burdening interstate commerce. A challenge to the state's taxation would arise if the double taxation provided a stumbling block to the continued mining or drilling on Indian lands.[41]

B. *Municipal Easement Condemnation of Indian Lands*

In *United States v. City of McAlester*,[42] the Tenth Circuit Court of Appeals held that the United States was not a necessary party to the city's 1903 watershed basin easement condemnation of Choctaw and Chickasaw reservation lands. The court, however, remanded the case to the federal district court for reconsideration of whether the city's present use of the easement was consistent with watershed basin purposes.[43]

The City of McAlester had condemned 2,535.8 acres of Indian lands in

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> The doctrine of Indian sovereignty means little if a tribe has no revenues to carry out its plans. This is especially true with the Navajo, whose population is undereducated and underemployed. . . . If a tribe is to govern itself, it is essential that taxation be one of the powers which is retained.

Id. at 64. This reasoning was adopted by Judge McKay in his concurring opinion. Judge McKay asserted that "it simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes." 617 F.2d at 550 (McKay, J., concurring).

40. *See* note 38 *supra*.

41. The Solicitor of the Department of Interior recently issued an opinion concerning New Mexico's taxation of the royalties accruing to the Jicarilla tribe from oil and gas production on reservation land. The opinion states that § 398 prescribes that executive-order reservation tribes are to be treated the same as treaty reservation tribes. Furthermore, he asserted that, pursuant to an earlier opinion explaining that tribal royalties from oil and gas production on treaty reservations in Montana could not be taxed by the state, "taxation of production on Jicarilla Apache tribal lands from leases made under the 1938 Leasing Act is not authorized by § 398c. . . . Thus, New Mexico may not tax royalties received by the Jicarilla Apache Tribe from 1938 Act leases." [1979] 6 INDIAN L. RPTR. H-4. This opinion, however, was specifically limited to Indian royalties and did not address New Mexico's right to impose severance taxes on the lessees themselves.

42. 604 F.2d 42 (10th Cir. 1979).

43. *Id.* at 55.

1903 for use as a "watershed and basin and [for] erecting, maintaining, and using a waterworks system," without joining the United States in the condemnation proceeding.[44] In 1950, the encumbered tribes filed a quiet title suit against the city and moved to join the United States. The United States was dismissed from the suit because it had not consented to be sued.[45] The easement condemnation was subsequently ruled valid by the district court,[46] which held that the Tenth Circuit decision of *Choctaw and Chickasaw Nations v. Seitz*[47] was controlling. In 1975, the United States brought a second quiet title action on behalf of itself and as the trustee of Indian lands. The government argued that because the United States was an indispensable party to the original 1903 action, the city's failure to join the United States rendered the 1903 condemnation decision invalid. The federal district court ruled against the United States,[48] a three-judge Tenth Circuit panel reversed,[49] and, upon grant of a rehearing *en banc*, the panel decision was overturned.[50]

The issues presented on appeal were: 1) whether the United States was an indispensable party to the 1903 condemnation; 2) whether section 11 of the Curtis Act authorized the condemnation; and 3) whether the city had made improper use of the easement for non-watershed purposes.[51]

The Tenth Circuit acknowledged that the Non-Intercourse Act of 1834[52] prevented any conveyance of Indian land without the consent of the United States.[53] The court pointed out, however, that this restriction had been significantly modified by subsequent legislation. Under provisions established by the Dawes Commission of 1893,[54] the United States gave its broad consent to the alienation of Indian lands without requiring specific prior approval by the federal government. Furthermore, section 11 of the Curtis Act allowed incorporated cities adjacent to reservation lands to condemn "lands actually necessary for public improvements, regardless of tribal lines."[55] Also, the Atoka Agreement of 1897, between the Dawes Commission and the Choctaw and Chickasaw nations, which was incorporated as section 29 of the Curtis Act,[56] gave United States consent for the tribes to

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44. City of South McAlester v. Choctaw and Chickasaw Nations, No. 3293 (C.D. Ind. Terr. 1903).

45. 604 F.2d at 58.

46. Choctaw and Chickasaw Nations v. City of McAlester, No. 2781—Civil (E.D. Okla. Sept. 10, 1952).

47. 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952).

48. United States v. City of McAlester, 410 F. Supp. 848 (E.D. Okla. 1976).

49. The panel decision is reprinted at the conclusion of the *en banc* decision. 604 F.2d at 57. Judges McWilliams and Doyle dissented from the majority opinion and continued to adhere to the panel decision. *See* Overview, *Lands and Natural Resources, Fifth Annual Tenth Circuit Survey*, 56 DEN. L.J. 517, 524-26 (1979).

50. 604 F.2d at 55.

51. *Id.* at 45.

52. 25 U.S.C. § 177 (1976) provides, in part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

53. 604 F.2d at 47.

54. 27 Stat. 612, 645 (1893).

55. Curtis Act of 1898, ch. 517, 30 Stat. 495, 498.

56. *Id.* at 505-13.

alienate their lands.

The Tenth Circuit Court of Appeals relied on section 2 of the Curtis Act to justify its conclusion that the United States was not a necessary party to the 1903 condemnation.[57] The majority of the court inferred that the legislature's failure to expressly mandate the inclusion of the United States as a necessary party demonstrated a congressional belief that the federal government was not an indispensable party in an action affecting tribal property.[58] The court concluded that the specific provisions of the Curtis Act, permitting the alienation of Indian lands without joinder of the United States, controlled over the more general provisions of the Non-Intercourse Act.[59]

In rejecting the government's argument that the condemnation provisions of section 11 pertained only to allotted lands, the court focused on the express language of the Curtis Act, which granted condemnation authority to "all towns and cities . . . [and] all lands, regardless of tribal lines . . . ."[60] The court was satisfied that this language demonstrated that municipal condemnation actions are not limited to allotted lands. Although the condemnation provisions of section 11 deal principally with allotted lands, the court pointed out that some of the section's provisions also refer to certain types of unallotted lands.[61] The court concluded that although the provision for condemnation proceedings had been included within section 11, Congress did not intend thereby to limit condemnation actions to allotted lands.[62]

The United States claim that Congress had breached its fiduciary duty as trustee of Indian lands, by allowing condemnation of unallotted lands without the government's prior, specific consent, was also rejected. The court found the 1953 decision of *Choctaw and Chickasaw Nations v. Atoka*,[63] in which the court had allowed the condemnation of unallotted Indian lands, to be controlling on this point. Further support for the court's reasoning was found in provisions of section 11, which established certain procedural requirements for municipal condemnation actions, such as the guarantee of the right to a jury trial and the designation of territorial federal district court judges to preside over condemnation actions. These procedural safeguards indicated, to the majority of the court, that the United States had not breached its fiduciary duties.[64]

Although the court of appeals affirmed the district court's decision, the case was remanded for a further hearing on the issue of whether the city had violated the purpose of the original easement. The city had leased some of

57. 604 F.2d at 49. Section 2 of the Curtis Act made Indian tribes necessary parties to any action affecting tribal property. 30 Stat. 495 (1898).

58. 604 F.2d at 50.

59. *Id.* at 49.

60. 30 Stat. 498 (1898).

61. *Id.* at 497-498. Certain provisions of the Curtis Act reserved from allotment those lands used for churches, schools, parsonages, charitable institutions, and burial grounds.

62. 604 F.2d at 50.

63. 207 F.2d 763 (10th Cir. 1953).

64. 604 F.2d at 51.

the easement lands for private uses.[65] The court noted that whether these non-municipal activities were a departure from the necessary or incidental purposes of the watershed easement was a question to be decided under Oklahoma law.[66]

Judges McWilliams, Doyle, and McKay subscribed to the earlier panel decision.[67] The unanimous three-judge panel had held that whereas the condemnation provisions in the Curtis Act appeared in section 11, and whereas this section dealt exclusively with allotted lands, unallotted lands were not included in those Indian lands subject to condemnation.

C. *State Court Jurisdiction Over Indian Reserved Water Rights*

The jurisdictional authority of state courts to determine the status of Indian reserved water rights was affirmed by the Tenth Circuit Court of Appeals in *Jicarilla Apache Tribe v. United States*.[68] In addition, the court confirmed the propriety of United States representation of Indian federal reserved water rights interests in state water rights adjudications. The right of a tribe to independently intervene to protect tribal water rights was also advanced.[69]

In an action filed in state district court, New Mexico sought a general water rights adjudication of all the water rights and uses of the San Juan River system.[70] As the action involved the determination of federally reserved water rights, including Indian reserved water rights, the United States was joined as a defendant. The United States attempted to remove the case to federal district court. Furthermore, the federal government sought to dismiss that part of the suit designating the United States as the fiduciary representative of all Indian reserved rights, claiming conflicts of interest.[71] The United States District Court for the District of New Mexico remanded the case to the state district court for a determination of all water rights claims, including the Indian claims. The federal district court mandated that the United States continue to represent Indian interests.[72]

The Jicarilla Apache tribe subsequently filed suit in federal district

65. *Id.* at 52. These private uses included farming, hunting, fishing, grazing, and recreational uses.

66. *Id.* at 55. The court held that the test used by the trial court, *i.e.*, whether the present uses were *inconsistent* with the watershed easement, was improper. The appropriate test, under Oklahoma law, was whether the uses were "incident or necessary to the reasonable and proper enjoyment of the easement." Hudson v. Lee, 393 P.2d 515, 518-19 (Okla. 1964).

67. 604 F.2d at 57-64. The panel decision was authored by the honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

68. 601 F.2d 1116 (10th Cir.), *cert. denied*, 100 S. Ct. 530 (1979). The McCarran Amendment, 43 U.S.C. § 666(a) (1976), in which the United States consented to joinder in any state proceeding involving the general adjudication of water rights, provided the statutory basis for the court's holding.

69. 601 F.2d at 1127.

70. Reynolds v. United States, No. 75-184 (Dist. Ct. San Juan County, filed Mar. 13, 1975).

71. 601 F.2d at 1118. The United States implied that whereas the Apaches, the Navajos, and the Utes all had reserved water rights claims involved in the litigation, it could not adequately represent each tribe's interest. *Id.* at 1120.

72. *Id.*

court, seeking both a general adjudication of water rights on the Navajo River system and injunctive relief against the United States to protect the tribe from an alleged violation of the Upper Colorado River Compact.[73] The tribe asserted that the United States diversion of water from the Chama-Rio Grande River system through the San Juan-Chama Project exceeded the amount of water that could beneficially be used by the appropriating parties.[74]

The State of New Mexico argued that the adjudication of all federally reserved water rights should be conducted in one forum. The state also asserted that the United States was the real party in interest in any litigation involving Indian reserved water rights. The federal district court suggested to the tribe that a bifurcation of the reserved rights issue and the interstate compact issue would facilitate a hearing on the transmountain diversion aspects of the case. The tribe rejected the court's suggestion.[75] The federal district court then dismissed the entire case for lack of subject matter jurisdiction.[76]

On appeal to the Tenth Circuit, the central issue before the court was whether the McCarran Amendment[77] had effectively repealed the jurisdictional disclaimer contained in the New Mexico Enabling Act[78] and in the state constitution.[79] Through the language in section 2 of the New Mexico Enabling Act, the people of New Mexico renounced the right to divest the title to any property "held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States."[80] The enabling act further provided that the disclaimer was irrevocable without the consent of *both* the Congress and the people of New Mexico.[81] These

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73. *Id.* at 1119.

74. *Id.* The appropriators had contracted with the Secretary of the Interior for said waters.

75. *Id.* at 1121.

76. *Id.* at 1123.

77. 43 U.S.C. § 666(a) (1976). The pertinent portion of the McCarran Amendment provides:

> (a) Consent is 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 water system or other source . . . . 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, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances.

Id.

78. New Mexico Enabling Act of 1910, ch. 310, 36 Stat. 557, 558-559. Section 2 of the New Mexico Enabling Act provides, in part:

> [T]he people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States.

Id.

79. N.M. CONST. art. 21, § 2. The wording is similar to the language of the Enabling Act, *see* note 78 *supra*.

80. 36 Stat. 558-559 (1910).

81. *Id.* The state relinquishment of authority over the public domain contained in the New Mexico Enabling Act is consistent with similar disclaimers found in the enabling acts of other public land states. L. MALL, PUBLIC LAND AND MINING LAW at 3-6 (1979).

provisions were codified in the state constitution.[82]

The Tenth Circuit court recognized the express wording of the enabling act and the state constitution, but nevertheless concluded that there presently exists no exclusive federal jurisdiction over Indian water rights disputes.[83] The court of appeals relied upon the legislative history of the McCarran Amendment, which the court felt demonstrated a congressional determination that all federal water rights should be settled in one forum. The Tenth Circuit court reasoned that the language of the McCarran Amendment and the congressional rationale for its enactment pointed toward an implicit modification of the New Mexico Enabling Act.[84] In addition, the Tenth Circuit Court of Appeals found that the decisions of *New Mexico v. Aamodt*[85] and *Colorado River Water Conservancy District v. United States*[86] were controlling. These earlier cases expressly held that state courts have jurisdiction to determine Indian reserved water rights. The court also found implicit support for its conclusion in *United States v. District Court*,[87] a case wherein the Supreme Court had spoken of non-Indian and Indian reserved rights without any suggestion of a distinction between the two for purposes of McCarran Amendment jurisdiction.

Together with its McCarran Amendment reasoning, the Tenth Circuit court adjudged that whereas the disclaimer provisions in the New Mexico Enabling Act pertained only to *proprietary interests* in Indian lands, the enabling act's limitations did not apply to general water rights adjudications. The court of appeals analogized this New Mexico case to the situation which confronted the Supreme Court in *Kake Village v. Egan*.[88] *Kake Village* arose as the result of Alaska's attempt to regulate the fishing practices of Indians residing in Alaskan incorporated communities. The Supreme Court ruled that despite jurisdictional disclaimer provisions in the Alaska Enabling Act, the state had authority to regulate Indian fishing activities.[89] The Tenth Circuit suggested, on the basis of *Kake Village*, that so long as state regulation of Indian rights does not interfere with property rights granted to the Indians by the United States, or impair the ability of Indian tribes to govern themselves, the state regulations will not constitute a breach of enabling act restrictions.[90] As state adjudication of Indian reserved water rights was deemed not to interfere with the Jicarilla Apache tribe's self-governance or to impair a property right granted to the Indians by the United States, the Tenth Circuit found that New Mexico jurisdiction attached.[91]

82. N.M. CONST. art. 21 § 2.
83. 601 F.2d at 1130.
84. *Id.* at 1131.
85. 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).
86. 424 U.S. 800 (1976). The Supreme Court declared that "the state court had jurisdiction over Indian water rights under the [McCarran] Amendment." *Id.* at 809.
87. 401 U.S. 520 (1971).
88. 369 U.S. 60 (1962).
89. *Id.*
90. 601 F.2d at 1135.
91. *Id.* A third foundation for the court's holding was the basic principle that Congress may delegate its supervisory authority over the Indian tribes. United States v. New Mexico, 590 F.2d 323, 328 (10th Cir. 1978), *cert. denied*, 100 S. Ct. 63 (1979). The court of appeals found that the McCarran Amendment served as a specific congressional delegation of jurisdictional author-

The court of appeals' distinction between Indian proprietary rights, to which the enabling act restrictions purportedly apply, and other Indian property rights, is a sound one. Because Indian reserved water rights, as Alaskan native fishing rights, fall into the latter category, state jurisdiction over the Indian water rights would be appropriate even if the enabling act was not modified by the McCarran Amendment. Rather than limiting itself to this analysis, however, the court emphasized the modification of the enabling act by subsequent congressional actions and Supreme Court decisions. The court never squarely addressed the tribe's contention that the McCarran Amendment did not repeal the disclaimer of the enabling act.[92] The language of the enabling act and of the state constitution clearly provides that the state's relinquishment of jurisdiction over Indian property rights can be reversed only with the consent of *both* the United States and the people of New Mexico.[93] The court adduced no evidence of state approval of the modification and, therefore, the court apparently assumed that Congress may effectively alter the terms of state enabling acts and state constitutions through unilateral action. That the result of the court of appeals' decision in this case was to increase the authority of the New Mexico state government does not minimize the significance of this declaration.

The ancillary issue of whether the federal government or the Indian tribes are the appropriate defendants in Indian reserved water rights litigation also was addressed by the Tenth Circuit in *Jicarilla Apache Tribe v. United States*.[94] The court affirmed that "the United States is the proper party defendant in *any* general water rights adjudication proceeding, whether brought in federal court or state court, relating to federally created water rights, including those reserved for use by Indian tribes."[95] The appellate court noted, however, that this rule does not preclude the affected Indian tribes from obtaining private counsel to guarantee against any possible conflict of interest.[96] Since the Jicarilla Apache tribe had pending water rights claims against the United States, and as several Indian tribes were affected by the New Mexico general water rights adjudication, this case provided a good example of the need for this independent right of intervention.

D. *Distribution of Appropriation Funds to Individual Tribal Members*

In *Whiskers v. United States*,[97] the central issue was whether the funding and distribution schemes enacted by Congress, as compensation for lands taken from the Southern Paiute Nation, created a trust to be administered by the Secretary of the Interior. The case arose because Chloe Whiskers, a member of the Southern Paiute tribe potentially eligible to receive benefits under the distribution scheme, failed to register for her share of the funds

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ity to New Mexico. 601 F.2d at 1135. This analysis, however, begs the question of whether New Mexico had accepted this delegation of authority.

92. 601 F.2d at 1130.
93. *Id.* at 1128.
94. *Id.* at 1127.
95. *Id.*
96. *Id.*
97. 600 F.2d 1332 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 1028 (1980).

within the period prescribed by the Secretary.[98] When her delayed request for funds was denied, Chloe Whiskers brought an action in the United States District Court for the District of Utah, seeking damages against the United States. Whiskers alleged breach of trust and statutory duties and claimed an unconstitutional taking of her property.[99]

The Tenth Circuit Court of Appeals, affirming the decision of the district court, held that the Southern Paiute Judgment Distribution Act (the Distribution Act)[100] neither expressly nor implicitly created a trust relationship between the Secretary and potential recipients of the benefits.[101] Although the court concurred with Whiskers' contention that, absent clear congressional intent to the contrary, a trust relationship is created when the word "trust" is used in an appropriations statute, the appellate tribunal found that neither the Second Supplemental Appropriations Act (the Appropriations Act)[102] nor the Distribution Act mentioned the creation of a trust. Congress nowhere stated that the Southern Paiute funds created by these acts should be held in trust pending distribution of the funds. The Distribution Act instructed the Secretary to establish procedures by which the department could determine those persons eligible for the payments. In failing to meet the enrollment deadline promulgated by the Secretary, Whiskers and all other Indians in her position were precluded from fund distribution.

The principle argument urged by Whiskers was that section 725s of Title 31 mandates that funds appearing on government records, including Indian monies, are to be classified by the Treasury Department as trust funds.[103] The court of appeals acknowledged that the statutory language appeared to include those funds appropriated by Congress for the Paiutes. The court asserted, however, that a closer analysis of the statute revealed that the funds referred to in section 725s were limited to a narrow category of monies set aside for Indians. The appeals court declared that only income resulting from the leasing of certain Indian lands originally reserved for agencies and schools was to be included in the section 725s trust funds.[104] The trust monies are to be spent by Indian schools and agencies. The Appropriation and Distribution Acts' grant to the Southern Paiute Nation, as a fund appropriated in settlement of Indian claims, was deemed not to fall within the narrow category of trust funds described in section 725s.[105]

The relationship between the United States government and the Indian tribes may be characterized as a fiduciary one. The court of appeals found,

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98. *Id.* at 1334.

99. *Id.*

100. Pub. L. No. 90-584, 82 Stat. 1147 (1968) (codified at 28 U.S.C. § 1346 (1976)).

101. 600 F.2d at 1339.

102. Pub. L. No. 89-16, tit. iv, 79 Stat. 108 (1965).

103. 31 U.S.C. § 725s(a)(20) (1976) provides:

(a) The funds appearing on the books of the Government . . . shall be classified on the books of the Treasury as trust funds. . . . [including]

(20) Indian moneys, proceeds of labor, agencies, schools, and so forth (5t301).

104. 600 F.2d at 1336, *citing* 78 Cong. Rec. 8242 (1934) (remarks of Rep. Griffin) and Hearing on H.R. 9410 before the Subcommittee on Permanent Appropriations of the House Appropriations Committee, 73d Cong., 2d Sess., 255, 258 (1934).

105. 600 F.2d at 1336-37.

nevertheless, that the test enunciated in *United States v. Testan*,[106] requiring an allegation of substantive statutory violations in actions against the United States, had not been met by Whiskers' claim of a fiduciary breach. In *Testan*, the Supreme Court had concluded that the Tucker Act,[107] the statute under which Whiskers had claimed standing to bring the damages suit, was not of itself a grant of jurisdiction. Claims under the Tucker Act must be supported by a charge that a specific federal statute, affording compensation by the United States for damages sustained, pertains to the case.[108] As the Tenth Circuit court could find no statutory, regulatory, or constitutional impropriety in the Secretary's failure to hold Whiskers' funds in trust, the court concluded that there could be no violation of a substantive right, and that certainly there was no specific congressional mandate to compensate persons in Whiskers' situation.

Whiskers also had argued that the express language in *Cheyenne-Arapaho Tribes v. United States*[109] mandated the classification of all judgments of the Indian Claims Commission, under which the Appropriation Act and the Distribution Act had been legislated, as trust funds. The court of appeals distinguished the *Cheyenne-Arapaho* decision on the basis that "specific congressional legislation had declared the funds in *Cheyenne-Arapaho* to be held in trust."[110] The court noted that there was no similar language in the acts relied upon by Whiskers. The court of appeals summarily disposed of Whiskers' fifth amendment taking claim, reasoning that since the Distribution Act provided for group claims, as opposed to providing individual property rights, Whiskers "had no constitutionally recognizable . . . property rights in the undistributed fund of which [she] could have been deprived in violation of the Fifth Amendment."[111]

By strictly construing the Appropriation and Distribution Acts, the Tenth Circuit Court of Appeals indicated an unwillingness to infer a trust relationship between Indian tribal members and the Secretary of the Interior, even where the Secretary is charged with distributing compensation funds granted by the Indian Claims Commission and subsequently approved by Congress. If individual tribal members are to preserve the right to compensation awards, even in the face of the Secretary's improper administration of the tribal funds, specific language decreeing the creation of a trust relationship must be included by Congress in the appropriations acts. Without specific statutory language, applicants qualified for federal compensation who do not strictly adhere to procedures established by the Secretary will be precluded from subsequent damage claims against the United States.

E. *Anti-Alienation Clause of the General Allotment Act*

Whether the anti-alienation clause of the General Allotment Act (Act)

106. 424 U.S. 392 (1976).
107. 28 U.S.C. § 1346(a) (1976).
108. 424 U.S. at 398.
109. 512 F.2d 1390, 1392 (Ct. Cl. 1975).
110. 600 F.2d at 1337.
111. 600 F.2d at 1338-39.

runs with the land or is limited to the original allottee was the issue which confronted the Tenth Circuit in *Oklahoma Gas & Electric Co. v. United States*.[112] The court of appeals held that alienation restrictions on allotted land run with the land and are not personal to the individual allottee.[113]

William Robedeaux, an Otoe Indian, was granted an allotment of Otoe reservation land under the General Allotment Act of 1907. He subsequently conveyed his allotted land, by deed, in 1950, to his son Willis. Willis entered into an agreement with the Oklahoma Gas and Electric Company to exchange the allotted land for other land. The exchange was approved by the Secretary of the Interior. Allotted land is held in trust by the United States and is not subject to encumbrances by creditors for debts incurred by the allottee prior to issuance of the final patent.[114] Red Rock Co-op, a judgment creditor of Willis, asserted a lien on the proceeds of the condemnation of the land and objected to the transfer agreement entered into by Willis as interfering with Red Rock Co-op's rights as a judgment creditor.[115]

The Tenth Circuit, in upholding Willis' right to exchange the allotted land, noted that although Willis was technically a grantee rather than an heir, he was, for practical purposes, an heir to his father's allotted land and as such subject to the same restrictions. The appellate court relied upon the holding of *Stevens v. Commissioner*,[116] a case wherein the Ninth Circuit had concluded that the Indian lands tax exemption applied to allotted land purchased by another Indian. The Ninth Circuit had noted the federal policy of encouraging the consolidation of larger blocks of land by Indians for purposes of economic viability. Because the protective provisions in the Act applied to the Indian transferee of allotted lands in *Stevens*, even though the transferee was not an heir, the Tenth Circuit court reasoned that it was congressional policy to extend the Act's anti-alienation provisions to grantees as well as to heirs. Therefore, judgment creditors such as Red Rock Co-op cannot assert liens on transferred allotted lands prior to patent.

F. *Indian Trust Lands Included in the Term "Indian Country"*

The issue facing the appellate court in *Cheyenne-Arapaho Tribes v. Oklahoma*[117] was whether the Assimilative Crimes Act[118] granted jurisdiction to the states to impose state hunting and fishing laws on lands held in trust by the federal government for Indians. The Cheyenne-Arapaho reservation was created by two treaties[119] and clarified by an executive order in 1869.[120] Hunting and fishing rights were not discussed in the text of the

112. 609 F.2d 1365 (10th Cir. 1979).
113. *Id.* at 1367.
114. 25 U.S.C. § 354 (1976).
115. 609 F.2d at 1366.
116. 452 F.2d 741, 747 (9th Cir. 1971).
117. 618 F.2d 665 (10th Cir. 1980).
118. 18 U.S.C. §§ 1151-1165 (1976).
119. Treaty with the Cheyennes and Arapahoes, 14 Stat. 703 (1865); Treaty with the Cheyenne Indians, 15 Stat. 593 (1867).
120. 618 F.2d at 666.

treaties or in the executive order. Under the General Allotment Act,[121] the President was authorized to allot portions of Indian reservations to individual tribal members and to sell the excess to private parties. The Cheyenne-Arapahoe reservation was subsequently disestablished.[122]

Oklahoma apparently had been exercising jurisdiction over the trust lands within the disestablished reservation.[123] The Cheyenne-Arapaho tribe brought an injunctive action seeking to halt this practice. Since Indian hunting and fishing rights within "Indian Country"[124] are determined under exclusive tribal jurisdiction, the Tenth Circuit had to decide whether trust lands within a disestablished reservation are included in the definition of the term "Indian Country," thereby rendering them immune from state hunting and fishing regulations.

The Tenth Circuit court relied principally on the recent decision in *United States v. John*,[125] wherein the Supreme Court held that criminal jurisdiction over Indian trust lands was vested exclusively in the United States. The court of appeals also noted that a 1945 Solicitor's Opinion had stated that lands acquired in trust for the Cheyenne-Arapaho tribe were classified as reservation lands.[126] Based on the Supreme Court's opinion in *John*, and on the 1945 Solicitor's Opinion, the Tenth Circuit court found that the Cheyenne-Arapaho trust lands should be considered "Indian Country."[127] Oklahoma therefore had no authority to regulate Indian hunting and fishing activities on trust lands.

The court of appeals rejected Oklahoma's argument that the Assimilative Crimes Act gave the state jurisdiction over hunting and fishing activities, asserting that the Act did not incorporate state criminal statutes which are inconsistent with federal policies. Particular reliance was placed on the Act's section 1162(b),[128] which specifically guarantees Indian hunting and

121. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, *as amended by* Act of May 8, 1806, ch. 2348, 34 Stat. 182.

122. Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, which ratified an earlier agreement between the United States and the tribes, and which provided:

> The said Cheyenne and Arapaho tribes of Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest of every kind and character, in and to the lands [established by the executive order].

26 Stat. 1022. The Act also provided that the lands were to be held in trust by the United States. 26 Stat. 1024.

123. In Ellis v. Page, 351 F.2d 250, 252 (10th Cir. 1965), the court had held that the cumulative effects of the several acts disestablished the reservation. The lands within the disestablished reservation were classified into three categories: 1) individual allotments, 2) trust lands, and 3) non-Indian lands. In the 1980 case, the Tenth Circuit was concerned with the second category.

124. The term "Indian Country" is defined, in 18 U.S.C. § 1151 (1976), as comprising all Indian reservation land, including patented and easement lands, "all dependent Indian Communities," and all Indian allotments with restrictions against alienation still in effect.

125. 437 U.S. 634 (1978).

126. 59 Interior Dec. 1 (1945).

127. 618 F.2d at 667-68.

128. 18 U.S.C. § 1162(b) (1976) provides, in part:

> Nothing in this section . . . shall deprive any Indian or Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

fishing rights on trust lands. The appellate court agreed with the United States argument that it would be inconsistent for Congress to have prohibited state control of Indian hunting and fishing rights in section 1162(b), and then to have given this authority back, indirectly, through other, less explicit language in the Act.[129]

II. NATURAL GAS SALES CONTRACTS

A. *Interpretation of Favored Nations Clauses*

In *Superior Oil Co. v. Western Slope Gas Co.*,[130] the Tenth Circuit Court of Appeals was asked to settle a contract dispute between the buyer and seller of natural gas. The contract, delineating the conditions of the intrastate sale of natural gas, included a favored nations clause requiring the buyer to pay to the seller a purchase price equal to the highest price paid to any other seller within a specific geographic area. The natural gas sales contract also included a savings clause, whereby the buyer's obligation to pay the higher price was made subject to several factors, including the quality of the gas, the bases of measurement, delivery pressure, and "other conditions of sale." When challenged by seller's claim that buyer was paying a higher price to certain other sellers in contravention of the favored nations clause, buyer defended by noting that the higher prices were being paid as a result of a Federal Power Commission (FPC) "vintaging" order.[131] The buyer asserted that vintaging, as one of the "other conditions of sale" contemplated by the contracting parties as an exception to the favored nations clause, should not be a factor in determining the price paid to seller. The Tenth Circuit, overruling the district court, found that the phrase "other conditions of sale" did not include vintaging,[132] and hence the FPC's order did not protect buyer from paying higher prices to seller when buyer paid higher prices to local sellers subject to the FPC's jurisdiction.[133]

Superior Oil, a natural gas production company, had entered, in 1964, into a 20-year natural gas contract with Western Slope. The contract contained a favored nations clause, which stated that Western Slope would pay Superior a rate equal to the price that Western Slope paid other natural gas suppliers within a three-county area of Colorado, if that price was higher than that being paid Superior.[134] In 1972, Western Slope notified Superior

See also 18 U.S.C. § 1165 (1976).

129. 618 F.2d at 669.

130. 604 F.2d 1281 (10th Cir. 1979).

131. "Vintaging" refers to the date when a successful well is drilled, with gas from older wells being priced lower than gas from recently drilled wells. 604 F.2d at 1284.

132. 604 F.2d at 1291.

133. Most of the regulatory responsibilities of the now defunct Federal Power Commission have been assumed by the Federal Energy Regulatory Commission. The federal regulatory agencies have authority over natural gas which is to be sold interstate.

134. Article 8.4 of the contract provides, in part:

> If, at any time during the term of this Agreement, Buyer pays to a producer of natural gas in Mesa, Garfield, and Rio Blanco County, Colorado, for the purpose of reselling such gas in its Colorado market area, a price per MCF higher than that being paid to Seller hereunder, due consideration being given to the quality of the gas, bases of measurement, delivery pressure, and *other conditions of sale*, Buyer shall, commencing upon the date of the first delivery of such natural gas at such higher price, and contin-

Oil that it was paying a higher rate to other suppliers in the vicinity under an FPC order and explained that it would begin paying Superior Oil at an equal rate, even though the FPC order applied only to natural gas contracts instituted on or after June 17, 1970.[135] In 1974, Western Slope informed Superior Oil that the favored nations clause was being triggered again, this time as a result of Western Slope's contract with a supplier of gas from wells drilled on or after January 1, 1973.[136] In 1975, however, Superior Oil discovered that Western Slope was paying a higher price to yet another supplier in the three-county area—fifty cents per mcf compared with forty-five cents per mcf paid to Superior Oil. Superior Oil notified Western Slope that the buyer was violating the favored nations clause. Western Slope replied that it had been advised that the vintaging concept established by the FPC was included in the phrase "other conditions of sale" in the favored nations clause of the 1964 agreement and that, under the vintaging scheme, Superior Oil was receiving a fair rate. Superior Oil reminded Western Slope that a triggering of the favored nations clause had occurred under previous FPC orders, which included vintaging schedules. Superior Oil noted that Western Slope's position was inconsistent with its past practice. When Western Slope refused to increase the price paid to Superior Oil, the seller filed a complaint against Western Slope, alleging buyer's failure to pay the full contract price.[137]

The Tenth Circuit attempted to discern what the intent of the contracting parties was at the time of the agreement's negotiation in 1964. In so doing, the court of appeals found that the intrastate utilization clause of the contract demonstrated that both Superior Oil and Western Slope intended that their contract should *not* come under FPC jurisdiction.[138] The court examined Western Slope's pre-1975 actions regarding the favored nations clause. By increasing the rate paid to Superior Oil without regard to the FPC's vintaging schedule in effect during the earlier period, the court felt that Western Slope indicated that it did not consider vintaging to be included in the term "other conditions of sale."[139]

Western Slope had relied primarily on the Seventh Circuit's holding in *Pure Oil v. FPC*[140] to support its position that all factors, including vintaging,

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uing so long as such higher price is paid for such gas, increase the price being paid to Seller hereunder to equal such higher prices.

604 F.2d at 1282 (emphasis supplied by the court).

135. 604 F.2d at 1283.

136. *Id.* at 1283-84.

137. *Id.* at 1284-85.

138. Article 7.1 of the contract provides, in part:

> Buyer represents that it is engaged solely in intrastate transportation of natural gas within the State of Colorado and represents that gas purchased hereunder shall be sold and used only in connection therewith. In the event Buyer should, at any time, propose to sell or use gas purchased hereunder in such manner that . . . will subject Seller to the jurisdiction of the Federal Power Commission or any successor body . . . , Buyer shall notify Seller at least ninety (90) days before such resale or other disposition is commenced and Seller shall have the right hereunder, upon thirty (30) days' notice to Buyer to terminate this agreement.

Id. at 1283.

139. 604 F.2d at 1289.

140. 299 F.2d 370 (7th Cir. 1962).

were included in the clause. The Tenth Circuit acknowledged the *Pure Oil* decision and agreed that peaking capacity was included in the savings clause; peaking capacity, however, is a physical characteristic of natural gas while there is no physical difference between "old" and "new" gas.[141] The court of appeals also distinguished the *Pure Oil* decision on the basis that the contract in that case involved interstate gas and as such it was subject to Commission regulations. The court noted that the contract in the instant controversy concerned the intrastate sale of natural gas.[142]

The court of appeals concluded that since vintaging was not contemplated by the parties as one of the "other conditions of sale" restricting the favored nations clause, vintaging could not relieve Western Slope of its duty to pay the higher price to Superior Oil.[143] Judge Barrett, in a concurring opinion, stated that favored nations clauses should be declared void as against public policy.[144] The concurrence urged the district court to consider this issue on remand.

B. *Restrictions on Interstate Contract Termination Under Section 7(b) of the Natural Gas Act*

The higher prices available in intrastate markets for natural gas persuaded two oil and gas producers to attempt termination of interstate gas purchase agreements. In both of these cases, the Tenth Circuit court found that the attempted terminations were invalid because the wells, from which the oil and gas flowed, previously had been dedicated to interstate markets under Federal Power Commission (Commission) public convenience and necessity certificates. The wells had not been abandoned formally under the Commission's administrative procedures. These Tenth Circuit decisions reflect the trend in recent Supreme Court opinions. The Court has sought to restrict the ability of producers to discontinue unilaterally interstate distributor contracts. Absent Commission approval, gas from wells dedicated to interstate markets cannot be diverted to intrastate markets.[145] Lease expiration or non-use of the wells do not obviate the necessity for formal abandonment proceedings.

The issue of interstate abandonment through lease expiration arose in *Amarex, Inc. v. FERC*.[146] In 1970, Amarex had succeeded, by assignment, to a leasehold interest in an Oklahoma oil and gas field. The lease, by its terms, was to expire in 1972. After acquiring the leasehold, but prior to 1972, Amarex entered into a gas purchase contract with Arkansas Louisiana Gas Company (Arkla) whereby Arkla agreed to purchase the gas produced from

141. 604 F.2d at 1290-91.

142. *Id.*

143. *Id.* at 1291.

144. *Id.* at 1291-97 (Barrett, J., concurring).

145. United Gas Pipe Line Co. v. McCombs, 442 U.S. 529 (1979); California v. Southland Royalty Co., 436 U.S. 519 (1978); Sun Oil Co. v. FPC, 364 U.S. 170 (1960); Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137 (1960); Atlantic Refining Co. v. Public Serv. Comm'n, 360 U.S. 378 (1959). *See also* Phillips Petroleum Co. v. FPC, 556 F.2d 466 (10th Cir. 1977).

146. 603 F.2d 127 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 1067 (1980). The regulatory responsibilities of the Federal Power Commission have been assumed by the Federal Energy Regulatory Commission.

"all wells now or hereafter completed" on the lands covered by the Oklahoma lease.[147] The contract included the gas produced from the quarter section, which gas became the subject of the dispute. After entering the contract, Amarex filed a petition with the Commission seeking a "small producer" certificate of convenience and necessity, which was granted in 1971. The effectiveness of the certificate was for an unlimited duration.

Amarex began natural gas deliveries to Arkla in 1971, although the gas delivered was not from the Oklahoma leasehold. Upon expiration of the Oklahoma leasehold in 1972, Amarex entered into another lease agreement with the fee owner for a term of five years. A gas well had been drilled, and there was production from the leasehold, but Amarex refused to deliver the leasehold's gas to Arkla. After both parties filed petitions with the Commission, the federal agency directed Amarex to deliver the natural gas to Arkla.[148]

The issue presented to the court of appeals was whether Amarex's certificate of public convenience and necessity, together with its contract with Arkla, required it to deliver natural gas produced from the Oklahoma lease. Amarex asserted that because the lease had been renewed subsequent to both the distribution contract and the certificate's issuance, and since gas had not been actually produced until 1975, Amarex was relieved of any duty to deliver the gas to Arkla. The Tenth Circuit, in concluding that the gas produced on the leasehold was dedicated to the interstate market, relied heavily on the Supreme Court's decision in *California v. Southland Royalty Co.*[149] In *Southland*, the fee owner of certain Texas acreage had entered into a fifty year lease with lessee, Gulf Oil Corporation. Gulf subsequently contracted to sell gas interstate and obtained a certificate of public convenience and necessity from the Commission to facilitate its interstate sales. Prior to the expiration of Gulf's lease, Southland Royalty Company obtained fee title to the acreage. Upon the expiration of the original fifty year lease in 1975, the remaining oil and gas reserves automatically reverted to Southland. Southland contracted to sell the gas intrastate; the Commission prevented delivery because Southland had not petitioned for a ruling of "abandonment" pursuant to the procedure established in Section 7(b) of the Natural Gas Act.[150] Since the original certificate was of unlimited duration, Southland was ordered to continue delivery to the interstate distributor. The Court asserted that the fact that the original lessee no longer had an interest in the land did not alter the circumstance that the wells had been dedicated to interstate service.[151]

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147. *Id.* at 128.
148. *Id.* at 129.
149. 436 U.S. 519 (1978).
150. 15 U.S.C. § 717f(b) (1976) provides:

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

151. 436 U.S. at 525.

Although acknowledging that the question in *Southland* was not precisely the one presented in *Amarex*, the court of appeals stated that the Supreme Court's holding in *Southland* was dispositive of the instant case. Once a natural gas field has been dedicated to interstate commerce pursuant to issuance, by the Commission, of a certificate of convenience and necessity, all gas in the field is subject to the certificate and gas produced from these fields cannot be diverted to intrastate sale without compliance with the statutorily mandated abandonment procedures.[152] The Tenth Circuit ruled that because Amarex had dedicated the Oklahoma gas to interstate commerce pursuant to a certificate granted by the Commission, all gas produced on the leased lands should be delivered to Arkla absent a Commission determination of abandonment. The court noted that it was irrelevant that the original lease had expired before production on the leased lands began.[153]

Another aspect of the abandonment issue was decided on the same day in *Texas Oil & Gas Corp. v. Michigan Wisconsin Pipe Line Co.*[154] In this case, the dispute centered upon leases originally held by Shell Oil Company, Texas Oil's predecessor. The leases of Oklahoma oil and gas lands were the basis for a gas purchase agreement between Shell and Michigan Wisconsin, whereby Shell committed all natural gas produced from the leased lands to interstate sale. When a successful well was drilled in 1962, Shell began delivery of all of the natural gas produced to Michigan Wisconsin, pursuant to a certificate of convenience and necessity issued by the Commission.[155] Texas Oil meanwhile had begun production within the same unitized tract and had entered into an intrastate contract for the delivery of gas to an Oklahoma distributor. Shell abandoned and plugged its well in 1969 with the permission of the Oklahoma Corporation Commission.[156]

Obtaining Shell's interest in the lease at issue, Texas Oil instituted a declaratory judgment action in federal district court to quiet title against Michigan Wisconsin's contractual claim to the gas and for a determination that the gas produced from the lease was not dedicated to interstate commerce.[157] The district court, in quieting title to the gas in Texas Oil, ruled that the Commission had no primary jurisdiction to determine the abandonment issue and that the Oklahoma Corporation Commission's permission to abandon was sufficient to terminate the interstate dedication.[158]

152. *See, e.g.*, United Gas Pipe Line Co. v. McCombs, 442 U.S. 529 (1979). In *McCombs*, the Supreme Court reversed a Tenth Circuit decision which had held that a gas field, from which there had been no production for several years, and on which a new deeper well had been drilled so as to produce gas, had been abandoned in fact although no formal abandonment procedure had been instituted. McCombs v. FERC, 570 F.2d 1376 (1978); *see* Overview, *Lands and Natural Resources, Fifth Annual Tenth Circuit Survey*, 56 DEN. L.J. 517, 531 (1979). The Supreme Court declared that there could be no abandonment of a natural gas field dedicated to interstate commerce absent a finding of abandonment, by the Commission, following a § 7(b) hearing. 442 U.S. at 543.

153. 603 F.2d at 131. Judge Barrett, in concurrence, maintained that the *Southland* decision cannot be broadened to include dedications beyond those lands included in oil and gas leases from which production was in fact realized. *Id.* at 132.

154. 601 F.2d 1144 (10th Cir. 1979).

155. *Id.* at 1145.

156. *Id.*

157. *Id.*

158. *Id.*

The Tenth Circuit, reversing the district court's holding, found that the Commission had primary jurisdiction to determine the question of the abandonment of gas wells dedicated to interstate markets. The district court had relied erroneously on the Tenth Circuit's earlier decision in *Wessely Energy Corp. v. Arkansas Louisiana Gas Co.*[159] as dispositive of the primary jurisdiction issue. The court of appeals, however, distinguished the *Wessely* case from the *Texas Oil* and *Amarex* situations because in *Wessely*, although a predecessor lessee had entered a contract for the sale of natural gas interstate, no natural gas was ever produced during the time of the lease. When the second lessee entered into a gas purchase contract with an intrastate distributor, the *Wessely* court determined that the second lessee was not bound by the previous lessee's contract with the interstate distributor.[160] Conversely, in the instant case, gas had been produced and was distributed in interstate commerce for seven years before Shell's well was shut down.[161] Following the Supreme Court's *Southland* rationale, the Tenth Circuit held that once gas is produced from a lease pursuant to a certificate of convenience and necessity issued by the Commission, and once the gas begins to flow in interstate commerce, all of the gas produced from the lease is dedicated to interstate commerce and cannot be terminated absent Commission approval.[162]

III. Public Lands

A. *Mineral Title Questions*

In *Amoco Production Co. v. United States*,[163] the Tenth Circuit Court of Appeals was asked to determine the timeliness of a quiet title action filed against the United States.[164] The court was called upon to interpret the constructive notice provision of a statute authorizing suit against the United States if filed within twelve years of the plaintiff's actual or constructive knowledge of an adverse title claim of the federal government.[165] The court of appeals determined that a quitclaim deed which did not appear in the grantor-grantee chain of title but which was recorded in the Bureau of Land Management (BLM) tract index did not constitute constructive notice to a subsequent grantee so as to commence the running of the statute of limitations.[166]

159. 593 F.2d 917 (10th Cir. 1979).

160. *Id.* at 920. The *Wessely* court held that "with no drilling, no production, no facilities, there was no introduction of gas into the interstate market or any market. The Natural Gas Act was never applicable to the tract." *Id.*

161. 601 F.2d at 1146.

162. *See* 436 U.S. 519, 527-28 (1978).

163. 619 F.2d 1383 (10th Cir. 1980).

164. *See* 28 U.S.C. § 2409a (1976) provides, in part:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

165. 28 U.S.C. § 2409a(f) (1976) provides:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

166. 619 F.2d at 1392.

In 1942, the Federal Farm Mortgage Corporation (FFMC) conveyed a fee interest in the disputed Utah land to the Newton family. The conflict arose over the grantor's subsequent conveyance of one-half of the mineral interest in the Newton tract to the United States by quitclaim deed in 1957. Amoco, the lessee of the Newton family company which claimed fee title, sued the United States to quiet title to its mineral interests. The United States defended, claiming that the action was barred by the twelve year statute of limitations. When the district court ruled that the action was timely, the United States sought to introduce evidence challenging the validity of the Newton's 1942 deed. The district court excluded all of the United States' proffered evidence and granted summary judgment for Amoco.[167]

On appeal, the Tenth Circuit affirmed the district court's conclusion that it was unreasonable to assume that Amoco had constructive notice of a stray deed.[168] The court of appeals emphasized that whereas Utah law was ambiguous and inconclusive on the issue of constructive notice, the federal courts could not assume that Amoco "should have known" of the 1957 FFMC mineral conveyance to the United States.[169] The appellate court did overturn the district court's grant of summary judgment, however, asserting that the exclusion of all of the evidence tendered by the United States was error. The Tenth Circuit noted that the trial court had misinterpreted several rules of evidence.[170]

The Tenth Circuit Court of Appeals was afforded a further opportunity to delineate the parameters of constructive notice to grantees of interests in the public lands in *Winkler v. Andrus*.[171] The case involved a challenge to the rights of an assignee of a second priority drawee of a noncompetitive federal oil and gas lease by the first drawee who had contested successfully the Department of Interior's invalidation of his right to the oil and gas lease. Although the court of appeals remanded the case for further deliberations at the district court level, it outlined the various factors to be considered in determining whether a lessee is a bona fide purchaser and, as such, is protected from administrative errors made by Interior in granting the lease.

The case arose from Winkler's efforts to obtain an oil and gas lease to which the Tenth Circuit previously had declared he was entitled.[172] Win-

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167. *Id.* at 1387.

168. *Id.* at 1389.

169. *Id.* at 1388.

170. The trial court had not allowed the BLM file copy of the recorded deed into evidence, basing its decision on FED. R. EVID. 1005 which provides that a certified, recorded copy of a deed appearing in the county recorder's office and received into evidence precludes acceptance of any other evidence. The Tenth Circuit, after quoting from the notes of the Advisory Committee relative to rule 1005, found that the rule applied to "the actual record maintained by the public office . . . , not the original deed from which the record is made." 619 F.2d at 1390. Since the contents of the original deed were at the crux of the controversy, FED. R. EVID. 1004(1), "which authorizes the admission of other evidence of the contents of a writing if all originals are lost or destroyed, rather than Rule 1005, is applicable to the 1942 deed." *Id.* The court also applied FED. R. EVID. 406, which allows introduction of the routine practice of an organization, in finding that the conformed copy of the deed from the BLM files was properly introduced and should have been received into evidence, assuming that the United States could obtain proper authentication from the BLM office under FED. R. EVID. 901 and 902.

171. 614 F.2d 707 (10th Cir. 1980).

172. *Id.* at 708-709.

kler had been the first drawee for a noncompetitive oil and gas lease on certain Wyoming acreage; the Department nevertheless rejected his entry card because of a name insufficiency.[173] Although the Tenth Circuit ultimately vindicated Winkler's right to the lease, the second drawee had been given the lease in the interim. The second drawee assigned her rights to the Davis Oil Company.[174]

After the initial rejection of Winkler's application by the Wyoming State Office of the BLM, he appealed, unsuccessfully, to the Interior Board of Land Appeals (IBLA).[175] Although Winkler sought relief in federal district court, he did not request a preliminary injunction or a temporary restraining order to stay the issuance of the lease. Winkler failed to file a lis pendens on the subject lease as required under section 1964 of Title 28.[176] Consequently, no actual or constructive notice was provided to the second drawee or to her assignee, Davis Oil Company, under Wyoming law.

Davis Oil, however, failed to search BLM records to assure itself that there was no claimed adverse interest, relying on issuance of the lease by the BLM as sufficient assurance that the award was not contested. By the time Davis Oil filed notice of the assignment in the BLM office, the office had received notice of Winkler's federal court action, and, as a result, the BLM delayed approval of the assignment. Two years later, in 1977, the BLM informed Davis Oil of the court action, but rather than wait until the Tenth Circuit had rendered an opinion, the BLM approved the assignment. At all times after this BLM approval of the assignment, Davis Oil had actual notice of Winkler's court action.[177]

The Tenth Circuit noted that the bona fide purchaser provision of the Mineral Leasing Act[178] and the holding in *Southwestern Petroleum Corp. v. Udall*[179] demonstrated that the time of bona fide purchaser determination is the date of the assignment, not the date of BLM approval of a transfer of

173. The BLM initially rejected Winkler's entry card because he had stamped "F.A. Winkler Agency" on one side, implying that the card was endorsed by a corporation. A corporation is required to provide supplemental information not supplied by Winkler. 43 C.F.R. § 3112.2-1(a) (1979). *See* Winkler v. Andrus, 594 F.2d 775 (10th Cir. 1979). *See also* Overview, *Administrative Law, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 131 (1980).

174. 614 F.2d at 709.

175. The issuance of the oil and gas lease was suspended during Winkler's administrative appeal, pursuant to 43 C.F.R. § 4.21(a) (1978), which provides, in pertinent part: "[A] decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal."

176. 28 U.S.C. § 1964 (1976) provides that an action in federal court against real property interests, including federal interests, must be recorded in the county office where the property is located to constitute constructive notice to potential purchasers, if state law so requires. This federal provision was triggered by state law. WYO. STAT. § 1-6-108 provides, in part:

> In an action in a state court or in a United States district court affecting the title or right of possession of real property . . . the plaintiff at the time of the filing of the complaint . . . , may file in the office of the county clerk in which the property is situate a notice of pendency of the action . . . . From the time of filing the notice a subsequent purchaser or encumbrancer of the property shall have constructive notice of the pendency of the action.

177. 614 F.2d at 709-10.

178. 30 U.S.C. § 184(h)(2) (1976).

179. 361 F.2d 650 (10th Cir. 1966). In *Southwestern*, the Tenth Circuit held that bona fide purchaser status under 30 U.S.C. § 184 was to be determined by common law standards; *i.e.*,

interest. Since Winkler had not filed a lis pendens on the contested lease, as he was required to do under both federal and state law, Davis Oil could not have been on constructive notice under the Wyoming standard.[180] The court noted, however, that the test of constructive notice under *Southwestern* is whether the circumstances are sufficient to put a man of ordinary prudence on inquiry, an inquiry which, if diligently followed, would lead to discovery of defects in title.[181] Davis failed to conduct a title examination of the Wyoming State Office BLM records before acquiring the lease assignment. Davis contended that it is standard industry practice to conduct a title examination only on lease assignments involving large cash payments. The court of appeals rejected this argument as not supported by case precedent.[182] Under the *Southwestern* holding, as applied in *O'Kane v. Walker*,[183] a BLM record search is mandatory for bona fide purchaser status, since any facts relevant to the situation would include notices of court action contained in BLM records.[184]

The Tenth Circuit emphasized that when Davis took its assignment, BLM records reflected that Winkler had made an unsuccessful administrative appeal. But Davis was also deemed to have constructive notice of the applicable statutes, particularly section 226-2 of Title 30, which states that an unsuccessful administrative appellant has ninety days after an adverse IBLA decision to seek judicial relief.[185] To be a bona fide purchaser Davis Oil should have waited for the expiration of the ninety-day period before taking its assignment.[186] The appellate court concluded by stating that the general rule is that a person taking a real property interest does so at his peril and that a lawsuit is considered pending until the time for appeal has passed.[187] The district court decision was remanded for further hearings to determine if Davis was a bona fide purchaser under the ordinary prudent man standard of *Southwestern*.[188]

This decision apparently voids a long-standing oil and gas industry practice of relying on BLM issuance of leases to qualify assignees as bona fide purchasers. Assignees of second drawees must now wait until the ninety-day appeal period has expired after an adverse decision of the IBLA to assure themselves that no federal court action has been taken by the first

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that he "acquired his interest in good faith, for valuable consideration, and without notice of the violation of the departmental regulations." *Id.* at 656.

180. 614 F.2d at 712.

181. *Id.*

182. *Id.* at 713.

183. 561 F.2d 207 (10th Cir. 1977). In *O'Kane*, the assignee of a second drawee was held to be a bona fide purchaser because he had employed an abstractor to conduct a title examination of BLM records. The examination had produced no evidence of any adverse claims or interests.

184. 614 F.2d at 713.

185. *Id.* 30 U.S.C. § 226-2 (1976) provides, in part: "No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter."

186. 614 F.2d at 714.

187. *Id. See* Wilkin v. Shell Oil Co., 197 F.2d 42 (10th Cir. 1951), *cert. denied*, 344 U.S. 854 (1952).

188. 614 F.2d at 714-15. The federal district court subsequently found that Davis Oil Company was not a bona fide purchaser and therefore the assignment of the lease issued to the second drawee was void. Winkler v. Andrus, No. 76-127k (D. Wyo. Aug. 5, 1980).

drawee. Alternatively, assignees could condition payment to drawees upon the absence of any federal court action within the ninety-day period.

A question not answered by the Tenth Circuit is whether an assignee of a first drawee who has been issued an oil and gas lease from the BLM can be a bona fide purchaser before the initial thirty-day protest period has expired. Past BLM practice has been to consider the first drawee's assignee a bona fide purchaser even if a protest by the second or third drawee ultimately is upheld; in such cases the first drawee's overriding royalty has been cancelled but the assignee has been allowed to retain the lease. Under the Tenth Circuit's decision in this case, it would appear that the first drawee's assignee would be required to wait until the thirty-day protest period has elapsed, since the assignee is on constructive notice of this regulation. A related question is whether the thirty-day period begins to run on the day of the drawing or on the date the second drawee is notified by the BLM that the first drawee's entry card is considered valid.

B. *Grazing Allotment Reduction Programs*

In *Valdez v. Applegate*,[189] the Tenth Circuit held that commencement of a court action challenging a grazing management program operates to stay implementation of the program until the case has been determined.[190] In making this determination, the court of appeals apparently ignored the clear implication of a provision in the November 27, 1979 Appropriations Act for the Department of the Interior.[191]

Pursuant to an Environmental Impact Statement prepared under an order issued by the District of Columbia District Court in *NRDC v. Morton*,[192] the BLM began implementation of the Rio Puerco Livestock Grazing Management Program. The program called for reductions in grazing permit areas, and some of the affected permittees instituted an action to enjoin the implementation of the program. The federal district court denied the motion for a preliminary injunction and the plaintiffs appealed to the Tenth Circuit, which issued a stay of program implementation until it rendered a decision.[193]

The United States claimed that the issue was moot because of a provision in the 1979 Appropriations Act stating that reductions of grazing allotments amounting to no more than ten percent were effective "when so

189. 616 F.2d 570 (10th Cir. 1980).

190. *Id.* at 573.

191. Pub. L. No. 96-126, 93 Stat. 954, 956 (1979) states in part:

Provided further, That an appeal of any reductions in grazing allotments on public rangelands must be taken within 30 days after receipt of a final grazing allotment decision or 90 days after the effective date of this Act in the case of reductions ordered during 1979, whichever occurs later. Reductions of up to 10 per centum in grazing allotments shall become effective when so designated by the Secretary of the Interior. Upon appeal any proposed reduction in excess of 10 per centum shall be suspended pending final action on the appeal, which shall be completed within 2 years after the appeal is filed.

192. 388 F. Supp. 829, 838-41 (D.D.C. 1974), *aff'd*, 527 F.2d 1386, (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976).

193. 616 F.2d at 571.

designated by the Secretary."[194] Since the grazing reductions being challenged were apparently within the ten percent limit, the United States argued that the reductions were effective immediately.

In rejecting this argument, the court relied on a provision in the 1976 Federal Land Policy and Management Act which states that "judicial review of public land adjudication decisions be provided by law."[195] The court interpreted this to mean that implementation of a program affecting public lands while the program was being judicially contested was "not consonant with judicial review."[196]

The court further held that the plaintiffs had demonstrated sufficient likelihood of success on the merits and a sufficient showing of irreparable harm to warrant a preliminary injunction prohibiting program implementation until the case was determined on the merits. An apparently crucial concern of the court was the fact that some permittees would be forced out of their livestock operations and that the program's probability of success in reducing costs to the permittees was questionable.[197] However, by ignoring the express provisions of the Appropriations Act, which gave the Secretary discretionary power to implement grazing reductions of ten percent or less, the court may have left itself open to the criticism that it exceeded statutory limits.

C. *Railroad Rights-of-Way*

1. Mineral Interests in Railroad Rights-of-Way

The continuing controversy over mineral interests in railroad rights-of-way grants resurfaced in *Energy Transportation Systems, Inc. v. Union Pacific Railroad Co.*,[198] a consolidation of two decisions at the federal district court level.[199] The Tenth Circuit disposed of two questions that have been plaguing the courts for years—whether mineral reservations were granted to railroads under the Union Pacific Railroad Act of 1862 (Act);[200] and, if they were, what type of mineral grant was envisioned. The court found that section 2 of the Act,[201] which granted the actual right-of-way for railroad construction across the public domain, did *not* include the servient mineral

194. *Id. See* note 191 *supra.*

195. 616 F.2d at 572. *See also* 43 U.S.C. § 1701(a)(6) (1976).

196. 616 F.2d at 572.

197. *Id.*

198. 606 F.2d 934 (10th Cir. 1979).

199. Energy Transp. Systems, Inc. v. Union Pac. R.R. Co., 456 F. Supp. 154 (D. Kan. 1978); Energy Transp. Systems, Inc. v. Union Pac. R.R. Co., 435 F. Supp. 313 (D. Wyo. 1977).

200. 12 Stat. 489, *as amended by* Act of July 2, 1864, 13 Stat. 356.

201. Section 2 of the Act provides, in part:

> [T]he right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line: and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, ...

12 Stat. 491.

estate, while the grant, under section 3,[202] of alternate township sections adjoining the railroad *did* include the mineral estate.[203]

Energy Transportation Systems, Inc. was planning to construct an underground coal slurry pipeline from Wyoming to Arkansas. It had obtained rights-of-way from successors to a Wyoming homestead patent issued in 1913, with neither a reservation of the mineral estate in the United States nor any mention of conflicting mineral interests by Union Pacific. Union Pacific had a right-of-way granted pursuant to section 2 of the Act which cut across the land and under which Energy Transportation Systems' pipeline had to pass. Because Union Pacific would not allow the company to construct the pipeline under Union Pacific's right-of-way, the coal slurry pipe line company sought a declaratory judgment to determine what, if any, right Union Pacific had to the mineral estate. The trial court found that Union Pacific did not have title to the mineral estate beneath its right-of-way.[204]

Union Pacific relied principally on *Northern Pacific Railway Co. v. Townsend*[205] as support for its claim that Union Pacific had been granted a limited fee which included the mineral estate. The district court, however, distinguished the *Northern Pacific* decision because that case had involved a homestead patentee's claim to the surface estate of the adjoining railroad right-of-way and did not address the railroad's mineral estate rights.[206] The trial court then followed the holdings in *United States v. Union Pacific Railroad Co.*[207] and *Wyoming v. Udall.*[208] The latter stated that the exception of mineral lands as reserved to the United States under section 3 also applied to section 2 and that, therefore, the United States had a right to the oil and gas underneath the right-of-way. Finding these decisions dispositive of the issue in the case before it, the district court held that Union Pacific had only surface rights in the section 2 right-of-way grant.[209]

The Tenth Circuit reached a different conclusion for those lands granted as inducement for railroad construction under section 3 of the Act. These grants were for odd-numbered township sections located in Kansas. Union Pacific's successors conveyed these lands to the present title holder, who had given Energy Transportation Systems an underground easement for its pipeline. Union Pacific argued that the *Northern Pacific* decision had precluded the original railroad company from conveying its mineral estate in the right-of-way adjacent to the odd-numbered sections when it transferred its title to a third party. The court of appeals noted that the *Northern*

202. Section 3 of the Act provides, in part:

> [T]here be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad . . . , every alternate section of public land, designated by odd numbers . . . , and within the limits of ten miles on each side of said road, ...

203. 606 F.2d at 937-38.

204. 435 F. Supp. at 319.

205. 190 U.S. 267 (1903).

206. 606 F.2d at 936.

207. 353 U.S. 112 (1957). In this case, the Court held that the reservation of "mineral lands" in section 3 of the Act also applied to the section 2 right-of-way grants and that, therefore, Union Pacific had no right to drill oil and gas wells on right-of-way lands.

208. 379 F.2d 635, 640 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967).

209. 606 F.2d at 937.

Pacific Court's ruling, that a railroad cannot alienate its right-of-way grant, pertained only to the surface estate. The Tenth Circuit declared that the servient mineral estate could be conveyed by the railroad.[210]

The appellate court's rationale is questionable because, if the railroad did not have an interest in the mineral estate sufficient to justify oil and gas exploration, as determined by the Supreme Court in *Union Pacific*,[211] it appears implausible to assert that the railroad had the right to convey the mineral interest to a third party. A logical extension of the *Union Pacific* decision would be a holding that the mineral estate remained in the United States and that any easement in the underground area should be obtained from the United States as holder of the mineral interest. In any event, this decision has resolved an important issue involving the right of a pipeline company to cross the subsurface of railroad rights-of-way and has helped open the way for development of coal slurry pipelines.

2. Railroad Rights-of-Way and State In-Lieu Selections

The Tenth Circuit addressed another aspect of railroad rights-of-way in *Wyoming v. Andrus*.[212] Wyoming filed a patent application for a school section with the Wyoming BLM office in 1970,[213] excluding that portion of the school section traversed by a railroad right-of-way. The BLM informed Wyoming that it would issue a patent for the entire school section, subject to the right-of-way easement. Wyoming then filed for a lieu land selection[214] to indemnify the state for the right-of-way area. The BLM refused to allow the selection, stating that Wyoming was not entitled to lieu lands as indemnification for the easement. Wyoming appealed the decision to the Interior Board of Land Appeals (IBLA), which upheld the BLM decision.[215] The District Court for the District of Wyoming affirmed the IBLA decision.[216]

The issue presented on appeal was whether the grant of a right-of-way to a railroad, prior to the enactment of the Wyoming Enabling Act, was a "prior disposition" that entitled Wyoming to lieu selections for that part of the school section sold or otherwise disposed of.[217] In finding that railroad rights-of-way create surface rights only, with certain profit à prendre rights to coal and iron ore, the court of appeals affirmed other recent decisions

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210. *Id.* at 938.

211. The 1957 *Union Pacific* decision implied that the railroad never had a right to mineral lands as part of those alternate, odd-numbered sections granted by section 3 of the Act. 353 U.S. at 114.

212. 602 F.2d 1379 (10th Cir. 1979).

213. Wyoming filed the application pursuant to 43 U.S.C. § 871(a) (1970), which statute authorized the issuance of patents to states for certain township school sections. This statute was repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1976). Patent applications which already were pending are protected under a savings clause in 43 U.S.C. § 1701 (1976).

214. Under 43 U.S.C. §§ 851-852 (1976), states are permitted to select indemnity lands, of equal acreage, for those school sections to which the state was entitled but in which title did not vest because of homestead claims, mining entrys, Indian, military or other reservations by the United States, and those lands "otherwise disposed of by the United States . . . ." *See also* Act of July 10, 1890, ch. 664 (Wyoming's Enabling Act), 26 Stat. 222.

215. State of Wyoming, 27 I.B.L.A. 137, 83 Interior Dec. 364 (1976).

216. Wyoming v. Andrus, 436 F. Supp. 933 (D. Wyo. 1977).

217. 43 U.S.C. § 851 (1976). *See* note 214 *supra*.

concerning the type of interest conveyed by these grants.[218] The court noted that, under the Act of July 1, 1862,[219] Union Pacific Railroad Company was given surface use only, through the grants of rights-of-way, with the United States retaining a mineral reservation, except for coal and iron ore incident to the use of the right-of-way.[220] The appellate court also relied on the assumption that Congress was aware of the Union Pacific's right-of-way when it passed the General Indemnification Act of 1891,[221] which Act listed the types of prior dispositions subject to in lieu selections by the states. Since railroad rights-of-way were not listed specifically among those dispositions for which a state could select lieu lands, the appellate court reasoned that Congress did not intend to include the right-of-way grants as prior dispositions.[222]

The Tenth Circuit limited its earlier decision of *Wyoming v. Udall*,[223] wherein the court had held that although the 1862 Act did not give Union Pacific or Wyoming a mineral interest in railroad rights-of-way, the right-of-way grant constituted a "prior disposition."[224] The court reconciled this latest decision by contending that its previous statements were dicta. The court further noted that Wyoming's continuing claim to a reversionary interest in the right-of-way,[225] was inconsistent with its argument that the land had been previously disposed.[226] Since the fee interest in these rights-of-way remained in the United States, and since the legislative history and a contemporaneous opinion by the Secretary[227] indicated that these lands were not considered among those subject to in lieu selections, the court of appeals held that Wyoming had no right to claim lieu land for that portion of the school section crossed by the railroad right-of-way.[228]

218. *E.g.*, Energy Transp. Systems, Inc. v. Union Pac. R.R. Co., 606 F.2d 934 (10th Cir. 1979). *See* text accompanying notes 198-211 *supra*.

219. 12 Stat. 489 (1862).

220. United States v. Union Pac. R.R. Co., 353 U.S. 113 (1957).

221. Act of Feb. 28, 1891, ch. 384, 26 Stat. 796 (codified at 43 U.S.C. § 851 (1976)).

222. 602 F.2d at 1384.

223. 379 F.2d 635 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967).

224. *Id.*

225. 602 F.2d at 1384. The court noted that its decision, in *Wyoming v. Udall*, that "neither the railroad nor Wyoming was entitled to these minerals" indicated that there was no disposition of these lands by the United States in spite of its later use of the term "prior disposition." This claim was brought under the Railroad Right-of-Way Abandonment Act, 43 U.S.C. § 912 (1976).

226. 602 F.2d at 1384.

227. The court gave considerable weight to an opinion issued by the Secretary of the Interior at the time of Wyoming's Enabling Act in 1891, which stated, in reference to in lieu selections:

> No provision is made by law for indemnifying the state in cases where the school section is crossed by railroads, claiming the right of way either under the act of March 3, 1875, or by a special grant from Congress . . . ." 13 Pub. Lands Dec. 454-55 (1891).

228. 602 F.2d at 1385-87. The debate over in lieu selections continues. The Supreme Court recently overturned a Tenth Circuit decision which permitted states to select in lieu lands of comparable mineral value to those school sections lost because of prior dispositions. Utah v. Kleppe, 586 F.2d 756 (10th Cir. 1978). In Andrus v. Utah, 100 S. Ct. 1803 (1980), the Court held that it was within the discretionary power of the Secretary to determine those lands available for in lieu selections, even if their mineral value was much less than those lands lost. Utah was claiming rights to lands rich in oil shale. *See United States Supreme Court Review of Tenth Circuit Decisions* within this Seventh Annual Tenth Circuit Survey, *infra* at 534.

IV. Environmental Law

Two cases of importance in the environmental area were decided by the Tenth Circuit in the last year. In *Environmental Defense Fund v. Andrus*,[229] the court of appeals held that variations in an approved plan for the production of oil shale on federally leased land did not require a supplemental Environmental Impact Statement (EIS), because the modifications would not cause any different or more severe effects upon the surrounding area than those environmental effects dealt with in the original EIS. In *United States v. Texas Pipeline Co.*,[230] the court reaffirmed its definition of "navigable stream" under the Clean Water Act as established in *United States v. Earth Sciences, Inc.*[231]

A. *Modification of Development Plans*

The imminent federal oil shale leasing program by the Department of Interior has come under attack by environmental groups. The possibilities of severe and permanent alteration of land, air, and water quality incident to a large scale oil shale industry has prompted environmental groups to challenge all aspects of the proposed leasing scheme. When Interior first proposed an experimental prototype oil shale leasing program in 1969, the Secretary issued a seven step procedure to be followed, with an exhaustive, comprehensive EIS for all aspects of the proposed oil shale leasing program.[232] After approval of the final EIS, bonus bids were accepted. Two of the lessees conducted baseline studies for site-specific analyses and issued final environmental baseline reports in October, 1976. Detailed Development Plans (DDP's) also were prepared in 1976. In 1977, modifications were incorporated into the DDP's, principally for "in situ" retorting. The Secretary determined that no supplemental EIS was necessary for these DDP's. The Environmental Defense Fund filed suit to force the Secretary to prepare a supplemental EIS for the "in situ" modifications.[233]

Finding that a supplemental EIS for the modified "in situ" DDP's was not necessary, the court of appeals emphasized that the requirements of the National Environmental Protection Act (NEPA) are procedural and do not control internal departmental decision-making.[234] The court also reiterated

229. 619 F.2d 1368 (10th Cir. 1980).

230. 611 F.2d 345 (10th Cir. 1979).

231. 599 F.2d 368 (10th Cir. 1979).

232. The procedure included:

1) promulgation of an EIS;
2) approval of an overall prototype program based on the environmental description and analysis of the EIS;
3) solicitation of competitive bids and awarding of leases for the tracts reviewed in the EIS;
4) filing by the lessees of Detailed Development Plans (DDP's), supplements and modifications thereto, if needed;
5) review and approval of the DDP's by the area oil shale supervisor;
6) specific site authorizations, such as rights-of-way; and
7) development of deposits on leased tracts in compliance with the terms of the lease and the DDP.

619 F.2d at 1371.

233. *Id.* at 1370-74.

234. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,

its position that remote environmental effects of a proposed federal agency action do not need detailed discussion in an EIS. The Tenth Circuit adhered to the "rule of reason" standard established by the District of Columbia Court of Appeals in *NRDC v. Morton*.[235] Noting that the Environmental Defense Fund had not disputed the adequacy of the 1973 EIS but was arguing that supplemental, site-specific EIS's were required for the new, modified in-situ retorting, the Tenth Circuit stated that NEPA did not mandate a detailed analysis of every federal implementing action. NEPA requires only that the agency take a "hard look" at the alternatives.[236]

Relying on the standard of review for determining the adequacy of an EIS set forth in *Save Our Invaluable Land (Soil), Inc. v. Needham*,[237] the Tenth Circuit found that the 1973 EIS, which included programmatic, site-specific, and regional analyses of the proposed oil shale leasing program, had adequately discussed the environmental effects of the modified in-situ retorting.[238] Acknowledging that the modified in-situ plans had not been specifically addressed, the court nevertheless held that the in-situ retorting modification did not demonstrate any "unknown, undescribed, or unidentified" effects on the environment not previously noted in the original EIS.[239] Because the 1973 EIS contained a reasonable, good faith discussion of each of the five NEPA procedural requirements for all future actions under the oil shale leasing program, no separate, supplemental EIS was required.[240] Following the decision in *Kleppe v. Sierra Club*,[241] the Tenth Circuit restated that an EIS need not resolve all of the issues incident to a proposed governmental action. The EIS need only insure that all issues are identified fully, so that

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435 U.S. 519 (1978); Jette v. Bergland, 579 F.2d 59 (10th Cir. 1978); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

235. 458 F.2d 827 (D.C. Cir. 1972) wherein the court stated that:

> We reiterate that the discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned.
>
> . . . .
>
> . . . Furthermore, the requirement in NEPA of discussion as to reasonable alternatives does not require "crystal ball" inquiry . . . . The statute must be construed in the light of reason . . . .

Id. at 836-37.

236. *See* Manygoats v. Kleppe, 558 F.2d 556, 560 (10th Cir. 1977).

237. 542 F.2d 539 (10th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). The standard of review established by the Tenth Circuit to determine EIS adequacy was 1) whether the EIS addressed the five requirements set forth in 42 U.S.C. § 4332(2)(C) (1976); and 2) whether the EIS was a good faith effort to comply with NEPA. *Id.* at 542-43.

238. 619 F.2d at 1382.

239. *Id.*

240. *Id.*

241. 427 U.S. 390 (1976). In *Kleppe*, the Court held that a regional EIS was not a prerequisite for Interior's issuance of coal leases or for other activities incident to coal leasing. The Secretary was in the process of completing an interim report on the potential impact of coal development in the Northern Great Plains when the Sierra Club sued to enjoin him from further leasing until the regional EIS was prepared. Noting that the Secretary had not proposed any legislation or plan for the development of coal on a regional basis, the Court held that the triggering provisions of 42 U.S.C. § 4332(2)(C) (1976) had not been met. *Id.* at 398-402. The Tenth Circuit found that implicit in the *Kleppe* decision was the approval by the Court of the Secretary's procedures and actions in the preparation of the interim report, procedures similar to the seven-step process employed in the instant case. 619 F.2d at 1377.

agency personnel can make informed and reasoned choices.[242]

B. *"Navigable Waters" in the Clean Water Act*

In *United States v. Texas Pipeline Co.*,[243] the Tenth Circuit reaffirmed the definition of "navigable waters" that it had established in *United States v. Earth Sciences, Inc.*[244] A pipeline owned by Texas Pipeline Company had been hit by a bulldozer, causing the release of the equivalent of 600 barrels of oil. Texas Pipeline immediately notified the Coast Guard and acted expeditiously in constructing a temporary dam to contain the oil, but the Coast Guard, after commending Texas Pipeline for its efforts, levied a $2,500 civil penalty against the company under provisions of the Clean Water Act.[245] Texas Pipeline argued that because the creek into which the oil had run was not a "navigable water" the provisions of the Act were not triggered. The creek, an unnamed tributary of Clear Boggy Creek, ultimately emptied into Red River; the tributary and creek had intermittent flows, generally only after heavy rainfalls.[246]

The Tenth Circuit held, as it had in *Earth Sciences*, that "navigable waters" under the Clean Water Act had a much broader definition than that which is accorded the conventional meaning of "navigable."[247] The stream involved in the *Earth Sciences* case was confined to one county where two dams collected the entire flow; yet the stream was determined to be navigable because of its impact on interstate commerce.[248] The water from the unnamed tributary in the instant case eventually flowed into a large interstate river; therefore, the stream was included in the definition of navigable waters contained in the Clean Water Act, regardless of whether there was any water flowing in it, or in Clear Boggy Creek, at the time of the oil spill-

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242. 619 F.2d at 1378.

243. 611 F.2d 345 (10th Cir. 1979).

244. 599 F.2d 368 (10th Cir. 1979).

245. 33 U.S.C. § 1321(b) (1976), which provides, in part:

> (3) The discharge of oil or hazardous substances into or upon the *navigable waters* of the United States . . . is prohibited. . . .
>
> . . . .
>
> (6) Any owner or operator of any . . . , on shore facility, . . . from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. (emphasis added).

For a discussion of the fifth amendment implications of these provisions of the Clean Water Act, see the comments on Ward v. Coleman, 598 F.2d 1187 (10th Cir. 1979), *rev'd*, 100 S. Ct. 2636 (1980) in *United States Supreme Court Review of Tenth Circuit Decisions* within this Seventh Annual Tenth Circuit Survey, *infra* at 531.

246. 611 F.2d at 345.

247. *Id.* at 347. The definition of "navigable waters" in 33 U.S.C. § 1363(7) (1976) is "the waters of the United States, including the territorial seas."

248. 599 F.2d at 374-75. Although recognizing that, by stipulation of both parties, the stream was not "navigable in fact nor is it used to transport any goods or materials," the Tenth Circuit found that the stream supported trout and beaver and water from the stream was used for agricultural irrigation, from which products were "sold in interstate commerce." *Id.* at 375. This constituted a sufficient nexus to interstate commerce to bring the stream within the meaning of "navigable waters" as intended by Congress. *See* S. REP. NO. 1236, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3822.

age.[249]

V. WATER LAW

The Tenth Circuit decided two cases in the water law area during the past year. *Jicarilla Apache Tribe v. United States* has been discussed previously.[250] The other water case concerned a continuing controversy over the reservoir rights of Denver vis à vis the United States. In *United States v. Northern Colorado Water Conservancy District*[251] the Tenth Circuit upheld a district court decision which had concluded that Denver was precluded from raising legal protests against the release of water from the Dillon Reservoir to the Green Mountain Reservoir because of the city's participation in stipulations in previous court decrees.

Green Mountain Reservoir was constructed in 1943 on the Blue River on the eastern slope of the Colorado Rockies as part of the Colorado-Big Thompson Project. The purpose of the project was to bring western slope waters to the more developed eastern range. Approximately one-third of the reservoir water is returned to the western slope, while the remainder is used "primarily for power purposes" on the eastern slope. After the water is released, it is available without charge "to supply existing irrigation and domestic appropriations of water."[252] In 1955, a stipulation was agreed upon between the United States and several state appropriators, including Denver, as to the water rights for the Colorado-Big Thompson Project and other water uses on the Blue River. Section 4(a) of the stipulation, which was incorporated into the 1955 decree of the United States District Court for the District of Colorado, reads:

> The rights of the City and County of Denver and the City of Colorado Springs are limited solely to municipal purposes as herein described and *subject to the rights of the United States of America* to fill each year the Green Mountain Reservoir to a capacity of 154,645 acre feet for utilization by the United States of America [for power generation].[253]

After Denver completed construction of the Dillon Reservoir, upstream from the Green Mountain Reservoir, in 1963, the city began to impound water normally flowing into the federally-operated facility. Suit was filed by the United States to enjoin Denver from continuing this impoundment; another stipulation was entered by Denver following an April, 1964 decree. In this second stipulated agreement, Denver acknowledged that the United States had a right to fill the Green Mountain Reservoir to capacity each year and that "Denver and Colorado Springs may not exercise their decreed right to divert the waters of the Blue River except with approval by the Secretary of the Interior."[254]

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249. 611 F.2d at 347.
250. See text accompanying notes 68-96 *supra*.
251. 608 F.2d 422 (10th Cir. 1979).
252. *Id.* at 425 (quoting S. DOC. NO. 80, 75th Cong., 1st Sess. (1937)).
253. *Id.* at 425-26.
254. *Id.* at 427.

In the summer of 1977, following a winter of below average snowfall, Denver refused to deliver 28,622 acre feet of water to the Green Mountain Reservoir. The Regional Director of the Bureau of Reclamation stated that this water was necessary to fill the Reservoir to its decreed capacity. A declaratory judgment action was subsequently filed against Denver.[255]

The central issue confronting the Tenth Circuit was the interpretation of a clause in the Senate document concerning the operation of the Green Mountain Reservoir as it related to the subsequent stipulations. Denver contended that since the primary purpose of the water stored in the Green Mountain Reservoir was for "power purposes," the city should be able to deliver to the United States an amount of electrical power equivalent to that which would be generated if the water it was impounding in Dillon Reservoir were released. Denver asserted that because it had the right to use the water for agricultural and domestic purposes, the United States electrical generating right was subservient to Denver's uses.[256]

The Tenth Circuit noted that Denver was neither a beneficiary of the Colorado-Big Thompson Project nor a party to the Colorado River Compact of 1922. Because of this, the city could not raise issues such as beneficial use. Denver's rights were deemed limited to the 1955 and 1964 court-approved stipulations, which expressly required Denver to release the water stored in Dillon Reservoir until the storage capacity of the Green Mountain Reservoir was filled. The court of appeals affirmed the lower court's finding that:

> [T]he 1955 decree determined that the United States' right to the water [from the Blue River] was superior to Denver's; under the 1964 decree it was provided that Denver had no right, title or interest in the Green Mountain Reservoir or in the water which the United States may or is entitled to store therein; [and that] under the 1964 decree, . . . Denver could not divert the Blue River water except with approval by the Secretary.[257]

Although no new legal ground was broken by this Tenth Circuit water decision, the settlement of the case should resolve finally the long-standing dispute as to which water rights are superior on the transmountain diversion affected by the Colorado-Big Thompson Project. It is now apparent that Denver's water rights in the Dillon Reservoir are subject to the superior rights of the United States to fill the Green Mountain Reservoir to its annual decreed capacity.

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255. *Id.* at 427-28.
256. *Id.* at 428.
257. *Id.* at 428-29.