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Lands and Natural Resources

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LANDS AND NATURAL RESOURCES

OVERVIEW

During the survey period, the Tenth Circuit Court of Appeals handed down five lands and natural resources opinions which merit review. The first case revisits a controversial Indian reservation boundary dispute.[1] A pair of cases address navigational waters issues: the first concerns the impact of a navigational servitude on Indian lands,[2] the second deals with a quiet title argument.[3] The fourth case resolves a mineral patent question.[4] The final case surveyed deals with an environmental impact statement related to a major water diversion project.[5]

These five lands and natural resources decisions reflect an inconsistent approach taken by the Tenth Circuit: two of the cases adhere to the Tenth Circuit's traditional approach in protecting the regulatory power which governmental agencies wield over lands and natural resources, while three of the cases demonstrate a departure from the traditional deference to governmental authority.

I. BOUNDARY DISPUTES

A. *Ute Indian Tribe v. Utah*

1. Background

The primary issue before the United States District Court for the District of Utah was whether the historic Uncompahgre and Uintah Indian Reservations were disestablished[6] by congressional enactments[7] which opened the unallotted and unsettled lands of those reservations for entry and settlement.[8] The case focused on determining what portions of those reservations were to be considered "Indian Country" within the meaning of 18 U.S.C. section 1151.[9]

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1. Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 3291 (1986).

2. Cherokee Nation v. United States, 782 F.2d 871 (10th Cir. 1986).

3. Utah v. United States, 780 F.2d 1515 (10th Cir. 1985).

4. Poverty Flats Land & Cattle Co. v. United States, 788 F.2d 676 (10th Cir. 1986).

5. Lidstone v. Block, 773 F.2d 1135 (10th Cir. 1985).

6. Disestablishment indicates termination of the reservation and total relinquishment of Indian interests in the land. Diminishment refers to a change in boundaries and subsequent reduction in the size of the reservation. *Ute Indian Tribe*, 521 F. Supp. at 1085-92 (D. Utah 1981).

7. *See infra* note 10.

8. The district court first discussed the threshold issue of criminal jurisdiction over members of the Ute Indian Tribe. *See* Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1078 (D. Utah 1981). Significant jurisdictional relationships between the State, local governments and the Tribe are dependent upon whether lands retain reservation status. Exclusive federal and tribal jurisdiction over the criminal conduct of tribal members extends only to "Indian Country." *See infra* note 9. If the lands are outside of "Indian Country," the State and its local government agencies have criminal jurisdiction over tribal members. *See, e.g.*, DeCoteau v. District County Court, 420 U.S. 425, 427 (1975).

9. The term "Indian Country" includes "all land within the limits of any Indian res-

The district court determined that the Uncompahgre Reservation had been disestablished, but the Uintah Reservation had only been diminished to the extent of certain gilsonite, forest, and reclamation withdrawals made by the federal government.[10] The Ute Indian Tribe appealed this adverse judgment to the Tenth Circuit.[11] The Tenth Circuit affirmed and reversed in part the lower court's decision.[12] Upon motion for rehearing, however, the Tenth Circuit reversed the district court, holding that the Uncompahgre Reservation had not been disestablished and the Uintah Reservation was not diminished by the withdrawal of forest lands. The appellate court affirmed the trial court's decision in all other respects.[13]

2. The Decision of the Tenth Circuit

In *Ute Indian Tribe v. Utah*,[14] the first of several boundary issues presented to the court concerned a boundary-line dispute involving the Uintah Reservation.[15] The second issue before the court dealt with the Uintah Forest Reserve and its relationship to the Uintah Reservation.[16]

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ervation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a) (1982).

10. *Ute Indian Tribe*, 521 F. Supp. at 1153-54. The district court concluded that (1) Congress disestablished the original Uncompahgre pursuant to the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87 (1899); (2) the original Uintah Reservation had been diminished by Congress through the withdrawal of a 7,040-acre tract known as the Gilsonite Strip, Act of May 24, 1888, ch. 310, 25 Stat. 157 (1889), through the withdrawal of approximately one million acres for inclusion in a national forest reserve pursuant to the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1070 (1906), and through the extinguishment of approximately 56,000 acres for the Strawberry Reclamation and Irrigation Project under the Act of April 4, 1910, ch. 140, 36 Stat. 269, 285 (1911); (3) except as expressly diminished, the Uintah Reservation lands retained continuing status as reservation land, and as "Indian Country" as that term is defined in 18 U.S.C. § 1151(a) (1982); and (4) the reservation boundaries of the former Uintah reservation were subsequently extended by Congress to include the lands known as the Hill Creek Extension by the Act of March 11, 1948, ch. 108, 62 Stat. 72 (1949). *Id.*

11. Ute Indian Tribe v. Utah, 716 F.2d 1298 (10th Cir. 1983).

12. Chief Judge Seth, writing for the court, affirmed the trial court's holding as to the disestablishment of the original Uncompahgre reservation, the diminishment of the Uintah Valley reservation, and the incorporation of the 510,000-acre Hill Creek Extension within the Uintah and Ouray reservation. *Ute Indian Tribe*, 716 F.2d at 1315. However, the court reversed the district court's decision "that the unallotted lands at the opening [of the reservation] remained part of the reservation." *Id.* Instead, the court held that the Indian Appropriations Acts of 1902, 1903, 1904 and 1905, opening the Uintah reservation retracted reservation status and, therefore, the unallotted lands became part of the public domain. *Id.* at 1308-13; *see* Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-64 (1903); Act of March 3, 1903, ch. 994, 32 Stat. 982 (1903); Act of April 21, 1904, ch. 1402, 33 Stat. 189, 207 (1904); Act of March 3, 1905, ch. 1479, 33 Stat. 1048 (1905). Judge Doyle dissented. *Ute Indian Tribe*, 716 F.2d at 1315-22 (Doyle, J., dissenting). For an insightful overview of the Tenth Circuit's earlier opinion in this case see note, *Eleventh Annual Tenth Circuit Survey: Lands and Natural Resources*, 62 DEN. U.L. REV. 273, 273-78 (1984).

13. Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 3291 (1986). Judge Doyle wrote the opinion of the court. The majority of the court joined Judge Seymour in a concurring opinion. Judge Seth, joined by Judge Barrett, dissented.

14. *Id.*

15. *Id.* at 1088-89.

16. *Id.* at 1089-90.

Finally, the court addressed the status of the Uncompahgre Reservation.[17]

a. *The* Solem *Test for Determining Disestablishment*

In light of the recent United States Supreme Court decision in *Solem v. Bartlett*,[18] the initial decisions of the trial court and Tenth Circuit became suspect and, therefore, warranted review.[19] Thus, in this decision, the Tenth Circuit considered disestablishment and diminishment issues utilizing the Supreme Court's newly formulated *Solem* test.

Historically, the Supreme Court mandated careful and specific review of events affecting the status of an Indian reservation to determine "whether a congressional determination to terminate is 'expressed on the face of the Act or [is] clear from the surrounding circumstances and legislative history.' "[20] The 1984 Supreme Court decision in *Solem* confirmed that courts have only two alternative tests to determine whether Congress intended to disestablish or diminish an Indian reservation. Furthermore, the Supreme Court in *Solem* cautioned that under either test "[d]iminishment, moreover, will not be lightly inferred. Our analysis . . . requires that Congress clearly evince an 'intent to change boundaries' before diminishment will be found."[21] The first test concentrates on the statutory language used to open the Indian lands. The Court explained that "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands."[22] If such language is paired with an unconditional commitment to pay a sum certain for the lands, "there is an almost insurmountable presumption that Congress" intended to diminish the reservation.[23] In the absence of such explict statutory language, the alternative test focuses on whether "events surrounding the passage of a surplus land act . . . unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation."[24]

b. *The Uintah Reservation*

Utilizing the *Solem* test as the standard for review in the case at bar,

17. *Id.* at 1090-93.

18. 465 U.S. 463 (1984).

19. *See* note, *Eleventh Annual Tenth Circuit Survey: Lands and Natural Resources*, 62 DEN. U.L. REV. 273, 276-78 (1984).

20. Rosebud Sioux Tribe v. Kneipp, 430 U.S. 584, 588 n.4 (1977) (quoting Mattz v. Arnett, 412 U.S. 481, 505 (1973)); *see* Seymour v. Superintendent, 368 U.S. 351 (1962).

21. *Solem*, 465 U.S. at 470 (quoting Rosebud Sioux Tribe, 430 U.S. at 615).

22. *Id.* (citing DeCoteau v. District County Court, 420 U.S. 425, 444-45 (1975)); *see also Seymour*, 368 U.S. at 354-57 (1962).

23. *Solem*, 465 U.S. at 470, 471; *see, e.g.*, *DeCoteau*, 420 U.S. at 447-48 (Agreement between tribe and United States not only opened all unallotted lands for settlement, but also appropriated and vested in the tribe a sum certain per acre in exchange for relinquishment of all unallotted lands.).

24. *Solem*, 465 U.S. at 471.

the Tenth Circuit found neither explicit nor implicit evidence in any congressional enactment of intent to diminish or disestablish the Uncompahgre and Uintah Reservation.[25] Judge Doyle, writing for the court, supported the district court's finding that Congress preserved the Uintah Reservation when it opened a portion of the unallotted lands to non-Indian homestead and townsite entry in 1905.[26] Judge Doyle based his decision on two factors: first, the Uintah Reservation was clearly established as a permanent home for the Ute Tribe by the Act of May 5, 1864,[27] and second, in 1905, the Indian Appropriations Act[28] did nothing more than open the Uintah Reservation for non-Indian settlement. Utilizing the standards set forth in *Solem*, Judge Doyle found it significant that the 1905 Act failed to include any language of cession or words "evidencing the present and total surrender of all tribal interests."[29] It was noted that the Ute Indians showed a complete unwillingness to relinquish their reservation[30] and "the language used in that Act, is sufficiently clear to support a finding that the Act [did not disestablish or diminish] the Uintah Reservation."[31]

In summary, the court believed that Congress did not disestablish the entire Uintah Valley Reservation. The Utes were unwilling to permit the Reservation to be allotted, but did acquiesce to a limited entry designed by Congress to encourage gradual non-Indian settlement for "the purpose[s], in part, of promoting interaction between the races and of encouraging Indians to adopt white ways."[32] Furthermore, the court's analysis of the legislative history failed to show a "clear" congressional intent to terminate the Uintah Reservation.[33]

In marked contrast to Judge Doyle's opinion, Judge Seth's dissent[34] supported diminishment of the Uintah Reservation. His opinion looked to Congress' withdrawal of land as indicative of diminishment.[35] Moreover, Judge Seth contended that when Congress provided for land allotments to individual Indians,[36] the unallotted lands were returned to the public domain.[37]

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25. *Ute Indian Tribe*, 773 F.2d at 1093.

26. Judge Doyle's opinion was in accordance with his dissent in the earlier panel decision of this identical case, Ute Indian Tribe v. Utah, 716 F.2d 1315-22 (10th Cir. 1983) (Doyle, J., dissenting). *Ute Indian Tribe*, 773 F.2d at 1089; *see supra* note 12.

27. Act of May 5, 1864, ch. 79, 13 Stat. 64 (1865).

28. Act of March 3, 1905, ch. 1479, 33 Stat. 1048 (1906).

29. *Ute Indian Tribe*, 773 F.2d at 1088; Solem v. Bartlett, 465 U.S. 463, 470 (1984).

30. *Ute Indian Tribe*, 773 F.2d at 1089; *see also* Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1118 (D. Utah 1981) ("Indian consent to the opening [for settlement] of the Uintah Reservation was wholly lacking in 1903, and never subsequently appeared.").

31. *Ute Indian Tribe*, 773 F.2d at 1088.

32. *See* Matt v. Arnett, 412 U.S. at 496 (1973).

33. *Ute Indian Tribe*, 773 F.2d at 1089. Reiterating the test in *Solem*, Judge Doyle stated "that in the absence of 'substantial and compelling evidence of a congressional intention to diminish Indian lands,' the courts' 'traditional solicitude for the Indian tribes' must compel a finding that 'the old reservation boundaries survived the opening.' " *Id.* (quoting *Solem*, 465 U.S. at 472); *see also* Mattz, 412 U.S. at 505.

34. *Ute Indian Tribe*, 773 F.2d at 1101. (Seth, J., dissenting).

35. *Id.* at 1114-16 (Seth, J., dissenting).

36. *Id.* at 1109 (Seth, J., dissenting).

37. *Id.* (Seth, J., dissenting). Judge Seth's "public domain" argument formed the ba-

c. *Uintah Forest Reserve*

The second boundary issue involved the status of the Uintah Forest Reserve which was set aside under the authority of the Act of March 3, 1905.[38] That Act provided that certain lands within the Uintah Reservation be set apart and reserved.[39] The Act provided only for a change in federal management of the land and nothing in the Act referred to a relinquishment of boundaries.[40] Furthermore, the court indicated that there is nothing in the Act to indicate that the Ute Indians ceded their interests in the forest lands.[41] Thus, Judge Doyle wrote "[t]here is clear evidence that Congress did not intend to extinguish the forest lands of the Uintah Reservation."[42]

The Supreme Court in *Solem* confirmed that there must be clear congressional intent to "change boundaries" before diminishment will be found.[43] Following *Solem*, the Tenth Circuit concluded that the setting aside of national forest lands in 1905 failed to indicate such an intent to change boundaries.[44] The court also noted that the only changes which have occurred since 1905 are that non-Indians as well as Indians now hunt on the national forest lands, a successor federal agency administers the lands, and in 1931 the Indians were paid for a portion of the value of the timber reserves.[45]

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sis for his opinion in Ute Indian Tribe v. Utah, 716 F.2d 1298 (10th Cir. 1983). *See supra* note 12.

38. *Ute Indian Tribe*, 773 F.2d at 1089-90; *see* Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1070 (1906).

39. Act of March 3, 1905, ch. 1479, 33 Stat. 1048 (1906). The Act opened the unallotted tribal lands to non-Indian entry and authorized the President to "set apart and reserve forest lands." *Id.* at 1070. The Act also allowed the President to "set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development," and over fifty thousand acres of reservation lands "were withdrawn from disposal" for reclamation purposes. *Id.*; *see also* Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1121 (D. Utah 1981).

The Congressional reclamation authorization in 1905 to the President was limited to reserving certain of the unallotted lands for homestead and townsite entry. *Ute Indian Tribe*, 521 F. Supp. at 1133. Significantly, in 1910 Congress passed a second statute which clearly extinguished all Indian claim, title and interest in the lands set aside for reclamation. Act of April 4, 1910, ch. 140, 36 Stat. 269, 285 (1911). It is important to note, however, that a similar statute was never enacted which would have extinguished the Ute Indians' title and interest to the forest reserve land. *Ute Indian Tribe*, 773 F.2d at 1090.

In 1931, Congress enacted provisions to compensate the Utes for 973,779 acres of the 1,010,000 acres of forest lands set aside in 1905. *See* Act of February 13, 1931, ch. 124, 46 Stat. 1092 (1931); *Ute Indian Tribe*, 773 F.2d at 1090. At that time, Congress clarified the Indians' legal and equitable interests in the lands set aside in 1905. Therefore, by one statute, Congress extinguished all Indian title and control over the reclamation lands, Act of April 4, 1910, ch. 140, 36 Stat. 269, 285 (1911); yet in the other, Congress compensated the Utes for the value of the land, but did not extinguish all of their title, claim and interest. Act of February 13, 1931, ch. 124, 46 Stat. 1092 (1931).

40. *Ute Indian Tribe*, 773 F.2d at 1090; *see* Act of February 1, 1905, ch. 288, 33 Stat. 628 (1905) (the administrative authority over the forest lands had been transferred from the Secretary of the Interior to the Secretary of Agriculture a month prior to the enactment).

41. *Ute Indian Tribe*, 773 F.2d at 1090; *see* Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1060-70.

42. *Ute Indian Tribe*, 773 F.2d at 1090.

43. *Solem*, 465 U.S. at 470.

44. *Ute Indian Tribe*, 773 F.2d at 1090.

45. *Id.*

Judge Seymour, in his concurring opinion, analyzed the effect of the 1905 Act as it related to the establishment of the Uintah Forest Reserve.[46] Judge Seymour examined the language of the 1905 Act and then reviewed previous congressional actions relating to changes in reservation land status,[47] as well as congressional motives behind the creation of the forest reserve,[48] to support his view that Congress elected not to extinguish the Uintah Reservation boundary when it created the Uintah Forest Reserve.[49]

In his dissenting opinion, Judge Seth concluded that "[n]o express language of termination of Indian jurisdiction over the Forest Service lands or an express extinguishment of the reservation boundaries was required."[50] Judge Seth supported this view by pointing to the fact that the management of the forest lands was transferred from the Department of the Interior to the Department of Agriculture.[51] Therefore, the dissenting view interpreted the 1905 Act as withdrawing forest lands from the reservation and placing those lands under the administration of the Department of Agriculture. The opinion indicated that the laws and regulations of the Department of Agriculture are entirely different from the laws and regulations governing Indians and Indian reservations and stressed that decisions regarding forest lands should be viewed in terms of the standards of the Department of Agriculture and not of the Department of Interior.[52]

d. *Uncompahgre Reservation*

The final issue before the court "is said to be the least popular of the group."[53] The Uncompahgre Reservation covers approximately 2,000,000 acres[54] of land in eastern Utah and since its establishment in 1882 very few Indians or non-Indians have elected to live on the reser-

46. *Id.* at 1099-1101 (Seymour, J., concurring). Judge Seymour was joined by Chief Judge Holloway and Judges McKay and Logan to form a majority bloc.

47. *Id.* at 1093-98 (Seymour, J., concurring). Judge Seymour, focusing on the surplus land acts enacted at the turn of the century, concluded that the statutes were ambiguous in the use of "public domain" language and, therefore, explicit language of disestablishment was not present. Furthermore, he relied on the apparent confusion on the part of Congress concerning the exact nature of the tribe's rights and interests in the land. *Id.* at 1097-98.

48. The 1905 Act "merely contemplated the opening of the reservation to non-Indians" rather than disestablishing the reservation. *Id.* at 1099. Thus, the Act did not terminate the Indians' interests, but preserved them.

49. *Id.* at 1099-1100.

50. *Id.* at 1114 (Seth, J., dissenting). Judge Seth initially argued that the transfer of lands from reservation status to Forest Reserve status for public use evidenced an intent to remove the lands from the reservation. *Id.* (Seth, J., dissenting).

51. *Id.* at 1115 (Seth, J., dissenting).

52. *Id.* (Seth, J., dissenting). Such laws and regulations may be in conflict with one another. An example of such a conflict arises when Forest Service regulations regarding hunting and fishing on Forest Service lands differ from hunting and fishing laws regarding Indians. *See, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 668-69, *modified*, 444 U.S. 816 (1979); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 176 n.15 (1977).

53. *Ute Indian Tribe*, 773 F.2d at 1090.

54. *Ute Indian Tribe*, 521 F. Supp. at 1108 n.112.

vation.[55] The reservation's "highest value, in addition to agriculture, is its mineral deposits, such as gilsonite."[56] The district court found that the Uncompahgre Reservation had been disestablished.[57] However, the finding seems to have been based on the "temporary"[58] nature of the reservation and, more importantly, on the interpretation of the phrase "public domain," in the 1894 Act.[59] The district court found these words indicative of disestablishment.[60]

Following *Solem*, Judge Doyle concluded that the term "restore to public domain" is not the same as congressional intent to disestablish the reservation.[61] Instead, he reasoned that "restoring to the public domain" is an expression confirming that Indian lands are open to public entry and settlement, but that the reservation boundaries are to remain intact.[62] The court held that there was insubstantial evidence to show diminishment and thus reversed the lower court's decision.[63] Not only did the Uncompahgre Indians fail to cede the unallotted lands of the Uncompahgre Reservation, but Congress did not use explicit language of disestablishment or extinguishment in the operative Acts.[64] Furthermore, according to the court, the surrounding circumstances failed to show "substantial and compelling" evidence of an intent to terminate the reservation.[65] Therefore, the 1882 Uncompahgre Reservation remained intact.

The concurring opinion[66] reinforced Judge Doyle's opinion and underscored the conclusion that a fair and complete reading of the legislative history and surrounding circumstances shows a lack of any language or understanding that Congress intended to disestablish the Uncompahgre Reservation. Judge Seymour stressed that there was a great deal of historical confusion and ambiguity regarding the Uncompahgre Reservation and the "nature of the Uncompahgres' rights in the reservation."[67] Following *Solem*,[68] the concurring opinion supported Judge Doyle's decision and emphasized that the court was "bound to resolve this ambiguity in favor of the Tribe."[69]

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55. *Ute Indian Tribe*, 716 F.2d at 1305.
56. *Ute Indian Tribe*, 773 F.2d at 1091.
57. *Ute Indian Tribe*, 521 F. Supp. at 1153.
58. *Ute Indian Tribe*, 773 F.2d at 1101-03.
59. *See* Act of August 15, 1894, ch. 290, 28 Stat. 286, 337 (1895) [hereinafter the 1894 Act].
60. *Ute Indian Tribe*, 521 F. Supp. at 1153.
61. *Ute Indian Tribe*, 773 F.2d at 1092.
62. *Id.*
63. *Id.* at 1093.
64. *Id.*
65. *Id.* The court concluded that "evidence as to 'surrounding events' [was] ambiguous." *Id.* Newspaper articles from the period, referring to the Uncompahgre Reservation as the "former" or "old" reservation, could not be accorded much significance because they were written from the white settler's point of view. Similarly, the language of the 1894 and 1897 Acts were also ambiguous and therefore without sufficient evidence of an intent to diminish. *Id.*
66. *Ute Indian Tribe*, 773 F.2d at 1093-1101 (Seymour, J., concurring).
67. *Id.* at 1098 (Seymour, J., concurring); *see supra* note 49.
68. 465 U.S. 475 (1984); *see supra* notes 20-25 and accompanying text.
69. *Ute Indian Tribe*, 773 F.2d at 1098; *see infra* notes 117-19 and accompanying text.

Judge Seth offered another viewpoint in his dissent.[70] He concluded that the 1894 Act established an intent to extinguish the Uncompahgre Reservation by directing the Secretary of the Interior to open the unallotted lands of the reservation.[71] The dissent then analyzed the 1897 Act "which made the allotment and opening of the Uncompahgre Reservation mandatory,"[72] and concluded that the 1897 enactment supported disestablishment.[73] Relying particularly on the 1894 Act which contained the restoration to "public domain" language, Judge Seth emphasized that "[l]and to be in the 'public domain' is inconsistent with reservation status."[74]

3. Summary

Generally, cases involving Indian lands and related jurisdictional issues have been concerned largely with the complex nature of the Indian tribe's interest in those lands. Certainly, broad generalizations in this area are hazardous due to the fact that tribal property interests are tied to specific agreements and treaties rather than to any generalized theories of tribal sovereignty. This has the effect of burdening the courts with an expansive analysis of those historical agreements and treaties. Necessarily involved in this process is an extensive review of the legislative and executive history associated with enactments and agreements which established and modified Indian rights to land.

A review of this case confirms the complexity of that analytical process. Judge Doyle reviewed the issues in light of the recent Supreme Court decision, *Solem v. Bartlett*,[75] the benefit of which the district court did not have in their analysis of the case. Based on the *Solem* decision, Judge Doyle affirmed the district court's holding that the 1864 Uintah Reservation had not been diminished by subsequent enactments.[76] Basic to this holding is that *Solem* "provides inferences against diminishment"[77] and that in the absence of compelling evidence of congressional intent to disestablish or diminish reservation lands, the original boundaries are not changed.[78]

In reversing the district court's decision regarding the withdrawal of

70. *Id.* at 1101, 1105-08 (Seth, J., dissenting).

71. *Id.* at 1106-07 (Seth, J., dissenting). Judge Seth reiterated his position that the land returned to the public domain. *Id.* at 1106 (Seth, J., dissenting). Furthermore, "limitations on entry" present in the 1894 Act, *supra* note 59, did not, as the trial court suggested, demonstrate that Congress intended to limit full public domain status, but simply meant that the land was restored to the public domain and public land laws would apply without changing the status of the land. Finally, Judge Seth argued that the intent of the 1894 Act was to allot the land to Indians as individuals and open up the land not allotted under public land laws. *Ute Indian Tribe*, 773 F.2d at 1106. (Seth, J., dissenting).

72. *Id.* at 1107 (Seth, J., dissenting); *see* Act of June 7, 1897, ch. 3, 30 Stat. 62, 87 (1899).

73. *Ute Indian Tribe*, 773 F.2d at 1107 (Seth, J., dissenting).

74. *Id.* at 1106.

75. 465 U.S. 475 (1984).

76. *Ute Indian Tribe*, 773 F.2d at 1089.

77. *Id.*

78. *Id.*

the Uintah Forest Reserve, Judge Doyle stated that "[t]here is clear evidence that Congress did not intend to extinguish the forest lands of the Uintah Reservation."[79] Judge Doyle also reversed the lower court's decision regarding the disestablishment of the Uncompahgre Reservation. He resolved the issue in terms of the *Solem* decision by stressing, again, that clear evidence of intent to disestablish the reservation could not be found.[80]

The concurring opinion placed emphasis on the historical background of the salient legislation and executive orders. Clearly, Judge Seymour and the majority of the court captured the essence of the problem in this case — that ambiguities are to be resolved in favor of the tribe.

However, the reasoning of the court was not left unchallenged. Judge Seth, in a dissenting opinion, found disquieting gaps in the reasoning and analysis of the case and even indicated that any reference to the *Solem* standard was inappropriate.[81] Judge Seth developed alternative interpretations of the legislative history involved in the case, which, in his opinion, would require the disestablishment and diminishment of reservation land.

II. NAVIGATIONAL WATERS

A. Cherokee Nation v. United States

1. Facts

The Cherokee Nation of Oklahoma brought a compensatory action against the United States regarding property used by the United States in the McClellan-Kerr Navigation Project.[82] The basis for the claim was that the construction of dams and waterways altered the channel of the Arkansas River causing a loss of valuable assets of sand, gravel and coal in the Arkansas riverbed, and thus constituted an uncompensated taking under the fifth amendment.[83] The United States District Court for the Eastern District of Oklahoma granted summary judgment in favor of the Cherokee Nation, holding that the United States had granted fee simple title to the Cherokee Nation, without the reservation of a navigational servitude.[84] Therefore, the district court reasoned that since the Chero-

79. *Id.* at 1090.

80. *Id.*

81. *Id.* at 1103 (Seth, J., dissenting).

82. Cherokee Nation v. United States, 782 F.2d 871, 873 (10th Cir. 1986). The McClellan-Kerr Navigation Project [hereinafter the Project] was an element of the construction of the Arkansas River Navigation System. *Id.*

83. U.S. CONST. amend. V states in pertinent part: "nor shall private property be taken for public use, without just compensation." The Cherokee Nation "sought just compensation for the past and future loss of the mineral deposits, fair market value of the damsites, and other damage to the bed and banks of the Arkansas River." *Cherokee Nation*, 782 F.2d at 873.

84. *Cherokee Nation*, 782 F.2d at 873. The court stated "that the term navigational servitude describes the superior interest of the United States in navigation and the nation's navigable waters." *Id.* at 875-76 (citing United States v. Twin City Power Co., 350 U.S. 222, 224-25 (1956)). Additionally, the Tenth Circuit noted that "[t]he term expresses the

kee Nation had a vested property right in the riverbed, the United States was monetarily liable for a taking of private tribal interests.[85]

On an interlocutory appeal by the United States, the Tenth Circuit affirmed the lower court's decision, but it did not adopt the district court's reasoning.[86] The sole issue before the court was whether the United States' assertion of a navigational servitude over land held in fee simple by the Cherokee Nation prevented liability for a taking under the fifth amendment.[87]

2. Historical Overview

During the first half of the Nineteenth Century, the Cherokee Indian Nation was relocated west of the Mississippi River pursuant to treaties with the United States Government.[88] In the Treaty of New Echota,[89] the United States agreed to convey lands in fee simple to the Cherokees. It also agreed that no part of the lands granted to the Indians would be included in any state or territory. Some eastern Cherokees were reluctant to leave their homeland, but were moved by military force to lands west of the Mississippi River in 1838.[90] A major portion of the Arkansas River lay within the exterior bounds of the Cherokee Nation by virtue of the Treaty of New Echota, which incorporated by reference two earlier treaties.[91]

In order to pave the way for the creation of the State of Oklahoma, however, the United States Government negotiated the extinguishment of tribal titles.[92] The Dawes Commission of 1893[93] recommended an agreement with the Cherokees which, in essence, nullified the earlier treaties and provided for the allotment of Indian lands to individual members of the Cherokee Nation.[94] The bed of the Arkansas River was

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notion that the right of the public to use a waterway supersedes any claim of private ownership." *Id.* at 876; *see* United States v. Cress, 243 U.S. 316 (1917).

85. *Cherokee Nation*, 782 F.2d at 876.

86. *Id.*

87. *Id.* The court reserved a second issue - "whether the exercise of a navigational servitude constituted the breach of some duty of care to the Cherokee Nation" - pending appeal. *Id.*

88. Treaty with the Cherokees, May 6, 1828, 7 Stat. 311 (western Cherokees' ceded lands in Arkansas for land in Oklahoma); Treaty with the Cherokees, Feb. 27, 1819, 7 Stat. 195 (1820) ("Old Settler" or western Cherokee were relocated to lands provided for them in Arkansas Territory); Treaty with the Cherokees, July 8, 1817, 7 Stat. 156 (1818) (Cherokee Nation traded lands in Georgia for an equal amount of land in Arkansas Territory).

89. Treaty with the Cherokees, December 29, 1835, 7 Stat. 478 (1836) (referred to as the "Treaty of New Echota").

90. Thousands died in this forced migration, which is known as the "Trail of Tears." *See generally*, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 92 (1982).

91. Treaty with the Cherokees, May 6, 1828, 7 Stat. 311 (1828); Treaty with the Cherokees, Feb. 14, 1833, 7 Stat. 414 (1834).

92. Act of March 3, 1893, ch. 209, § 16, 27 Stat. 612, 645 (1894).

93. The Dawes Commission was created by the Act of March 3, 1893, ch. 209, 27 Stat. 612, 645 (1894).

94. Choctaw Nation v. Oklahoma, 397 U.S. 620, 627 (1970); *see* Act of June, 28, 1898, ch. 517, 30 Stat. 495 (1899) (enacted the recommendations of the Dawes Commission and forced the Cherokee Nation to execute an agreement with the United States); Act of July 1, 1902, ch. 1375, 32 Stat. 716 (provided for final disposition of affairs of Cherokees and required that lands be held by the United States for the use and benefit of the Indians); Act

not allotted. Therefore, under the patent issued by the United States to the Cherokee Nation in 1838, the fee simple title to the Arkansas riverbed arguably was vested in the Cherokee Nation, and held in trust by the United States for the Cherokees.[95] Subsequently, in 1907, Oklahoma was admitted to the Union "on an equal footing with the original states."[96]

3. The Tenth Circuit's Decision

In recounting the early, often troubled, history of the Cherokee Nation, the Tenth Circuit relied heavily upon the decision of the United States Supreme Court in *Choctaw Nation v. Oklahoma*.[97] In *Choctaw Nation*, the State of Oklahoma argued that, in accordance with the equal footing doctrine, title to the bed of the Arkansas River passed from the United States to "Oklahoma upon admission to the Union as an incident of statehood."[98] However, the Supreme Court held that the United States intended to and did convey the title to land underlying the navigable portions of the Arkansas River and, more specifically, the ownership of the minerals beneath the riverbed.[99]

In light of the *Choctaw Nation* decision, the Tenth Circuit held that while the United States could exercise a navigational servitude in the Arkansas River, the Cherokee Nation had the right to just compensation.[100] This article reviews the court's reasoning and conclusions.

a. *Navigational Servitude*

The Tenth Circuit first reviewed the district court's holding that a failure to reserve a navigational servitude in the land patent resulted in the loss of the right to assert it.[101] The United States' argument on appeal was two-pronged: first, that "the navigational servitude is a constitutional power arising from the Commerce Clause and permits no

of April 26, 1906, ch. 1876, § 27, 34 Stat. 137, 148 (1906) (provided that remaining tribal property "be held in trust by the United States for the use and benefit of the Indians").

95. *Choctaw Nation*, 397 U.S. at 627, 634-36.

96. Act of June 16, 1906, ch. 3335, 34 Stat. 267 (1907). New states are admitted on an equal footing with the other states and the United States holds beds to navigable waters in trust for future states. The equal footing doctrine is a court-made rule founded upon Article IV, section 3, clause 2 of the United States Constitution which provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. The Supreme Court first articulated the doctrine in Pollard v. Hagan, 44 U.S. (3 How.) 212, 222-23, 229 (1845):

> When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, *except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States*, for the temporary purposes provided for in the deed of cession, and the legislative acts connected with it.

Id. at 223 (emphasis added).

97. 397 U.S. 620 (1970).

98. *Choctaw Nation*, 397 U.S. at 627-28.

99. *Id.* at 621, 635.

100. Cherokee Nation v. United States, 782 F.2d 871, 879 (10th Cir. 1986).

101. *Id.* at 875.

'special exception' for Indian tribes," and, second, that the Cherokee Nation is a "quasi-sovereign at the sufferance of Congress and subject to the dominant power of a navigational servitude."[102] The Tenth Circuit agreed that a navigational servitude may in the interest of interstate commerce create an exception to the United States' obligation to pay just compensation under the taking clause of the fifth amendment.[103] However, the court cautioned that "the Supreme Court has never held that 'the navigational servitude create[d] a blanket exception to the Taking Clause whenever Congress exercises its Commerce Clause authority to promote navigation.' "[104]

The Tenth Circuit noted that, despite other reservations,[105] the United States failed to reserve a navigational servitude in the Treaty of New Echota. Nevertheless, it found indisputable the fact that the Commerce Clause[106] grants Congress broad powers over interstate activity, including navigation.[107] At this point, however, the Tenth Circuit deviated from the district court, and held that the *existence* of the navigational servitude in the Arkansas River was never in question, but the *effect* of the reservation was at issue.[108] The court proceeded to limit the application of the navigational servitude. Judge Moore, writing for the majority, observed that "the assertion of a navigational servitude on particular waters acknowledges *only* that the property owner's right *to use* these waters is shared with the public at large."[109] Furthermore, the court held that fifth amendment constitutional limitations apply to navigational servitudes.[110]

As *Choctaw Nation* indicates, the 1838 patent of the United States granting to the Cherokee Nation fee simple title to the Arkansas riverbed was unique because after the patent the Cherokee Nation was not a mere riparian owner of land along the Arkansas River, but the fee simple title owner of the riverbed.[111] Consequently, cases dealing with the rights of riparian owners along a public navigable stream were not

102. *Id.*
103. *Id.* at 876.
104. *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979)).
105. *Id.*
106. U.S. CONST. art. I, § 8.
107. *Cherokee Nation*, 782 F.2d at 876; *see* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 22 (1824) ("It is a common principle, that arms of the sea, including navigable rivers belong to the sovereign, *so far as navigation is concerned.* Their *use* is navigation." (emphasis in original)); *see, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 173-74 (1979) (A shallow lagoon, dredged for development as a marina, fell within the definition of "navigable waters" and thus was subject to Congress' "extensive authority over this Nation's waters under the Commerce Clause."); United States v. Grand River Authority, 363 U.S. 229, 231-32 (1960) ("[W]hen the United States asserts its superior authority under the Commerce Clause to utilize or regulate the flow of the water of a navigable stream there is no 'taking' of 'property' in the sense of the Fifth Amendment because the United States has a superior navigation easement which precludes private ownership of the water or its flow."); United States v. Appalachian Electric Power Co., 311 U.S. 377, 426 (1940) (authority of Congress over navigable waters is as broad as the needs of commerce).
108. *Cherokee Nation*, 782 F.2d at 876.
109. *Id.* at 877 (emphasis in original).
110. *Id.*
111. *Choctaw Nation*, 397 U.S. at 633-35; *Cherokee Nation*, 782 F.2d at 877.

applicable.[112] In the opinion of the court, the instant case was one of special circumstances which favored the Indian tribe.

In conclusion, the court held that when the United States Corps of Army Engineers entered the Arkansas River without the consent of the Cherokee Nation, altered its natural course and destroyed the valuable sand and gravel assets of the Cherokee Nation by dredging its main channel and building three dams on the riverbed, the United States took private property from the Cherokees and converted it to its own public use.[113] Therefore, the court decided that the United States was required to pay just compensation to the Cherokee Nation, the fee title owner, for loss of property and diminution of value of Arkansas riverbed property.

b. *Ancillary Issues*

i. Treaty Abrogation

Based on the uniqueness of the riverbed's ownership granted to the Cherokees, the court also "consider[ed] the principle that rights secured by treaty will not be deemed to be abrogated or modified absent a clear expression of Congressional purpose."[114] The Supreme Court has established certain canons of construction that must be applied in matters involving the interpretation and construction of Indian treaties. These canons mandate that treaties be liberally construed in favor of Indians,[115] that ambiguous expressions in treaties must be resolved in favor of Indians,[116] and that treaties should be construed as the Indians would have understood them.[117]

112. *Cherokee Nation*, 782 F.2d at 877.

113. *Id.* at 878-79. The Army Corps of Engineers acted pursuant to the Flood Control Act of 1944, Act of Dec. 22, 1944, ch. 665, 58 Stat. 887, 890 (1945), and the Rivers and Harbors Act of 1946, Act of July 24, 1946, ch. 595, 60 Stat. 634, 635-36 (1947).

114. *Cherokee Nation*, 782 F.2d at 877.

115. Choctaw Nation v. Oklahoma, 318 U.S. 423, 431-32 (1943); Choate v. Trapp, 224 U.S. 665, 675 (1912).

116. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. United States, 207 U.S. 564, 576-77 (1908).

117. *Choctaw Nation*, 397 U.S. at 631; United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-54, 582 (1832). In view of the principles set forth in *Choctaw Nation*, it was not disputed by the court that "to take a valuable portion of the grant to the Cherokee Nation without compensation would alter the purpose for which Congress set aside the land originally." *Cherokee Nation*, 782 F.2d at 878. *See also* Moore v. United States, 157 F.2d 760 (9th Cir. 1946). The Cherokee Nation paid no small price for the reservation that was set aside for their exclusive use and benefit. The Cherokee Tribe was at the mercy of the United States' "superior negotiating skills and superior knowledge of the language in which treat[ies were] recorded." Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979).

Moreover, the reluctance of the Supreme Court to hold that an act of Congress abrogates a treaty has led to a number of other special rules concerning construction of Indian treaties. For example, in Leavenworth, Lawrence, and Galveston R.R. Co. v. United States, 92 U.S. 733 (1876), where the issue was whether a statutory grant included treaty lands, the Supreme Court concluded that "there [must] be an express declaration to that effect," otherwise, "the presumption is conclusive that Congress never meant to grant it." *Id.* at 741-42. In United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339 (1941), where the United States sued to protect Indian occupancy of lands, the Court held that Indian title

In *Cherokee Nation*, the Tenth Circuit recognized the Supreme Court's reluctance to abrogate Indian treaty rights,[118] and concluded that "if the effect of exercising a navigational servitude is to alter or extinguish rights secured by treaty and unrelated to the power to use without the express authorization of Congress, just compensation is required."[119]

ii. Fiduciary Relationship

The court also examined the navigational servitude within the context of a fiduciary relationship between the United States and the Cherokee Nation.[120] Citing the Act of April 26, 1906, the Supreme Court in *Choctaw Nation*, held that all unallotted tribal property would " 'be held in trust by the United States for the use and benefit of the Indians.' "[121] As a consequence of this trust relationship, the Tenth Circuit found that a limitation on Congressional power was mandated.[122] This trust relationship required the United States to manage and control the tribe's affairs and imposed a duty to guard the trust property for the benefit of the Cherokee Nation.[123] According to the Cherokee Nation, therefore, when the United States took Cherokee property for its own public uses in the construction of the McClellan-Kerr Navigation Project, the United States violated the trust relationship.

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had never been extinguished because there was no showing that Congress had expressed a "clear and plain" intention to extinguish the Tribes' right. *Id.* at 354.

The same special rules of construction have been followed in cases asserting that a later general Congressional act abrogated an earlier treaty right. For example, in Choate v. Trapp, 224 U.S. 665 (1912), the State of Oklahoma contended that an act of Congress allowed the state to tax Indian allotments. The Court held that doubtful expressions in the statute must be "resolved in favor of" the Indians. *Id.* at 676. Later, in Squire v. Capoeman, 351 U.S. 1 (1956), the issue was whether the later-enacted capital gains provisions of the Internal Revenue Code could be applied to income generated from trust property, despite the language of the earlier-enacted General Allotment Act which required property to be given to Indians free of liens. Although the government argued that the income tax could be levied even though no lien could be imposed, the Court held that it could not agree that the "taxability of respondents in these circumstances is unaffected by the treaty." *Id.* at 6. A more recent case, Menominee Tribe v. United States, 391 U.S. 404 (1968), involved the question of whether a termination statute enacted by Congress nullified treaty rights of tribal members to hunt and fish on the reservation free from state regulation. The Court emphasized that the act contained no "explicit statement" abrogating hunting and fishing rights, and that such an intention would not be "lightly imputed" to Congress. *Id.* at 413 (quoting Pigeon River Co. v. Cox Co., 291 U.S. 138, 160 (1934)). In fact, the Court recognized that treaty rights are a form of property protected by the fifth amendment. *Id.* at 413. Finally, *Menominee* was expressly reaffirmed in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) where the Court stated that "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights." *Id.* at 690.

118. *Cherokee Nation*, 782 F.2d at 877.

119. *Id.* at 878.

120. *Id.* at 878-79.

121. *Choctaw Nation*, 397 U.S. at 627 (citing Act of April 26, 1906, ch. 1876, § 27, 34 Stat. 137, 148 (1907)).

122. *Cherokee Nation*, 782 F.2d at 878.

123. *Id.* The Supreme Court stated in United States v. Sioux Nation, 448 U.S. 371 (1980) that "this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitation inhering in . . . a guardianship and to pertinent constitutional restrictions." *Id.* at 415.

In upholding the Cherokee's contention, the Tenth Circuit relied on *United States v. Creek Nation*,[124] where the Supreme Court held that as a guardian of the property of an Indian tribe the United States can manage and control the trust property, but it cannot give it away to others or use it for its own purposes without becoming liable to the tribe. The court concluded that "[l]ike any other trust relationship, the United States, as trustee, is obligated to act for the benefit of the tribe absent Congressional authorization to the contrary."[125] This duty to the Cherokee Nation could not "be preempted and subsumed by the navigational servitude."[126]

4. The Dissent

The dissenting opinion[127] of Judge Seth is persuasive through its logical veracity. He argued that "the nature and source of [the Cherokee Nation's] title makes no real difference."[128] Noting that all concerned parties agreed that the Arkansas River is navigable,[129] he explained that navigable waters are "public property" under the exclusive control of the federal government pursuant to the Commerce Clause of the United States Constitution.[130] Therefore, in Judge Seth's view, this power to regulate navigation gave the United States a "dominant servitude;" the exercise of which was not an invasion of any private property rights in the river or any lands underlying it.[131] Hence, there could be no taking from riparian owners for which just compensation was due.

Judge Seth also responded to the Cherokee Nation's assertion that they are a sovereign nation and, therefore, the navigational servitude of

124. 295 U.S. 103 (1935). In *Creek Nation*, like the instant case, the Creek Nation had fee simple title to the lands. "That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession." *Id.* at 109. In analyzing the relationship between the Creek and the United States, the Court held that while the tribe was under the guardianship of the United States and the United States was responsible for the management and control of the reservation, that control "did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering . . . just compensation for them." *Id.* at 110.

125. *Cherokee Nation*, 782 F.2d at 879. In neither the Flood Control Act nor the Rivers and Harbors Act was any provision made for payment to the Cherokee Nation for lands taken for the construction of the three dams on the Arkansas riverbed. Furthermore, Congress did not indicate that there was an "overriding public need" for the construction of the dam which might authorize such a taking. *Id.*

126. *Id.*

127. *Id.* at 880-83 (Seth, J., dissenting).

128. *Id.* at 880 (Seth, J., dissenting). Judge Seth emphasized that the navigational servitude represents a constitutional power, not a property right. Referring to the Supreme Court's decision in Montana v. United States, 450 U.S. 544 (1981), Judge Seth stated: " '[T]he United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who [Montana or the Crow Tribe] owns the riverbed.' " *Cherokee Nation*, 782 F.2d at 882 (Seth, J., dissenting) (quoting *Montana*, 450 U.S. at 555).

129. *Cherokee Nation*, 782 F.2d at 880-81 (Seth, J., dissenting).

130. *Id.* at 881 (Seth, J., dissenting); *see supra* notes 101-15 and accompanying text.

131. *Id.* (Seth, J., dissenting) (quoting United States v. Rands, 389 U.S. 121, 122-23 (1967)).

the United States could not be effective against them.[132] He argued that Indian tribes had lost many of the attributes of sovereignty, and there was no reason to limit the application of the navigational servitude doctrine to exclude Indian tribes. For Judge Seth, the Cherokees were not above the application of the doctrine of navigational servitude, especially since the exercise of the servitude is not the taking of property but the exercise of a power to which any riparian-property owner, including the Cherokee Nation, has always been subject.[133]

5. Conclusion

The Tenth Circuit determined that although the United States could exercise a navigational servitude in the Arkansas River, the Cherokee Nation was entitled to just compensation for the taking. Both *Cherokee Nation* and *Ute Indian Tribe* marked victories for the Indian tribes over the intrusion of governmental interests. More importantly, however, the decisions in this area reflect a general sentiment that ambiguities are to be resolved in favor of the Indian tribes, a trend which will undoubtedly continue in the Tenth Circuit.

B. Utah v. United States

1. Facts

Utah Lake is a large, fresh-water lake, covering approximately 150 square miles, located in Utah County, Utah.[134] In 1889, the United States designated Utah Lake as a reservoir site, under the provisions of the Sundry Appropriations Act of 1888.[135] The controversy prompting this litigation, however, did not arise until 1976 when the Bureau of Land Management (the BLM) issued oil and gas leases on the bed of Utah Lake.[136]

The State of Utah sought an injunction[137] in the United States Dis-

132. *Id.* at 882 (Seth, J., dissenting).

133. *Id.* at 882-83 (Seth, J., dissenting).

134. For a general description of Utah Lake, see Utah v. Marsh, 740 F.2d 799, 800-01 (10th Cir. 1984).

135. Act of October 2, 1888, ch. 1069, 25 Stat. 505, 526-27 (1889) [hereinafter the 1888 Act].

136. Utah v. United States, 780 F.2d 1515, 1516 (10th Cir. 1985).

137. The State of Utah insisted that its action was one for declaratory judgment, while the defendant United States maintained that the action was one under the Quiet Title Act, 28 U.S.C. § 2409a (1978). The district court found that a declaratory judgment action would lie against the United States, relying on section 702 of the Administrative Procedure Act, 5 U.S.C. § 702 (1982) for the proposition that section 702 waived the sovereign immunity of the United States for a declaratory judgment action in which subject matter jurisdiction was based upon federal question jurisdiction. Utah v. United States, 624 F. Supp. 622, 624-26 (D. Utah 1985). *See* Carpet & Linoleum & Resilient Tile Co. v. Brown, 656 F.2d 564, 567 (10th Cir. 1981) (section 702 of the Administrative Procedure Act waived sovereign immunity in mandamus action based on federal question jurisdiction). The Tenth Circuit recharacterized the action as one for quiet title, relying on the Supreme Court decision in Block v. North Dakota *ex rel.* Board of University and School Lands, 461 U.S. 273, 282-90 (1983), and stated that "the Court ruled that Congress intended the Quiet Title Act to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Utah*, 780 F.2d at 1517 n.2.

trict Court for the District of Utah claiming that it obtained title to the bed of Utah Lake under the equal footing doctrine at the date of statehood, or alternatively, that it obtained title to the lakebed under the Submerged Lands Act of 1953.[138] The United States contended, however, that by withdrawing the lake as a reservoir site, the federal government effectively reserved the lakebed of Utah Lake in federal ownership thereby preventing title from passing to Utah under the equal footing doctrine at the date of its statehood.[139] After the district court granted summary judgment in favor of the United States,[140] Utah appealed to the Tenth Circuit. The Tenth Circuit affirmed, quieting title to the bed of Utah Lake in the United States.[141]

2. The Tenth Circuit Decision

The principal issues presented on appeal were (1) whether the State of Utah obtained title to the bed of Utah Lake under the equal footing doctrine, or (2) whether the State of Utah gained title to the bed of Utah Lake under the Submerged Lands Acts.[142]

a. *The Equal Footing Doctrine*

Under the principles of the equal footing doctrine, the presumption exists that the United States "holds [lands under navigable waters] in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established state."[143] In applying the equal footing doctrine, the critical issue is whether Congress plainly or "definitely declared" its intent to withdraw the land before a State entered the Union.[144] In analyzing congressional intent, courts will determine if a "public exigency"[145] necessitated a departure from the policy of reserving owernship of land under navigable waters for the future states.

138. *Utah*, 780 F.2d at 1516; *see* 43 U.S.C. §§ 1301-15 (1982).

139. Utah v. United States, 780 F.2d 1515, 1516 (10th Cir. 1985); *see supra* note 96 and accompanying text.

140. Utah v. United States, 624 F. Supp. 622 (D. Utah 1985). Based upon its interpretation of the language used in correspondence and documents surrounding the events, the district court found that the United States withdrew the bed of Utah Lake as part of its 1889 reservoir site selection. *Id.* at 626-27. The lower court further found that the equal footing doctrine did not cut off the United States' title in the lakebed where "[t]he withdrawal of Utah Lake was made 'after acquiring the territory and before the creation of the state' for the carrying out of 'public purposes appropriate to the objects for which the territory was held.' " *Id.* at 628 (quoting United States v. Holt State Bank, 270 U.S. 49, 54-55 (1926)). Finally, the district court found that the bed of Utah Lake was excepted from the Submerged Lands Act, 43 U.S.C. §§ 1301-15 (1964), by way of a provision which excluded "all lands expressly retained by . . . the United States when the State entered the Union." *Id.*; *see* 43 U.S.C. § 1311(a) (1964).

141. *Utah*, 780 F.2d at 1525.

142. *Id.* at 1517.

143. *Id.* at 1518 (quoting Montana v. United States, 450 U.S. 544, 551-52 (1981)); *see supra* note 104 and accompanying text.

144. *Utah*, 780 F.2d at 1518-19 (quoting Montana v. United States, 450 U.S. 544, 552 (1981)); *see* United States v. Holt State Bank, 270 U.S. 49 (1926).

145. *Utah*, 780 F.2d at 1519; *Montana*, 450 U.S. at 552.

i. The 1889 Reservoir Site Selection

In the instant case, the Tenth Circuit found that the withdrawal of Utah Lake, including the bed, was clearly made for a public purpose and motivated by public exigency. The requisite congressional intent was evidenced by Congress' concern "that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled."[146] Furthermore, the court's review of the United States Geological Survey (U.S.G.S.) documents clearly indicated that the bed was included in the reservoir site selection.[147]

ii. Congressional Authorization

(A.) The Sundry Appropriations Act of 1888

The Sundry Appropriations Act of 1888[148] provided that all lands selected as reservoir sites "are from this time henceforth hereby reserved from sale as the property of the United States and shall not be subject . . . to entry, settlement or occupation until further provided by law."[149] The Act authorized the selection of land for reservoir sites and reserved such designated sites as the property of the United States.

The State argued that "the Act's proscription on 'entry, settlement or occupation' of lands selected under the Act"[150] limited lands which could be selected to those which could be entered, settled or occupied and, therefore, excluded the beds of navigable waters. However, the Tenth Circuit found no merit in the argument and concluded that the Act "imposes no restriction on the U.S.G.S.'s selection authority on the type of lands that could be designated or selected."[151]

(B.) Subsequent Congressional Action

The State also relied on its interpretation of the legislative history of amendments to the 1888 Act to support the view that the United States did not have the authority to select Utah Lake as a reservoir site.[152] Utah initially looked to statements made in subsequent house

146. *Utah*, 780 F.2d at 1524.

147. *Id.* at 1520. These documents also showed that the United States contemplated plans to lower the level of the lake as well as to make the water available by means of ditches and canals from the lake. *Id.* at 1523. Thus, these documents indicated that Utah Lake was withdrawn for an important public purpose and these plans could not have been realized unless the bed of Utah Lake had also been withdrawn. *Id.* at 1524.

148. Act of October 2, 1888, ch. 1069, 25 Stat. 505, 526-27 (1889) [hereinafter the 1888 Act].

149. *Id.* at 527.

150. *Utah*, 780 F.2d at 1521.

151. *Id.*

152. *Id.*; *see* Act of August 30, 1890, ch. 897, 26 Stat. 371, 391 (1891) (repealing the 1888 Act except as it reserved reservoir sites); Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1101-02 (1892) (restricting the reservation of reservoir sites to "only so much land as is actually necessary for the construction and maintenance of reservoirs" and providing for rights of way across public lands for the construction of irrigation canals and ditches to the extent construction did not interfere with the United States' occupation of the land); Act of February 26, 1897, ch. 335, 29 Stat. 599 (1898) (authorizing states to improve and occupy reservoir sites).

debates to bolster the premise that the purpose of the 1888 Act was to arrest the monopoly and rampant speculation of western public lands.[153] The State further asserted that (1) the legislative history demonstrates that reservoir site withdrawals were not permanent, but only temporary, in order to facilitate the fair development of the public lands[154] and (2) "by their nature, beds of navigable waters simply could not have been part of the problem Congress wanted to remedy."[155] The court discounted both arguments as being in direct conflict with the provisions of the 1888 Act.[156]

Furthermore, the State argued that Congress intended that only the adjacent uplands surrounding natural navigable lakes be withdrawn as reservoir sites. Utah's argument was based on the assumption "that Congress was concerned in every instance with those uplands that might be inundated if and when the water level was raised."[157] The court was not persuaded by the State's contention and pointed out that the concern of the U.S.G.S. with respect to Utah Lake was not limited to the adjacent uplands that might be inundated, but rather necessarily extended to the natural lakebed itself which would be exposed as the water level was lowered.[158]

Therefore, in reviewing the legislative history of the amendments to the 1888 Act, the court found nothing to substantiate the State's assertion that Congress revoked any of the reservoir selections made by the U.S.G.S. pursuant to the 1888 Act.[159] The court concluded that the U.S.G.S. intended to withdraw the bed of Utah Lake in its 1889 reservoir selection.[160] Furthermore, the court cautioned the State for basing its

153. *Utah*, 780 F.2d at 1522. The historical background of the passage of the 1888 Act and the legislative history of subsequent amendments make it clear that one of Congress' primary concerns was the monopolization of reservoir sites by corporations. By 1888 it had come to the attention of Congress that large corporations were making fraudulent land filings under the various land entry laws and were seeking to acquire vast tracts of the public domain in the West. There was also evidence that the large corporations were seeking to monopolize water resources of the area in order to sell water to farmers at exhorbitant profits. *See generally*, 21 CONG. REC. 7297-7399 (1890) (statement of Sen. Reagan).

154. *Utah*, 780 F.2d at 1522.

155. *Id.*

156. *Id.* Regarding the first argument, the Tenth Circuit found that the plain language of the 1888 Act, reserving sites to the United States "until further provided by law," refuted the State's claim by allowing for the possibility of non-temporary withdrawals. *Id.* The court relied on the language of the Act and the U.S.G.S. interpretation of it to dispose of the second argument. *Id.* at 1522-23.

157. *Id.* However, a U.S.G.S. report stated that the segregation of Utah Lake included "not only the bed but the lowlands up to the mean highwater." U.S.G.S., ELEVENTH ANN. REP. OF THE U.S. GEOLOGICAL SURVEY TO THE SECRETARY OF THE INTERIOR, PT. II, 183, 184 (1889-90). Furthermore, the Tenth Circuit pointed out that "although officials of the U.S.G.S. initially thought that the water level of Utah Lake should be raised, subsequent studies indicated that the water level should be lowered below the natural shoreline." *Utah*, 780 F.2d at 1523. Similarly, the U.S.G.S. stated that the withdrawal of Utah Lake was a "segregation of the land around and under the lake." U.S.G.S., TWELFTH ANN. REP. OF THE U.S. GEOLOGICAL SURVEY TO THE SECRETARY OF THE INTERIOR, PT. II — IRRIGATION 339 (1892),

158. *Utah*, 780 F.2d at 1523.

159. *Id.*

160. *Id.*

line of argument on the "views of individual Congressmen who were part of a different Congress from that which passed the 1888 Act."[161]

(C.) Mineral Estate

Utah alternatively claimed that "the 1888 Act authorized withdrawal of the surface estate only, and not the mineral estate" of the lakebed.[162] Utah's argument reasoned that the reservoir site withdrawal did not segregate the mineral estate from the public domain and since "the mineral estate had not been reserved or withdrawn, it would have passed to Utah at statehood."[163] No authority was cited for this proposition. The court noted that the 1888 Act makes no distinction between the surface and subsurface estates.[164] The court held that "the 1888 Act and the reservation made pursuant to it covered the lakebed, and underlying minerals, not just the surface of the bed, among the lands withdrawn in connection with Utah Lake."[165]

iii. The Selection Process

The State next argued that there was a strong presumption against pre-statehood withdrawals of lands underlying navigable waters "except upon a strict and narrow concept of 'public exigency.' "[166] Utah asserted that "a public exigency requires a public necessity and not simply an 'appropriate public purpose.' "[167] The State relied on the Supreme Court's decision in *Montana v. United States*[168] to support its argument. In *Montana*, the Court ruled in favor of the State of Montana and against a claim that Montana's title to a navigable riverbed had been defeated by the creation of an Indian reservation prior to statehood.[169] The Court in *Montana* examined whether a "public exigency" would have required a departure from the federal policy of reserving ownership of the land under navigable waters for future states. Although the Court did not find that the treaties with the Crow Nation demonstrated an intent by the United States to convey the riverbed to the tribe,[170] the Court em-

161. *Id.* " '[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Id.* (citing United States v. Price, 361 U.S. 304, 313 (1960)).

162. *Id.* at 1523.

163. *Id.*

164. *Id.* It was not until 1909 that Congress enacted any law which split estates between the surface and subsurface. *See* 30 U.S.C. § 81 (1982); *see also* Udall v. Tallman, 380 U.S. 1 (1965), in which the regulations governing oil and gas leases in the Kenai Moose Range in Alaska were upheld. Over two million acres were withdrawn for the protection of moose. Although the Executive Order which created the range did not mention the subsurface estate, the Court concluded that there was no doubt that the United States Government retained ownership of it. *Id.* at 4-5; *see* Exec. Order No. 8979, 6 Fed. Reg. 6471 (1941).

165. *Utah*, 780 F.2d at 1523.

166. *Id.* (citing *Montana*, 450 U.S. at 552).

167. *Id.*

168. 450 U.S. 544 (1981).

169. *Id.* at 550.

170. *Id.* at 556-57. The Court held that title to the bed of the Big Horn River passed to Montana upon its admission into the Union because the United States had not, prior to statehood, conveyed beneficial ownership of the riverbed to the Crow Nation by certain

phasized that a "public exigency" would constitute a valid pre-statehood conveyance of lands underlying navigable waters and would prevent passage to a state under the equal footing doctrine.[171]

In analyzing the present case, the Tenth Circuit found that a "public exigency" clearly did exist at the time of the Utah Lake withdrawal.[172] The court concluded "that the withdrawal of Utah Lake, including the bed, was made for a public purpose motivated by a public exigency, given Congress' stated concerns that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled."[173]

b. *The Submerged Lands Act*

Finally, the State argued that if it did not obtain title to the lakebed under the equal footing doctrine, it obtained title pursuant to the Submerged Lands Act[174] because the United States was not in "actual possession" of the lakebed in 1953.[175] However, the court explained that sections 1311(a) and (b)(1) of the Submerged Lands Act provide that the Act does not confirm the title to the states of any lands expressly retained by the United States.[176] As the court stated, "the United States expressly reserved the bed of Utah Lake for federal reservoir purposes in 1889, seven years before Utah became a state. Thus, this case falls squarely within the language of section 1313(a), and the 1889 withdrawal remains valid."[177] The court concluded that since the United States retained title to the lakebed at statehood, Congress specifically excepted reservations of this type from the Submerged Lands Act grant.[178]

III. MINERAL PATENT

A. Poverty Flats Land & Cattle Company v. United States

1. Facts

Plaintiff Poverty Flats Land & Cattle Co. (Poverty Flats) brought an

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treaties. *Id.* The Court noted that the treaties expressed no intention by the United States to convey the riverbed to the tribe. *Id.* at 554.

171. *Id.* at 552, 556.

172. *Utah*, 780 F.2d at 1524.

173. *Id.*

174. 43 U.S.C. §§ 1301-43 (1982 & Supp. II 1984). The court focused particular attention on sections 1311(a) and (b)(1) of the Act which read in pertinent part:

> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . . be, and they are, subject to the provisions hereof, recognized, confirmed, established and vested in and assigned to the respective States . . . ;
>
> (b)(1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources . . . .

43 U.S.C. §§ 1311(a), (b)(1) (1982 & Supp. II 1984); *see Utah*, 780 F.2d at 1525.

175. *Utah*, 780 F.2d at 1524.

176. *Id.* at 1525.

177. *Id.*

178. *Id.*

action[179] to quiet title to ranch land in New Mexico. Poverty Flats' predecessor in interest, the C.L. Crowder Investment Company, had originally acquired the land in January of 1970, pursuant to an exchange of lands provision under section 8 of the Taylor Grazing Act.[180] The patent issued to the C.L. Crowder Investment Company reserved to the United States "[a]ll mineral deposits in the lands so patented, and to it, or persons authorized by it, the right to prospect, mine and remove such deposits from the same under the applicable law."[181] During the exchange negotiations, no discussion was ever had regarding the subject of caliche[182] and its status as part of the surface or mineral estate.[183] In June of 1981, Poverty Flats discovered that a lessee of the United States, Oilfield Construction Company, had entered plaintiff's land and by February of 1982, was removing dirt, rock, and caliche from the land.[184] Thus, Poverty Flats sought to establish that, under a proper construction of the land patent, the United States had not reserved an interest in these materials.

The United States District Court for the District of New Mexico granted the government's motion for summary judgment on the ground that the suit was barred by the twelve-year statute of limitations for quiet title actions against the United States.[185] The Tenth Circuit reversed, holding that it was error to grant summary judgment on the statute of limitations issue without determining whether it was unreasonable for the landowner to believe that the government's reservation of "mineral rights" included a reservation of caliche, and remanded to the trial court for such a factual determination.[186] On remand, the district court found that the action was brought within the applicable time period, but concluded, as a matter of law, that caliche was included in the mineral reservation.[187] On subsequent appeal, the Tenth Circuit again reversed in favor of Poverty Flats and ruled that caliche was not included in the mineral reservation.[188]

179. Poverty Flats Land & Cattle Co. v. United States, 788 F.2d 676 (10th Cir. 1986).

180. Taylor Grazing Act of 1934, Pub. L. No. 73-482, 48 Stat. 1269, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792 (codified at 43 U.S.C. §§ 1701-82 (1982)).

181. *Poverty Flats*, 788 F.2d at 677.

182. "According to Webster's Third New International Dictionary, caliche is 'a crust or succession of crusts of calcium carbonate that forms within or on top of the stony soil of arid or semiarid regions.' Caliche is apparently used in road building along with sand and gravel." *Poverty Flats*, 706 F.2d at 1079 n.1.

183. *Povery Flats*, 788 F.2d at 679.

184. *Id.* at 678-79.

185. *Poverty Flats*, 706 F.2d at 1078; *see* 28 U.S.C. § 2409a(f) (1982) (providing for twelve-year statute of limitations on quiet title actions). The district court found that notice of the mineral reservation in the 1970 patent was notice to the successors in interest, Poverty Flats, that the United States claimed to own dirt, rock and caliche in the patented land by virtue of the reservation. *Poverty Flats*, 706 F.2d at 1079.

186. *Poverty Flats*, 706 F.2d at 1078, 1080.

187. *Poverty Flats*, 788 F.2d at 677.

188. *Id.* at 676, 683-84.

2. The Decision of the Tenth Circuit

Judge Seth, writing for a unanimous court, addressed the issue of whether caliche was a statutorily reserved mineral under the Taylor Grazing Act and the discretionary patent reservation of mineral deposits or a material not within the reservation of minerals. Judge Seth proceeded to review the mineral reservation in the context of the Taylor Grazing Act,[189] the Surface Resources Act of 1955,[190] and the common law principles set forth in *Watt v. Western Nuclear, Inc.*[191]

a. *Interpretations of the Taylor Grazing Act*

First, the court determined that the patent to the land in question was expressly provided for in section 8 of the Taylor Grazing Act.[192] This statutory provision, according to the court, was unique in that "the nature and extent of the mineral reservation . . . in the patent were left to the complete discretion of the Secretary of the Interior."[193] The Tenth Circuit decided that "[t]he unusual statutory provision for complete discretion in the Secretary" eliminated the factor of congressional intent as to the scope of the reservation which is used in other situations where a mandatory mineral reservation was provided.[194] Therefore, instead of looking to congressional intent, the court relied upon administrative interpretations of the Taylor Grazing Act.

189. Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792 (codified at 43 U.S.C. §§ 1701-82 (1982)).

190. The Surface Resources Act of 1955, ch. 375, 69 Stat. 368 (codified as amended at 30 U.S.C. § 611 (1982)).

191. 462 U.S. 36 (1983).

192. *Poverty Flats*, 788 F.2d at 677-78. Section 8 of the Taylor Grazing Act was codified at 43 U.S.C. § 315g (1970) but was repealed by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792 (codified at 43 U.S.C. §§ 1701-82 (1982)).

193. *Poverty Flats*, 788 F.2d at 678. For instance, section 8 of the Taylor Grazing Act also authorized the Secretary to exchange public lands for state-owned lands. Such an exchange could be based upon lands of either equal value or equal acreage. In the case of an exchange by the Secretary of lands of equal acreage which were mineral in character, section 8 required that the patent contain a reservation of "all minerals" to the United States. However, in the case of an exchange of lands of equal value, as in this case, the statute left both the reservation of minerals and the scope of any such reservation to the discretion of the parties to the exchange and provided in part:

> Provided, That either party to an exchange based upon equal value under this section *may* make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary.

Taylor Grazing Act of 1934, ch. 865, § 8, 48 Stat. 1269, *repealed by* the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792 (codified at 43 U.S.C. §§ 1701-82 (1982)) (emphasis added).

194. *Poverty Flats*, 788 F.2d at 678. The court also noted that the discretionary authority of the Secretary, coupled with the ever-changing policy stance of the Department of the Interior, made "reliance on similar language or wording in other reservations of questionable worth." *Id. Cf.* Millsap v. Andrus, 717 F.2d 1326, 1328 (10th Cir. 1983) (where deed reservation incorporated language of congressional legislation, "the proper construction of the deed depends on what Congress intended to reserve").

i. The Mineral Reservation

Generally, federal mineral reservations are to be construed in favor of the government with no rights passing by implication.[195] However, federal grants of land resources "are to receive such a construction as will carry out the intent of Congress,"[196] and "are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication."[197] Similarly, it is well settled that "[p]atent mineral reservations are construed according to the purpose for which the legislative body granted the surface and reserved the minerals. Therefore the statute authorizing the patent controls the reservation if the patent language is erroneous or even if the reservation is omitted from the patent."[198] The Tenth Circuit added that a constructional preference in favor of a government agency which did nothing to reveal its beliefs regarding the scope of a mineral reservation until eleven years after the transaction, would promote instability of land titles and unfairly penalize innocent grantees.[199]

Following the 1970 land transaction in *Poverty Flats*, evidence showed that the Bureau of Land Management (BLM) began to construe mineral reservations in a different way and classified caliche as a "mineral." However, "[t]his change was not made known publicly and the Government point[ed] to no notice or change in the regulations."[200] As the court indicated, the inconsistency with this policy change lay in the fact that the caliche sold to the Oilfield Construction Company "was sold as a common surface material [and] not treated as a 'mineral.' "[201]

b. *The Surface Resources Act of 1955*

The Surface Resources Act of 1955[202] was enacted to remove a large group of "common materials" from the "locatable minerals" category. Common "materials" were removed from the application of the mining laws and put under a permit system.[203] The court held that the United States was improperly attempting to place caliche into the cate-

195. *See* United States v. Union Pac. R.R. Co., 353 U.S. 112, 116 (1957) (grant of right-of-way through public lands by United States to railroad company did not convey mineral lands where expressly reserved by Congress); *see also* Andrus v. Charlestone Stone Prod. Co., 436 U.S. 604, 617 (1978).

196. Leo Sheep Co. v. United States, 440 U.S. 668, 682 (1979) (quoting Winona & St. Peter R. Co. v. Barney, 113 U.S. 618, 625 (1885)).

197. *Id.* at 682-83 (quoting United States v. Denver & Rio Grande R. Co., 150 U.S. 1, 14 (1893)).

198. *See* Mall, *Federal Mineral Reservations*, 20 ROCKY MTN. MIN. L. INST. 399, 410 (1975).

199. *Poverty Flats*, 788 F.2d at 683.

200. *Id.* at 679.

201. *Id.*

202. 30 U.S.C. §§ 601-15 (1976). This was intended to "prevent mining locations on public lands containing these materials being made with a view to ultimately obtaining title to the lands." *Poverty Flats*, 788 F.2d at 680.

203. Section 611 of the Surface Resources Act provides in part that "[n]o deposit of common varieties of sand, stone, gravel . . . shall be deemed a valuable mineral deposit within the meaning of the mining . . . laws so as to give effective validity to any mining claim hereafter located under such mining laws." 30 U.S.C. § 611 (1982).

gory of minerals, known as "mineral materials," outside the scope of the Surface Resources Act. According to the Court, though, caliche could not be both a "locatable *mineral*" falling within the mineral reservation and a "common *material*" under the Surface Resources Act.[204] As Judge Seth stated, "[c]aliche cannot be both fish and fowl."[205] The court concluded that caliche is a non-locatable common surface material.[206]

c. Western Nuclear *Applied*

Finally, the Tenth Circuit distinguished *Poverty Flats* from *Watt v. Western Nuclear, Inc.*,[207] in which the United States Supreme Court held that gravel was a mineral reserved to the United States under the Stock Raising Homestead Act of 1916.[208] The two cases evidence separate tests used by courts to determine what is to be considered a mineral under a mineral reservation: the separate value test[209] and the settled expectations test.[210]

i. The Separate Value Test

In *Western Nuclear*, the Supreme Court relied on the separate value test[211] to determine that gravel was a reserved mineral. The Court concluded that in order for a substance to be a reserved mineral under the Stock Raising Homestead Act, it must first be "mineral in character," capable of being "removed from the soil," and able to "be used for commercial purposes."[212] Secondly, "there [must] be no reason to suppose

204. *Poverty Flats*, 788 F.2d at 680.

205. *Id.*

206. *Id.* at 683; *see* United States v. Coleman, 390 U.S. 500 (1968); *see also* Robert L. Berry, 25 I.B.L.A. 287, 294-96 (1976) (holding that "common dirt," while literally a mineral, cannot be classified as a locatable mineral).

207. 462 U.S. 36 (1983). Western Nuclear purchased land on which an open gravel pit was located. The conveyance of the land patent was made in 1926 and was issued under the Stock Raising Homestead Act of 1916 (SRHA), 43 U.S.C. §§ 291-301 (1976), *suspended by* Taylor Grazing Act of 1934, Pub. L. No. 73-482, 48 Stat. 1269, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-82 (1982)). The patent reserved to the United States "all the coal and other minerals." *Western Nuclear*, 462 U.S. at 37. Western Nuclear, as part of its mining and milling operations, used gravel obtained from the pit.

In 1975, the Wyoming office of the Bureau of Land Management (the BLM) cited Western Nuclear for trespass upon the mineral estate. At the administrative hearing, the BLM determined that the gravel on and underlying Western Nuclear's land was reserved to the United States. *Id.* at 41. Following several appeals to administrative agencies and lower federal courts, the case was appealed to the Supreme Court. *Id.* at 36. The Court, in a 5-4 decision, concluded that gravel was a mineral under the SRHA reservation. *Id.* at 60.

208. Stock Raising Homestead Act of 1916, 43 U.S.C. §§ 291-301 (1976), *suspended by* Taylor Grazing Act of 1934, Pub. L. No. 73-482, 48 Stat. 1269, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. § 1701-82 (1982)).

209. *See* Northern Pac. Ry. Co. v. Soderberg, 188 U.S. 526 (1903) (land containing deposits of common substances are classified as mineral lands if the deposits render the land more valuable than for agricultural purposes).

210. *See* Leo Sheep Co. v. United States, 440 U.S. 668 (1979) (recognizing the expectations of patentees).

211. *Western Nuclear*, 462 U.S. at 53-54; *see supra* note 209.

212. *Western Nuclear*, 462 U.S. at 53.

[it was] intended to be included in the surface estate."[213] Applying this test, the *Western Nuclear* Court categorized gravel as a valuable, locatable mineral.[214]

In *Poverty Flats*, Judge Seth concluded that caliche has never been considered a locatable mineral "under any administrative or court decision or practice and thus [did] not meet *Western Nuclear*'s basic requirement."[215] Moreover, the court decided that caliche does not qualify as a locatable mineral as defined in *Andrus v. Charlestone Stone Products*.[216] The court noted that although caliche has "value as fill dirt and surfacing . . . [n]othing can be extracted from it nor derived from it. It is used by reason of its physical characteristics only."[217] Furthermore, its occurrence over vast areas of the West necessitated the categorization as a non-locatable common surface material and not as a mineral within the scope of the reservation.[218]

ii. Settled Expectations Test

This test looks to the expectations of patentees at the time the patent was issued. The test was first recognized in *Leo Sheep Company v. United States*[219] and is premised on the need for certainty and predictability in land titles. Accordingly, the implied reservations in a patent cannot be asserted after patentees have come to expect certain stability in their titles.[220]

The dissent in *Western Nuclear* emphasized that western settlers had expectations of perpetual ownership and control of the land.[221] However, the majority in that case did not apply the settled expectations test to determine the meaning of a "mineral" under the Stock Raising Homestead Act mineral reservation.

Poverty Flats acknowledged the recognized position of the BLM at the time the Taylor Grazing Act was enacted and when the patent was issued to Poverty Flats' predecessor in title. The court indicated that caliche was not considered a mineral under the Secretary of Interior's mineral reservation at the time of the exchange. The court considered and applied the settled expectations test of *Leo Sheep* to determine the meaning of a "mineral" under the Taylor Grazing Act exchange mineral reservation. Therefore, by not claiming ownership in caliche for nearly eleven years, the surface owners had the right to expect that this mate-

213. *Id.*
214. *Id.* at 59-60.
215. *Poverty Flats*, 788 F.2d at 682.
216. 462 U.S. 604 (1978). The Tenth Circuit noted that the *Charlestone* Court had "considered the two factors on which the experts based their opinion in the case before us:" chemical identification as a mineral and whether the substance had value. *Poverty Flats*, 788 F.2d at 682.
217. *Poverty Flats*, 788 F.2d at 683.
218. *Id.*
219. 440 U.S. 668 (1979).
220. *Id.* at 687.
221. *Western Nuclear*, 462 U.S. at 71-72 (Powell, J., dissenting). Justice Powell defended the concept of "citizen sovereignty" of the soil. *Id.* at 71 (Powell, J., dissenting).

rial was part of the surface estate. To now take caliche away from Poverty Flats would raise serious doubts regarding the extent of land titles granted under the Taylor Grazing Act. As stated by the Supreme Court in *Leo Sheep*, there is a "special need for certainty and predictability where land titles are concerned."[222]

In conclusion, *Poverty Flats* marked the triumph of the rights of private citizens over the claim of the United States Government to a material not specifically mentioned in a mineral reservation. The Tenth Circuit refused to extend the litany of "minerals" which the government may claim under mineral reservations and thereby limited the scope of governmental power.

IV. ENVIRONMENTAL IMPACT STATEMENT

A. Lidstone v. Block

1. Facts

In 1976, the City of Cheyenne Board of Public Utilities applied to the United States Forest Service for a right of way over part of the Medicine Bow National Forest in order to construct a water diversion project.[223] The purpose of the project was to provide an adequate supply of water for the City of Cheyenne, Wyoming. At that time, Cheyenne was drawing water from wells and from Douglas Creek, a tributary of the North Platte River. The Douglas Creek water diversion project was referred to as Stage I.[224] Stage I and additional water sources supplied approximately 14,700 acre-feet of water annually to the City of Cheyenne.[225]

In view of anticipated growth and attendant increase in water demand, Cheyenne proposed a project in 1978, known as Stage II, seeking to increase its annual water supply to approximately 28,100 acre-feet.[226] Following the procedure established in the Stage I project, the Stage II application proposed the diversion of additional water from the North Platte River with replacement from the Little Snake River. To accommodate the increased water flow, the city proposed to expand the Stage

222. *Leo Sheep*, 440 U.S. at 687.

223. Lidstone v. Block, 773 F.2d 1135 (10th Cir. 1985); EPA Final Environmental Impact Statment for the City of Cheyenne [hereinafter FEIS] at 2 (December 8, 1981).

224. FEIS, *supra* note 223, at 4. Under the provisions of Stage I, Cheyenne constructed the Rob Roy Reservoir on Douglas Creek and a pipeline to transport water to the Granite Springs Reservoir. However, the Stage I diversion project permits were conditioned on the replacement of water taken from the North Platte with water drawn from the tributaries of the Little Snake River on the western side of the Continental Divide. *Id.*

In order to meet this condition, Cheyenne constructed a diversion and collection system which draws water from certain tributaries of the Little Snake River and transports the water through a tunnel under the Continental Divide to Hog Park Reservoir. Water is released from the Hog Park Reservoir into the Encampment River, a tributary of the North Platte. The Little Snake diversion and the Hog Park Reservoir collection system were constructed on lands in the Medicine Bow National Forest under a permit from the United States Forest Service. *Id.*

225. *Id.*

226. *Id.* at 15.

I project by constructing additional diversion structures and pipelines on tributaries of the Little Snake that had not previously been affected.[227] This expansion project included construction over lands in the Medicine Bow National Forest; therefore, the city applied for a right of way pursuant to section 501 of the Federal Land Policy and Management Act (FLPMA).[228]

In accordance with the requirements of the National Environmental Policy Act,[229] an Environmental Impact Statement (EIS) was prepared by the Forest Service. The initial EIS was rated inadequate by the Environmental Protection Agency and a revised draft was prepared.[230] On December 8, 1981, the Regional Forester issued the Final Environmental Impact Statement (FEIS) together with his Record of Decision, which granted a conditional right of way that was more restrictive than that sought in Cheyenne's application.[231] The Forest Service found that Cheyenne's proposal was not environmentally acceptable because it did not provide for the required maintenance and flushing flows in all diverted streams.[232] Consequently, the Forest Service eliminated Cheyenne's proposal and instead selected five alternatives for detailed study and comparison.[233] The right of way which was granted by the Forest Service was consistent with Alternative C.[234] Although Alternative C would not permit all of the diversion facilities that Cheyenne had proposed, this alternative would provide for the required maintenance and flushing flows in all the diverted streams.[235] Additionally, the Regional Forester placed two conditions on the issuance of the permits: (1) Cheyenne was required to demonstrate its financial ability to carry out the project, since the bond issue to finance the project had been defeated in a municipal election; and (2) a joint statement from the city and State of Wyoming was required that, in essence, would justify that the selected

227. *Lidstone*, 773 F.2d at 1136. Additionally, the city proposed to enlarge both the Hog Park Reservoir and the Rob Roy Reservoir to accommodate the increased flow. The city also proposed to construct another pipeline from the Rob Roy Reservoir to carry the water to the City of Cheyenne. The estimated cost of the Stage II diversion project was $100,000,000. FEIS, *supra* note 223, at 18-19.

228. *Lidstone*, 773 F.2d at 1136; 43 U.S.C. §§ 1701, 1761-71 (1982 & Supp. II 1984).

229. 42 U.S.C. § 4332 (1982 & Supp. II 1984).

230. FEIS, *supra* note 223, at 5.

231. *Lidstone*, 773 F.2d at 1136. The FEIS included a comprehensive discussion of the city's proposal, alternatives to the proposal, and the environmental impacts of certain alternatives. *Id.*

232. FEIS, *supra* note 223, at 19.

233. *Lidstone*, 773 F.2d at 1136. The five alternatives were: (A) the no action alternative; (B) Cheyenne's full proposal coupled with environmental restrictions; (C) mitigation measures which limited the extent of the new diversion facilities in the Little Snake Basin, but permitted full development of the remainder of the proposal with the application of the mitigation measures; (D) mitigation measures which would have replaced the Little Snake diversion system with a reservoir on that river and a pumping station to deliver water to the existing tunnel under the Continental Divide, and; (E) mitigation measures which would have abandoned Stage II and relied instead on a combination of water conservation, water rights purchase and groundwater development to meet the estimated demand. FEIS, *supra* note 223, at 82-101.

234. *Lidstone*, 773 F.2d at 1136.

235. FEIS, *supra* note 223, at 1-2.

alternative was compatible with the State's water development plans.[236]

Subsequently, Cheyenne amended its application by postponing, for ten to fifteen years, the construction of the additional pipelines from Douglas Creek to the city's water system. Although this reduced the estimated cost of the project by $40,000,000, there was not a similar reduction in the amount of water to be transferred from the Little Snake to the North Platte River.[237] State legislation required the City to market the excess water and to apply the proceeds to repayment of a loan made by the state to the city to finance construction.[238] Voters approved the revised bond issue and the city and state provided a statement that the project was compatible with the State's water development plans. Since the two conditions had been met, the Regional Forester issued the permits and this decision was affirmed by the Chief of the Forest Service.[239]

Appellants then brought this action in the United States District Court for the District of Wyoming challenging the Forest Service's decision to grant the right of way. The complaint alleged violations of the National Environmental Policy Act (NEPA),[240] the Federal Land Policy and Management Act (FLPMA),[241] the Endangered Species Act,[242] the Upper Colorado River Basin Compact (Compact),[243] and the Supreme Court's decree in *Nebraska v. Wyoming*.[244] The appellants then moved to disqualify the trial judge, Judge Brimmer. The stated grounds for disqualification were that the judge had made a financial contribution to a committee organized to promote the passage of the bond issues for the Stage II water diversion project.[245]

2. The Lower Court Decision

The district court denied the motion to disqualify, concluding that Judge Brimmer's small contribution to an organization supporting the bond issue did not create a reasonable question as to his impartiality.[246] The court also dismissed all claims based on the *Nebraska v. Wyoming* case, the Compact, and the Endangered Species Act.[247] Finally, the court granted the federal and city defendants' motion for summary judgment on the NEPA and FLPMA claims. The lower court concluded that the FEIS contained a satisfactory discussion of the alternatives and had dealt with the issues appellants raised under the Upper Colorado River

236. *Id.* at 1.
237. *Id.* at 20.
238. *Id.* at 17. *See* WYO. STAT. § 41-2-210(e) (Cum. Supp. 1984).
239. FEIS, *supra* note 223, at 17-18.
240. 42 U.S.C. § 4321-70 (1982 & Supp. II 1984).
241. 43 U.S.C. § 1701-84 (1982 & Supp. II 1984).
242. 16 U.S.C. § 15 (1982 & Supp. II 1984).
243. Upper Colorado River Basin Compact, ch. 48, 63 Stat. 31 (1949); *see infra* note 261 and accompanying text.
244. 325 U.S. 589 (1945).
245. *Lidstone*, 773 F.2d at 1137; *see infra* note 250.
246. *Id.* at 1137-38.
247. *Id.* at 1136. The claim under the Endangered Species Act was dropped.

Basin Compact and the decree in *Nebraska v. Wyoming*. The court also rejected the FLPMA claim, holding that the selection of Alternative C and the mitigation measures ordered by the Forest Service satisfied its duty to limit the right of way so as to do no unnecessary damage to the environment.[248]

3. The Tenth Circuit Decision

Affirming the district court's decision, the Tenth Circuit found that the environmental effects of the proposed project had been thoroughly examined.[249] Judge Seth, writing for the court, agreed that no personal bias could be found in Judge Brimmer's contribution to a Cheyenne organization seeking to educate the public about the bond issue proposed for the expansion of the water system.[250]

a. *Standard of Review - Environmental Impact Statement*

The standard of judicial review of an environmental impact statement is well established and was described in *Environmental Defense Fund, Inc. v. Andrus*:[251]

> Judicial review of an EIS is limited to a consideration of the following: (1) does the EIS discuss all of the five procedural requirements listed in 42 U.S.C. § 4332(C); (2) does the EIS constitute a good faith compliance with the demands of NEPA; and (3) does the statement contain a reasonable discussion of the subject matter involved in the five respective areas?[252]

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248. *Id.* at 1137.

249. *Id.*

250. *Id.* at 1137-38. The appellants attempted to disqualify the district court judge on the basis of a modest financial contribution, twenty-five dollars, made by Judge Brimmer, before suit was filed, to a group in Cheyenne seeking to inform the public about a proposed bond issue to finance the Stage II expansion project. Disqualification was sought under the provisions of 28 U.S.C. § 455(a) (1982), which states that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Lidstone*, 773 F.2d at 1137.

The Tenth Circuit concluded that Judge Brimmer properly remained sitting on this action because "the plaintiff's failed to meet the standard set forth in *United States v. Irwin*." *Id.* (citing United States v. Irwin, 561 F.2d 198 (10th Cir. 1977)). The standard is that "[t]he bias charged must be of a personal nature and must be such as would likely result in a decision on some basis other than what the judge learned from his participation in the case." *Irwin*, 561 F.2d at 200.

In affirming Judge Brimmer's decision not to recuse himself, Judge Seth pointed out that the plaintiffs had failed to demonstrate any real connection between the contribution and the issue of whether the Forest Service complied with the applicable federal law. *Lidstone*, 773 F.2d at 1137-38.

251. 619 F.2d 1368 (10th Cir. 1980) (Environmental groups sought to compel the Secretary of the Interior to comply with the National Environmental Policy Act in connection with approving detailed development plans prepared by defendant lessees, in lieu of an environmental impact statement, under a prototype oil shale leasing program.).

252. *Id.* at 1376 (quoting Save Our Invaluable Land (SOIL), Inc. v. Needham, 542 F.2d 539, 542-43 (10th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977)). The five procedural requirements listed in 42 U.S.C. § 4332(C) are:

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

Thus, the duty of the reviewing court is limited to determining whether the consideration and disclosure of the environmental consequences was adequate.[253] Moreover, the reviewing court may not substitute its judgment for that of the agency as to the ultimate choice of action.[254]

The National Environmental Protection Act requires that an EIS include a comprehensive examination of the relevant environmental consequences of a project and that the reviewing agency disclose the results to the public.[255] The Federal Land Policy and Management Act (FLPMA) authorizes the Secretary of Agriculture to grant rights of way over lands in national forests for "reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water."[256] Furthermore, the FLPMA requires that each right of way must be "limited to the ground which the Secretary . . . determines . . . will do no unnecessary damage to the environment."[257] Also rights of way must contain terms and conditions that will "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment."[258] Finally, the FLPMA requires that the location of the right a way be "along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors."[259] In the present case, the Tenth Circuit found that the district court did not abuse its discretion in its review of whether the Forest Service had complied with the requirements of the FLPMA and NEPA.

b. *Water Diversion Issues*

Appellants also advanced issues related solely to water rights. The court found, however, that right of way applications for a water project

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(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(C) (1982 & Supp. II 1984).

253. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) ("The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' "); *see, e.g.*, Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97-98 (1983); Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980) (per curiam) (agency must not elevate environmental concerns over other appropriate considerations); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978) (NEPA imposes "upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.").

254. Manygoats v. Kleppe, 558 F.2d 556, 560 (10th Cir. 1977) ("court should not second-guess the experts"); *Save Our Invaluable Land (SOIL), Inc.*, 542 F.2d at 543 ("Nor should the courts in evaluating an EIS engage in hindsight judgment by way of second guessing."); National Helium Corp. v. Morton, 486 F.2d 995, 1002-03 (10th Cir.) (court rejected concept that environmental statement is judicially reviewable on the merits to determine sufficiency), *cert. denied*, 416 U.S. 993 (1973).

255. 42 U.S.C. § 4332(C) (1982 & Supp. II 1984).

256. 43 U.S.C. § 1761(a)(1) (1982).

257. 43 U.S.C. § 1764(a)(4) (1982).

258. 43 U.S.C. § 1765(a)(ii) (1982).

259. 43 U.S.C. § 1765(b)(v) (1982).

involve land use determinations and not water rights determinations.[260] Therefore, the Tenth Circuit affirmed the district court's dismissal of water rights arguments based on alleged violations of the *Nebraska v. Wyoming* decree and the Upper Colorado River Compact. The court emphasized "that the right of way grant had nothing to do with the question as to whether Wyoming could move the water out of the Snake River Basin."[261] Consequently, the court held that the Forest Service

260. *Lidstone*, 773 F.2d at 1137.

261. *Id.* Appellants argued that the Upper Colorado River Basin Compact precluded transbasin diversion of the Little Snake River. *Id.* at 1136. The Compact was designed to protect allocations of water between the states, not the methods of dividing waters within the state boundaries. The most applicable language of the Compact is Article XI, section (f), which states that "[w]ater use projects initiated after the signing of this Compact, to the greatest extent possible, shall permit the full use within the Basin in the most feasible manner of the waters of the Little Snake River and its tributaries." Upper Colorado River Basin Compact, ch. 48, 63 Stat. 31, 39 (1949).

The State Engineer of Wyoming specifically required the diversion of Little Snake waters into the North Platte Basin under this project. In so doing, the State Engineer indicated that the State may appropriate water for use in Wyoming so long as the amount is within its apportionment under the Compact and so long as the State meets its delivery obligation to the Lower Basin. FEIS, *supra* note 223, at 13-23. The Compact must be interpreted in light of the principle expressed in Nebraska v. Wyoming, 325 U.S. 589 (1945): "Our problem is not to determine what allocation would be equitable among the canals in Nebraska or among those in Wyoming. That is a problem of internal administration for each of the States." *Id.* at 645.

Article VIII, section 3, of the Wyoming Constitution deals with "internal administration" and expresses the rule as follows: "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests." WYO. CONST. art. VIII, § 3. This does not prohibit transbasin diversion. In Willey v. Decker, 11 Wyo. 496, 531, 73 P. 210, 220 (1903), the following principle was established: "The appropriator, though he may not own the land on either bank of a running stream, may divert the water therefrom, and carry the same whithersoever necessity may require for beneficial use, without returning it, or any of it, to the natural stream in any manner." *Id.* (quoting Oppenlander v. Left-Hand Ditch Co., 18 Colo. 1012, 31 P. 854 (1892)); *see also*, Moyer v. Preston, 6 Wyo. 308, 44 P. 845 (1896).

In 1929 the United States Supreme Court resolved a dispute between Wyoming and Colorado involving the waters of the Laramie River. Wyoming v. Colorado, 259 U.S. 419 (1929). The Laramie flows north from Colorado into Wyoming. Colorado appropriators built a canal to divert water out of the Laramie River Basin into a foreign basin for agricultural use. Wyoming complained that "the waters of this interstate stream cannot rightfully be taken from its watershed and carried into another." *Id.* at 456-57. In finding for Colorado and allowing the transbasin diversion, the Court noted that both states subscribed to a policy of prior appropriation which allowed transbasin diversion. The Court stated:

> Both States pronounce the rule just and reasonable as applied to the natural conditions in that region; and to prevent any departure from it the people of both incorporated into their constitutions. It originated in the customs and usages of the people before either State came into existence, and the courts of both hold that their constitutional provisions are to be taken as recognizing the prior usage rather than as creating a new rule.

Id. at 470.

The Upper Colorado River Basin Compact, ch. 48, 63 Stat. 31 (1949), does not prohibit transbasin diversion, it promotes beneficial use. Article XI, section (c) of the Compact reads: "Water uses under the apportionment made by this Article shall be in accordance with the principle that beneficial use shall be the basis, measure and limit of the right to use." 63 Stat. at 38.

Furthermore, Article III, section (b) reads as follows:

> The apportionment made to the respective States by paragraph (a) of this Article is based upon, and shall be applied in conformity with, the following principles and each of them:
>
> (1) the apportionment is of any and all man-made depletions;
>
> . . . .

properly restricted its environmental study to the land use issues with which it had the authority to deal and evaluate.[262]

4. Conclusion

The Tenth Circuit correctly concluded that the district court had properly followed the established standard of review in considering a challenge to an EIS. The grant of a right of way is an agency action subject to judicial review under the Administrative Procedure Act.[263] Under that statute, the decision must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[264]

The FEIS demonstrated that the Forest Service did not violate its duty under the FLPMA when it granted the right of way. The Regional Forester met the requirements of the FLPMA and NEPA by thoroughly examining the environmental consequences of the project and recommending an approach which would minimize environmental damage.[265] The Tenth Circuit found that, procedurally, the Forest Service had considered all "feasible, reasonable alternatives."[266] The district court did not have the authority to second guess the judgment of the Forest Service, but only to determine if the Forest Service had complied with the requirements of preparing an EIS. The Tenth Circuit properly affirmed the district court's decision.

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(4) The apportionment to each State includes all water necessary for the supply of any rights which now exist.

63 Stat. at 33.

262. *Lidstone*, 773 F.2d at 1137.

263. 5 U.S.C. § 551 (1982 & Supp. II 1984).

264. 5 U.S.C. § 706(2)(A) (1982 & Supp. II 1984).

265. *Lidstone*, 773 F.2d at 1137.

266. *Id.*