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The Legal Landscape Is Rough Country for South Dakota Ranchers Who Operate on Federal Lands

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THE LEGAL LANDSCAPE IS ROUGH COUNTRY FOR SOUTH DAKOTA RANCHERS WHO OPERATE ON FEDERAL LANDS

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Federal lands are common in South Dakota, and ranchers who operate on or next to federal land in the State face significant legal hurdles when challenging federal management practices within the administrative appeals process and within the federal courts. In 2011, the South Dakota Supreme Court ruled that the South Dakota Department of Game, Fish, and Parks had sovereign immunity against South Dakota ranchers who sued the agency when prairie dogs allegedly encroached from abutting federal lands and damaged private property. Arguably, the ranchers sued the wrong sovereign and should have disputed with the United States Forest Service. However, challenging federal agency decisions is not an easy process and federal land management remains immune from state laws and removed from direct South Dakotan control. This comment will give background on federal land management and give important considerations for South Dakotans when challenging said management in federal courts.

I. INTRODUCTION

As the four-wheeler sputtered to a calm, the rancher stepped off briskly.[1] He had plenty on his mind. While placing mineral supplements into troughs for the nearby cattle munching on the short, green grass, he thought about all the other jobs he needed to be doing—fencing, haying, moving some cattle, or finally working on that broken-down farm equipment. Busied by his thoughts, he almost missed the small quips of the alerted prairie dogs all around him.

The prairie dogs sounded a warning "bark" to their neighbors of the dangerous intruder. The rancher pondered how long the prairie dog town had been there. It could not have been long; he had just been through this area and would have noticed the critters. The pasture abutted a large tract of national grassland and the rancher guessed that the "homesteading" prairie dogs had likely come from there because there were other prairie dog towns on the federal land. Sighing, he added the town's eradication to the growing list of jobs. "Never let them get started", is what the rancher could hear his older, wiser neighbor tell him. Once they are there, it is impossible to get rid of them. The prairie dogs create

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1. Dear readers: This account is from the author's perspective during the early summer of 2018 while working on the family's ranch in South Dakota.

holes and hills everywhere. Worse yet, they leave desolate any vegetation for the needy cows. The rancher took his stewardship of the land and cattle seriously, yet his busy summer schedule gave little time to ask any government agency for help to eradicate them. The South Dakota agency required administrative steps proving that the prairie dogs indeed came from federal lands, and it was quicker, easier, and more effective if the rancher supplied the labor and materials for eradication himself.[2] Listening to the barking still going on around him in the middle of the prairie dog "town," the rancher agreed that they were cute little things. Yet, left unchecked, the invasive prairie dogs would eat and burrow until he was out of business. Neither the nearby cattle nor the rancher appreciated the ecological footprint from the prairie dogs. Indeed, the barking dogs were wise to sound the alarm. The rancher had found them.

While prairie dogs are common in South Dakota and many ranchers deal with their populations, federal land is also common in the western-half of the state.[3] Out of South Dakota's forty-nine million acres, approximately three hundred thousand acres are managed by the Bureau of Land Management (BLM) in South Dakota.[4] In addition, the United States Forest Service (Forest Service) manages nearly two-and-a-half million additional acres in South Dakota including one million acres of national grasslands.[5] Federal land is increasingly becoming an area for outdoor recreation, endangered species habitat, and nature preserves.[6] Over the last forty years, cattle numbers on public lands across the United States have been cut in half.[7] The deeper issues of federal land management surfaced in

2. *See* S.D. DEP'T OF GAME, FISH, & PARKS, *Prairie Dog Control*, http://sdgfp.maps.arcgis.com/apps/GeoForm/index.html?appid=289d889c47e74718accdce0d64194b35 (last visited Oct. 5, 2018) (showing the application process for prairie dog control through the South Dakota state agency for prairie dogs that have encroached from abutting public lands).

3. *See* S.D. DEP'T OF GAME, FISH, & PARKS, COLONY ACREAGE AND DISTRIBUTION OF THE BLACK-TAILED PRAIRIE DOG IN SOUTH DAKOTA, 2012 1 (Feb. 2015) https://gfpga.sd.gov/hunting/docs/prairiedogmappingreport.pdf (detailing that South Dakota is home to over a half million acres of prairie dog populations as of the latest statistics). *See also* Eric Olson, *National Grasslands Management A Primer*, U.S. DEP'T OF AGRIC. 3 (Nov. 1997) https://www.fs.fed.us/grasslands/documents/primer/NG_Primer.pdf (detailing that Buffalo Gap National Grassland (the second largest grassland in the nation) is located in South Dakota and contains over half-a-million acres).

4. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 2017, 7 (June 2018), https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2017.pdf.

5. U.S. FOREST SERV., U.S. DEP'T OF AGRIC., LAND AREAS OF THE NATIONAL FOREST SYSTEM 40 (Sept. 30, 2017), https://www.fs.fed.us/land/staff/lar/LAR2017/LAR_Book_FY2017.pdf.

6. Jim Carlton, *In the Battle for the American West, the Cowboys Are Losing*, THE WALL STREET J., Mar. 30, 2018, at A1. *See also* U.S. DEP'T OF AGRIC. FOREST SERV., *Buffalo Gap Nat'l Grassland*, https://www.fs.usda.gov/recarea/nebraska/recarea/?recid=30329 (last visited Oct. 9, 2018) (advertising the various recreational activities including biking, camping, hiking, hunting, nature viewing, and rockhounding).

7. Carlton, *supra* note 6, at A1. Some have explained that "in 1960, the Forest Service started to apply its policies and laws to the national grasslands . . . . This approach to national grasslands administration has the potential to destabilize agricultural operations dependent on forage from the national grasslands." Elizabeth Howard, *Management of the National Grasslands*, 78 N.D.L. REV. 409, 411 (2002).

South Dakota as a result of the Forest Service efforts to increase prairie dog populations.[8]

In 1994, the Forest Service ceased all control of prairie dogs on federal land in South Dakota so that the Forest Service could establish an adequate population for the endangered Black-Footed Ferret, which naturally preys upon prairie dogs.[9] The Forest Service prairie dog management plan allowed for 6,180 acres of federal land on the Buffalo National Grasslands and elsewhere in the Conata Basin to be developed into prairie dog populations for the reintroduction of the Black-Footed Ferret.[10]

South Dakota state law mandates the control of the population of the Black-Tailed Prairie Dog only if the prairie dog is considered a pest.[11] Prairie dogs are considered pests when the state population exceeds 145,000 acres.[12] Between 1995 and 1997, total acres of prairie dogs in South Dakota exceeded the threshold when the population reached 189,258 acres.[13] By 2006, total acres of prairie dogs in South Dakota had grown to 625,410 acres.[14] That same year, the South Dakota Department of Game, Fish, and Parks (SDGFP) treated 42,056 acres for prairie dog encroachments from federal land.[15] According to the latest survey by the SDGFP, the prairie dog population looms at 526,641 acres.[16]

Federal management does not allow hunting of prairie dogs on the Buffalo Gap National Grasslands because of the protection efforts for the Black-Footed Ferret.[17] In 2010, thirty-six western South Dakota ranchers who bordered federal land filed a complaint in state court against two state agencies because prairie dogs

8. *See* Adrian v. Vonk, 2011 SD 84, ¶ 2, 807 N.W.2d 119, 120 (discussing how prairie dogs allegedly encroaching from federal lands caused damage to rancher's private land which adjoined the federal land).

9. Brief of Appellees at 3, Adrian v. Vonk, 2011 SD 84, 807 N.W.2d 119 (No. 25922) [hereinafter Brief of Appellees].

10. Adrian v. Vonk, 2011 SD 84, ¶ 9, 807 N.W.2d 119, 122.

11. *Id.* ¶ 11, 807 N.W.2d at 122 (detailing "the State's statutory obligation to control and manage prairie dogs"). *See also* S.D.C.L. § 38-22-1.2(7) (Supp. 2018) (giving guidelines to when a prairie dog can be considered a pest by law). *See also* S.D.C.L. § 34A-8A-5 (Supp. 2018) (explaining that "[f]ailure to control the species of management concern thereby causing encroachment on the property of another" constitutes a nuisance).

12. S.D.C.L § 38-22-1.2 (7)(b) (Supp. 2018).

13. Appellants' Reply Brief at 8-10, Adrian v. Vonk, 2011 SD 84, 807 N.W.2d 119 (No. 25922) [hereinafter Appellants' Reply Brief].

14. *Id.*

15. *See id.* (detailing that in 2006, 30,200 acres were treated on private lands and 11,856 acres on public lands for prairie dogs (which equals 42,056 total acres, but differs from what the Appellants' Reply Brief has for total acres at 41,875—this appears to be a mathematical error in the Brief)).

16. S.D. DEP'T OF GAME, FISH, & PARKS, COLONY ACREAGE AND DISTRIBUTION OF THE BLACK-TAILED PRAIRIE DOG IN SOUTH DAKOTA, 2012 1 (Feb. 2015) https://gfpga.sd.gov/hunting/docs/prairiedogmappingreport.pdf.

17. *See* S.D. DEP'T OF GAME, FISH, & PARKS, *Prairie Dog* https://gfp.sd.gov/prairie-dog/ (last visited Oct. 10, 2018) (discussing that prairie dogs have an open season year-round except in the Buffalo Gap National Grassland). *See also* U.S. DEP'T OF AGRIC. FOREST SERV., PRAIRIE DOG SHOOTING INFORMATION 1-2 https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd543171.pdf (last visited Oct. 19, 2018) (detailing when hunting of the prairie dog is not allowed on the Conata Basin of Buffalo Gap National Grassland).

left federal lands, crossed buffers, and settled on private land.[18] When the SDGFP was unable to ensure control of prairie dogs that toddled across the fence from federal land onto private ground, ranchers sued the State agencies charged with controlling the prairie dogs rather than the federal agencies who managed the prairie dog population boom.[19]

The South Dakota Supreme Court held that the State had sovereign immunity from the ranchers' suit because the State's duty to control prairie dogs was "clearly discretionary" and that there were no "hard and fast rules" appropriated by State legislators for controlling prairie dogs.[20] Former South Dakota Governor Mike Rounds commented about management on the federal lands and the problems faced by the State to help ranchers control prairie dogs:

> Let's face it, the federal government hasn't been a good neighbor in regards to the management of prairie dogs on their lands. Not only are the farmers and ranchers who graze cattle and sheep on these lands getting short changed, but when the prairie dogs are spilling onto private land, we really have a serious problem to fix.[21]

In other circumstances, tensions have sparked antics such as standoffs between landowners and federal agencies over management of the western federal lands.[22]

This comment will explore the legal landscape surrounding federal land management practices and will suggest that the primary path to greater accountability for public lands in South Dakota may rest in the transfer of federal land management to states. In Part II, the comment will give the historical development of federal land management in western states, and the changes in policy regarding grazing.[23] Next, the comment will explore how disputes against federal land management are resolved through the administrative process and some of the difficulties of settling disputes within the judiciary.[24] The comment will then glance at how some states have attempted to circumvent the process of challenging federal management and examine how South Dakota ranchers reacted to federal land management practices.[25] Finally, in Part III, a brief analysis will discuss the challenges facing most appeals to federal land management

18. Adrian v. Vonk, 2011 SD 84, ¶ 2, 807 N.W.2d 119, 120.

19. Appellants' Brief at 5-6, Adrian v. Vonk, 2011 SD 84, 807 N.W.2d 119 (No. 25922) [hereinafter Appellants' Brief].

20. *Adrian*, 2011 S.D. 84, ¶¶ 14-18 807 N.W.2d at 124-25.

21. S.D. STATE NEWS, *Gov. Rounds authorizes emergency prairie dog management practices* http://news.sd.gov/newsitem.aspx?id=9900 (last visited Oct. 10, 2018).

22. *See* Carlton, *supra* note 6, at A1 (discussing Bundy's armed stand-off with federal authorities in Nevada stemming from a dispute where Bundy refused to pay the grazing permit fees).

23. *See infra* Part II.0 (discussing the history of the settlement of public lands and the various Congressional acts that changed the policy of how the land is managed by federal agencies).

24. *See infra* Part II.0 (explaining how complaints are brought through the administrative process and important considerations in both the administrative appeals process and the federal courts).

25. *See infra* Part II.0 (noting the two examples states or individuals have used to skirt the legal framework discussed previously—including state legislation attempts to transfer federal land to state control and the suit attempting to hold South Dakota responsible for federal land management practices).

practices.[26] Ultimately, the comment will suggest a political solution and a more likely solution which is simply to encourage better relations between South Dakota agricultural producers and their respective federal land management agency.[27]

II. BACKGROUND

A. FEDERAL LAND MANAGEMENT HISTORY

The total area of the United States is 2.4 billion acres.[28] From the wet grasslands of Florida to the desert chaparrals of California, the United States has 770 million acres of rangeland.[29] The BLM (under the Department of Interior) administers 245.7 million acres of public rangeland and 800 million acres of federal subsurface minerals.[30] The Forest Service, (under the Department of Agriculture), manages another 191 million acres of which about half is rangelands.[31] Of the 1.8 billion acres the federal government acquired from 1781 to 1867, approximately 1.3 billion acres have been transferred out of the federal government's ownership and into individual ownership.[32]

By the early 1800s, free-grazing on unclaimed federal land created beef and sheep empires.[33] About one hundred years later, rangelands had become overstocked and overcrowded, and Congress took action to establish the Forest Service as the grazing control agency.[34] During this time, the goal of Congress was to "[get] the lands into the hands of the . . . individual farmer seeking a new life on the frontier."[35]

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26. *See infra* Part III.0-0 (discussing the hurdles facing ranchers in South Dakota who challenge federal land management decisions).

27. *See infra* Part III.0 (discussing a range of possible solutions).

28. BUREAU OF LAND MGMT., *supra* note 4, at 1.

29. U.S. DEP'T OF AGRIC., *About Rangeland Management*, U.S. FOREST SERV. https://www.fs.fed.us/rangeland-management/aboutus/index.shtml (last visited Oct. 10, 2018). For an excellent visual graphic of demonstrating the vast size of the rangelands in the United States, the reader should visit Bloomberg.com where all land devoted to grazing is by far the largest single use of land. Dave Merrill & Lauren Leatherby, *Here's How America Uses Its Land*, BLOOMBERG (July 31, 2018), https://www.bloomberg.com/graphics/2018-us-land-use/. Note, however, that federal grassland is bundled in with private grasslands on the graphics. *Id.* According to the Environmental Protection Agency, "[r]angelands are those lands on which the native vegetation . . . is predominantly grasses, grass-like plants, forbs, or shrubs suitable for grazing or browsing use. Rangelands include natural grassland . . . ." U.S. ENVTL. PROT. AGENCY, *Agriculture: Pasture, Rangeland and Grazing*, https://www.epa.gov/agriculture/agriculture-pasture-rangeland-and-grazing (last visited Sept. 29, 2018).

30. BUREAU OF LAND MGMT., *supra* note 4, at 1.

31. U.S. DEP'T OF AGRIC., *supra* note 29.

32. BUREAU OF LAND MGMT., *supra* note 4, at 1.

33. U.S. DEP'T OF AGRIC., *supra* note 29.

34. *Id.*

35. Howard, *supra* note 7, at 416.

1. Homesteading and the Dust Bowl

The Homestead Act, signed by President Lincoln in 1862, was a successful and revolutionary method for distributing the vast public land to private landowners who homesteaded 160 acres at a time.[36] The Act allowed any United States citizen to file an application and own the land after five years (later reduced to three years) if the person farmed the land and built a twelve by fourteen dwelling in feet or inches.[37] Approximately 270 million acres were settled in this way in the west until the act was repealed in 1976.[38] Although the Homestead Act of 1862 originally offered 160 acres to homesteaders, in 1909 the Enlarged Homestead Act offered 620 acres in order to better support homesteaders who settled in the semi-arid west.[39] By 1890, over six million settlers arrived on western grasslands and replaced the grass with crops.[40] Unfortunately, droughts and harsh winters proved that the land was not meant for plows.[41] During the Dust Bowl and Great Depression of the 1930s, Congress passed the National Industrial Recovery Act of 1933 and the Emergency Appropriations Act of 1935, which allowed the federal government to purchase and restore damaged lands from settlers, which would later become part of the national grasslands.[42]

Furthermore, the Taylor Grazing Act of 1934 established grazing districts when western ranchers requested regulation of public rangelands due to overgrazing.[43] When the BLM was created, the "dominant use" approach was used which preferred grazing over other "non-economic" uses.[44] In the 1960s and 1970s, public policy towards grasslands changed as protection of natural resources

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36. NAT'L PARK SERV., *About the Homestead Act*, https://www.nps.gov/home/learn/historyculture/abouthomesteadactlaw.htm. (last visited Oct. 10, 2018).

37. *See* THE U.S. NAT'L ARCHIVES & RECORDS ADMIN., *The Homestead Act of 1862*, https://www.archives.gov/education/lessons/homestead-act (last visited Oct. 10, 2018) (explaining that some had taken advantage of a loophole in the language of the act that never specified if the dwelling could be in feet or inches). Before the Civil War, northern states with cheap factory labor available and southern states with slavery in effect opposed the homestead laws and three bills were defeated in the Senate during the 1850s. *Id.*

38. *Id.*

39. *Id. See also* NAT'L PARK SERV., *supra* note 36 (discussing that most of the land was homesteaded from 1911 to 1920). *See also* NAT'L PARK SERV., *The Settlers Come*, BADLANDS: HISTORY OF BADLANDS NATIONAL MONUMENT, https://www.nps.gov/parkhistory/online_books/badl/sec2.htm (last visited Oct. 10, 2018) (discussing the expanded acres used in semi-arid western states to support homesteaders).

40. U.S. DEP'T OF AGRIC., *The National Grasslands Story*, U.S. FOREST SERV., https://www.fs.fed.us/grasslands/aboutus/ (last visited Oct. 10, 2018).

41. *Id.*

42. *Id.*

43. BUREAU OF LAND MGMT., *About Livestock Grazing on Public Lands*, https://www.blm.gov/programs/natural-resources/rangelands-and-grazing/livestock-grazing/about (last visited Oct. 10, 2018). *See also* U.S. ENVTL. PROT. AGENCY, BACKGROUND FOR NEPA REVIEWERS: GRAZING ON FEDERAL LANDS 1 (Feb 1994), https://www.epa.gov/sites/production/files/2014-08/documents/grazing-federal-lands-pg.pdf (discussing how grazing districts under the Taylor Grazing Act of 1934 eventually became the Bureau of Land Management which was established in order to rehabilitate grasslands and how the National Grasslands were brought under the Forest Service management under the Bankhead-Jones Farm Tenant Act).

44. Edith Sanders, *Alternative Ranch Experiments: Better Than the BLM*, 27 WM. & MARY ENVTL. L. & POLICY REV. 265, 275 (2002).

such as sensitive plants, endangered species, historical objects, and riparian areas became more important to policy considerations resulting with the adoption of the National Environmental Policy Act of 1969 (NEPA), the Endangered Species Act of 1973 (ESA), and the Federal Land Policy and Management Act of 1976 (FLPMA).[45] The FLPMA, for example, was the culmination of a change in public attitude about environmental values regarding the federal grasslands and the policy of the federal government to retain ownership of these acquired lands.[46]

2. *Enter the Federal Agency Management*

Because of the hardships experienced on the grasslands in the Dust Bowl of the 1930s, the federal government initiated emergency efforts to acquire sub-marginal land in order to: (1) prevent farming of some land not suited for it, (2) control the land and prevent further misuse, and, (3) demonstrate model farming practices to farmers.[47] During the mid-1930s, Congress utilized its power under the Takings Clause of the Fifth Amendment (and multiple Emergency Relief Acts) and condemned private property for public use and further instructed the Secretary of Agriculture to condemn and acquire land under his authority.[48] One of the original reasons the federal government condemned and acquired the grasslands was to achieve sustainability by returning the land to a grazing purpose.[49] In 1954, the Secretary of Agriculture transferred nearly two-and-a-half million acres to the Bureau of Land Management, one million acres to state and local governments, and four million acres to the Forest Service as national grasslands.[50] The original intent was to dispose of those four million acres to private individuals, and the Forest Service attempted to do so, but was unable.[51]

3. *The De-Emphasis on Grazing within Federal Agencies*

The synonymous relationship between grazing and national grasslands faltered during the latter half of the twentieth century.[52] By 1970, higher public scrutiny of the national grassland's management and increased interest in recreation and conservation became possible catalysts for the policy actions taken on behalf of wildlife protection, watershed areas, and recreation in the national

45. *Id.* at 276-77.

46. BUREAU OF LAND MGMT., *supra* note 4, at 1.

47. Howard, *supra* note 7, at 419-20.

48. *Id.* at 427. *See also* U.S. CONST. amend. V (containing the Takings Clause which states: "nor shall private property be taken for public use, without just compensation").

49. Howard, *supra* note 7, at 429.

50. *Id.* at 425.

51. *Id.*

52. U.S. FOREST SERV., *Why does the Forest Service permit livestock grazing on National Forest System lands?*, https://www.fs.fed.us/rangeland-management/grazing/allowgrazing.shtml (last visited Oct. 11, 2018).

grasslands by the Forest Service.[53] During the 1990s, the Forest Service began to manage the national grasslands under the same principles and objectives used in such lands as the national forests.[54] Congress provided a list of five purposes for national forests with the Multiple-Use Sustained-Yield Act (MUSYA) of 1960.[55] These five uses for national forests are recreation, grazing, timber, watershed, and wildlife and fish resources.[56] Some have postulated the MUSYA mandate may not be legally binding on national grasslands.[57] However, the current direction of the Forest Service management on the rangeland serves a "multitude" of needs such as habitat, clean water and sustainable grazing.[58] Concomitantly, the FLPMA changed the mandate of the BLM which ended the "dominant use" preference of Taylor Grazing Act so that:

> public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.[59]

As a result of these changes in policy in the 1960s and 1970s, the BLM began to modify the terms and conditions of grazing permits and leases.[60]

4. Enter the Environmental Laws of the 1960s and 1970s Endangered Species Act

Furthermore, in 1969, NEPA created a deluge of powerful environmental laws which required federal management to be filtered through environmental impact studies.[61] The Endangered Species Act, one of the twelve major environmental laws passed after 1969, restricted an increasingly large landscape of rangeland to provide habitat for endangered species and covers more than 700

53. Howard, *supra* note 7, at 426. However, as late as 1963, the Secretary of Agriculture reaffirmed the original mission for acquiring the national grasslands as the promotion of sustainable yield agriculture while exemplifying prudent land management practices to adjacent landowners. *Id.*

54. *Id.* at 426-27.

55. *Id.* at 435.

56. *Id.*

57. *Id. See also* 16 U.S.C. § 528 (2017) ("Nothing herein shall be construed . . . to affect the use or administration of Federal lands not within national forests."); 16 U.S.C. § 475 (2017) (stating "it is not the purpose or intent of these provisions . . . to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes").

58. U.S. DEP'T OF AGRIC., *supra* note 29.

59. Sanders, *supra* note 44, at 276 (quoting Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701(a)(8) (2017)).

60. BUREAU OF LAND MGMT., *supra* note 43.

61. Sanders, *supra* note 44, at 277.

species with 9,000 available for listing.[62] With the advent of the ESA, Congress required federal agencies to conserve and provide habitat for endangered or threatened species and to criminalize the taking of endangered species.[63] Because of the broad mandate by the Act, the impact of regulation has been specifically severe on landowners who have endangered species currently living on their property.[64] The ESA allows federal agencies to regulate any activity in order to fulfill the mandate of conserving species and ecosystems—such as the Utah prairie dog and its habitat.[65]

5. Land Resource Management Plans

Land Resource Management Plans, hereinafter referred to as Forest Plans, refer to the National Forest Management Act's (NFMA) requirement that the Forest Service "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System . . . ."[66] The Forest Plans "provide for multiple use and sustained yield . . . and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness[.]"[67] The NFMA also required the Secretary of Agriculture to manage the public lands "under principles of multiple use and sustained yield . . . except that where a tract of such public land has been dedicated to specific uses . . . ."[68] Each Forest Plan is specific to a national forest or grassland.[69]

In 1974, Congress charged the Forest Service to implement these Forest Plans over all lands the Forest Service administered, and, in doing so, folded the management of national grasslands into the Forest Service.[70] This created a setup

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62. *Id.*

63. Jonathan Wood, *A Federal Crime Against Nature? The Federal Government Cannot Prohibit Harm to All Endangered Species Under the Necessary and Proper Clause*, 29 TUL. ENVTL. L.J. 65, 76 (2015).

64. *Id.*

65. *Id.* at 80-81. Protection of some prairie dogs in Utah has prevented business owners from legitimate business activity and even prohibited the protection of a cemetery from rodent infestations. Jonathan Wood, *PLF fights crippling, and unconstitutional, regulations that put a rodent above the constitutional rights of people*, PACIFIC LEGAL FOUNDATION (April 18, 2013), https://pacificlegal.org/plf-fights-crippling-and-unconstitutional-regulations-that-put-a-rodent-above-the-constitutional-rights-of-people/. For further information on the Endangered Species Act and its relation with the Black-Tailed Prairie Dog *see* Christopher Pepper, et al, *Threatened or Endangered? Keystone Species or Public Health Threat? The Black-Tailed Prairie Dog, the Endangered Species Act, and the Imminent Threat of Bubonic Plague*, 24 J. LAND RESOURCES & ENVTL. L. 355, 390 (2004) ("Harming prairie dogs may give rise to familiar forms of liability under relevant wildlife and criminal laws.").

66. 16 U.S.C.§ 1604(a) (2017). *See also*, U.S. DEP'T OF AGRIC., *Planning for the Future*, https://www.fs.fed.us/forestmanagement/aboutus/planforfuture.shtml (last visited Oct. 10, 2018) (explaining "[i]n conformance with the [NFMA], each national forest develops a comprehensive plan, utilizing substantial public involvement and sound science, to guide future management").

67. 16 U.S.C. § 1604(e)(1) (2017).

68. 43 U.S.C. § 1732(a) (2017).

69. Samuel Adams, *Supreme Court Denies Review of Challenges Made to Forest Management Plan*, 19 J. LAND, RESOURCES, & ENVTL. L. 104, 105 (1999).

70. *See* Olson, *supra* note 3, at 14. (providing a better historical perspective and other considerations in law regarding the national grasslands). *See also* 16 U.S.C. § 1609(a) (2017) (quoting "[t]he 'National

which lead to national grasslands being administered under laws historically used only for national forests.[71] Under the NFMA, Congress "delegates substantial autonomy to the [Forest Service] in many of its important responsibilities . . . . As the Ninth Circuit once artfully observed, the multiple-use mandate indeed 'breathes discretion at every pore.'"[72] Some have claimed that the Forest Plans do not apply to national grasslands, only national forests due to unique legal status and legal history of national grasslands.[73] Thus, the national grasslands should still be adapted to the sole, most beneficial use (promoting grassland agriculture) rather than the multiple uses required under the MUSYA.[74]

B. LEGAL FRAMEWORK FOR DISPUTE RESOLUTION

1. The Property Clause and the Supremacy of Federal Law

The United States Constitution addresses federal land management in the Property Clause found in Article IV, section 3: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."[75] Because Congress has the power to enact legislation regarding the administration of federal lands under the Property Clause, federal legislation also "necessarily overrides conflicting state laws under the Supremacy Clause."[76] Otherwise, federal land would be "completely at the mercy of state legislation."[77]

This legal vein has been expanded to include federal regulation of private landowners' activities which affect the federal land[78] All State and individual

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Forest System' shall include . . . the national grasslands and land utilization projects administered under title III of the Bankhead-Jones Farm Tenant Act . . . .").

71. Howard, *supra* note 7, at 437.

72. Ashley K. Hoffman & Sean M. Kammer, *Smoking Out Forest Fire Management: Lifting the Haze of an Unaccountable Congress and Lighting Up A New Law of Fire*, 60 S.D. L. REV. 41, 65 (2015).

73. Howard, *supra* note 7, at 437. "Congress has repeatedly recognized the unique legal status of the national grasslands and excluded them from laws applicable to other National Forest System Lands. . . . Congress did not apply the sweeping requirements of the MUSYA to the national grasslands. . . . Congress . . . exclud[ed] the national grasslands from the broad rangeland and grazing provisions of the 1976 Federal Land Policy and Management Act (FLPMA) . . . ." *Id.* at 437 n.210. *See also* Hoffman & Kammer, *supra* note 72, at 61 (discussing how the Forest Service exceeded statutory authority given by Congress on occasion such as the Forest Management Act of 1897 which did not give statutory authority for a grazing use in national forests).

74. *See* Howard, supra note 7, at 438 (reasoning that the Forest Service must manage the grasslands so as "to promote grassland agriculture and stabilize local national grasslands communities.").

75. U.S. CONST. art. IV, § 3, cl. 2.

76. Kleppe v. New Mexico, 426 U.S. 529, 543 (1976). *See also* U.S. CONST. art. VI, cl. 2 (stating "the Laws of the United States . . . shall be the supreme Law of the Land").

77. *Kleppe*, 426 U.S. at 543 (quoting Camfield v. United States, 167 U.S. 518, 526 (1897)).

78. *See Camfield*, 167 U.S. at 528 (holding that a rancher created a nuisance when he attempted to fence his land and in so doing, denied public access to federal lands). "The inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of government lands." *Id.* at 525.

property interests in federal land are subordinate to the manifestation of the Property Clause powers.[79] The United States Supreme Court addressed this point:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.[80]

As recently as 2005 the Supreme Court reaffirmed that "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."[81]

2. *Appealing Federal Land Management Decisions*

In addition to the administrative appeals process, three main doctrines (though not an exclusive list by any means) become relevant in how a case will proceed once outside of the administrative process regarding federal land management: the exhaustion doctrine, the ripeness doctrine, and *Chevron* doctrine.[82] Because the Forest Service issues numerous resource management decisions every year, many are open to individuals or entities to appeal through the Forest Service Administration.[83] Decisions by the Forest Service not subject to appeal include non-significant amendments to a plan, preliminary planning decisions, or intra-agency recommendations.[84] Appeals start with a forest supervisor and are reviewed by the regional forester.[85] To further appeal, notice of appeal is filed with the Chief of the Forest Service and, ultimately, final discretionary review is with the Secretary of Agriculture.[86] The Administrative Procedures Act (APA) governs how federal agencies develop and issue regulations and provides standards for appeals and judicial review of an agency

79. David Abelson, *Water Rights and Grazing Permits: Transforming Public Lands into Private Lands*, 65 U. COLO. L. REV. 407, 412–13 (1994).

80. Howlett v. Rose, 496 U.S. 356, 367 (1990).

81. Gonzales v. Raich, 545 U.S. 1, 29 (2005).

82. *See infra* Part II.B(2)0-0 (discussing the exhaustion doctrine, the ripeness doctrine, and the Chevron doctrine).

83. U.S. FOREST SERV., *Forest Service Environmental Appeals—Related Information*, https://www.fs.fed.us/appeals/appeals_related.php (last visited Oct. 17, 2018).

84. U.S. FOREST SERV., *Optional Appeal Procedures Available During the Planning Rule Transition Period*, 3 (July 2013), https://www.fs.fed.us/emc/applit/includes/201307PlanAppealProceduresDuringTransition.pdf.

85. *Id.* at 5. Filing a notice of appeal must occur within 45 days for non-significant amendments to a land resource management plan that has been documented in a record of decision, and filing of a notice of appeal must occur within 90 days for plans that have been published in the record of decision. *Id.* The filing periods are not extendable. *Id.* at 6.

86. *Id.* at 5.

decision.[87] Judicial review of an agency decision is another avenue, but "[t]o obtain judicial review under the APA, [a party] must challenge a final agency action."[88] Furthermore, a "six-year statute of limitations found in 28 U.S.C. Section 2401(a) applies to APA claims."[89]

a. Exhaustion Doctrine

When appealing for a review of a federal agency action, courts have long required the litigant to exhaust available administrative remedies through the appropriate federal agency.[90] The exhaustion doctrine is as old as administrative law itself.[91] During a definitive case for the birth of the doctrine, Justice Holmes reasoned that the doctrine barred an appeal because the statute "point[ed] out a mode of procedure which must be followed before there can be a resort to the courts."[92] Justice Holmes further pointed out that "it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way."[93] Further benefits of the doctrine provided: (1) a proper mechanism to sort through highly technical issues, (2) an initial divergence from courts to avoid a bottleneck of litigation, and (3) a chance that the issue may be resolved.[94] The general test for whether administrative remedies must be exhausted first is "if the litigant's interests in immediate judicial review outweigh the government's interest in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further."[95]

Some issues are committed solely to agency discretion, but this is a very narrow exception where a statute may be interpreted so broadly that it has the same effect as precluding judicial review.[96] In South Dakota, farmer Donald Madsen, proceeding *pro se*, challenged an administrative decision of the Agriculture Stabilization and Conservation Service (ASCS) for the purpose of contesting the bushels-per-acre wheat yield assigned to his farm.[97] The ASCS contended on appeal to the Eighth Circuit that the regulations from the Administrative Procedure Act (APA) precluded judicial review because the ASCS had discretion by statute

87. U.S. ENV'T PROT. AGENCY, *Summary of the Administrative Procedures Act*, https://www.epa.gov/laws-regulations/summary-administrative-procedure-act (last visited Oct. 17, 2018).

88. U.S. v. Estate of Hage, 810 F.3d 712, 720 (9th Cir. 2016) (quoting Or. Nat. Desert Ass'n v. U.S. forest Serv., 465 F.3d 977, 982 (9th Cir. 2006)).

89. *Id.* (citing Wind River Mining Corp. v. United States, 946 F.2d 710, 713 (9th Cir. 1991)). *See also* 28 U.S.C. 2401(a) (2017) (explaining that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues").

90. Sharps v. U.S. Forest Serv., 28 F.3d 851, 853-54 (8th Cir. 1994).

91. Raoul Berger, *Exhaustion of Administrative Remedies*, 48 YALE L. J. 981, 981 (1939).

92. *Id.* at 982 (quoting United States v. Sing Tuck, 194 U.S. 161, 161 (1904)).

93. *Id.* at 984 (quoting United States v. Sing Tuck, 194 U.S. 161, 168 (1904)).

94. *Id.*

95. West v. Bergland, 611 F.2d 710, 715 (8th Cir. 1979).

96. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (stating that "statutes are drawn in such broad terms that in a given case there is no law to apply").

97. Madsen v. Dep't of Agric., 866 F.2d 1035, 1036 (8th Cir. 1989). The ASCS was folded into the Farm Service Agency in 1994. U.S. FARM SERV. AGENCY, *History of USDA's Farm Service Agency*, https://www.fsa.usda.gov/about-fsa/history-and-mission/agency-history/index (last visited Oct. 1, 2018).

to implement the agency actions.[98] The Eighth Circuit held, however, that there was "law to apply" and therefore was subject to judicial review in accordance with the APA.[99] Ultimately, Madsen's appeal failed because he did not "take full advantage of administrative procedures permitting him to challenge wheat yields assigned to his farm" during the last five years.[100]

The federal courts scrutinize Forest Service administrative appeals with the exhaustion doctrine in mind. The Eighth Circuit dismissed a wildlife biologist's complaint because the claims did not initiate an "administrative remedy available . . . within the forty-five days of the date of the decision notice" by the Forest Service and because other claims were "merely an attempt to circumvent the exhaustion doctrine."[101] In 1989, the Forest Service amended a land resource management plan which contemplated a one-mile buffer for prairie dogs in the Buffalo Gap National Grasslands in Fall River County, South Dakota.[102] Sharps, the wildlife biologist, participated in the public involvement phase which adopted alternate proposals—one of which was eventually implemented—and Sharps did not otherwise challenge this agency decision.[103] However, in 1990, the Forest Service implemented a second district plan to bring the Fall River District into compliance—this district plan was challenged administratively and denied.[104] Sharps then challenged the district plan in district court seeking to halt the prairie dog management plan under several theories.[105] The District Court found that Sharps had standing but had failed to state a claim for which relief could be granted.[106] On appeal, the Eighth Circuit found Sharps had no standing because "Sharps did not institute an administrative appeal of the August 1989 decision notice at any time during the forty-five-day appeal period."[107] Because Sharps was a participant in the prairie dog management decision which took substantial time and resources to develop, the court was disinclined to waive any exhaustion requirement.[108]

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98. *Madsen*, 866 F.2d at 1036. The law to apply in farmer Madsen's case consisted of a specific statutory formula created by Congress to calculate crop yields which the agency adopted as regulations. *Id.* at 1037.

99. *Id.* at 1037.

100. *Id.*

101. Sharps v. U.S. Forest Service, 28 F.3d 851, 854-55 (8th Cir. 1994). The distinction that the Eighth Circuit drew between forest plans and district plans was disapproved of by Ninth Circuit. Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754, 760 n.6 (9th Cir. 1996).

102. *Sharps*, 28 F.3d at 852.

103. *Id.* at 852-53.

104. *Id.* at 853. This plan would consolidate prairie dog populations and create a one-mile buffer in order to better control the spread to private or Indian lands. *Id.* at 854.

105. *See id.* at 853 (challenging the district plan with legal theories under the National Environmental Policy Act, The National Forest Management Act, the Endangered Species Act, the Bald and Golden Eagle Protection Act, The Migratory Bird Treaty, and the Administrative Procedures Act).

106. *Sharps*, 28 F.3d at 853.

107. *Id.* at 854.

108. *See id.* (discussing the court's weighing of Sharps interest in judicial review and the exhaustion doctrines goals of increasing administrative efficiency).

b. Ripeness Doctrine

When deciding whether a federal agencies management decision is appropriate for a court to review, the first step is to determine whether the issue is ripe for judicial review.[109] The ripeness doctrine has some similarities with standing or mootness doctrines, and the doctrine focuses on the idea that a necessary injury must be present and accompanied by a "concrete adversary context."[110] The purpose of which is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[111]

In *Ohio Forestry Association, Inc. v. Sierra Club*, the respondent challenged the lawfulness of a land resource management plan in federal court after pursuing the administrative remedies available in the Forest Service agency.[112] The Sierra Club's complaint contended that, *inter alia*, the plan permitted excessive logging and clearcutting of Wayne National Forest in southern Ohio and that the Forest Service's regulations were "arbitrary, capricious, an abuse of discretion, and not in accordance with law."[113] The District Court reviewed the resource management plan and granted summary judgment in favor of Ohio Forestry finding that the Forest Service lawfully allowed the logging permit when it proposed the plan.[114] However, the Court of Appeals for the Sixth Circuit held that the Sierra Club had standing to bring suit which was "ripe for review" because it was unnecessary to wait "until a site specific action occurs."[115] Further, the Court of Appeals disagreed with the District Court's ruling on the merits that the plan did not "improperly favored clearcutting and therefore violated NFMA."[116]

The Supreme Court granted certiorari to determine whether the issue was ripe for judicial review and Justice Breyer laid out the test for ripeness by considering: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."[117] The Supreme Court unanimously reversed the Sixth

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109. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732 (1998).

110. DAVID CRUMP, DAVID S. DAY & EUGENE GRESSMAN, CASES AND MATERIALS ON CONSTITUTIONAL LAW 82 (6th ed. 2014) [hereinafter CRUMP].

111. *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 733 (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967)).

112. *Id.* at 730.

113. *Id.* at 729-31.

114. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732 (1998).

115. *Id.* (quoting Sierra Club v. Thomas, 105 F.3d 248, 250 (6th Cir. 1997)).

116. *Id.* (citing *Sierra Club*, 105 F.3d at 251-52).

117. *Id.* at 733. *See also* CRUMP, *supra* note 110, at 83 (discussing other formulations that exist for determining ripeness which compete with each other). *See* Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803 (2003) ("Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial review and (2) the hardship to the parties of withholding court consideration").

Circuit Court of Appeals and found that this test foreclosed the Court's review of the controversy.[118] Further, the Court found that the controversy was not ripe for judicial consideration because the forest plan did not "create adverse effects . . . of a sort that traditionally would have qualified as harm" because "they do not command anyone to do anything or refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations."[119] The Court reasoned that: (1) a case-by-case approach to a specific logging decision would be necessary, (2) immediate judicial review would hinder the agency efforts to refine the forest plan; and (3) review of the claims regarding logging would be too inefficient with judicial resources spent on dissecting a technical and elaborate forest plan.[120]

c. *Chevron* Doctrine

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[121] the Supreme Court determined that the Environmental Protection Agency's (EPA) interpretation of the Clean Air Act Amendment's mention of the words "stationary source" was permissible because the EPA's concept of the word was reasonable.[122] Since Congress had not defined the term, nor had Congress made its intent clear regarding the term, the Court reasoned that "considerable weight should be accorded to an executive department's construction of a statutory scheme [that] it is entrusted to administer," and not "whether in [the Court's] view the concept is 'inappropriate' in the general context of a program designed to improve air quality . . . ."[123]

The Court has long recognized that during judicial review of an agency decision, a court should not disturb an agency's "reasonable accommodation of conflicting policies" handed to it by Congress.[124] If Congress has spoken directly and specifically to an issue, the court and agency must carry out the express intent of Congress.[125] If, however, Congress has explicitly left a gap for the agency to fill, the agency gap-filling regulations are given authority unless they are "arbitrary, capricious, or manifestly contrary to the statute."[126] Because "[j]udges are not experts in the field, and are not part of either political branch of Government[,]" it is more appropriate for the federal agencies to make policy choices and resolve competing interests of Congress.[127] This policy plays out

118. *Ohio Forestry Ass'n, Inc.*, 532 U.S. at 733, 739.
119. *Id.* at 733.
120. *Id.* at 735-36.
121. 467 U.S. 837, 840-41 (1984).
122. *Id.*
123. *Id.* at 844-45.
124. *Id.* (quoting United States v. Shimer, 367 U.S. 374, 382-83 (1961)).
125. *Id.* at 842-43.
126. *Id.* at 843-44.
127. *Id.* at 865-66.

frequently as courts' "deference to an agency's expertise" is extended to a federal administrative agency except "solely to see whether that interpretation is arbitrary and capricious."[128]

C. ATTEMPTS TO CIRCUMVENT FEDERAL AGENCY MANAGEMENT

Due to the procedures and doctrines applicable to the federal appeals process, both in the administrative area and the judicial area, legislatures and individuals have attempted creative approaches to resolving disputes arising from the management of these federal lands—two of which discussed below involve attempts to bypass the previously mentioned procedures and doctrines.[129] The Utah legislative example and South Dakota lawsuit example employ unorthodox methods which attempt to skirt the administrative and federal judicial process altogether.

1. Utah Example

Some of the western states' legislatures attempted to avoid the federal law and agency management of the lands by transferring certain federal lands to state control.[130] In 2015, thirty-seven pieces of legislation were proposed in eleven western states that would have authorized land transfer.[131] Utah currently has legislation enacted into law.[132] Utah House Bill 148 "provides a framework for transferring public lands into State ownership. Public lands contemplated by the bill exclude national parks, all national monuments (except the Grand Staircase-Escalante National Monument), specific congressionally-designated wilderness

128. Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754, 760 (9th Cir. 1996) (citations omitted).

129. *See infra* Part II.C 21-23 (showing how Utah has passed legislation to evade federal laws attached to federal lands and how South Dakota ranchers attempted to hold state agencies responsible for federal land management practices).

130. *See generally* Donald J. Kochan, *Public Lands and the Federal Government's Compact-Based "Duty to Dispose": A Case Study of Utah's H.B. 148-the Transfer of Public Lands Act*, 2013 B.Y.U. L. Rev. 1133, 1136 (2013) ("[T]he State has a variety of other arguments it offers for transferring ownership into State hands, including claims that the federal government is a poor manager of the lands and that it has an unwise concept of multiple use, among other things.")

131. THEODORE ROOSEVELT CONSERVATION P'SHIP, *It's Time to Do More Than Just "Keep It Public"* (Aug. 29, 2017), www.trcp.org/2017/08/29/public-land-transfer-dying-west-evolving-d-c/ [hereinafter THEODORE]. *See also* Kochan, *supra* note 130, at 1139-41 (outlining that "[s]ince 2012 and particularly after the passage of H.B. 148, a number of Western states—including Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, and Wyoming have started the process of considering legislation similar to or modeled after the TPLA—whether by drafting bills, passing resolutions, introducing bills, or committing to study the issue through special committees or task forces").

132. *See* Utah Code § 63L-6-103 ("On or before December 31, 2014, the United States shall: (a) extinguish title to public lands; and (b) transfer title to public lands to the state"). *See also* Kochan, *supra* note 130, at 1133 (explaining that the Transfer of Public Lands Act (TPLA), also known as House Bill 148, required the federal government to "extinguish title" to approximately twenty million acres of federal land and transfer it to the State of Utah).

areas, Department of Defense areas, and tribal lands."[133] The purpose of the legislation was to better manage approximately two-thirds of Utah's energy resources which are located on federally owned lands and avoid "[c]onflicting and cumbersome federal rules, regulations, processes, and management policies [which] often prevent development of these resources resulting in diminished revenue to the State and its citizen."[134] Federal management of Utah lands allegedly suffered from "inefficiency, paralysis, and a predisposition to limited-use management" which concomitantly hampered local economies, recreational access, rural culture, and the sustainability of the land.[135] Born out of frustration with the congressional mandate to employ the multiple-use and sustained yield across 31.2 million acres of Utah public lands, Utah legislators funded a comprehensive study to determine feasibility of the State assuming the role of ownership and management.[136] The study concluded that the transfer of lands to the State could be an economical and balanced approach to public land policy.[137]

2. South Dakota Example

In 1988, a Forest Service Prairie Dog Management Plan allocated 6,180 acres of Black-Tailed Prairie Dog populations in South Dakota on national grasslands which would be habitat for the endangered Black-Footed Ferret.[138] In response to federal management decisions regarding the reintroduction of the Black-Footed Ferret and the increase in prairie dog populations, the South Dakota legislature passed laws which provided that the State could participate in the reintroduction efforts by the federal agency as long as certain conditions were met.[139] In addition, State resources were to be used to control the spread of the prairie dogs onto private land because the South Dakota legislature was concerned about protecting ranchers from the federal land management actions.[140] South Dakota Codified Law section 41-11-15(2) requires "[t]he existing United States Forest Service Prairie Dog Management Plan for the Conata Basin, Buffalo Gap National Grasslands shall be strictly adhered to, and if future increases in prairie dog acres are needed, a funding mechanism shall be established to provide financial compensation to landowners suffering lost income . . . ."[141]

In 2004, Pennington County, Custer County, and Fall River County passed resolutions stating that the landowners experienced encroachments of prairie dogs

133. UTAH'S PUBLIC LANDS POLICY COORDINATING OFFICE, STATE OF UTAH OFFICE OF THE GOVERNOR (August 1, 2018), http://publiclands.utah.gov/current-projects/transfer-of-public-lands-act/.

134. *Id.*

135. Public Lands Policy Coordinating Office, *Pathway To A Balanced Public Lands Policy*, OFFICE OF THE GOVERNOR, 3-4 (Nov. 28, 2014), https://publiclands.utah.gov/wp-content/uploads/2014/12/Summary-20141128_FINAL.pdf.

136. *Id.*

137. *Id.*

138. Adrian v. Vonk, 2011 SD 84, ¶¶ 3, 9, 807 N.W.2d 119, 121-22.

139. Appellants' Brief, *supra* note 19, at 9-10. S.D.C.L. § 41-11-15(2) (2004).

140. *Id.*

141. S.D.C.L. § 41-11-15(2) (2004).

onto private land predominately from public lands and declared the prairie dogs a public nuisance.[142] Townships in Pennington County threatened lawsuits and urged the SDGFP to curb the populations.[143] In 2010, western South Dakota ranchers sued the SDGFP and the South Dakota Department of Agriculture to force the agencies to manage and control the prairie dogs, and, in *Adrian v. Vonk*, the state agencies moved for summary judgement arguing that the ranchers' claims were barred by the Supremacy Clause and the doctrine of sovereign immunity.[144]

a. *Adrian v. Vonk*

In 2010, thirty-two ranchers on the Western grasslands of South Dakota sued both the SDGFP and the South Dakota Department of Agriculture in state court for ongoing property damage allegedly caused by prairie dog encroachment from federal lands.[145] The ranchers abutted federal land managed by the United States Forest Service.[146] In *Adrian*, the South Dakota Supreme Court held that "the undisputed evidence [showed] that the State has failed to maintain the prairie dog population within the range identified by its laws . . . ."[147] Furthermore, according to the SDGFP records, no acres were treated for prairie dog infestations on private or public land for four years despite the prairie dog population surpassing 145,000 acres.[148] From 1995 until 1999, acreages that the SDGFP treated on private ground barely exceeded 1,000 acres per year and for two years were less than 200 acres per year.[149] Meanwhile, total acres of prairie dogs in South Dakota exceeded the threshold for consideration as a pest at 189,258 acres.[150] From 2000 to 2003, no acres were treated by SDGFP on public or private ground.[151] By 2003, the total acres of prairie dogs had swelled to 412,122 acres.[152] By 2006, SDGFP had treated 30,200 acres of private land and 11,856

142. Appellants' Brief, *supra* note 19, at 30-31.

143. *Id.*

144. Adrian v. Vonk, 2011 S.D. 84, ¶¶ 3-4, 807 N.W.2d 119, 121.

145. Appellants' Brief, *supra* note 19, at 5. *See also Adrian*, 2011 SD 84, ¶ 3, 807 N.W.2d at 121 (stating "the State claimed that the reintroduction of the black-footed ferret in 1994 on certain public lands in South Dakota by the United States Department of the Interior caused the increased prairie dog population, which federal action the State could not control"). Note that under the Immunity Theory of the Eleventh Amendment, "citizens of a state cannot sue their own state for damages in federal court." CRUMP, *supra* note 110, at 313. The *Ex parte Young* exception is applicable in a case where the defendant is a state official in his or her official or representative capacity and only injunctive or declaratory relief may be granted—not retrospective relief from past damages. *Id.* 314. Here, although the ranchers sued the SDGFP's Secretary, Jeff Vonk, and others in their official capacities, the suit demanded civil damages under state laws, not federal laws. *See generally Adrian*, 2011 SD 84, 807 N.W.2d 119 (showing that the defendants were the department heads).

146. *Adrian*, 2011 SD 84, ¶ 2, 807 N.W.2d at 120.

147. *Id.* ¶ 11, 807 N.W.2d at 122.

148. Appellants' Reply Brief, *supra* note 13, at 9.

149. *Id.* at 8.

150. *Id.*

151. *Id.* at 8-9.

152. *Id.* at 8.

acres of public land for prairie dog encroachments from federal land while total acres of prairie dogs in South Dakota grew to 625,410 acres.[153]

In May of 2010, Circuit Court Judge A.P. Fuller held hearings on the State's defenses regarding the sovereign immunity issue and the Supremacy Clause issue.[154] At the conclusion, Judge Fuller granted the Rancher's motion for summary judgment that State law imposed a duty upon the SDGFP to control the prairie dog acres which the State failed to do.[155] Furthermore, Judge Fuller ruled that the State had caused a nuisance which provided remedies such as abatement, injunctive relief, and civil remedies.[156] Judge Fuller also considered sovereign immunity expressly waived in state law and the Supremacy Clause as separate and unrelated to the State's duty to control the prairie dogs.[157] Before a trial on damages, the case was assigned to then Circuit Court Judge Janine M. Kern, and on motion to reconsider summary judgment, Judge Kern found for the State on the issue of sovereign immunity due to Judge Fuller's limited analysis on the issue.[158] The ranchers appealed to the South Dakota Supreme Court.[159]

b. The South Dakota Supreme Court Upholds Sovereign Immunity in *Adrian v. Vonk*

The South Dakota Constitution states that "[t]he Legislature shall direct by law and in what manner and in what courts suits may be brought against the state."[160] The waiver of any sovereign immunity must be made expressly by the South Dakota Legislature and "only to the extent provided by the express terms of these statutes . . . ."[161] Nevertheless, negligent acts of state employees during the commission of ministerial acts are not covered under sovereign immunity—thus, no shield of sovereign immunity can be claimed where there is absent express statutory language waiving the sovereign immunity.[162] The South Dakota Supreme Court has defined a ministerial duty under a statute as "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed designated facts or the execution of a set task imposed by law prescribing

153. *Id.*

154. Adrian v. Vonk, 2011 SD 84, ¶ 4, 807 N.W.2d 119, 121. "In regard to the Supremacy Clause, the State claimed that the reintroduction of the black-footed ferret in 1994 on certain public lands in South Dakota by the United States Department of the Interior caused the increased prairie dog population, which federal action the State could not control." *Id.* ¶ 3, 807 N.W.2d at 121.

155. *Id.* ¶ 4, 807 N.W.2d at 121.

156. *Id.*

157. *Id.*

158. *Id.* ¶ 6, 807 N.W.2d 119 at 121-22. "Justice Kern, who was appointed to the Supreme Court on November 25, 2014, by Governor Dennis Daugaard, represents the First Supreme Court District, which includes Custer, Lawrence, Meade and Pennington counties." SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM, *South Dakota Supreme Court* http://ujs.sd.gov/Supreme_Court/default.aspx (last visited Oct. 17, 2018).

159. *Adrian*, 2011 SD 84, ¶ 7, 807 N.W.2d at 122.

160. S.D. CONST. art. III, § 27.

161. Pourier v. S.D. Dep't of Revenue & Regulation, 2010 S.D. 10, ¶ 14, 778 N.W.2d 602, 606.

162. Hansen v. S.D. Dep't of Transp., 1998 S.D. 109, ¶ 17, 584 N.W.2d 881, 885.

and defining the time, mode, and occasion of its performance."[163] However, the difference between a simple discretionary act and ministerial act can be difficult as follows:

> [T]he determination as to whether an official has acted in his or her discretion or capacity, and therefore is entitled to immunity, is not subject to a fixed, invariable rule, but instead requires a discerning inquiry into whether the contributions of immunity to effective government in the particular context outweigh the perhaps recurring harm to individual citizens . . . . [T]he view has been expressed that, in the final analysis, the decision as to whether a public official's acts are discretionary or ministerial must be determined by the facts of each particular case after weighing such factors as the nature of the official's duties, the extent to which the acts involve policymaking or the exercise of professional expertise and judgment, and the likely consequences of withholding immunity.[164]

In light of this, the South Dakota Supreme Court held that there was "no language in [South Dakota Codified Law section 41-11-15] expressly waiving sovereign immunity or providing a right to sue the State."[165] The court reasoned that "the acts mandated by these statutes are clearly discretionary . . . there are no 'hard and fast' rules guiding the State's actions for managing the prairie dog population."[166] Because the state had not waived sovereign immunity, the court declined to address any potential Supremacy Clause issues raised by the defendants, the SDGFP and the South Dakota Department of Agriculture.[167]

III. ANALYSIS

A. THE COMPLEXITY OF FEDERAL LAND MANAGEMENT

Federal land management prior to the Dust Bowl had a clear goal of incentivizing private development of federal lands for such uses as grazing.[168] With the environmental challenges brought on by the Dust Bowl and the policy changes in the 1970s, grazing has been removed from the pedestal and put on even ground with, or arguably even beneath, the other mandates given to federal

163. *Id.* ¶ 25, 584 N.W.2d at 887 (quoting GEORGE BLUM, J.D, ET AL., AMERICAN JURISPRUDENCE, SECOND EDITION § 120 at 132–33 (Aug. 2018)).

164. *Id.* ¶ 23, 584 N.W.2d at 886.

165. Adrian v. Vonk, 2011 S.D. 84, ¶ 13, 807 N.W.2d 119, 123. *See also* S.D.C.L. § 41-11-15 (2004) (detailing how the state should control prairie dogs, but no express waiver of sovereign immunity).

166. *Id.* ¶ 14, 807 N.W.2d at 124.

167. *Id.* ¶ 18, 807 N.W.2d at 125.

168. *See* Howard, *supra* note 7, at 416 (explaining the goal of Congress was "getting the lands into the hands of the . . . individual farmer").

agencies by Congress.[169] Federal agencies such as the BLM readily admit to the paradoxical and difficult Congressional mandates which require "multitask[ing] to manage the myriad land uses . . . which may appear to conflict with other uses or resources. That makes the BLM's stewardship mission both complex and challenging."[170] Recreation, for example, is not only a use of national grassland, but actively promoted by the Forest Service.[171] When the SDGFP raised the defense of the Supremacy Clause regarding the damages experienced by prairie dogs encroaching from federal lands in *Adrian*, the scarcity of local accountability for management of these federal lands was accentuated.[172] Whether the individual or the state, the default response then becomes to blame federal agencies or an impotent Congress for any perceived or real injury that stems from federal land management.[173]

Unfortunately, these somewhat conflicting mandates given by Congress to federal agencies are tasks which both the federal agencies and courts must sort through.[174] These mixed mandates do not align well with some ranchers in South Dakota who depend upon the land's productivity for grazing and attempt to maximize that use.[175] Furthermore, the courts defer to the federal agencies' interpretation of these mandates.[176] As a possible example of avoiding a fruitless challenge to federal agency management, South Dakota ranchers who opposed the competition for grass from the prairie dogs brought a lawsuit against the State of

169. *See supra* note 67 (discussing forest plans and that federal law mandates the Forest Service implement and include "coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness"). *See also* Carlton, *supra* note 7 (discussing how grazing numbers have been cut in half during the last forty years).

170. *See* BUREAU OF LAND MGMT., U.S. DEP'T OF INTERIOR, *What We Manage*, https://www.blm.gov/about/what-we-manage/national (last visited Oct. 18, 2018) (discussing that no one authorized use may trump the other uses and that "'multiple use' does not mean every use on every acre").

171. *See supra* note 6 (discussing the various activities that the Forest Service promotes for people visiting the Buffalo Gap National Grasslands).

172. *See* Brief of Appellees, *supra* note 9, at 14 (explaining that "any action taken against the State would fail to redress the injuries suffered by the Ranchers as neither the States nor a decision of this Court can prevent federal agency action").

173. *See* Carlton, *supra* note 6, at A1 (explaining one rancher's frustration "'I was getting wore out from all the BS from these agencies'. . .[while] nursing a beer . . . ."). The South Dakota Department of Agriculture and the SDGFP pointed to the proximate cause of the ranchers' injuries:

> It is undisputable that the damages alleged in the Ranchers' Complaint were proximately caused by federal agency action authorized by the ESA. As a matter of law, due to federal supremacy, the State could not have compelled the Secretary of the Interior to comply with state laws designed to inhibit reintroduction programs. Nor could the State have flatly prohibited the actions taken by Fish and Wildlife. The Secretary of the Interior could and would have proceeded unilaterally with reintroduction measures as they occurred on federal property.

Brief of Appellees, *supra* note 9, at 13-14.

174. *See supra* Part II.B18) (discussing the Court's analysis of a forest plan which involved the Forest Service's interpretation of the multiple-use mandate that had been brought through administrative procedures into the judiciary system).

175. *See supra* II.C(23) (discussing the ranchers' lawsuit to hold the State responsible for prairie dogs allegedly encroaching from federal lands).

176. *See supra* II.B(20) (discussing the deference given to agency interpretation).

South Dakota which is arguably the wrong governmental entity.[177] The South Dakota Legislature passed laws as a resource for ranchers who may experience collateral damage from federal actions regarding the swelling prairie dog numbers.[178] It was policy aimed at helping the South Dakotan rancher—not a mechanism for ultimate responsibility.[179] Consequently, this mistake in suit was not a mistake at all but rather an attempt to circumvent a lawsuit that could not survive the hurdles found in appealing a federal land management practice made long ago.[180]

Any discussion regarding federal land management laws should mention the law packing the greatest regulatory power—the Endangered Species Act.[181] The South Dakota Legislature may have capitulated to the Act's objective to create habitat for the Black-Footed Ferret (which also would increase prairie dog acreages) across the state as the better option and avoided heightened federal regulation that could accompany both species being designated as endangered.[182] The South Dakota Legislature compromised by adopting the federal plans to ensure a healthy population of prairie dogs and ferrets in the state, and, in turn, the Legislature provided ranchers with a funding mechanism for damages caused from the prairie dogs.[183]

B. RESOLVING DISPUTES TO FEDERAL LAND MANAGEMENT: BEST PRACTICES

1. Administrative Process

The individual who appeals a federal management decision through the administrative channels experiences a mechanical process without much flexibility.[184] Administrative claims have narrower time periods which busy ranchers must be vigilant to notice and appeal, and the appeals within the administrative agency become discretionary the further up they go.[185] Further,

177. *See supra* II.C(23) (mentioning that thirty-two ranchers who sued the South Dakota Department of Agriculture and the SDGFP).

178. Appellants' Brief, *supra* note 19, at 9-10.

179. *See supra* II.C(26) (positing that the purpose of the law was to help landowners in certain circumstances affected by prairie dogs encroaching onto private land from federal lands).

180. *See supra* Part II.13(a)-(c) (discussing the various obstacles when challenging federal land management practices).

181. Wood, *supra* note 63, at 76-77.

182. *See* Brief of Appellees, *supra* note 9, at 14 (discussing the state's argument that (1) "neither the States nor a decision of this Court can prevent federal agency action" and (2) "[i]t is undisputable that the damages alleged in the Ranchers' Complaint were proximately caused by federal agency action authorized by the [Endangered Species Act]"). *See also* S.D. DEP'T OF GAME, FISH, & PARKS, *supra* note 3, at 1 ("In response to a petition to list the black-tailed prairie dog (Cynomys ludovicianus) in 1998, several states began a cooperative process to retain management of this species.").

183. *See* S.D.C.L. § 41-11-15 (2004) ("The Department of Game, Fish and Parks and the Department of Agriculture may participate in programs to reintroduce the black-footed ferret . . . and if future increases in prairie dog acres are needed, a funding mechanism shall be established to provide compensation to landowners . . . .").

184. *See supra* note 84, at 5 (discussing the timeframes for appealing an LRMP).

185. *Id.*

the exhaustion doctrine, requiring exhaustion of administrative remedies, prohibits ranchers from bypassing administrative hearings in favor of direct consideration by a federal court.[186]

If a rancher's dispute does move into the judicial system, one important consideration for a court reviewing the matter is to analyze the administrative agency's review process—a process which may be used to "insulate its decisions from meaningful judicial scrutiny . . . ."[187] Some administrative processes may have the practical effect of "giv[ing] the agency the opportunity to develop a record the principal purpose of which is to withstand the narrow scope of judicial review of agency decisions[,]" but this may compound the hurdles ranchers currently face in federal court and the deference already given to the agency by the judicial system.[188]

2. *Judicial Process*

As a dispute transpires into a lawsuit, the difficulties interpreting ripeness using the balancing test laid out by the United States Supreme Court can be a cause of ambivalence.[189] When an individual's claim is litigated in federal court, the court may punt on the interpretation of the statutes or regulations which may be technical and complex and defer to the agency's superior expertise up until the court deems an agency's interpretation as arbitrary or capricious.[190] Thus, some have complained that "[b]ecause the scope of review is so limited and biased in favor of the agency, challengers to Forest Service action begin at a disadvantage and face a heavy burden in the courts."[191] This may be especially important when broad Congressional mandates regarding federal land management appear to compete with each other and create a haze over the issue.[192] Although there is good reason for courts to respect the expertise found in federal agency decisions, "[t]he courts need to be responsive to this danger and be wary of granting too much deference to the agency . . . ."[193] Because of federal law's supremacy over state law, states such as South Dakota must accept large areas of land being managed

186. *See* Sharps v. U.S. Forest Serv., 28 F.3d 851, 855 (8th Cir. 1994) (holding that the plaintiff's claims were "merely an attempt to circumvent the exhaustion doctrine").

187. Michael Goodman, *Forest Service Appeals Reform: Searching for Meaningful Review*, 3 N.Y.U. ENVTL. L.J. 117, 155-56 (1994).

188. *Id.* at 156. *See also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844-45 (1984) (holding "that considerable weight should be accorded to an executive department's construction of a statutory scheme [that] it is entrusted to administer, and the principle of deference to administrative interpretations.").

189. *See* Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998) (detailing the test for ripeness).

190. *See Chevron, U.S.A., Inc.*, 467 U.S. at 845 (mentioning that it is acceptable that a court should not disturb an agency's "reasonable accommodation of conflicting policies" handed to it by Congress and that it is more appropriate for the federal agencies to make policy choices and resolve competing interests of Congress).

191. Goodman, *supra* note 187, at 138.

192. *See* BUREAU OF LAND MGMT., *supra* note 170 (discussing the myriad of uses of federal land which may conflict with one another but supposedly equal).

193. Goodman, *supra* note 187, at 155.

by federal agencies.[194] On the other hand, individuals such as ranchers have uniquely struggled on the judiciary front:

> [L]awsuits have been successfully used by environmental groups to force land managers to live up to legislation such as the Multiple-Use Sustained-Yield Act of 1960, and the 1976 Federal Land Policy and Management Act, while ranchers' lawsuits to establish property rights in their permits and protect the status quo have repeatedly failed.[195]

3. Political Process

Meanwhile, ranchers have not had the political power once held. Because of the shrinking size of the agricultural voter base, ranchers have less ability to affect policy in the voting booth.[196] The situation can adequately be described as such:

> Since the 1960s and continuing to the present, several factors have changed in the Western social and political landscape culminating in a challenge to the traditional favored status ranching has held in grassland management. First, a western population shift into urban areas has weakened the political influence of ranching interests. Second, ranching has been displaced as a dominant industry in the western states as other industries, such as gaming and tourism, have moved in that do not share ranchers' interests. Third, advocates of greater efficiency in government have continued to question the favorable terms given to ranchers, characterizing them as a subsidy of an inefficient industry at public expense . . . .[197]

The political process determines who fills politically-accountable offices such as in the Forest Service and BLM, and the political process does not directly include the members of the federal judiciary who have lifetime appointments. Thus, the political process may not be the asset that ranchers once utilized, and this has been evidenced by the Congressional Acts of the 1960s and 1970s which implement multiple-uses on federal lands rather than grazing as the single, foremost use.[198]

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194. U.S. CONST. art. IV, § 3, cl. 2.

195. Sanders, *supra* note 44, at 278. *See, e.g.*, United States v. Estate of Hage, 810 F.3d 712, 720 (9th Cir. 2016) (holding that a district court erred in finding that the Hages' water rights provided a defense to the government's claim of trespass).

196. *See* ECON. RESEARCH SERV., *The number of farms has leveled off at about 2.05 million*, U.S. DEP'T OF AGRIC., (Sept. 11, 2018), https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58268 ("After peaking at 6.8 million farms in 1935, the number of U.S. farms fell sharply until leveling off in the early 1970s. Falling farm numbers during this period reflected growing productivity in agriculture and increased nonfarm employment opportunities.").

197. Sanders, *supra* note 44, at 277-78.

198. *See supra* Part II.A(0) (discussing the formation of federal agencies, multiple-use policy, and decrease in grazing numbers on federal lands). *See also* Howard, *supra* note 7, at 426 (explaining that

C. SOLUTIONS FOR CHALLENGING FEDERAL LAND MANAGEMENT DECISIONS

The spectrum of options to challenge a federal land management decision varies from an armed standoff to a good-natured conversation. Cliven Bundy mounted a standoff against the government for its allegedly over-restrictive grazing policies.[199] Wayne Hage, another Nevadan rancher, who persisted in a second-generation lawsuit with the BLM over grazing permit issues, said, "[you] live the most miserable life ever because you're dealing with lawyers all the time."[200] Neither method has worked.[201] Western South Dakota ranchers tried to pass the responsibility to South Dakota agencies.[202] Again, that method did not work.[203] Western states such as Utah have attempted to return federal lands to state control.[204] If utilized in South Dakota, this method could achieve a more direct South Dakotan control scheme under state law and skirt some Congressional acts which have attached themselves to federal land management.[205] However, without a Congressional act satisfying the Property Clause, this would be legally untenable.[206] Ranchers mustering up a political movement to fuel the transfer of land to the states would be equally unlikely.[207] It seems the best way to currently appeal a federal management decision is to follow administrative appeals

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increased public scrutiny and introduction of multiple uses for national grasslands turned the attention off of the original purpose for which the lands were acquired).

199. Carlton *supra* note 6, at A1.

200. *Id.*

201. *See generally* United States v. Estate of Hage, 810 F.3d 712, 715 (9th Cir. 2016) (vacating the district court's ruling in favor of Wayne Hage claim that the water rights allowed for an easement by necessity to the federal lands). *See also* Jaime Fuller, *The long fight between the Bundys and the federal government, from 1989 to today*, THE WASHINGTON POST, (Jan. 4, 2016), https://www.washingtonpost.com/news/the-fix/wp/2014/04/15/everything-you-need-to-know-about-the-long-fight-between-cliven-bundy-and-the-federal-government/?utm_term=.5893a3cc544e (documenting the long-standing fight between Bundy and the federal land agencies).

202. *See generally* Adrian v. Vonk, 2011 SD 84, ¶ 2 807 N.W.2d 119, 120 (detailing how ranchers brought suit for monetary relief against the SDGFP and the South Dakota Department of Agriculture for failure to comply with state laws requiring the agencies to control prairie dogs spreading onto private land).

203. *See id.* ¶¶ 17, 18, 807 N.W.2d at 124-25 (holding that sovereign immunity barred the ranchers' claims for relief).

204. *See supra* Part II.C(21) (discussing the laws passed by Utah to transfer federal lands to the State of Utah). Utah's Transfer of Public Lands Act ("TPLA") represents a unique legal maneuver primarily utilizing Utah's Enabling Act, which "does not 'declare' that Utah owns land, and makes no effort to take land away from the federal government." Donald J. Kochan, *Public Lands and the Federal Government's Compact-Based "Duty to Dispose": A Case Study of Utah's H.B. 148-the Transfer of Public Lands Act*, 2013 B.Y.U. L. REV. 1133, 1134-35, 1148 (2013).

205. *See supra* Part II.13 (discussing that any federal land is subject to the federal laws applied to it through Congressional acts, which are given effect by the Property Clause). *See supra* Part II.C(0) (discussing the laws passed by Utah to transfer federal lands to the State of Utah).

206. *See supra* Part II.13 (positing only Congress has the authority regarding federal management of federal land due to the Property Clause).

207. Carlton, *supra* note 6, at A1. "America's Western plains and valleys were once endless pastures for ranchers, the backdrop of an industry wrapped in romance and mythology . . . . Congress passed tougher environmental laws in the 1970s . . . . In more recent years, administrations have tightened access and restrictions on ranchers . . . ." *Id.* "The government decided how many cows could graze on public land, and how much they could consume—down to the number of inches on a blade of grass." *Id.*

processes within the federal agencies.[208] With that, an amiable relationship with the local federal land administration might just be in order.

IV. CONCLUSION

It appears that the South Dakota rancher may be backed into a box-canyon when it comes to options to appeal a federal management decision. That said, South Dakota ranchers have the support of the South Dakota Legislature as evidenced by the statutes mentioned in *Adrian*. It remains to be seen what comes of the movement to transfer public lands to the states. Although it seems highly unlikely given the current political views regarding such a radical idea, one hundred years ago, it was the intention of the federal government for the individual to care for the land. States controlling the public lands appears to be a good compromise between individual and federal control. Nevertheless, for ranchers, this is not the first time they have traversed some rough country—this too shall pass. Best practice for settling disputes would be to have a good-natured conversation over a cup of coffee with the good people at the local federal land office.

208. *See supra* Part II.0 (discussing some of the more important considerations when bringing a dispute in an administrative agency and in Federal Court).

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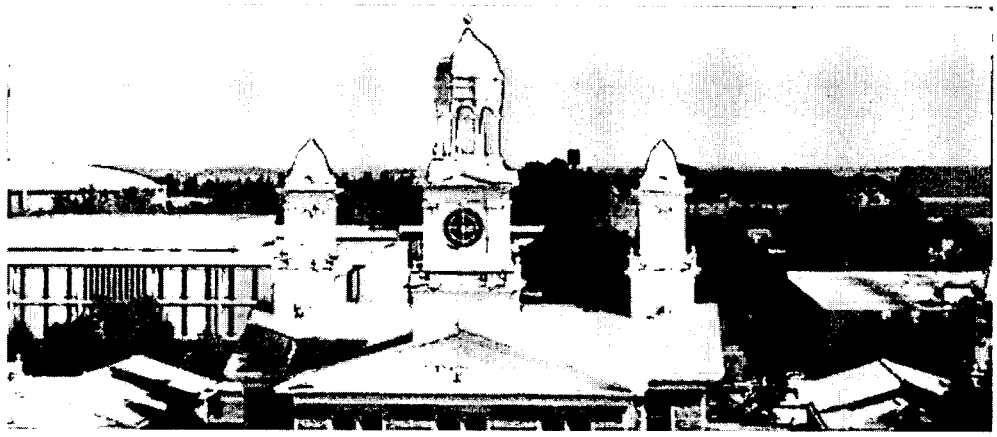

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Established at Vermillion by the Dakota Territorial Legislature in 1862, The University of South Dakota began instruction in 1882. It is situated in the southeast corner of the state upon a bluff north of the last remaining natural portion of the majestic Missouri River. Vermillion is only one hour from two substantial population centers, each with airports served by major commercial carriers.

The University offers over ninety majors in seven colleges: the College of Arts and Sciences, the College of Fine Arts, the Graduate School, the School of Business, the School of Education, the School of Medicine, and the School of Law. These colleges and schools offer students degrees ranging from the two-year Associate Degree to Doctor of Philosophy, Doctor of Medicine, and Juris Doctor. The School of Law offers interdisciplinary and joint degree programs with the other schools and colleges of the University.

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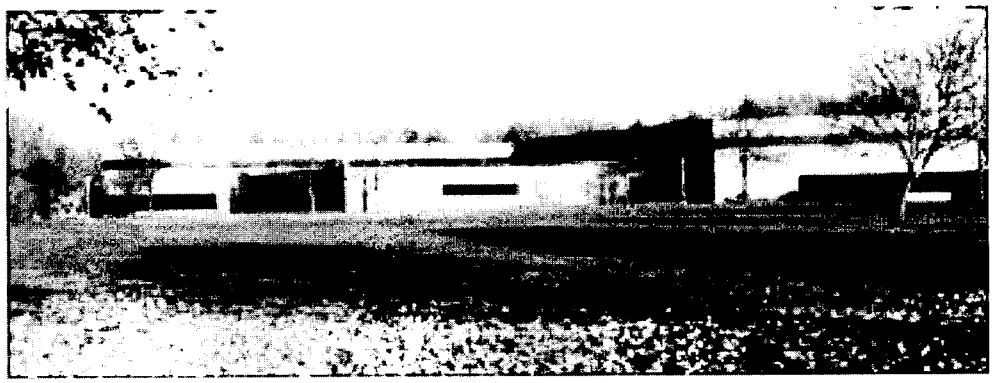
The School of Law opened in 1901. It has been accredited by the American Bar Association since 1923 and a member of the Association of American Law Schools since 1907. In August 1981, the school moved into a new building which provides class rooms, a teaching courtroom that is fully wired with state-of-the-art video-conferencing technologies, and office space for faculty, student activities, and administration. With a total student enrollment of approximately 198 and fourteen full-time faculty, the Law School's student-faculty ratio of 1:15 is one of the more favorable in the nation.



The McKusick Law Library occupies three floors of the Law School building. The largest and most complete law library in South Dakota, the library houses the equivalent of a collection of over 208,000 print volumes. The Law Library provides access to primary authority including court reporters, South Dakota and surrounding state statutes, select Congressional documents, and the opinions and briefs filed in the cases of the South Dakota Supreme Court. The Law Library also provides access to secondary legal authority including treatises, law reviews and journals, practice and other materials. An on-line catalog allows immediate access to the University of South Dakota I.D. Weeks Library and McKusick Law Library catalogs as well as to other university and public libraries throughout South Dakota. Individual study carrels are located in the library and assigned to individual students. Additional seating is available for other patrons and guest of the Law School.

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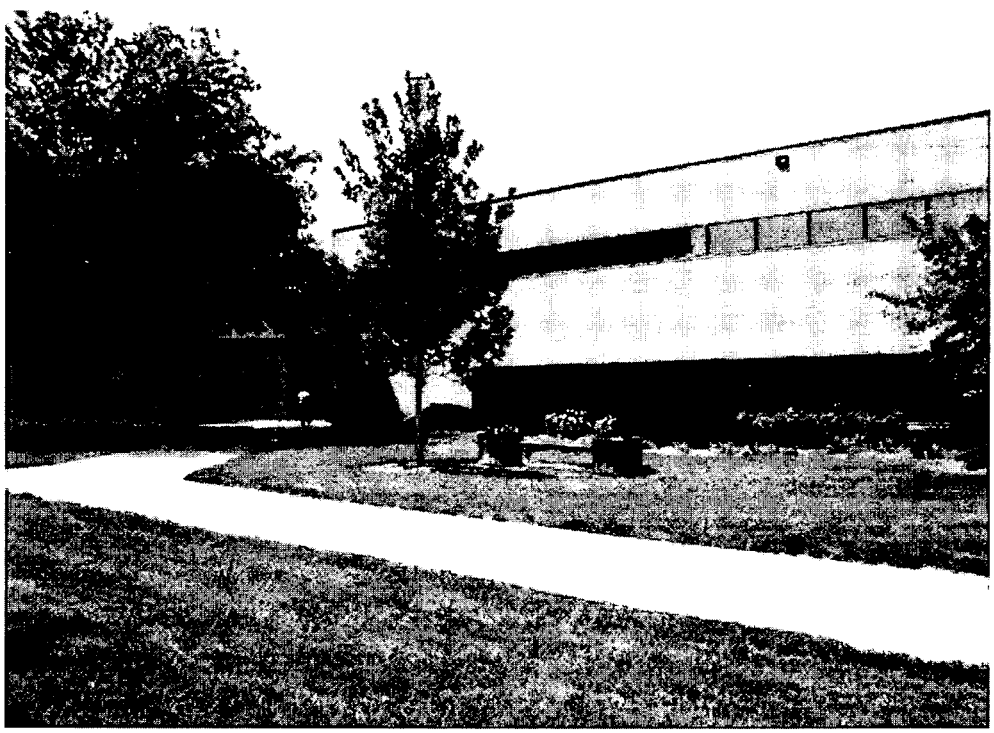

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