"NOTHING BESIDE REMAINS": THE LEGAL LEGACY OF JAMES G. WATT'S TENURE AS SECRETARY OF THE INTERIOR ON FEDERAL LAND LAW AND POLICY

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I. INTRODUCTION 474
II. THE DEPARTMENT AND MR. WATT: AN INTRODUCTION 478
A. *The Department of the Interior* 479
1. History 479
2. The Mixed Mandate 482
3. Secretarial Discretion 485
B. *James Gaius Watt* 488
III. PRIVATIZING THE PUBLIC LANDS 490
A. *The Sagebrush Rebellion and Privatization* 491
1. The Sagebrush Rebellion 492
2. Privatization 494
B. *The Moratorium on Parkland Acquisition and the Hit List* 497
C. *The St. Matthew's Island Exchange* 499
D. *Project Bold* 502
IV. RECLASSIFYING THE PUBLIC LANDS 504
A. *Terminating Classification and Revoking Withdrawals* 505
B. *Paring Down the BLM Wilderness Study* 509
C. *Transferring Jurisdiction* 513
1. The Arctic National Wildlife Refuge 513
2. The Matagorda Island Transfer 515
3. The BLM/Forest Service Land Exchange Proposal 516

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V. PRIVATIZING RESOURCES AND DEREGULATING PUBLIC LAND USERS 518
A. *Mineral Leasing* 521
1. Offshore Oil and Gas Leasing 522
a. *The Five-Year, Billion-Acre Lease Plan* 523
b. *The Offshore Oil and Gas Lease as a Property Interest* ... 525
2. Coal Leasing 527
3. Mineral Leasing in Wilderness and Wilderness Study Areas 532
a. *Opening Designated Wilderness Areas* 533
b. *Opening Wilderness Study Areas* 535
c. *Opening Florida Wilderness to Phosphate Leasing* 536
B. *Livestock Grazing Management on the Public Lands* 538
1. Short History of Livestock Grazing Regulation on the Public Lands 538
2. Grazing Regulation in the Watt Administration 540
a. *Planning and the Moratorium* 540
b. *Cooperative Management Agreements* 543
VI. CONCLUSION 545

I met a traveller from an antique land
Who said: "Two vast and trunkless legs of stone
Stand in the desert, . . . Near them on the sand,
Half sunk, a shattered visage lies, whose frown
And wrinkled lip and sneer of cold command
Tell that its sculptor well those passions read
Which yet survive, stamped on these lifeless things,
The hand that mocked them and the heart that fed.
And on the pedestal these words appear:
'My name is Ozymandias, king of kings:
Look on my works, ye mighty, and despair.'
Nothing beside remains. Round the decay
Of that colossal wreck, boundless and bare,
The lone and level sands stretch far away."

Percy Bysshe Shelley, *Ozymandias*, 1817[1]

I. INTRODUCTION

The Secretary of the Interior traditionally has had immense power over the allocation of America's public natural resources. That power evolved because many of the statutes governing the Department of the Interior were phrased in discretionary instead of mandatory terms, and because decisions of the Interior Secretaries, although

[1] *In, e.g.*, 3 THE COMPLETE POETICAL WORKS OF PERCY BYSSHE SHELLEY 25 (W. Rossetti ed. 1878).

they have always been monitored closely by those who stood to gain or lose directly by them, were seldom very visible to the general public. In recent years, secretarial discretion has been limited by a spate of more precise statutes,[2] by the swirling political crosscurrents that now engulf the office,[3] and by a commitment to the status quo shared by many beneficiaries of existing arrangements.[4]

Secretaries of the Interior only rarely achieve general notoriety. In the 1920s, the Teapot Dome scandal and the bribery conviction of Secretary Albert B. Fall generated considerable publicity and is said to have retarded mineral leasing for decades.[5] In the 1930s, Secretary Harold Ickes was a well-known and controversial New Deal leader. Throughout the 1940s and 1950s, however, the Department gave the appearance of a moribund haven for private privilege.

The start of a new era in public land policy can be traced to the tenure of Secretary Stewart Udall in the 1960s. Not only did the Kennedy and Johnson Administrations prevail upon Congress to pass a precedent-breaking series of preservation-oriented laws,[6] but Interior Solicitor Frank Barry also succeeded in reversing long-standing Department policies.[7] Secretaries during the Nixon-Ford years

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[2] *See infra* notes 83–85 and accompanying text.

[3] Resource decisionmaking in the Interior Department and ensuing litigation is now almost always polycentric. Public land users inevitably argue that any proposed course of action is too restrictive while environmentalists claim that it is too lenient. Resource scientists within and without the agency often feel that the proposal is too economically oriented, while the resource economists refuse to recognize any other basis for decision. States complain of a lack of consultation and deference to their desires, while federal political superiors dictate legally unacceptable results. Public land management is now conducted in a fishbowl-type atmosphere, and the lot of a land manager is not always a happy one. *See generally* P. CULHANE, PUBLIC LANDS POLITICS (1981); S. DANA & S. FAIRFAX, FOREST AND RANGE POLICY (1980); Fairfax, *Old Recipes For New Federalism*, 12 ENVTL. L. 945, 969–73 (1982).

[4] *See* Leshy, *Sharing Federal Multiple-Use Lands—Historic Lessons and Speculations for the Future*, in RETHINKING THE FEDERAL LANDS 235, 254–71 (S. Brubaker ed. 1984).

[5] *See* C. MAYER & G. RILEY, PUBLIC DOMAIN, PRIVATE DOMINION: A HISTORY OF PUBLIC MINERAL POLICY IN AMERICA 196–97 (1985); B. NOGGLE, TEAPOT DOME: OIL AND POLITICS IN THE 1920'S, at 209–10 (1962).

[6] These included: The Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890, 890–96 (codified as amended at 16 U.S.C. §§ 1131–1136 (1988)) (enacted 1964); the Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-578, 78 Stat. 897, 897–904 (codified as amended at 16 U.S.C. §§ 460d, 460*l*-4 to 460*l*-11 (1988)) (enacted 1964); the Classification and Multiple Use Act, Pub. L. No. 88-607, 78 Stat. 986, 986–88 (previously codified at 43 U.S.C. §§ 1411–1418 (1970)) (enacted 1964, expired 1970); the Wild and Scenic Rivers Act, Pub. L. No. 90-452, 88 Stat. 906, 906–18 (codified as amended at 16 U.S.C. §§ 1271–1287 (1988)) (enacted 1968); and the National Trails System Act, Pub. L. No. 90-543, 82 Stat. 919, 919–26 (codified as amended at 16 U.S.C. §§ 1241–1251 (1988)) (enacted 1968).

[7] *See, e.g.*, United States v. Coleman, 390 U.S. 599, 602–04 (1968) (redefining "valuable mineral deposit"); United States v. Tulare Lake Canal Co., 535 F.2d 1093, 1142–43 (9th Cir. 1976) (enforcing Reclamation Act restrictions), *cert. denied*, 429 U.S. 1121 (1977).

were conservatives grappling with a slew of new environmental mandates.[8] Secretary Hickel stood out in that transition period both for his advocacy of change and for his dismissal as a result.[9] Secretary Andrus' tenure under President Carter solidified the conservation gains of preceding administrations. By use of statutory withdrawal powers[10] and new allocation policies more in line with the new statutory structure,[11] Secretary Andrus moved resource protection closer to the top of Interior's priority list.

James Gaius Watt succeeded Andrus in early 1981. Mr. Watt's secretaryship exhibited substantive and stylistic tendencies that differed markedly from all other Interior Secretaries of this century. His philosophy of public land policy differed so radically from the assumptions underlying most of the reforms in public land and natural resources law for the quarter century preceding his appointment that his tenure offers a fascinating study of modern federal policy dynamics. In short, Mr. Watt evinced a reactionary desire to return to an earlier age, an age that likely existed only in nostalgic imagination. The irrepressible Secretary tried to swing back the pendulum of public land law and policy.[12] He won several skirmishes, but he

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[8] These mandates were manifested in the pollution and wildlife laws of the early 1970s, such as the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 852–56 (codified as amended at 42 U.S.C. §§ 4321–4375 (1982 & Supp. V 1987)) (enacted 1970); the Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476, 476–80 (codified as amended at 16 U.S.C. §§ 1600–1687 (1988)); and the public land statutes cited *supra* note 6. On the unsuccessful efforts of one Interior division, the Bureau of Land Management (BLM), to adjust to the new mandates, see Natural Resources Defense Council, Inc. v. Hughes, 435 F. Supp. 981, 984–85, 992 (D.D.C. 1977) (coal leasing program EIS held inadequate), *modified*, 454 F. Supp. 1286, 1288, 1297–98 (D.D.C. 1978) (off-road vehicle regulations held inadequate); and Natural Resources Defense Council v. Morton, 388 F. Supp. 829, 831–32, 840–41 (D.D.C. 1974) (grazing program EIS held inadequate), *aff'd*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976).

[9] *See* P. WILEY & R. GOTTLIEB, EMPIRES IN THE SUN: THE RISE OF THE NEW AMERICAN WEST 47–49 (1982).

[10] "Withdrawals" remove tracts of land from availability for specified uses. *See infra* note 216 and accompanying text. In 1978, Secretary Andrus and President Carter cited the Antiquities Act of 1906, 16 U.S.C. §§ 431–433 (1988), and the emergency withdrawal section of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714(e) (1982), as authority for a part of their withdrawals of over 100 million acres of land in Alaska. *See* Alaska v. Carter, 462 F. Supp. 1155, 1158–59, 1161 (D. Alaska 1978).

[11] *See, e.g.*, County of Del Norte v. United States, 732 F.2d 1462, 1464–65 (9th Cir. 1984), *cert. denied sub nom.* Association of Calif. Water Agencies v. United States, 469 U.S. 1189 (1985); American Motorcyclists Ass'n v. Watt, 534 F. Supp. 923, 928–29 (C.D. Cal. 1981), *aff'd*, 714 F.2d 962 (9th Cir. 1983).

[12] Secretary Watt vowed to make drastic changes in the way Interior manages its lands by "swing[ing] the pendulum back to center." Adler, *James Watt's Land Rush*, NEWSWEEK, June 29, 1981, at 22. Another of his favorite themes was managing federal resources in order to "allow the marketplace to work." *See, e.g.*, Mosher, *Reagan and the GOP Are Riding the*

failed to achieve any notable substantive success, and his major programs for change came to naught. This Article assesses Mr. Watt's resource allocation initiatives against the backdrop of public land law evolution.

Section II of this Article explains pertinent historical, philosophical, administrative, and personal background. It introduces the Department of the Interior and Mr. Watt, briefly describes the evolution and organization of the Department, the mixed legal mandates implemented by it, and the areas in which secretarial discretion is prominent. Section II also recounts Mr. Watt's background and expressed policy preferences as he assumed office in 1981.

The remaining sections discuss a dozen or so land and resource initiatives of the Watt years. This Article categorizes these initiatives according to the three overlapping main themes of Mr. Watt's abortive revolution: (1) federal ownership of land, if not unconstitutional or unconscionable, is at least A Bad Idea; (2) to the extent that land remains in federal ownership, valuable land should be reclassified or transferred to make them more easily accessible to resource developers; and (3) the resources of the federal lands should be made available to private developers to the maximum possible extent, at minimum cost, and with the fewest possible regulatory restrictions.

The fate of those new management emphases on disposal, development, and deregulation is the subject of this Article. Section III recounts the attempts of the Watt Administration to privatize the public lands. These attempts included proposed sales of "surplus" BLM lands, a moratorium on acquisition of national lands for recreation, and proposed land exchanges. Section IV then examines the closely related subject of federal land classification during the Watt years. The Interior Department tried to shift public land jurisdiction to agencies favoring more development and to reclassify lands into less restrictive categories, but it met with little success. Section V addresses some of the more notorious attempts to privatize public natural resources. Under this heading were Mr. Watt's pushes to increase coal, oil, gas, and other types of mineral leasing on the federal lands, both onshore and offshore, and his attempt to abdicate federal control over livestock grazing.

Sagebrush Rebellion—But for How Long?, 13 NAT'L J. 476, 479 (1981). The unlikelihood of his success was predicted by several contemporary commentators. *See, e.g.*, Coggins, *The Public Interest in Public Land Law: A Commentary on the Policies of Secretary Watt*, 4 PUB. LAND L. REV. 1, 26–27 (1983); Sax, *Why We Will Not (Should Not) Sell the Public Lands: Changing Conceptions of Private Property*, 1983 UTAH L. REV. 313, 325–26.

The final section of this Article assesses the legacy of Secretary Watt, and draws several conclusions from the failure of the Watt policies. Although the Watt years were unambiguously aberrant, the attempts to reverse the course of history in this area offer valuable lessons for the future.

Two related disclaimers are in order. First, this Article makes no pretense of exhaustiveness. The examples of changes introduced by Secretary Watt were chosen for inclusion because of their importance and visibility. Second, Mr. Watt and his policies were not unmitigatedly evil or bad, even from a solely preservationist viewpoint. Evidently, he was sincere in advocating his new policies. He instituted and implemented several changes that benefit the general conservation cause,[13] and some of his ideas that could streamline public land administration retain vitality.[14] Still, the Watt dream quickly turned to ashes, and, of his great reform program, "nothing beside remains."

II. THE DEPARTMENT AND MR. WATT: AN INTRODUCTION

"Buy the shores of Gitche Gumee,
Buy the shining offshore leases,
Buy the shining mining leases,
Giving me the credit due me,
And you'll be as rich as Croesus,
Richer far than old King Croesus,
Though the Congress may beshrew me,
Pick my policies to pieces,
Reagan's will is working through me,
Not to mention Edwin Meese's."

Thus spake Watt in his ascendence,
Pillar of Conservatism,
Glowing with a great resplendence,
Til he brewed a mess of pottage,
That created massive schism,
Dimmed his incandescent wattage,

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[13] The most noteworthy of these contributions were Secretary Watt's support of the Coastal Barrier Resources Act, 16 U.S.C. §§ 3501–3510 (1988) (enacted 1982) and his efforts to repair and upgrade national park facilities. *See* GENERAL ACCOUNTING OFFICE, NATIONAL PARKS' HEALTH AND SAFETY PROBLEMS GIVEN PRIORITY; COST ESTIMATES AND SAFETY MANAGEMENT COULD BE IMPROVED 6–13 (1983) (discussing the effort by the National Park Service to improve facilities in national parks).

[14] *See infra* notes 203–06, 309–11 and accompanying text.

Even in the Great White Cottage,
Spreading through the Great White Cottage,
Instant Oval Roomatism.

Thereupon Watt drew dismissal,
Drew dismissal unexpected
When the Wise Men blew the whistle:
Reagan must be re-elected.

Felicia Lamport, *The Song of High Watt* (1983)[15]

The Department of the Interior (the Department) is a curious institution. Its responsibilities are highly varied, its mandates are fragmented, and the statutes it implements cover a wide subject matter spectrum. Efforts to reorganize the Department often have been thwarted by entrenched political and economic interests.[16] Substantive reforms of departmental missions and procedures have been few and far between.[17] Resource allocation by the Department has been rife with endemic and epidemic conflict. The Secretary traditionally has had wide discretion to allocate resources, but that discretion has been narrowed by recent statutes.

A. The Department of the Interior

1. History

The Department of the Interior was created in 1848; its primary constituent was the General Land Office, which had been in the business of selling public land since 1812. The Supreme Court long has characterized the Department as the trustee of America's public land assets.[18] The Department's history, however, often has featured lax administration of public land laws, interjurisdictional squabbles,

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[15] Lamport, *The Song of High Watt*, N.Y. Times, Oct. 23, 1983, § 4, at 19, cols. 5–6 (copyright Felicia Lamport; used by permission).

[16] *See* Leshy, *supra* note 4, at 251.

[17] In the realm of grazing regulation, for instance, Congress waited more than 40 years to reform the law in the face of evidence that public land grazing continued to destroy the productive capacity of the land. *See* Coggins & Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 87–91 (1982); *see also infra* notes 466–77 and accompanying text. Similarly, the public land mining location statutes, indefensible on any modern policy basis, remain essentially unchanged from a century ago. *See generally* J. LESHY, THE MINING LAW—A STUDY IN PERPETUAL MOTION 89–118, 158–67 (1987).

[18] *See, e.g.*, Knight v. United States Land Ass'n, 142 U.S. 161, 178, 181 (1891).

lack of coordination, increasing agency specialization, and informal alliances with resource developers.[19]

Until the 1890s, the main job of the Interior Department was to expedite the transfer of public land to state and private ownership. States received hundreds of millions of acres through statehood acts, the swampland laws, the Morrill Act, and special disposition statutes.[20] The Department today administers the program whereby the State of Alaska will select over 100 million acres of federal lands,[21] and it deals with remaining "in lieu" state selection problems from earlier eras.[22]

The Interior Department also was responsible for overseeing the large grants to the transcontinental railroads[23] and small grants to individual homesteaders[24] by which the West was settled. Implementation of both programs was marked by fraud, corruption, laxness, and perjury, but a degree of lawlessness generally was tolerated in the era following the Civil War.[25] The massive transcontinental railroad grants ended in 1871,[26] and homesteading ceased for all practical purposes in 1934.[27]

It is difficult to pinpoint the beginnings of the Department as a conservation agency, but the origins of the various agencies within the Department are indicative of the shift from land agent to resource manager and protector.[28] Although Congress established Yel-

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[19] For a discussion of the history of the Department of the Interior, see G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW ch. 2 (2d ed. 1987); P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

[20] *See* P. GATES, *supra* note 19, chs. XII–XIII.

[21] *See* G. COGGINS & C. WILKINSON, *supra* note 19, at 165–68, 249–57.

[22] State "in lieu" claims arose when lands granted to states by their statehood acts were already legally taken by other acts or reserved for federal purposes. *See, e.g.*, Andrus v. Utah, 446 U.S. 500, 501–02 (1980).

[23] *See* Act of July 1, 1862, 12 Stat. 489; G. COGGINS & C. WILKINSON, *supra* note 19, at 88–105.

[24] *E.g.*, Homestead Act, ch. 75, 12 Stat. 392, 392–94 (previously codified at 43 U.S.C. §§ 161–302 1970)) (enacted 1862, repealed 1976); Desert Land Act, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321–339 (1982)) (enacted 1877); Kincaid Act, ch. 1801, 33 Stat. 547, 547–48 (previously codified at 43 U.S.C. § 224 (1976)) (enacted 1904, repealed 1976); Enlarged Homestead Act, ch. 160, 35 Stat. 639, 639–40 (previously codified at 43 U.S.C. §§ 218–221 (1976)) (enacted 1909, repealed 1976); Stock Raising Homestead Act, ch. 9, 39 Stat. 862, 862–65 (previously codified at 43 U.S.C. §§ 291–302 (1976)) (enacted 1916, repealed 1976); *see* G. COGGINS & C. WILKINSON, *supra* note 19, at 65–82. In total, the United States gave away or sold over one billion acres.

[25] *See, e.g.*, P. GATES, *supra* note 19, at 395–434.

[26] The differences between the early and later railroad grants is explained in Great Northern Railway v. United States, 315 U.S. 262, 270–80 (1941).

[27] *See generally* E. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN 5, 214–24 (1951).

[28] For a discussion of the shift in policies and priorities, see P. GATES, *supra* note 19; R.

lowstone National Park in 1872, the Department was powerless to manage the area as a park until much later,[29] and the National Park Service (NPS or Park Service), now the most visible agency in the Department, did not see birth until 1916.[30] Similarly, while wildlife refuges were reserved as early as 1903, the Department did not have an agency (now the Fish and Wildlife Service) devoted to their management as refuges until 1940.[31] In 1902, the Reclamation Act created the Bureau of Reclamation (BuRec), which has since constructed an immense system of dams and diversions for irrigation in the West.[32]

The Interior Department still retains most of its historic functions. The Bureau of Land Management (BLM), the unhappy product of a 1946 merger of the Grazing Service and the General Land Office, administers the few remaining programs whereby individuals, corporations, and political entities can gain title to federal land.[33] The BLM also oversees mineral locations under the General Mining Law of 1872,[34] leases various minerals under various laws,[35] and issues permits for livestock grazing on the public lands,[36] among other tasks.[37] In addition to housing the NPS, the FWS, the BLM, BuRec, and other agencies,[38] the Department has its own legal[39] and

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NASH, WILDERNESS AND THE AMERICAN MIND (3d ed. 1982); J. SAX, MOUNTAIN WITHOUT HANDRAILS (1980); Coggins, *supra* note 12.

[29] *See* W. EVERHARDT, THE NATIONAL PARK SERVICE 9–21 (172).

[30] National Park Service Act, 16 U.S.C. § 1 (1982).

[31] *See* M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 119–34 (2d ed. 1983); Coggins & Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 OR. L. REV. 59, 94 (1981). For a general discussion of the Fish and Wildlife Service, see N. REED & D. DRABELLE, THE UNITED STATES FISH AND WILDLIFE SERVICE (1984).

[32] *See* Kelley, *Staging a Comeback—Section 8 of the Reclamation Act*, 18 U.C. DAVIS L. REV. 97 (1984); Taylor, *California Water Project: Law and Politics*, 5 ECOLOGY L.Q. 1 (1975).

[33] *See* Faulkner v. Watt, 661 F.2d 809, 810–11 (9th Cir. 1981); Bleamaster v. Morton, 448 F.2d 1289 (9th Cir. 1971).

[34] *See* 30 U.S.C. §§ 21–28 (1982 & Supp. V 1987). For a general discussion of the BLM's duties, see J. LESHY, *supra* note 17; Strauss, *Mining Claims on Public Lands*, 1974 UTAH L. REV. 185.

[35] *See generally* ROCKY MOUNTAIN MINERAL LAW FOUNDATION, THE LAW OF FEDERAL OIL AND GAS LEASES (1987).

[36] For a general discussion of public rangeland management, see Coggins & Lindeberg-Johnson, *supra* note 17. *See also infra* notes 461–70 and accompanying text.

[37] On the BLM generally, see E. BAYNARD, PUBLIC LAND LAW AND PROCEDURE (1986); M. CLAWSON, THE BUREAU OF LAND MANAGEMENT 8–19 (1971).

[38] The Department also contains the U.S. Geological Survey, the Minerals Management Service, and the Bureau of Indian Affairs, but those agencies and their operations are beyond the scope of this Article.

[39] The Interior Department Solicitor, as general counsel to the Secretary, heavily influences public land law through written opinions on statutory construction and like issues. *See* Rocky Mountain Oil and Gas Ass'n v. Watt, 696 F.2d 734, 741, 744 (10th Cir. 1982).

adjudicative[40] arms, and was given the task of surface mining regulation in 1977.[41]

2. The Mixed Mandate

The bureaus and services that comprise the Interior Department are not independent agencies; each is one part of a strictly hierarchical structure with the Secretary at the top of the pyramid. These line bureaus operate only on delegated authority because the statutes they implement usually grant final powers of decision to the Secretary.

The National Park Service empire has steadily grown; it now encompasses monuments, recreation areas, rivers, battlefields, gateway and urban parks, and a variety of other special areas, in addition to the "flagship" national parks.[42] The basic Park Service mandate is limited to preservation and recreation[43]—sometimes internally inconsistent management objectives—and many units within the park system are governed by specific management statutes.[44] Resource conflicts in national parks are litigated relatively rarely. One prominent dispute concerned the allocation of rafting privileges on the Colorado River through Grand Canyon National Park; the courts upheld the quota system devised by the NPS.[45]

The Fish and Wildlife Service (FWS), a relative newcomer,[46] both manages the eighty-odd million acres set aside for wildlife protection

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[40] The Interior Office of Hearing and Appeals contains the Interior Board of Land Appeals which, as the Secretary's delegate, decides contested cases from the BLM. *See infra* note 253.

[41] Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1211(c) (1982); *see also infra* note 321.

[42] *See* W. EVERHARDT, *supra* note 29, at 52–60. The NPS now manages 68.5 million acres, the bulk of which is in Alaska.

[43] *See* National Park Service Act, 16 U.S.C. § 1 (1988). For a general discussion of American land conservation, see S. UDALL, THE QUIET CRISIS (1963).

[44] *See* 16 U.S.C. §§ 21–450rr-6 (1988).

[45] Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1253–54 (9th Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).

[46] The FWS has had a somewhat checkered history. In 1939, the Bureau of Biological Survey within the Department of Agriculture, and the Bureau of Fisheries within the Department of Commerce, were both transferred to Interior, and the two agencies were consolidated into the Fish and Wildlife Service a year later. The two bureaus were again separated in 1956, when the Bureau of Sport Fisheries and Wildlife was created within the Department of Interior, and the Bureau of Commercial Fisheries, with responsibilities over marine fisheries, was transferred back to Commerce, where it became the National Marine Fisheries Service. The Bureau of Sport Fisheries was renamed the Fish and Wildlife Service in 1974. *See* M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 65–66 (1983). The agency responsibilities remain divided. For a discussion of the history of American Wildlife Management, see

and administers several general regulatory programs intended to benefit wildlife, especially migratory birds,[47] marine mammals,[48] and endangered or threatened species.[49] Congress directed the Fish and Wildlife Service to manage its lands primarily for protection and propagation of wildlife, and, secondarily, for all other natural resource uses.[50] Several recent judicial opinions have confirmed the precedence of wildlife in refuge management,[51] even though hunting is allowed on parts of many refuges.[52] Congress in 1964 commanded both the NPS and the FWS to commence wilderness designation processes for lands under their care.[53] Compared with the Forest Service experience with wilderness studies, such designation has been relatively uncontroversial.[54]

The BLM, which is in charge of more land than the other Interior agencies combined, is at once the key player and the weakest link in the Department. Its main historical functions are indicated by its derisory nickname, the "Bureau of Livestock and Mining." The agency has long been considered a model of the "capture" phenomenon because some of its operations essentially have been controlled by the entities that the agency is supposed to regulate.[55] Its attempts to avoid conflict by pacifying public land users increasingly have fallen afoul of the law.[56] In 1976, Congress decreed that the BLM henceforth would promulgate land use plans and manage for multiple

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H. BORLAND, THE HISTORY OF WILDLIFE IN AMERICA (1975) and Greenwalt, *The National Wildlife Refuge System*, in WILDLIFE AND AMERICA 399 (H. Brokaw ed. 1978).

[47] Migratory Bird Treaty Act, 16 U.S.C. §§ 703–711 (1988).

[48] Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1384 (1988).

[49] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (1988).

[50] Refuge Recreation Act of 1962, 16 U.S.C. §§ 460k to 460k-4 (1988); National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd–668ee (1988).

[51] Schwenke v. Secretary of the Interior, 720 F.2d 571, 577–78 (9th Cir. 1983); Defenders of Wildlife v. Andrus, 11 Env't Rep. Cas. (BNA) 2098, 2101 (D.D.C. 1978); *see also* M. BEAN, *supra* note 31, at 125–34; N. REED & D. DRABELLE, *supra* note 31.

[52] *See* N. REED & D. DRABELLE, *supra* note 31, ch. 4.

[53] Wilderness Act, 16 U.S.C. §§ 1131–1136 (1988).

[54] *See* J. HENDEE, G. STANKEY & R. LUCAS, WILDERNESS MANAGEMENT 106–23 (1978).

[55] *See, e.g.*, W. CALEF, PRIVATE GRAZING AND PUBLIC LANDS (1960); P. FOSS, POLITICS AND GRASS (1960); W. VOIGT, THE PUBLIC GRAZING LANDS (1976); Coggins & Lindeberg-Johnson, *supra* note 17, at 61–68; Shanks, *Sagebrush Rebellion*, 56 DEFENDERS OF WILDLIFE 38, 39 (Apr. 1981); Trueblood, *They're Fixing to Steal Your Land*, 84 FIELD & STREAM 40, 167 (Mar. 1980).

[56] *See, e.g.*, American Motorcyclist Ass'n v. Watt, 543 F. Supp. 789, 795–97 (C.D. Cal. 1982); Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981, 988–91 (D.D.C. 1977); National Wildlife Fed'n v. Morton, 393 F. Supp. 1286, 1291–92 (D.D.C. 1975); Natural Resources Defense Council, Inc. v. Morton, 388 F. Supp. 829, 833–34 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976); *see also infra* notes 246–75 and accompanying text.

use and sustained yield.[57] The agency's efforts to adopt a more balanced management regime have been criticized almost universally.[58]

The Bureau of Reclamation is the closest approximation of a pure "development" agency in the Department. Its main task is construction and operation of the dams and diversions that since 1902 have transformed many arid areas of the West with heavily subsidized irrigation water.[59] The Department's Office of Surface Mining Reclamation and Enforcement, on the other hand, regulates private mining operations and lacks land management responsibilities.[60] Those two agencies will not figure much in this narrative.

One other agency, although not within the Department of the Interior, deserves mention. The Department of Agriculture houses the Forest Service, which has managed the 190 million acres of reserved forest lands since 1905.[61] The Forest Service has encountered the same conflicts between preservation and development that bedevil Interior. It too has been forced to reassess its practices in light of new statutory emphases on preservation and multiple use.[62]

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[57] 43 U.S.C. §§ 1712, 1732(a) (1982 & Supp. V 1987); *see also* Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1 (1983).

[58] Numerous newspaper and magazine articles chronicled the parade of horribles as the BLM haltingly shifted into its new mode of operation. *See, e.g.*, Bavarskis, *The BLM's Big Dilemma: Tussle Over Federal Lands*, PLANNING, June 1977, at 10; Church, *Rural Counties Angry Over New BLM Rules*, Nev. St. J., Jan. 11, 1976, at 1, col. 1; Mathews, *The Angry West vs. the Rest*, NEWSWEEK, Sept. 17, 1981, at 31; Shabecoff, *Easing Federal Control of Public Land*, N.Y. Times, Feb. 10, 1981, at A21, col. 1; Shanks, *supra* note 55, at 39.

[59] The Bureau of Reclamation was created by the Reclamation Act, which directed the Secretary of the Interior to "locate and construct . . . irrigation works" in the 17 Western states. 43 U.S.C. § 411 (1982). The intent of the Act was to provide incentives for farmers to settle the West by providing water for irrigation. The Act originally provided that project construction costs would be repaid over a period of 10 years without interest. *See* B. HOLMES, A HISTORY OF FEDERAL WATER RESOURCES PROGRAMS, 1800–1960, at 7 (1983). The Act limited the amount of land that any one individual could irrigate to 160 acres, 43 U.S.C. § 431 (1982), in order to benefit the small homesteader, but abuses were rampant. The Bureau embarked Interior on a massive construction program that encompassed several hundred projects by 1983. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, SUMMARY STATISTICS, VOLUME I, at 1 (1983). Despite some attempts to curb abuses, the program still provides massive subsidies to Western irrigators. *See* NATIONAL WILDLIFE FED'N, SHORTCHANGING THE TREASURY: THE FAILURE OF THE DEPARTMENT OF THE INTERIOR TO COMPLY WITH THE INSPECTOR GENERAL'S AUDIT RECOMMENDATIONS TO RECOVER THE COSTS OF FEDERAL WATER PROJECTS 1 (1984). The Reclamation Reform Act of 1982, 43 U.S.C. §§ 390aa to 390zz-1 (1982 & Supp. V 1987), liberalized some former limits.

[60] *See infra* note 321.

[61] *See* Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239, 267–80 (1978).

[62] For a discussion of the Forest Service's various and often conflicting missions, see Wilk-

All land management agencies, as representatives of the governmental owner, have narrow, ill-defined powers to outlaw or regulate private activities on adjacent lands that pose dangers to federal resources and amenities.[63] Only the FWS (with respect to wildlife)[64] and the Office of Surface Mining Reclamation and Enforcement (with respect to stripmining),[65] however, have general regulatory powers over all private entities.

In sum, the present departmental organization, as a product more of history than of logic, is not always internally consistent.[66] The Department of the Interior is a mixed bag of agencies, each subject to mixed mandates. The Department's mission includes elements of preservation, recreational use, resource exploitation, resource protection, dam building, and regulation of private activities. The agencies within the Department by law serve radically different purposes, often imposing on the Secretary the burden of reconciliation. Each land management agency's legal mandate also contains the seeds of intra-agency and intra-resource allocation conflict. Allocational conflicts are inevitable because they are built into the statutory, political, and administrative contexts. Consequently, the Secretary of the Interior must mediate constantly among the contending mandates, resources, and parties.

3. Secretarial Discretion

Most of the statutes applicable to the Interior Department delegate powers directly to the Secretary,[67] who then subdelegates powers to undersecretaries and agencies. The Secretary retains the final power of decision, but he seldom exercises it in individual adjudications.[68] Congressional attitudes about the appropriate degree of

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inson & Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1 (1985).

[63] *See* Camfield v. United States, 167 U.S. 518, 524–26 (1897); Minnesota v. Block, 660 F.2d 1240, 1249–51 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); G. COGGINS & C. WILKINSON, *supra* note 19, at 202–09.

[64] The statutes cited *supra* notes 47–49 authorize general regulatory programs. *See* N. REED & D. DRABELLE, *supra* note 31.

[65] Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328 (1982 & Supp. V 1987); *see also infra* note 321.

[66] Further, the Department lacks jurisdiction over some aspects of public natural resources—notably the national forests and marine creatures—that logically should be included. Presidential efforts over many decades to combine related functions in a Department of Natural Resources failed.

[67] *E.g.*, 43 U.S.C. §§ 1711(a), 1712(a) (1982).

[68] *See infra* note 252 and accompanying text.

secretarial discretion have differed radically over the years. In the disposition era, the Secretary frequently had little choice: if an applicant even arguably had met the statutory conditions, the law required the Department to transfer the land to him or her.[69] Mineral "location" under the 1872 Mining Law is perhaps the sole remaining vestige of this age.[70]

In the era of conservation, Congress greatly broadened secretarial discretion. Although the Yellowstone[71] and National Park System[72] Acts strictly limited the purposes of park management, they gave the Secretary considerable leeway in the means used to achieve those purposes. Laws of 1891[73] and 1906[74] granted the President authority to decide which lands merited protection as forests and monuments, and the 1910 Pickett Act allowed the executive branch to withdraw any public land for any purpose it deemed public.[75] The 1920 Mineral Leasing Act[76] made fuel mineral exploitation dependent upon an initial secretarial decision whether to lease or to grant prospecting permits, and also authorized the Secretary to attack conditions to leases.[77] The leasing model was followed and extended to subsequent energy mineral legislation.[78] The 1934 Taylor Grazing Act contained some guidelines for grazing permit issuance but essentially left the matter to the Secretary's judgment.[79] Although not confirmed by a general statute until 1966, secretarial authority to manage wildlife refuges long was assumed to be without significant limitation.[80] Departmental discretion has never been as broad as that of the Forest Service under its 1897 Organic Act,[81] coupled with the 1960 Multiple-

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[69] *See, e.g.*, Ard v. Brandon, 156 U.S. 537 (1895).

[70] The duty to issue a patent is widely recognized to be a ministerial act. *See* South Dakota v. Andrus, 614 F.2d 1190 (8th Cir.), *cert. denied*, 449 U.S. 822 (1980), and cases cited therein.

[71] Yellowstone National Park Protection Act, 16 U.S.C. §§ 21–40c (1988).

[72] National Park Service Act, 16 U.S.C. §§ 1–18(f) (1988).

[73] Forest Reserve Act of 1891, ch. 561, § 24, 26 Stat. 1103 (previously codified at 16 U.S.C. § 471 (1970)) (repealed 1976).

[74] National Monument Act, ch. 3060, § 2, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431–433 (1988)).

[75] Pickett Act, ch. 421, § 1, 36 Stat. 847 (previously codified at 43 U.S.C. § 141 (1970)) (enacted 1910, repealed 1976).

[76] Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended in scattered sections of 30 U.S.C.).

[77] *See* United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414, 417 (1931); *cf.* Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553, 557–58 (D.C. Cir. 1979).

[78] Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (1982 & Supp. V 1987); Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001–1025 (1982).

[79] 43 U.S.C. §§ 315–315r (1982); *see also* Coggins & Lindeberg-Johnson, *supra* note 17, at 53.

[80] *See* Greenwalt, *supra* note 46.

[81] 16 U.S.C. §§ 473–482 (1988); *see also* Wilkinson & Anderson, *supra* note 62, at 46–60.

Use, Sustained-Yield Act,[82] but the statutes governing Interior operations gave rise to the notion that the Secretary could do pretty much as he pleased with America's public resources.

Modern legislation in this age of resource protection and preservation has reverted more toward the mode of limited discretion. Congress had given less and less deference to the presumed professional expertise of the agencies, and many of the Secretary's responsibilities, once outlined only in general terms, are now fleshed out in statutory detail and are framed in mandatory language. The broad management statutes are now supplemented or supplanted by the more detailed strictures of, for example, the Federal Land Policy and Management Act (FLPMA),[83] the National Forest Management Act (NFMA),[84] and the Endangered Species Act (ESA).[85] Other laws, such as the National Environmental Policy Act (NEPA),[86] the Wilderness Act,[87] the Wild and Scenic Rivers Act,[88] and the Surface Mining Control and Reclamation Act,[89] have thrust entirely new responsibilities on the Department. Many of these statutes, unlike earlier laws, also contain elaborate procedural provisions.[90]

Just as significantly, perhaps, courts since the 1969 *Parker v. United States*[91] decision have evinced a willingness to confine secretarial discretion within statutory bounds[92]—a very important reversal of earlier judicial laissez-faire attitudes.[93] Other judicial doctrines such as implied reserved water rights[94] and the public trust[95]

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[82] 16 U.S.C. §§ 528–531 (1988).

[83] 43 U.S.C.A. §§ 1701–1784 (West 1986 & Supp. 1989).

[84] National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.).

[85] 16 U.S.C. §§ 1531–1544 (1988).

[86] 42 U.S.C. §§ 4321–4370a (1982 & Supp. V 1987).

[87] 16 U.S.C. §§ 1131–1136 (1988).

[88] 16 U.S.C. §§ 1271–1287 (1988).

[89] 30 U.S.C.A. §§ 1201–1328 (West 1987 & Supp. 1989).

[90] *See, e.g.*, American Motorcyclist Ass'n v. Watt, 534 F. Supp. 923, 933–36 (C.D. Cal. 1981) (discussing FLPMA planning provisions), *aff'd*, 714 F.2d 962 (9th Cir. 1983).

[91] 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

[92] The most prominent decision limiting secretarial discretion may be National Audubon Society v. Hodel, 606 F. Supp. 825 (D. Alaska 1984). For a discussion of *National Audubon Society v. Hodel*, see *infra* notes 181–99 and accompanying text.

[93] *See* G. COGGINS & C. WILKINSON, *supra* note 19, ch. 4, § B.

[94] *See* United States v. New Mexico, 438 U.S. 696 (1978); Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985), *appeal dismissed sub nom.* Sierra Club v. Lyng, slip op. (10th Cir. Oct. 8, 1986), *on remand*, 661 F. Supp. 1490 (D. Colo. 1987).

[95] *See* Sierra Club v. Department of the Interior, 398 F. Supp. 184 (N.D. Cal. 1975); Sierra Club v. Department of the Interior, 376 F. Supp. 90 (N.D. Cal. 1974). *But see* Sierra Club v. Andrus, 487 F. Supp. 443 (D.D.C. 1980), *aff'd on other grounds sub nom.* Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981). For a discussion of the application of the public trust

also have overridden secretarial discretion. Further, a new class of disputants in the public land arena have focused increasing public awareness on the activities of the agencies managing the nation's resources. Environmental groups with full-time legal staffs and an ability to generate grassroots support now function as a powerful practical limitation on the Secretary's discretion.[96]

Interior secretaries still have considerable leeway in some areas of public land law, but recent statutes and judgments have severely circumscribed much of their former authority. James G. Watt apparently did not understand that historical trend when he assumed office in January, 1981.

B. James Gaius Watt

Mr. Watt, a Westerner and an avowed Sagebrush Rebel,[97] entered office with significant experience in public land administration.[98] He had served on the staff of former Wyoming Senator Millard Simpson and had been a natural resources lobbyist for the United States Chamber of Commerce. Under President Nixon, Watt was a deputy assistant interior secretary for water and power resources and chief of the now-defunct Bureau of Outdoor Recreation. President Ford appointed him to the Federal Power Commission. From 1977 to 1980, Mr. Watt was president of the Mountain States Legal Foundation (MSLF) in Denver, an industry-supported interest group founded by Joseph Coors to counterbalance the rising influence of the envi-

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doctrine to public land law, see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); *Symposium on the Public Trust Doctrine*, 14 U.C. DAVIS L. REV. 180 (1980); Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1 (1980). On the public trust doctrine in state law, see National Audubon Society v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983) (water rights must be reconciled with the public trust); United Plainsmen Association v. North Dakota State Water Conservation Commission, 247 N.W.2d 457, 460–63 (N.D. 1976) (state officials must consider public trust before issuing new water rights).

[96] Most of the litigation discussed in this Article, the effect of which has been to destroy or retard Secretary Watt's programs, was initiated by the Sierra Club, the Natural Resources Defense Council, the National Wildlife Federation, and the National Audubon Society. *See infra* note 536 and accompanying text.

[97] Drew, *Reporter at Large: Secretary Watt*, NEW YORKER, May 4, 1981, at 104. On the Sagebrush Rebellion, see *infra* text accompanying notes 119–42.

[98] *See* Culhane, *Sagebrush Rebels in Office: Jim Watt's Land and Water Politics*, in ENVIRONMENTAL POLICY IN THE 1980S: REAGAN'S NEW AGENDA 293, 294–95 (N. Vig & M. Kraft eds. 1984) [hereinafter REAGAN'S NEW AGENDA]; *Senate Approves Nomination of Watt to be Reagan's Secretary of the Interior*, 11 Env't Rep. (BNA) 1854 (1981).

ronmentally-oriented public interest law firms.[99] Under Mr. Watt, the MSLF filed a number of suits challenging Interior Department policies and decisions that restricted resource development.[100]

New Secretary Watt soon announced his intention to change the way Interior conducted its business.[101] He believed that the new environmental laws and regulations were standing in the way of necessary development, and that federal public land policy should favor more resource utilization.[102] Mr. Watt did not test the waters by gradual introduction of his proposals. Instead, he sought confrontation with emphatic, colorful, and frequently inflammatory rhetoric.[103] He attacked his new job at Interior with a sense of mission and purpose, stating flatly that he would always "err on the side of public use versus preservation."[104] Some described his dedication as religious zeal.[105] His oft-expressed disdain for conservation groups

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[99] Drew, *supra* note 97, at 108. Coors is also one of the founders of the Heritage Foundation, which released its controversial guidebook, "Mandate for Leadership," as Watt was taking office. *Id.* at 110.

[100] Shortly before leaving MSLF, Mr. Watt filed a brief challenging the constitutionality of the Surface Mining Control and Reclamation Act. *Id.* at 110. Watt described his mission at MSLF: to "fight in the courts those bureaucrats and no-growth advocates who create a challenge to individual liberty and economic freedoms." *Id.* at 108. A list of cases undertaken by the MSLF during Mr. Watt's tenure there is included with the text of his confirmation hearings. *James G. Watt Nomination: Hearings on the Proposed Nomination of James G. Watt to be Secretary of the Interior Before the Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 32–43 (1981).

[101] Bernstein, *What Hath Watt Wrought?*, FORTUNE, Oct. 31, 1983, at 74. Watt stated that he wanted to bring about "massive changes" at Interior.

[102] Adler, *supra* note 12, at 22. His professed overall goal was to "open up as much land as I can." Stoler, *Land Sale of the Century*, TIME, Aug. 23, 1982, at 16.

[103] *See* Adler, *supra* note 12, at 24.

[104] Drew, *supra* note 97, at 128. Of park acquisitions and wilderness preservation, Mr. Watt said, "we have already protected most of the truly unique lands." Drew, *supra* note 97, at 124. Of grazing on public lands: "to tell people how to manage their own land—that's *despicable* in America." Adler, *supra* note 12, at 30 (emphasis in original). On environmental regulation of coal mining and the Office of Surface Mining: "Embodied in this one office we find every abuse of government centered in one agency, directed at one industry." *Id.* at 32. On the general philosophy of public land management: "My concept of stewardship is to invest in it. Build a road, build a latrine, pump in running water so you can wash dishes . . . . Do we have to buy enough land so that you can go backpacking and never see anyone else?" *Id.* at 24. One person who knew Watt stated that Watt believed that "America would be better off if the companies were unshackled to do what they want." Drew, *supra* note 97, at 108.

Watt also averred that he would "get rid of" anyone standing in his way. *Id.* at 112. "I plan to end unnecessary and burdensome regulations now frustrating America's mineral development programs." *Id.* at 119. "We mean business, and when you read the press you're going to find that I can be cold and calculating, and indeed I can. But we are determined, and we are going to get hold of this thing fast . . . . If a personality is giving you a problem, we're going to get rid of the problem or the personality, whichever is faster." *Id.* at 112. Shortly after Watt made this statement, a large number of career Interior personnel were dismissed.

[105] Watt became a born-again charismatic Christian in the mid-1960s. A friend of Watt has

raised to new heights popular opposition to departmental policies.[106] Many of Mr. Watt's philosophical supporters distanced themselves from his extreme remarks. His style left little room for compromise and soon predisposed perhaps a majority of the American people against his new initiatives even before the details of new policies were revealed.[107]

Within his first few months in office, Secretary Watt proposed major changes to almost all of Interior's programs. He also embarked on regulatory and budgetary revisions that would encourage development of public resources at the expense of protection programs.[108] As with most of Mr. Watt's initiatives, these were attempts to exercise his administrative discretion. Rarely did he propose new legislation to accomplish his aims.[109]

III. Privatizing the Public Lands

> AMBITION, *n.* An overmastering desire to be vilified by enemies while living and made ridiculous by friends when dead.
> DUTY, *n.* That which sternly impels us in the direction of profit, along the line of desire.
> MORAL, *adj.* Conforming to a local and mutable standard of right. Having the quality of general expediency.
>
> Ambrose Bierce, *The Devil's Dictionary*, c. 1911[110]

Sagebrush Rebellion advocates in the late 1970s were ambiguous about the details of their proposals, but their unifying theme was that permanent federal ownership of at least some kinds of federal

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said that he has "the most anthropocentric interpretation of Christianity—he feels that whatever human beings need is O.K. And he does have a religious sense of being a chosen person." Drew, *supra* note 97, at 111.

[106] Watt always addressed the conservationists pejoratively. He sometimes called them "greedy land-grab[bers]." Adler, *supra* note 12, at 24. At other times they were just "enemies," J. WATT & D. WEED, THE COURAGE OF A CONSERVATIVE 199 (1985), or those elements "left out on the more shrill end of the vocal spectrum." Mosher, *supra* note 12, at 479. Watt drew particularly harsh criticism when he analogized environmentalists to Nazis. Beck & Cook, *Watt's Latest Stand*, NEWSWEEK, Jan. 31, 1983, at 26.

[107] More than one million citizens signed a petition for Mr. Watt's removal. *See* Coggins, *supra* note 12, at 11 n.107.

[108] *See infra* notes 321–26 and accompanying text.

[109] Secretary Watt apparently was unable to convince Congress of the need for any major new public land legislation other than the Coastal Barrier Resources Act, 16 U.S.C. §§ 3501–3510 (1988) (enacted 1982), a conservation measure.

[110] *In, e.g.*, A. BIERCE, THE DEVIL'S DICTIONARY 23, 77, 223 (Tower Books ed. 1941).

land was immoral if not unconstitutional.[111] In his confirmation hearings, Secretary-to-be Watt disclaimed any intention to dispose of large amounts of public land, stating that his ill-defined "good neighbor" policies would obviate the need for wholesale disposition.[112]

As Secretary of the Interior, Mr. Watt did not openly espouse the more extreme aims of the Sagebrush Rebellion—which, by 1982, was petering out as a political force from its own internal inconsistencies and unpopularity.[113] The courts also assisted in the movement's interment by holding that Nevada had no legal claim to federal lands within its borders[114] and that the general twelve-year statute of limitations barred state claims of title against federal property.[115]

Despite the demise of the Rebellion, Secretary Watt's actions strongly indicated that his Sagebrush propensities were alive if sublimated. Watt's tenure saw the rebirth of Sagebrushism in the new guise of "privatization," moratoria on federal land acquisition, and attempted land exchanges to promote resource development. One land exchange idea supported by Secretary Watt called Project Bold, although not implemented during his tenure, offers promise for streamlining future public land management.[116] The common denominator of these actions was federal title transfer. This section describes those policy initiatives and explains why they were ultimately unsuccessful.

A. The Sagebrush Rebellion and Privatization

At the heart of Secretary Watt's new policies was the plan for outright disposal of large tracts of public lands. The debate began when President Reagan announced in February, 1982 that the government intended to sell approximately 35 million acres of federal

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[111] It is no coincidence that Nevada, one of the most ardent supporters of the Rebellion, is a state in which the United States owns 86.4% of the land. The BLM manages nearly 68% of Nevada. *See* PUB. LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 327 (1970) [hereinafter PLLRC REPORT].

[112] *Proposed Nomination of James G. Watt, Hearings Before the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 72 (1981).

[113] *See infra* notes 140–42 and accompanying text.

[114] Nevada *ex rel.* Nevada State Bd. of Agric. v. United States, 512 F. Supp. 166, 171–72 (D. Nev. 1981), *aff'd on other grounds*, 699 F.2d 486, 487 (9th Cir. 1983).

[115] North Dakota v. Block, 461 U.S. 273, 290 (1983). Congress since has exempted state title claims from the limitations statute. Quiet Title Act, 28 U.S.C. § 2409a(8) (Supp. V 1987).

[116] *See infra* text accompanying notes 200–13.

land.[117] While some of the tracts were in the national forests[118] or under the jurisdiction of various other agencies, the bulk of the lands proposed for sale were managed by Interior's Bureau of Land Management. James Watt was the main proponent of the plan and thus the focus of the controversy. Disposition versus retention of the public lands was hardly a new issue, but this was a new approach to it.

1. The Sagebrush Rebellion

The recent Sagebrush Rebellion had its roots in the settlement of the West, when the federal government long attempted to dispose of western lands through such legislation as the Homestead Act of 1862,[119] the Timber and Stone Lands Act of 1878,[120] the Desert Lands Act of 1877,[121] the General Mining Law of 1872,[122] and the Stock-Raising Homestead Act of 1916.[123] All of these laws gave lands to anyone meeting, or claiming to meet, their minimal legal conditions.[124] Much land remained unclaimed into the 1930s, however, because it was unsuitable for agriculture, forestry, or mining.[125] By this time, national land policy had shifted away from unfettered disposal toward permanent retention and management of public domain lands. The Taylor Grazing Act of 1934,[126] although facially an interim measure, actually ended the disposal era, leaving several hundred million acres of unreserved public domain land in long-term federal ownership.[127]

The lands now in the BLM's charge are the lands that no one wanted, either for homesteading or for national reservations. The western states even rejected President Hoover's attempts to give them outright the surface estates of those lands.[128] Later, bills were

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[117] Exec. Order No. 12,348, 47 Fed. Reg. 8,547 (1982).

[118] *See Forest Service Budget Up $13 Million; Soil Conservation Funds Down $118 Million*, 13 Env't Rep. (BNA) 1752 (Feb. 4, 1983).

[119] 43 U.S.C. §§ 161–284 (repealed 1976).

[120] 43 U.S.C. §§ 311–313 (repealed 1891).

[121] 43 U.S.C. §§ 321–339 (1982).

[122] 30 U.S.C. §§ 21–28 (1982).

[123] 43 U.S.C. §§ 291–302 (repealed 1976).

[124] *See* T. WATKINS & C. WATSON, THE LAND NO ONE KNOWS 50–70, 108 (1975) (discussing the provisions of the statutes).

[125] *See id.* at 110.

[126] 43 U.S.C. § 315–315r (1982).

[127] *See* E. PEFFER, *supra* note 27, at 224.

[128] Shanks, *supra* note 55, at 40. Utah Governor George H. Dern's response was typical: "The states already own, in their school land grants, millions of acres of this same kind of land, which they can neither sell nor lease, and which is yielding no income. Why should they want more of this precious heritage of desert?" *Id.*; *see also* E. PEFFER, *supra* note 27, at

introduced in Congress to set up a commission that would transfer all forest, mineral, and grazing lands to the states, but the proposal was dropped in the face of strong public opposition.[129] Although many Westerners long have resented federal control of lands, the BLM in fact has been a benevolent landlord, highly responsive to public land users. The Taylor Act subsidized grazing leases, and the BLM almost automatically renewed them.[130] The BLM also usually failed to regulate or challenge unperfected, unpatented mining claims, thus allowing rampant abuses of the mining laws.[131]

Even so, federal ownership of land has long been a sore point in the West. The seeds of the most recent Sagebrush Rebellion, which began around 1976, were sown by new constraints on western resource development,[132] by the Federal Land Policy and Management Act of 1976, and by a streak of general cussedness in some public land users. The Rebellion was marked by bills in state legislatures[133] and in the Congress[134] to transfer the BLM lands, or, alternatively, the BLM and the Forest Service lands, from the federal government to the states.[135] The FLPMA, by formally adopting the policy that the public or BLM lands would be retained, was the ostensible reason for the controversy.[136] Further, the FLPMA forced the BLM into an unfamiliar new role as multiple use manager and planner of vast national resources,[137] meaning that the agency likely would become less responsive to the local mining and grazing interests who were the main leaders of the Rebellion. Anti-regulatory attitudes are

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203–13; Gregg, *The Sagebrush Rebellion: What It Is, What It Isn't, and Where It's Going*, INTERMOUNTAIN OUTDOOR SYMP., May 15, 1980, at 3.

[129] *See* Gregg, *supra* note 128, at 3.

[130] *Id.* at 22–23. For a good history of this era, see M. CLAWSON, *supra* note 37, at 8–19.

[131] J. LESHY, *supra* note 17, at 64–67.

[132] *See, e.g.*, Kirschten, *There's More Rhetoric than Reality in the West's "Sagebrush Rebellion"*, 11 NAT'L J. 1928 (1979).

[133] Nevada enacted a bill in July, 1979, asserting control of all federal lands within the state's boundaries. *See Ranchers, Miners Ask State Control of Local Lands*, Nev. St. J., July 12, 1979, at 3. Shortly thereafter, similar legislation was enacted in New Mexico, Utah, and Wyoming. The Arizona Assembly overrode Governor Babbitt's veto of such a law. An Idaho Sagebrush bill was defeated in the state Senate. *See* Western Governor's Policy Office, Sagebrush Rebellion: A Background Paper 2 (1980) (unpublished briefing paper).

[134] *Id.* at 3. Following the lead of the state assemblies, Senator Orrin Hatch and Representatives Jim Santini and Steve Symms proposed legislation in Congress to achieve similar objectives. *Id.*

[135] *See* Shanks, *supra* note 55, at 38, 40.

[136] *See id.* at 40. The FLPMA provides that "it is the policy of the United States that the public lands be retained in Federal ownership." 43 U.S.C. § 1701(a)(1) (1982). Prior to this Act, land had been retained under the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315 - 315r (1982), which authorized withdrawal of all grazing lands for classification. *Id.* § 315; *see also* E. PEFFER, *supra* note 27, at 223.

[137] *See* Coggins, *supra* note 57, at 32–33.

especially acute in some parts of the West, where self-initiative and self-reliance are a self-proclaimed way of life.[138] That mood did not accord well with the increasing conditions imposed on utilization of federal resources in the 1970s.[139]

At bottom, the Sagebrush Rebels could not agree on goals. Some wanted the lands transferred to private ownership, while others only wanted to exert pressure to force changes in the way the BLM and other federal agencies dealt with the commodity land users and the states.[140] Of those who hoped to gain state control of the land, some preferred that the land remain in state and local ownership, while others wanted the lands to pass to private ownership, although this latter faction was divided over who should have priority to buy them.[141] The view held depended on whether the sales would be competitive or held on a preferential basis. Western ranchers, for example, preferred an outright sale, but only if the lands were first offered to them at below-market rates.[142] The Sagebrush Rebellion thus suffered from its own internal inconsistencies as well as from the popular public perception that it was really "The Great Terrain Robbery."

2. Privatization

The Reagan Administration eschewed Rebellion rhetoric,[143] instead portraying its land sale proposal as a business-like decision to reduce the federal cost of managing the land and to use the sale revenues for reduction of the federal deficit. On February 25, 1982, President Reagan created the Property Review Board (PRB or

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[138] *See, e.g.*, Stegner, *Will Reagan Ride with the Raiders?*, Wash. Post, Jan. 20, 1981, special section (Inauguration '81: The Reagan Presidency), at 33, col. 1. One observer has described the West as "a ranching and farming civilization at once humble and touched with glory, practical and myth-bound, something made up about equally of deprivation, hard work, muleheadedness, pride, freedom, self-sufficiency, and illusion." *Id.*

[139] The paradigmatic example is coal leasing: no coal was sold during the 1970s. *See* G. COGGINS & C. WILKINSON, *supra* note 19, ch. 6, § 3; Tarlock, *Western Coal in Context*, 53 U. COLO. L. REV. 315 (1981); *see also infra* text accompanying notes 379–411.

[140] Melloan, *Rebellious Mood in the West*, Wall St. J., Aug. 16, 1979, at 16, col. 4.

[141] *See id.*

[142] Culhane, *supra* note 98, in REAGAN'S NEW AGENDA, *supra* note 98, at 300.

[143] Mr. Watt stated in his confirmation hearings:

> "I do not see the need at this time for a massive transfer of public lands to state and local control or private interests. If we do not shape up the management processes of these public lands, then there probably ought to be a massive transfer. I think some good management will handle those problems."

Drew, *supra* note 97, at 104.

Board) within the Executive Office of the President.[144] The Board's three stated goals were: to improve management of the federal lands; to identify unneeded federal lands and expedite their sale to the private sector; and to use the land sale proceeds to reduce the federal deficit.[145]

With cooperation and encouragement from Secretary Watt, the PRB soon released an inventory of lands for sale that included 4.4 million acres of BLM lands. The sale plan was developed without a hearing or any rulemaking procedures. In July, 1982, the PRB announced that the General Services Administration (GSA) would sell 307 parcels totalling 60,000 acres.[146] The Board projected that its sales program would generate receipts of $1.3 billion in fiscal year 1983, and more than $4.25 billion in each of fiscal years 1984–87.[147] By contrast, prior GSA receipts from sales of surplus property only amounted to $60 million annually.[148]

The PRB's plan soon ran into major legal and political obstacles. Conservation organizations filed suit, alleging that the Board's proposed sale required preparation of an environmental impact statement (EIS), and that the Administrative Procedure Act[149] required notice of the PRB regulations governing the sale.[150] In May, 1984, the United States District Court for the District of Massachusetts rejected several of the plaintiffs' substantive claims,[151] but ruled that the PRB was an "agency" for NEPA purposes and that the sale constituted a major federal action requiring a programmatic EIS prior to any land sales.[152] Further, the PRB must give notice and an opportunity for hearing before promulgating rules and regulations.[153]

Although the Conservation Law Foundation's lawsuit was initially successful, it merely slowed the progress of the proposed land sales.

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[144] Exec. Order No. 12,348, 3 C.F.R. 134–35 (1982). The Property Review Board (PRB) was not an independent blue-ribbon study panel. It consisted of several of the President's closest advisors, including William Clark, David Stockman, and Edwin Meese. *See* Conservation Law Found. v. Harper, 587 F. Supp. 357, 362 (D. Mass. 1984).

[145] *See* 3 C.F.R. 134–35 (1982).

[146] *See* Hooper, *Privatization—The Reagan Administration's Master Plan for Government Giveaways*, SIERRA, Nov.–Dec. 1982, at 34; Shabecoff, *U.S. Plans Biggest Land Shift Since Frontier Times*, N.Y. Times, July 3, 1982, at 1, col. 3.

[147] *Harper*, 587 F. Supp. at 362.

[148] *Id.* at 362–63.

[149] 5 U.S.C. §§ 551–559, 701–706 (1988).

[150] *Harper*, 587 F. Supp. at 363–65.

[151] On the merits, the district court ruled that the sales program did not violate the retention provision of FLPMA, 43 U.S.C. § 1713 (1982), because the plaintiffs had produced no evidence to show that the PRB failed to meet FLPMA's disposal criteria. *Harper*, 587 F. Supp. at 369.

[152] *Harper*, 587 F. Supp. at 362–65.

[153] *Id.* at 367–68.

The plan to privatize the public lands was halted primarily by political resistance, some of which came from the western states. Western governors passed a resolution opposing any land sales held without their consultation.[154] Attempting to smooth ruffled feathers, Watt acknowledged that the PRB "did a miserable job," and that criticism of the program to sell the public lands was "for the most part justified."[155] Land sales by the PRB through June, 1983 totalled only 4,600 acres and brought in only about $4.8 million.[156] The Property Review Board was then disbanded and the large-scale privatization program abandoned.

The public nationwide did not support the proposed sale of lands because the Reagan Administration never presented a compelling reason for it. The touted economic efficiency of the sale program was unrealistic. The proceeds would have done little to overcome the huge federal deficit,[157] particularly when many of the tracts would have been sold at below-market prices.[158] Further, the objective of the privatization plan was unabashedly short-term, a view at odds with the widely-accepted view that the government is the manager and custodian of the public lands for future generations.[159] The growing urban Sun Belt populations, steadily increasing recreational use of the federal lands, and a growing awareness of the strategic importance of federally-owned minerals all buttressed the case for retention of the public lands.

Many believed that the groups most vocally supporting privatization were the powerful ranching, mining, logging, and land spec-

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[154] *Watt Says Review Board Out of Land Sales But McClure Calls For Board's Abolishment*, 14 Env't Rep. (BNA) 619 (Aug. 12, 1983).

[155] *Id.* at 620.

[156] Culhane, *supra* note 98, in REAGAN'S NEW AGENDA, *supra* note 98, at 300.

[157] Even if the Administration had met its ambitious land sale targets, total receipts over the PRB's projected five-year life would have totalled only about $5.5 billion, a miniscule portion of the annual federal deficit then around $200 billion.

[158] *See* Culhane, *supra* note 98, in REAGAN'S NEW AGENDA, *supra* note 98, at 300.

[159] *See* Stoler, *supra* note 102, at 17–19; *see also* J. KRUTILLA & A. FISHER, THE ECONOMICS OF NATURAL ENVIRONMENTS 19–74 (1975). Professor Sax has noted the contradiction between free market economics and the use of federal government ownership as a means of preserving lands for public use and for posterity:

> The federal government as a landlord of hundreds of millions of acres of quite ordinary land is an anomaly in both American tradition and thought. Large-scale federal ownership has no explicit basis in the Constitution, was never anticipated by the framers and is inconsistent with 150 years of disposition history. Indeed, it is particularly anomalous in this country, which—unlike so many others—abjures public ownership of telephone and telegraph, railroads, airlines, gas and electric utilities and other major features of the economy.

Sax, *supra* note 12, at 313. That contradiction, however, is now firmly embedded in American assumptions. *See, e.g.*, Coggins, *supra* note 12, at 26–27.

ulation interests who stood to benefit the most.[160] Western ranching interests, however, would support the program only if the land was sold at well below market prices.[161] But privatization through subsidies and giveaways was inconsistent with the Administration's justification that the sales were necessary to generate revenue and to allow operation of free-market forces.[162] Mr. Watt's claim that the privatization of resources was an economically efficient program appeared to be a thinly veiled excuse to impose on the country his own philosophical conviction that federal ownership was just plain wrong.

B. The Moratorium on Parkland Acquisition and the Hit List

Every year the United States reacquires a substantial number of additional tracts for various purposes,[163] and it also sells, grants, and exchanges lands annually. The government purchases and condemns inholdings in national parks, national wildlife refuges, and wilderness areas,[164] as well as easements and lands bordering wild and scenic rivers,[165] and lands for new parks.[166] Since 1965, Congress has funded purchases of recreational land through the Land and Water Conservation Fund (LWCF).[167] Obviously, a philosophy that regards federal ownership as odious would wish to halt if not reverse federal land reacquisition.

Mr. Watt first responded to this "problem" by reducing spending for national parkland acquisition from an average of $284 million in

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[160] *See* Drew, *supra* note 97, at 118; Stoler, *supra* note 102, at 17.

[161] Culhane, *supra* note 98, in REAGAN'S NEW AGENDA, *supra* note 98, at 300.

[162] *Id.*

[163] *See* GENERAL ACCOUNTING OFFICE, THE FEDERAL DRIVE TO ACQUIRE PRIVATE LANDS SHOULD BE REASSESSED 1 (1979) [hereinafter 1979 GAO REPORT].

[164] "Inholdings" are private parcels within federal reservation boundaries. *See* Lambert, *Private Landholdings in the National Parks: Examples From Yosemite National Park and Indiana Dunes National Lakeshore*, 6 HARV. ENVTL. L. REV. 35, 36–37 (1982).

[165] *See* 1979 GAO REPORT, *supra* note 163, app. I at 71–73 (Chattooga River); *id.* at 100–02 (Rogue River); *Buffalo National River, Arkansas: Hearings on S.7 Before the Subcomm. on Parks and Recreation of the Sen. Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. 8 (1971).

[166] *See* 1979 GAO REPORT, *supra* note 163, at 4. The NPS spent $815 million between 1965 and 1977 to purchase 977,000 acres of land from over 45,000 property owners. *Id.*

[167] Land and Water Conservation Act of 1964, 16 U.S.C. §§ 460*l*-4 to -11 (1982). The LWCF was established in 1964 to alleviate the necessity of obtaining appropriations for parks from general revenues. The money comes from earmarked receipts from various sources, including offshore oil and gas leases. The LWCF has two components—grants to state governments and money for land acquisition by the NPS, FWS, BLM, and USFS. Originally, the Fund was authorized at $50 million; by 1970, it had grown to $300 million. *See* Futrell, *Parks to the People: New Directions for the National Park System*, 25 EMORY L.J. 255, 262–63 (1976). When Mr. Watt took office, annual authorizations approached $1 billion. *See* Glicksman & Coggins, *Federal Recreational Land Policy: The Rise and Decline of the Land and Water Conservation Fund*, 9 COLUM. J. ENVTL. L. 125, 160 (1983).

the last three years of the Carter Administration to $76 million in the first full year of the Reagan Administration.[168] Congress, however, continued to authorize parkland purchases and to appropriate LWCF money for acquisitions.[169] The Secretary then declared a moratorium on all purchases for parkland. He simply refused to spend any of the monies Congress had appropriated for this purpose from the LWCF, except in a few very limited instances.[170] His stated rationale for the moratorium was that the funds were better spent for improvements to existing physical park facilities.[171] In addition, it was widely believed—in spite of departmental denials—that Mr. Watt had prepared a "hit list" of newly authorized urban park units that in his view should be de-authorized.[172]

While philosophically consistent, Mr. Watt's efforts to prevent federal land reacquisition through the moratorium were successful only during his short tenure, and the alleged hit list was futile. The moratorium was never reviewed by a court, but withholding appropriated and earmarked funds without following the procedures specified by statute seems clearly if not blatantly illegal.[173] Regardless of legality, the moratorium and the hit list rumors galvanized influential members of Congress as well as the conservation community who deplored delaying completion of authorized parks as shortsighted. Secretary Clark, Mr. Watt's successor, altered the moratorium.[174] The pace of reacquisition since has been slow, but the post-Watt Reagan and Bush Administrations seem to have dropped adamant opposition to new federal lands.[175]

Politicians generally favor national parks because parks involve high visibility from heavy usage,[176] are popular with local voters,[177] and cost relatively small amounts of money.[178] Mr. Watt apparently

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[168] Glicksman & Coggins, *supra* note 167, at 163–64.

[169] *Id.* at 179–80; *see also* Pub. Land News, July 9, 1981, at 4.

[170] Glicksman & Coggins, *supra* note 167, at 125–26; *see also Bumpers, of All People, Revives Idea of "Hit List,"* Pub. Land News, May 14, 1981, at 4–5 [hereinafter *Bumpers Revives "Hit List"*].

[171] *See* Glicksman & Coggins, *supra* note 167, at 164–67.

[172] *Bumpers Revives "Hit List," supra* note 170, at 4–5; *see* Tinianow, *In Defense of Federal Parks Near Urban Areas*, 14 NAT. RESOURCES LAW. 567 (1981).

[173] *See* Glicksman & Coggins, *supra* note 167, at 184–229.

[174] *Id.* at 126–27.

[175] *E.g.*, Kansas City Times, Dec. 19, 1989, § A, at 3, col. 1 (OMB proposes excise taxes for conservation acquisitions).

[176] *See, e.g.*, Futrell, *supra* note 167, at 260–61 (parks are frequently used for such activities as hiking, picnicking, swimming, and boating).

[177] Proponents of a "hit list" assailed the authorization of so many new parks as pure "park-barrel[ing]." *Bumpers Revives "Hit List," supra* note 170, at 5.

[178] The amount of the LWC Fund appropriated to the NPS has varied from a low of $910,000

did not take that combination of factors adequately into account. Although the Secretary used GAO reports critical of federal land acquisition policies[179] as ammunition for his crusade, he might have been more successful had he also followed the GAO's recommendations to substitute or supplement outright acquisition with the purchase of easements and management agreements with private landowners to permit more effective management of the national park lands.[180] He might also have taken a lesson from the reaction to President Carter's unpopular "hit list" of water development projects. Because Secretary Watt failed to heed history, law, and politics, the ideological pendulum did not swing back appreciably.

C. The St. Matthew's Island Exchange

Both the privatization program and the moratorium on parkland acquisition were at least arguably unlawful because no statute authorized either initiative. Several statutes, on the other hand, expressly contemplate land exchanges that serve certain federal interests. The FLPMA, chief among these laws, consolidates early exchange provisions,[181] and the Alaska National Interest Lands Conservation Act of 1980 (ANILCA)[182] authorizes the Secretary to exchange lands in Alaska. Under ANILCA, only two loose conditions need be met if the exchanged lands are of unequal value: the new federal lands must advance some ANILCA purpose; and the exchange must be in the "public interest."[183] Mr. Watt tried to use the ANILCA authority to assist private resource development at the expense of wilderness values, but the federal court for the District of Alaska ruled that the Watt conception of the public interest differed radically from what Congress had in mind.[184]

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in 1974 to a high of $367 million in 1978. In most years, the NPS appropriation averaged less than $100 million. *Public Land Management Policy: Hearings on the Impact of Acquisition Delays on the Lands and Resources of the National Park System Before the Subcomm. on Public Lands and National Parks of the House Comm. on Interior and Insular Affairs*, 98th Cong., 1st Sess., 63, 64, 69 (1983) (testimony of Russell Dickenson, NPS Director).

[179] 1979 GAO REPORT, *supra* note 163; GENERAL ACCOUNTING OFFICE, PRIVATE LAND ACQUISITIONS IN NATIONAL PARKS: IMPROVEMENTS NEEDED (1976).

[180] *See* 1979 GAO REPORT, *supra* note 163, at 23–25, 30, 35; Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 244–45 (1976).

[181] 43 U.S.C.A. § 1716 (West 1986 & Supp. 1989). For a discussion of land exchanges under the FLPMA, see Anderson, *Public Land Exchanges, Sales, and Purchases Under the Federal Land Policy and Management Act of 1976*, 1979 UTAH L. REV. 657.

[182] 16 U.S.C. §§ 3101–3233 (1982).

[183] *See id.* § 3192(h).

[184] National Audubon Soc'y v. Hodel, 606 F. Supp. 825 (D. Alaska 1984).

St. Matthew's, an uninhabited island in the Aleutians, has been a wildlife refuge since 1909 and a wilderness area since 1970.[185] Mr. Watt proposed to exchange a portion of the island for inholdings in other Alaskan wildlife refuges owned by Native corporations.[186] The purpose of the exchange was to facilitate oil and gas development in the area. The Native corporations would lease the exchanged lands to oil companies for an air support base, refinery, and natural gas processing facility.[187]

The resulting litigation disclosed that the Department had done a much better job of its homework than it usually did during Mr. Watt's tenure.[188] The Secretary's "Record of Decision" and "Determination" isolated seven factors relevant to the public interest in the exchange and discussed each factor at some length.[189] The reviewing court approved this broad approach.[190] The court went on, however, to find that the Secretary was simply wrong in his public interest analysis because he overstated the benefits that would accrue for wildlife protection while understating the damage that likely would inure to the wildlife habitat of the island.[191]

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[185] *Id.* at 828.

[186] *See id.* Native corporations hold land in Alaska for the benefit of their tribal constituents. These interests included nondevelopment easements in three areas—two in the Yukon Delta National Wildlife Refuge and one in the Kenai National Wildlife Refuge. *See id.* at 827.

[187] *Id.* The conveyance was to have been for 50 years, or so long as commercial oil production activities continued in the vicinity. *Id.*

[188] For examples of poor legal preparation, see National Wildlife Federation v. Burford, 835 F.2d 305 (D.C. Cir. 1987); Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985).

[189] *See* 606 F. Supp. at 829. Secretary Watt asserted that the transfer furthered the purposes of ANILCA by consolidating recreational and wildlife habitat lands within the National Wildlife Refuge System, by reducing potential inconsistent Native land use within the other two refuges, and by lowering Native selection conveyance time and expense. As for furthering the public interest, the Secretary concluded that the exchange would eliminate private inholdings in the other two refuges, that the land received was three times the acreage on St. Matthew's Island, and that economic benefits would accrue to the area. Further, the agreement noted that Interior would receive land heavily used by the public, "while only temporarily disposing of land on St. Matthew Island lacking recreational potential." *Id.*

[190] *Id.* at 835–36.

[191] *See id.* at 842. The court concluded that the exchange "suffer[ed] from serious errors of judgment and misapplication of law which have led to a clear error of judgment." *Id.* at 846. The two land interests in the Yukon Delta NWR were already protected under section 22 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1621(g) (1982), which decreed that all patents issued by the Secretary of the Interior to Native corporations for lands within an NWR "shall contain a provision that such lands remain subject to the laws and regulations governing use and development of such Refuge." 606 F. Supp. at 837. One of the interests was subject to additional development restrictions under section 14(h) of ANSCA and was in no danger of degradation. *Id.* at 841. Of the Kenai NWR lands, about half of the land was already protected by sections 14(h) and 22; the other half, the court conceded, amounted to a

The decision to proceed was therefore an enjoinable abuse of discretion.[192]

The St. Matthew's Island lawsuit not only halted a small part of Mr. Watt's resource development program, it also set a precedent of potentially historic proportions. Courts, of course, have long assessed public interest considerations both in ascertaining substantive authority[193] and in evaluating procedural remedies.[194] But the St. Matthew's Island case apparently is the first instance in which a court has reviewed in depth a formal public interest determination necessary to perform an otherwise discretionary function by the Secretary and found the determination to be so lacking in substance as to be arbitrary and capricious. Given the vast number of statutes that refer to the public interest as a (or the) factor in decisionmaking,[195] the court's opinion could have important implications.

Unlike its eventual retreat from the land privatization program and the reacquisition moratorium, the Department did not abandon the use of land exchanges to advance private economic aims. After the departure of Mr. Watt, the Department worked out a deal whereby it would exchange mineral estates in lands on the coastal plain of the Arctic National Wildlife Refuge (ANWR), where vast quantities of oil and gas are thought to exist, to Native corporations in exchange for lands elsewhere.[196] Again, the purpose was to assist oil companies who could then lease from the Native corporations free of many environmental and other restraints imposed on federal lessees.[197] The storm of protest generated by the disclosure of the "under-the-table" arrangement forced Interior to concede that it

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genuine increase in recreation access. *Id.* The court noted, however, that there was no existing threat to recreation potential. *Id.*

[192] *Id.* at 827.

[193] *E.g.*, United States v. Midwest Oil Co., 236 U.S. 459, 471–74 (1915) (government may withdraw or reserve parts of the public domain when it serves the public interest); *cf.* LaRue v. Udall, 324 F.2d 428, 431 (D.C. Cir. 1963) (even under a restricted view of the meaning of the statutory words "public interests," it is clearly the Secretary's duty, in considering a proposed land exchange, to consider its net result).

[194] *E.g.*, American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 965–67 (9th Cir. 1983); National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1616 (D.D.C. 1985), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987).

[195] In the FLPMA, 43 U.S.C. §§ 1701–1784 (1982), for instance, the phrases "public interest," "national interest," and "public objectives" frequently recur.

[196] *Interior Characterizes Land Swap Talks as Way to Acquire High-Value Wildlife Habitat*, 18 Env't Rep. (BNA) 911–12 (July 31, 1987) [hereinafter *Interior Characterizes Talks*].

[197] Federal oil and gas leasing is a phased process with built-in environmental safeguards at each step. *See, e.g.*, Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1340 (1989).

would not complete the exchange without congressional sanction.[198] Congress since has refused to open the ANWR.[199] Should the proposed exchange arrangement proceed without affirmative legislative blessing, the St. Matthew's Island case stands as a considerable obstacle.

D. Project Bold

The defeat of the three foregoing privatization initiatives, each premised to an extent on the notion that federal ownership itself is contrary to the public interest, may have contributed to the defeat of one of Mr. Watt's more worthwhile objectives, the streamlining of public land management through "Project Bold." In essence, the Bold proposal called for a massive exchange of lands between the State of Utah and the United States.

Utah, like many western states, owns a great deal of land within its borders, largely the legacy of its statehood act which granted the state four sections of federal land in each township.[200] Much of that state land remains interspersed among federal holdings, making federal management difficult and state management next to impossible.[201] Only large parcels can be effectively managed in much of the semiarid Intermountain Basin. Over the years, parcel-by-parcel exchanges to alleviate the obvious difficulties proved to be slow, awkward, and unavailing.[202] Utah's Governor Scott Matheson, with Mr. Watt's enthusiastic concurrence, proposed to cut the Gordian Knot by exchanging all isolated state parcels for blocks of federal land.[203] When completed, the swap would have consolidated the holdings of both sovereigns into more manageable units.

As originally envisioned, Utah would have exchanged more than 3.2 million of its acres for federal land of roughly equal value, some containing fuel and nonfuel minerals.[204] The federal government thereby would have received title to scattered state inholdings in BLM wilderness study areas, national wildlife refuges, national parks, and national forests,[205] thus eliminating the need to buy these

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[198] *Interior Characterizes Talks*, *supra* note 196, at 911–12.

[199] *See* Pub. Land News, Apr. 13, 1987, at 1.

[200] *See* Andrus v. Utah, 446 U.S. 500, 502 (1980).

[201] Matheson & Becker, *Improving Public Land Management Through Land Exchange: Opportunities and Pitfalls of the Utah Experience*, 33 ROCKY MTN. MIN. L. INST. 4-1 (1987).

[202] *Id.*

[203] *See Huge Utah Exchange Aired, Legislation To Be Sought*, Pub. Land News, Nov. 11, 1982, at 5–7 [hereinafter *Huge Utah Exchange*].

[204] *Id.* at 5.

[205] *Id.* at 7. The original proposal also envisioned transfer of some BLM wilderness study

lands when they presented threats to the federal reservations.[206] The plan became more complex as the parties encountered difficulty in exchanging mineral rights under two different allocation systems.[207] Ensuring equal valuation also presented problems, and a tract-by-tract analysis would have been inefficient and time-consuming.

Despite the mutual enthusiasm, Project Bold has not been consummated. Many parties affected—environmentalists, ranchers, and hardrock miners—found some reason for opposition.[208] Ranchers feared they would lose their preference grazing rights,[209] and miners feared that Utah would attempt to lease mineral lands once the transfer was complete. Private interests, supportive of Watt proposals to sell public lands to them under preferential arrangements, became more protective of their federal privileges when faced with the prospect of stricter state resource management.

Project Bold passed through the Utah legislature with many concessions, but it received little support from the Utah delegation on Capitol Hill.[210] Undaunted, Interior proposed a scaled-down approach more palatable to Congress, but the Utah legislature and the new Utah governor were less enthusiastic about the project.[211]

Although the new governor, the new Interior Secretary, and Congress promised to consider the revised proposal, the exchange has not progressed. What appeared to be a promising opportunity for improved management of western resources became mired in the

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areas to the State, which would prevent their designation as wilderness, but these were later deleted from the deal to reduce political opposition. *See New Project Bold Plan Would Split Revenues 50-50*, Pub. Land News, July 19, 1984, at 4 [hereinafter *New Project Bold Plan*].

[206] *See* Coggins, *Protecting the Wildlife Resources of National Parks From External Threats*, 22 LAND & WATER L. REV. 1 (1986); Keiter, *On Protecting the National Parks From the External Threats Dilemma*, 20 LAND & WATER L. REV. 355 (1985); Sax & Keiter, *Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations*, 14 ECOLOGY L.Q. 207 (1987).

[207] *See* Matheson & Becker, *supra* note 201; *Huge Utah Exchange*, *supra* note 203, at 6. Utah leases all minerals, while federal mineral claimants can mine free of charge and acquire fee title to the land. Utah wanted to give existing federal mineral right holders 10 years to make a valuable discovery and patent the land; after that time it would open the lands to competitive leasing.

[208] *Utah Miners Pick at Project Bold But Compromise Possible*, Pub. Land News, June 23, 1983, at 6; *Huge Utah Exchange*, *supra* note 203, at 7.

[209] *Huge Utah Exchange*, *supra* note 203, at 7.

[210] *Long Knives Are Out as Project Bold is Introduced*, Pub. Land News, Apr. 12, 1984, at 3–4; *see also Bold Moves to Capitol Hill But Bill Introduction Delayed*, Pub. Land News, Feb. 2, 1984, at 7.

[211] *See State Committee Asks Project Bold Delay, Supporters Back on Track*, Pub. Land News, Aug. 2, 1984, at 4. Interior's new proposal included a 50/50 sharing of mineral revenues from all exchanged lands. Utah feared that it would lose significant oil and gas revenues as compared with the original proposal. *See id.*

complexity of entrenched federal land management practices when opposition surfaced from interest groups who saw many of their subsidized benefits threatened. Governor Matheson and Secretary Watt apparently underestimated the inertial power of the status quo. Mr. Watt's perceived general overzealousness also may have contributed to the failure of this promising approach.

The Sagebrush Rebellion now is little more than a faint memory, disowned by all save a clique of ideological economists.[212] Secretary Watt's post-Sagebrush privatization efforts similarly went down in inglorious flames, and even his defensive strategy of refusing to purchase new parkland was immediately disavowed by his successor. While conservationists may justly regard the failure of privatization as a gain for the conservation cause, they should also be dismayed that Project Bold, a good idea whose time ought to have come, was thrown out with the bathwater. In any event, the 1976 congressional decision to retain the public lands in federal ownership[213] has been emphatically reaffirmed by these developments, and the pendulum of federal land history ultimately was unaffected.

IV. RECLASSIFYING THE PUBLIC LANDS

> Who overcomes
> By force, hath overcome but half his foe.
>
> John Milton, *Paradise Lost*[214]

The privatization vision of Secretary Watt initially encompassed only about five percent of federal land holdings. Even if that vision became reality, management of the remaining lands would still be a far greater challenge. Mr. Watt's land management philosophy could be summed up, for the most part, in one sentence: The government should remove all obstacles to development and use of all public resources as soon as possible. Section V of this Article discusses some of the means chosen by the Watt Administration to expedite development of lands already open to development. This section

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[212] *See, e.g.*, FORESTLANDS PUBLIC AND PRIVATE (R. Deacon & M. Johnson eds. 1985) [hereinafter FORESTLANDS]; G. LIBECAP, LOCKING UP THE RANGE (1981); R. STROUP & J. BADEN, NATURAL RESOURCES—BUREAUCRATIC MYTHS AND ENVIRONMENTAL MANAGEMENT (1983).

[213] Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(1) (1982).

[214] 1 J. MILTON, PARADISE LOST 28 (A.W. Verity ed. 1934).

examines efforts during the Watt tenure to open more federal lands to development by reclassification or jurisdictional transfer.

The categories into which federal parcels of land fall beggar description. To say that there are five major lands systems managed by four agencies in two departments only gives the very general outline of federal lands nomenclature. A parcel managed by the National Park Service, for instance, could be classified as a park, monument, recreation area, wilderness, trail, scenic river, lakeshore, seashore, battlefield, cultural area, and so forth. A BLM parcel could be designated as a wilderness area, a conservation area, a power site withdrawal, an unpatented mining claim, an area of critical environmental concern, a wildlife sanctuary, or even unreserved, unwithdrawn public land. These lists are not exhaustive. The number of labels likely is excessive, but those labels determine the initial availability of federal parcels for use, although actual use usually must await some variety of federal permission. The more restrictive the classification, the fewer the permissible uses.

Secretary Watt attempted to open more federal land to economic use in three ways: by reclassifying the parcel to eliminate barriers to use; by preventing reclassification of a parcel to a more restrictive category; and by transferring jurisdiction over the parcel to an agency more attuned to development. His ventures in this realm met with a near-total lack of success. As in the case of privatization, opposition to anything proposed by Mr. Watt helped defeat an idea with promise for making public land management more efficient.

A. Terminating Classifications and Revoking Withdrawals

Restricting use of a federal parcel by classification or withdrawal has been a point of friction between the legislative and executive branches for more than a century.[215] In public land law, "classification" means designating a parcel as being more valuable for some uses than others, and "withdrawal" means making the parcel unavailable for some uses.[216] The Supreme Court in the 1915 landmark *Midwest Oil*[217] opinion declared that Congress had conferred a nonstatutory general withdrawal power on the President by congressional acquiescence in earlier executive withdrawals. The Pickett

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[215] *See* Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279 (1982).

[216] *See* G. COGGINS & C. WILKINSON, *supra* note 19, ch. 4, § A.

[217] United States v. Midwest Oil Co., 236 U.S. 459, 477–81 (1915).

Act of 1910[218] authorized the President to withdraw lands from all uses except metalliferous entry when the President thought withdrawal would serve a public purpose, but later decisions held that the Pickett Act did not restrict presidential power to withdraw land even from metalliferous entry so long as Congress continued to acquiesce.[219]

Many early withdrawals (for military use, bird sanctuaries, and so forth) became permanent reservations, and the ad hoc executive exercises of the withdrawal power from 1910 to 1976 closed a substantial part of the erstwhile public domain to the prohibited uses enumerated in the withdrawal orders.[220] The Taylor Grazing Act of 1934[221] and the 1964 Classification and Multiple Use Act (CMUA)[222] direct the BLM to "classify" lands for certain purposes,[223] and the classifications remained after the CMUA expired in 1970. The uses prohibited by withdrawals and classifications often include mineral location and mineral leasing as well as settlement. By 1976, the map of the public lands was a crazyquilt of new and old withdrawals and classifications, many of which were overlapping and obsolete.[224]

With the 1976 FLPMA, Congress asserted legislative control over classification of federal land, hoping to bring long-term order to the cartographic chaos. FLPMA retains both classification and withdrawal as methods of restricting federal land use.[225] The statutory procedures for invoking or revoking both methods include opportunities for public participation,[226] promulgation of rules and regulations governing revocations,[227] and submission to the President and the Congress of the Secretary's recommendations for withdrawal revocations.[228]

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[218] Pickett Act of 1910, ch. 421, 36 Stat. 847, *repealed by* Federal Land Policy and Management Act of 1976, 43 U.S.C. § 141 (1982).

[219] Portland Gen. Elec. Co. v. Kleppe, 441 F. Supp. 859, 862 (D. Wyo. 1977), and authorities cited therein.

[220] *See* G. COGGINS & C. WILKINSON, *supra* note 19, ch. 3, § A; Getches, *supra* note 215, at 285–86.

[221] 43 U.S.C. §§ 315–315r (1982).

[222] *Id.* §§ 1411–1418 (1970) (expired 1970).

[223] *Id.* §§ 315j, 1411.

[224] *See* OFFICE OF TECHNOLOGY ASSESSMENT, MANAGEMENT OF FUEL AND NONFUEL MINERALS IN FEDERAL LAND 215–20 (1979) (discussing withdrawals and urging an accounting of the use status of federal land and a coordinating of mineral and nonmineral uses) [hereinafter 1979 OTA REPORT]; Bennethum & Lee, *Is Our Account Overdrawn?*, MINING CONGRESS J., Sept. 1975, at 33.

[225] 43 U.S.C. §§ 1714 (1982) (withdrawal), 1712(d) (classification).

[226] *Id.* §§ 1712(a), 1739(e).

[227] *Id.* § 1740.

[228] *Id.* § 1714(*l*).

Between 1981 and 1985, the Interior Department terminated prior classifications on nearly 161 million acres of public land and revoked withdrawals covering twenty million acres, mostly on BLM lands.[229] Obviously, the Department could not fully consider the merits of each individual revocation in a program of that magnitude. That the terminations were prompted more by ideology than management requirements or demonstrated need was equally obvious. The Department apparently took great pains to ignore or circumvent the statutory requirements for reclassification and withdrawal revocations. As a consequence of litigation challenging those decisions, the status of those 180 million acres has been in limbo for six years, with no resolution in sight.

The courts preliminarily found the terminations and revocations unlawful in 1985 and 1987, dismissed the lawsuit in 1988, and reinstated the litigation in 1989. The district court in *National Wildlife Federation v. Burford*[230] had little trouble finding that the revocations of both classifications and withdrawals should be preliminarily enjoined, even without addressing most of the plaintiffs' contentions.[231] The court first declared that FLPMA drew a clear line between classifications and withdrawals.[232] The law allows reclassification only as a part of the land use planning process, and specifies that modification or termination of a classification must be "consistent with such land use plans."[233] Few if any land use plans under FLPMA had been completed when the revocations commenced.[234] The Department argued that the preexisting Management Framework Plans (MFPs) were "such" land use plans,[235] a tortured mis-

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[229] *See* National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1610 (D.D.C. 1985), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987).

[230] 23 Env't Rep. Cas. (BNA) 1609, 1610 (D.D.C. 1985), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987).

[231] One difficult issue in the case was the effect of the judgment on nonjoined third parties. The Department claimed that thousands of rights or interests—mainly mineral locations and mineral leases, but also grants to municipalities—had been initiated on the subject lands in reliance on the revocations, and it asserted that all with such claims were indispensable parties to the litigation. *Id.* at 1612. The *Burford* court disagreed. It found that they were necessary parties whose interests could be affected, but that their joinder was not necessary for jurisdiction because their interests were adequately represented, permanent harm to them was only speculative, the plaintiff otherwise would be denied a forum, and the case was within the "public rights" exception to the indispensable party doctrine. *Id.* at 1614.

[232] *Id.* at 1615.

[233] 43 U.S.C. § 1712(d) (1982).

[234] Indeed, the BLM's chief planner has indicated that the agency does not intend to prepare plans for all of its lands. Williams, *Planning Approaches in Bureau of Land Management*, 24 TRENDS No. 2, at 27 (1987). The BLM refusal to plan apparently contravenes the congressional command in 43 U.S.C. § 1712(a) (1982).

[235] 23 Env't Rep. Cas. (BNA) at 1614–15.

construction of the statutory language referring to "any land use plan developed pursuant to this section."[236] The court found more broadly that the reclassifications were attempts to evade both the "consistent with" language and the section 1712 command to develop land use plans.[237]

The court then held that the withdrawals were also unlawful because the BLM afforded no opportunity for public participation in this facet of public land management.[238] The withdrawals probably violated other FLPMA procedural provisions as well, but the court did not reach those questions.[239] The plaintiffs, stated the court, clearly demonstrated a likelihood of success on the merits, and the public interest favored injunctive relief.[240]

The Court of Appeals for the District of Columbia affirmed, directing the district court to expedite the trial on the merits.[241] The district court instead dismissed the case, ruling that the plaintiffs lacked standing, a decision that the appellate court summarily reversed.[242] At this writing, therefore, the revocations and terminations ordered by Secretary Watt in 1981–83 are still in litigation and presumptively invalid, leaving all persons with claims established since 1981 in untenably precarious positions.

This bollixed-up situation illustrates a Watt Administration tendency to regard rather cavalierly the statutes with which it disagreed or that were inconvenient.[243] The result was certainly inconvenient not only to the Department, but also to those who may have relied and invested in good faith because of the departmental actions. The lessons from this snafu apparently remained unlearned: instead of going back and revoking correctly, the Department appealed to Congress.[244] Congress eventually allowed pending land exchange

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[236] 43 U.S.C. § 1712(d) (1982). The court held that the BLM's Management Framework Plans (MFPs) for each grazing district could only be relied upon temporarily, since the Interior regulations themselves identified the land-use plans as Resource Management Plans (RMPs), distinct from MFPs. *See* 23 Env't Rep. Cas. (BNA) at 1614–15; 43 C.F.R. § 1601.0-5(k) (1984).

[237] 23 Env't Rep. Cas. (BNA) at 1614–15.

[238] *Id.* at 1615 (citing 43 U.S.C. § 1739(e) (1982)).

[239] Section 1714(*l*) of FLPMA institutes a general procedure for withdrawal revocation which the Department evidently ignored.

[240] 23 Env't Rep. Cas. (BNA) at 1616.

[241] National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987).

[242] National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 332 (D.D.C. 1988), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989).

[243] *See* Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985); *see also infra* notes 516–22 and accompanying text.

[244] Address by BLM Director Robert Burford, New Mexico State Bar Ass'n, Santa Fe, N.M. (Sept. 25, 1987).

proposals to proceed with additional safeguards,[245] but otherwise rejected legislative relief. If the BLM had complied with the statutory requirements, its decisions would have rested on firmer foundations. Without further congressional intervention, the lands likely will remain withdrawn and restrictively classified for some time to come.

B. Paring Down the BLM Wilderness Study

The Watt program for opening lands to development not only included the offensive strategy of revoking existing classifications and withdrawals, but it also sought as a defensive measure to prevent reclassification of federal parcels to more restrictive categories. Wilderness generally is the most restrictive classification in federal law.[246] When Secretary Watt took office, the BLM was reviewing all of its lands for wilderness potential as required by the 1976 FLPMA.[247] Only Congress may finally designate an area as official wilderness. The agency, however, must conduct extensive studies and report its recommendations to the President and Congress.[248] Data collection and formalization of the inventory process began in 1978, but few substantive land classification decisions had been made by 1981. FLPMA's instructions to the BLM on the required wilderness study are general,[249] leaving the Secretary of the Interior broad authority to fill in study procedure details. The BLM's process consisted of three phases: (1) inventory (subdivided into initial inventory and intensive inventory); (2) study; and (3) submission of a report to Congress.[250]

By 1981, the BLM had identified twenty-three million acres as wilderness study areas (WSAs). As an initial matter, that number

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[245] Federal Land Exchange Facilitation Act of 1988, Pub. L. No. 100-409, 102 Stat. 1086 (codified in scattered sections of 16 U.S.C. and 43 U.S.C.).

[246] Watt labelled wilderness designation as a "greedy land-grab by the preservationists." Adler, *supra* note 12, at 24.

[247] 43 U.S.C. § 1782 (1982).

[248] *Id.* § 1782(a).

[249] The FLPMA's broad wilderness study directions are contained in 43 U.S.C. § 1782(a) (1982). The Act directs the Secretary to "review" roadless areas and make recommendations to the President and Congress as to the suitability of areas for wilderness designation. *Id.*

[250] BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, INTERIOR MANAGEMENT POLICY AND GUIDELINES FOR WILDERNESS STUDY AREAS 6 (1979). This three-tiered process allows public comments at various stages of the process, and identifies some criteria for evaluating wilderness areas. Nonetheless, the broad statutory guidelines of FLPMA, coupled with the slippery, somewhat subjective definition of wilderness, 16 U.S.C. § 1131(c) (1988), means that BLM officials have broad discretion in deciding whether an area should go forward in the process or be quietly dropped.

seemed small in relation to the more than 170 million acres outside Alaska managed by the agency,[251] and many environmentalists believed that Secretary Watt thereafter took a much too restrictive view of the process. Deletion of many individual pristine roadless areas from consideration for wilderness designation provoked a series of administrative adjudications in which the challengers have had limited success.[252]

Mr. Watt's more general attempts to exclude classes of lands from wilderness consideration, on the other hand, were emphatically rejected by a federal district court. Three Interior Board of Land Appeals (IBLA)[253] decisions precipitated wholesale deletions of previously designated WSAs. In 1981, the IBLA ruled in *Tri-County Cattlemen's Association*[254] that FLPMA authorized the review only of areas greater than 5,000 acres.[255] The IBLA then considered whether the BLM could include as part of a WSA land that lacked the requisite wilderness characteristics but which buffered areas qualifying as wilderness. In *Don Coops*,[256] the Board held that the BLM improperly included these lands because all land in WSA units must have wilderness properties.[257] A substantial number of WSAs

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[251] By contrast, the Forest Service found that nearly half of its 190 million acres technically qualified for wilderness designation. *See* California v. Block, 690 F.2d 753 (9th Cir. 1982) (after the Forest Service designated millions of acres as wilderness, one third of the national forest lands still technically qualifies).

[252] Several decisions by the Interior Board of Land Appeals (IBLA) affirmed in part, but reversed or remanded in part BLM nonwilderness designations. *See, e.g.*, Phillip Allen and Desert Wilderness Coalition, 77 IBLA 330 (Dec. 5, 1983); Sierra Club—Rocky Mountain Chapter, 75 IBLA 220 (Aug. 23, 1983); Utah Wilderness Ass'n, 72 IBLA 125 (Apr. 14, 1983); Timothy Kesinger, 72 IBLA 100 (Apr. 14, 1983). *But cf.* Michael Huddleston, 76 IBLA 116 (Sept. 21, 1983) (affirming nonwilderness designation).

[253] The IBLA was created within the Office of the Secretary by Interior Secretarial Order on July 17, 1970, 35 Fed. Reg. 12,081 (1970), in the belief that the Office of the Solicitor should not serve as both an agency advocate and an objective judge in disputes between Interior and others. *See* Richardson, *Making Your Voice Heard at the Department of the Interior*, 1 NAT. RESOURCES & ENV'T 13 (1985). Although the Solicitor now serves as agency advocate, the IBLA is the Secretary's official representative in adjudicating specified disputes. The Secretary has authority to take jurisdiction of and overturn IBLA decisions. *See* 43 C.F.R. § 4.5 (1988).

[254] 60 IBLA 305 (Dec. 18, 1981).

[255] *Id.* at 312. In interpreting § 603(a), the IBLA concluded:

> [O]nce the inventory stage is completed, the authority for designation of areas of the public lands as WSAs [Wilderness Study Areas] is derived from § 603(a) of FLPMA. That section directs the Secretary to review *only* those areas of 5,000 acres or more. Thus, it appears that § 603(a) of the FLPMA established a minimum acreage requirement for WSAs.

Id. (emphasis in original).

[256] 61 IBLA 300 (Feb. 3, 1982).

[257] *Id.* at 307.

had fewer than 5,000 acres without the buffering lands.[258] In a third opinion, *Santa Fe Pacific Railroad*,[259] the IBLA decided that the BLM could not designate WSAs on lands that possessed the necessary wilderness qualities if they overlay privately owned mineral estates. In managing split-estate WSAs, the IBLA held, the BLM would be impermissibly encumbering vested mineral rights.[260]

Secretary Watt amended the BLM's wilderness inventory procedures on December 30, 1982,[261] removing more than 1.5 million acres formerly designated as WSAs from the protection of the BLM's Interim Management Policy (IMP).[262] The IMP essentially required maintenance of the status quo pending disposition of a study area. The deleted WSA lands included 138,000 acres contiguous to wilderness areas, 625,000 acres with split mineral-surface estates, and 158 WSAs with fewer than 5,000 acres.[263]

Two years later, the court in *Sierra Club v. Watt*[264] reversed most of the Secretary's decisions to delete lands. In holding that split estates could be WSAs,[265] the court relied on the FLPMA's definition of "public lands," which includes "any land and interest in land owned by the United States."[266] Because the Secretary must study all the public lands for wilderness potential, and because the surface estates are interests in the public lands, the areas must be studied for wilderness characteristics.[267]

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[258] *See* Sierra Club v. Watt, 608 F. Supp. 305, 313 n.12 (E.D. Cal. 1985).

[259] 64 IBLA 27, 33 (May 6, 1982).

[260] *Id.* at 34. The IBLA reasoned that the mineral estate, owned in fee simple, is a "vested right" while the surface wilderness estate is only a "valid existing right." *Id.* at 33.

[261] 47 Fed. Reg. 58,372 (1982).

[262] Sierra Club v. Watt, 608 F. Supp. 305, 313 n.12 (E.D. Cal. 1985). The BLM's Interim Management Policy was first published under Secretary Andrus on December 12, 1979, to partially implement section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1982), which requires the Secretary to

> manage . . . [potential wilderness areas] . . . so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976; provided, that in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

Id.; *see also* Rocky Mountain Oil and Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982).

[263] Sierra Club v. Watt, 608 F. Supp. 305, 312 n.9, 313 n.12 (E.D. Cal. 1985).

[264] *Id.*

[265] *Id.* at 335.

[266] 43 U.S.C. § 1702(e) (1982). The court distinguished the contrary holding in Columbia Basin Land Protection Association v. Schlesinger, 643 F.2d 585 (9th Cir. 1981), on the basis of the analysis in Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983). *Sierra Club*, 608 F. Supp. at 337.

[267] 608 F. Supp. at 333.

The court agreed with the IBLA that Secretary Andrus had no authority under the FLPMA to designate as WSAs areas of fewer than 5,000 acres, and that the portion of Secretary Watt's order deleting these lands was valid insofar as Secretary Andrus relied on that section.[268] The court also found, however, that Secretary Andrus did have authority under other sections of FLPMA to designate these areas for special protection.[269] Secretary Watt's further action of returning the lands to unrestricted multiple use management was therefore without a legal basis because he neglected to determine the proper management standard.[270] Until the Department considers the other bases of Secretary Andrus' order and exercises its discretion to fashion standards for management, the lands will remain in the protective status assigned them by Secretary Andrus.[271]

The result in *Sierra Club v. Watt* restored some degree of protection to ninety percent of the lands that Secretary Watt had withdrawn from the wilderness study. The decision does not ensure eventual wilderness designation for any of these areas, however, it merely restores them to the inventory for further study.

Future challenges to the BLM's study process will be much more difficult to mount. The process involves hundreds of individual decisions on millions of acres over many years.[272] Areas may be effectively deleted in a number of subtle ways, including changes in boundaries and reassessments of energy or timber resources.[273] Decisions on individual areas will not receive the same national publicity as Watt's December, 1982 order. Whether many isolated tracts are given the consideration on the merits commanded by the statute before being relegated to nonwilderness status will depend largely on the vigilance and resources of conservation groups, because the BLM has evidenced a consistent antiwilderness bias. Given the demonstrated willingness of local and national environmental organizations to pursue legal remedies involving the Forest Service's parallel

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[268] *Id.* at 340.

[269] *Id.* at 341–42.

[270] *Id.* at 340. In an interview, Watt said that now these WSAs can be released by administrative action rather than only by Congress. Shabecoff, *Watt v. Wilderness—Over For Now*, L.A. Daily J., Feb. 3, 1983, at 4, col. 3.

[271] 608 F. Supp. at 341–42.

[272] *See infra* notes 435–42 and accompanying text. *See generally* Watson, *Mineral and Oil and Gas Development in Wilderness Areas and Other Specially Managed Federal Lands in the United States*, 29 ROCKY MTN. MIN. L. INST. 37, 55 & n.76 (1983) (evolution of the BLM's wilderness area study and management policies).

[273] The IBLA has already dealt with a number of BLM decisions on individual areas, and most of these involve boundary determinations, whether old roads in the area should prevent the area from qualifying as wilderness, or the proper criteria to determine solitude and the potential for recreation opportunities. *See supra* note 252 and cases cited therein.

wilderness study process,[274] more suits are likely as the BLM wilderness study progresses. The Watt Administration should have learned from the wrenching Forest Service experience in the wilderness designation arena,[275] but its ideological rigidity prompted precipitousness that compounded its problems.

C. Transferring Jurisdiction

Mr. Watt's arsenal of weapons in his war on preservation also included administrative transfers of jurisdiction, usually from an agency whose statutory mission tilted toward resource preservation to one more development-oriented. In one instance, transfer of management authority to a state was successful after legislative intervention. The Secretary's attempted transfer of mineral study authority away from the FWS was enjoined, however, and his broader, better-conceived transfer package between the BLM and the Forest Service bore relatively little fruit. The same theme recurs: because Mr. Watt proposed so many actions with apparent anticonservation purposes and inspired so much personal animosity, his worthwhile ideas as well as his indefensible ploys were rejected indiscriminately.

1. The Arctic National Wildlife Refuge

The huge oil strike at Prudhoe Bay in northern Alaska generated intense industry interest in the production potential of the nearby Arctic National Wildlife Refuge (ANWR), particularly its coastal plain. Resource development was frozen in Alaska during the 1970s pending congressional decision on which lands should be placed in which federal lands systems.[276] The logjam was broken by the Alaska National Interest Lands Conservation Act of 1980 (ANILCA).[277] One ANILCA provision directed the Secretary to carry out a study for recommending mineral exploration guidelines in the ANWR.[278] On

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[274] *See, e.g.*, Parker v. United States, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

[275] Courts several times forced the Forest Service to start the whole process almost over again when it failed to take the statutory spirit and commands sufficiently seriously. The setbacks, described in G. COGGINS & C. WILKINSON, *supra* note 19, ch. 11, § C, were capped by the decision in California v. Block, 690 F.2d 753 (9th Cir. 1982).

[276] *See* Rudd, *Who Owns Alaska?—Mineral Rights Acquisition Amid Rapidly Changing Land Ownership*, 20 ROCKY MTN. MIN. L. INST. 109 (1975).

[277] 16 U.S.C. §§ 3101–3233 (1988).

[278] *Id.* § 3142(c); S. REP. NO. 413, 96th Cong., 2d Sess. 126, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5070–72. Section 3142 of ANILCA directs the Secretary of the Interior to conduct a baseline study of fish and wildlife in the refuge, and prepare guidelines for oil and gas exploration based on the baseline study results. 16 U.S.C. § 3142(c) (1988).

March 12, 1981, Secretary Watt transferred lead responsibility for preparation of the oil and gas exploration EIS and exploration regulations for the ANWR from the Fish and Wildlife Service (FWS) to the United States Geological Survey (USGA).[279] Although an Interior agency would still retain primary responsibility, the move evidently was designed to ensure a more pro-development slant to the ultimate recommendations.

A citizens' group named Trustees for Alaska sued, claiming that the transfer was invalid.[280] The Department argued that development of the oil and gas exploration guidelines was entirely within secretarial discretion.[281] The federal district court in Alaska held that the action was not committed to agency discretion and that the transfer was in excess of the Secretary's statutory authority.[282] The court reasoned that the development of exploration guidelines constituted refuge management,[283] a function entrusted by statute exclusively to the FWS.[284] The court found support for its view in the legislative histories of both the National Wildlife Refuge System Administration Act (NWRSAA),[285] which sought to eliminate earlier problems of joint jurisdiction and management over refuges,[286] and ANILCA, which requires that development in the ANWR occur only with adequate information on the adverse effects to fish and wildlife.[287]

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[279] Under Watt's jurisdictional transfer, FWS would retain responsibility for the baseline study, but the USGS became the lead agency on development of the EIS and the oil and gas exploration regulations. Trustees for Alaska v. Watt, 524 F. Supp. 1303, 1307 (D. Alaska 1981), *aff'd*, 690 F.2d 1279 (9th Cir. 1982).

[280] Trustees for Alaska v. Watt, 524 F. Supp. 1303. The plaintiffs, including environmental groups and Alaska natives, claimed violations of the NWRS Administration Act of 1966, 16 U.S.C. §§ 668dd–668ee (1988), and ANILCA.

[281] 524 F. Supp. at 1307.

[282] *Id.* at 1310.

[283] *Id.* at 1309. The court determined that protection of wildlife and control over human access to the refuge constituted refuge management, and that approval of exploration in the refuge "manifestly involves controlling and directing human access to the refuge. This must be done by the FWS." *Id.* The court relied in part on the makeshift definition of wildlife management crafted in Coggins & Ward, *supra* note 31, at 68–69.

[284] 524 F. Supp. at 1304–05.

[285] 16 U.S.C. § 668dd (1988).

[286] The court noted that Congress, in passing the NWRSAA, affirmed its intent that the FWS was to be the exclusive administering agency, "thereby eliminating the possibility of the Secretary delegating his authority to . . . any other Interior agency." 524 F. Supp. at 1309; *see* M. BEAN, *supra* note 31, at 128–29.

[287] 16 U.S.C. § 3142 (1988); *see* 524 F. Supp. at 1310; *cf.* Schwenke v. Secretary of the Interior, 720 F.2d 571, 574–75 (9th Cir. 1983) (wildlife allowed slightly limited priority over cattle on the Charles M. Russell Range).

The Watt years were not characterized by overly close adherence to statutory requirements, but the statutes in this instance were not explicit. The attempted transfer nevertheless demonstrates the peril of ignoring statutory purposes in pursuing ideological quests. Reviewing courts often focus more broadly than the Department, and they increasingly have been willing to demand compliance with the spirit as well as the letter of the law.[288]

2. The Matagorda Island Transfer

One of Secretary Watt's few victories in his attempts to remove land from, or dilute, federal control was the 1982 transfer of 19,000 federally-owned acres of the Aransas National Wildlife Refuge on Matagorda Island to management by the State of Texas.[289] Secretary Watt originally attempted to give the land to Texas, which had long sought the land for oceanfront park development, to administer as it saw fit for 100 years.[290] Although the Secretary is prohibited from disposing of lands that Congress included in the National Wildlife Refuge System (NWRS),[291] Mr. Watt claimed transfer authority because the lands were originally brought into the System by a cooperative agreement between the FWS and the Air Force.[292] After protracted negotiations with the National Audubon Society under threat of litigation, a compromise was adopted whereby the Department would terminate the original cooperative agreement, remove the land from the NWRS, and then transfer administration to Texas.[293] The new agreement specified that federal oversight would continue and that the lands would be managed as a wildlife refuge, not as a park.[294]

The Sierra Club, dissatisfied with the compromise, brought suit to declare the transfer void,[295] alleging violations of the Refuge

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[288] *E.g.*, Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 764–65 (9th Cir. 1986); American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 966 (9th Cir. 1983); National Audubon Soc'y v. Hodel, 606 F. Supp. 825, 845 (D. Alaska 1984).

[289] Of the 50,500 acres comprising the island, 25,000 acres were already owned by the State of Texas and managed as a wildlife refuge. S. REP. No. 176, 98th Cong., 1st Sess. (1983), Appendix.

[290] N. REED & D. DRABELLE, *supra* note 31, at 31.

[291] 16 U.S.C. § 668dd (1988). The National Wildlife Refuge System Administration Act Amendments of 1976 allow the Secretary of the Interior to transfer refuge lands only if the Migratory Bird Conservation Commission certifies that the lands are no longer necessary and the government receives fair market value. *Id.* § 668dd(a)(2).

[292] *See* S. REP. No. 176, 98th Cong., 1st Sess. (1983), Appendix.

[293] N. REED & D. DRABELLE, *supra* note 31, at 31.

[294] *Id.*

[295] Sierra Club v. Watt, No. 82-3638 (D.D.C. filed Dec. 23, 1982).

Administration Act,[296] the Migratory Bird Conservation Act,[297] and NEPA.[298] Before the suit was decided, Congress held hearings and then ratified the new agreement with Texas, rendering the pending litigation moot.[299] The Senate, however, did not intend this ratification to serve as precedent for handling other agreements involving refuge lands, stating that the law did not "resolve the general question of whether, absent Congressional approval, the action of the Secretary in entering into an agreement such as this one would be in compliance with Federal law."[300]

In some cases, transfer of refuge management to a state, or in cooperative management with the state, might be desirable from all viewpoints. If the state has the resources and the willingness to manage the lands in a manner that advances federal purposes, then the federal agency involved might better devote its limited resources to other tracts needing more attention. But Secretary Watt's initial approach to Matagorda Island—simply turning over management to a state for 100 years without adequate guarantees of protection—smacked of an attempt to move land out of federal control without regard for the federal purpose of protecting wildlife in refuges. The ensuing compromise and legislative ratification, however, removed the possibility of frustration of federal purpose.

3. The BLM/Forest Service Land Exchange Proposal

No good reason justifies the current separate existence of the BLM and the Forest Service. The two agencies began with many similar functions, and the parallels became even stronger after the enactment of FLPMA in 1976. Both agencies now operate under multiple

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[296] 16 U.S.C. §§ 668dd–668ee (1988). The Sierra Club asserted that Watt violated section 668dd(b)(3) of the Refuge Administration Act by failing to determine that the lands were "suitable for disposition."

[297] 16 U.S.C. §§ 715–715(s) (1988). Section 10(a) of the Migratory Bird Conservation Act requires land reserved under that act to be administered by the Secretary of the Interior. *Id.* § 715i.

[298] 42 U.S.C. § 4321 (1982 & Supp. V 1987). Although an EIS on the cooperative agreement was prepared, the Sierra Club claimed that it violated NEPA because it failed to consider reasonable alternatives. The Sierra Club also claimed that the agreement violated the Administrative Procedure Act, 5 U.S.C. § 552 (1988), in that the action was arbitrary and capricious.

[299] Hearings were held beginning in March, 1983. *See* S. REP. No. 176, 98th Cong., 1st Sess. 4 (1983). The agreement was passed on August 4, 1983, and was signed into law as Pub. L. No. 98-66, 97 Stat. 368 (1983).

[300] S. REP. No. 176, 98th Cong., 1st Sess. 4 (1983).

use, sustained yield statutory mandates,[301] unlike the "dominant use" commands to the National Park Service[302] and the Fish and Wildlife Service.[303] The Forest Service, as its name implies, traditionally has been viewed as the nation's timber resources manager,[304] while the BLM historically has been associated with grazing regulation.[305] But both agencies manage large tracts of grazing and timber lands; both have a say in hardrock mining-claim location and oil, gas, and coal leasing; both must cater to recreation demands; and both manage wilderness areas.[306] The interrelationship between the two agencies is geographical as well, because their lands are contiguous and even intermingled in many areas.[307]

Other presidents have backed, unavailingly, creation of a Department of Natural Resources that would include the Forest Service as well as the Interior agencies. The Carter Administration entertained the notion of merging the Forest Service and the BLM, but backed off in the face of strong opposition within the agencies themselves.[308] Secretary Watt tried to engineer a less ambitious change: an exchange of lands between the two agencies and boundary changes to improve management efficiency. Unlike Project Bold, the exchange received relatively little publicity during the planning phase. The plan, in November of 1981, was portrayed as minor boundary "tinkering."[309] More than three years later, however, word of progress on the proposal escaped when the GAO reported that the agencies envisioned an exchange totaling thirty-five million acres—15.1 million acres from the Forest Service to the BLM, and from 18.1 to 19.4 million acres from the BLM to the Forest Service.[310] One week later, the Administration requested legislation to carry out the plan, estimating that 700–1200 fewer personnel would be needed.

In addition to the opposition from agency personnel who feared the loss of jobs, the grazing, timber, and mineral interests also voiced

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[301] Multiple-Use, Sustained-Yield Act of 1960, 16 U.S.C. § 528 (1988); FLPMA, 43 U.S.C. §§ 1702(c), (h), 1732(a) (1982).

[302] 16 U.S.C. § 1 (1988).

[303] *Id.* § 668dd.

[304] *E.g.*, Huffman, *supra* note 61.

[305] *See* P. FOSS, *supra* note 55; Coggins & Lindeberg-Johnson, *supra* note 17.

[306] *See generally* G. COGGINS & C. WILKINSON, *supra* note 19, at chs. 6–8.

[307] *See* PLLRC REPORT, *supra* note 111, at 58 (map showing public lands in southeastern Idaho).

[308] *Massive Boundary Changes May Come From BLM and Forest Service*, Pub. Land News, Nov. 12, 1981, at 10.

[309] *Id.* BLM personnel merely hinted that more than 100,000 acres might be at stake. *See id.*

[310] GENERAL ACCOUNTING OFFICE, PROGRAM TO TRANSFER LAND BETWEEN THE BUREAU OF LAND MANAGEMENT AND THE FOREST SERVICE HAS STALLED 17 (1985).

disapproval, as did some western states and environmental groups.[311] Congress expressed its displeasure through the appropriations process by voting to prohibit any exchange before October 1, 1985.[312] In the face of nearly universal antagonism, this exchange, like Project Bold, was shelved. Congress resurrected the idea in 1988 by authorizing an exchange between the agencies limited to lands in Nevada.[313] If Secretary Watt had only proceeded openly, with full public participation, and perhaps more incrementally, the streamlining project as a whole might have stood a better chance of general acceptance.

Secretary Watt's program of removing legal barriers to resource development by reclassification or jurisdictional transfer was a bust. Even in the Matagorda situation, intervention by conservationists and legislative oversight thwarted the original anti-wildlife thrust of the transfer. The Interior Department's precipitousness and lack of foresight in the withdrawal and classification revocations and the deletion of lands eligible for wilderness study status actually harmed those whom Mr. Watt wanted most to benefit. The miners, mineral lessees, and others who initiated claims in the interim between the action and its judicial rejection were left holding the bag. Perhaps there is symmetrical justice in the fact that those same interests contributed substantially to the delay and partial defeat of the public land administration streamlining proposal. In these senses, counterproductivity was a hallmark of the Watt tenure.

V. PRIVATIZING RESOURCES AND DEREGULATING PUBLIC LAND USERS

> There is this trouble about special providences—namely, there is so often a doubt as to which party was intended to be the beneficiary.
>
> Mark Twain, *Pudd'nhead Wilson*[314]

Secretary Watt's largely unavailing attempts to reduce federal land ownership and to make more federal lands available for development were almost incidental to his other major area of endeavor: the simultaneous "privatization" of public natural resources and the

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[311] *See Long Knives Appear on Massive Land Interchange, Most Waiting*, Pub. Land News, Feb. 21, 1985, at 3.

[312] *See* H.R. 2577, House Appropriations Committee, May 21, 1985.

[313] *See Landfill Reverter, Nevada Swap in Jumbo Public Land Bills*, Pub. Land News, Sept. 29, 1988, at 4.

[314] M. TWAIN, PUDD'NHEAD WILSON 38 (n.d.).

concomitant "deregulation" of public land users. America's public lands contain enormous wealth-generating resources as well as unparalleled scenery and wildlife habitat. For reasons more of history than of logic, different legal regimes under different statutes have evolved to govern the disposition of each of the major federal resources: water, minerals, timber, grass, wildlife, recreation, and preservation.[315] While the degree of secretarial discretion in allocating each of these resources varies widely, the Secretary of the Interior usually has far more latitude in resource disposition than in matters of land titles or jurisdiction.[316]

Secretary Watt's efforts to "privatize" federal resources should have come as no surprise, but the speed and magnitude of his resource disposition program outstripped reasonable expectations. Almost immediately upon confirmation, Mr. Watt declared his intention to lease the entire outer continental shelf for oil and gas exploration within five years,[317] to resume coal leasing on a large scale,[318] and to stop reducing livestock grazing in areas where it exceeded grazing capacity.[319] During the rest of his tenure, Secretary Watt also presided over departmental programs to increase motorized recreation at the expense of more primitive recreation values,[320] to virtually destroy the Office of Surface Mining and its regulatory programs,[321]

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[315] See G. COGGINS & C. WILKINSON, *supra* note 19, from which this resource typology is borrowed. While some statutes, such as FLPMA, 43 U.S.C. §§ 1701–1784 (1982 & Supp. V 1987) affect allocation of all resources, each resource (and each land system and each land management agency) is also governed by separate statutes. As Justice Powell noted, in the context of hardrock mining law:

> "[I]t is fair to say that, commencing in 1872, Congress has created an almost impenetrable maze of arguably relevant legislation in no less than a half-dozen statutes, augmented by the regulations of the Departments of the Executive. There is little cause for wonder that the language of these statutes and regulations has generated considerable confusion."

California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419, 1438 (1987) (Powell, J., dissenting).

[316] *See, e.g.*, United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414 (1931) (mineral leasing); Perkins v. Bergland, 608 F.2d 803 (9th Cir. 1979) (grazing management); Hi-Ridge Lumber Co. v. United States, 443 F.2d 452 (9th Cir. 1971) (timber sales).

[317] *See infra* notes 344–67 and accompanying text.

[318] *See infra* notes 379–411 and accompanying text.

[319] *See infra* notes 481–505 and accompanying text.

[320] *See* Sierra Club v. Clark, 774 F.2d 1406 (9th Cir. 1985); Sierra Club v. Clark, 756 F.2d 686 (9th Cir. 1985). On earlier disputes over off-road vehicle use in the California Desert Conservation Area, created by 43 U.S.C. § 1781 (1982), see American Motorcyclist Association v. Watt, 714 F.2d 962 (9th Cir. 1983); American Motorcyclist Association v. Watt, 543 F. Supp. 789 (C.D. Cal. 1982). Exec. Order No. 11,989, 3 C.F.R. 120 (1977); Exec. Order No. 11,644; D. SHERIDAN, OFF-ROAD VEHICLES ON PUBLIC LAND (1979).

[321] The Office of Surface Mining (OSM, now OSMRE) was created in 1977 to implement the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328 (1982 & Supp. V 1987). By 1981, the OSM had resolved many of the complex issues of regulation and

to dilute protection for endangered and threatened wildlife species,[322] to abdicate federal responsibility for grazing regulation on the public lands,[323] and to lease minerals in wilderness and wilderness study areas,[324] among other like actions.[325] At the same time, Secretary Watt's budget requests were aimed at assisting development and deemphasizing conservation.[326] The Watt Administration's resource privatization actions echoed the Secretary's land disposition philosophy.

Some of Mr. Watt's resource disposition and user deregulation initiatives were short-term successes. On the whole, however, Con-

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federalism facing it after a series of lawsuits. *See In re* Permanent Surface Mining Regulation Litig., 617 F.2d 807 (D.C. Cir. 1980). Mr. Watt vowed to change the agency's orientation. *Legislative Changes Are Not Needed For Surface Mining Act, Watt Testifies*, 11 Env't Rep. (BNA) 1952 (Feb. 13, 1981). He destroyed the OSM as an effective regulator for the decade of the 1980s. The Department's rewritten regulations did not pass judicial muster, for the most part. *In re* Permanent Surface Mining Regulation Litig., 22 Env't Rep. Cas. (BNA) 1557 (D.D.C. 1985); 21 Env't Rep. Cas. (BNA) 1724 (D.D.C. 1984); 21 Env't Rep. Cas. (BNA) 1193 (D.D.C. 1984). But Mr. Watt's reorganization of the Office, his budget slashes, and his appointment of inexperienced ideologues to run it left the OSM an impotent shell, a state from which it had not recovered in 1987. *See generally* Menzel, *Redirecting the Implementation of a Law: The Reagan Administration and Coal Surface Mining Regulation*, 43 PUB. ADMIN. REV. 411 (1983); Barry, *The Surface Mining Control and Reclamation Act of 1977 and the Office of Surface Mining: Moving Targets or Immovable Objects?*, 27A ROCKY MTN. MIN. L. INST. 169 (1982).

[322] During Secretary Watt's tenure, the Department disproportionately reduced funding for wildlife protection and greatly slowed the rate at which species were added to the list of endangered and threatened species. *See* Bernstein, *supra* note 101, at 75. Reversing long-standing policy, Mr. Watt also allowed the State of Minnesota to institute a sport hunting season on the threatened and previously endangered eastern timber wolf. The Court of Appeals for the Eighth Circuit held that the sport hunting season violated the Endangered Species Act. Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985).

[323] *See infra* notes 506–24 and accompanying text.

[324] *See infra* notes 412–42 and accompanying text.

[325] Secretary Watt also advocated opening federal lands, including national parks, to snowmobile use even as he was being picketed for asserted callousness toward natural amenities. *Watt Asks Change on Trail Vehicles*, N.Y. Times, July 14, 1981, at A1, col. 1. He favored diluting protection for BLM wilderness study areas. *See* Rocky Mountain Oil and Gas Ass'n v. Watt, 696 F.2d 734, 746 n.17 (10th Cir. 1982). He also supported the idea of allowing strip mining in an area adjacent to a national park. *See Federal Court Bans Surface Mining Outside Bryce Canyon in Utah*, 13 Env't Rep. (BNA) 1511 (Jan. 7, 1983). For criticism of Mr. Watt's administration of the Department, see Culhane, *supra* note 98, at 296. When Mr. Watt cut short a Colorado River trip because he didn't like to walk and didn't like to paddle, conservationists took his remarks as an indication of a general anticonservation attitude. *See, e.g.*, Reed, *GOP Conservationism*, N.Y. Times, June 27, 1981, at 23.

[326] Secretary Watt performed budgetary surgery that left permanent scars on the face of the Department's conservation programs. His budget requests, personnel reductions and transfers, and reorganizations had one common denominator: increasing resources for mineral and other production and decreasing resources for enforcement, habitat protection, and similar resource conservation programs. *See* Barry, *supra* note 321, at 216–17 (OSM funding), Pub. Land News, Aug. 6, 1981, at 3.

gress, courts, and the general public consigned the Watt program to an oblivion from which it will not soon emerge. No complete survey of every administrative venture under the heading of "privatization and deregulation" is possible in this space. This section therefore is limited to several prominent facets of the Department's mineral leasing and livestock grazing management programs. Even here, in areas where Interior Secretaries encounter relatively fewer legal restraints, the Watt Revolution largely fizzled, and some apparent Administration victories were Pyrrhic.

A. Mineral Leasing

Hardrock minerals in the national forests and "public domain" lands can be acquired free of charge by any prospector who discovers them and locates a claim under the 1872 General Mining Law.[327] Coal, however, has never been subject to location, and, starting in 1920, Congress has removed fuel, chemical, and other types of minerals from the location system in favor of mineral leasing.[328] The 1920 Mineral Leasing Act[329] was the model for later legislation governing outer continental shelf minerals,[330] geothermal resources,[331] and acquired lands.[332] If a hardrock mineral prospector locates a valid claim, the Department may impose some controls on exploration and extraction methods, but it cannot regulate so strictly as to deny or unduly restrict the established right.[333] Mineral leasing of all kinds, however, is almost completely at the discretion of the Secretary until a prospecting permit or lease actually issues.[334] Even after lease issuance, the Department retains broad powers of control over lessee operations.[335] Mr. Watt determined to accelerate mineral

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[327] 30 U.S.C. § 22 (1982). *See generally* J. LESHY, *supra* note 17.

[328] *See, e.g.*, G. COGGINS & C. WILKINSON, *supra* note 19, ch. 6, § B.

[329] 30 U.S.C. §§ 181–287 (1982 & Supp. V 1987).

[330] Outer Continental Shelf Lands Act of 1953, as amended, 43 U.S.C. §§ 1301–1315 (1982 & Supp. V 1987).

[331] Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001–1025 (1982 & Supp. V 1987).

[332] Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351–359 (1982).

[333] *See, e.g.*, Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981); United States v. Weiss, 642 F.2d 296 (9th Cir. 1981); South Dakota v. Andrus, 614 F.2d 1190 (8th Cir.), *cert. denied*, 449 U.S. 822 (1980).

[334] *See* United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414 (1931); Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553 (D.C. Cir. 1979); Utah Int'l, Inc. v. Andrus, 488 F. Supp. 976 (D. Colo. 1980). *But see* Mountain States Legal Found. v. Hodel, 668 F. Supp. 1466 (D. Wyo. 1987); Mountain States Legal Found. v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980).

[335] Secretary of the Interior v. California, 464 U.S. 312, 337 (1984); Sierra Club v. Peterson,

leasing, especially of oil and gas, in the face of powerful reasons to proceed more cautiously. This subsection traces several Watt Administration mineral leasing misadventures.

1. Offshore Oil and Gas Leasing

Echoing the petroleum industry position, Secretary Watt declared at the outset of his tenure that national security demanded accelerated offshore oil and gas leasing.[336] His announced plans, however, exceeded even the most optimistic industry hopes: he decided to lease the entire billion-acre outer continental shelf within five years.[337] Had that plan been carried out, all offshore fuel mineral resources would have been "privatized" in a short span of time. By contrast, the Department had leased only forty-two million acres in the preceding twenty-eight years[338] under the 1953 Outer Continental Shelf Lands Act (OCSLA).[339] State opposition, congressional obduracy, judicial interference, and dry holes conspired to thwart Mr. Watt's grandiose leasing scheme.

The OCSLA vests great latitude in the Secretary of the Interior to determine whether and how offshore oil and gas development should proceed.[340] Until 1969, the relatively low-level leasing program seldom encountered serious legal obstacles, but the Santa Barbara blowout in January of that year changed the situation drastically and permanently. Throughout the 1970s, environmentalists—often joined by affected states—persistently challenged offshore oil and gas lease sales in court.[341]

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717 F.2d 1409, 1414 (D.C. Cir. 1983); Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553, 558 (D.C. Cir. 1979).

[336] *Watt OCS Plan Offers One Billion Acres; Environmental Groups, Others File Suit*, 13 Env't Rep. (BNA) 420–21 (July 30, 1982) [hereinafter *Watt Plan*]; *see* Note, *The Seaweed Rebellion: Federal-State Conflicts Over Offshore Oil and Gas Development*, 18 WILLAMETTE L. REV. 535, 538 (1982).

[337] *Watt Plan*, *supra* note 336, at 420.

[338] *Id.*; Jones, *Understanding the Offshore Oil and Gas Controversy*, 17 GONZ. L. REV. 221, 225 n.12 (1982); *see also* Comment, *The Seaweed Rebellion Revisited: Continuing Federal-State Conflict in OCS Oil and Gas Leasing*, 20 WILLAMETTE L. REV. 83, 91 (1984).

[339] 43 U.S.C. §§ 1331–1352 (1982 & Supp. V 1987).

[340] *See, e.g.*, California v. Watt, 668 F.2d 1290, 1295 (D.C. Cir. 1981).

[341] *E.g.*, Secretary of the Interior v. California, 464 U.S. 312 (1984); Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984); Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983); Brown v. Watt, 668 F.2d 1290 (D.C. Cir. 1981); North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980); Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Massachusetts v. Watt, No. 83-1530 (D. Mass. filed Mar. 2, 1983); North Slope Borough v. Watt (D. Alaska filed Oct. 21, 1982); Kean v. Watt, 18 Env't Rep. Cas. (BNA) 1921 (D.N.J. 1982).

Their success in stopping individual sales was sporadic and largely ephemeral, but their efforts led to two significant developments. First, Congress in 1978 radically revised the leasing system, directing the Secretary to use innovative leasing techniques and to take more account of environmental factors.[342] Second, the courts gradually eroded the notion of the offshore oil and gas lease as a full-fledged, protectable interest in real property.[343] Mr. Watt's failure to apprehend the changes in the statute, in the state response to accelerated leasing, and in the judicial construction of lease terms, left his overall plan largely in tatters.

a. The Five-Year, Billion-Acre Lease Plan

Offshore oil and gas leasing is governed by a variety of statutes. The central leasing authority stems from the OCSLA as amended in 1978. Congress designed the amendments to provide a comprehensive framework for "expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."[344] Four stages of development are mandatory: (1) the Interior Department formulates a five-year leasing program;[345] (2) the Department conducts lease sales pursuant to the program;[346] (3) the lessee engages in exploration activities;[347] and (4) if oil or gas is found, the lessee develops the leasehold for production.[348]

The OCSLA as amended is not exclusive. Compliance with NEPA is a major factor in the leasing process.[349] Several offshore oil and gas cases have turned on interpretation of the 1973 Endangered Species Act,[350] and, lately, on the 1980 Alaska National Interest

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[342] Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (codified as amended at 43 U.S.C. § 1334 (1982)). *See generally* Jones, *The Legal Framework for Energy Development on the Outer Continental Shelf*, 10 UCLA—ALASKA L. REV. 143, 155–67 (1981).

[343] *See infra* notes 374–78 and accompanying text.

[344] 43 U.S.C. § 1332(3) (1982).

[345] *Id.* § 1344(a).

[346] *Id.* § 1337 (1982 & Supp. V 1987).

[347] *Id.* § 1340.

[348] *Id.* § 1351 (1982).

[349] *See, e.g.*, Village of False Pass v. Clark, 733 F.2d 605, 607 (9th Cir. 1984); Natural Resources Defense Council v. Morton, 458 F.2d 827, 829 (D.C. Cir. 1972).

[350] *See, e.g.*, Village of False Pass v. Clark, 733 F.2d 605, 607 (9th Cir. 1984); Conservation Law Found. v. Watt, 716 F.2d 946, 947 (1st Cir. 1983); North Slope Borough v. Andrus, 642 F.2d 589, 592 (D.C. Cir. 1980).

Lands Conservation Act.[351] Of special interest is the Coastal Zone Management Act of 1972 (CZMA),[352] as implemented by the coastal states. The CZMA generally provides, among other things, that if a coastal state develops an approved coastal zone management plan, federal activities that "directly affect" the coastal zone must be certified as consistent with the state plan.[353] Those statutes in combination have complicated offshore leasing considerably. As Secretary Watt entered office, for instance, the Court of Appeals for the District of Columbia Circuit enjoined the implementation of his predecessor's more modest five-year leasing plan.[354]

Secretary Watt sought to simplify the process. The final version of the ultimately ambitious Watt plan was announced on July 21, 1982.[355] Despite criticism of earlier drafts, the final plan was very similar to the original proposal.[356] The final plan emphasized provisions to "streamline" lease procedures,[357] with a single EIS covering millions of acres and new bidding procedures that contained few safeguards against poor market conditions and below-market lease sale receipts.[358] Ensuing litigation, claiming failure to comply with fair market value provisions and to provide adequate environmental safeguards, was unavailing.[359] Similarly, the Supreme Court in 1981 held that bidding methodology remained largely within secretarial discretion.[360]

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[351] 16 U.S.C. §§ 3101–3233 (1988). *See* Amoco Prod. Co. v. Village of Gambell, 107 S. Ct. 1396, 1397 (1987).

[352] 16 U.S.C. §§ 1451–1464 (1988).

[353] *Id.* §§ 1454, 1456(c)(1).

[354] California v. Watt, 668 F.2d 1290, 1325–26 (D.C. Cir. 1981).

[355] *See Watt Plan*, *supra* note 336, at 420–21.

[356] Comment, *supra* note 338, at 99, 102. The initial proposal was published in April, 1981. 46 Fed. Reg. 22,468 (1981).

[357] *Interior Makes Final Regulations to Streamline OCS Leasing Program*, 13 Env't Rep. (BNA) 280 (June 25, 1982). The original proposal also emphasized "streamlining." *See Interior's Streamlined OCS Schedule Calls for Tiering Environmental Studies*, 11 Env't Rep. (BNA) 2245, 2246 (Apr. 24, 1981).

[358] *See* COMM'N ON FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RESOURCES, FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RESOURCES 13–38 (1982) (management problem in royalty collection); Davis, Wilen & Jergovic, *Oil and Gas Royalty Recovery Policy on Federal Indian Lands*, 23 NAT. RESOURCES J. 391 (1983); Editorial, *A Federal Fire Sale*, Wash. Post, May 12, 1982, at A22. Despite the passage of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701–1757 (1982 & Supp. V 1987), creation of the Mineral Management Service, 47 Fed. Reg. 28,368 (1982), both designed to improve the management and fiscal accountability of OCS revenues, underpayment of lease royalties continues and may be getting worse. *See* Shapiro, *Sagebrush and Seaweed Robbery: State Revenue Losses from Onshore and Offshore Federal Lands*, 12 ECOLOGY L.Q. 481, 489–91 & n.69 (1985).

[359] *See* California v. Watt, 712 F.2d 584 (D.C. Cir. 1983).

[360] *See* Watt v. Energy Action Educ. Found., 454 U.S. 151, 162 (1981).

Mr. Watt's privatization blueprint for offshore resources faced a wide spectrum of opposition, and even many oil companies regarded the idea as far too much, far too soon.[361] States objected to Mr. Watt's brand of new federalism when he insisted on leasing in areas that the affected states thought too risky, and litigation exploded.[362] As in its other resource disposition programs, the Department sometimes attempted to circumvent procedural requisites, and a series of injunctions ensued.[363]

Congress also rebelled, declaring moratoria on certain lease sales and constricting or eliminating budget authority for others.[364] In addition, market conditions and nature militated against accelerated leasing during much of this period. Oil prices dropped sharply. Several leases yielded only dry holes and were abandoned.[365] Despite the streamlining, offshore oil leasing never approached Mr. Watt's billion-acre goal during the ensuing five years. The billion-acre leasing program generated more acrimony, confusion, litigation, and futility than oil and gas.

b. The Offshore Oil and Gas Lease as a Property Interest

The minor premise of Mr. Watt's major program of resource divestiture was the sanctity of private property. A lease from the government certainly qualified as private property in Mr. Watt's philosophical lexicon. Courts, however, had been eroding steadily the quantum of property rights held by offshore oil and gas lessees. In 1975, the Court of Appeals for the Ninth Circuit held that undue delay in allowing a lessee to enjoy the benefits of production from a leasehold would constitute an unconstitutional taking.[366] By 1977,

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[361] *See* Jones, *supra* note 338, at 225.

[362] *See* Secretary of the Interior v. California, 464 U.S. 312 (1984); Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984); Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983); Brown v. Watt, 668 F.2d 1290 (D.C. Cir. 1981); Massachusetts v. Watt, No. 8301530 (D. Mass. filed Mar. 2, 1983); Kean v. Watt, 18 Env't Rep. Cas. (BNA) 1921 (D.N.J. 1982); North Slope Borough v. Watt, No. A82-421 (D. Alaska filed Oct. 21, 1982).

[363] *See, e.g.*, Massachusetts v. Watt, 716 F.2d at 951.

[364] Act of Oct. 12, 1984, Pub. L. No. 98-473, § 108, 98 Stat. 1837, 1853–55; Act of Nov. 4, 1983, Pub. L. No. 98-146, §§ 107–109, 113, 97 Stat. 919, 934–37, 938; Act of Dec. 30, 1982, Pub. L. No. 97-394, §§ 107–108, 96 Stat. 1966, 1982. Moratoria were continued on most of these same areas at least through fiscal year 1986. Act of Dec. 19, 1985, Pub. L. No. 99-190, § 107, 99 Stat. 1185, 1241–1243; *see* CONG. RESEARCH SERVICE, LEASING OF ENERGY RESOURCES ON FEDERAL LANDS: ENERGY, WILDERNESS AND OTHER CONCERNS 8 (Issues Brief No. IB83058) (May 22, 1984).

[365] *See, e.g.*, Massachusetts v. Watt, 716 F.2d at 951.

[366] Union Oil Corp. v. Morton, 512 F.2d 743, 750 (9th Cir. 1975); *see also* Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973) (equity required extending oil company's lease by the number of days that Secretary suspended the lease).

however, the Second Circuit Court of Appeals confirmed the ability of the Department to halt lease operations or change lease conditions after the lease issuance if circumstances encountered subsequently warranted new controls.[367] The Court of Appeals for the District of Columbia Circuit went a step further in 1980, holding that the leasing process was segmented and that environmental evaluation could occur at the later stages even if the lessee were precluded from developing the lease because of information acquired after lease issuance.[368] When Mr. Watt assumed office, therefore, he was not writing on a clean slate.

The new Secretary's desire to return resource decisionmaking to the states in practice was selective. While he frequently trumpeted the superior wisdom of states in resource allocation and regulation, he was seldom willing to listen to state voices counseling caution in resource development. One such state/federal dispute prominently featuring the CZMA landed in the Supreme Court with potentially devastating consequences for federal offshore oil and gas lessees.[369]

California, fearing another Santa Barbara disaster, objected to a lease sale planned for the nearby Santa Maria Basin. When political persuasion failed to convince the Secretary of the Interior to delete the areas in controversy, the State of California sued, claiming, *inter alia*, that the lease sale could not go forward until the State certified the sale's "consistency" with California's coastal zone management plan.[370] The lower courts agreed and enjoined the sale.[371] The Supreme Court reversed, the majority of five holding that the CZMA consistency provision was inapplicable to the initial offshore oil and gas lease sale because the sale by itself did not "directly affect" the state coastal zone.[372] The strong dissent argued that the federal government had bound itself to the state determination at all stages of the leasing process.[373]

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[367] County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1390 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

[368] North Slope Borough v. Andrus, 642 F.2d 589, 606 (D.C. Cir. 1980).

[369] *See* Secretary of the Interior v. California, 464 U.S. 312, 343 (1984).

[370] *Id.* at 317. The Coastal Zone Management Act provides that, for states with approved coastal management plans, all federal activities "directly affecting the coastal zone" must be "consistent with" the state plan. 16 U.S.C. § 1456(c)(1) (1988).

[371] 464 U.S. at 319.

[372] *Id.* at 339.

[373] *Id.* at 357–59 (Stevens, J., dissenting). Bills to reverse the holding have been introduced in Congress. *E.g.*, H.R. 4589, 98th Cong., 2d Sess.; S. 2324, 98th Cong., 2d Sess. In the 99th Congress, bills were introduced in both houses again. H.R. 5, 99th Cong., 1st Sess. (1985); S. 55, 99th Cong., 1st Sess. (1985); *see also* 15 Env't Rep. (BNA) 1504 (Jan. 11, 1985). Both died in committee.

The price of confirming federal supremacy was destruction of the protectible property aspects of the offshore leasehold, a result obviously abhorrent to Mr. Watt's privatization philosophy. The majority of the Court was well aware of the congressional desire to make leasing more environmentally responsible. Environmental consistency realistically could not be considered at the lease sale stage due to a lack of relevant information, the Court noted, but it could be factored in at the exploration and production stages.[374] In other words, California and the Department of the Interior were free to make new consistency determinations at later stages and to impose additional conditions to alleviate newly-discovered or more clearly defined problems.[375] To the natural objection that the reservation of such unbounded regulatory power would destroy the lessee's property interest in the lease, the Court replied that a lessee has no traditional property interest but rather only an exclusive right to pursue further administrative permission to develop the leasehold.[376] To make sure that this holding would not be misunderstood, the Court carefully repeated it several times.[377]

The demise of property rights in offshore oil and gas leases will haunt indefinitely the very entities Mr. Watt most wanted to benefit. The same principles have already been applied in other areas of mineral leasing.[378] An oil and gas lessee conceivably could lose its million- or billion-dollar investment in the lease and preliminary development if unforeseen environmental problems cannot be overcome by regulatory means. Secretary Watt evidently did not understand that the interests of resource developers and of the states do not always and necessarily coincide. In retrospect, considering the multitude of factors then known that militated against immediate divestiture of all offshore oil and gas resources, Mr. Watt's efforts in this arena must be characterized as ill-considered.

2. Coal Leasing

The United States owns several hundred billion tons of low-sulphur coal in the West, much of it located in the Northern Great

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[374] 464 U.S. at 339–41.

[375] *Id.* at 340–41. The Court stated: "The first two stages are not subject to consistency review; instead, input from State Governors and local governments is solicited by the Secretary of the Interior. The last two stages invite further input for Governors or local governments, but also require formal consistency review." *Id.*

[376] *Id.* at 338.

[377] *See id.* at 338–42.

[378] *See* Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983); *see also infra* notes 438–40 and accompanying text.

Plains.[379] Treated separately in law since 1864, coal became a leasable mineral in 1920.[380] Coal leases before 1975 contained terms extremely favorable to lessees.[381] Acquisition, frequently by oil companies, of federal coal leases for speculation in the 1960s[382] triggered first a 1971 moratorium on further coal leasing,[383] and then the Coal Leasing Amendments Act of 1975.[384] Congress enacted the latter Act in large part to require competitive bidding on all lease sales, to obtain better royalty return to the government, and to ensure greater diligence in lease development.[385] The Ford and Carter Administrations' attempts to resume coal leasing were halted by further litigation.[386] Except for holdover preference right leases, no federal coal was leased during the 1970s.[387] The moratorium created widespread legal confusion but likely had little effect on the coal market because billions of tons of coal were already under federal lease and awaiting development.[388]

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[379] *See* 1979 OTA REPORT, *supra* note 224, at 298–301. It is estimated that there are up to 1.73 trillion tons of coal in identified United States reserves. *Id.* at 300 (table A-2). About 55–60% of the identified reserves in western states are located on federal land. *Id.* at 301. About 37% of identified reserves are located in North Dakota and Montana. *See id.*

[380] Mineral Leasing Act of 1920, 30 U.S.C.A. §§ 181–287 (West 1986 & Supp. 1989).

[381] *See, e.g.*, Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553, 558–59 (D.C. Cir. 1979) (environmental protection conditions absent); *cf.* FMC Wyoming Corp. v. Watt, 587 F. Supp. 1545, 1548 (D. Wyo. 1984) (12% royalty is a 1000% increase), *rev'd*, 812 F.2d 496 (10th Cir. 1986), *cert. denied*, 484 U.S. 1041 (1988).

[382] A BLM study in 1970 found that, from 1945 to 1970, the number of acres of land under federal coal leases increased tenfold, but annual coal production from these lands decreased during the same period from 10 million tons to 7.4 million tons. Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981, 984 (D.D.C. 1977) (citing DIVISION OF MINERALS, BUREAU OF LAND MANAGEMENT, HOLDINGS AND DEVELOPMENT OF FEDERAL COAL LEASES (Nov. 1970)).

[383] *See* Krueger v. Morton, 539 F.2d 235, 237 (D.C. Cir. 1976) (challenging order by Secretary of Interior suspending issuance of prospecting permits); American Nuclear Corp. v. Andrus, 434 F. Supp. 1035, 1035–36 (D.D.C. 1977) (asserting right to coal prospecting permit by way of prior application for permits); Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981, 993 (D.D.C. 1977) (challenging implementation of coal leasing program prior to issuance of Environmental Impact Statement required under section 102 of NEPA).

[384] Federal Coal Leasing Amendments Act of 1975 (FCLAA), 30 U.S.C. §§ 201–209 (1982).

[385] On some of the problems the FCLAA was designed to address, see *Federal Coal Leasing, 1975: Hearings on H.R. 3265 Before Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 10 (1975); Hustace, *The New Federal Coal Leasing System*, 10 NAT. RESOURCES LAW. 323 (1977).

[386] Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981, 993–94 (D.D.C. 1977), *settlement aff'd*, 454 F. Supp. 148, 149 (D.D.C. 1978); *see also* Tarlock, *supra* note 139, at 332–33.

[387] *See* Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553, 556 (D.C. Cir. 1979) (Department of Interior stopped issuing permits for coal exploration in 1973).

[388] According to the plaintiffs in *Hughes*, 437 F. Supp. at 991, federal reserves already under lease would last for over a century even at considerably higher production rates.

Secretary Watt's approach to coal leasing paralleled his program for accelerated offshore oil and gas leasing. He announced plans to resume coal leasing on a large scale and scheduled a series of major coal lease sales. His apparent goal was to privatize most remaining unleased federal coal without much regard for demand or safeguards.[389] The Department did manage to sell some coal during the Watt tenure, but by the time of Mr. Watt's resignation the coal leasing program was left in total shambles, a state in which it remains. Little if any federal coal is likely to be sold at least until the 1990s. At the same time, Secretary Watt essentially destroyed the Interior agency responsible for policing all coal stripmining operations. That damage too has not yet been repaired.[390] The Department's brushes with coal blackened its reputation for credibility and competence, and those ravages with coal leases remain a prominent part of the Watt legacy.[391]

Two relatively small lease sales were completed in 1981.[392] The Powder River Basin fiasco came in 1982. Despite a soft market and pronounced lack of developer interest, in 1982 the Department sold leases for 1.6 billion tons of coal in the Powder River Basin of Wyoming and Montana, one of the largest coal lease sales in history.[393] The Powder River Basin sales were marked by allegations

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[389] Watt claimed that the accelerated sales were necessary to "reduce the vulnerability of America to blackmail, embargoes, or other national-security threats." Taylor, *Interior's James Watt: Hero or Villain?*, U.S. NEWS & WORLD REP., June 6, 1983, at 52. The sales were more likely part of the Secretary's desire to transfer "more control and discretion for development of federally owned resources to private industry." COMM'N ON FAIR MARKET VALUE POLICY FOR FEDERAL COAL LEASING, FAIR MARKET VALUE POLICY FOR FEDERAL COAL LEASING 374 (1984) [hereinafter COAL COMM'N REPORT]. The Coal Commission was highly critical of Watt's pre-determined mindset to lease large amounts of coal regardless of the market. *See infra* note 411 and accompanying text.

[390] *See supra* note 321.

[391] This subsection sketches the main points of coal leasing under Secretary Watt without detailing the Byzantine political maneuvers in those years.

[392] The Department leased 573 million tons of coal in the Green River-Hams Fork region, and offered 555 million tons in the Uinta-Southwestern Utah region, though only 88 million tons were sold. OFFICE OF TECHNOLOGY ASSESSMENT, ENVIRONMENTAL PROTECTION IN THE FEDERAL COAL LEASING PROGRAM 67 (table 6) (1984) [hereinafter 1984 OTA REPORT].

[393] COAL COMM'N REPORT, *supra* note 389, at 374, 379. The Powder River area contains the richest coal beds in the United States. Seams, in places more than 100 feet thick, are estimated to contain about 142.5 billion tons, accounting for two-thirds of all western U.S. coal reserves. *Powder River Basin Regional Coal Lease Sales: Was Fair Market Value Received? Hearing Before the House Comm. on Interior and Insular Affairs*, 98th Cong., 1st Sess. (1983). Watt set a target leasing level of 2.5 billion tons at the sale. GENERAL ACCOUNTING OFFICE, ANALYSIS OF THE POWDER RIVER BASIN FEDERAL COAL LEASE SALE: ECONOMIC VALUATION IMPROVEMENTS AND LEGISLATIVE CHANGES NEEDED 1 (1983) [hereinafter GAO POWDER RIVER REPORT].

of corruption and fire sale prices;[394] an investigating commission later estimated that the sale price was perhaps as much as $100 million below market value.[395] This sale was made possible by eleventh-hour regulation changes to lower the minimum acceptable bid.

Two lawsuits challenged the legality of the lease sales. The plaintiffs in one suit secured an injunction in 1985 against the sale insofar as it affected tribal lands in Montana. The Court of Appeals for the Ninth Circuit later affirmed and expanded upon the injunction.[396] Also in 1985, the United States District Court for the District of Montana held that the sale did not contravene land use plan provisions, and in August, 1987, the same court ruled that the leases covering nontribal lands did not violate the statutory fair market standard.[397] The Ninth Circuit Court of Appeals affirmed those holdings in 1988 without much helpful explanation or analysis.[398]

The latter judicial decisions came too late to rescue federal coal leasing. Public and congressional reaction to the Powder River Basin sales in 1983 halted coal leasing and indirectly drove Mr. Watt from office. In response to widespread criticism, more western state antagonism, and critical reports by legislative auditors,[399] Congress

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[394] The eleventh hour changes in the leasing procedures were especially controversial. In March, 1982, the government's estimate of fair market value for each tract (called minimum acceptable bids, or MABs) became known to some coal company officials. COAL COMM'N REPORT, *supra* note 389, at 376. MABs are proprietary information. *See id.* The Department learned of the leak but took no action to delay the Powder River Basin sale. Shortly thereafter, Interior changed the bidding program by, among other things, cutting the original MABs nearly in half. *Id.*; GAO POWDER RIVER REPORT, *supra* note 393, at 17 & n.3. The new MABs provided no incentive to initial competitive bidding because the coal companies could increase their offers if the tract attracted competitive bids. Only three of thirteen did, and sale receipts were only slightly more than the revised minimum bid numbers. COAL COMM'N REPORT, *supra* note 393, at 390, 391, 392 & table 2.

[395] GAO POWDER RIVER REPORT, *supra* note 393, at 25. Under the FCLAA, coal is to be leased for fair market value. 30 U.S.C. § 207(a) (1982). Only three of the thirteen tracts offered received more than one bid; two were not bid on at all. COAL COMM'N REPORT, *supra* note 389, at 377. The average price paid for the Powder River coal was 3.5¢ per ton. Barron, *Watt, the Nation's Trustee, is Selling the Goods*, L.A. Daily J., Feb. 21, 1983, at 4, col. 3.

[396] Northern Cheyenne Tribe v. Hodel, 842 F.2d 224 (9th Cir. 1988).

[397] National Wildlife Fed'n v. Burford, 677 F. Supp. 1445 (D. Mont. 1985), *aff'd*, 871 F.2d 849 (9th Cir. 1989). For an analysis of the reaction to the district Court decision, see *Top Court Asked to Hear Coal Royalty; Watt Sale Appeal*, 12 Pub. Land News, Nov. 26, 1987, at 2.

[398] 871 F.2d 849 (9th Cir. 1989). In addition, litigation challenging Interior's general coal leasing regulation revisions of this period has been pending since 1982. Natural Resources Defense Council v. Burford, No. 82-2763 (D.D.C. filed Sept. 28, 1982).

[399] SURVEY AND INVESTIGATIONS STAFF OF HOUSE COMM. ON APPROPRIATIONS, 98TH CONG., 1ST SESS., REPORT ON THE COAL LEASING PROGRAM OF THE DEPARTMENT OF INTERIOR (1983); GAO POWDER RIVER REPORT, *supra* note 393. The GAO found that Interior's last-minute changes were "untimely and ineffective." GAO POWDER RIVER REPORT,

established a commission to examine whether fair market value was obtained in the coal lease sales.[400] Undeterred, Secretary Watt held two additional, but relatively minor, sales of Powder River area coal[401] and a larger sale of coal leases in the Fort Union region of Montana and North Dakota. The Department held the latter sale in the face of a House committee order to withdraw the lands from sale—an order Mr. Watt defied.[402] The Fort Union sale was enjoined due to the Department's failure to observe its own regulations.[403] Congress then prohibited the expenditure of any funds for the Fort Union sale, effectively revoking it.[404] In Mr. Watt's last days at Interior, Congress reinstituted the moratorium on coal lease sales until the new commission reported.[405]

The Linowes Commission report, released in early 1984, was scathing in its criticism of departmental leasing procedures and results.[406] Hearings by legislative committees and investigations by the Office of Technology Assessment reached similar conclusions.[407] Secretary Clark quickly acknowledged the problems and promised to return coal leasing to the drawing board.[408] Coal leasing has never

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supra note 393, at 13. The GAO also disagreed with Interior's lowering of minimum bids on maintenance tracts. It believed that these tracts should command an even higher price than previously estimated fair market value, because these leases essentially isolate the owner of the nearby existing mine from leasing competition. *See id.* at 69–71.

[400] Act of Nov. 4, 1983, Pub. L. No. 98-63, 97 Stat. 301 (1983).

[401] *See* COAL COMM'N REPORT, *supra* note 389, at 378. The two new leases sold for a total of $23.7 million. *Id.*

[402] *See id.* at 5. Secretary Watt believed that he need not comply with the House Resolution because the House had previously used the same provision to try to prevent oil and gas leasing in wilderness areas, but a court challenge resulted in a ruling that only the Secretary could determine the duration of such a withdrawal. *See infra* notes 422–34 and accompanying text. In refusing to comply, Watt declared that a delay would signal unreliability in the government's coal leasing plans, COAL COMM'N REPORT, *supra* note 389, at 5, implying that a withdrawal of any duration was unacceptable.

[403] National Wildlife Fed'n v. Clark, 571 F. Supp. 1145, 1151, 1156, 1158 (D.D.C. 1983). Because the regulations, 43 C.F.R. § 2310.5 (1985), had not been rescinded, the court held that the Secretary was bound to follow them, even if the statute on which they were based was unconstitutional.

[404] Act of Nov. 4, 1983, Pub. L. No. 98-146 § 112, 97 Stat. 937 (1983).

[405] *See Interior Inadequately Evaluated Tracts Leased Since 1981, Congressional Report Says*, 15 Env't Rep. (BNA) 145, 146 (June 1, 1984).

[406] *See* COAL COMM'N REPORT, *supra* note 389, at 415–20. "[A]t the very least, the Interior Department made serious errors in judgment in its procedures for conducting the . . . Powder River lease sale . . . ." *Id.* at 420.

[407] *See* 1984 OTA REPORT, *supra* note 392, at ix. The OTA noted that "[t]he planning processes . . . have become too unpredictable and unsystematic to ensure compliance with the environmental mandate." *Id.*

[408] *See Congress/Administration Coal Lease War Comes to a Head May 24*, Pub. Land News, May 10, 1984, at 8.

re-emerged. Until the coal market recovers and coal producers demonstrate the need to transfer new reserves to them, federal coal leasing may remain quiescent.

Secretary Watt's intemperate actions and remarks brought rebukes from the White House on several occasions.[409] White House patience had been exhausted by the time Mr. Watt—by then a distinct political liability—described the Coal Commission as composed of "a black, a woman, two Jews, and a cripple."[410] That remark signaled the end of the Watt tenure, although aspects of the Watt legal philosophy lingered on in the Department.[411]

Mr. Watt enjoyed less success in his program to privatize coal than in his offshore oil and gas leasing program. The reasons for the failures were similar. Economically, demand for the resource did not justify the projected leasing levels. Politically, the Secretary antagonized state officials, enraged members of Congress, and inspired widespread popular obloquy. Legally, the Department cut too many corners, thereby undermining its credibility and generating disruptive lawsuits with a procession of injunctions. Practically, the biggest losers over the long haul could be the coal developers with a real need for new mines and a lack of access to existing leases. Haste and heedlessness again achieved counterproductive results.

3. Mineral Leasing in Wilderness and Wilderness Study Areas

Secretary Watt not only took an interest in accelerated fossil fuel leasing, but he also concerned himself with the places to be leased. More particularly, and in keeping with his desire to open more lands to development, Mr. Watt attempted to lease minerals in wilderness and wilderness study areas, a radical break from bipartisan policy since passage of the 1964 Wilderness Act.[412] The results of this initiative were iterative: the attempt failed, leaving only legal prec-

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[409] The best-known instance was Mr. Watt's decision to ban the Beach Boys from the Washington, D.C. Fourth of July celebration as subversive influences. *See* G. COGGINS & C. WILKINSON, *supra* note 19, at 887–88.

[410] *See* Bernstein, *supra* note 101, at 74.

[411] In September, 1987, BLM Director Robert Burford, one of the few remaining Watt appointees, was still describing the Department's many setbacks in court as the result of a concerted attack on his multiple use philosophy by "environmental vigilantes." Address by BLM Director Robert Burford to New Mexico State Bar Ass'n, Santa Fe, N.M. (Sept. 25, 1987).

[412] *See, e.g.*, Mountain States Legal Found. v. Andrus, 499 F. Supp. 383, 394 (D. Wyo. 1980) (concerted governmental refusal to process lease applications for wilderness study areas).

edents that will haunt the Department and boomerang against prospective lessees indefinitely.

a. Opening Designated Wilderness Areas

The original Wilderness Act[413] embodied several compromises between preservation and resource use.[414] The Act, later made applicable to the BLM lands,[415] provided that mineral location and leasing in wilderness areas were permissible under stringent controls, but only until 1984.[416] After December 31, 1983, leasing still could occur in BLM wilderness study areas, but lessees are subject to a management standard so strict as to discourage exploration in all but the most promising areas.[417]

Until 1981, the Department refused to process lease applications for wilderness areas.[418] A federal district court in 1980, at the behest of the Mountain States Legal Foundation, found that this policy constituted a land withdrawal without observance of FLPMA procedures.[419] Despite the highly questionable basis for that holding,[420] the Reagan Administration did not appeal it.[421]

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[413] 16 U.S.C. §§ 1131–1135 (1988).

[414] *Id.* §§ 1133(d)(2)–(3) (minerals); 1133(d)(4) (grazing); 1133(d)(8) (hunting); 1133(d)(5) (BWCA); *see* McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288 (1966); Watson, *supra* note 272, at 58–61 & nn.90–101.

[415] 43 U.S.C. § 1782 (1982).

[416] 16 U.S.C. § 1133(d)(3) (1988); *see* Toffenetti, *Valid Mining Rights and Wilderness Areas*, 20 LAND & WATER L. REV. 31, 32 & n.2 (1985). The ban on mineral leasing did not become effective until December 31, 1983, 16 U.S.C. § 1133(d)(3) (1988), thus leaving a 20-year "window" from 1963 until 1983 during which wilderness areas would legally be available for leasing. A few wilderness areas were designated with no development windows. *E.g.*, 16 U.S.C. §§ 460aa-1, -9 (1988) (Sawtooth National Recreation Area and Wilderness); 16 U.S.C. §§ 460gg-1, -8 (1988) (Hell's Canyon National Recreation Area and Wilderness). Other individual areas were designated with shorter windows. *E.g.*, Act of Oct. 21, 1978, Pub. L. No. 95-495, § 11, 92 Stat. 1649, 1655 (Boundary Waters Canoe Area Wilderness). Still others have longer development windows. *E.g.*, Endangered American Wilderness Act of 1978, Pub. L. No. 95-237, § 5, 92 Stat. 40, 46 (1978) (Gospel-Hump Wilderness); Central Idaho Wilderness Act of 1980, Pub. L. No. 96-312, § 5(d), 94 Stat. 948, 949 (River of No Return Wilderness). Several writers have argued that mineral leasing of any kind is inconsistent with wilderness and permanently destroys the area's primitive characteristics. *See, e.g.*, Edelson, *The Management of Oil and Gas Leasing on Federal Wilderness Lands*, 10 B.C. ENVTL. AFF. L. REV. 905, 913–14 (1983).

[417] 43 U.S.C. § 1782(c) (1982); *see also* Rocky Mountain Oil and Gas Ass'n v. Watt, 696 F.2d 734, 750 (10th Cir. 1982).

[418] Mountain States Legal Found. v. Andrus, 499 F. Supp. 383, 397 (D. Wyo. 1980).

[419] *Id.*

[420] *See* Getches, *supra* note 215, at 326 & n.267.

[421] Reagan administrative officials issued a directive ordering the dismissal of the appeal on

On the contrary, Mr. Watt instead announced plans to approve oil and gas leases in several designated wilderness areas.[422] Members of Congress reacted angrily to this departure. The House Interior and Insular Affairs Committee purported to withdraw the affected areas from availability for leasing pursuant to the "emergency withdrawal" section of FLPMA.[423] The Department reluctantly acceded to the Committee's withdrawal order, but both the Pacific and the Mountain States Legal Foundations sought judicial invalidation of the congressional command.[424] The legislative branch and environmental organizations intervened in the suit,[425] making it a six- or seven-cornered donnybrook that some called "Watt v. Watt."[426]

The case turned on the constitutionality of an odd form of the legislative veto, which is really more like a legislative action-forcing mechanism.[427] The district court's decision—rendered before the Supreme Court ruled in *Immigration & Naturalization Service v. Chadha*[428]—tiptoed a very fine line. The court held that the congres-

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March 4, 1981. *Id.* at 328. In August, 1987, the United States District Court for the District of Wyoming again ruled that delay in processing lease applications amounted to an unlawful land withdrawal, relying in part on the earlier decision. Mountain States Legal Found. v. Hodel, 668 F. Supp. 1466, 1475 (D. Wyo. 1987).

[422] 46 Fed. Reg. 27,734 (1981) (Washakie Wilderness, Wyoming); 46 Fed. Reg. 27,735 (1981) (Bob Marshall Wilderness, Great Bear Wilderness, Scapegoat Wilderness, and Mission Mountains Wilderness, Montana); *see also* Watson, *supra* note 272, at 52 & n.61 (citing BLM Instruction Memorandum No. 83-355, Feb. 28, 1983). The decision to approve oil and gas leases in these wilderness areas was sparked by at least three different factors. First, the dramatic increases in oil and gas prices in the 1970s spurred interest in leasing on public lands. In 1972, oil cost $3.39 per barrel; in July, 1981, it cost $33.76 per barrel. Edsall, *Boom and Bust: Economic Ills Strain Alliance of Oilmen, GOP*, Wash. Post, Apr. 25, 1983, at 1, col. 1. Second, the "window" on leasing was rapidly closing. *See* 16 U.S.C. § 1133(d)(3) (1988). The third and most important factor was the Reagan/Watt philosophy to open the public lands to private development. The Reagan Administration's aggressive onshore leasing plan was not limited to wilderness areas. In 1981, the amount of onshore acreage leased was 150% greater than in 1980, and the 1982 acreage leased was nearly double the 1981 acreage. *See* U.S. DEP'T OF THE INTERIOR, A YEAR OF PROGRESS: PREPARING FOR THE 21ST CENTURY 1 (1982). Designated wilderness areas were not the only areas affected by Watt's push to make public lands available for private development—wilderness study areas, as well as candidates for wilderness, were also opened to leasing. *See infra* text accompanying notes 435–43.

[423] 43 U.S.C. § 1714(e) (1982).

[424] Pacific Legal Found. v. Watt, 529 F. Supp. 982 (D. Mont. 1981), *modified*, 539 F. Supp. 1194 (D. Mont. 1982).

[425] *Id.*

[426] Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983).

[427] *See* Glicksman, *Severability and the Realignment of the Balance of Power Over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 1, 44–48 (1984).

[428] 462 U.S. 919 (1983).

sional committee could order the Secretary to withdraw land, but that, to avoid constitutional problems, the timing, duration, and conditions of the withdrawal must remain within secretarial discretion.[429] This Solomonic rendering satisfied no one, but no appeal was decided because Congress mooted the controversy by forbidding any expenditures for processing the wilderness area leases.[430] Although the proviso expired three months before all leasing was outlawed by the Wilderness Act,[431] Secretary Watt threw in the towel and agreed not to approve any wilderness leases during the "window" period.[432] Litigation convinced other lessees of wilderness lands to exchange them for nonwilderness.[433] When 1984 arrived, little or no damage had been done to official wilderness areas by the Secretary's fervor.[434]

b. Opening Wilderness Study Areas

The FLPMA requires very strict controls on mineral operations commenced after 1976 in BLM wilderness study areas.[435] The Wilderness Act, however, does not prescribe similar safeguards for leasing in Forest Service wilderness study areas, where the Interior Department processes the leases in consultation with the Forest Service.[436] The agencies long regarded single leases as environmentally insignificant and did not prepare environmental impact statements (EISs) on them.[437] In *Sierra Club v. Peterson*,[438] the Court of Appeals for the District of Columbia Circuit decided that leases in

[429] 529 F. Supp. at 1004.

[430] Act of Dec. 30, 1982, Pub. L. No. 97-394, § 308, 96 Stat. 1966, 1996–97; Act of Oct. 2, 1982, Pub. L. No. 97-276, § 126, 96 Stat. 1186, 1196.

[431] 16 U.S.C. § 1133(d)(3) (1988).

[432] INSIDE ENERGY/WITH FEDERAL LANDS, Jan. 10, 1983, at 11.

[433] Edelson, *supra* note 416, at 917 n.86; *Wilderness Area Leased Despite Agreement With Congress Not to Do So*, 13 Env't Rep. (BNA) 606 (Sept. 3, 1982). Watt said that he was "unaware" that the area was wilderness when he issued the leases. When Congress questioned him about the leases, he obtained "no surface occupancy" stipulations on them.

[434] Mining and mineral leasing rights established before 1984 can be developed, *see* Toffenetti, *supra* note 416, at 36, and a few recent additions to the Wilderness System have longer "windows." The number of existing mining claims is unknown, but most have been or probably will be abandoned. *Id.* at 31 n.1, 61–65.

[435] 43 U.S.C. § 1782(c) (1982). *See* Rocky Mountain Oil and Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982).

[436] 16 U.S.C. § 1133(d)(2) (1988) (permitting prospecting and other activities to gain information about mineral resources in national forest wilderness and requiring Department of Interior to survey land for mineral values and to make results public).

[437] Since lessees drill on only a small fraction of leases, and fewer leases actually produce, environmental evaluation at the lease stage was thought to be time-wasting and futile.

[438] 717 F.2d 1409 (D.C. Cir. 1983).

wilderness study areas were major federal actions with significant environmental effects.[439] The court ordered the leasing agencies to prepare EISs in this situation unless the agency retained full authority to deny the lessee all exploration and development rights.[440] The Ninth Circuit Court of Appeals twice has endorsed this reading and has extended it to all federal lands,[441] while the Tenth Circuit Court of Appeals has allowed oil and gas leasing to proceed without full EISs.[442] As with offshore oil and gas leasing, the Department's compulsion to cut corners redounded to the detriment of lessees, whose oil and gas leases now more resemble exclusive procedural rights than vested property interests.[443]

c. Opening Florida Wilderness to Phosphate Leasing

While Congress was debating legislation to designate a wilderness area in the Osceola National Forest in Florida, Secretary Watt announced his intention to issue four phosphate leases covering much of the proposed wilderness.[444] The Forest Service had for years denied applications for these leases, contending that restoration of the sensitive wetlands environment following mining would be technologically impossible. Suddenly, during late 1981, the Forest Service changed its mind and decided that reclamation would be feasible, and Interior coincidentally decided to issue the leases immediately.[445]

Florida Senators and other state officials filed suits to enjoin the issuance of the leases.[446] Furthermore, Congress responded by adding a mining ban to the proposed wilderness legislation.[447] The mining ban inspired President Reagan to veto the Florida wilderness designation legislation, the first veto of a wilderness bill.[448] Under

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[439] *Id.* at 1412.

[440] *Id.* at 1415.

[441] Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1340 (1989); Connor v. Burford, 836 F.2d 1521 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1121 (1989).

[442] Park County Resources Council v. United States Dep't of Agric., 817 F.2d 609 (10th Cir. 1987).

[443] *See* G. COGGINS, PUBLIC NATURAL RESOURCES LAW § 23.02[4][B] (1989).

[444] *Chiles, NWF File Suit Against Interior, Agriculture Over Mining in Osceola Forest*, 13 Env't Rep. (BNA) 69 (May 21, 1982).

[445] *Id.*

[446] *Id.*

[447] *House Suspends Rules, Passes Bill to Ban Phosphate Leases in Osceola*, 14 Env't Rep. (BNA) 245 (June 10, 1983) [hereinafter *House Bans Phosphate Leases*].

[448] *Reagan Veto of Florida Wilderness First Under 1964 Wilderness Protection Act*, 13 Env't Rep. (BNA) 1621 (Jan. 21, 1983).

pressure from Congress and Florida officials, Mr. Watt then announced that he would not issue the phosphate leases after all because reclamation was not technologically feasible.[449] Congress again proceeded to pass the Florida wilderness bill, but without the mining ban, and this version was signed into law in 1983.[450]

The prospective lessees sued to force issuance of the disputed preference right leases, claiming that they had satisfied all legal requisites.[451] In the course of his opinion rejecting that claim, Judge Parker noted that mineral development is not a primary purpose of national forest establishment, and that it can be incompatible with timber and water supply purposes.[452] If that admonition influences other courts, it could justify far more stringent regulation of mining operations in national forests than has traditionally been the case.[453]

Judge Parker's opinion also might affect the validity of hardrock mining claims at their inception. The standard for issuance of preference right leases under the Acquired Lands Leasing Act[454] is whether the applicant has discovered "valuable deposits" of phosphate,[455] a standard that the court opined was identical to the meaning of the 1872 General Mining Law.[456] In holding that the plaintiff had not discovered valuable deposits because reclamation was administratively deemed infeasible,[457] the court apparently put in jeopardy some hardrock mining claims that might otherwise meet the discovery test of *United States v. Coleman*.[458] If a finding of technical feasibility or infeasibility is to be treated as a political decision, industry can stake little comfort in science or in departmental statements of intention. Like the decision in *Secretary of the Interior v. California*,[459] this Interior Department victory is potentially Pyrrhic from the viewpoint of Mr. Watt's privatization philosophy.

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[449] *House Bans Phosphate Leases*, *supra* note 447, at 246.

[450] *See* Florida Wilderness Act of 1983, § 1, 98 Stat. 1665.

[451] Kerr-McGee Corp. v. Hodel, 630 F. Supp. 621 (D.D.C. 1986), *vacated as moot*, 840 F.2d 68 (D.C. Cir. 1988).

[452] *Id.* at 629.

[453] *See* Converse v. Udall, 399 F.2d 616, 622 (9th Cir. 1968). *See generally* J. LESHY, *supra* note 17, at 164–66.

[454] 30 U.S.C. §§ 351–359 (1982).

[455] *Id.* § 352.

[456] *Kerr-McGee*, 630 F. Supp. at 624–25; *cf.* 30 U.S.C. § 211(b) (1982). *See generally* Fairfax & Andrews, *Debate Within and Debate Without: NEPA and the Redefinition of the "Prudent Man" Rule*, 19 NAT. RESOURCES J. 505 (1979).

[457] *Kerr-McGee*, 630 F. Supp. at 629.

[458] 390 U.S. 599 (1968); *see also* J. LESHY, *supra* note 17, at 148–50.

[459] 464 U.S. 312 (1984); *see also supra* notes 369–72 and accompanying text.

B. Livestock Grazing Management on the Public Lands

The problems of the Watt Administration in managing subsurface mineral resources were mirrored by the difficulties it experienced in managing surface resources—which, for the BLM, is primarily livestock grazing management.[460] Secretary Watt tried to reverse historic trends in this arena, but he achieved only mixed results. In the short term, courts emphatically rejected his new program for abdicating federal management responsibility, but, in the longer term, his initiatives may have set back by a decade or more the national priority of improving public rangeland conditions. This section begins with a synopsis of historical public range law developments and then recounts Mr. Watt's changes and their judicial reception.

1. Short History of Livestock Grazing Regulation on the Public Lands

Outside Alaska, the BLM administers roughly 170 million acres, nearly all of it devoted to livestock grazing.[461] BLM land tends to be high, rocky, and arid or semi-arid, and most is unsuitable for conventional agriculture.[462] A century ago, when these public lands were free from regulation, overgrazing severely eroded their grass-producing capacity.[463] Pursuant to the Taylor Grazing Act of 1934,[464] the government withdrew the unclaimed, unreserved federal lands into grazing districts to be managed by a federal agency.[465]

A half-century of BLM regulation under the Taylor Act has stabilized but not appreciably improved range conditions.[466] The BLM

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[460] Although the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411–1418 (expired 1970), and the FLPMA, 43 U.S.C. § 1732(a) (1982), called for rough equality of resource treatment in BLM surface management, the agency has continued to regard livestock use as the dominant use of the public lands to which all other uses (save minerals) and values are subservient. *See generally* Coggins, *supra* note 57.

[461] *See* Coggins & Lindeberg-Johnson, *supra* note 17, at 2.

[462] *See, e.g.*, P. FOSS, *supra* note 55, at 4; E. PEFFER, *supra* note 27, at 219.

[463] *See, e.g.*, Box, *The American Rangelands: Their Condition and Policy Implications for Management*, in RANGELAND POLICIES FOR THE FUTURE 16 (1979) (proceedings of a symposium held Jan. 28–31, 1979, in Tucson, Ariz.); Coggins, Evans & Lindeberg-Johnson, *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 541 n.29 (1982); Cox, *Deterioration of Southern Arizona's Grasslands: Effects of New Federal Grazing Legislation Concerning Public Grazing Lands*, 20 ARIZ. L. REV. 697 (1979).

[464] 43 U.S.C. §§ 315–315r (1982 & Supp. V 1987).

[465] *See* E. PEFFER, *supra* note 27, at 225–31.

[466] *See, e.g.*, Natural Resources Defense Council, Inc. v. Morton, 388 F. Supp. 829 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976).

was unable to effectuate reforms to improve range conditions because it has long been a weak agency, dominated by the ranchers it is supposed to regulate.[467] The Bureau initiated several improvement programs in the 1960s, but these efforts usually collapsed when the ranchers with heavily subsidized grazing permits opposed reductions in grazing levels.[468]

Three related developments in the 1970s, however, promised fundamental change in public rangeland management. First, a court in 1974 ordered the agency to prepare environmental impact statements for all of its districts detailing the consequences of livestock grazing.[469] The EISs publicly revealed that range conditions were very poor and that improvement was unlikely until grazing levels were reduced to grazing capacity.[470]

Second, Congress in 1976 indicated its displeasure with range conditions[471] and supplemented the Taylor Act by giving explicit authority to reduce grazing levels whenever the Secretary judged that conditions warranted it.[472] The FLPMA also commanded the BLM to plan and manage for multiple use, not just grazing use,[473] and to observe sustained yield principles.[474] Two years later, Congress more emphatically decried poor and declining range conditions,[475] authorized funding for range improvement projects,[476] and made range improvement a high management priority.[477] The Carter Administration took tentative steps to implement multiple use, sus-

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[467] *See* Coggins, Evans & Lindeberg-Johnson, *supra* note 463, at 550–52.

[468] *See* Coggins & Lindeberg-Johnson, *supra* note 17, at 89–100. The federal grazing fee is only a small fraction of fair market value. The fee subsidy has been capitalized into the value of the permittee's base ranch, which accounts for the adamant resistance to reductions in permitted grazing levels, even though ranchers would be the prime beneficiaries of more productive grass ecosystems. *See id.* at 74–75.

[469] *Morton*, 388 F. Supp. at 831–33. The BLM agreed to comply with the decision. The agency procrastinated for several years, however, until the court refused to accept further postponements. *See* Natural Resources Defense Council, Inc. v. Andrus, 448 F. Supp. 802, 804 (D.D.C. 1978).

[470] *See* Coggins, *The Law of Public Rangeland Management III: Creeping Regulation at the Periphery, III, 1934–1982*, 13 ENVTL. L. 295, 363–65 (1983).

[471] *See* 43 U.S.C. § 1751(a) (1982 & Supp. V 1987).

[472] *Id.* § 1752(e). Grazing privileges may be adjusted at any time "to the extent the Secretary concerned deems necessary" if he "finds on reexamination that the condition of the range requires adjustment in the amount or other aspect of grazing use." *Id.*

[473] *Id.* § 1712.

[474] *Id.* § 1732(a). The terms "multiple use" and "sustained yield" are defined in 42 U.S.C. § 1702(c), (h).

[475] Public Rangelands Improvement Act of 1978, 43 U.S.C. § 1901(a) (1982 & Supp. V 1987).

[476] *Id.* § 1904.

[477] *See id.* § 1903(b). This section contains the strongest congressional statement of managerial priorities in all of the grazing statutes.

tained yield planning and management for range condition betterment.[478] When those efforts included grazing reductions, the affected ranchers raised storms of protest that fueled the Sagebrush Rebellion.

As Secretary, James Watt evidently gave credence to the views of some permittee ranchers that they, not the government, were entitled to decide how to use the federal lands under grazing permit.[479] In addition to his plans for privatizing the BLM lands,[480] Mr. Watt instituted a series of actions designed to privatize the public grass and to remove regulatory restraints on livestock grazing permittees.

2. Grazing Regulation in the Watt Administration

The grazing regulation changes took a variety of forms. Under Mr. Watt's personal orders, the BLM imposed a moratorium on grazing reductions, introduced a "triage" system for evaluating grazing allotments, and instituted a "cooperative management agreement" (CMA) program.[481] While other reforms of similar purpose and effect went unchallenged, courts took differing approaches to lawsuits growing out of the grazing reduction moratorium and the CMA program.

a. Planning and the Moratorium

Environmental impact statements showing that more grass was allocated to permittee ranchers than was grown were primary sources of western unhappiness. Mr. Watt decided in 1981 that these EISs were all based on faulty science.[482] From that premise, his Administration proceeded to abandon the resource inventorying procedures mandated by FLPMA[483] in favor of trend data monitoring, to classify allotments by productivity (essentially giving up on those deemed in irremedially poor condition),[484] and to hold livestock use

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[478] *See* U.S. DEP'T OF THE INTERIOR, MANAGING THE NATION'S PUBLIC LANDS 51–52 (1980).

[479] Before assuming office as Secretary, Mr. Watt represented permittee ranchers as head of the Mountain States Legal Foundation. *See* Valdez v. Applegate, 616 F.2d 570 (10th Cir. 1980).

[480] *See supra* notes 143–62 and accompanying text.

[481] *See infra* notes 506–22 and accompanying text.

[482] *See* Dahl v. Clark, 600 F. Supp. 585, 586, 589 (D. Nev. 1984) (citing 1981 Directive from Secretary Watt).

[483] 43 U.S.C. § 1711(a) (1982).

[484] The monitoring and classification systems are described in Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. 1045, 1050 (D. Nev. 1986), *aff'd*, 819 F.2d 927 (9th Cir. 1987).

at current levels even where the EISs showed gross damage from overgrazing.[485] Those reforms led indirectly to a judicial decision that promises harmful consequences both for federal land use planning and for range productivity.

For some purposes, the BLM has combined its NEPA obligations and planning duties into one process following its pre-FLPMA planning practice.[486] The second stage planning document becomes the proposal for action evaluated in the EIS and, as modified, then becomes the final land use plan.[487] The philosophical assumptions of the Watt appointees, as translated into the grazing reduction moratorium and accompanying changes, greatly inhibit planning by eliminating many remedial options from consideration by planners. The stultifying effect of the limitations on the BLM planning process is starkly illustrated in *Natural Resources Defense Council v. Hodel*[488] (*NRDC II*). The Reno planning area, some 700,000 acres in Nevada, has a history of overgrazing and concededly poor conditions on roughly half of its land.[489] In promulgating a plan and EIS for the area, the moratorium on grazing level reductions precluded the BLM from implementing the obvious remedy.

Consequently, the Reno plan was a nonplan: it postponed for five years consideration of grazing reductions, which it admitted were ultimately necessary; it indicated that the agency would rely instead on generally unspecified range improvement projects in the interim; it failed to specify any concrete actions or deadlines; and it lacked any significant substantive content.[490] The EIS mirrored the plan's vagueness. It too lacked factual detail and discussed only a very limited range of alternatives.[491] The plan thus was a substantively unreasonable delaying action, and the environmental evaluation of the do-nothing proposal steadfastly downplayed the overgrazing problem while ignoring possible solutions.[492]

In an earlier case involving wild horse populations, a federal district judge in Nevada discerned the nakedly political motivation for

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[485] *See Dahl*, 600 F. Supp. at 589–91.

[486] 43 C.F.R. § 1600 (1988). Neither the court nor the agency explained why the FLPMA planning process was not being followed in the 1980s.

[487] *See* Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. at 1049.

[488] *Id.* at 1045.

[489] *Id.* at 1048, 1053.

[490] *Id.* at 1052, 1054–56, 1058.

[491] *Id.* at 1052–55. In fact, the EIS even failed to mention the "no action" alternative, previously the *sine qua non* of the environmental evaluation process. *Cf.* Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981, 990–91 (D.D.C. 1977).

[492] The court was well aware of the main reason why the plan was a "nonplan." *See infra* note 501.

the moratorium and declared it arbitrary and capricious.[493] In *NRDC II*, Judge Burns upheld the plan and the EIS, however, and the Court of Appeals for the Ninth Circuit affirmed without analysis.[494] The Burns opinion rested on three propositions: neither the FLPMA nor the 1978 Public Rangelands Improvement Act (PRIA)[495] impose substantive standards against which BLM plans can be judged, and therefore, promulgation of a vague and facially counterproductive plan contravenes no law;[496] a "rule of reason" allows the agency to evaluate a vague, nonspecific plan with vague environmental analysis;[497] and—perhaps foremost—the court should not be put in the position of "rangemaster."[498] From these propositions and some narrow Ninth Circuit precedent on judicial review of land management agency actions,[499] Judge Burns opined that plan review was limited to whether the BLM action was clearly "irrational."[500] The court took pains to point out that, while the plan made little if any management or ecological sense,[501] policy choices are beyond the scope of review, irrespective of the motivation behind them.[502]

The trial and appellate courts in *NRDC II* can be criticized for failing to read and interpret the governing statutes.[503] The case

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[493] Dahl v. Clark, 600 F. Supp. 585, 592 (D. Nev. 1984).

[494] Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927 (9th Cir. 1987). After reciting the facts, the Ninth Circuit panel merely stated that "we agree with the district court that we cannot label this policy decision as either irrational, or contrary to law." *Id.* at 930.

[495] 43 U.S.C. §§ 1901–1908 (1982).

[496] Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. 1045, 1060 (D. Nev. 1986).

[497] *Id.*

[498] *Id.* at 1062–63. It is perhaps ironic that in one of the cases mentioned by the court, the Supreme Court upheld a district court judge who had assumed sweeping powers and duties as a state's "fishmaster." *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 659 (1979).

[499] Perkins v. Bergland, 608 F.2d 803 (9th Cir. 1979); Strickland v. Morton, 519 F.2d 467 (9th Cir. 1975). The court apparently distinguished the more liberal approach of later cases. *E.g.*, California v. Block, 690 F.2d 753 (9th Cir. 1982); Foundation for N. Am. Wild Sheep v. United States Dep't of Agric., 681 F.2d 1172 (9th Cir. 1982).

[500] Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. at 1062.

[501] In a footnote, the court observed:

> Why the agency would propose a course of action that can, with little effort, be seriously criticized as being more expensive, resulting in less long-run improvement, and even less grazing in the long run can only be the source of speculation to the outsider. Certainly one obvious explanation is that the BLM performed an administrative policy pirouette under the baton of Secretary Watt around 1981, essentially deciding to postpone grazing reductions indefinitely.

Id. at 1056 n.6.

[502] *Id.* at 1062.

[503] Contrary to the courts' unexamined assumptions, the FLPMA multiple use, sustained yield management and planning sections do have some substantive content, however difficult

outcome seems to represent a dual abdication. The BLM abdicated its responsibility for improving range condition, and the courts abdicated their review responsibilities. The possible consequences of the decision may be significant for public natural resources law. If courts continue to find that nonplans comply with the FLPMA, the congressional desire to systematize public land management through formal land use planning could be thwarted entirely.[504] Unless some administrative, statutory, or judicial change occurs, BLM land use planning could be a dead letter, a paperwork holding action against confronting resource conflicts. Fortunately, other courts in other contexts have enforced FLPMA planning requirements in a more realistic fashion.[505] *NRDC II*, however, still suggests that FLPMA purposes may be circumvented by plan provisions so general that they offer no guidance for actual management. Whether Mr. Watt desired this result is problematic. The unfettered administrative discretion in planning now apparently permissible is a two-edged sword that could work to the detriment of Mr. Watt's intended beneficiaries.

b. Cooperative Management Agreements

In 1983, the BLM proposed a series of amendments to its grazing regulations.[506] The most radical amendment established a new Cooperative Management Agreement program.[507] In reality, nothing was particularly "cooperative" about the idea. Instead, the BLM proposed near-total abdication of management responsibility to selected permittee ranchers on their grazing allotments. Those chosen, by nearly nonexistent criteria,[508] could graze their livestock when and how they pleased, without limitations, seasons, or conditions.[509] The agency practically agreed in advance not to penalize them for

to interpret and apply. *See* Coggins, *supra* note 57, at 65–74, 98–109. The courts' NEPA analysis is also at best shallow.

[504] *See id.* at 98–100, 107–09.

[505] National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987); American Motorcyclist Ass'n v. Watt, 714 F.2d 962 (9th Cir. 1983); Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848, 853 (E.D. Cal. 1985); American Motorcyclist Ass'n v. Watt, 543 F. Supp. 789, 795–97 (C.D. Cal. 1982).

[506] 43 C.F.R. §§ 4100–4120.2-2 (1989). The proposed regulations initially appeared at 48 Fed. Reg. 21,820 (1983).

[507] 43 C.F.R. § 4120.1(a) (1984).

[508] Permittees were to be selected on the basis of whether they had demonstrated "exemplary rangeland management practices." *Id.*

[509] Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848, 862–63 (E.D. Cal. 1985).

even egregious abuses of this new, automatically renewable privilege.[510] The several dozen such open-ended agreements entered into before the final regulations were published demonstrated the lack of criteria and conditions.[511] In addition to the CMA program, the new regulations also provided that the BLM, in effect: (1) would no longer dictate permitted grazing limits in allotment management plans;[512] (2) would allow local BLM managers to ignore land use plans in making grazing decisions;[513] (3) would remove penalties for rancher violations of air, water, and wildlife laws on federal lands;[514] and (4) would no longer allow the general public to participate in or appeal from agency grazing decisions.[515]

Judge Ramirez, of the Eastern District of California, in *Natural Resources Defense Council, Inc. v. Hodel (NRDC I)*,[516] invalidated every one of the challenged regulations. He did not speculate on the BLM's motives in seeking to avoid its conservation mission, and he assiduously avoided taking sides in the "cows vs. environment" debate.[517] He nevertheless found the BLM regulations fatally flawed without reaching many of the plaintiff's substantive arguments. Procedurally, the BLM did not draft an EIS for the proposed changes,[518] and it did not describe accurately what the regulations were intended to and would accomplish.[519]

The court threw out the CMA program on the merits. It was not authorized by PRIA's experimental stewardship section,[520] the court ruled, and it ran directly contrary to every federal law on the subject going back to the 1934 Taylor Act.[521] On this point, Judge Ramirez concluded: "It is for Congress and not [the BLM] to amend the grazing statutes. In the meantime, it is the public policy of the United States that the Secretary and the BLM, not the ranchers, shall retain final control and decisionmaking authority . . . on the

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[510] *See* 43 C.F.R. § 4120.1(b), (c), (d) (1984).

[511] *See* 618 F. Supp. at 863. "These agreements list no terms or conditions whatsoever which prescribe the manner in or extent to which livestock grazing shall be managed on these allotments." *Id.*

[512] *See* 43 C.F.R. § 4120.2(a) (1984).

[513] *See id.* § 4130.6–3.

[514] *See id.* § 4140.1(b) (7).

[515] *See id.* § 4100.0–5.

[516] Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985).

[517] *Id.* at 881.

[518] *Id.* at 871–73.

[519] *Id.* at 878.

[520] *Id.* at 866–68 (construing 43 U.S.C. § 1908 (1982)).

[521] *Id.* at 868–71.

public lands."[522] The government did not appeal, and it later paid attorneys' fees to the plaintiffs in recognition that its position was not substantially justified.[523] The official attempt to privatize federal forage thus failed, but, as *NRDC II* illustrates, the BLM grazing regulation scheme remains far from rigorous.

BLM Director Burford (by 1987, one of the last remaining Watt appointees in the Department) later attempted to resurrect the CMA program in a package of regulation amendments that also would have abandoned the grazing capacity concept.[524] Public opposition forced him to abandon this latest manifestation of departed Secretary Watt's invisible hand. That seems a fitting postscript to the Watt Revolution.

VI. CONCLUSION

> And indeed there will be time
> To wonder, 'Do I dare?' and, 'Do I dare?'
> Time to turn back and descend the stair,
> With a bald spot in the middle of my hair —
> . . .
> Do I dare
> Disturb the universe:
> In a minute there is time
> For decisions and revisions which a minute will reverse.
>
> T.S. Eliot, *The Love Song of J. Alfred Prufrock*[525]

James G. Watt took office at a time when the Sagebrush Rebellion was still alive and resource economists were earnestly debating the merits of various privatization options.[526] The political mood had shifted far to the right, and President Reagan fully endorsed his appointee's radical proposals.[527] Less than three years later, Mr. Watt was dismissed in disgrace, his programs and his Department[528]

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[522] *Id.* at 871.

[523] Conversation with attorneys for plaintiffs (July, 1987).

[524] 52 Fed. Reg. 19,032 (1987).

[525] T.S. ELIOT, THE WASTE LAND AND OTHER POEMS 4–5 (1958).

[526] *See, e.g.*, FORESTLANDS, *supra* note 212; G. LIBECAP, *supra* note 212; R. STROUP & J. BADEN, *supra* note 212.

[527] Vig & Kraft, *Environmental Policies From the Seventies to the Eighties*, in REAGAN'S NEW AGENDA, *supra* note 98, at 2.

[528] Mr. Watt left Department morale at an all-time low because he fired and transferred career employees, dismantled the Solicitor's Honors Program, hired on solely political bases, and imposed strict censorship. *See* Coggins, *supra* note 12, at 25 n.203.

in shambles. Blanket judicial rejection of his initiatives was on the horizon. By any scoresheet, Mr. Watt was a personal, professional, political, and philosophical loser.

The reasons why Mr. Watt fell off the surging wave of conservatism when many other facets of President Reagan's programs were being adopted bear reemphasizing. It is not enough to dismiss Secretary Watt as an ideological zealot whose inflammatory rhetoric brought deserved political retribution. Other Reagan Administration officials of similar ilk, such as Attorney General Meese, survived in office far longer. Historians at some future time may produce a full exposition of public resource policy during the early 1980s, but at this brief remove we can only conclude with preliminary evaluations.

The main reasons for the debacle, aside from Mr. Watt's provocative utterances, were the more precise substantive and procedural limitations of modern public land law; Mr. Watt's underestimation of public support for environmental protection, of the strength of opposing conservation groups, and of the inertial forces opposing change; his failure to obtain congressional ratification or state cooperation; and his nonrecognition of the degree to which these trends effectively had circumscribed secretarial authority.

The past quarter-century has seen public land law and policy change greatly, but the changes were more evolutionary than revolutionary, and they continued long-established trends.[529] Mr. Watt's experience demonstrates that radical reform in this area is difficult, if not impossible, to accomplish administratively. Not only do recent statutes restrict secretarial discretion, but the interests of the Department's political constituencies from all over the spectrum also have become so entrenched that even moderate reform proposals must overcome a form of political gridlock.[530] During Mr. Watt's tenure, many public land users favored his ideas generally, but even his strongest supporters resisted any proposal that might adversely affect their positions in any way.[531] Other initial supporters were appalled at Mr. Watt's personal and policy extremism, and the western state governments quickly became disenchanted when the Department did not consult and cooperate with them to the extent that they desired.

Congress seldom legislates in the public land arena unless it perceives an emergency or the contending parties reach general agree-

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[529] *See id.* at 3–10.

[530] *See* Leshy, *supra* note 4, at 272.

[531] *See supra* notes 140–42, 208–11, 311, 364 and accompanying text.

ment on the need for new, legislatively-set management priorities.[532] With Mr. Watt in the saddle, however, even individual mineral leases became emergencies to which Congress strongly reacted.[533] The conservation/preservation interests were of course adamantly against nearly every change proposed by Mr. Watt, and they translated their opposition into effective legal and political action. Because Mr. Watt's attempt to impose his philosophy on the legal structure of federal land and resource allocation was essentially political, his failure was entirely fitting. Congress, not the Interior Secretary, has the constitutional power and duty to make such political determinations, and it is to Congress that Mr. Watt should have turned for reform authority.

The inconsistencies and unrealism of Mr. Watt's programs also contributed heavily to their rejection. Certainly he tried to do too much too soon. If the overall Department strategy contemplated overwhelming its opponents by sheer mass, then the strategy was defective. Instead, it led to broader and more concerted opposition in every forum. Economically, many of the Watt proposals were ill-timed. Massive coal leasing, for instance, makes little sense from any governmental perspective in the absence of strong demand.[534] Politically, ideas such as leasing in wilderness areas were bound to cause far more trouble than any possible production would have been worth. Practically, land and resource privatization controversies kept the Department continually on the defensive and embarrassed the only constituencies likely to support broad developmental initiatives.

Mr. Watt could never reconcile conflicting strains in his ideology. Western public land users are heavily subsidized in a variety of ways.[535] Mr. Watt could not both continue those preferences and

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[532] An example is the National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1614 (1988). It took a lawsuit, West Virginia Division of Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975), which shut down many Forest Service operations, to prompt Congress into action, and Congress then acted only after the combatants had agreed on some general outlines of the necessary legislation.

[533] *See supra* notes 444–59 and accompanying text.

[534] *See supra* notes 392–411 and accompanying text.

[535] Federal water is delivered and federal grass is allocated by permit for a fraction of market value, preference right lessees pay no bonus, mineral locators pay nothing, and recreationalists usually enter federal lands without leave or payment, for example. Further, states receive a large share of the relatively small federal revenues from these activities. *See* S. FAIRFAX & C. YALE, THE FINANCIAL INTEREST OF WESTERN STATES IN NON-TAX REVENUES FROM THE FEDERAL PUBLIC LANDS (1985). The federal government also subsidizes the West in less direct ways, such as predator control. *See* Coggins & Evans, *Predators' Rights and American Wildlife Law*, 24 ARIZ. L. REV. 821 (1982).

introduce free market, fair market value economics. Similarly, the Secretary's federalism principles were doomed when he honored the primacy of state resource allocation desires only insofar as states wanted unrestricted resource development within their borders.

The names of cases cited in this Article suggest another reason for the demise of Mr. Watt's reactionary reforms. The Sierra Club, the Natural Resources Defense Council, the National Wildlife Federation, and the National Audubon Society figure prominently as plaintiffs that successfully challenged Interior policy initiatives. Mr. Watt seriously underestimated the strength, tenacity, sophistication, and popular support of these and other self-appointed public interest guardians. To compound the consequences of that underestimation, Mr. Watt's confrontational rhetoric spurred the conservation organizations to greater efforts and filled their ranks with eager volunteers and donors.[536] These groups thought of their efforts as holding actions to contain environmental damage until another Administration entered office. In fact, the legislative and judicial defeats they inflicted on Mr. Watt solidified the legal constraints on resource development that they advocated far more than would have occurred under a less ideological Secretary.

The Watt experience illustrates another important lesson: the conservationists have won the battle for the hearts and minds of Americans. Because conservation and preservation values are firmly entrenched in the American consciousness, legal questions now usually revolve around means, and the ends are seldom disputed. Congress reflected that preference: not a single major piece of environmental legislation was repealed or seriously diluted during 1981–1983, and several new laws and amendments in that period strengthened legal protection of environmental amenities.[537] Mr. Watt was wrong—politically, legally, and popularly—in claiming that the pendulum of environmental protection had swung too far. His futile experience (as well as that of Anne Gorsuch at the Environmental Protection Agency[538]) demonstrated that the environmental ethic is as firmly

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[536] The Sierra Club, for instance, doubled its membership and its budget during Mr. Watt's tenure. *See* Gendlin, *Mike McCloskey: Taking Stock, Looking Forward*, SIERRA, Jan./Feb. 1983, at 45; Mitchell, *Public Opinion and Environmental Politics in the 1970s and 1980s*, in REAGAN'S NEW AGENDA, *supra* note 98, at 61–62.

[537] *E.g.*, The Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1420 (Oct. 13, 1982) (codified as amended at 16 U.S.C. §§ 1531–1544 (1988)); *see also* Coggins & Harris, *The Greening of American Law?: The Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 NAT. RESOURCES J. 247 (1987).

[538] In at least one notable instance, the EPA scandals had a decided effect on an Interior Department public resource allocation controversy. *See* Conservation Law Found. v. Watt,

fixed high on the national political priority list as it is embedded in positive law.

In the end, that law proved to be the main agent of Mr. Watt's undoing. He consistently disregarded the process that Congress commanded as due, and his attempted circumvention of statutory strictures verged on the contemptuous. Procedurally, the Department often had been inept long before Mr. Watt's secretaryship,[539] but the failure to observe statutorily required procedures during his tenure plumbed new depths. NEPA, by 1981, was neither unknown nor novel, but the Department often tried to ignore or circumvent the environmental evaluation it required.[540] As the "unwithdrawal" case demonstrated, Mr. Watt also neglected to read FLPMA or abide by its procedural requirements.[541] A common thread in these instances was the apparent desire to exclude all but the economic resource users from the decisionmaking process.[542] At least since Watergate, administrative secrecy can be a prescription for disaster. Procedural corner-cutting proved counterproductive, because courts seized upon the procedural deficiencies to justify injunctions against the developments that corner-cutting was intended to facilitate.[543] Many of those disputed development proposals were then abandoned—perhaps permanently.[544]

Substantively, the Watt initiatives generated congressional and judicial rejections of unprecedented sweep and magnitude. Wholesale land privatization was simply a bad idea, incapable of realizing much popular support. Courts in the St. Matthew's Island land exchange,[545] BLM grazing

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560 F. Supp. 561, 580 (D. Mass.), *aff'd sub nom* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

[539] *See, e.g.*, Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981 (D.D.C. 1977); National Wildlife Fed'n v. Morton, 393 F. Supp. 1286 (D.D.C. 1975); Natural Resources Defense Council, Inc. v. Morton, 388 F. Supp. 829 (D.D.C. 1974).

[540] *See supra* notes 181–95, 264–71, 349–54 and accompanying text.

[541] *See* National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987); *see also supra* text accompanying notes 230–44.

[542] That thread was evident in the "unwithdrawal" case, the grazing regulations case, *supra* notes 481–524, the St. Matthew's Island exchange case, *supra* notes 181–99, and the privatization program, *supra* notes 143–62.

[543] *See* cases cited *supra* notes 181–95, 251, 268–75, 332–37, 480.

[544] *E.g.*, the Fort Union coal sale, *supra* notes 402–03; the St. Matthew's Island land exchange, *supra* notes 181–98; oil and gas leases in wilderness areas, *supra* notes 414–33; land privatization, *supra* notes 143–62; the Osceola National Forest phosphate lease, *supra* notes 451–58; wolf hunting, *supra* note 322; and the cooperative management program, *supra* notes 506–24.

[545] National Audubon Soc'y v. Hodel, 606 F. Supp. 825 (D. Alaska 1984), discussed at *supra* notes 184–92.

regulation,[546] wilderness study area deletion,[547] and jurisdictional transfer[548] cases were not the only courts to decide that Secretary Watt's judgments contravened the substantive statutes.[549]

Strangely enough, it is possible to surmise that the legacy of Secretary Watt ultimately might be positive. Federal land and natural resources law, even after the reforms since 1960, remains a nearly impenetrable maze of statutes, regulations, doctrines, common law, and historical assumptions, which in its totality still lacks logic, consistency, equality, and fairness. Mr. Watt's pendulum swinging helps bring those defects into stark relief. Future Congresses may and should use the Watt misadventures as points of departure for streamlining and rationalizing the law governing the Nation's landed heritage. At the very least, future Interior Secretaries may profitably learn from the events of the Watt years that administrative reform must be moderate, cautious, and popularly accepted.

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[546] Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985); *see also supra* notes 516–23 and accompanying text.

[547] Sierra Club v. Watt, 608 F. Supp. 305 (E.D. Cal. 1985); *see also supra* notes 264–71 and accompanying text.

[548] Trustees for Alaska v. Watt, 690 F.2d 1279 (9th Cir. 1982); *see also supra* notes 280–87 and accompanying text.

[549] Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985); cases cited *supra* notes 229–40, 321, 322.